OFFICE OF ADMINISTRATIVE COURTS STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-130-043-005

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that recommended medical treatment is reasonable and necessary to maintain the claimant at maximum medical improvement (MMI). The specific medical treatment at issue includes:

   a. a referral from Dr. Craig Stagg for a neurosurgical consultation;

   b. a referral from NP Sara Winsor for a consultation with physiatrist Dr. Bain;

   c. a referral from NP Winsor for magnetic resonance imaging (MRI) of the claimant's lumbar spine; and

   d. a referral from NP Winsor for lumbar spine transforaminal epidural steroid injections {TFESIs).

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S.

3. Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to additional mileage reimbursement from the respondents.

FINDINGS OF FACT

1. On February 1, 2020, the claimant was injured while working for the employer. Specifically, the claimant's left foot and ankle were crushed between two pieces of steel. The respondents have admitted liability for the February 1, 2020 work injury.

2. Immediately following the injury the claimant underwent surgery to his left foot and ankle. Initially, the claimant's authorized treating provider (ATP) was Dr. Robert McLaughlin. The claimant has also seen Dr. Craig Stagg as his ATP.

3. On April 7, 2021, the claimant attended an independent medical examination (IME) Dr. Katherine Mccranie. In connection with the IME, Dr. Mccranie reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In her IME report, Dr. Mccranie opined that the

claimant suffered a left lower extremity crush injury resulting in the need for surgical intervention. Dr. Mccranie also listed a diagnosis of left lower extremity peroneal neuropathy. These diagnoses were identified as being related to the claimant's work injury. Dr. Mccranie further opined that the claimant did not suffer a lumbar spine injury as a result of the February 1, 2020 incident. With regard to maximum medical improvement (MMI), Dr. Mccranie opined that the claimant would be placed at MMI at his next appointment with Dr. McLaughlin. Dr. Mccranie assessed a permanent impairment rating of 15 percent for the claimant's left lower extremity. She did not assess any other permanent impairment.

4. On May 3, 2021, Dr. McLaughlin placed the claimant at MMI. In addition, Dr. Mclauglin assessed permanent impairment of 17 percent for the claimant's left lower extremity, and 15 percent for the claimant's lumbar spine. With regard to maintenance medical treatment, Dr. McLaughlin recommended chiropractic treatment (12 visits); physical therapy (12 visits); use of a TENS unit; and topical creams.

5. On September 2, 2021, the respondents filed a Final Admission of Liability (FAL) reflecting Dr. McLaughlin's May 3, 2021 report.

6. After reviewing additional medical records, on February 14, 2022, Dr. Mccranie authored a second report. Dr. Mccranie was asked to state an opinion regarding recommendations for the claimant to undergo a neurologic consultation and medical massage. With regard to both modes of treatment, Dr. Mccranie opined that the treatment was neither reasonable nor necessary. With regard to her recommendations for maintenance medical treatment, Dr. Mccranie stated: 12 visits of physical therapy over 12 to 18 months; 12 chiropractic visits over 12 to 18 months; a TENS unit; one to three follow-ups with specialists Dr. Matsumura and/or Dr. Githens. Dr. Mccranie reiterated her opinion that the claimant did not suffer an injury to his lumbar spine. Therefore an lumbar ESI would not be related to the work injury.

7. Additional maintenance medical treatment has been recommended for the claimant. specifically, Dr. Craig Stagg has recommended a neurosurgical consultation. In addition, NP Sara Winsor had recommended the claimant see physiatrist Dr. Bain; undergo a lumbar spine MRI; and receive lumbar spine transforaminal epidural steroid injections (TFESIs). These modes of treatment have each been denied by the respondents.

8. After reviewing additional medical records, on June 15, 2022, Dr. Mccranie authored a third report. Dr. Mccranie was specifically asked to address whether the recommendations of NP Winsor for a consultation with Dr. Bain; a lumbar spine MRI; and lumbar spine TFESIs. Dr. McCranie was also asked to opine regarding the reasonableness and relatedness of Dr. Stagg's recommendations for a neurosurgery evaluation and injections. With regard to these recommended treatments, Dr. Mccranie opined that the treatment was neither reasonable nor necessary.

9. Dr. McCranie's deposition testimony was consistent with her written reports. Dr. Mccranie testified that it continues to be her opinion that the claimant's lumbar spine issues are not related to his work injury. In support of this opinion, Dr. Mccranie noted that when Dr. McLaughlin placed the claimant at MMI "he could not say with certainty whether or not the disc herniation was due to [the claimant's] work injury". Dr. Mccranie specifically testified that a consultation with a neurosurgeon would not be related to the claimant's work injury. Dr. Mccranie testified that the claimant's lumbar spine was a new body part unrelated to the injury. Dr. Mccranie also testified that the claimant does not need to undergo treatment with a physical medicine and rehabilitation specialist. Likewise, the recommended lumbar spine MRI is not related to the work injury. Dr. Mccranie further testified that the claimant does not require lifetime medical maintenance treatment. She explained that the claimant's work injury was to his ankle, and those injuries have stabilized. It is Dr. McCranie's opinion that an altered gait would not cause a lumbar disc protrusion.

10. Dr. Mccranie testified that with regard to maintenance medical treatment, claimants generally stabilize within six months to a year after MMI. Therefore, it is Dr. McCranie's recommendation that the claimant have maintenance treatment of a total of 12 physical therapy visits over 18 months; 12 chiropractic visits total over 12 months; a TENS unit for 18 months; and one to three visits total with a physical medicine doctor, with no further follow ups beyond 18 months.

11. With regard to the recommended neurosurgical consultation, Dr. Mccranie explained such a consultation is not related to the work injury because his lumbar disc herniation is not related to the February 1, 2022 work injury. Dr. Mccranie also testified that the treatment with a neurologist would be duplicative. Dr. Dean evaluated the claimant and performed electrodiagnostic testing. It is Dr. McCranie's opinion that there is no reason for it to occur again.

12. Dr. Mccranie explained the referral for the lumbar spine injection would not be indicated as she explained that the lumbar disc herniation was not related to the accident. Dr. Mccranie elaborated that the claimant's EMG testing ruled out lumbar radiculopathy and the MRI demonstrated degenerative disc disease consistent with his age. Dr. Mccranie explained that while an altered gait may cause some temporary discomfort in the sacroiliac region, the claimant's mechanism of injury would not cause a disc protrusion with radiculopathy. Therefore, lumbar ESIs would not be related to the claimant's work injury.

13. The ALJ credits the medical records and the opinions of Dr. Mccranie regarding the recommended maintenance medical treatment. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the recommended maintenance medical treatment (including a neurosurgical consultation; consultation with physiatrist Dr. Bain; a lumbar spine MRI; and lumbar spine TFESIs) is reasonable and necessary to maintain the claimant at MMI.

14. The claimant requests reimbursement of costs related to the medical treatment at issue at this time, pursuant to Section 8-42-101(5) C.R.S. The amount requested is $384.82.

15. On June 17, 2022, the claimant submitted a request for mileage to the respondents. This request was for a total of $582.08 for 1,144 miles. This mileage was for dates from September 27, 2021 through January 12, 20221. On June 23, 2022, the insurer issued a payment to the claimant in the amount of $152.00 for mileage. The respondents agree that they did not provide the claimant with written notification that mileage requests must be submitted within 120 days of the date of service.

CONCLUSIONS OF LAW

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

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

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

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

[1] The request was for mileage rates of $0.52 per mile for 2021, and $0.50 per mile for 2022.

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the recommended maintenance medical treatment (including a neurosurgical consultation; consultation with physiatrist Dr. Bain; a lumbar spine **MRI;** and lumbar spine TFESIs) is reasonable and necessary to maintain the claimant at **MMI. As** found, the medical records and the opinions of Dr. Mccranie are credible and persuasive.

7. The claimant has requested costs related to the current Application for Hearing. Section 8-42-101(5), C.R.S. provides:

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

8. **As** the ALJ has not ordered any of the requested medical treatment, Section 8-42-101(5), C.R.S. is not applicable at this time. The claimant's request for costs is denied and dismissed.

9. On September 7, 2021, Section 8-42-101(7) C.R.S.[2] became effective. That section states, in pertinent part:

> A claimant must submit a request for mileage expense reimbursement for travel reasonably necessary and related to obtaining compensable treatment, supplies, or services specified in subsection (1)(a} of this section to the employer or, if insured, to the employer's insurer no later than one hundred twenty days after the date the expense is incurred,

[2] This section was further amended effective August 10, 2022 to include language regarding advance mileage. As the claimant's request in this matter was made on June 17, 2022, the ALJ does not address that version of the statute.

unless good cause for a later submission is shown. Good cause includes a failure by the employer or employer's insurer to provide the notice in the brochure required by section 8-43-203 (3)(c)(IV).

10. WCRP 16-8-2(8) provides similar language, specifically: "Injured workers shall submit requests for mileage reimbursement within 120 days of the date of service or reimbursement may be denied unless good cause exists."

11. The claimant has demonstrated that he is entitled to the full amount of mileage reimbursement requested ($582.08). Here, the respondents have admitted their failure of notifying the claimant of the 120 day requirement. Section 8-42-101(7) C.R.S. specifically identifies this failure to act as good cause for a late request for mileage reimbursement. Therefore, the claimant is entitled to the balance of the mileage reimbursement requested of $370.08.

ORDER

It is therefore ordered:

1. The claimant's requests for maintenance medical treatment of a neurosurgical consultation; consultation with physiatrist Dr. Bain; a lumbar spine MRI; and lumbar spine TFESIs; is denied and dismissed.

2. The respondents shall pay the claimant mileage reimbursement of $370.08.

3. The claimant's request for costs is denied and dismissed.

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

Dated January 3, 2023.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the

ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-210-260-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the surgical procedure requested by Dr. Rumley, including a three-level fusion, is reasonable and necessary?

FINDINGS OF FACT

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

1. Claimant was employed by Employer, when he was injured in the course and scope of his employment on June 29, 2022. *Hrg. Trans. pg. 11 lns. 16-22*.
2. While lifting objects from low shelves, Claimant felt immediate pain in his lower back. Over time, Claimant began experiencing numbness and shooting pains in his lower extremities, as well as bouts of incontinence. Claimant also began experiencing weakness in his left leg, drop foot, and needing assistive devices to walk. *Hrg. Trans. pg. 12 lns. 1-25, pg. 13 lns. 1-5*.
3. At the time of hearing, Claimant's body mass index (BMI) was 39 and he had been continuing to lose weight since his injury. *See Hrg. Trans. pg. 13 lns. 6-17*.
4. Having failed all prior conservative treatment measures, Dr. Jacob Rumley, Claimant's authorized treating orthopedic specialist, has recommended a transforaminal lumbar interbody fusion (TLIF) procedure for L2-L5. *See Ex. 5, Bates 34.*
5. Claimant has discussed the pros/cons, and risks/potential benefits of the proposed TLIF procedure. Having engaged in thorough shared decision making with Dr. Rumley, Claimant has accepted the surgical risks and wishes to proceed with Dr. Rumley TLIF surgical recommendation. *See Hrg. Trans. pg. 14 lns. 1-10*.
6. Dr. Rumley is a fellow in the American Academy of Orthopedic Surgeons, is a member of the North American Spine Society and AO Spine, and he is board-certified in orthopedic surgery. His training includes a spine fellowship at Augusta University which was a level 1 trauma and deformity center. Moreover, he currently trains fellows in spine surgery and therefore maintains an academic role. Dr. Rumley is also level II accredited. *See Rumley Depo. pgs. 7-8.*
7. Dr. Rumley explained that a patient's signs are objective findings that support a patient's reported subjective symptoms. *See Rumley Depo. pg. 9 lns. 14-20*.
8. Claimant suffers from claudication-type symptoms. "Claudication is progressive symptoms with inactivity either being ambulation or upright posture." Typical examples include increased leg pain, leg symptoms, and urinary incontinence. *Rumley Depo. pg. 10 lns. 10-21*.

9. Claimant underwent a lumbar MRI on July 14, 2022. The findings show that Claimant had significant stenosis of his foramen, lateral recess, and central canal. There was also significant lumbar disc degeneration. *Rumley Depo. pg. 11 lns. 1-10; Rspndt. Ex. H, Bates 51.*

10. Claimant also underwent an EMG nerve conduction study and it revealed that Claimant was experiencing radiculopathy as a result of nerve compression at multiple levels of his lower back.

11. The TLIF procedure recommended by Dr. Rumley includes decompression of Claimant's nerves by way of a laminectomy. A laminectomy is the removal of bone from the lumbar spine, which results in the foramen being opened and relieving the nerve compression. *See Rumley Depo. pg. 12 lns. 14-17*.

12. Claimant also has sagittal malalignment. This means that Claimant's spine is outside of normal alignment ranges when compared to the position of his pelvis. The positional difference is significant as a person of Claimant's young age (54), should be at or near 0 but Claimant is at a difference of 13. *See Rumley Depo. pgs. 14-16*.

13. The purpose of the recommended TLIF procedure is to decompress the nerves in Claimant's lumbar spine to allow the nerves to function properly—thereby resolving Claimant's claudication symptoms. *Rumley Depo. pg. 17 lns. 4-8, pg. 33 lns. 17-19, pg. 34 lns. 14-16*.

14. As a result of bone removal from laminectomies, instability of the lumbar spine is anticipated. The expected instability is one reason for Claimant to undergo fusion as part of the decompression procedure. *Rumley Depo. pg. 18 lns. 6-19*.

15. Dr. Brown is Respondents retained expert. While Dr. Brown is board certified, he is board certified in neurology, and not orthopedic surgery. Moreover, Dr. Brown is not fellowship trained as is Dr. Rumley. As a result, Dr. Brown's skillset might be different than Dr. Rumley's and not as innovative or advanced – since he is not fellowship trained.

16. Dr. Brown indicated that he believes Claimant may have untreated NIDDM—otherwise known as Type 2 diabetes. *Ex. A, Bates 13; Rumley Depo. pg. 19 lns. 5-10.*

17. Claimant's symptoms are more likely related to his lumbar injury then they are to polyneuropathy potentially caused by diabetes. *See Rumley Depo. pg. 19 lns. 15-17, pg. 20 lns. 1-18.*

18. At the time of hearing, Claimant's BMI was 39 and Dr. Rumley explained that it is an acceptable BMI to proceed with the recommended surgery because it is under 40. Rumley Depo. pg. 21 lns. 10-23. When a patient has a BMI of 40 or more, the risks of surgery are increased and include higher rates of infection, deep vein thrombosis, and perioperative complications. *Rumley Depo. pg. 22 lns. 1-13*.

19. Dr. Brown agrees that Claimant needs to undergo decompression surgery, but he suggests an alternative procedure using tubes to decompress three levels of the spine. *Ex. A, Bates 14*.

20. Dr. Rumley strongly disagrees with Dr. Brown that tubular decompression is the superior procedure for Claimant to undergo for several reasons. First, the TLIF

procedure is far more likely to result in a better decompression of Claimant's lumbar nerves (especially related foraminal stenosis such as Claimant's), which is the main goal of both possible surgeries. Second, Claimant has an underlying structural deformity (*i.e.*, the sagittal imbalance). The tubular decompression surgery would not address this deformity, while the TLIF procedure recommended by Dr. Rumley will. To not address the deformity in conjunction with decompression will set Claimant up for a worse long-term outcome and increase the likelihood he would need to undergo another lumbar surgery in the future because the structure will worsen over time. As a result addressing the deformity is a necessary component of the overall surgical procedure recommended by Dr. Rumley. *Rumley Depo. pgs. 23-24, pg. 34 lns. 10-22, pg. 35 lns. 16-18.*

21. Dr. Brown has indicated the tubular decompression procedure he has proposed does not guarantee that Claimant will be without lumbar instability. *Brown Depo. pg. 16 lns. 4-5.*

22. Dr. Rumley has performed tubular decompression surgeries. Dr. Rumley noted that those patients do not tend to do as well post-operatively as patients that undergo TLIF. *Rumley Depo. pg. 28 lns. 21-25, pg. 29 lns. 1-2*.

23. Dr. Rumley is routinely referred patients that have previously undergone spine surgery by others. When he sees patients that have previously undergone tubular decompression, those patients commonly have structural instability, or the decompressions were incomplete in the first place. This is yet another reason why the TLIF procedure is superior to tubular decompression. The revision surgery for those patients is TLIF and carries with it increased risks and complications as a revision surgery. *See Rumley Depo. pg. 29 lns. 3-25, pg. 30 lns. 1-2*.

24. Generally, Dr. Brown avoids operating on anyone that is morbidly obese. *See Brown Depo. pg. 11 lns. 6-8*.

25. Dr. Brown concedes that TLIF, as recommended by Dr. Rumley, "is certainly an option." *Brown Depo. pg. 12 lns. 1-2*. He also concedes that TLIF "provides a good decompression." *Id. at pg 12 lns. 7-12*.

26. In support of his recommended tubular decompression procedure, Dr. Brown referenced a publication indicating "that a decompression, a simple decompression, versus a fusion Improved back pain . . . ." *Brown Depo. pg. 17 lns. 21-24*. As noted above, however, the primary focus and need for Claimant's surgery is decompression of the nerves to address his claudication symptoms—not generalized back pain.

27. Dr. Brown also expressed concern about future adjacent level degeneration. This concern, however, was based on unverified cited statistics related to the cervical spine—not the lumbar spine. *Brown Depo. pg. 20 lns. 2-10*.

28. When asked if Dr. Rumley's recommended TLIF procedure was unreasonable, Dr. Brown said that it was aggressive and not within the *Guidelines*[1] and normal standards. *See Brown Depo. pg. 20 lns. 18-21.*

[1] Workers' Compensation Rules of Procedure, 17, Ex. 1, Low Back Pain Medical Treatment Guidelines.

29. Based on his qualifications, training, experience, and analysis set forth in his testimony, the ALJ finds Dr. Rumley's opinions to be credible and highly persuasive.

30. On the other hand, Dr. Brown was retained to perform an independent medical examination. He came to Colorado from Florida for a single examination for the sole purpose of litigation as he does routinely once per month. Dr. Brown does not treat patients in Colorado. *Brown Depo. pg. 23 lns. 19-22, pgs. 24-25, pg. 26 lns. 4-7*. Moreover, as specifically stated in his report, Dr. Brown advised Claimant that merely performing the IME does not create a physician patient relationship between Claimant and Dr. Brown. Moreover, and most importantly, Dr. Brown does not have as much training as Dr. Rumley. As found, Dr. Rumley is fellowship trained and Dr. Brown is not. Thus, the ALJ does not find Dr. Brown's opinions to be as persuasive as Dr. Rumley's.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that the surgical procedure requested by Dr. Rumley, including a three-level fusion, is reasonable and necessary?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Off.,* 53 P.3d 1192 (Colo. App. 2002).

When determining whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines (*Guidelines*) because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the *Guidelines* is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather, the ALJ may give evidence regarding compliance with the *Guidelines* such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., WC* 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). See also: Section 8-43-201(3), C.R.S.

There is no dispute that Claimant needs lumbar surgery and that such surgery is causally related to his work injury. The dispute that exists is which procedure is the most appropriate for Claimant.

Dr. Rumley, as a treating physician, has concluded that the TLIF procedure is not only the superior procedure, but it is also reasonable and necessary. When asked directly, Dr. Brown did not specifically say the TLIF procedure was unreasonable—but yet he did say that it was aggressive and not within normal standards. Thus, he believes the procedure is not reasonable.

Dr. Brown's belief that the TLIF procedure is not reasonable, is based on three primary arguments—all of which are unpersuasive.

The first is that the TLIF procedure is for three levels and the *Guidelines* indicate that no more than two levels should be done in the case of fusion surgeries.

As pointed out by Dr. Rumley, the *Guidelines* are just that—guidelines. They are not absolutes. So while the *Guidelines* do provide guidance as to when certain procedures should or should not be done, there is the ability to deviate from the *Guidelines* in appropriate circumstances and the Court finds that such circumstances exist here.

Both Dr. Rumley and Dr. Brown recognize that Claimant has objective findings by way of MRI, EMG, and diagnostic injections confirming that Claimant has claudication symptomatology stemming from three levels of his lumbar spine. While the procedure is different, even Dr. Brown's recommended tubular procedure is for three levels. Both physicians appear to agree that if three levels are symptomatic, they should all be addressed.

Dr. Rumley has convincingly shown that TLIF involving laminectomy is likely to lead to better results for decompressing Claimant's lumbar nerves and resolve his claudication symptoms which is the primary goal of both surgical recommendations. As Dr. Rumley pointed out, it does not make sense to address two levels with fusion only to leave out a third that is symptomatic to satisfy a general guideline.

Risks coincide with any type of surgery. The issue becomes whether the risks are outweighed by the benefits. Here, Dr. Rumley and Claimant have engaged in a shared decision-making process and decided that TLIF is most likely to result in the most benefit to Claimant.

Dr. Brown's second basis of recommending tubular decompression over TLIF is that Claimant does not currently have lumbar instability. Recommendation 153 of WCRP 17, Ex. 1, Sec. 8.b.iii, in the *Guidelines*, states that one of the diagnostic indications for fusion includes "surgically induced segmental instability." This means that one need not necessarily have instability to undergo fusion surgery, but such instability may be a likely result as part of another surgery—like decompression by laminectomy. Even tubular decompression as recommended by Dr. Brown may result in segmental instability which would require fusion. The fusion needed from tubular decompression would be a later, second surgery, only serving to place additional risks the chance for complications on Claimant.

Further reason exists here for Claimant to undergo TLIF involving three-level fusion and that is to address his structural deformity. Even though Claimant's work injury did not cause the deformity, it nevertheless interplays with his nerve compression and claudication. By correcting the deformity, Claimant is likely to experience far better decompression of the nerves. Moreover, correcting the deformity will greatly reduce the chances for the need of future lumbar surgery as the condition progressively deteriorates. Plus, correcting the deformity also improves the overall outcome of the surgery to treat Claimant's work injury. As a result, fixing the deformity is inextricably intertwined with treating Claimant's work injury and is therefore reasonably necessary to cure and relieve Claimant from the effects of his injury.

Finally, Dr. Brown consistently stresses that Claimant's BMI is high, and it invites increased risk for TLIF, thereby making the TLIF surgery unreasonable. Dr. Rumley convincingly explained that Claimant's BMI of 39 is within acceptable range for the TLIF procedure. It is worth noting that, as demonstrated by the medical records, Claimant's BMI was 39 as of the hearing date down from more than 42 in January 2023, when he first saw Dr. Rumley, and it was continuing to trend downward due to continued weight loss.

Morbid obesity is a relative contraindication to fusion per WCRP 17, Ex. 1, Sec. 8.b.ii. But it is not an absolute contraindication. The difference is that relative

contraindication only means that caution should be used when doing fusion procedure and the procedure is acceptable if the benefits outweigh the risk.

Table 52 of WCRP 17, Ex. 1, Sec. 8.b (Surgical Interventions) of the *Guidelines* indicates that there is good evidence to suggest functional improvement from most back surgery is similar between patients with BMI under 25 and those with a BMI between 25 and 35. As discussed, Claimant's last known BMI was 39, but it was declining due to continued weight loss. This means that Dr. Brown's concerns lessen regarding Claimant's BMI with each pound Claimant loses before surgery and the closer he gets to a BMI of 35.

Dr. Rumley explained that a BMI of 40 or more would remove Claimant as a surgical candidate until the BMI is again below 40. This is based on studies that indicate risks and complications are far less when the patient's BMI is under 40. The *Guidelines* do not have such an explicit line in the sand for fusions. The only area of the Guidelines where a BMI of 40 or more as a contraindication related to lumbar surgery is in WCRP 17, Ex. 1, and Sec. 8.b.iv of the *Guidelines* for total disc replacement surgery— which is not contemplated or recommended here.

Dr. Rumley is a board-certified expert in his field of orthopedic surgery. Plus, Dr. Rumley also trained via a spine fellowship at Augusta University which was a level 1 trauma and deformity center. Lastly, he currently trains fellows in spine surgery and therefore maintains an academic role. These additional qualifications adds to the persuasiveness of his opinion and conclusion for the recommended surgery. Plus, what might be considered aggressive to Dr. Brown, might not be considered aggressive by Dr. Rumley who is a fellow trained spinal surgery. As a result, the ALJ finds and concludes that Dr. Rumley has convincingly concluded that the TLIF is the most appropriate procedure for Claimant, and Claimant has indicated that he wishes to proceed with TLIF understanding the associated pros and cons as well as the risks and benefits.

As a result, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the lumbar decompression and fusion surgery recommended by Jacob Rumley, D.O. as reasonable and necessary treatment related to his admitted June 29, 2022, industrial injury.

ORDER

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

I. Respondents shall pay for the lumbar decompression and fusion surgery recommended by Jacob Rumley, D.O. as reasonable and necessary treatment related to Claimant's industrial injury.

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

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

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

DATED: December 1, 2023.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-202-948-002

ISSUES

- Did Claimant prove she suffered a compensable injury to her right shoulder on March 7, 2022?
- Did Claimant prove medical treatment she received for the right shoulder was reasonably needed, authorized, and causally related to a compensable injury?
- Did Claimant prove entitlement to TTD benefits from April 6, 2022 through June 6, 2022?
- Did Respondents prove Claimant was responsible for termination of her employment?
- Did Claimant prove Respondents should be penalized for failure to timely admit or deny liability?
- Did Claimant prove Respondents should be penalized for failure to timely exchange the claim file and wage records as required by § 8-43-203(4) and WCRP 5-4(D)?
- The parties stipulated to an average weekly wage of $443.01.

FINDINGS OF FACT

1. Claimant worked for Employer as a housekeeper. Her primary duties included cleaning hotel rooms between guest stays. The job is physically demanding and requires lifting, pushing, and pulling heavy objects such as furniture and linens.

2. Claimant alleges any injury to her right shoulder on March 7, 2022, while lifting a mattress to change the sheets. Claimant testified she lifted one corner of the mattress and felt "a really hard pain" in her shoulder. Nevertheless, she kept working and finished her shift.

3. Claimant did not report an incident or injury to anyone on March 7, 2022. Claimant testified she did not report the injury because she was afraid she might lose her job. However, she had previously reported allergic skin reactions from cleaning chemicals, which her supervisor tried to remedy, with no adverse impact on her job.

4. Claimant worked her regular duties without limitation until she was suspended on April 6, 2022, for noninjury-related reasons. Although Claimant testified she had difficulty performing the job during that time, there is no persuasive evidence from any co-worker or supervisor to corroborate that her performance was limited in any way.

5. Claimant was suspended on April 6, 2022, for theft of guest property. Claimant took a pair of Apple AirPods from a guest room (Room 610) on March 6, 2022. Claimant had been responsible for cleaning Room 610 that day. The guest eventually tracked the location of the AirPods to Claimant's residence. On April 5, 2022, [Redacted, hereinafter SA] questioned Claimant about the AirPods, but Claimant denied having them or knowing where they were. However, the next day, Claimant returned to work and gave the AirPods to SA[Redacted]. Claimant alleged she had found the AirPods in a conference tote bag ("swag bag") she took from the room after the guests had checked out. Claimant claimed she did not realize the AirPods were in the bag until she checked after being questioned by SA[Redacted].

6. Claimant testified to the same story at hearing.

7. Respondents convincingly refuted Claimant's testimony about the AirPods. The tote bag in question was from a conference held at the hotel in mid-February. Given Employer's rigorous cleaning and inspection procedures, it is highly unlikely a tote bag from the conference would still have been in the room when the guest that owned the AirPods checked in several weeks later. It is far more likely that Claimant intentionally took the AirPods and fabricated a cover story after learning they had been tracked to her home.

8. Claimant was placed on administrative leave on April 6, 2022, pending completion of Employer's investigation. After determining Claimant's explanation was untrue and she had probably stolen the AirPods, Employer formally terminated her employment on May 14, 2022.

9. On April 18, 2022, Claimant filed a workers' compensation claim alleging a right shoulder injury.

10. Claimant sought no treatment for many weeks after the alleged injury.

11. Claimant was evaluated by Darielle Johnson, NP at Peak Vista Community Health Center on April 25, 2022. Claimant stated she injured her right shoulder and both knees at work. She said the shoulder injury occurred on April 6, 2022. Examination of the shoulder showed positive impingement signs and limited range of motion, but "no evidence" of a rotator cuff tear.

12. Claimant started working as a custodian at [Redacted, hereinafter DO] on June 7, 2022. The job involves customary institutional cleaning tasks such as trash removal, cleaning windows, and cleaning bathrooms. There is no persuasive evidence Claimant requested, received, or required any accommodations or limitations on the regular duties of the position.

13. Claimant underwent a right shoulder MRI on July 20, 2022. It showed a full-thickness supraspinatus tear, supraspinatus and infraspinatus tendinosis, a possible biceps tear, and a subtle SLAP tear.

14. On January 25, 2023, Claimant saw Kelsey Jackson, NP, at Kinetic Orthopedics. Claimant told Ms. Jackson her shoulder pain started when she was making a bed at work on March 7, 2022. Ms. Jackson recommended surgery.

15. Dr. Lawrence Lesnak performed an IME for Respondents on January 24, 2023. Dr. Lesnak noted numerous nonphysiologic findings on examination, including exaggerated pain response to light touch, give-way weakness throughout the right arm, and highly inconsistent shoulder range of motion depending on body position. Dr. Lesnak opined the MRI findings were likely degenerative in nature, with no indication of any acute injury or trauma-related pathology. Dr. Lesnak noted Claimant was still working full-time as a custodian "without any restrictions whatsoever." Claimant told Dr. Lesnak her shoulder pain severely worsened several months after she was terminated by Employer. Dr. Lesnak opined that Claimant suffered no work-related injury and any treatment she required for her shoulder was related to a purely personal medical condition.

16. Dr. Lesnak's opinions are credible and persuasive.

17. SA's[Redacted] testimony is credible and persuasive.

18. Claimant's testimony is not credible.

19. Claimant failed to prove a compensable injury to her right shoulder.

CONCLUSIONS OF LAW

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

As found, Claimant failed to prove she suffered a compensable injury to her right shoulder. SA's[Redacted] testimony is credible and persuasive. Dr. Lesnak's analysis and opinions are credible and persuasive. Claimant's testimony is not credible. Claimant abused a position of trust and stole property from a hotel guest. She compounded the dishonesty with a false explanation after being caught. She told the same story at hearing under oath. Considering Claimant's repeated untruthfulness, the ALJ is unwilling to credit her testimony with respect to any disputed material fact. There is no direct proof to support Claimant's alleged injury, such as witness statements or immediately contemporaneous medical records showing evidence of acute trauma. Nor does the circumstantial evidence support her claim. Claimant told no one about any injury until after she had been placed on administrative leave. She continued working her regular job for a month after March 7, 2022, with no persuasive evidence showing any functional limitations or reduced efficiency. Claimant sought no treatment for more than six weeks after the alleged injury. The initial evaluation by Ms. Johnson showed "no evidence" of a rotator cuff tear, and the

July 2022 MRI that showed a tear was not completed until after Claimant started working for a new employer as a custodian. Claimant told Dr. Lesnak her shoulder severely worsened after she was terminated, which further reduces the likelihood of a causal connection to her employment. The preponderance of persuasive evidence fails to establish that Claimant's right shoulder pathology and need for treatment were proximately caused by an injury at work on March 7, 2022.

ORDER

It is therefore ordered that:

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

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

DATED: December 1, 2023

DIGITAL SIGNATURE
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-938-002

ISSUES

1. Whether Respondent has proven by a preponderance of the evidence that Claimant's claim is barred by the statute of limitations in §8-43-103(2), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease in the form of bilateral Carpal Tunnel Syndrome (CTS) that began on October 24, 2022 during the course and scope of her employment with Employer.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment designed to cure and relieve the effects of her October 24, 2022 occupational disease.

FINDINGS OF FACT

1. Claimant worked for Employer as a Prevention Unit Manager. Her job responsibilities included data entry, data analysis, report development, investigation research and documentation, publications, process development, public health recommendation letters, email communications, grant development and reporting, position development, and evaluations. Claimant has worked continuously for Employer since September 1999.

2. The record reflects that Claimant has a long history of bilateral upper extremity symptoms. Initially, Claimant reported a work-related injury/condition on May 12, 2014. Employer completed a First Report of Injury on May 20, 2014. Respondent filed a Notice of Contest on May 22, 2014. Claimant did not file a Workers' Claim for Compensation or Application for Hearing seeking benefits related to the May 12, 2014 injury.

3. On May 12, 2014 Claimant sought treatment with Authorized Treating Provider (ATP) Concentra Medical Centers for her bilateral upper extremity symptoms. She associated her symptoms with "being on the computer." Claimant reported a sudden increase of pain that made her unable to use her left hand. Providers noted the "pain is so bothersome it wakes her up at night (numbness, tingling, electric shocks), she has to switch back and forth between her two hands while driving because they 'go dead on her'…pain 6/10 with pain to left greater than right." Claimant's symptoms included wrist and forearm pain, tingling, numbness in her fingers and loss of strength.

4. On October 28, 2014 Claimant visited orthopedic surgeon Edmund B. Rowland, M.D. for an examination. She reported numbness and tingling in both hands, as well as numbness in her thumb and fingers. Claimant noted that "activity modification and ergonomic changes to the workstation have been somewhat beneficial." She was

struggling to write and it was more difficult to use her keyboard. Dr. Rowland assessed Claimant with bilateral Carpal Tunnel Syndrome (CTS) from possible overuse. He noted "bilateral upper extremity complaints in a worker who feels typing has played a significant role in this."

5. On November 5, 2014 Claimant was evaluated by John J. Aschberger, M.D. He assessed "bilateral upper extremity pain localized predominantly at the wrists, paresthesias noted distally," and determined there "may be a component of tendinitis at the wrists as well."

6. On November 5, 2014 Claimant underwent EMG testing. Dr. Aschberger reviewed the EMG and concluded "there are very mild findings consistent with a diagnosis of [CTS] with indications of median neuropathy at the right wrist. No abnormalities suggested for the left upper extremity with nerve conduction testing and electromyographic testing shows no indications of nerve injury or irritation for either upper extremity."

7. Claimant's medical treatment and evaluation concluded in 2014. She received guidance to alleviate her symptoms that consisted of utilizing wristbands and performing home exercises. From 2014 until her October 24, 2022 Workers' Compensation claim, Claimant continued to experience flare-ups in her upper extremities that never completely resolved. Claimant followed the recommendations prescribed by her 2014 treating physicians for controlling her symptoms.

8. Claimant testified that when the COVID-19 pandemic began in March 2020 she was deployed for COVID-19 response and investigated outbreaks in healthcare settings. Her duties involved traveling throughout Colorado, participating in drive-up clinics, helping providers set up outdoor clinics, writing recommendations and providing guidance for health care workers.

9. Because of Respondent's office closure, Claimant began working remotely in late March 2020 and started experiencing flare-ups of her CTS symptoms in April 2020. Claimant noted her symptoms included increased pain at the wrist and numbness in the fingers that radiated up the arms. She explained that when a "flare-up" started, she implemented the suggestions and exercises she had learned including adjustments to her workstation. Notably, in June 2022 Claimant purchased her own workstation that included a desk and screen mount. Nevertheless, subsequent to beginning work from home, the combination of increased hours at her computer and changes to her workstation ergonomics exacerbated Claimant's symptoms.

10. On October 24, 2022 Claimant reported her symptoms and Employer completed a First Report of Injury. Claimant specifically noted symptoms including numbness, pain in fingers, elbow pain, cold hands, dexterity issues, shaking, twitching in the left hand, and left arm pain. She received a designated provider list and selected Concentra as her ATP.

11. On October 31, 2022 Claimant visited Cynthia Rubio, M.D. at Concentra for an examination. Dr. Rubio reviewed Claimant's medical history and conducted a physical examination. She commented that Claimant had been diagnosed with right CTS in 2014. Although Claimant's right wrist remained symptomatic, she was experiencing more left-sided symptoms. Because Claimant had suffered a flare-up of her condition, she underwent an ergonomic evaluation of her workstation in June 2022 but had not followed-up with the recommendations. Claimant remarked that she had been doing "fairly well" until mid-October 2022. Dr. Rubio diagnosed Claimant with bilateral CTS. However, she concluded that her objective findings were not consistent with a work-related mechanism of injury. Dr. Rubio noted that Claimant could immediately return to work with no restrictions.

12. On November 3, 2022 Claimant visited David Hnida, D.O. at Concentra. Dr. Hnida reviewed Claimant's medical history and conducted a physical examination. He considered Claimant's history of CTS and remarked that she had reached her functional goal but was not at the "end of healing." Dr. Hnida recorded that "since 2014 she has not had any periods of time when she was symptom free – she has waxed and waned since then, but things usually get better…Her symptoms, in sum, have been present for years, with this being a recent flare that has not subsided. It is noted she is hypothyroid." He assessed Claimant with bilateral wrist pain as well as numbness and tingling. Dr. Hnida concluded that objective findings were not consistent with a work-related mechanism of injury. He commented that Claimant could immediately return to work with no restrictions. Dr. Hnida noted that the "timeline of this bilat complaint presents causality challenges. I believe a worksite eval is warranted."

13. On November 28, 2022 Claimant returned to Dr. Hnida for an evaluation. Claimant's symptoms remained unchanged. Dr. Hnida reiterated that objective findings were not consistent with a work-related mechanism of injury. He referred Claimant for an EMG study.

14. On December 12, 2022 Claimant presented to Robert W. Kawasaki, M.D. for an evaluation. Dr. Kawasaki completed an EMG nerve conduction study and compared it to the previous study performed by Dr. Aschberger in 2014. The 2014 EMG demonstrated right mild CTS while the left upper extremity testing was normal. However, the December 12, 2022 EMG study revealed bilateral moderate CTS. Dr. Kawasaki diagnosed bilateral CTS and median neuropathy at the wrist. He recommended using splints at night. Dr. Kawasaki noted that steroid injections and surgical CTS releases could be considered.

15. On December 19, 2022 Claimant underwent a surgical evaluation with Rudy Kovachevich, M.D. Claimant reported she had been working in excess of 60-70 hours per week over the past few years because of the pandemic. She noted bilateral hand numbness and paresthesias that has waxed and waned over the past 10 years. Dr. Kovachevich diagnosed Claimant with bilateral CTS, left cubital tunnel syndrome, left lateral epicondylitis, and right lateral epicondylitis. He concluded that "it appears [Claimant] did sustain an injury to bilateral hands arising out of and caused by the

industrial exposure of 10/24/22." Dr. Kovachevich recommended surgical intervention including a left CTS release and left "UND" release at elbow with possible soft tissue rearrangement/transposition.

16. Contrary to Claimant's reports of working in excess of 60-70 hours each week because of the COVID-19 pandemic, the record reveals she has worked the following hours since 2020:

- 2020: average of 48.3 hours per week
- 2021: average of 48.0 hours per week
- 2022: average of 45.1 hours per week

17. A Job Demands Analysis (JDA) was initially scheduled to occur in this matter on December 28, 2022 with Joseph B. Blythe, MA, CRC. However, when Mr. Blythe arrived, Claimant advised that an evaluation would not provide him with an opportunity to observe her typical job duties. Claimant received alternate dates to complete the JDA and selected January 9, 2023.

18. On January 9, 2023 Mr. Blythe performed a JDA for the position of Prevention Unit Manager. He noted the Prevention Unit Manager is responsible for oversight of the services, staff, and partnerships within the agency. Claimant also was responsible for planning, developing, and implementing policies, procedures, goals, and objectives to ensure the provision of quality services. Mr. Blythe remarked that Claimant had been diagnosed with bilateral CTS. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (MTGs), Mr. Blythe did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties for Employer.

19. Mr. Blythe conducted time studies while observing Claimant over a 4.5-hour period to ascertain her Primary and Secondary Risk Factors pursuant to the MTGs. Based on a 10-hour workday, he specifically found the following:

- no force and repetition of Claimant's left upper extremity and 30 minutes/day or 15% of the secondary threshold of pinch force for the right upper extremity;
- regarding "awkward posture and repetition," 1.7 hours per day or 57% of the secondary threshold for left elbow flexion and 1.6 hours per day or 54% of the secondary threshold for right elbow flexion;
- no supination/pronation of 45 degrees with power grip or lifting;
- mouse use of 2.7 hours or 66% of the 4.0 hours per day threshold;
- keyboarding of 2.5 hours per day;
- no vibratory hand tools or cold work environment; and
- regarding the additional study of bilateral elbow and forearm contact, 1.7 hours per day of the left upper extremity and 1.1 hours per day of the

right upper extremity.

20. Mr. Blythe subsequently reviewed Claimant's daily timesheets from January 2022 through December 2022. He issued a revised JDA on August 6, 2023. Mr. Blythe documented work days that lasted between four and 15 or more hours. Notably, 47% of the time, or much larger than any other hour interval, Claimant worked for eight hours each day. The second most common length of a workday was nine hours or 13% of the total. Although Claimant worked 14 hours each day only 1% of the time, Mr. Blythe issued a revised JDA on August 6, 2023 in which he considered Claimant's Primary and Secondary Risk Factors over the course of 11-14 hour workdays. He again did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties.

21. Claimant testified that just before Mr. Blythe was going to leave after observing her for 4.5 hours, she stated his observations did not represent her typical job duties. Although she was about to begin her regular job tasks, Mr. Blythe left. In contrast, Mr. Blythe remarked that Claimant never mentioned he was not observing her typical job duties. He explained that, if she had advised that he had not observed her regular duties, he would have rescheduled the JDA just as he had done on December 28, 2022. Similarly, if Claimant had stated she was about to begin her typical activities he would have stayed longer.

22. On January 10, 2023 Dr. Kovachevich submitted a request for surgical authorization. Respondent subsequently denied the request.

23. On January 10, 2023 Claimant visited ATP Thomas Corson, D.O. at Concentra for an examination. Dr. Corson assessed Claimant with bilateral wrist pain, CTS, numbness and tingling. He concluded that his objective findings were not consistent with a work-related mechanism of injury. Dr. Corson noted that Claimant could immediately return to work with no restrictions.

24. On February 24, 2023 and October 5, 2023 Carlos Cebrian, M.D. conducted records reviews of Claimant's claim. He also testified at the hearing in this matter. After reviewing Claimant's medical records and considering Mr. Blythe's JDA, Dr. Cebrian conducted a causation analysis pursuant to the MTGs. Dr. Cebrian explained that, in order to perform a medical causation analysis for a cumulative trauma condition, the first step is to make a diagnosis, the next step is to clearly define the job duties and the third step is to compare the job duties with the delineated Primary Risk Factors. He initially noted that Claimant had been diagnosed with bilateral CTS. Notably, none of Claimant's treating physicians performed a causation analysis pursuant to the MTGs to determine whether her symptoms were related to her work activities.

25. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the MTGs. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. An additional Primary Risk Factor category is Awkward Posture and

Repetition/Duration. The category requires four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees. Other risk factors in the category are six hours of elbow flexion > 90 degrees or six hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Dr. Cebrian also noted that computer work can be a Primary Risk Factor, but up to seven hours per day at an ergonomically correct workstation is not a risk factor. Continuous mouse use of greater than four hours each day is also a risk factor. Dr. Cebrian concluded Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs.

26. When there are no Primary Risk Factors, step four of a causation analysis involves a review of Secondary Risk Factors. Any Secondary Risk Factor must be physiologically related to the diagnosis. Force and Repetition/Duration must be for three hours using two-pounds pinch force or 10 pounds of hand force three times or more per minute. Additional Secondary Risk Factors for Force and Repetition/Duration are three hours of lifting 10 pounds > 60X per hour or three hours of use of hand held tools weighing two pounds or greater. Another Secondary Risk Factor category is Awkward Posture and Repetition/Duration. The preceding Factor requires three hours of elbow flexion > 90 degrees or three hours of Supination/pronation of 45° with power grip or lifting. Computer Work and mouse use are not Secondary Risk Factors. Handheld vibratory power tools can be a Secondary Risk Factor if used for two hours when combined with other risk factors. After evaluating Claimant's job duties, Dr. Cebrian concluded she does not have Secondary Risk Factors for the development of a cumulative trauma condition. Because Claimant did not have a Secondary Risk Factor, the Diagnosis-based risk factor table is not used.

27. Dr. Cebrian explained that the MTGs show an association of cumulative trauma conditions, including cubital tunnel syndrome or ulnar neuritis and CTS, with certain medical conditions. The conditions include hypothyroidism, increasing age, and the female sex. Based on the medical records, Dr. Cebrian remarked that Claimant is a 45-year-old female who was diagnosed with hypothyroidism. Moreover, Dr. Cebrian stated that, pursuant to the MTGs, conditions must be physiologically related to job activities. The Diagnosis-based risk factor table for lateral epicondylitis and cubital tunnel syndrome or ulnar neuritis reflects they are not physiologically related to keyboarding and mouse use. In fact, the MTGs specify there is good evidence that keyboarding is not related to the preceding conditions.

28. Relying on the MTGs, Dr. Cebrian concluded that it is "not medically probable that [Claimant's] bilateral upper extremity complaints were directly or indirectly causally related to her work activities for [Employer] nor were they the proximate result of her work activities." He explained that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs. Dr. Cebrian commented that further evaluation, diagnosis, and treatment under the Workers' Compensation system was not medically reasonable, necessary, or causally related to Claimant's symptoms. Claimant thus did not suffer an occupational disease in the form of a cumulative trauma condition as a result of her work activities for Employer.

29. Respondent has failed to prove it is more probably true than not that Claimant's claim is barred by the statute of limitations in §8-43-103(2), C.R.S. The record reveals that Claimant has a long history of bilateral upper extremity symptoms. Initially, Claimant reported a work-related injury/condition to her upper extremities on May 12, 2014 and obtained medical care with ATP Concentra. After undergoing conservative treatment, Claimant's medical care and evaluation concluded later in 2014. Nevertheless, Claimant's flare-ups of numbness in her upper extremities never completely resolved. Because of the COVID-19 pandemic, Claimant began working remotely in late March 2020 and started experiencing flare-ups of her CTS symptoms in April 2020. The combination of increased hours at her computer and changes to workstation ergonomics exacerbated Claimant's symptoms. On October 24, 2022 Claimant reported her symptoms, Employer completed a First Report of Injury, and she again received treatment with ATP Concentra. In her first visit with ATP Dr. Rubio, Claimant specifically reported that she had been doing "fairly well" until mid-October, 2022. On November 3, 2022 Claimant reported to ATP Dr. Hnida that she suffered a recent flare-up that had not subsided.

30. The preceding chronology reflects that Claimant has experienced upper extremity symptoms sporadically since at least 2014. However, Claimant's present claim is predicated on a request for compensation from October 24, 2022. Although Respondent asserts that Claimant's current claim is barred by the two-year statute of limitations in §8-43-103(2), C.R.S., the record reflects that Claimant did not recognize the nature, seriousness, and probable compensable character of her injury until October 2022. Claimant's occasional flare-ups prior to the date of reporting were not disabling, and Claimant continued to perform her job duties. After Claimant began working from home and suffering increased pain, she attempted to alleviate her symptoms and made adjustments to her workstation. However, she was ultimately unsuccessful and reported her claim for compensation in a timely fashion. The record reflects that, although Claimant's upper extremity pain waxed and waned over the years, she was doing fairly well until she suffered a flare-up of symptoms in October 2022. Notably, she developed left-sided symptoms and was no longer able to alleviate her pain. Because Claimant filed a notice claiming compensation within two years of discovering the work-related nature of her injury, Respondent has not demonstrated that her October 24, 2022 claim is barred by the statute of limitations in §8-43-103(2), C.R.S.

31. Claimant has failed to demonstrate it is more probably true than not that she suffered an occupational disease in the form of bilateral CTS that began on October 24, 2022 during the course and scope of her employment with Employer. Initially, the record reflects that Claimant has suffered a long-history or upper extremity symptoms since at least 2014. Claimant commented that the combination of increased hours at her computer and changes to workstation ergonomics exacerbated her upper extremity symptoms. On October 24, 2022 she reported her symptoms and began receiving treatment with ATP Concentra. She was diagnosed with bilateral CTS. After undergoing conservative treatment, Dr. Kovachevich concluded that Claimant suffered industrial injuries to her bilateral upper extremities as a result of her work activities and recommended surgical

intervention.

32. Despite Claimant's testimony and Dr. Kovachevich's opinion, the record reflects that Claimant's bilateral CTS symptoms are not causally related to her work activities for Employer. Importantly, ATPs Drs. Rubio, Hnida and Corson concluded that their objective findings were not consistent with a work-related mechanism of injury. The doctors also noted that Claimant could immediately return to work with no restrictions. Moreover, on January 9, 2023 a JDA performed by Mr. Blythe did not find evidence of any Primary or Secondary Risk Factors for the development of Claimant's symptoms. Specifically, relying on the MTGs and conducting time studies, Mr. Blythe determined that Claimant's job activities did not reach the minimum thresholds for either the Primary or Secondary Risk Factors for a cumulative trauma condition. Although Claimant explained that the 4.5 hour JDA did not constitute an accurate representation of her typical job duties, the record reflects she was aware Mr. Blythe sought to observe her typical work activities and the JDA could be rescheduled if she was not performing her regular job duties. Nevertheless, Claimant chose to proceed with the evaluation. Thus, based on the credible testimony of Mr. Blythe, the JDA constituted an accurate portrayal of Claimant's typical work activities.

33. The persuasive testimony of Dr. Cebrian demonstrates that Claimant did not likely suffer a cumulative trauma condition as a result of her work activities for Employer. Initially, Dr. Cebrian is the only physician in the present matter who conducted a formal causation assessment pursuant to the MTGs. He persuasively determined that Claimant's bilateral upper extremity complaints are not causally related to her work activities. Dr. Cebrian reasoned that it is "not medically probable that [Claimant's] bilateral upper extremity complaints were directly or indirectly causally related to her work activities for [Employer] nor were they the proximate result of her work activities." He explained that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs. Dr. Cebrian commented that further evaluation, diagnosis, and treatment under the Workers' Compensation system was not medically reasonable, necessary, or causally related to Claimant's symptoms. Claimant thus did not suffer an occupational disease in the form of a cumulative trauma condition as a result of her work activities for Employer.

34. Based on Mr. Blythe's JDA, a review of Claimant's job duties and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive activities for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant has failed to demonstrate it is more probably true than not that she suffered an occupational disease in the form of bilateral CTS that began on October 24, 2022 during the course and scope of her employment with Employer. Her claim for Workers' Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Statute of Limitations

4. Section 8-43-103(2), C.R.S. requires a claimant to file a notice claiming compensation within two years of discovery of the work-related nature of an injury or within three years if a reasonable excuse exists and no prejudice results to respondents. The notice must apprise the Division and respondents of the claimant's intent to seek compensation. The preceding requirement is not satisfied by the employer filing a first report of injury, the Division's assignment of a claim number, claimant's counsel's entry of appearance or the claimant's service of interrogatories. *Packard v. Indus. Claim Appeals Off. and City and County of Denver,* 456 P.3d 473 (Colo. App. 2019). The limitation period commences when "the claimant, as a reasonable [person], should recognize the nature, seriousness, and probable compensable character of [the] injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *City of Colorado Springs v. Indus. Claim Appeals Off.*, 89 P.3d 504 (Colo. App. 2004). For a claimant to appreciate an injury's seriousness and probable compensable nature, the injury must be "to some extent" disabling. *City of Colorado Springs*, 89 P.3d at 506. The "seriousness" of the injury refers to the claimant's recognition of the "gravity of the medical condition." *Burnes v. United Airlines*, WC 4-725-046 (ICAO. Apr. 17, 2008). The claimant must recognize all three of the preceding factors to trigger the running of the statute of limitations. *Id.* The question of when the claimant recognized the nature, seriousness, and probable compensable character of the injury is one of fact for determination by the ALJ. *Id.*

5. As found, Respondent has failed to prove by a preponderance of the evidence that Claimant's claim is barred by the statute of limitations in §8-43-103(2), C.R.S. The record reveals that Claimant has a long history of bilateral upper extremity symptoms. Initially, Claimant reported a work-related injury/condition to her upper extremities on May 12, 2014 and obtained medical care with ATP Concentra. After undergoing conservative treatment, Claimant's medical care and evaluation concluded later in 2014. Nevertheless, Claimant's flare-ups of numbness in her upper extremities never completely resolved. Because of the COVID-19 pandemic, Claimant began working remotely in late March 2020 and started experiencing flare-ups of her CTS symptoms in April 2020. The combination of increased hours at her computer and changes to workstation ergonomics exacerbated Claimant's symptoms. On October 24, 2022 Claimant reported her symptoms, Employer completed a First Report of Injury, and she again received treatment with ATP Concentra. In her first visit with ATP Dr. Rubio, Claimant specifically reported that she had been doing "fairly well" until mid-October, 2022. On November 3, 2022 Claimant reported to ATP Dr. Hnida that she suffered a recent flare-up that had not subsided.

6. As found, the preceding chronology reflects that Claimant has experienced upper extremity symptoms sporadically since at least 2014. However, Claimant's present claim is predicated on a request for compensation from October 24, 2022. Although Respondent asserts that Claimant's current claim is barred by the two-year statute of limitations in §8-43-103(2), C.R.S., the record reflects that Claimant did not recognize the nature, seriousness, and probable compensable character of her injury until October 2022. Claimant's occasional flare-ups prior to the date of reporting were not disabling, and Claimant continued to perform her job duties. After Claimant began working from home and suffering increased pain, she attempted to alleviate her symptoms and made adjustments to her workstation. However, she was ultimately unsuccessful and reported her claim for compensation in a timely fashion. The record reflects that, although Claimant's upper extremity pain waxed and waned over the years, she was doing fairly well until she suffered a flare-up of symptoms in October 2022. Notably, she developed left-sided symptoms and was no longer able to alleviate her pain. Because Claimant filed a notice claiming compensation within two years of discovering the work-related nature of her injury, Respondent has not demonstrated that her October 24, 2022 claim is barred by the statute of limitations in §8-43-103(2), C.R.S.

Compensability

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

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

9. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

10. The Colorado Division of Workers' Compensation has developed specific MTGs for Cumulative Treatment Conditions in Rule 17, Exhibit 5. The MTGs provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p. 20.

11. The MTGs include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three

hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing at least two pounds. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the MTGs provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, pp. 24-26.

12. Rule 17, Exhibit 5 instructs physicians about using risk factors for assessing causation of a cumulative trauma condition. After determining a diagnosis and defining the job duties of the worker, physicians should compare the worker's duties with the Primary Risk Factor Definition Table. The MTGs specify that "[h]ours are calculated by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive times are not included in the total time. W.C.R.P. Rule 17, Exhibit 5, p. 21.

13. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease in the form of bilateral CTS that began on October 24, 2022 during the course and scope of her employment with Employer. Initially, the record reflects that Claimant has suffered a long-history or upper extremity symptoms since at least 2014. Claimant commented that the combination of increased hours at her computer and changes to workstation ergonomics exacerbated her upper extremity symptoms. On October 24, 2022 she reported her symptoms and began receiving treatment with ATP Concentra. She was diagnosed with bilateral CTS. After undergoing conservative treatment, Dr. Kovachevich concluded that Claimant suffered industrial injuries to her bilateral upper extremities as a result of her work activities and recommended surgical intervention.

14. As found, despite Claimant's testimony and Dr. Kovachevich's opinion, the record reflects that Claimant's bilateral CTS symptoms are not causally related to her work activities for Employer. Importantly, ATPs Drs. Rubio, Hnida and Corson concluded that their objective findings were not consistent with a work-related mechanism of injury. The doctors also noted that Claimant could immediately return to work with no restrictions. Moreover, on January 9, 2023 a JDA performed by Mr. Blythe did not find evidence of any Primary or Secondary Risk Factors for the development of Claimant's symptoms. Specifically, relying on the MTGs and conducting time studies, Mr. Blythe determined that Claimant's job activities did not reach the minimum thresholds for either the Primary or Secondary Risk Factors for a cumulative trauma condition. Although Claimant explained that the 4.5 hour JDA did not constitute an accurate representation of her typical job duties, the record reflects she was aware Mr. Blythe sought to observe her typical work activities and the JDA could be rescheduled if she was not performing her regular job duties. Nevertheless, Claimant chose to proceed with the evaluation. Thus, based on the credible testimony of Mr. Blythe, the JDA constituted an accurate portrayal of Claimant's typical work activities.

15. As found, the persuasive testimony of Dr. Cebrian demonstrates that Claimant did not likely suffer a cumulative trauma condition as a result of her work activities for Employer. Initially, Dr. Cebrian is the only physician in the present matter who conducted a formal causation assessment pursuant to the MTGs. He persuasively determined that Claimant's bilateral upper extremity complaints are not causally related to her work activities. Dr. Cebrian reasoned that it is "not medically probable that [Claimant's] bilateral upper extremity complaints were directly or indirectly causally related to her work activities for [Employer] nor were they the proximate result of her work activities." He explained that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs. Dr. Cebrian commented that further evaluation, diagnosis, and treatment under the Workers' Compensation system was not medically reasonable, necessary, or causally related to Claimant's symptoms. Claimant thus did not suffer an occupational disease in the form of a cumulative trauma condition as a result of her work activities for Employer.

16. As found, based on Mr. Blythe's JDA, a review of Claimant's job duties and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive activities for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant has failed to demonstrate it is more probably true than not that she suffered an occupational disease in the form of bilateral CTS that began on October 24, 2022 during the course and scope of her employment with Employer. Her claim for Workers' Compensation benefits is thus denied and dismissed.

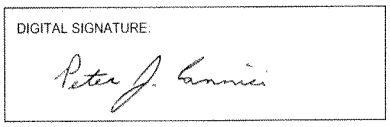
ORDER

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

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

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

DATED: December 1, 2023.



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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained a work related injury within the course and scope of her employment on March 6, 2023.

IF THE CLAIM IS DEEMED COMPENSABLE:

II. Whether Claimant has proven by a preponderance of the evidence that she was entitled to reasonably necessary and related medical care for the compensable work related injury including whether she was entitled to select Dr. David Yamamoto as an authorized treating physician.

III. Whether Claimant has proven by a preponderance of the evidence what her average weekly wage was.

IV. Whether Claimant has proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from March 7, 2023 until terminated by law.

V. Whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause.

STIPULATIONS

The parties stipulated that, if the claim was found compensable, Claimant's average weekly wage was $720.00, not including the costs of replacing health insurance benefits or other benefits.

FINDINGS OF FACT

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

A. Generally

1. Claimant was a housekeeper for Employer, working full time in the critical care unit (CCU) for approximately thirty (30) years and was 55 years old at the time of the hearing. She was 5' 5" tall. Claimant was responsible for cleaning her assigned floor which included sixteen (16) rooms, the waiting area, the public bathrooms and the nurses' station, including lifting trash, wet linens, mopping and sweeping. She worked the 5:30 a.m. to 2:00 p.m. shift. Claimant considered this very heavy and hard work.

2. Claimant was assigned a housekeeping closet where she kept her cart and the supplies needed to perform her job. The closet also had a sink, a floor sink or drain and a mobile wire rack or cart where the supplies were kept. The room was just big enough to fit her cart, her supplies and herself. When she arrive at work first thing in the

morning, she would enter her housekeeping closet, though it was a tight fit. She would typically stand between her cart, that reached right below her chest[1] and the supply cart, which was lined up against the wall next to the sink.

3. Prior to her work related accident, she had no problems with either her low back or her right shoulder.

B. The accident

4. Claimant was working her normal schedule and job on March 6, 2023. She was injured when, the door of her closet closed shut and when she tried to exit the housekeeping closet, the door handle and the cart stuck together, effectively locking her in the closet with her cart. Claimant contacted the housekeeping office and asked the individual that answered to help her get out. After waiting approximately 15 minutes, Claimant was worried that she had to start work and that her time was counting.

5. On March 6, 2023, Claimant lifted the cart from the bottom to disentangle it from the door handle and while she was doing that, she twisted, injuring her right shoulder and low back going into the buttock area, though she was able to exit the closet. Claimant felt a stabbing sensation, like a nail had stabbed her in the low back.

6. It was not until after she was out of the housekeeping closet that the night team lead arrived to help. They removed the cart and Claimant proceeded to begin working.

7. Claimant's supervisor contacted Claimant to request she clean a specific room and Claimant reported that she had hurt herself. His response was "Dear, dear, dear, one clean, one discharge," explaining that the room where the patient was discharged needed to be done right away. Claimant continued her duties and when her supervisor approached her again, Claimant again explained that she was hurt that morning. Her supervisor did not send her to a provider. He insisted she continue cleaning her floor and advised her he would not assign her any extra work. Claimant proceeded to complete her floor, though she had a lot of difficulty due to the pain, especially with the trash, the linens and mopping. Claimant then went to the office to punch out early, at approximately 11:30 a.m. or 12:00 p.m. The housekeeping Assistant Director provided her a patch to put on her back and an ice pack, advising her not to return to work the following day. The Assistant Director counselled her that she would be better with some rest, probably by the next day. That is why Claimant did not go to the emergency room that day.

8. On March 7, 2023, when she woke up, she continued to have pain in both her low back and her right shoulder. The housekeeping Assistant Director contacted Claimant that day and requested Claimant report to the office to complete and sign some paperwork. Her husband accompanied her. The Assistant Director did not speak Spanish, so the clerk helped with translation. The paperwork included a "write up." Claimant explained that she had not done anything wrong and what happened to her on March 6, 2023 was simply an accident. Claimant understood the Assistant Director to

[1] Claimant is 5' 5" tall so if her cart reached just below her chest, it would be at least 3 and one half (3 ½) foot tall.

say that if Claimant wished to have medical attention that she had to sign the document. She understood that it was a new company policy to issue write ups when an employee had an accident. Claimant declined to sign something that held her responsible for her accident. When she declined, Claimant understood the Assistant Director to advise Claimant that if she did not sign, that she was terminated. She was not provided a copy of the paperwork she needed to complete. Claimant left the office. At no time did anyone send her for medical care or provide her the name and address of a provider. Neither did anyone from her Employer contact her as she would have recognized the phone number. Claimant never contacted Employer as she believed she had been fired.

9. Claimant went immediately thereafter to the St. Anthony emergency room. At that time she was in pain, felt nausea, like she was about to vomit. They provided her with pain medications, which helped for a time but the pain returned.

10. She did not obtain any other medical care because she did not have the funds or insurance, but she continued to have pain in her right shoulder and low back. Claimant indicated that she wished to have medical care and has some urgency because of the pain.

11. She indicated that she could not work in the condition she was in at this time because the work was heavy and she did not have strength in her low back because of the pain.

C. Medical Records

12. Claimant was seen at the St. Anthony Hospital Emergency Department on March 7, 2023 by Erin Steins, R.N. and Scott Wesley Branney, M.D. They documented that Claimant had been lifting something heavy “at work starting yesterday while working”, and twisted while doing so, and felt a “pop” in her low back which caused persistent pain, greater on the left side than the right side. She rated her pain upon arrival at 9, then after she was given medications in the hospital including a Toradol injection for the pain, at a 6 out of 10, with radiation into the posterior left buttocks and posterior left leg. Dr. Branney gave a differential diagnosis of cauda equine syndrome, acute disc herniation, sciatica and muscle strain. He noted that examination was consistent with muscle strain with left sided sciatica, recommended medications including anti-inflammatories, oxycodone-acetaminophen, Methocarbamol as well as Lidoderm patches. She was instructed to follow up with another provider for further care. The CT was simply read as “normal” by Dr. Blaze Cook.

13. Dr. John J. Aschberger conducted an Independent Medical Examination pursuant to Respondents’ request. Dr. Aschberger took a history of the mechanism of the injury, which included a lifting and twisting motion, injuring her low back and right shoulder. He reviewed the emergency room records. He noted that he questioned Claimant regarding her treatment and Claimant indicated that she was dissatisfied with the care they provided and that they were focused on her low back so did not address the right shoulder.

14. Claimant reported that she continued with pain in the lower lumbar area and "waist" with radiation to the gluteal musculature and into the groins. She had "numbness" in both legs, predominantly on the left with electrical shock sensation occurring

intermittently, again bilaterally, but predominantly on the left. She reported pain at the right shoulder anteriorly and laterally, like "a nail going in." She indicated the onset began with the initial injury. She had difficulty with motion at the shoulder with no radiation.

15. On exam, Dr. Aschberger noted tenderness in the sacral sulcus on the left, limited range of motion of the lumbar spine, extension being restricted with increased pain in the lower back, lateral flexion was tight bilaterally, with pulling at the lumbosacral areas, the left SI joint was locked with forward flexion, Claimant was positive for facet loading, and a markedly positive Patrick's test on the left. Dr. Aschberger specifically noted that pain behaviors were not excessive. Dr. Aschberger remarked that exam of the right shoulder showed a negative impingement test, Spurling's and full range of motion, but noted that Claimant had anterior tenderness, weakness with supraspinatus testing and external rotation, and had tight trapezial musculature. He specifically noted that there were objective limitations with a consistent examination.

16. Dr. Aschberger provided a provisional impairment of 20% whole person (WPI) that included a 12% right upper extremity impairment which converted to a 7% WPI, a Table 53IIB 5% for the lumbar spine and a 9% loss of range of motion of the spine. He recommended further medical care for the lumbar spine including medication management with anti-inflammatories, muscle relaxants, and sleep medication, as well as intervention with physical therapy and/or chiropractic care. He also stated that, if Claimant continued to fail to improve, that further imaging might be warranted. He also recommended further diagnostic evaluation for the right shoulder.

D. Employment Records

17. The Floor Tech Position, initialed by Claimant in 2016, which is the description of Claimant's job, noted that Claimant was required to be able to lift up to 40 lbs. frequently with lifting of equipment and other items up to 100 lbs., being able to stand, walk, squat, bend, twist, kneel, and reaching continuously, pushing and pulling a maids' cart, linen cart, or various equipment on tile or carpeted floors continuously, handle and interact with chemicals, dust, vacuum, mop and use the wringer for the mop as well as clean and detail bathrooms, among other duties.

18. The Employer's First Report of Injury (FROI) was completed by Claimant's supervisor on March 10, 2023. He reported that Claimant had injured her shoulder on March 6, 2023 and that Claimant had "notified" Employer of it on March 6, 2023. The report stated that Claimant "reported to manager on duty that she had been stuck in her housekeeping closet which claims she was in before clocking in. In the process of being stick/trapped (sic.) inside her initial chief complaint was of soreness in the shoulder. The TM[2] insisted on comp." This ALJ infers from this statement that Claimant had other complaints other than those initially reported. It is further deduced that Employer knew or should have known that Claimant was claiming a work injury and required care as she insisted on having compensation benefits.

19. Claimant filed a Worker's Claim for Compensation on March 27, 2023. Claimant reported that she had been in the process of taking mops to the janitor closet,

[2] This ALJ infers that TM means team member.

when she had to lift the cleaning cart to move it, hurting her low back and hip on March 6, 2023.

20. Claimant's wage records, pay check stubs, and compensation summary all indicate that Claimant's rate of pay was $18.00 per hour and $720.00 per week. They further showed Claimant was unlikely to have had any benefits such as medical insurance which would increase her average weekly wage.

E. Housekeeping Assistant Director Testimony

21. The Assistant Director for Employer had been working for them for approximately seven years, and had been the Director of Housekeeping but, at the time of Claimant's work injury, she was the Assistant Director. She was familiar with Claimant. She stated that the paperwork for work-related injuries was completed by the Director or Assistant Director. She stated

> When an injury is reported there is paperwork that needs to be filled out by both the injured party and then the management team. And then it is up to the injured if they want to be treated for their injury. They could accept or they can decline. And then there is a form that needs to be signed, which is a verbal coaching.
> …
> So there are a couple of forms that need to be filled out. It is just the injured party stating and acknowledging that, yes, she was injured, or, no, she was not injured. Or, yes, she was injured but she declined medical treatment. And then there is a form that needs to be filled out, which is a verbal coaching, saying that, you know, this is going to go into your record. You acknowledge that a policy was violated, so not practicing work safe mechanics while on the job.

22. She described the housekeeping closets as a six foot by four foot room, though they varied in size depending on the floor. She stated that the Claimant's cart was approximately three feet wide by four feet long, weighing approximately 60 lbs. if it was fully stocked. The Assistant Director disagreed that Claimant would be able to fit in her closet between her cart and the wire rack of supplies.

23. The Assistant Director believed Claimant first reported the injury to her supervisor. She reported that Claimant had gone into the office to speak with her and when asked if Claimant required medical care, Claimant answered that she did. Her admin assistant interpreted for them. When presented with the write-up, Claimant became upset, was speaking Spanish to her husband and declined to sign the paperwork, after which they left.

24. The Assistant Director indicated she had not conveyed to Claimant that she would be fired for not signing the warning and that Claimant did not complete any of the paperwork. She stated Claimant never re-contacted Employer or provided any doctor's note.

25. She stated that she did not know when Claimant was finally terminated from her employment with Employer but that she was not longer an employee. She believed there was an employee file that had not been produced to Claimant's counsel but that she did not have access to the file or the write-up form, Form 230. The Assistant Director did not believe that Claimant was written-up for failure to show to work. She did not mail

a designated provider list (DPL) to Claimant, stating that it was “in her file if we still have it.”

F. Conclusory Findings

26. As found, Claimant was injured in the course and scope of her employment with Employer on March 6, 2023. She was in her housekeeping closet. When she went to leave the closet, she noted that the handle of her cart was entangled with the closet door handle. She was unable to move it so she lifted the cart to get out. While doing so, she twisted and injured her right shoulder and low back. As found, this likely was to be anticipated as the closet was very small and there was little room to move in order to lift her cart.

27. As found, Claimant reported her injuries to her supervisor, though he did not send her to a provider and required that she complete the floor before she could go home to rest. She left approximately two hours before the end of her normal schedule. As found, Claimant went to clock out early in the housekeeping office and she was provided with an ice pack and a patch to put on her back and instructed not to show the next day in order to recuperate. As found, Claimant was credible and persuasive.

28. As found, Claimant was called in the following day and she, again, reported her injuries, this time to the Assistant Director of Housekeeping. She advised she required a medical provider but was advised that she needed to sign the “write-up” before she would be given any documentation or referral. As found, Claimant declined to state that she had violated any company safety policy. Claimant was never sent a designated list of providers. Claimant was appropriately attended at the emergency room on March 7, 2023. Further, as found, the right of selection of an authorized provider passed to Claimant when Respondents failed to send Claimant the DPL despite Claimant having reported her injury on multiple occasions, including to her supervisor, the Assistant Director and by filing a WCC.

29. As found, Claimant requires medical attention as recommended by Dr. Branney and Dr. Aschberger. Claimant continues to have symptoms and complaints that have not been addressed and she is requesting further medical care. Claimant is credible and persuasive.

30. As found, Claimant has been unable to return to work due to her ongoing physical limitations related to the injuries which were caused by the March 6, 2023 accident.

31. As found, the Assistant Director of Housekeeping was not persuasive in her arguments that Claimant elected to be terminated. As found, Claimant believed that the clerk interpreting for her on March 7, 2023 stated that Claimant had to sign the admission of guilt (write-up) to obtain medical care and Claimant reasonably declined to sign a statement that she did not believe was correct. As found, Claimant’s understanding was supported by the fact that Employer took no further steps to provide Claimant with a DPL by mail or contact Claimant to discuss the alleged misunderstanding. Respondents’ complete disregard for an employee that had been working for Employer for 30 years speaks for itself. As found, Claimant did not act in a volitional manner. Claimant is more credible and persuasive over the contrary testimony of the Assistant Director.

32. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See Industrial Commission v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or

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

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

A compensable industrial accident is one that resulted in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To establish a compensable injury an employee must prove by a preponderance of the evidence that her injury arose out of the course and scope of employment with her employer. Section 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury had its "origin in an employee's work-related functions and was sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there was a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. It is for the ALJ to determine the weight and credibility to be assigned to the evidence presented. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

As found, Claimant has shown that she was injured in the course and scope of her employment. Claimant was in the process of tending to work activities, including taking a mop into her housekeeping closet. Claimant would typically go into her closet while her housekeeping cart was in the closet to supply it, and it was a tight fit. Claimant's testimony

in this regard is more credible and persuasive than that of the Assistant Director of Housekeeping who stated that it was not possible for Claimant to be in her closet at the same time as her cart because they could not fit. Clearly, Claimant had been performing this job for 30 years and had a system or routine. Claimant has shown that it was more likely than not that she was within the course and scope of her work related activities when she injured her shoulder and low back, lifting the housekeeping cart, which was entangled with the doorknob, in order to exit the closet. This is supported by the medical records, the FROI and the Worker's Claim for Compensation.

Further, Claimant has shown by a preponderance of the evidence that she injured her shoulder and low back in the process of lifting her cart and required medical attention and continues to require medical attention. Claimant was attended at the emergency room at St. Anthony. Dr. Branney and Nurse Steins took roughly consistent histories of the mechanism of injury as credibly described by Claimant. Even Respondents' IME physician, Dr. Aschberger, described the mechanism consistently. These medical providers are credible and persuasive. It is particularly persuasive that, since the closet was so small, she had to twist in the limited space in order to manipulate the 60 lb. cart away from the door so she could get out, after been locked in the confined space for a quarter hour. As found and concluded, it is more likely than not that Claimant sustained injuries to her right shoulder and low back which were proximately caused by the accident at work on March 7, 2023.

C. Medical benefits

Employer is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance," in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006); *Loofbourrow v. Indus. Claim Appeals Office*, 321 P.2d 548 (Colo. App. 2011). If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury. *Brunch, supra*. An employer is deemed notified of an injury when it

has some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. See Sec. 8-42-101(1)(a), C.R.S.; *Jones v. Adolph Coors Co.,* 689 P.2d 681, 684 (Colo. App. 1984); *Berends v. Town of Kiowa*, I.C.A.O., W.C. No. 5-162-468 (August 28, 2023).

The respondents are liable for emergency and authorized medical treatment reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777, 781 (Colo. App. 1990)("[I]in an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention."). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, *supra*; *see also* W.C.R.P. 8-3. The question whether medical treatment was reasonable and necessary to cure and relieve the effects of the injury is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The emergency exception is not necessarily limited to life-threatening situations, and whether a “bona fide emergency” existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). Since Claimant was not provided a list of providers, she was initially seen at St. Anthony Hospital where it was determined her condition was significant enough to inject her with Toradol and provide her with narcotic medications. Claimant requested medical care and Employer failed to provide her with any documentation of where she was to be attended. This information should not have been held hostage by Employer simply because Claimant declined to agree and sign a verbal coaching that required Claimant to admit that she was responsible for a policy violation in not working safely. Respondents failed to even allege that they had provided Claimant with any documentation they were alleging Claimant failed to complete. Claimant has shown that this was an emergent need for care and St. Anthony Hospital and its providers are authorized. Respondents are liable for payment of Claimant’s St. Anthony emergency room visit on March 7, 2023.

As further found, Employer knew of the injury. Claimant was credible and persuasive that she reported her injury right after it happened, was in instructed that she could go home after finishing her floor, which she did approximately two hours before her regularly scheduled time to leave, and was told that her condition might very well resolve overnight. Claimant met with the Assistant Director the day following the accident and again reported her accident. Respondents never referred Claimant to a medical provider to treat the injuries. Rule 8-2(1)(A) is very clear that, when an employer has notice of an on-the-job injury, the employer or insurer “shall provide” the injured worker with a verifiable written list of designated providers, which clearly did not take place here. Accordingly, the right of selection passed to Claimant and she may now see a doctor of her choice. In this case Claimant has designated Dr. Yamamoto, who is now an authorized treating physician.

Claimant has shown she is entitled to medical benefits that are reasonably necessary and related. Claimant was credible and persuasive that she needed further medical care and was asking for further medical care for her March 6, 2023 work related

injuries. Respondents' own IME physician, Dr. Aschberger, noted that Claimant needed medical care for the lumbar spine including medication management with anti-inflammatories, muscle relaxants, and sleep medication, as well as intervention with physical therapy and/or chiropractic care. He stated that, if Claimant continued to fail to improve, that further imaging might be warranted. He also recommended further diagnostic evaluation for the right shoulder. This ALJ infers from Dr. Aschberger's report that the imaging needed is an MRI of the right shoulder in order to determine if Claimant requires further medical care related to the shoulder. Dr. Branney also recommended that Claimant follow up with another provider. As found and concluded, Claimant requires medical attention that is reasonably necessary and related to the injuries to her right shoulder and lumbar spine as well as the sequelae of both injuries, which Claimant sustained as a consequence of the March 6, 2023 work related accident. Claimant has shown that the medical care in question are proximately caused by the March 6, 2023 accident and authorized medical treatment is reasonably necessary to cure and relieve Claimant from the effects of a work related injuries.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The parties stipulated that Claimant's average weekly wage was $720.00, which is also supported by the evidence. The parties' stipulation is approved and part of this order.

E. Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant's testimony and the medical records support Claimant's inability to return to her regular employment. Claimant credibly and persuasively testified that she was unable to perform the work in housekeeping after March 6, 2023 because it was very heavy for her and she would not be able to do what was required of her. While she

followed her supervisor's instructions to finish her floor on March 6, 2023, it is found that Claimant had a lot of difficulty doing so and left at least two hours before her scheduled time to leave, and she left due to her injuries. Claimant has continued to be off work since her work related injury of March 6, 2023, causing her wage loss. Further, she credibly testified that she was unable to work at this time due to the pain and lack of treatment. Nothing in the portions of Dr. Aschberger's report that was in evidence nor the emergency room records indicated that Claimant would be able to physically return to work at this time. In light of the lack of substantial medical records to the contrary, this ALJ is persuaded by the totality of the evidence that Claimant is unable to work at this time and is entitled to temporary total disability benefits beginning the day following her work injury on March 6, 2023 to the present until terminated by law. Claimant has proven by a preponderance of the evidence that she is owed TTD benefits.

Claimant is owed TTD at least to the date of the hearing, including interest pursuant to statute for benefits which were not paid when due. Benefits through the date of the hearing and interest are calculated below. Further, Respondents continue to owe benefits following this date, including interest, until terminated by law.

[Redacted, hereinafter BC]

F. Responsible for Termination and Termination for Cause

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant reasonably believed that she was terminated by Employer's representative, the Assistant Director. Employer communicated through the admin assistant of the Assistant Director, who was translating for Claimant. Claimant understood the Assistant Director to state that, if she did not sign the "write-up" or "verbal coaching" that she could not be attended by a medical provider and was terminated. The

admin assistant did not testify and this ALJ found the Claimant's testimony credible, especially in light of the Assistant Director's explanation that the verbal coaching noted that the write-up was going into Claimant's permanent record and that it was Claimant's acknowledgement that a policy was violated because Claimant was not practicing safe work mechanics while on the job. It is clear from the Employer's job description that Claimant would, at the very least, be required to lift items of up to 100 lbs. on an occasional basis. The cart was no more than 60 lbs. as stated by the Assistant Director. Further, Claimant called the office and was locked in the closet, for what clearly seemed a long time to Claimant, without assistance. As found, Claimant acted reasonably in extricating herself from a situation that was not in any way volitional and it was unreasonable of Employer to require that Claimant sign a document requiring her to admit to being guilty of a policy violation when there was no policy violation in the acts Claimant exercised in moving her cart. As found, the act of refusing to sign such a document also is found not to be a policy violation. Respondents failed to provide persuasive evidence that there was a policy in place at the time of Claimant's work related injury that required Claimant to sign a document admitting to some kind of responsibility for the accident that occurred. Of course, there was no documentation in evidence of what the policy was other than testimony of the Assistant Director, who was not credible. There were no further write-ups of policy violations following Employer's termination of Claimant, no employment file showing the documentation that Employer was asking Claimant to sign nor any other documents or other actions by Employer following the termination. From the totality of the evidence, as found, Claimant was found credible and persuasive that Employer terminated Claimant on March 7, 2023 and Claimant was not at fault for the termination.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant proved by a preponderance of the evidence that she sustained work related injuries to her right shoulder and low back on March 6, 2023.

2. Respondents shall pay for reasonably necessary and related medical benefits for the treatment of Claimant's right shoulder, low back and any sequelae of the injuries in this matter, including the emergency visit to St. Anthony Hospital.

3. The right to select an authorized treating physician passed to Claimant and Claimant selected Dr. David Yamamoto who is now an authorized treating physician.

4. The parties stipulation is accepted and ordered, noting that Claimant's average weekly wage was $720.00 per week and her TTD rate is $480.00.

5. Respondents shall pay for TTD from March 7, 2023 until terminated by law.

6. Respondents shall pay interest on all benefits not paid when due pursuant to Sec. 8-43-410(2), C.R.S.

7. Respondents shall pay the benefits due through the date of the hearing in the amount of $14,928.58. Respondents shall continue to pay until terminated by law.

8. Respondents failed to show by a preponderance of the evidence that Claimant was either responsible for her termination or was terminated for cause.

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

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

DATED this 4th day of December, 2023.

By: _____

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that Claimant's August 24 and 25, 2022 hospitalization was reasonably necessary to cure and relieve Claimant of the effects of his April 21, 2020 work injury, and whether Respondents are liable for the cost of that treatment.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on April 21, 2020, consisting of contraction of COVID-19. Respondents filed an admission of liability for the injury.

2. Claimant was admitted at Sky Ridge Medical Center beginning on April 24, 2020, where he was intubated until May 10, 2020, then transferred to Spaulding Rehabilitation Hospital on May 21, 2020, and then to the Medical Center of Aurora where he was treated for pulmonary embolism from May 23, 2020, through May 26, 2020, before he was readmitted to Spaulding Rehabilitation treating with Dr. Castro.

3. In June 2020, Claimant complained of severe, right sided flank and low back pain from kidney stones. Medical records document an acute kidney injury following his COVID diagnosis. Claimant testified that he is more susceptible to get kidney stones as a result of his work-related acute kidney injury. Symptoms related to his acute kidney condition included significant right flank and right lower back pain. Claimant also later testified that his authorized treating physician, Dr. Ramaswamy, advised him to go to the emergency room should he experience such pain because he had serious kidney problems requiring dialysis as a result of his COVID infection.

4. On August 24, 2022, more than two years after his initial hospitalization, Claimant sought unauthorized emergency care outside the chain of referral UC Health Emergency Department complaining of problems with his knee and his abdomen. Claimant believed he was suffering from work-related kidney stones, as his symptoms were consistent with those he experienced with the work-related kidney stones in 2020. The clinical impression was acute flank pain with right-sided low back pain without sciatica. Claimant underwent an ultrasound of his kidneys which was normal. There were no kidney stones. Claimant was treated with a lidocaine patch for his back pain and discharged on August 25, 2022, with a prescription for

physical therapy. Claimant was counseled on the need to follow up with his primary care provider.

5. Claimant underwent independent medical examinations with Dr. Scott Primack at Respondents' request on November 16, 2021, and February 16, 2023. In his report from the February 16, 2023, Dr. Primack addressed whether the August 24, 2022 hospital visit was related to Claimant's April 2020 COVID-19 hospitalization: "Based upon his history, clinical examination, knowing that this patient had work-related Covid, this most recent hospitalization, in no way shape or form would be considered work-related." He reasoned that Claimant's symptoms were more in line with sciatica, which he felt to be unrelated to Claimant's prior COVID-19 diagnosis.

6. Dr. Ramaswamy, after reviewing Dr. Primack's report, opined that Claimant's August 24 and 25, 2022 hospital stay was not work related and noted that "low back pain, sciatica, flank pain would not relate to this injury or to treatment related to this injury."

7. At hearing, Claimant testified that he felt compelled to go to the emergency room based on his weakened condition, pain levels, and Dr. Ramaswamy's advice to seek emergency treatment if he experienced kidney pain.

8. Dr. Primack testified that the cardiopulmonary issues caused by the COVID-19 results in acute kidney injuries. However, Dr. Primack testified that more than two years after his COVID-19 hospitalization any kidney stones would not be related to Claimant's COVID-19 diagnosis. Furthermore, Dr. Primack opined that Claimant's type-II diabetes, which Claimant had had for more than twenty years, doubled Claimant's risk for kidney stones. Therefore, in his opinion, the kidney stones were more likely due to Claimant's diabetes than his COVID-19.

9. The Court finds Claimant's testimony to be credible insofar as Claimant did subjectively believe that he had COVID-19-related kidney stones and sought treatment on August 24, 2022, based on Dr. Ramaswamy's prior advice to seek emergency treatment should he experience symptoms similar to those of kidney stones in the future. The Court also finds Dr. Primack's and Dr. Ramaswamy's opinions credible insofar as they opined that Claimant did not in fact have a kidney stone in August 2022, that his pain was related to sciatica, and that the sciatica was not related to Claimant's COVID-19 diagnosis.

10. The Court finds that the treatment Claimant received on August 24 and 25, 2022, was not reasonably necessary to cure and relieve Claimant of the effects of the work-related April 21, 2020 COVID-19 contraction.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Benefits – August 24 and 25, 2022 Hospitalization

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S.

In a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Indus. Claim Appeals Office of the State of Colo.*, 942 P.2d 1337, 1339 (Colo.App.1997).

Claimant argues that the emergency care obtained on August 24 and 25, 2022, was reasonably necessary to cure and relieve Claimant of the effects of his admitted injury. Specifically, he argues that his symptoms were identical to those he experienced in 2020 as a result of work-related kidney stones, and that he reasonably believed he was experiencing a new episode of work-related kidney stones and therefore sought treatment based on Dr. Ramaswamy's prior advice. In support thereof, Claimant cited *Sims v. Indus. Claim Appeals Off. of the State of Colo.*, 797 P.2d 777 (Colo.App.1990), for the proposition that an employee need not give notice to the employer prior to seeking medical care in an emergency situation.

Claimant argues that the fact that Claimant did not in fact have kidney stones is not relevant and that the investigation at the hospital was reasonably necessary to rule out work-related kidney stones. He reasons, "It is no different than an injured worker seeking further diagnostics sometime after the date of injury because of, for example, increased shoulder pain. If diagnostics of the hypothetical shoulder condition did not produce an explanation, it would not be later claimed unnecessary for purposes of establishing entitlement to medical benefits."

Respondents, in turn, argue that they are responsible only for that medical treatment that is reasonably necessary to cure and relieve Claimant of the effects of his work injury. Respondents contend that Claimant's subjective belief and actions, such as following advice from Dr. Ramaswamy, do not automatically render the treatment work-related, emphasizing the need for a proximate cause.

Regarding emergency medical care, Respondents argue that even if Claimant genuinely believed it to be a bona fide emergency, Respondents are not liable unless the need for treatment was caused by the work injury. Respondents cite *Madonna v. Walmart*, W.C. No. 4-997-641-02 (August 21, 2017), to support the assertion that liability for emergency medical treatment arises only when it is proximately caused by the work injury.

In *Sims*, 797 P.2d 777, a claimant obtained emergency treatment for an accident. The claimant's emergency physician then referred him to another physician, a physician not on the employer's designated provider list, with whom he sought treatment. An ALJ later determined that the treatment with the post-emergency doctor was not authorized by the employer. Although the ALJ in that case determined that the claimant did not sustain a compensable injury, the ALJ in that case did not address whether the employer was responsible for payment for the emergency treatment. *See Madonna* ("[T]he holding in *Sims* does not dictate the conclusion that the respondents may be held liable for emergency medical care for an injury that is not compensable.")

In the following years, various panels of the ICAO have reviewed cases implicating *Sims*. In *Mctaggart-Kerns v. Dell*, W.C. No. 4-915-218-02 (May 29, 2014), a claimant was involved in a motor vehicle accident arising out of and in the course of her employment. She sought treatment immediately at the emergency room with various pain complaints and due to a concern that a medication she had been taking made her particularly susceptible to a brain bleed. At the emergency room, all tests were negative. An ALJ later determined that the claimant did not sustain any injuries arising from the accident, and therefore there was no compensable claim, thus denying the claimant's request for the respondents to pay for the emergency room visit. The claimant appealed, arguing that the emergency room evaluation was necessary in order to evaluate her for a possible brain bleed or other injuries. The ICAO panel held that § 8-42-101(1)(a), C.R.S., does not provide for medical benefits where no injury in fact results from the accident.

Several years later, in *Madonna v. Walmart*, W.C. No. 4-997-641-02 (August 21, 2017), a panel of ICAO addressed a similar issue. In *Madonna*, an ALJ determined the claim was not compensable but nevertheless ordered the respondents to pay for the emergency medical treatment initially obtained by the claimant. The ICAO panel reversed the ALJ, holding that "since the ALJ did not find a causal relationship between the claimant's need for medical treatment and the work incident . . . the respondents may not be held liable for emergency medical treatment provided to the claimant."

In *Madera v. GCA Services Group*, W.C. No. 5-048-431 (May 6, 2020), an ICAO panel addressed a somewhat different, yet distinguishable set of facts. In *Madera*, an ALJ found that the claimant did not sustain a compensable injury and that concluded that the issue of medical benefits was therefore moot. The claimant appealed, arguing that where the respondents accepted and paid for medical treatment with designated providers while the claim was under a denial for further investigation, the claimant should not later be held liable for the medical expenses, citing § 8-42-101(6)(a), C.R.S., which provides in part, "An employer, insurer, carrier, or provider may not recover the cost of care from a claimant where the employer or carrier has furnished medical treatment except in the case of fraud." The respondents argued in turn that *Madonna* controlled insofar as it held that respondents are not liable for medical care that is not reasonably necessary to cure and relieve the effects of a compensable injury. The ICAO panel rejected the respondents' argument, noting that *Madonna* involved emergency care, not care furnished by the employer, and therefore was distinguishable. Therefore, the panel held that the issue of medical benefits was not moot, thus remanding the issue to the ALJ for further findings.

The facts of the present case are unique from those of *Sims*, *Madonna*, and *Madera*. Specifically, in this case, the injury involved an admitted claim in which Claimant had already selected an authorized treating physician. At least one of Claimant's authorized treating physicians, Dr. Ramaswamy, recommended that Claimant go to the ER should he experience such pain because he had serious kidney problems requiring dialysis as a result of his COVID infection. Claimant did in fact have serious pain that he reasonably believed to be related to his work injury and therefore sought medical

treatment based on Dr. Ramaswamy's past advice. However, it turned out that the pain and the treatment were wholly unrelated to Claimant's compensable condition.

However, despite Claimant having sustained a compensable injury in this case, the Court finds that Claimant's need for treatment on August 24 and 25, 2022, did not arise from his April 2020 work injury. Section 8-42-101(1)(a), C.R.S., provides that respondents are liable for costs of medical treatment only where the need for treatment arises from a compensable injury. In this case, the need for treatment does not.

Although Claimant argues that the emergency room visit was reasonably necessary to rule out the possibility of another kidney stone related to the injury and should therefore be compensable, the ICAO rejected a similar argument in *Mctaggart-Kerns*. Based on the rationale in *Mctaggart-Kerns*, this Court concludes that it may not order Respondents to pay for otherwise unauthorized emergency medical treatment obtained only to rule out the involvement of a compensable condition.

While § 8-42-101(6)(a), C.R.S., provides that an employer may not recover the costs of medical treatments furnished by the employer, the Court finds that Respondents did not furnish the treatment for the episode of care on August 24 and 25, 2022. Therefore, because Respondents did not furnish the August 24 and 25, 2022 treatment, and because that treatment was not reasonably necessary to cure and relieve Claimant of the effects of the April 21, 2020 injury, Respondents are not liable for the cost of medical treatment for the episode of care of August 24 and 25, 2022.

ORDER

It is therefore ordered that:

1. Claimant's request for compensation for the August 24 and 25, 2022 episode of medical care is denied.

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

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

review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 4, 2023.

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has proved by a preponderance of the evidence that the sacroiliac joint injection and chiropractic care recommended by Dr. Miller on April 4, 2023, are reasonable, necessary, and related to the industrial injury.

2. Whether Respondent has proved by a preponderance of the evidence that maintenance medical care is no longer reasonably necessary to maintain Claimant's status at maximum medical improvement.

FINDINGS OF FACT

1. Claimant was a parts clerk for Respondent who sustained an admitted injury on August 29, 2019, when he developed low back and neck pain while bending over to reposition a heavy metal frame onto a rack.

2. The following day, Claimant obtained treatment with his authorized treating physician, Dr. Kirk Holmboe, at Midtown Occupational Health Services. Claimant complained of tenderness over his left sacroiliac area. Dr. Holmboe performed a physical examination and noted left low back pain. He diagnosed Claimant with a left sacroiliac strain and a cervical strain.

3. Claimant began undergoing physical therapy and chiropractic care. At Claimant's September 12, 2019 visit with chiropractor Dr. Jason Gridley, Dr. Gridley performed a Patrick's test and sacroiliac joint loading maneuvers with positive reproduction of symptoms in Claimant's left sacroiliac joint.

4. On October 10, 2019, Dr. Marc Steinmetz, one of Claimant's authorized treating physicians referred Claimant for a lumbar MRI. Claimant underwent the MRI on November 5, 2019. The MRI showed multilevel degeneration at the L4-L5, L5-S1, broad based left paracentral disc protrusion at L4-L5, and disc herniation at L5-S1 impinging the left L5 nerve root in the foramen.

5. Claimant was referred for psychological counseling with Ms. Susie Love, M.A., L.P.C, under the supervision of Dr. Timothy Shea, Psy. D. Claimant was diagnosed with adjustment disorder, anxiety, and insomnia. Notably, Claimant complained of intermittent left sacroiliac joint pain.

6. On January 21, 2020, Claimant underwent left L4-L5 and L5-S1 transforaminal epidural steroid injections. Several weeks later, on February 5, 2020, Claimant saw Dr. Miller and reported substantial improvement in his pain. Claimant also saw Dr. Steinmetz that day who assigned Claimant temporary work restrictions of maximum lifting of 40 pounds.

7. Claimant again had increased pain at his May 11, 2020 appointment and underwent additional epidural steroid injections two days later.

8. At Claimant's June 3, 2020 appointment with Dr. Steinmetz, Claimant reported improvements in his pain with his therapy and chiropractic treatment. Dr. Steinmetz released Claimant to full duty.

9. On June 30, 2020, Claimant complained to Dr. Steinmetz of increased back pain after having returned to full duty.

10. At Claimant's October 8, 2020 visit with Ms. Love, Ms. Love observed that Claimant's coping skills and mood management had improved. She recommended additional sessions to help Claimant with his continued anxiety.

11. Claimant was ultimately placed at maximum medical improvement by Drs. Steinmetz and Miller on December 2, 2020. Claimant was still experiencing left low back pain and lateral upper left thigh discomfort at that time. Dr. Steinmetz recommended maintenance medical treatment consisting of continued visits with Dr. Miller. He also provided Claimant with permanent work restrictions of lifting up to twenty pounds.

12. Claimant requested a Division independent medical examination, which took place with Dr. John Douthit on April 12, 2021. Dr. Douthit concurred with Drs. Steinmetz and Miller regarding Claimant's date of MMI. Respondent consequently filed a Final Admission of Liability consistent with Dr. Douthit's report and admitted for open medical maintenance benefits.

13. Claimant continued with chiropractic care under his maintenance medical care. On April 13, 2021, Claimant reported to Dr. Gridley that he was experiencing pain across the lower lumbar region and left upper sacroiliac joint region. Dr. Gridley's evaluation was consistent with mild sacroiliac joint restriction on the left.

14. On May 1, 2021, Claimant saw Dr. Steinmetz. Claimant continued to complain of back pain and discomfort. However, he was also concerned that he would not be able to find employment within his permanent work restrictions. Claimant requested that Dr. Steinmetz loosen his restrictions. However, Dr. Steinmetz was not comfortable doing so and referred Claimant to Dr. Miller.

15. Claimant followed up with Dr. Miller. At that appointment, he complained of tenderness over his sacroiliac joint. Claimant requested Dr. Miller loosen his

restrictions. Dr. Miller agreed to have Claimant undergo a functional capacity evaluation to determine what loosened restrictions would be appropriate.

16. Claimant underwent an independent medical examination with Dr. Carlos Cebrian at Respondent's request on July 9, 2021. Dr. Cebrian concurred with the date of MMI and found that the recommended maintenance care was reasonable and necessary.

17. On August 6, 2021, Dr. Miller assigned Claimant loosened permanent work restrictions of below-waist lifting maximum of sixty pounds occasionally and forty pounds frequently, above-waist lifting to sixty pounds occasionally and fifty pounds frequently, sitting maximum of forty minutes per hour, standing maximum of one hour, maximum pushing of sixty-five pounds, and maximum pulling of seventy-five pounds.

18. Claimant returned to Dr. Miller on November 5, 2021, complaining of a flare up in back pain. On physical examination, Dr. Miller noted tenderness of the left sacroiliac joint with a positive Yeomans and Patrick's tests. Dr. Miller recommended a repeat rhizotomy.

19. Claimant saw Dr. Gridley on November 23, 2021, and complained of diffuse back pain, primarily in the lumbosacral junction and sacroiliac joint.

20. On December 6, 2021, Dr. Miller performed the rhizotomy. Claimant reported that the procedure was very helpful and resulted in a 70 percent improvement of his symptoms.

21. Claimant returned to Dr. Miller on March 20, 2022. At that appointment, Claimant requested that Dr. Miller release him to full duty, which Dr. Miller did. Claimant later testified that he had not been allowed to work for Respondent due to his work restrictions. However, after his work restrictions were lifted, he was able to return to working for Respondent.

22. Claimant saw Dr. Miller again on September 28, 2022, complaining of increased stiffness and diminished range of motion in his back after having returned to work for Respondent. Dr. Miller noted that Claimant continued to use lidocaine patches for his low back pain. Dr. Miller ordered another rhizotomy procedure, which Claimant underwent on November 14, 2022.

23. When Claimant next saw Dr. Miller on November 29, 2022, Claimant reported only minimal relief from the rhizotomy. Dr. Miller performed Yeomans and Patrick's tests, both of which were positive on the left, suggesting sacroiliac joint pain. Dr. Miller recommended continued use of lidocaine patches, chiropractic care, medications, and his home exercise program. Dr. Miller indicated he would consider a left sacroiliac joint injection if Claimant did not experience pain relief in the coming weeks.

24. At an appointment on January 5, 2023, Claimant stated that he did not experience an obvious benefit from the ablation. Dr. Miller opined that Claimant's symptoms were now more consistent with an SI joint condition. However, because Claimant felt better overall, Dr. Miller deferred a recommendation for a SI injection.

25. Claimant returned to Dr. Miller on April 4, 2023, with continued pain. Dr. Miller again performed Yeomans and Patrick's tests, both of which were positive, suggesting sacroiliac joint pain. Dr. Miller recommended left sacroiliac joint injections and additional chiropractic care.

26. Respondent obtained a medical record review performed by Dr. Joseph Fillmore to address whether the requests for the SI injection and further chiropractic care was reasonable, necessary, and related to the original workplace injury on behalf of Respondent. Dr. Fillmore determined that the SI joint injection did not relate to his claim, noting that the SI joint was not an initial pain generator.

27. Based on Dr. Fillmore's record review, Respondent denied Dr. Miller's request for prior authorization for left sacroiliac joint injections and additional chiropractic care. Consequently, Claimant filed an Application for Hearing to challenge the denials. Respondent in turn endorsed the issue of withdrawing its admission for medical maintenance.

28. Claimant underwent an independent medical examination with Dr. Robert Kleinman on June 16, 2023. Dr. Kleinman noted that Claimant had initially been diagnosed with adjustment disorder and that Dr. Shea had recommended six sessions of psychotherapy. However, Dr. Kleinman noted that Claimant had undergone eighty-five sessions and continued to receive treatment despite returning to work and managing stress. Noting [Redacted, hereinafter JC] progress, Dr. Kleinman suggested terminating psychotherapy, asserting that it was no longer reasonable or necessary under workers' compensation. He recommended a maximum of two additional sessions over four weeks for consolidation and termination of treatment, leaving the option for further therapy outside workers' compensation if desired.

29. On July 12, 2023, Claimant underwent an independent medical examination with Dr. Cebrian. Dr. Cebrian noted Claimant's initial diagnoses included "lumbar strain with facet-mediated disease and lumbar radiculopathy, and cervical strain." Notably, Dr. Cebrian left out Claimant's "left sacroiliac strain" that was also included in his initial, August 30, 2019, diagnoses. Dr. Cebrian stated "there has been no consistent SI joint complaints as part of his claim." He opined that Claimant's sacroiliac joint pain was unrelated to his work claim and no further maintenance treatment was necessary.

30. Claimant testified at hearing that he rarely lifts heavy things at work—at most ten to twenty-five pounds. Claimant testified that he continued to go to the gym even

after he was placed at maximum medical improvement. He testified that his pain is normally about a two out of ten. However, it will increase to five or seven out of ten on days when he works. Claimant testified that after a five-day workweek, his pain would be miserable. He testified that his pain was much less when he was still receiving maintenance medical treatment. Nevertheless, Claimant testified that he was still able to perform his work, albeit with pain.

31. The Court finds Claimant's testimony credible.

32. Dr. Cebrian testified as an expert in occupational medicine. Dr. Cebrian testified about the relatedness of the sacroiliac joint injection recommended by Dr. Miller, which he felt would not be related to Claimant's injury. He reasoned that when Claimant was injured it was the facet joints on the left side that were determined at that time to be the pain generator, as determined by the outcome of the medial branch blocks. Specifically, he clarified that Claimant would not have had the diagnostic response to the medial branch blocks that he did had it not been the facet joints that were the pain generator, as the blocks were directed at Claimant's facet joints. Dr. Cebrian testified that it was only the facet joints that were addressed with regard to Claimant's pain from 2019 through 2023. Dr. Cebrian's understanding was that it was not until Claimant had the most recent unsuccessful rhizotomy that Dr. Miller began to suspect the sacroiliac joint as the source of Claimant's symptoms.

33. Regarding Claimant's chiropractic care, Dr. Cebrian testified that the chiropractic care would have been reasonable before and shortly after Claimant reached MMI, but he felt it was no longer necessary. He explained that chiropractic care might be reasonable when there is an increase in activity, but that it should not be used for long-term care, and what Claimant had exceeded what was recommended by the Medical Treatment Guidelines.

34. The Court does not find Dr. Cebrian's testimony credible or persuasive. Dr. Cebrian's opinions rely in significant part on the premise that the pain generator of Claimant's early symptoms was not the sacroiliac joint and that treatment for that region was not recommended until later in his treatment. However, the records clearly document complaints of sacroiliac joint pain throughout Claimant's treatment. Although Dr. Cebrian noted a negative Patrick's maneuver on physical examination, Claimant's treating providers documented positive Patrick's maneuvers, including Dr. Gridley on September 12, 2019, and Dr. Miller on November 5, 2021, November 29, 2022, and April 4, 2023.

35. The Medical Treatment Guidelines recommend a sacroiliac joint injection only if the patient exhibits "at least 3 positive physical exam maneuvers (e.g. Patrick's sign, Faber's test, Ganslen, distraction or gapping, or compression test.)." Rule 17, WCRP, Exhibit 1 (8)(a)(iii), p. 52. While it appears that Dr. Miller performed only the Patrick's test, he repeated the test several times over the course of several

years, obtaining a positive response each time, which was consistent with the positive result obtained by Dr. Gridley.

36. Dr. Kleinman also testified at hearing as an expert in psychology and psychiatry. Dr. Kleinman testified that Claimant had more than eighty therapy appointments with Ms. Love, which is well beyond what is recommended by the medical treatment guidelines. He testified that the objective of the therapy was to help Claimant with getting back to work and managing his anxiety in the process. He felt that Claimant had developed an emotional dependence on his psychotherapy sessions. Since Claimant had not seen Ms. Love in nine or ten months, Dr. Kleinman felt that Claimant may not need any closing appointments, though a couple of closing sessions might be reasonable.

37. The Court finds Dr. Kleinman's testimony credible and his opinions persuasive.

38. Although Claimant has continued to work full duty for Respondent despite a cessation of his maintenance medical care, the Court finds that, based on the totality of the circumstances, Claimant's level of function is likely to diminish should his sacroiliac joint pain worsen.

39. The Court finds that the left sacroiliac joint injections and additional chiropractic care recommended by Dr. Miller on April 4, 2023, are reasonably necessary to relieve Claimant of the effects of his injury and prevent further deterioration of his condition. Therefore, the Court finds that Claimant continues to require maintenance medical treatment to maintain his status at maximum medical improvement.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Medical Benefits – sacroiliac joint injections and chiropractic care

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S.

It is well settled that even though a respondent is found liable to pay for ongoing maintenance medical benefits, either by order or by admitting in a final admission of liability, it is not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). Further, when the respondent contests liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1998); *Snyder*, supra.

Even where an ATP makes a recommendation at maximum medical improvement for only a limited set of maintenance medical benefits, treatment beyond that recommendation "merely becomes an element of the claimant's burden to prove the disputed treatment is reasonable, necessary and causally related to the industrial injury." *Karathanasis v. Chili's Grill & Bar*, Claimant, W. C. No. 4-461-989 at *3 (Aug. 8, 2003).

Claimant argues that his sacroiliac joint pain is well documented in the record and that Dr. Miller is in the best position to determine what ongoing maintenance medical treatment is appropriate to maintain Claimant at maximum medical improvement. Respondent, in turn, argues that there is insufficient evidence that Claimant's pain originates at the sacroiliac joint and that, even if it does, it would not be related to

Claimant's work injury, as a sacroiliac joint injury was insufficiently documented over the course of Claimant's treatment for his injury. Furthermore, Respondent argues that chiropractic care is appropriate only for temporarily managing flare-ups in symptoms when patients increase their activity level.

As found above, Claimant's sacroiliac joint pain is well documented in the record from early on in his treatment through those most recent records documenting Claimant's maintenance medical treatment. Dr. Miller has performed sufficient testing such that sacroiliac injections are reasonably necessary to maintain Claimant's status at maximum medical improvement. Also, as found above, Claimant's chiropractic treatment is reasonably necessary to maintain Claimant's status at maximum medical improvement, as he has testified that his symptoms are much less when he is receiving maintenance care. Consequently, the Court finds and concludes that sacroiliac joint injections and continued chiropractic care are reasonably necessary to relieve Claimant of the effects of his work-related injury and prevent deterioration of his condition.

Medical Benefits – termination of maintenance

A claimant may receive medical treatment reasonably necessary to relieve the effects of a claimant's industrial injury or to prevent further deterioration of the claimant's condition. *See* § 8-42-101(1)(a), C.R.S.; *see also Grover v. Industrial Commission*, 759 P.2d 705 (Colo.1988) (authorizing receipt of reasonably necessary medical treatment after permanent disability award). However, the burden of proof is on the claimant to establish entitlement to Grover medical benefits. *Grover v. Industrial Commission, supra*; *Cordova v. Foundation Builders Inc.*, W.C. No. 4-296-404 (April 20, 2001). In order to receive such benefits, at the time permanent disability benefits are determined the claimant must present substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *See Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo.App.2003*); Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

However, where, as here, respondents have admitted for maintenance medical benefits in a final admission of liability, the burden is on respondents to prove by a preponderance of the evidence that no further maintenance medical treatment is reasonably necessary. Under section 8–43–201(1), a party seeking to modify a general or final admission, a summary order, or a full order has the burden to prove by a preponderance of the evidence that such a modification should be made. *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014).

As found above, sacroiliac joint injections and continued chiropractic care are reasonably necessary to relieve Claimant of the effects of his work-related injury and prevent deterioration of his condition. Therefore, because there is maintenance medical treatment that remains appropriate under this claim, Respondent has not proved by a preponderance of the evidence that a withdrawal of the admission for maintenance medical benefits is appropriate.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the sacroiliac joint injections and chiropractic care recommended by Dr. Miller on April 4, 2023.

2. Respondent's request to withdraw its admission for maintenance medical benefits is denied.

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

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

DATED: December 4, 2023.

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his right eye arising out of the course of his employment with Employer on July 8, 2021. Claimant had worked for Employer for approximately four years. Claimant stopped working for Employer on June 28, 2023. At the time of his injury, Claimant was also employed by [Redacted, hereinafter BO], where he had worked for more than 20 years.

2. On November 7, 2022, Respondents filed a Final Admission of Liability admitting for temporary disability and permanent partial disability benefits. Respondents admitted to an average weekly wage (AWW) of $1,073.03, which was calculated based solely on his wages earned from Employer. (Ex. A). No credible evidence was admitted indicating Respondents calculation of Claimant's AWW earned from his work for Employer was incorrect. However, Respondents' AWW calculations did not account for Claimant's earnings from BO[Redacted].

3. Claimant's Exhibit 3 includes wage records from BO[Redacted] from January 2018 to April 2023, and show Claimant was paid bi-monthly. (Ex. 3). For the three months preceding his work injury (*i.e.*, April 1, 2021 to June 30, 2021, a period of 91 days), Claimant worked 260.5 hours (averaging 20.04 hours per week) at an hourly rate of $15.63, and earned $4,071.62. This corresponds to an AWW of $313.20, calculated as follows:

BO[Redacted] WAGES FROM 4/1/21 – 6/30/21	
Hourly Rate	$15.63
Days from 4/1 - 6/30/21	91
Total Hours for Period	260.5
Total Wages (Hr. Rate x Total Hrs.)	$4,071.62
Daily Wage (Total Wages/days)	$44.74
AWW (Daily Wage x 7)	$313.20

4. Claimant received an hourly wage increase on July 1, 2021 (seven days before his injury), to $15.87 per hour. (Ex. 3).

5. Claimant continued to work for BO[Redacted], and received periodic hourly wage increases. In March 2022, Claimant's hourly wage at BO[Redacted] was increased to $19.00. It was again increased in April 2022 to $19.95. (Ex. 3). Claimant testified at hearing that his current hourly wage is $21.00, although this is not reflected in Claimant's

employment or wage records. Claimant testified that these raises were given to all BO[Redacted] employees.

6. Following his injury, Claimant did not work for BO[Redacted] for approximately two months, and returned sometime during the first two weeks of September 2021, working periodically until the week of November 16, 2021. (Ex. 3). Claimant was released to work full-duty with no restrictions effective November 2, 2021. (Ex. A, p.23). Claimant then returned to working for BO[Redacted] on the week of November 16, 2021, working without interruption until at least April 30, 2023, averaging approximately 36.5 hours per week. (Ex. 3). Claimant testified he currently works for BO[Redacted] and another employer.

CONCLUSIONS OF LAW

Generally

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

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

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

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). "This discretionary authority permits the ALJ to calculate the average weekly wage based on earnings from concurrent employments which the claimant held at the time of the injury." *Contreras v. Chimr*, W.C. No. 4-399-293 (ICAO Jun. 20, 2007). However, there is no *ipso facto* rule requiring the inclusion of wages from concurrent employment. *Id*.

The objective of wage calculation is to determine a fair approximation of a claimant's wage loss and diminished earning capacity. *Avalanche Indus., Inc. v. Indus. Claim Appeals Office,* 166 P.3d 147, 153 (Colo. App. 2007), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008), as modified on denial of reh'g (Jan. 20, 2009). Thus, wages from current employment may be included in the calculation of AWW where appropriate. *Broadmoor Hotel & Cont'l Ins. Co. v. Indus. Claim Appeals Off. of State of Colo.*, 939 P.2d 460, 462 (Colo. App. 1996).

Claimant has established that his AWW should be increased to include his wages earned at BO[Redacted] at the time of his injury. Because Claimant was concurrently employed, a fair approximation of his hourly wage at the time of injury includes the income earned from all employment at the time of injury. Respondents' admitted AWW of $1,073.03, does not include the Claimant's wages earned from BO[Redacted] at the time of is injury. The ALJ finds that Claimant's AWW for his employment with BO[Redacted] should be calculated based on the hourly rate he was receiving at the time of his injury (*i.e.*, $15.87 per hour). Applying the same formula used in Finding of Fact 3, above, Claimant's AWW from BO[Redacted] at the time of injury was $318.01.

BO[Redacted] AWW CALCULATION		
Hourly Rate	$15.63	$15.87
Days from 4/1 - 6/30/21	91	91
Total Hours for Period	260.5	260.5
Total Wages (Hr. Rate x Total Hrs.)	$4,071.62	$4,134.14
Daily Wage (Total Wages/days)	$44.74	$45.43
AWW (Daily Wage x 7)	$313.20	$318.01

Claimant's AWW at the time of injury was therefore $1,391.04 (*i.e.*, $1,073.03 + $318.01).

Claimant asserts his AWW should be further increased to reflect his current hourly wage of $21.00, rather than his hourly rate at the time of injury. While an AWW

determination may consider post-injury wage increases, the inclusion of such increases is discretionary. *See Waalkes v. The Salvation Army*, W.C. No. 4-533-879 (Sep. 30, 2003); *Pizza Hut v. Indus. Claim Appeals Office,* 18 P.3d 867, 868 (Colo. App. 2001).

In his position statement, Claimant contends that including Claimant's wage increase is supported by both *Pizza Hutt, supra*, and *Waalkes, supra*. Claimant's case, however, is distinguishable from both *Waalkes* and *Pizza Hut*. Unlike *Pizza Hut*, Claimant did not change careers after his work injury, but remained in the same position with BO[Redacted]. Thus, the rationale for applying a higher AWW in *Pizza Hut* is not present. In *Waalkes*, the ICAO found that the ALJ could reasonably infer that the claimant's industrial injury resulted in permanent medical restrictions which may impair the claimant's ability to maintain employment at his hourly wage. Here, the record before the ALJ does not indicate Claimant has permanent work restrictions which may impact his future career, or his ability to earn wages. To the contrary, Claimant was released to work full duty, without work restrictions, on November 2, 2021, and earned more post-injury than before. Claimant has articulated no persuasive argument for including post-injury wage increases in the calculation of his AWW.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage at the time of injury was $1,391.04.

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

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

DATED: December 4, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-210-260-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the surgical procedure requested by Dr. Rumley, including a three-level fusion, is reasonable and necessary?

FINDINGS OF FACT

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

1. Claimant was employed by Employer, when he was injured in the course and scope of his employment on June 29, 2022. *Hrg. Trans. pg. 11 lns. 16-22*.
2. While lifting objects from low shelves, Claimant felt immediate pain in his lower back. Over time, Claimant began experiencing numbness and shooting pains in his lower extremities, as well as bouts of incontinence. Claimant also began experiencing weakness in his left leg, drop foot, and needing assistive devices to walk. *Hrg. Trans. pg. 12 lns. 1-25, pg. 13 lns. 1-5*.
3. At the time of hearing, Claimant's body mass index (BMI) was 39 and he had been continuing to lose weight since his injury. *See Hrg. Trans. pg. 13 lns. 6-17*.
4. Having failed all prior conservative treatment measures, Dr. Jacob Rumley, Claimant's authorized treating orthopedic specialist, has recommended a transforaminal lumbar interbody fusion (TLIF) procedure for L2-L5. *See Ex. 5, Bates 34.*
5. Claimant has discussed the pros/cons, and risks/potential benefits of the proposed TLIF procedure. Having engaged in thorough shared decision making with Dr. Rumley, Claimant has accepted the surgical risks and wishes to proceed with Dr. Rumley TLIF surgical recommendation. *See Hrg. Trans. pg. 14 lns. 1-10*.
6. Dr. Rumley is a fellow in the American Academy of Orthopedic Surgeons, is a member of the North American Spine Society and AO Spine, and he is board-certified in orthopedic surgery. His training includes a spine fellowship at Augusta University which was a level 1 trauma and deformity center. Moreover, he currently trains fellows in spine surgery and therefore maintains an academic role. Dr. Rumley is also level II accredited. *See Rumley Depo. pgs. 7-8.*
7. Dr. Rumley explained that a patient's signs are objective findings that support a patient's reported subjective symptoms. *See Rumley Depo. pg. 9 lns. 14-20*.
8. Claimant suffers from claudication-type symptoms. "Claudication is progressive symptoms with inactivity either being ambulation or upright posture." Typical examples include increased leg pain, leg symptoms, and urinary incontinence. *Rumley Depo. pg. 10 lns. 10-21*.

9. Claimant underwent a lumbar MRI on July 14, 2022. The findings show that Claimant had significant stenosis of his foramen, lateral recess, and central canal. There was also significant lumbar disc degeneration. *Rumley Depo. pg. 11 lns. 1-10; Rspndt. Ex. H, Bates 51.*

10. Claimant also underwent an EMG nerve conduction study and it revealed that Claimant was experiencing radiculopathy as a result of nerve compression at multiple levels of his lower back.

11. The TLIF procedure recommended by Dr. Rumley includes decompression of Claimant's nerves by way of a laminectomy. A laminectomy is the removal of bone from the lumbar spine, which results in the foramen being opened and relieving the nerve compression. *See Rumley Depo. pg. 12 lns. 14-17*.

12. Claimant also has sagittal malalignment. This means that Claimant's spine is outside of normal alignment ranges when compared to the position of his pelvis. The positional difference is significant as a person of Claimant's young age (54), should be at or near 0 but Claimant is at a difference of 13. *See Rumley Depo. pgs. 14-16*.

13. The purpose of the recommended TLIF procedure is to decompress the nerves in Claimant's lumbar spine to allow the nerves to function properly—thereby resolving Claimant's claudication symptoms. *Rumley Depo. pg. 17 lns. 4-8, pg. 33 lns. 17-19, pg. 34 lns. 14-16*.

14. As a result of bone removal from laminectomies, instability of the lumbar spine is anticipated. The expected instability is one reason for Claimant to undergo fusion as part of the decompression procedure. *Rumley Depo. pg. 18 lns. 6-19*.

15. Dr. Brown is Respondents retained expert. While Dr. Brown is a board-certified neurosurgeon, Dr. Brown is not fellowship trained as is Dr. Rumley. As a result, Dr. Brown's skillset might be different than Dr. Rumley's and not as innovative or advanced – since he is not fellowship trained.

16. Dr. Brown indicated that he believes Claimant may have untreated NIDDM—otherwise known as Type 2 diabetes. *Ex. A, Bates 13; Rumley Depo. pg. 19 lns. 5-10.*

17. Claimant's symptoms are more likely related to his lumbar injury then they are to polyneuropathy potentially caused by diabetes. *See Rumley Depo. pg. 19 lns. 15-17, pg. 20 lns. 1-18.*

18. At the time of hearing, Claimant's BMI was 39 and Dr. Rumley explained that it is an acceptable BMI to proceed with the recommended surgery because it is under 40. Rumley Depo. pg. 21 lns. 10-23. When a patient has a BMI of 40 or more, the risks of surgery are increased and include higher rates of infection, deep vein thrombosis, and perioperative complications. *Rumley Depo. pg. 22 lns. 1-13*.

19. Dr. Brown agrees that Claimant needs to undergo decompression surgery, but he suggests an alternative procedure using tubes to decompress three levels of the spine. *Ex. A, Bates 14*.

20. Dr. Rumley strongly disagrees with Dr. Brown that tubular decompression is the superior procedure for Claimant to undergo for several reasons. First, the TLIF procedure is far more likely to result in a better decompression of Claimant's lumbar

nerves (especially related foraminal stenosis such as Claimant's), which is the main goal of both possible surgeries. Second, Claimant has an underlying structural deformity (*i.e.*, the sagittal imbalance). The tubular decompression surgery would not address this deformity, while the TLIF procedure recommended by Dr. Rumley will. To not address the deformity in conjunction with decompression will set Claimant up for a worse long-term outcome and increase the likelihood he would need to undergo another lumbar surgery in the future because the structure will worsen over time. As a result addressing the deformity is a necessary component of the overall surgical procedure recommended by Dr. Rumley. *Rumley Depo. pgs. 23-24, pg. 34 lns. 10-22, pg. 35 lns. 16-18.*

21. Dr. Brown has indicated the tubular decompression procedure he has proposed does not guarantee that Claimant will be without lumbar instability. *Brown Depo. pg. 16 lns. 4-5.*

22. Dr. Rumley has performed tubular decompression surgeries. Dr. Rumley noted that those patients do not tend to do as well post-operatively as patients that undergo TLIF. *Rumley Depo. pg. 28 lns. 21-25, pg. 29 lns. 1-2*.

23. Dr. Rumley is routinely referred patients that have previously undergone spine surgery by others. When he sees patients that have previously undergone tubular decompression, those patients commonly have structural instability, or the decompressions were incomplete in the first place. This is yet another reason why the TLIF procedure is superior to tubular decompression. The revision surgery for those patients is TLIF and carries with it increased risks and complications as a revision surgery. *See Rumley Depo. pg. 29 lns. 3-25, pg. 30 lns. 1-2*.

24. Generally, Dr. Brown avoids operating on anyone that is morbidly obese. *See Brown Depo. pg. 11 lns. 6-8*.

25. Dr. Brown concedes that TLIF, as recommended by Dr. Rumley, "is certainly an option." *Brown Depo. pg. 12 lns. 1-2*. He also concedes that TLIF "provides a good decompression." *Id. at pg 12 lns. 7-12*.

26. In support of his recommended tubular decompression procedure, Dr. Brown referenced a publication indicating "that a decompression, a simple decompression, versus a fusion Improved back pain . . . ." *Brown Depo. pg. 17 lns. 21-24*. As noted above, however, the primary focus and need for Claimant's surgery is decompression of the nerves to address his claudication symptoms—not generalized back pain.

27. Dr. Brown also expressed concern about future adjacent level degeneration. This concern, however, was based on unverified cited statistics related to the cervical spine—not the lumbar spine. *Brown Depo. pg. 20 lns. 2-10*.

28. When asked if Dr. Rumley's recommended TLIF procedure was unreasonable, Dr. Brown said that it was aggressive and not within the *Guidelines*[1] and normal standards. *See Brown Depo. pg. 20 lns. 18-21.*

[1] Workers' Compensation Rules of Procedure, 17, Ex. 1, Low Back Pain Medical Treatment Guidelines.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established by a preponderance of the evidence that the surgical procedure requested by Dr. Rumley, including a three-level fusion, is reasonable and necessary?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Off.,* 53 P.3d 1192 (Colo. App. 2002).

When determining whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines (*Guidelines*) because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the *Guidelines* is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather, the ALJ may give evidence regarding compliance with the *Guidelines* such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., WC* 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). See also: Section 8-43-201(3), C.R.S.

There is no dispute that Claimant needs lumbar surgery and that such surgery is causally related to his work injury. The dispute that exists is which procedure is the most appropriate for Claimant.

Dr. Rumley, as a treating physician, has concluded that the TLIF procedure is not only the superior procedure, but it is also reasonable and necessary. When asked directly, Dr. Brown did not specifically say the TLIF procedure was unreasonable—but yet he did say that it was aggressive and not within normal standards. Thus, he believes the procedure is not reasonable.

Dr. Brown's belief that the TLIF procedure is not reasonable, is based on three primary arguments—all of which are unpersuasive.

The first is that the TLIF procedure is for three levels and the *Guidelines* indicate that no more than two levels should be done in the case of fusion surgeries.

As pointed out by Dr. Rumley, the *Guidelines* are just that—guidelines. They are not absolutes. So while the *Guidelines* do provide guidance as to when certain procedures should or should not be done, there is the ability to deviate from the *Guidelines* in appropriate circumstances and the Court finds that such circumstances exist here.

Both Dr. Rumley and Dr. Brown recognize that Claimant has objective findings by way of MRI, EMG, and diagnostic injections confirming that Claimant has claudication symptomatology stemming from three levels of his lumbar spine. While the procedure is different, even Dr. Brown's recommended tubular procedure is for three levels. Both

physicians appear to agree that if three levels are symptomatic, they should all be addressed.

Dr. Rumley has convincingly shown that TLIF involving laminectomy is likely to lead to better results for decompressing Claimant's lumbar nerves and resolve his claudication symptoms which is the primary goal of both surgical recommendations. As Dr. Rumley pointed out, it does not make sense to address two levels with fusion only to leave out a third that is symptomatic to satisfy a general guideline.

Risks coincide with any type of surgery. The issue becomes whether the risks are outweighed by the benefits. Here, Dr. Rumley and Claimant have engaged in a shared decision-making process and decided that TLIF is most likely to result in the most benefit to Claimant.

Dr. Brown's second basis of recommending tubular decompression over TLIF is that Claimant does not currently have lumbar instability. Recommendation 153 of WCRP 17, Ex. 1, Sec. 8.b.iii, in the *Guidelines*, states that one of the diagnostic indications for fusion includes "surgically induced segmental instability." This means that one need not necessarily have instability to undergo fusion surgery, but such instability may be a likely result as part of another surgery—like decompression by laminectomy. Even tubular decompression as recommended by Dr. Brown may result in segmental instability which would require fusion. The fusion needed from tubular decompression would be a later, second surgery, only serving to place additional risks the chance for complications on Claimant.

Further reason exists here for Claimant to undergo TLIF involving three-level fusion and that is to address his structural deformity. Even though Claimant's work injury did not cause the deformity, it nevertheless interplays with his nerve compression and claudication. By correcting the deformity, Claimant is likely to experience far better decompression of the nerves. Moreover, correcting the deformity will greatly reduce the chances for the need of future lumbar surgery as the condition progressively deteriorates. Plus, correcting the deformity also improves the overall outcome of the surgery to treat Claimant's work injury. As a result, fixing the deformity is inextricably intertwined with treating Claimant's work injury and is therefore reasonably necessary to cure and relieve Claimant from the effects of his injury.

Finally, Dr. Brown consistently stresses that Claimant's BMI is high, and it invites increased risk for TLIF, thereby making the TLIF surgery unreasonable. Dr. Rumley convincingly explained that Claimant's BMI of 39 is within acceptable range for the TLIF procedure. It is worth noting that, as demonstrated by the medical records, Claimant's BMI was 39 as of the hearing date down from more than 42 in January 2023, when he first saw Dr. Rumley, and it was continuing to trend downward due to continued weight loss.

Morbid obesity is a relative contraindication to fusion per WCRP 17, Ex. 1, Sec. 8.b.ii. But it is not an absolute contraindication. The difference is that relative contraindication only means that caution should be used when doing fusion procedure and the procedure is acceptable if the benefits outweigh the risk.

Table 52 of WCRP 17, Ex. 1, Sec. 8.b (Surgical Interventions) of the *Guidelines* indicates that there is good evidence to suggest functional improvement from most back surgery is similar between patients with BMI under 25 and those with a BMI between 25 and 35. As discussed, Claimant's last known BMI was 39, but it was declining due to continued weight loss. This means that Dr. Brown's concerns lessen regarding Claimant's BMI with each pound Claimant loses before surgery and the closer he gets to a BMI of 35.

Dr. Rumley explained that a BMI of 40 or more would remove Claimant as a surgical candidate until the BMI is again below 40. This is based on studies that indicate risks and complications are far less when the patient's BMI is under 40. The *Guidelines* do not have such an explicit line in the sand for fusions. The only area of the Guidelines where a BMI of 40 or more as a contraindication related to lumbar surgery is in WCRP 17, Ex. 1, and Sec. 8.b.iv of the *Guidelines* for total disc replacement surgery— which is not contemplated or recommended here.

Dr. Rumley is a board-certified expert in his field of orthopedic surgery. Plus, Dr. Rumley also trained via a spine fellowship at Augusta University which was a level 1 trauma and deformity center. Lastly, he currently trains fellows in spine surgery and therefore maintains an academic role. These additional qualifications adds to the persuasiveness of his opinion and conclusion for the recommended surgery. Plus, what might be considered aggressive to Dr. Brown, might not be considered aggressive by Dr. Rumley, who is a fellow trained spinal surgeon. As a result, the ALJ finds and concludes that Dr. Rumley has convincingly concluded that the TLIF is the most appropriate procedure for Claimant, and Claimant has indicated that he wishes to proceed with TLIF understanding the associated pros and cons as well as the risks and benefits.

As a result, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the lumbar decompression and fusion surgery recommended by Jacob Rumley, D.O. as reasonable and necessary treatment related to his admitted June 29, 2022, industrial injury.

ORDER

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

I. Respondents shall pay for the lumbar decompression and fusion surgery recommended by Jacob Rumley, D.O. as reasonable and necessary treatment related to Claimant's industrial injury.

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

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

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

DATED: December 5, 2023.

/s/ Glen Goldman

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his admitted September 30, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. after reaching Maximum Medical Improvement (MMI) on September 17, 2020.

2. Whether Claimant has demonstrated by a preponderance of the evidence that a total hip arthroplasty constitutes reasonable, necessary, and causally related medical care for his September 30, 2019 industrial injury.

FINDINGS OF FACT

1. Claimant has worked as a Delivery Driver for Employer for over 25 years. On September 30, 2019 he sustained admitted work injuries to his right hip and lower back. Claimant subsequently obtained medical treatment through Authorized Treating Provider (ATP) Concentra Medical Centers.

2. On December 6, 2019 Claimant underwent a lumbar spine MRI without contrast. The imaging revealed "[s]pinal canal narrowing at L4-5 primarily due to hypertrophic changes about the facet joints and a posterior disc protrusion."

3. On December 6, 2019 Claimant underwent an MRI of his right hip. The imaging showed the following:

> 1. Findings suggesting mild cam-type of femoral acetabular impingement. There is increased signal traversing the anterosuperior labrum raising concern for a nondisplaced labral tear. 2. Mild tendinosis with mild undersurface and interstitial tearing of the right common hamstring tendon origin on the ischial tuberosity.

4. On February 25, 2020 Claimant underwent surgical intervention for his September 30, 2019 lower back injuries. He specifically had a bilateral microdiscectomy and right-sided far lateral microdiscectomy at L4-L5.

5. On September 17, 2020 Frederic Zimmerman, D.O. determined that Claimant had reached Maximum Medical Improvement (MMI) for his admitted industrial injuries. He assessed Claimant with the following: (1) a lumbar discogenic injury, that had been surgically repaired, with chronic radicular symptoms down the right lower extremity; and (2) a right hip labral tear that had been treated non-surgically with a steroid injection. Dr. Zimmerman noted that Claimant had plateaued in his recovery. He assigned a 24% whole person permanent impairment rating, released Claimant to full duty employment, and recommended medical maintenance care. The MMI report specified that Claimant

would follow-up with Nathan Faulkner, M.D. at Orthopedic Centers of Colorado in 18 months for possible hip surgery.

6. On November 23, 2020 Dr. Faulkner recommended right hip arthroscopic surgery. He reasoned that Claimant had failed conservative treatment and suffered persistent pain as a result of his labral tear.

7. On July 13, 2021 Claimant underwent a Division Independent Medical Examination (DIME) with Justin D. Green, M.D. He concluded that Claimant had not reached MMI. Dr. Green remarked that Claimant's symptomatic labral tear required additional orthopedic evaluation.

8. On December 13, 2021 Claimant returned to Dr. Faulkner for an examination. He noted that Claimant had good relief from a diagnostic injection that suggested most of the pain was coming from his right hip joint. Based on Claimant's failure of conservative treatment, positive response to the hip injection and continued symptoms, Dr. Faulkner recommended a total hip replacement.

9. On December 20, 2021 Claimant visited Angie Schack, PA-C for an examination. After reviewing Claimant's medical records and performing a physical examination PA-C Schack recommended a total right hip arthroplasty. She suggested a right hip injection and referred Claimant to David C. Loucks, M.D.

10. On December 22, 2021 Respondents and Claimant's former attorney executed a Stipulation. The parties agreed that Claimant had reached MMI on September 17, 2020. The Stipulation was approved on December 28, 2021.

11. On January 4, 2022 Claimant returned to Dr. Faulkner for an examination. Dr. Faulkner remarked that Claimant's right hip MRI showed a labral tear with mild chondromalada. He also commented that Claimant obtained good relief from a diagnostic Injection that suggested most of his pain was coming from his hip joint. Dr. Faulkner concluded that, based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive diagnostic response, Claimant should proceed with a total hip replacement. He noted the procedure provides a quicker recovery and has a more predictable outcome in patients of Claimant's age with a cartilage Injury.

12. On January 19, 2022 Claimant visited Dr. Loucks for a surgical evaluation. He recounted that in early December 2021 Claimant had undergone an MRI that revealed moderate to high grade changes of the right hip with partial labral tearing and femoral acetabular impingement. Dr. Loucks noted that nine days earlier Claimant had received a repeat intra-articular right hip injection that provided approximately 60% relief of his groin and buttocks symptoms.

13. On February 18, 2022 Claimant returned to Dr. Loucks for an examination. After conducting a physical examination and reviewing Claimant's medical records, Dr.

Loucks assessed Claimant with a tear of the right acetabular labrum and femoral acetabular impingement. He recommended a total right hip arthroplasty.

14. On January 5, 2023 Claimant visited Pressley Swann, M.D. for an evaluation of his right hip pain. Dr. Swann remarked that Dr. Loucks referred Claimant for a second opinion about proceeding with a total right hip arthroplasty. He conducted a physical examination and reviewed pertinent imaging. Dr. Swann agreed with Dr. Loucks' recommendation for a total right hip replacement. He explained that x-rays revealed "some pincer based acetabular and impingement as well as a cam type impingement with a loose body in his joint."

15. On February 16, 2023 Claimant visited Barry Nelson, D.O. at Concentra. In addressing Claimant's right hip, Dr. Nelson noted that he had no additional recommendations for conservative treatment. He explained that Claimant had the option of an arthroscopic repair of the right hip or a total hip arthroplasty. Dr. Nelson left the decision about the appropriate surgery with orthopedic surgeons Drs. Loucks and Swann.

16. Claimant testified at the hearing in this matter. He explained that at the time of MMI he was experiencing pain in the right hip, groin and buttocks area. However, his buttocks and groin symptoms have worsened since he reached MMI. Furthermore, Claimant's right leg has become more unstable.

17. Claimant has established it is more probably true than not that he should be permitted to reopen his admitted September 30, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. On September 17, 2020 ATP Dr. Zimmerman determined that Claimant had reached MMI. He assessed Claimant with the following: (1) a lumbar discogenic injury, that had been surgically repaired, with chronic radicular symptoms down the right lower extremity; and (2) a right hip labral tear that had been treated non-surgically with a steroid injection. On July 13, 2021 DIME Dr. Green concluded that Claimant had not reached MMI. He remarked that Claimant's symptomatic labral tear required additional orthopedic evaluation. The parties subsequently stipulated that Claimant had reached MMI on September 17, 2020.

18. The record reveals that Claimant has suffered a worsening of his right hip condition since reaching MMI on September 17, 2020. At the time of MMI Claimant's right hip labral tear had been treated non-surgically and required additional orthopedic evaluation. Claimant credibly testified that his right hip pain has subsequently worsened. The pain has affected his well-being and overall ability to function. The records are consistent with Claimant's testimony. The medical records note that Claimant underwent extensive care after MMI to help maintain his condition. Claimant's ATP's provided detailed documentation about his persistent right hip symptoms and need for a total hip replacement.

19. Dr. Faulkner determined that Claimant had good relief from a diagnostic injection that suggested most of the pain was originating from his right hip joint. Based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive

diagnostic response, Dr. Faulkner recommended proceeding with a total hip replacement. Similarly, Dr. Loucks concluded that a total right hip arthroplasty was warranted. An MRI had revealed moderate to high grade changes of the right hip with partial labral tearing and femoral acetabular impingement. Dr. Loucks noted that Claimant had received a repeat intra-articular right hip injection that provided approximately 60% relief of his groin and buttocks symptoms. Finally, Dr. Swann agreed with Dr. Loucks' recommendation for a total right hip replacement. He explained that x-rays revealed "some pincer based acetabular and impingement as well as a cam type impingement with a loose body in his joint."

20. The persuasive medical records, in conjunction with Claimant's credible testimony, reflect that Claimant has suffered a change in his right hip condition since reaching MMI on September 17, 2020. Claimant has suffered a worsening of his right hip symptoms that warrants additional medical treatment in the form of a total hip arthroplasty. He has experienced persistent pain and dysfunction in his right hip that has been resistant to conservative treatment. Accordingly, Claimant has demonstrated that he is entitled to reopen his admitted September 30, 2019 Workers' Compensation claim.

21. Claimant has demonstrated by a preponderance of the evidence that a total hip arthroplasty constitutes reasonable, necessary, and causally related medical care for his September 30, 2019 industrial injury. The record reveals that Claimant has received significant conservative treatment for his right hip condition. Nevertheless, he continues to suffer persistent right hip and groin symptoms. Treating physicians have assessed Claimant with a tear of the right acetabular labrum and femoral acetabular impingement. The persuasive opinions of Drs. Faulkner, Loucks and Swann suggest that, based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive diagnostic response to injections, a total right hip arthroplasty is warranted. Dr. Faulkner specifically noted that the procedure provides a quicker recovery and has a more predictable outcome in patients of Claimant's age with a cartilage Injury. The record thus reveals that Claimant's work activities aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant has proven that a total right hip arthroplasty is reasonable, necessary and causally related to his September 30, 2019 admitted industrial injury.

CONCLUSIONS OF LAW

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

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

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

Reopening for Change of Condition

4. At any time within six years of the date of injury, an ALJ may reopen an award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. The intent of the statute is to provide a remedy to claimants who are entitled to awards of both medical and disability benefits. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186 (Colo. App. 2002). In seeking to reopen a claim based on a change in condition, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004). An ALJ's decision to grant or deny a petition to reopen may therefore "be reversed only for fraud or clear abuse of discretion." *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *see also Heinicke* 197 P.3d at 222 ("In the absence of fraud or clear abuse of discretion, the ALJ's decision concerning reopening is binding on appeal.").

5. As found, Claimant has established it is more probably true than not that he should be permitted to reopen his admitted September 30, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. On September 17, 2020 ATP Dr. Zimmerman determined that Claimant had reached MMI. He assessed Claimant with the following: (1) a lumbar discogenic injury, that had been surgically repaired, with chronic radicular symptoms down the right lower extremity; and (2) a right hip labral tear that had been treated non-surgically with a steroid injection. On July 13, 2021 DIME Dr. Green concluded that Claimant had not reached MMI. He remarked that Claimant's symptomatic labral tear required additional orthopedic evaluation. The parties subsequently stipulated that Claimant had reached MMI on September 17, 2020.

6. As found, the record reveals that Claimant has suffered a worsening of his right hip condition since reaching MMI on September 17, 2020. At the time of MMI Claimant's right hip labral tear had been treated non-surgically and required additional orthopedic evaluation. Claimant credibly testified that his right hip pain has subsequently worsened. The pain has affected his well-being and overall ability to function. The records are consistent with Claimant's testimony. The medical records note that Claimant underwent extensive care after MMI to help maintain his condition. Claimant's ATP's provided detailed documentation about his persistent right hip symptoms and need for a total hip replacement.

7. As found, Dr. Faulkner determined that Claimant had good relief from a diagnostic injection that suggested most of the pain was originating from his right hip joint. Based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive diagnostic response, Dr. Faulkner recommended proceeding with a total hip replacement. Similarly, Dr. Loucks concluded that a total right hip arthroplasty was warranted. An MRI had revealed moderate to high grade changes of the right hip with partial labral tearing and femoral acetabular impingement. Dr. Loucks noted that Claimant had received a repeat intra-articular right hip injection that provided approximately 60% relief of his groin and buttocks symptoms. Finally, Dr. Swann agreed with Dr. Loucks' recommendation for a total right hip replacement. He explained that x-rays revealed "some pincer based acetabular and impingement as well as a cam type impingement with a loose body in his joint."

8. As found, the persuasive medical records, in conjunction with Claimant's credible testimony, reflect that Claimant has suffered a change in his right hip condition since reaching MMI on September 17, 2020. Claimant has suffered a worsening of his right hip symptoms that warrants additional medical treatment in the form of a total hip arthroplasty. He has experienced persistent pain and dysfunction in his right hip that has been resistant to conservative treatment. Accordingly, Claimant has demonstrated that he is entitled to reopen his admitted September 30, 2019 Workers' Compensation claim.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

11. As found, Claimant has demonstrated by a preponderance of the evidence that a total hip arthroplasty constitutes reasonable, necessary, and causally related medical care for his September 30, 2019 industrial injury. The record reveals that Claimant has received significant conservative treatment for his right hip condition. Nevertheless, he continues to suffer persistent right hip and groin symptoms. Treating physicians have assessed Claimant with a tear of the right acetabular labrum and femoral acetabular impingement. The persuasive opinions of Drs. Faulkner, Loucks and Swann suggest that, based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive diagnostic response to injections, a total right hip arthroplasty is warranted. Dr. Faulkner specifically noted that the procedure provides a quicker recovery and has a more predictable outcome in patients of Claimant's age with a cartilage Injury. The record thus reveals that Claimant's work activities aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant has proven that a total right hip arthroplasty is reasonable, necessary and causally related to his September 30, 2019 admitted industrial injury.

ORDER

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

1. Claimant's request to reopen his September 30, 2019 admitted claim based on a change in condition pursuant to §8-43-303(1), C.R.S. is granted.

2. Claimant is entitled to receive reasonable, necessary and causally related medical benefits including a total right hip arthroplasty as recommended by Drs. Faulkner, Loucks and Swann.

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

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

mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 5, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-646-001

ISSUES

1. Whether Respondents' March 20, 2023 Final Admission of Liability (FAL) was defective and thus failed to close the present claim.

2. Alternatively, if the March 20, 2023 FAL was sufficient to close the claim, whether Respondents should be permitted to reopen the matter based on a mutual mistake of material fact pursuant to §8-43-303(1) C.R.S.

3. Whether Respondents have proven by a preponderance of the evidence that they are entitled to terminate Claimant's Temporary Total Disability (TTD) benefits based on a modified duty job offer.

4. Whether Respondents have established by a preponderance of the evidence that Claimant's disability was triggered by the intervening event of cancer treatment that terminated his entitlement to TTD benefits.

FINDINGS OF FACT

1. Claimant worked as a Caregiver at Employer's facility. On June 17, 2022 he sustained an admitted industrial injury during the course and scope of his employment with Employer. Claimant was specifically assaulted by a patient and suffered injuries to his right shoulder and right wrist.

2. On June 22, 2022 Claimant began treatment through Authorized Treating Provider (ATP) Concentra Medical Centers. He received restrictions of no lifting or carrying over 10 pounds, limited pinching or gripping, and no reaching overhead or away from the body.

3. On June 23, 2022 Respondents provided Claimant with an offer of transitional duty. The employment involved serving meals, helping with resident activities, spending one-on-one time with residents, cleaning laundry, and other tasks as assigned. Although Claimant accepted the position, there is no evidence that the job duties were reviewed or approved by Claimant's treating physician.

4. On June 24, 2022 Claimant returned to Concentra for an examination. He received increased restrictions of no lifting or carrying more than five pounds, limited pinching or gripping, and no reaching overhead or away from the body. Respondents did not subsequently provide a modified duty job offer.

5. On July 1, 2022 Claimant was restricted to no use of his right upper extremity/right arm. The restrictions were renewed on July 6, July 29, August 29, September 2, and September 30, 2022.

6. On November 2, 2022 Employer's Business Office Coordinator [Redacted, hereinafter BG] confirmed to Insurer's Adjuster that Employer could not accommodate Claimant's restrictions.

7. While Claimant's restrictions were still in place, he underwent treatment for cancer. Respondents have not offered any evidence related to Claimant's cancer treatment. Notably, there is no evidence that Claimant was under any restrictions due to his treatment.

8. On November 11, 2022 Claimant's ATP reiterated the restrictions of no use of the right upper extremity, no patient contact, and to avoid hazardous conditions, i.e., grabbing of the right hand/wrist. The preceding restrictions were renewed on December 9, 2022.

9. On December 12, 2022 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged Temporary Total Disability (TTD) benefits from June 23, 2022 and continuing.

10. On February 3, 2023 the ATP placed Claimant at Maximum Medical Improvement (MMI) with permanent right arm restrictions including no reaching overhead and away from the body, a five-pound lifting limit with the right hand, and a two-pound repetitive lifting maximum. He received a 29% upper extremity impairment rating that converts to a 17% whole person impairment.

11. On March 2, 2023 Respondents filed a Final Admission of Liability (FAL). The FAL erroneously acknowledged a 17% whole person impairment, rather than the 29% scheduled impairment. The FAL also recognized the previously admitted TTD benefits for the period June 23, 2022 until February 2, 2023.

12. On March 28, 2023 the Colorado Division of Workers' Compensation (DOWC) issued an error Notice regarding the FAL. The Notice requested Respondents to file a corrected FAL within 10 days, admit to a scheduled impairment, and specify a correct amount of TTD benefits. The Notice specifically provided:

> The admission states a position on 17% whole person/non-scheduled impairment, however, the medical report appears to indicate the impairment rating is 29% scheduled impairment to the upper extremity (body code 01). In addition, the required impairment worksheet was not attached to the admission.

The Notice directed Respondents to file a corrected FAL "with a current certificate of mailing date and any required supporting documentation to all parties within 10 days of receipt of this letter."

13. Instead of filing a new FAL as directed by the DOWC, Respondents filed an Application for Hearing (AFH) on April 7, 2023. Respondents' sought to withdraw the FAL on the basis of mutual mistake of material fact.

14. Respondent filed a "Response to Division of Workers Compensation Notice Regarding Final Admission of Liability" with their AFH. They remarked that they were "raising the issue of withdrawal of the FAL based on the mutual mistake of the parties." Respondents elaborated that the mutual mistake included "Respondents' mistakenly admitting to whole person impairment and the mistake regarding Claimant's restrictions and ability to work as claimant was undergoing cancer treatment simultaneously with treatment for the related Workers' Compensation injuries."

15. On April 24, 2023 Respondents filed a new GAL attempting to rescind the entire period of TTD benefits and acknowledge medical benefits only.

16. In response, the DOWC sent a second letter to Respondents dated May 22, 2023. The letter specified that "[t]emporary benefits may not be modified without complying with Rule 6 or through the hearing process. Within 15 days, please provide correspondence regarding your position or file an amended decision reinstating the previously admitted temporary benefits with a current certificate of mailing date."

17. On May 30, 2023 Respondents notified the DOWC that a hearing was scheduled on the issues. They specified that they were "disputing the period during which Claimant was entitled to TTD benefits, as Claimant was undergoing treatment for health issues not related to a work incident." Respondents also sought an overpayment of TTD benefits.

18. The record reveals that Respondents' March 20, 2023 FAL was defective and thus failed to close the present claim. Notably, the FAL erroneously acknowledged a 17% whole person impairment rather than the 29% scheduled impairment. The DOWC advised Respondents that the medical report suggested the admitted impairment should be a 29% scheduled rating to the upper extremity. The DOWC also noted that the required impairment worksheet was not attached to the FAL.

19. After the DOWC informed Respondents that the FAL was defective, Respondents did not file an amended FAL. Instead, Respondents filed an AFH within 10 days to withdraw the FAL. By failing to amend the FAL and clarify the benefits to which Claimant was entitled, Claimant did not receive all the information necessary to make an informed decision. Moreover, Respondents did not attach the required impairment worksheet to the document. Claimant thus lacked sufficient information about whether to challenge the FAL. Therefore, the March 20, 2023 FAL was defective and failed to close any issues.

20. Respondents have failed to prove it is more probably true than not that they are entitled terminate Claimant's TTD benefits based on a modified duty job offer. At no point after June 23, 2022 and prior to MMI did Claimant return to regular or modified duty employment. Although Claimant received an "offer of transitional duty" on June 23, 2022,

it did not comply with Rule 6-4. Despite Claimant's acceptance of the position, there is no evidence that the job duties were reviewed or approved by Claimant's treating physician. He also never received a written release to return to regular employment. The offer of transitional duty thus did not comply with WCRP Rule 6-4. It was therefore insufficient to terminate TTD benefits. Even if the modified job offer was sufficient to cease TTD benefits, Claimant received increased restrictions on the following day. Respondents would thus have had to provide a new modified duty job offer complying with Rule 6-4. Respondents have not met their burden to modify previously admitted TTD benefits because none of the statutory conditions enumerated in §8-42-105(3)(a)-(d), C.R.S. were satisfied until Claimant reached MMI. Claimant is thus entitled to receive TTD benefits for the period June 23, 2022 until terminated by statute on February 3, 2023.

21. Respondents have failed to establish it is more probably true than not that Claimant's disability was triggered by the intervening event of cancer treatment that terminated his entitlement to TTD benefits. Respondents have not demonstrated that Claimant's cancer treatment severed the causal connection between his industrial injury and wage loss. They have simply offered no evidence that Claimant was under any restrictions due to his cancer treatment. The record reveals that Claimant was consistently restricted from using his right upper extremity until he reached MMI on February 3, 2023. While undergoing cancer treatment, Claimant was under the same restrictions of not using his right arm. Notably, by November 2, 2022, Respondents confirmed that they could not accommodate Claimant's work restrictions. Because Claimant received permanent restrictions and an impairment rating, his industrial injury contributed to his wage loss throughout the entirety of his claim. Accordingly, Claimant is entitled to receive TTD benefits for the period June 23, 2022 until terminated by statute on February 3, 2023.

CONCLUSIONS OF LAW

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

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

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

Validity of the March 20, 2023 FAL

4. The presence of a valid FAL is a jurisdictional prerequisite to the closure of a claim. *McCotter v. U.S. West Communications*, W.C. No. 4-430-792 (ICAO, Mar. 25, 2002). In the absence of full compliance with §8-43-203(2), C.R.S. the claimant's failure to object to a final admission does not close the claim. *Reed v. Demetre Painting*, W.C. No. 3-069-138 (ICAO, Jan. 15, 1993). Specifically, in *Reed* the respondents failed to attach the medical report on which the final admission for permanent disability benefits was predicated. The Panel concluded that, under the circumstances, the claimant's failure to contest the defective final admission did not close the issue of permanent disability. Similarly, in *Burns v. Northglenn Dodge*, W.C. No. 4-486-911 (ICAO, May 12, 2003), the Panel determined that a final admission containing the wrong notice under §8-43-203(2), C.R.S. was invalid and did not close any issues, even absent an objection from the claimant. *See Maloney v. Ampex Corporation*, W.C. No. 3-952-034 (ICAO, Feb. 27, 2001) (failure to attach medical reports as required by statue vitiated effectiveness of FAL). Therefore, if the FAL is insufficient to close the issue of permanent disability benefits, it is also insufficient to close the issue of temporary total disability benefits. *See Bargas v. Special Transit* W.C. No. 4-534-551 (ICAO, June 4, 2004); *Siegmund v. Fore Property Company,* W.C. No. 4-649-193 (ICAO, Jan. 30, 2007). One obvious purpose of the requirements of §8-43-203(2)(b), C.R.S. and Rule 5-5(A) is to provide the claimant with notice of the exact basis of admitted or denied liability in order to permit an informed decision about whether to challenge the final admission. *Silva v. Poudre School Dist.*, W.C. No. 4-651-643 (ICAO, Apr. 30, 2008).

5. As found, the record reveals that Respondents' March 20, 2023 FAL was defective and thus failed to close the present claim. Notably, the FAL erroneously acknowledged a 17% whole person impairment rather than the 29% scheduled impairment. The DOWC advised Respondents that the medical report suggested the admitted impairment should be a 29% scheduled rating to the upper extremity. The DOWC also noted that the required impairment worksheet was not attached to the FAL.

6. As found, after the DOWC informed Respondents that the FAL was defective, Respondents did not file an amended FAL. Instead, Respondents filed an AFH within 10 days to withdraw the FAL. By failing to amend the FAL and clarify the benefits to which Claimant was entitled, Claimant did not receive all the information necessary to make an informed decision. Moreover, Respondents did not attach the required impairment worksheet to the document. Claimant thus lacked sufficient information about whether to challenge the FAL. Therefore, the March 20, 2023 FAL was defective and failed to close any issues.

Temporary Total Disability Benefits

7. To prove entitlement to TTD benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Eligibility for TTD benefits requires only that the work-related injury contributes "to some degree" to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

8. WCRP Rule 6-4 enumerates the procedures for terminating TTD benefits based on a modified duty job offer:

> (4) A copy of a written offer delivered to the claimant with a signed certificate of service, containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.
>
> (a) A written offer of modified duty may only be used to terminate benefits pursuant to this subsection if:
>
> i) A copy of the written inquiry to the treating physician is provided to the claimant by the insurer or employer at the time the authorized treating physician is asked to provide a statement on the claimant's capacity to perform the offered modified duty; and

ii) The claimant is provided a period of 3 business days from the date of receipt of the offer to return to work in response to the offer of modified duty.

9. As found, Respondents have failed to prove by a preponderance of the evidence that they are entitled terminate Claimant's TTD benefits based on a modified duty job offer. At no point after June 23, 2022 and prior to MMI did Claimant return to regular or modified duty employment. Although Claimant received an "offer of transitional duty" on June 23, 2022, it did not comply with Rule 6-4. Despite Claimant's acceptance of the position, there is no evidence that the job duties were reviewed or approved by Claimant's treating physician. He also never received a written release to return to regular employment. The offer of transitional duty thus did not comply with WCRP Rule 6-4. It was therefore insufficient to terminate TTD benefits. Even if the modified job offer was sufficient to cease TTD benefits, Claimant received increased restrictions on the following day. Respondents would thus have had to provide a new modified duty job offer complying with Rule 6-4. Respondents have not met their burden to modify previously admitted TTD benefits because none of the statutory conditions enumerated in §8-42-105(3)(a)-(d), C.R.S. were satisfied until Claimant reached MMI. Claimant is thus entitled to receive TTD benefits for the period June 23, 2022 until terminated by statute on February 3, 2023.

Intervening Event of Cancer Treatment

10. The existence of an intervening event is an affirmative defense to the respondents' liability. *In Re Granados*, W.C. No. 5-146-480 (ICAO, Dec. 5, 2022). Consequently, it is the respondents' burden to prove that the claimant's disability is attributable to the intervening injury or condition and not the industrial injury. *See Owens v. Indus. Claim Appeals Off.*, 49 P.3d 1187 (Colo. App. 2002). The intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). Whether the respondents have sustained their burden to prove the claimant's disability was triggered by an intervening event is a question of fact for resolution by the ALJ. *See City of Aurora v. Dortch*, 799 P.2d 462 (Colo. App. 1990).

11. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant's disability was triggered by the intervening event of cancer treatment that terminated his entitlement to TTD benefits. Respondents have not demonstrated that Claimant's cancer treatment severed the causal connection between his industrial injury and wage loss. They have simply offered no evidence that Claimant was under any restrictions due to his cancer treatment. The record reveals that Claimant was consistently restricted from using his right upper extremity until he reached MMI on February 3, 2023. While undergoing cancer treatment, Claimant was under the same restrictions of not using his right arm. Notably, by November 2, 2022, Respondents confirmed that they could not accommodate Claimant's work restrictions. Because

Claimant received permanent restrictions and an impairment rating, his industrial injury contributed to his wage loss throughout the entirety of his claim. Accordingly, Claimant is entitled to receive TTD benefits for the period June 23, 2022 until terminated by statute on February 3, 2023.

ORDER

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

1. Respondents' March 20, 2023 FAL was defective and thus failed to close the present claim.

2. Claimant shall receive TTD benefits for the period June 23, 2022 until terminated by statute when he reached MMI on February 3, 2023.

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

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

DATED: December 8, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the follow up sleep study and prescription for Losartan is reasonable and necessary medical treatment related to Claimant's admitted injury?

- Prior to the hearing, the parties agreed that Respondent would pay the outstanding medical bills for Claimant's home supply of oxygen and oxygen concentrator.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her right shoulder while employed by Employer on or about December 18, 2020 when she lifted a seventy five (75) pound ski bag. Claimant subsequently underwent two (2) surgeries to her right shoulder to repair her rotator cuff. Claimant testified that during the second surgery, she had an injection that paralyzed her phrenic nerve and paralyzed her right hemidiaph ragm.

2. Claimant testified that her current symptoms include shortness of breath and that she now uses a BiPAP machine at night when she sleeps along with 2 liters of oxygen. Claimant testified that prior to her workers' compensation injury, she did not use oxygen and did not experience shortness of breath. Claimant testified that prior to the work injury, she had not been diagnosed with asthma.

3. Following Claimant's February 17, 2022 surgery with Dr. Bynum that resulted in her phrenic nerve injury, Claimant sough t treatment with Dr. Hirsch. Dr. Hirsch had Claimant undergo a series of tests that demonstrated Claimant had reduced oxygen intake as a result of the phrenic nerve injury. On May 13, 2022, Dr. Hirsch recommended Claimant obtain a BiPAP machine to assist Claimant with her nighttime hypoxia and shortness of breath.

4. Claimant was subsequently referred for spirometry testing on May 31, 2022. The spirometry testing demonstrated Claimant presented with reduced FEV1 and FVC levels with significant bronchodilator response. Claimant was subsequently referred to National Jewish Hospital where she was initially evaluated on August 23, 2022.and underwent a series of tests.

5. Claimant returned to National Jewish Hospital on September 13, 2022 and was evaluated by Dr. Lin. Dr. Lin noted Claimant's accident history and surgeries and summarized the testing results from Claimant's August visit. Dr. Lin referred Claimant for additional evaluation with Dr. Metjian.

6. Claimant was examined by Dr. Lee at Montrose Regional Health on December 29, 2022. Dr. Lee noted that Claimant had discordant blood pressure readings and hypertension. Dr. Lee noted Claimant had a history of white coat hypertension. Claimant reported to Dr. Lee that she would have her blood pressure tested frequently and never had discordant readings until after her rotator cuff surgery. Claimant was instructed to keep a daily log of her blood pressure and return to discuss use of antihypertensives.

7. Claimant was examined by Dr. Shelton on January 9, 2023. Dr. Shelton noted that Claimant's blood pressure was appropriate for her age, but at times borderline. Claimant reported she would like to avoid medicines for her blood pressure if possible. Dr. Shelton indicated that he believed Claimant's blood pressure would be improved by the receipt of her BiPAP machine and ambubag.

8. Claimant returned to Montrose Regional Health on February 27, 2023. Nurse Pimetel noted Claimant continued to have elevated blood pressure and noted that they may recommend medications including Losartan at a follow up examination in six months.

9. Claimant presented to National Jewish Hospital on April 28, 2023 and was evaluated by Dr. Metjian. Dr. Metian noted Claimant's medical history and her use of the BiPAP machine along with using an ambubag 2-3 times per day. Dr. Metian recommended Claimant start Albuterol and recommended Claimant undergo a sleep study for PAP Titration.

10. Claimant presented the testimony of Dr. Lin at hearing. Dr. Lin is a physician specializing in pulmonary medicine. Dr. Lin testified she treated Claimant when she previously worked at National Jewish Hospital. Dr. Lin testified that Claimant was diagnosed with a paralyzed right diaphragm that was related to her rotator cuff surgery. Dr. Lin testified Claimant underwent a pulmonary function test ("PFT") on May 31, 2022 that showed Claimant had a bronchodilator effect.

11. Dr. Lin testified at hearing that the sleep study recommended by Dr. Metrian was intended to make sure the air pressure in the bypass is at the right level to keep Claimant's lungs open. Dr. Lin opined that the follow up sleep study was appropriate for Claimant's ongoing care.

12. Dr. Lin noted in her testimony that Claimant had been diagnosed with mild asthma after her work injury. Dr. Lin testified that Claimant reported she was asymptomatic from a respiratory stand point prior to her work injury. Dr. Lin testified that when Claimant sustained the injury to her diaphragm, it made it difficult for her to compensate for her underlying asthma. Dr. Lin testified that the proposed sleep study would not be related to Claimant's underlying asthma.

13. Dr. Lin testiffeid that Claimant had reported that she had improvement with her symptoms when she used the ambubag and BiPAP machine. Dr. Lin explained that the BiPAP machine does not treat the phrenic nerve, but instead helps support the

paralyzed diaphragm and allows the body to heal on its own. Dr. Lin testified that the sleep study would help determine what BiPAP pressure settings were effective in preventing Claimant from having low oxygen at night while sleeping.

14. With regard to Claimant's development of hypertension, Dr. Lin testified that weight gain and inactivity could aggravate Claimant's high blood pressure. Dr. Lin also testified that contributing factors for high blood pressure could include anxiety, stress and pain.

15. Dr. Shelton testified for Claimant at the hearing in this matter. Dr. Shelton testified he treats Claimant for the effects of her work injury. Dr. Shelton noted that as a result of the work injury, Claimant sustained an injury to her right rotator cuff which required surgery. Dr. Shelton noted that after Claimant's second surgery, Claimant developed shortness of breath and was diagnosed with phrenic nerve paralysis.

16. Dr. Shelton testified Claimant eventually underwent a plication surgery to her right hemidiaphragm. Dr. Shelton noted that after the plication surgery Claimant reported some improvement, but still had issues with her oxygen levels. Dr. Shelton noted that Claimant had a sleep study recommended that would be a two night study. Dr. Shelton testified that it was his opinion that the sleep study was reasonable and necessary as it could show if Claimant improved after the plication surgery.

17. Dr. Shelton testified that after Claimant's injury she developed high blood pressure. Dr. Shelton testified that he eventually prescribed medication (Losartan) for Claimant's high blood pressure. Dr. Shelton testified that after Claimant's plication surgery, he took Claimant off the medication as she was not tolerating the medications and after the surgery, Claimant's high blood pressure came down to an acceptable level. Dr. Shelton testified that prior to Claimant's high blood pressure coming under control after the surgery, the Losartan was reasonable and necessary medical treatment that was related to Claimant's work injury.

18. Respondent obtained a records review independent medical examination ("IME") of Claimant with Dr. Lesnak on June 23, 2023. Dr. Lesnak summarized Claimant's medical treatment and opined that any treatment for Claimant's diagnosis of reactive airway disease (likely asthma), symptomatic GERO, or episodic hypertension would be unrelated to her diagnosis of a right phrenic nerve injury palsy. Dr. Lesnak further opined that Claimant's hypertension was not related to her work injury.

19. Respondent obtained a records review IME of Claimant with Dr. Schwartz on October 16, 2023. Dr. Schwarz issued a report following his review of the records that summarized Claimant's medical treatment and set forth his opinions involving Claimant's case. Dr. Schwartz opined in his report that Claimant's hypertension was not related to her work injury. Dr. Schwartz noted that Claimant's echocardiogram that was performed on December 1, 2022 showed concentric left ventricular hypertrophy, thickening of the heart that typically occurs from years of untreated hypertension.

20. Dr. Schwartz testified at hearing in this matter and agreed that Claimant had a paralysis of the phrenic nerve that is a rare complication of the nerve block Claimant had during her surgery. Dr. Schwartz testified that Claimant has paralysis of the right diaphragm, so the diaphragm will become flaccid and billow upwards and put pressure on the base of the right lung. Dr. Schwartz testified that the plication procedure involves the surgeon going in and sewing up the diaphragm to keep the diaphragm sitting in a lower position and keeping it from putting pressure on the lung. Dr. Schwartz testified that this procedure doesn't fix the condition, but does improve the condition and will take some time to heal.

21. Dr. Schwartz testified that he would recommend that Claimant undergo a breathing capacity test. Dr. Schwartz testified that this testing could be performed while Claimant was recumbent, but not necessarily asleep. Dr. Schwartz testified that the results of this testing would show whether Claimant needed oxygen at night. Dr. Schwartz also recommended testing of Claimant's oxygen levels with activity to determine whether Claimant needed oxygen during activity.

22. Dr. Schwartz opined in his testimony that Claimant needed oxygen while she sleeps but did not need the BiPAP machine. Dr. Schwartz further opined that a sleep study would not be related to her work injury. Dr. Schwartz opined that if Claimant had sleep apnea, it would not be related to her diaphragm injury.

23. Dr. Schwartz testified that Claimant had thickening of the heart as shown on the echocardiogram was the result of longstanding hypertension and not related to Claimant's workers' compensation injury.

24. With regard to the sleep study, the ALJ credits the Claimant's testimony at hearing along with the testimony of Dr. Lin and Dr. Shelton and finds that Claimant has established that it is more probable than not that the sleep study is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. The ALJ finds the testimony of Dr. Lin that the sleep study would demonstrate the appropriate levels of oxygen for Claimant to use at night to be credible and persuasive.

25. With regard to the prescription for Losartan, the ALJ credits the testimony of Dr. Shelton that Claimant's blood pressure stabilized after her plication surgery to the point that she no longer needs medication for her high blood pressure. The ALJ further credits the testimony of Dr. Schwartz that the findings of the echocardiogram show evidence of long standing hypertension. The ALJ further credits the testimony of Dr. Schwartz that the work injury did not cause Claimant's hypertension as it preexisted her work injury.

26. The ALJ therefore finds that Claimant has failed to prove that it is more probable than not that the Losartan medication was causally related to her December 19, 2020 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S., 2013 The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. As found, Claimant has proven by a preponderance of the evidence that the medical treatment involving the sleep study recommended by National Jewish Hospital is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her injury. As found, the testimony of Claimant, Dr. Shelton and Dr. Lin are found to be credible and persuasive with regard to this issue.

5. As found, Claimant has failed to prove by a preponderance of the evidence that the prescription for Losartan is reasonable medical treatment related to Claimant's December 19, 2020 work injury. As found, the testimony of Dr. Schwartz is found to be credible with regard to this issue.

ORDER

It is therefore ordered that:

1. Respondent is liable for the sleep study recommended by National Jewish Hospital as reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the injury.

2. Claimant's request for an Order requiring Respondent to pay for the Losartan prescription is denied and dismissed.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-git@state.co.us.**

DATED: December 11,2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-156-485-004

ISSUES

1. Whether claimant has proven by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on October 13, 2020;

2. Determination of Claimant's average weekly wage (AWW);

3. Whether, in what amounts, and for what periods Claimant is entitled to temporary total or temporary partial disability (TTD or TPD) benefits;

4. Whether Respondents are liable to pay for medical care provided to Claimant to treat his compensable injury;

5. Whether and as of what date Claimant reached maximum medical improvement (MMI);

6. Whether and in what amount Claimant entitled to permanent partial disability (PPD) benefits;

7. Whether and in what amount Claimant is entitled to an award of disfigurement benefits;

8. Whether and in what amount each party is liable for the attorney fees of the other party.

FINDINGS OF FACT

1. Claimant date of birth is December 2, 1955. He was sixty-seven years old at the time of hearing.

2. Claimant was first employed by employer in 2007 as EMT/Paramedic and Assistant Chief of Operations. While he was a full-time employee, Respondent-Employer provided Claimant with health insurance benefits. He worked continuously as a full-time employee for employer until he resigned effective January 1, 2021, as Claimant was unable to work full-time and perform the duties required of his positions. Claimant worked PRN for Respondent-Employer beginning January 1, 2021, doing tasks assigned to him by employer.

3. On September 23, 2020, while he was at work at the [Redacted, hereinafter PS], Claimant was required to receive, and did receive, the flu vaccine, GFK

Fluarix, 0.5 ml.

4. Since June 2020, Claimant had been treated for left quadriceps tendon repair which he had suffered in a non-work related fall. He had surgery and was receiving physical therapy at Rocky Mountain Physical Therapy in Pagosa Springs for the torn quad. The physical therapist reported Claimant had been doing well until October, and on October 13, 2020, he reported Claimant demonstrated bilateral leg weakness with significant difficulty with walking.

5. During October 2020, Claimant was treated by orthopedist Dr. William Webb, for the increasing bilateral leg weakness and rapid loss of function of his legs.

6. An MRI and a low back epidural steroid injection were done to treat low back stenosis identified at L3-S1, which had worsened since Claimant had undergone an L4-S1 fusion in 2013.). There was no improvement in the leg weakness from this treatment.

7. On October 31, 2020 and November 3, 2020, Claimant suffered dislocations of his right hip which required emergency and orthopedic care to reduce the dislocations. The emergency care in November included a lumbar puncture the findings from which were consistent with Guillain-Barre Syndrome (GBS).

8. On November 3, 2020, Claimant was transferred by air transport to University of Colorado Health Memorial Hospital in Colorado Springs where the GBS diagnosis was confirmed and he was treated by specialists including orthopedics, neurology, neurosurgery, radiology, and physiatry. He was treated by intravenous immuno-globulin for five (5) days and experienced significant relief of leg weakness and lack of function.

9. Claimant was transferred to University of Colorado Health Rehabilitation. He was discharged from there on November 19, 2020. He consulted Spine Colorado about the worsened low back stenosis. He was evaluated by his family physician, Dr. Buchner, in Pagosa Springs. He relocated to Denver and attended physical therapy at Spalding Rehabilitation for the GBS symptoms.

10. On December 14, 2020, orthopedic physician Dr. Jennings examined Claimant and opined that Claimant's hip dislocations were due to the effects of the GBS and the generalized lower extremity weakness resulting therefrom, and not due to the prior hip prosthesis revision which Claimant had undergone in 2019.

11. On December 4, 2020, Claimant reported the injury of GBS due to the flu vaccine to the employer. Employer filed a first report of injury on December 11, 2020.

12. On December 16, 2020, Respondents issued a Notice of Contest pending further investigation.

13. Claimant continued outpatient treatment at Spalding Rehabilitation through February, 2021. Improvement occurred, but he continued to experience weakness and fatigue, and balance issues with difficulty walking on any surface other than a flat even surface.

14. On February 5, 2021, Claimant suffered a third right hip dislocation. According to Dr. Jennings at Colorado Joint Replacement, the dislocation was caused by the GBS. The dislocation was reduced by the emergency department of the Medical Center of Aurora.

15. Claimant relocated back to Pagosa Springs from Denver and received care from Dr. Buchner and Rocky Mountain Physical Therapy.

16. On July 11, 2021, Claimant experienced his fourth right hip dislocation while walking. The Pagosa Springs Hospital Emergency Department reduced the dislocation.

17. Claimant received care from Spine Colorado. On January 1, 2022, Dr. Orndorff recommended a L3-4 lumbar fusion. After a second opinion from Dr. Wong in Denver, Dr. Orndorff did the fusion surgery on May 31, 2022. The surgery has relieved the leg pain symptoms from the low back, but the symptoms of generalized weakness, fatigue, balance problems, and coordination attributed to GBS, persist. Claimant described them as ongoing and currently present.

18. Respondents arranged for an independent medical evaluation of Claimant with Elizabeth Bisgard, MD, MPH, FACOEM on October 10, 2022. Dr. Bisgard is certified by the State of Colorado as a Level II accredited physician. Dr. Bisgard reviewed extensive medical records covering Claimant's medical care from May 2010 through May 2022. She wrote a twenty-six (26) page medical record review. She met with Claimant via Zoom and issued a nine (9) page narrative report on October 14, 2020. Dr. Bisgard opined that the GBS is probably related to the flu vaccine, and Claimant's presentation is consistent with post-vaccine GBS, that his four right hip dislocations are secondary to the weakness in his leg from GBS, and therefore are causally connected. She opined that Claimant's lumbar spine condition, bi-lateral shoulder conditions, and Achilles heel issues discussed in her report are unrelated to Claimant's GBS and are outside the scope of the workers' compensation claim. She opined Claimant reached MMI on September 16, 2021. Dr. Bisgard agreed with Claimant's treating physicians that Claimant was able to work in a sedentary position, but that he does not meet the qualifications to work as a paramedic in the field. She opined Claimant's future medical maintenance care for GBS may include physical therapy treatment three to four times a year to upgrade his home exercise program. The parties stipulated to the accuracy and correctness of those opinions. This ALJ finds that Dr. Bisgard's opinions are well supported by the medical records, by Claimant's testimony, and the record as a whole,

and that her reports and opinions are credible and accepted as fact.

19. Dr. Bisgard also opined Claimant has a thirty percent (30%) whole person permanent impairment based on the *AMA Guides, Third Edition (Revised), 1991, Neurologic Table, page 109*, A. The parties declined to stipulate to this opinion as they understand the issue of permanent partial disability benefits (PPD) is not yet ripe and not before this court at this hearing.

20. Claimant testified he had reviewed Dr. Bisgard's report and agreed with her medical record report and with her opinions in her narrative report. The parties stipulated and the record supports that the medical care he has received to treat the effects of the GBS has all been from authorized providers. Claimant testified and reaffirmed that he has had certain medical issues and treatment since the onset of the GBS which were unrelated to the GBS, including an Achilles tear, the lumbar surgery, and shoulder problems.

21. Claimant applied for a hearing on May 10, 2023, on the issues presented herein.

22. Claimant started receiving Social Security retirement benefits beginning January 1, 2021. Exhibits 62-65 document the dollar amount paid for Social Security Retirement and his receipt of Medicare benefits as of January 1, 2021.

23. Claimant's wage and health insurance records of the employer are Exhibits 35-59. Although the first report of injury states Claimant's AWW was $1,420.41, the parties stipulated that Claimant's average weekly wage at the time of injury on October 13, 2020, was $1,446.13. The wage records and exhibits support the parties' stipulation. The AWW as of October 13, 2020, was $1,446.13.

24. Claimant's health insurance benefits from the employer terminated on December 31, 2020. His loss of health insurance benefits increased his average weekly wage. The parties stipulated to an increased average weekly wage commencing January 1, 2021 at the rate of $1,500.00. The exhibits support the parties' stipulation. The AWW beginning January 1, 2021, is $1,500.00.

25. Claimant testified he was able to work part time and remotely due to the GBS symptoms after October 13, 2020, and he worked while he was hospitalized and receiving treatment for GBS and while he was outpatient living at home. The wage records show impairment of his regular historical earnings through reduced hours and wages since the injury through MMI of September 16, 2021. The parties stipulated to the calculated amounts of temporary disability on account of the wage impairment during his disability until MMI as follows: (a) Temporary partial disability compensation from October 13, 2020 to January 1, 2021, in the amount of $5,073.58; and, (b) Beginning January 1, 2021, the parties stipulated that Claimant's average weekly wage increased, as noted

above, and that respondents are entitled to take the statutory offset of fifty percent (50%) predicated upon the initial award of Social Security Benefits. The parties stipulated that Claimant was entitled to temporary partial disability benefits beginning January 1, 2021, through MMI on September 16, 2021, in the total amount of $19,426.07. The exhibits support the stipulations and this ALJ accepts the stipulations as fact.

26. Claimant's testimony is undisputed, and well supported by the exhibits. This ALJ finds that Claimant is credible.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2010. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2006).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); S*ee City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P. 2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Iriando,* 811

P.2d, 379, 383 (Colo. 1991). The claimant must prove a casual nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961, P.2d 571 (Colo.App.1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo.App.2004); *H & H Warehouse v. Vicory*, 805, P.2d 1167 (Colo.App.1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (Oct. 2, 2015).

5. Based upon the evidence and the law, this ALJ concludes that Claimant has established by the preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment on October 13, 2020. As found, Claimant contracted GBS and other causally related conditions, as determined by Dr. Bisgard.

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

An ALJ may base an AWW determination "not only on the claimant's wage at the time of the injury, but on other relevant factor when the case's unique circumstances require." *Avalanche Indus, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008), rev'd on other grounds, *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010). The ALJ's discretionary authority permits the ALJ to consider post-injury pay increases a claimant would have received absent the work-related injury. *See In Re Tibbs,* W.C. No. 4-422-333 (ICAO, Apr. 12, 2001); *Wheeler v. Archdiocese of Denver Management Corp.,* W.C. No. 4-669-708 (Dec. 21, 2010). But, an ALJ may not base an award on speculation or conjecture. *Nanez v. Industrial Claim Appeals Office,* 444 P.3d 820 (Colo. 2018); *Upchurch v. Industrial Commission*, 80 P.2d 628 (Colo. App. 1985). To that end, the alleged post-injury wage increase must be "sufficiently definite" to support an increase in the AWW. *Tibbs, supra; Ebersbach v. UFCW local No. 7,* W.C. No. 4-240-475 (May 5, 1997); *Romero v. Cub Foods,* W.C. No. 4-218-823 (Sept. 28, 2000).

7. Based on the evidence and the law, this ALJ concludes that Claimant's AWW should be calculated to include his average earnings, including overtime, and after the loss of Claimant's health insurance, the AWW should be increased to account for his loss of the fringe benefit of health insurance. This ALJ concludes that the calculation of

the AWW should not and will not include any additional amount in the calculation, such as from loss of bonuses, any contributions for social security, retirement or pension contributions, or any other employment benefits. The ALJ concludes that the parties' stipulation and calculation of the AWW is supported by the evidence and the law, and that the AWW from October 13, 2020 to January 1, 2021, is $1446.13, and that the AWW beginning January 2021, is $1,500.00.

8. To prove entitlement to temporary partial disability benefits a claimant must demonstrate by a preponderance of the evidence that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. See §8-42-105 and 106, C.R.S.; *Anderson v. Longmont Toyota,* 102P. 3d 323 (Colo. 2004). *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1) (a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain disability benefits. The term "disability" connotes two elements; (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Acce Electric*, 971 nP.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.,* 964 P.2d 595, 597 (Colo.App.1998)(citing *Ricks v. Indus. Claim Appeals Off.,* P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lumburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

9. Temporary partial disability (TPD) benefits are 66 2/3 percent of the difference between the employee's AWW at the time of the injury (and later as it is increased for lost health insurance benefits), and the employee's AWW during the continuance of his temporary partial disability. Those benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-106 (1) - (2), C.R.S.

10. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TPD benefits for the period October 13, 2020 until the date of MMI, September 16, 2021, in the total amount of $24,499.65.

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio,* 886 P2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.* 107 P.3d 999, 1001 (Colo.App.2004). The question of whether a particular disability is the result of the natural

progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *Univ. Park Care Center v. Indus. Claim Appeals Off.,* 43 P.3d 637 (Colo.App.2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. In *re Parker*, W.C. No. 4-517-537 (May 31, 2006); In re *Frazier*, W.C. No. 3-920-202 (Nov. 13, 2000).

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

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his October 13, 2020 industrial injuries resulting from the September 23, 2020, flu vaccination required by employer.

14. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1998). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.* Based upon the evidence and the law, this ALJ concludes that Dr. Bisgard's opinions on maintenance medical care are well supported by the evidence, and adopts them: Claimant is entitled to maintenance medical care after the MMI date of September 16, 2021, of four to six physical therapy visits per year.

15. Maximum medical improvement means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-4-201 (11.5). Dr. Bisgard credibly opined that Claimant attained MMI on September 16, 2021. Claimant and Respondents concur with Dr. Bisgard's opinion regarding the date of MMI, and so stipulated at hearing. As found, this ALJ recognizes the parties' stipulation, and concludes that the evidence and the law support Dr. Bisgard's determination that Claimant reached MMI on September 16, 2021.

16. Permanent partial disability benefits are paid after the claim is found compensable by respondents to a claimant when a claimant's injury results in permanent

medical impairment, either scheduled or nonscheduled, and an opinion of permanent impairment is provided, depending on the circumstances of each case, by either a treating physician, or an independent medical examiner, Section 8-42-107.2, C.R.S. This ALJ agrees with the parties' counsel's statements at hearing that the determination of PPD benefits is premature. The parties have agreed to address the issue of PPD benefits after the hearing order is final.

17. Section 8-43-403, C.R.S. addresses attorney fees under the Colorado Workers' Compensation Act and provides for a 20% contingency fee paid by a claimant to his attorney. The few exceptions noted in that Section do not apply to this claim. There are no provisions for respondents to pay the attorney fees of a claimant's attorney except in limited circumstances that do not apply here, such as the setting of a hearing on issues unripe for determination. Section 8-43-211 (2)(d), C.R.S., provides, "if any person requires a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting." This statute authorizes a party to seek its fees and costs incurred before the hearing and without reference to the guidelines for seeking attorney fees and costs provided by other statutes or by court rules. Whether attorney fees and costs are reasonable is considered under an abuse of discretion standard. An ALJ does not abuse discretion unless the order is beyond the bounds of reason, as where it is unsupported by the law or contrary to the evidence. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo.App.2001). Since it was Claimant's application for hearing that commenced the litigation and issues presented to the Court herein, this Court concludes that there is no basis for Respondents to pay Claimant's attorney fees.

18. Disfigurement benefits may be awarded to an employee who is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits. §8-42-108, C.R.S. Claimant averred that he has not sustained disfigurement, and he presented no evidence at hearing providing a basis upon which to award disfigurement benefits. Therefore, this Court declines to award disfigurement benefits.

19. The last issue is whether respondents should pay Claimant's litigation costs. In the Colorado Workers' Compensation Act, like attorney fees, costs are generally the responsibility of the party incurring them. One exception is found in Section 8-42-101(5), C.R.S., involving unpaid maintenance medical care bills. Neither that issue nor any exception applies here. This ALJ concludes that each party shall pay their own respective litigation costs.

ORDER

It is therefore ordered that:

1. Claimant sustained an injury in the course and scope of his employment on October 13, 2020.
2. Claimant's average weekly wage at the time of injury was $1,446.14. On

January 1, 2021, Claimant's average weekly wage increased to $1,500.00.

3. Respondents shall pay claimant $5,073.58 as temporary partial disability compensation for the time period beginning October 13, 2020 through December 31, 2020, and temporary partial disability compensation of $19,426.07 for the time period beginning January 1, 2021 through the date of maximum medical improvement on September 16, 2021. The total of temporary disability benefits owed by respondents to claimant through September 16, 2021, is $24,499.65.
4. Respondents shall pay for the reasonable and necessary medical care related to the Guillian-Barre Syndrome (GBS) and consequential care for the Gullian-Barre Syndrome (GBS), in accordance with Dr. Bisgard's opinions in her report discussed above, which includes, but is not limited to the four incidents of the right hip dislocation.
5. Claimant reached MMI on September 16, 2021.
6. The issue of PPD is deferred for future determination.
7. Claimant's application for disfigurement is denied and dismissed.
8. Claimant is not entitled to an award for his attorney's fees and/or litigation costs. Each party shall pay their respective attorney fees and costs.
9. All matters not determined herein are reserved for future determination.

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

DATED: December 11, 2023

/s/ Stephen J. Abbott

_____

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on or about January 18, 2023.

II. If Claimant established that he suffered a compensable right shoulder injury, whether he also established, by a preponderance of the evidence, that the surgery recommended to treat his right shoulder condition is reasonable, necessary, and related to said industrial injury.

III. If Claimant established a compensable injury, whether he also proved that he is entitled to temporary total disability ("TTD") benefits beginning May 26, 2023 and ongoing.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Raschbacher, the ALJ enters the following findings of fact:

1. Claimant is a former heavy equipment mechanic for Employer.[1] On January 18, 2023, Claimant was tasked with changing the batteries and repairing the thumb linkage on an excavator owned by Employer.

2. After changing the batteries without misfortune, Claimant turned his attention to repairing the linkage. Claimant testified that the linkage was difficult to remove and he had to resort to using a 10 pound hand held sledge hammer to loosen/remove the pins holding the linkage to the machine. While hammering, Claimant experienced a sudden onset of pain in his right shoulder.[2]

3. Claimant testified that he reported his injury to his supervisor, [Redacted, hereinafter AW] who was nearby at the time. According to Claimant he said: "I think I hurt my shoulder working on this thing", to which AW[Redacted] replied, "Are you gonna be okay?" Claimant testified that he was able to finish his work shift, albeit in pain. He went home for the evening and took Ibuprofen for his persistent pain.

4. Claimant testified that no written report regarding the incident was completed on the date of the alleged injury.

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[1] At hearing, Claimant testified that he was not sure if he is still employed by [Redacted, hereinafter PC]; however, he added that his last day of work for Employer was May 26, 2023. Moreover, in his position statement, Counsel for Respondents notes specifically that Claimant "was" employed by PC[Redacted] (Employer) as their lead mechanic. Accordingly, the ALJ has elected to characterize Claimant as a former employee of PC[Redacted].

[2] Claimant is right hand dominate. (Resp. Ex. A, p. 1).

5. Claimant testified that he returned to work on January 19, during which shift he worked with a painful shoulder. Again, no conversations occurred between Claimant and his Employer regarding the alleged January 18 injury during this shift and no accident report was completed.

6. Because his shoulder symptoms were not improving with time, Claimant testified that he felt needed to do something for his pain. Accordingly, Claimant testified that on January 24, 2023, he told AW[Redacted] he needed to see a doctor. Neither an incident report nor an employer's first report of injury were completed at this time and Claimant was not referred to a designated medical provider.

7. Claimant proceeded to the offices of his primary care physician (PCP) on January 24, 2023, where he was evaluated by Physician Assistant (PA) Stanley Johnson. PA Johnson noted that Claimant presented with a chief complaint of right shoulder pain during the week prior to his appointment. No specific mechanism of injury (MOI) was documented. Instead, PA Johnson simply noted: "[N]o new trauma old injury not sure, heavy equipment mechanic." (Resp. Ex. C, p. 14).

8. Claimant testified that he went to his personal doctor on January 24 because he did not know that he was supposed to use a workers' compensation doctor and no one referred him to a workers' compensation physician. He testified further that, he told his provider that he was injured on the job. When asked why the provider stated that he said there was no trauma Claimant replied, "I have no idea on that." Based on the brevity of the information contained in the "History of Present Illness" section of PA Johnson's January 24, 2023 report, the ALJ credits Claimant's testimony to find it probable that he told PA Johnson he was injured at work and PA Johnson omitted additional details regarding the history and mechanism of Claimant's injury (MOI) when completing his report.

9. An x-ray of the right shoulder was obtained during Claimant's January 24, 2023 appointment.[3] The indication for imaging was documented as: "Pt. c/o pain in right shoulder that extends down RUE to Rt. Thumb. "Pt. denies trauma, surgery, and prior known injury. Pt states frequent use and heavy lifting." *Id*. at p. 16. Claimant's x-ray revealed: "Moderate joint space narrowing and enthesophyte formation of the acromioclavicular joint" and "[n]o displaced fracture." *Id.*

10. An "Employer's First Report of Injury" (FROI) was completed on January 25, 2023. (Resp. Ex. H, p. 35). The form is only partially completed and is unsigned. *Id.* Consequently, it is unknown who completed the form. Claimant testified that he did not complete the form and was never asked to provide or verify any information contained on the form itself. Regarding the MOI, the FROI contains the following statement: "Employee states that between the days of 1/16/23 and 1/20/23 he thinks he injured his shoulder while either removing batteries from excavator." *Id*. Nothing follows the words "while either removing batteries from excavator." Thus, it is unknown

[3] It was noted that Claimant would need an MRI following his x-ray. (Resp. Ex. C, p. 13).

what other activity Claimant reported to the author of the FROI regarding the activity that allegedly caused his shoulder injury. As presented, the ALJ finds the FROI unverified, incomplete and of limited utility in helping determine the issues endorsed for hearing. *Id*.

11. On February 2, 2023, approximately two weeks after his claimed injury date, Claimant underwent an MRI of the right shoulder. No prior MRIs were available for comparison, which the ALJ finds consistent with Claimant's testimony that he has never had any prior injuries to or treatment for his right shoulder. According to the interpreting radiologist, this MRI revealed a small amount of fluid in the subacromial/subdeltoid bursa consistent with subacromial/subdeltoid bursitis. Additionally, there was a near complete tear of the supraspinatus tendon; however, as interpreted by the radiologist, the remaining tendons of the rotator cuff, including the infraspinatus, subscapularis and the long head of the biceps were unremarkable and normally located. (Resp. Ex. C, p. 16).

12. Following his MRI, Claimant was referred to the Orthopedic Centers of Colorado for evaluation. On March 8, 2023, Claimant was evaluated by Shannon M. Constantinides, Nurse Practitioner (NP) for Dr. David Weinstein.

13. NP Constantinides obtained the following history regarding Claimant's January 18, 2023 injury: "[Claimant] is a pleasant 48-year-old RHD (right hand dominate) heavy equipment operator who reports today for orthopedic evaluation of chronic right shoulder pain. . . . He states that he was working on a piece of equipment that required a bit of heavy lifting. He noticed a fairly acute onset of right shoulder pain." (Resp. Ex. D, p. 17). NP Constantinides also reviewed and independently interpreted Claimant's February 2, 2023 MRI. According to NP Constantinides, Claimant's MRI revealed "low-grade partial-thickness tearing of the subscapularis tendon" along with "high-grade partial-thickness (essentially full thickness) intratendinous tearing of the supraspinatus." *Id*. at p. 18. In addition to this tearing, the MRI demonstrated fluid in the subacromial space, an attenuated appearance to the long head of the biceps with degenerative change at the biceps and labral anchors and degenerative change at the AC joint with subchondral cystic edema. *Id*. NP Constantinides noted that Claimant's history, symptoms, exam and imaging were consistent with the following:

- *Traumatic* Complete Tear of the Rotator Cuff, Sequela
- Tendinopathy of Right Rotator Cuff
- Biceps Tendinopathy, Right
- Degenerative Superior Labral Anterior-To-Posterior (SLAP) Tear OF Right Shoulder
- Arthrosis of Right Acromioclavicular Joint

(Resp. Ex. D, p. 19) (Emphasis added).[4] Regarding treatment, NP Constantinides makes the following observations/comments:

> Radiographically, there are perhaps a few remaining fibers intact of [Claimant's] supraspinatus, however, his tear pattern is essentially full-thickness. . . . The likelihood of this doing well without surgery is low. Conservative care would be aimed at temporizing pain symptoms. This would include rest, activity modification, use of anti-inflammatories, physical therapy, and cortisone injections. Again, the patient was counseled that conservative care will not cure a nearly full-thickness intratendinous rotator cuff tear. Definitive treatment would be in the form of a right shoulder arthroscopic decompression, rotator cuff repair, and possible biceps tenodesis.

(Resp. Ex. D, p. 19).

14. Claimant expressed a desire to proceed to surgery and advised NP Constantinides that he would discuss the same with Employer. (Resp. Ex. D, p. 20).

15. Following completion of the FROI and Claimant's apparent discussion with Employer regarding his desire to proceed with surgery, Insurer, through their third party administrator, denied liability for Claimant's asserted injury by "Notice of Contest" filed March 23, 2023. (Resp. Ex. G, p. 32). Liability was denied due to Insurer's need to investigate the claim and obtain Claimant's medical records since he "sought treatment outside of w/c provider." *Id.*

16. Claimant would not see a workers' compensation doctor until May 30, 2023, when he would be evaluated by PA Michael Gottus at Concentra Medical Centers (Concentra). (Resp. Ex. E, pp. 21-26). During the May 30, 2023 appointment PA Gottus noted Claimant's chief complaint as: "The patient presents today with pt states working on excavator installing batteries injuring right shoulder in January, has already seen specialist and has imaging."[5] *Id*. at p. 21. PA Gottus' report further states, "While working overhead on heavy equipment felt dull ache in rt shoulder. d/w boss. No pop." *Id.* at p. 22. Claimant testified that lifting the batteries overhead was not the cause of the injury because you cannot lift them overhead given their weight. In reference to PA Gottus' indication that Claimant's injuries were caused while working overhead, Claimant testified, "I don't know why he put that statement in."

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[4] Based upon the content of NP Constantinides evaluation, the ALJ finds that Claimant likely has acute on chronic pathology in the right shoulder. Indeed, the ALJ is convinced that the right, essentially complete (full thickness) intratendinous supraspinatus tear is probably acute and traumatic in nature while the subscapularis tear, SLAP tear and bicipital tendon changes are degenerative in origin.

[5] The ALJ finds this documentation incomplete. Indeed, PA Gottus failed to note what Claimant presented with. Nonetheless, based upon the totality of the evidence presented, the ALJ infers that PA Gottus probably meant to indicate that Claimant presented with right shoulder pain.

17. PA Gottus referred Claimant back to Dr. Weinstein. He also imposed a 5 pound lifting and 20 pound carrying restriction with the right arm. (Resp. Ex. E, p. 24). He precluded Claimant from reaching overhead and climbing with use of the right arm. *Id.* Claimant testified that Employer did not accommodate these restrictions. Consequently, Claimant testified that his last day of work for Employer was May 26, 2023. According to Claimant, he was referred to Human Resources (HR) to apply for short-term disability (STD) benefits. Claimant testified that his claim was approved and he was paid STD benefits through September 3, 2023. Claimant testified upon termination of his STD benefits on September 3, 2023, he has had no income from any source.

18. Respondents sent Claimant to Dr. John Raschbacher for an independent medical examination (IME) on July 11, 2023. In his IME report, Dr. Raschbacher documents the following concerning the MOI: "[Claimant] was repairing a linkage on an excavator. This was in his shop. The piece he was working on was on the machine. He was standing in front of it using a sledgehammer to try to break it free or separate the sides of the linkage. This was about at his face level, and he was pounding with the sledgehammer. He had [an] acute onset of pain while doing this. He was striking the linkage to get it off the pin. The shoulder pain in the right shoulder developed acutely, and the next day he was worse, and it was aching pretty good. He was first seen for it on 1-24, and worked in the interim between the 18th and the 24th. He denies any prior or similar problem, injury, or condition of the shoulder." (Resp. Ex A, p. 2).

19. Following a medical records review and physical examination, Dr. Raschbacher opined that based upon Claimant's history, physical examination and medical record review, his "injury is likely work related in causation and should be accepted as work related and treated as such." (Resp. Ex. A, p. 3). Dr. Raschbacher specifically noted, "The mechanism of injury he described is appropriate for either or both rotator cuff tear and labral tear, and at this point the appropriate treatment is to proceed with surgical repair." *Id.*

20. Dr. Raschbacher issued an addendum to his July 11, 2023 IME report on July 25, 2023. (Resp. Ex. B, p. 12). In his addendum, Dr. Raschbacher notes that the conclusions referenced in his July 11, 2023 IME report assumed that Claimant provided an "accurate history of the mechanism of injury", noting further that if the MOI was "other than what was described" by Claimant or there were "different histories with respect to mechanism of injury, then the conclusions concerning work-relatedness may need to be withdrawn or altered. *Id.*

21. As noted, Dr. Raschbacher testified by deposition on September 14, 2023.[6] Dr. Raschbacher is board certified in family medicine but has exclusively practiced occupational medicine for the past 20 years. (Depo. Tr. Dr. Raschbacher, hereinafter Depo. Tr., p. 5, ll. 3-7). Dr. Raschbacher testified as a Level II accredited expert in occupation medicine. (Depo. Tr., p. 5, ll. 9-11; p. 6, ll. 1-5). When asked about Claimant's diagnosis, Dr. Raschbacher testified that "based on his imaging tests,

[6] Mistakenly identified as June 14, 2023 in Respondents' post-hearing position statement.

Claimant had a rotator cuff tear and a labral tear and "also some preexisting non-work related degenerative changes at the shoulder on the right." (Depo. Tr. p. 7, ll. 6-9). Regarding the supraspinatus tear specifically, Dr. Raschbacher testified that there is no reason to think that it wasn't acute. Indeed, he agreed that it should be assumed that it was an acute tear. (Depo. Tr. p. 8, ll. 21-25; p. 9, ll. 1-9).

22. Dr. Raschbacher testified that PA Johnson did not delineate an actual MOI in his January 24, 2023 report. (Depo. Tr. p. 10, ll. 1-6). When asked about his understanding of the mechanism of the injury, Dr. Raschbacher testified that during the IME, Claimant reported that he first experienced symptoms January 8, 2023,[7] while repairing an excavator's linkage in Employer's shop. *Id.* at p. 12, ll. 5-11). Dr. Raschbacher understood Claimant's report to indicate that he was not involved in bench work but rather standing in front of the machine and striking the linkage at face level in an effort to break it free with the sledge hammer. *Id*. at ll. 10-17.

23. When asked whether he believed that using a sledgehammer could have been the mechanism of the injury, Dr. Raschbacher testified that it fit with his diagnosis, noting further that "slinging a sledge at face level, arms up swinging and then the impact could have torn the rotator cuff." (Depo. Tr. p. 13, ll. 15-21).

24. Dr. Raschbacher was also asked whether he believed that changing the batteries in the excavator could have caused the injuries in question. In response, Dr. Raschbacher testified, "I wouldn't expect, generally installing or replacing batteries, that you likely tear a rotator cuff or injure the shoulder." (Depo. Tr. p. 13, ll. 1-14).

25. Dr. Raschbacher was also asked what type of response he would expect from person who experienced an acute event. He testified that he would "expect somebody to say I was doing this and my shoulder started to hurt." He also testified, "You don't stub your toe on Monday, and say, Ouch, on Wednesday. I'd expect you to report it pretty quickly." (Depo. Tr. p. 15, ll. 19-25; p. 16, ll. 1-3). The evidence presented persuades the ALJ that Claimant probably reported his symptoms to AW[Redacted] on January 18, 2023 and presented to a medical providers office within a week. Accordingly, the ALJ finds that Claimant reported his injury and sought treatment expeditiously.

26. Regarding the compensable nature of Claimant's asserted injury, Dr. Raschbacher testified:

> Well that's going to depend on you all and the ALJ. My opinion is that if he gave an accurate history and was pounding with a sledge that could account for an acute rotator cuff tear. If that history is not accurate, and he was not doing that, and didn't give us an accurate history, then I don't see any reason to consider it work-related.

[7] Based upon the totality of the competing evidence, the ALJ finds Dr. Raschbacher's reference to a symptom onset date of 1/8/2023 erroneous. Indeed, Dr. Raschbacher subsequently clarified that the actual date of injury is 1/18/2023. (Depo. Tr. p. 17, ll. 1-16).

(Depo. Tr. p. 16, ll. 4-13).[8]

27. Dr. Raschbacher testified that if the claim is determined to be compensable and Claimant remains symptomatic, sufficient time has passed such that Claimant should proceed expeditiously with the recommended surgery. (Depo. Tr. p. 19, ll. 17-23; p. 23, ll. 11-18).

CONCLUSIONS OF LAW

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

Compensability

A. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

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

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[8] Interestingly, Dr. Raschbacher had the 1/24/23, 3/8/23 and 5/30/23 medical reports at his disposal during the 7/11/23 IME but chose not to raise alarm about the asserted differences between the MOIs raised in those reports and the MOI Claimant reported during his 7/11/23 IME. Rather, he plainly elected to credit Claimant's verbal report regarding the MOI to find the injury "work related in causation". (Resp. Ex. A, p. 3). Based upon the evidence presented, the ALJ finds it probable that Dr. Raschbacher was contacted by Respondents or their counsel after receipt of Dr. Raschbacher's July 11, 2023 IME report at which time they probably discussed the concern Dr. Raschbacher outlined in his July 25, 2023 addendum. Nonetheless, Dr. Raschbacher did not comment further and did not "withdraw or alter" his opinion regarding causality, except to state during his testimony that it was up to the ALJ to determine Claimant's credibility.

In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Conversely, the "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). In this case, Respondents contend that Claimant failed to establish that he suffered a compensable injury because he "gave vague, changing, and speculative reports of the mechanism of injury when seeking medical treatment" which Respondents argue "weighs in favor of a finding that Claimant has not proven a compensable injury under the Act by a preponderance of the evidence." As support for their assertion, Respondents cite to the documented history of present illness contained in the medical records from the different providers who have evaluated Claimant. The ALJ is not persuaded.

C. The determination of whether there is a sufficient "nexus" or causal relationship between the Claimant's employment related duties and the alleged injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Based upon a totality of the evidence presented, the ALJ is persuaded that Claimant's right shoulder symptoms have their origins in his work related functions, and is sufficiently related to those functions, i.e. repair and maintenance of Employers equipment, so as to be considered part of his service to Employer. Here, Claimant testified that he has had no history of prior symptoms or treatment directed to the right shoulder and no evidence was presented to refute this testimony. Moreover, the tearing of the supraspinatus appeared "traumatic" and "acute." Accordingly, the ALJ is convinced that Claimant's symptoms and need for treatment "arose out of" his work duties on January 18, 2023 when Claimant developed pain in the shoulder while using a sledge hammer to break the linkage on an excavator his was assigned to fix. Consequently, the record evidence also supports a conclusion that Claimant's alleged injury occurred within the time and place limits of his employment and during an activity connected to his work-related functions as a mechanic for Employer, namely changing the batteries and fixing the linkage on Employer's excavator. Based upon the evidence presented, the ALJ is persuaded that the alleged injury occurred in the course and scope of Claimant's employment.

D. In support of this conclusion, the ALJ credits Claimant's testimony to find it probable that his various treating providers documented an incomplete and inaccurate history regarding the MOI in this case. Indeed, as pointed out by Dr. Raschbacher, PA Johnson's January 24, 2023 report does not delineate an actual MOI. Moreover, the ALJ finds the March 8, 2023 and May 30, 2023 reports from NP Constantinides and PA Gottus regarding Claimant's MOI vague. Claimant has no control over what aspects of the history he provided to a particular provider get documented and he seemed genuinely surprised when questioned regarding the content of those reports. In contrast to PA Johnson, NP Constantinides and PA Gottus, Dr. Raschbacher obtained a history and MOI substantially consistent to what Claimant provided at hearing, which MOI is capable, according to Dr. Raschbacher, of causing the type of injury and tearing

revealed in an MRI obtained approximately 2 weeks after the inciting event. In this case, the ALJ concludes that the totality of the evidence presented is sufficient to justify an inference that Claimant's symptoms, need for treatment and disability were caused by the activities associated with fixing the thumb linkage on Employer's excavator on or about January 18, 2023.[9] Accordingly, the ALJ is convinced that there is a sufficient nexus between Claimant's January 18, 2023 work activities and the alleged injury to establish compensability.

Claimants Entitlement to Medical Benefits

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

F. As noted, Claimant has proven that he suffered a compensable right shoulder injury. Moreover, the ALJ is convinced that the recommended surgery in this case is reasonable, necessary and related to Claimant's January 18, 2023 industrial injury. Indeed, the radiographic findings of Claimant's right rotator cuff demonstrate that Claimant's supraspinatus tear was acute and that there were "perhaps a few remaining fibers intact of the supraspinatus; however, his tear pattern is essentially full thickness". (RHE D, p. 19). NP Constantinides has opined that the "likelihood of doing well without surgery is low" and that further "conservative care will not cure a nearly full thickness intratendinous tear". *Id*. The ALJ credits Claimant's testimony regarding his persistent symptoms and notes Dr. Raschbacher's agreement that because sufficient time has passed since the incident in question, Claimant should "proceed expeditiously" with the recommended surgery if he remains symptomatic. Based upon this evidence, the ALJ persuaded that the recommended right shoulder surgery is reasonable, necessary and

[9] Based in part upon Claimant's probable report to his providers that he was injured at work while pounding with a sledge hammer in combination with his testimony that he did not engage in activities outside work likely to cause injury and the imaging which supports a conclusion that Claimant suffered an acute/traumatic, near full-thickness intratendinous supraspinatus tear which appears superimposed on other degenerative findings.

related to Claimant's January 18, 2023 injury. Accordingly, the ALJ concludes that Respondents are liable for this and all other treatment designed to cure and relieve Claimant from the ongoing effects of his January 18, 2023 industrial injury.

Claimant's Entitlement to Temporary Total Disability

G. To receive temporary disability benefits, Claimant must prove the injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1), C.R.S. 2001; *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

H. In this case, it has been determined that Claimant sustained a compensable injury to his right shoulder. The evidence also supports a finding that Claimant was returned to work in a modified capacity by Dr. Daniel Peterson following his May 30, 2023 appointment with PA Gottus. (RHE E, pp. 24-26). Claimant testified and the ancillary evidence supports a conclusion that Employer could not accommodate his physical restrictions and referred him to Human Resources (HR) to initiate the paperwork necessary to secure short-term disability benefits (STD). Claimant testified that his claim for STD benefits was approved and that his last day of work was May 26, 2023. According to Claimant, he has not returned to work and has had no income from any source since September 3, 2023.[10] Again, no contrary evidence was presented to refute Claimant's testimony.

I. Based upon the evidence presented, the ALJ is convinced that Claimant's ability to perform his regular employment as heavy mechanic was probably impaired by both a restriction of bodily function, i.e. shoulder pain from his compensable injury and the restrictions imposed on him by his authorized treating providers at Concentra. Consequently, the ALJ is convinced that Claimant has proven that he suffered a disability. Moreover, since he has had no earnings since his last STD benefits were paid and the evidence presented fails to support a finding that a triggering event has

[10] Claimant agrees that, if he is entitled to TTD benefits, Respondents would be entitled to an offset in his benefits due to his receipt of STD benefits between May 26, 2023 and September 3, 2023.

occurred by which Respondents could terminate ongoing TTD, Claimant has proven that he has suffered an actual wage loss as a direct and proximate consequence of the above referenced compensable right shoulder injury. Because the ALJ concludes that Claimant has proven that he is "disabled" and that this disability has resulted in an actual wage loss within the meaning of § 8-42-105, C.R.S., he has proven that he is entitled to TTD benefits beginning May 26, 2023 and continuing until those benefits can be terminated in accordance the provisions of the Workers' Compensation Act. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999); C.R.S. § 8-42-105(3)(a)-(d). Respondents shall be entitled to credit the amount of short-term disability benefits paid between May 26, 2023 and September 3, 2023 against TTD benefits owed.[11]

ORDER

It is therefore ordered:

1. Claimant's January 18, 2023 right shoulder claim is compensable.

2. Respondents are liable for all reasonable, necessary and related medical treatment to cure and relieve Claimant of the effects of his January 18, 2023 industrial injury, including the recommended right shoulder surgery. All medical expenses shall be paid pursuant to the workers' compensation medical benefits fee schedule.

3. Respondents shall pay TTD in accordance with C.R.S. § 8-42-103(1)(b), for the period beginning May 26, 2023 and ongoing, subject to any applicable offsets, at a rate of sixty-six and two-thirds percent of Claimant's average weekly wage (AWW), until such benefits can be properly terminated by operation of law.

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

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

Dated: December 12, 2023.

/s/ Richard M. Lamphere

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

[11] At hearing, the issue regarding the amount of Claimant's average weekly wage and the amounts to be paid in TTD was reserved pending the ALJs determination regarding the compensable nature of Claimant's right shoulder injury.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-223-042-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that an L4-5 microdiscectomy performed by Adam Hebb, M.D., was reasonable and necessary to cure or relieve the effects of Claimant's June 5, 2021 work injury.

FINDINGS OF FACT

1. Claimant is a firefighter employed by Respondent who sustained an admitted injury on June 5, 2021. Claimant sustained an injury to her lower back while participating in a work-related training exercise.

2. Claimant has a history of back issues dating to November 2016, when she sustained an injury lifting weights. (Ex. 7). Following the November 2016 injury, Claimant was diagnosed with lumbar radiculopathy and lumbar spondylosis. (Ex. 9). An MRI performed on July 18, 2017 mild to moderate lumbar spine degeneration, with a an moderate L4-5 broad-based central disc protrusion, with moderate bilateral neuroforaminal and lateral recess narrowing. (Ex. 8).

3. Claimant received physical therapy through Cascade Physical Therapy on a regular basis through May 2021. In the year before June 5, 2021, Claimant attended nine physical therapy visits. Claimant's physical therapy records from 2017 through 2021 document that Claimant experienced pain and stiffness in her lower back aggravated by sitting, lifting, and bending. Claimant's records document Claimant being active in weight training, CrossFit, skiing, and physical work as a firefighter.

4. Claimant reported the June 5, 2021 incident to Employer on the day it occurred. Claimant described the incident as follows "We were practicing victim removal. I wrapped my arms around a victim around his middle to lift him up [and] felt a harp pain in the lower-middle of my back. I felt dizzy, I let him back down and told my supervisor. I did not pass out." (Ex. 11). At hearing, Claimant testified that the "victim" she lifted in the training exercise was a 180-pound co-worker, and that she immediately felt pain in her lower back at her belt line. Claimant further testified that she had not experienced similar pain in the past.

5. Following the injury, Claimant reported the incident to her supervisor, and contacted a nurse via Employer's "OUCH Line." Claimant testified, credibly, that she was advised to wait a couple of days to see if her condition improved, and then to seek help if it did not. On June 8, 2021, Claimant returned to Cascade Physical Therapy for treatment for her injury, and treated solely with Cascade until April 2022.

6. On April 8, 2022, Claimant filed a second report of injury for her June 5, 2021 injury. Claimant reported that she was still having lower back pain and glute numbness, and that

her back was continually aggravated by her work duties. Claimant was advised by the OUCH Line nurse to seek treatment with a physician.

7. On April 11, 2022, Claimant saw Elizabeth Esty, M.D., and Douglas C. Scott, M.D., at Denver Health. Claimant reported that her symptoms had not improved with physical therapy, and that she was experiencing occasional anterior left thigh numbness, and symptoms in her left gluteal area. Dr. Esty reviewed Claimant's November 2016 MRI report. Based on her examination and review of records, Dr. Esty opined that Claimant's problem was a work-related exacerbation of her pre-existing condition, and ordered a new lumbar MRI. (Ex. 15).

8. The lumbar MRI was performed on April 15, 2022, and showed at L4-5, "Desiccation of the disc with a broad-based central/left subarticular disc protrusion with mild to moderate bilateral facet arthrosis. There is moderate spinal stenosis with compression of the descending left L5 nerve and contact of the descending right L5 nerve within the subarticular recess. Mild to moderate left and mild right foraminal stenosis." (Ex. 16).

9. Claimant returned to Denver health on April 18, 2022, and saw Dr. Scott. Dr. Scott reviewed the MRI and noted that it showed possible irritation of the left L5 and S1 nerve roots, and referred Claimant to a physical medicine and rehabilitation physician and for EMG/NCV testing. (Ex. 16).

10. On May 6, 2022, Claimant saw Samuel Chan, M.D., on referral from Dr. Scott. An EMG/NCV test he performed was normal. On June 9, 2022, Dr. Chan performed a left L5S1 transforaminal epidural steroid injection (TESI), which Claimant later reported provided no benefit. (Ex. 18, 19 & 20). On July 14, 2022, Dr. Chan referred Claimant for an orthopedic surgery evaluation. (Ex. 21).

11. On August 23, 2022, Claimant saw Maria Kaplan, PA, physician assistant for Stephen Pehler, M.D., at Orthopedic Consultants of Colorado. Based on Claimant's MRI, and lack of response to conservative treatment, Ms. Kaplan recommended Claimant undergo a bilateral L4-5 microdiscectomy. (Ex. 22).

12. After consultation with Dr. Scott, Claimant sought a second opinion regarding spine surgery from David Wong, M.D., on September 19, 2022. Dr. Wong offered Claimant additional potential treatment options, including continued conservative therapy and injections. Dr. Wong opined that Claimant was not an ideal candidate for fusion surgery, but did not address performance of a microdiscectomy. (Ex. 25).

13. Claimant consulted with Dr. Pehler on October 21, 2022. Dr. Pehler recommended Claimant undergo a bilateral L4-5 microdiscectomy and decompression surgery. (Ex. 26). On October 24, 2021, Dr. Scott agreed with Dr. Pehler's recommendation for surgery.

14. On November 9, 2022, Claimant underwent an independent medical examination (IME) with Lawrence Lesnak, D.O., at Respondent's request. (Ex. E). Dr. Lesnak testified at hearing and was admitted as an expert in occupational medicine. Based on his review of records and examination of Claimant, Dr. Lesnak opined that Claimant sustained a

work-related lumbosacral sprain/strain. He further opined that Claimant did not require any further medical care for her work-related injury, and that Claimant had reached maximum medical improvement (MMI), and that she was not a surgical candidate. (Ex. E).

15. Dr. Lesnak opined that Claimant's April 2022 MRI showed "similar if not the exact findings" as her July 2017 MRI, that "**appeared to be completely unrelated to her 06/05/2021 reported occupational incident**." (Emphasis original). (Ex. E). The ALJ notes that Dr. Lesnak did not review the 2017 MRI film, and his opinion relies on the radiologist report for the 2017 MRI. Contrary to Dr. Lesnak's testimony, the July 2017 does not document "similar if not the exact same findings." For example, the July 2017 MRI report does not document compression of the left L4-5 nerve root, nor does it document a left-sided disc protrusion, both of which are shown on the April 2022 MRI. Dr. Lesnak's testimony on this issue is not credible or persuasive. Similarly, his opinion that Claimant sustained only a soft tissue injury, and that she was not a surgical candidate is neither credible nor persuasive.

16. On December 5, 2022, Dr. Scott responded to correspondence from Respondent which requested that Dr. Scott review Dr. Lesnak's report, and comment on whether he agreed Claimant had reached MMI. Dr. Scott responded "NO" and wrote "I recommended that she proceed [with] recommended lumbar spine surgery, but apparently not authorized by insurance carrier." (Ex. 29).

17. Claimant returned to Dr. Scott on March 20, 2023, reporting that her back conditioned seemed worse. He noted that the request for surgery was denied by Respondent, and that Claimant continued to receive physical therapy for which she paid out of pocket. He referred Claimant for additional physical therapy, and back to Dr. Chan for a repeat ESI. (Ex. 31).

18. On April 5, 2023, the parties entered into a stipulation noting that Claimant's request for surgery had been denied, but stipulating that Claimant could proceed with the recommended surgery through her private health insurance – [Redacted, hereinafter KR], and that if the procedure was found reasonable, necessary and related to her work injury, Respondent would waive any defense related to authorization of the care or provider under WCRP 16. (Ex. 21).

19. On April 6, 2023, Claimant had another lumbar MRI, which showed at L4-5: "Disc desiccation. There is a focal disc herniation/extrusion located at the left central zone measuring 4 mm. Disc herniation contacts and posteriorly displaces the descending left S1 nerve root and contacts the medial margin of the exiting left L5 nerve root." (Ex. 32).

20. On April 14, 2023, Claimant returned to Dr. Chan for a new EMG study. Dr. Chan noted that she had MRI findings impingement on the L5 and S1 nerve roots, which could be a pain generator, and clinical findings consistent with left L5 and S1 radiculitis. However, Claimant's EMG was normal. He offered Claimant an additional ESI injection, which Claimant did not pursue. (Ex. 33).

21. On May 10, 2023, Claimant saw Adam Hebb, M.D., a neurosurgeon at Kaiser Permanente regarding surgery. Dr. Hebb recommended a left L4-5 hemilaminectomy and microdiscectomy, and scheduled the Claimant for surgery, which was performed on June 8, 2023. (Ex. 35 and 38). Approximately two months following surgery, on August 16, 2023, Claimant saw Dr. Hebb and reported that her back pain had resolved, she reported that she continued to have left calf pain in an L5 distribution, but that it was improved compared to before surgery. (Ex. 44).

22. On July 25 and 27, 2023, Claimant underwent an IME with L. Barton Goldman, M.D., at Claimant's request. Dr. Barton opined that Claimant's MRIs demonstrated "clear evidence of a significant change in the patient's underlying anatomy between 2017 and April 15, 2022 that is quite consistent with the change of her symptom presentation to more left lower extremity referred pain within 2 weeks of the June 5, 2021 work-related injury." He opined that as a result of Claimant's work injury, she sustained an aggravation of a pre-existing chronic lumbosacral strain and L4-5 disc protrusion leading to L4-5 disc herniation and extrusion. He opined that the Claimant's L4-5 surgery was work-related, stating "it is highly medically probable that were it not for the patient's work-related injury of June 5, 2021 that she would not have required the surgery she underwent on June 8, 2023. " The ALJ finds Dr. Goldman's opinion credible and persuasive.

23. On September 18, 2023, Dr. Lesnak issued an addendum report to his previous IME report, in which he reiterated his prior opinions, stating "There is absolutely no medical evidence to support that [Claimant] required any type of lumbar spine surgical procedures whatsoever as it would in any way pertain to her 06/05/21 occupational incident claim." (Ex. D). Dr. Lesnak's opinions are contrary to the opinions of Drs. Scott, Pehler, Hebb, and Goldman, and are not persuasive.

24. At hearing, Claimant testified that her position as a firefighter is a physically demanding job which she was able to perform prior to June 5, 2021 without difficulty. After her June 5, 2021 injury, Claimant continued to work, self-limited her work, due to difficulty performing certain tasks. Although Claimant did not have formal work restrictions, she testified that she received assistance from coworkers in performing heavy lifting tasks, and that her lieutenant was aware of her injuries and limitations.

25. Claimant testified that the June 5, 2021 incident caused significant pain in a single spot in her back that she had not previously experienced. She acknowledged that she had received treatment at Cascade for the same area of her lower back, but that the June 5, 2021 injury felt very different. Claimant testified that her back continued to worsen over time, and she was experiencing pain into her leg, calf and toes, and had pins and needles sensation in her left leg. She testified that these symptoms were different than those she previously experienced. Before the June 5, 2021 injury, she had not been referred to a surgeon nor had surgery been recommended. She credibly testified that the June 8, 2023 surgery resolved her back pain and most of her radicular symptoms. She indicated she has no foot numbness and occasional nerve pain in the left calf, which is decreasing. Claimant returned to work full time and full duty in October 2023. She testified that she no longer requires assistance in the performance of her job. Claimant's testimony was consistent and credible.

CONCLUSIONS OF LAW

Generally

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

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

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals*

Office, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).” *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant’s request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009)

Claimant has established by a preponderance of the evidence that the June 9, 2023 surgery was reasonable and necessary to cure or relieve the effects of her June 5, 2021 industrial injury. The credible evidence demonstrates that while Claimant had a preexisting back condition, that condition was aggravated and worsened by the June 5, 2021 work-injury. The ALJ credits the opinions of Drs. Scott, Pehler, Hebb, and Goldman that Claimant was an appropriate surgical candidate. The ALJ also credits Dr. Goldman’s opinion that but for Claimant’s June 5, 2021 work injury, she would not have required surgery. Claimant’s April 2022 MRI shows anatomical changes in the Claimant’s back that did not exist on the July 2017 MRI, including a left-sided disc protrusion and compression of the left L4-5 nerve, conditions addressed by Dr. Hebb in surgery.

ORDER

It is therefore ordered that:

1. The June 9, 2023 surgery performed by Dr. Hebb was reasonable and necessary to cure or relieve the effects of Claimant’s June 5, 2021 industrial injury.

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

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

review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 12, 2023

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a work-related injury on December 1, 2021.

    a. If Claimant established a compensable injury occurring on December 1, 2021, whether Claimant establish by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment to cure or relieve the effects of that injury.

    b. If Claimant established a compensable injury occurring on December 1, 2021, whether Claimant established by a preponderance of the evidence an entitlement to temporary disability benefits related to that injury.

2. Whether Claimant established by a preponderance of the evidence that he sustained a work-related injury on June 13, 2022.

    a. If Claimant established a compensable injury occurring on June 13, 2022, whether Claimant establish by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment to cure or relieve the effects of that injury.

    b. If Claimant established a compensable injury occurring on June 13, 2022, whether Claimant established by a preponderance of the evidence an entitlement to temporary disability benefits related to that injury.

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage is $789.90.

FINDINGS OF FACT

1. Claimant began working for Employer on October 6, 2021, as a food services technician at [Redacted, hereinafter PV] Hospital. Claimant's duties included preparing food, setting up and breaking down his station, cleaning, stocking, and various other duties.

2. Claimant testified that on November 30 or December 1, 2021, he was taking out trash when a co-worker asked him to lift a box of potatoes. Claimant testified that he felt a "slight pop" in his stomach. He then went to the restroom, lifted his shirt, and noticed a small ½ inch bulge above his navel. Claimant testified that the bulge was not painful, and that he did not inform Employer of the incident on that date.

3. On December 1, 2021, Claimant had a telephone consultation with Heather Schnorr, FNP the UCHealth Family Medicine Center for medication refills for an unrelated condition. Ms. Schnorr documented that Claimant had "some concerns for a hernia – Reports having a lean 6 pack and has tissue that pops through and he is able to push it in. Not painful." The medical record does not document any work-related activity causing the condition. Claimant was advised to follow up with his primary care provider. (Ex. U). Claimant's testified he informed [Redacted, hereinafter SR] that the hernia occurred at work while lifting a box of potatoes.

4. Claimant's next documented medical visit was December 29, 2021, when he saw Joshua Hammond, M.D., at UCHealth Family Medicine Center. Dr. Hammond noted a new umbilical hernia, which Claimant believed resulted from lifting at work, and requested a surgical referral. Claimant reported working out frequently, and that the bulge caused discomfort. Dr. Hammond diagnosed Claimant with an umbilical hernia without obstruction or gangrene, and referred Claimant to general surgery to discuss treatment options. (Ex. V).

5. Claimant's returned to Dr. Hammond on January 26, 2022, noting that he had not yet scheduled hernia surgery. (Ex. X). Claimant had additional visits with Dr. Hammond on February 16, 2022, and March 23, 2022, during which his hernia was not addressed, other than listing the diagnosis of umbilical hernia. (Ex. Y, Z, AA).

6. On April 6, 2022, Claimant saw John Hunter, M.D., at UCHealth for further evaluation of the umbilical hernia. Claimant reported noticing a small bump over the umbilicus for a few months, which he characterized as bothersome, but not severely painful. Dr. Hunter noted there was "No inciting event or injury. He works at PH[Redacted] in Food services but does not have to do a lot of strenuous lifting or anything there." Based on his evaluation, Dr. Hunter recommended a laparoscopic hernia repair, with mesh. (Ex. BB).

7. On June 9, 2022, Claimant underwent surgery for repair of the umbilical hernia. (See Ex. FF).

8. Claimant returned to work on June 13, 2022, working in the kitchen for Employer. As part of his job duties, Claimant moved a large bin full of ice from a rolling cart onto a counter when he felt a pull, and pain in his stomach. Claimant testified he informed his supervisor, and went to the emergency room.

9. On June 13, 2022, Claimant went to the UCHealth emergency department at Poudre Valley Hospital, reporting that he was moving ice that morning when he felt a "tear" in his abdomen. On examination, it was noted that Claimant's surgical incisions were intact, and that there was no swelling, bruising, or recurrence of the hernia. Claimant reported mild pain to palpation, but no other significant symptoms. Upon discharge, Claimant's symptoms had improved. Claimant had a previously scheduled appointment with Dr. Hunter for that day, and was instructed to keep the appointment. (Ex. F).

10. On June 13, 2022, saw Dr. Hunter, reporting experiencing increased pain after lifting a tray of ice at work. On examination, Dr. Hunter noted that Claimant's surgical incisions were intact, and that Claimant was mildly tender at the incision, but no other significant symptoms. Dr. Hunter advised Claimant to avoid strenuous activity or lifting more than 20 pounds for two to three weeks from the date of surgery. (Ex. EE). Dr. Hunter authored a June 13, 2022 letter advising that Claimant was unable to participate in sports or perform strenuous activities from June 9, 2022 through July 3, 2022. He indicated Claimant could return to work at full duty effective July 4, 2022. (Ex. FF)

11. On June 17, 2022, Claimant saw Kevin O'Toole, D.O., at the UCHealth occupational medicine clinic. Claimant reported on his intake form that his injury occurred on December 29, 2021, while "lifting 50-pound boxes of potatoes for coworkers." Claimant reported to Dr. O'Toole that the initial hernia was not bad, and he waited to have surgery until his symptoms worsened. Claimant reported to Dr. O'Toole that after surgery, he was assigned temporary lifting restrictions of no more than 20 pounds, and returned to work on June 13, 2022. He reported that he was "assigned to move an ice cart" and felt a "tear" in his left abdomen. On examination, Dr. O'Toole noted no palpable defect, no swelling, bulging or pain complaint with Valsalva maneuver. Dr. O'Toole's assessment was that Claimant's hernia was not probably work-related, and that there was no evidence of worsening following the June 13, 2022 work incident, and opined that "it is not medically probable that [Claimant was] seeking treatment for a work-related disease." He placed Claimant at maximum medical improvement and recommended no maintenance care or permanent impairment rating. (Ex. HH).

12. On June 22, 2022, Respondents filed a Notice of Contest, indicating that Claimant's injury was not work-related. (Ex. A).

13. On June 28, 2022, Claimant returned to Dr. Hunter's office for a post-surgical wound check with Allison Kennedy, RN. Ms. Kennedy noted that Claimant's incisions were well healed, without signs of swelling, or infection, and that Claimant did not need medication for pain. Claimant requested to return to work on July 4, 2022. (Ex. II).

14. Claimant returned to Dr. Hammond on July 20, 2022, August 17, 2022, and March 1, 2022, for unrelated medical problems. During these visits, claimant did not report issues with the hernia. (Ex. LL, MM, & NN).

15. On May 31, 2023, Claimant saw Dr. Hammond, and reported that bulging above the hernia repair site while doing sit-ups. (Ex. OO). Claimant did not report additional symptoms after May 31, 2023.

16. Claimant testified that, on December 29, 2021, he informed his manager of food services, [Redacted, hereinafter WA], that he was diagnosed with an umbilical hernia, but did not complete any written report. After being diagnosed with the hernia on December 29, 2021, Claimant continued with his normal job activities. Claimant testified that he did not receive any treatment for the hernia between December 2021 and April 2022, because it was not painful, and did not interfere with his personal or job activities.

17. Claimant testified he returned to work after his June 9, 2022 surgery because he believed he would be doing cashier work, and would not be lifting more than ten pounds. Claimant testified that prior to his surgery, he spoke with supervisor, [Redacted, hereinafter SS], and WA[Redacted], and informed them he would be having hernia surgery. Claimant testified that he had submitted a written request for time off for surgery. Claimant testified that his post-surgery restrictions included no lifting of more than 10 to 20 pounds, and that he understood he would be training as a cashier following surgery.

18. After the June 13, 2022 incident, Claimant did not return to work until July 4, 2022. Claimant testified that after returning to work in July 2022, he did not have any further problems with his hernia, although the surgical scars remain. Claimant has since moved to a different job for Employer working with patient transport, which he described as extremely physical.

19. SS[Redacted] testified at hearing that she works with Claimant as a "team lead" and that she often worked with Claimant when he was worked as a food services technician. She testified that Claimant did not tell her he had sustained a work-related hernia in December 2021, and she learned about the hernia a few weeks before Claimant's surgery in June 2022. She indicated Claimant requested two days off work for his surgery, and he did not tell her it was work-related. SS[Redacted] testified she was not aware of any restrictions placed on Claimant when he returned to work on June 13, 2022. Claimant only worked a couple of hours before he had to leave due to pain. SS[Redacted] testified that if she was aware of any restrictions, she would not have allowed Claimant to lift ice on June 13, 2022.

20. WA[Redacted] was the manager of food services during the times relevant to the issues in this case. WA[Redacted] testified that Claimant did not discuss a hernia with him in December 2021, and he first learned Claimant had sustained a hernia when Claimant submitted a vacation request approximately two to three weeks before Claimant's June 2022 surgery. WA[Redacted] did not recall Claimant telling him how the hernia occurred, or that it was work-related. WA[Redacted] testified that he was not aware of any specific work restrictions after Claimant's surgery, and if he was aware of restrictions he would have assigned Claimant job duties that did not require heavy lifting, such as making pizzas or sandwiches.

21. [Redacted, hereinafter KB], an investigative claims unit adjuster for Insurer testified at hearing. KB[Redacted] testified she became aware that Claimant was asserting that he sustained a work-related injury on June 14 or 15, 2022. She spoke with Claimant on June 16, 2022, and he informed her he had already scheduled an appointment with Dr. O'Toole for the following day. KB[Redacted] testified that Dr. O'Toole is an authorized treating physician, from Insurer's perspective. She testified that Insurer did not authorize treatment with Dr. Hammond or Dr. Hunter.

22. Respondents submitted Dr. O'Toole's post-hearing deposition in lieu of live testimony. Dr. O'Toole was admitted as an expert in occupational medicine, and testified he did not see evidence that Claimant sustained a re-herniation at his June 17, 2022 examination. He further testified that umbilical hernias may occur spontaneously without

an inciting event, and that the most common cause is a congenital weakness in the abdominal musculature. He testified that the June 13, 2022 incident did not lead to a substantial or permanent aggravation of Claimant's hernia, and that there was no need for additional treatment due to the June 13, 2022 incident. Dr. O'Toole's testimony on these issues was credible.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

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

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa Cty. Valley Sch. Dist. #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

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

Claimant has failed to establish that he sustained a compensable injury arising out of the course of his employment with Employer on either November 30, 2021, December 1, 2021, or June 13, 2022. Claimant's assertion that he sustained an injury on November 30, 2021 or December 1, 2021 while working for Employer is not supported by credible evidence. Although Claimant did report to SR[Redacted] a bulge in his abdomen on December 1, 2021, the record does not reference any cause of the event, or that the hernia was a recent occurrence. The ALJ does not find it credible that Claimant reported the injury as occurring at work while lifting a box of potatoes, or that SR[Redacted] would have failed to document such a report

When Claimant saw Dr. Hammond on December 29, 2021, it was documented that Claimant thought the hernia resulted from lifting at work, however, no specifics of how the incident occurred were documented. Claimant saw Dr. Hunter on April 6, 2022, it was documented that there was "no inciting event or injury." Claimant's first documented report of sustaining and injury while lifting potatoes at work was on June 17, 2022, when he saw Dr. O'Toole. Between December 29, 2021 and June 17, 2022, Claimant had at least eight visits with health care providers for various issues (including visits with Dr. Hammond and Dr. Hunter specifically for a hernia) and did not report any specific work-related incident causing a hernia. Moreover, none of Claimant's treating medical providers have opined that Claimant's hernia was the result of work-related activities.

Although Claimant testified that on or around December 29, 2021, he informed WA[Redacted] he sustained a hernia at work, the ALJ finds more credible the testimony of WA[Redacted] and SS[Redacted] that Claimant did not report a hernia occurring at work to either of them. The ALJ concludes that Claimant has not met his burden of establishing that it is more likely than not that he sustained a hernia on or about December 1, 2021 arising out of the course of his employment with Employer.

The evidence demonstrates that Claimant did experience a "tearing" sensation while working on July 13, 2022. However, this incident did not result in any exacerbation or aggravation of Claimant's condition, beyond transient pain, and the incident itself did not necessitate Claimant's time off from work. Claimant's contention in position statements that the July 13, 2022 incident caused a tear in the mesh implanted during the June 9, 2022 surgery is not supported by the medical records. Claimant was examined by four different providers (twice on June 13, 2022, once on June 17, 2022, and once on June 28, 2022), none of these medical professionals documented disruption of the surgical sutures, or other findings indicating the surgical mesh became torn. The ALJ finds credible Dr. O'Toole's opinion that the June 13, 2022 incident did not require additional treatment, and did not cause an aggravation of Claimant's hernia. The ALJ concludes that while Claimant did experience pain at work on June 13, 2022, the incident did not aggravate or exacerbate his condition, and merely resulted in transient pain which resolved. Claimant's time off work between June 13, 2022 and July 4, 2022, was not the result of a work-injury, but was the result of his non-work-related hernia surgery. Claimant has failed to meet his burden of establishing that he sustained an injury arising out of the course of his employment with Employer on June 13, 2022.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to medical benefits.

Temporary Total Disability

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103 (1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to temporary total disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that he sustained a work-related hernia on November 30, 2021, or December 1, 2022.

2. Claimant has failed to establish that he sustained a work-related injury on June 13, 2022, or that he aggravated or exacerbated a pre-existing condition.

3. Claimant's request for medical benefits is denied.

4. Claimant's request for temporary total disability and temporary partial disability benefits is denied.

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

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

DATED: December 12, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-151-120-003

ISSUES

- Did Claimant prove [Redacted, hereinafter WM] is a statutory employer with respect to a left knee injury Claimant suffered on August 7, 2020?
- Medical benefits.
- Average weekly wage.
- Temporary Total Disability benefits.

PROCEDURAL ISSUES

During the hearing, it was learned that Claimant's actual employer, [Redacted, hereinafter CF], had an active bankruptcy case pending in the United States Bankruptcy Court for the District of Colorado, denominated Case No. [Redacted, hereinafter CA]. Pursuant to 11 U.S.C. § 362(a), filing a bankruptcy petition automatically stays the commencement or continuation of any judicial or administrative action against the debtor to recover a claim that arose before the commencement of the bankruptcy case. The ALJ agreed to receive the parties' evidence at the hearing, subject to further investigation into the status of the bankruptcy matter. At a post-hearing status conference on February 27, 2023, it was agreed that (1) the parties would forthwith file a motion for relief from the stay with the Bankruptcy Court, (2) no decision would be rendered regarding Claimant's workers' compensation claim without approval of the Bankruptcy Court, and (3) any decision will be limited to WM's[Redacted] potential liability as Claimant's statutory employer.

FINDINGS OF FACT

1. CF[Redacted] was a mushroom farm that grew, harvested, and sold mushrooms to retailers, food distributors, and restaurants.

2. Claimant worked for CF[Redacted] as a mushroom harvester.

3. On August 7, 2020, Claimant injured her left knee when she lost her balance and twisted her knee. She was diagnosed with meniscal tears and ultimately underwent arthroscopic surgery.

4. CF[Redacted] was uninsured for workers' compensation liability at the time of Claimant's injury. CF[Redacted] directly paid $5,722.00 for medical bills related to the injury, including the surgery. CF[Redacted] also paid Claimant wage continuation for an unknown period when she was off work because of the injury.

5. WM[Redacted] and CF[Redacted] executed a contract under which CF[Redacted] produced and packaged mushrooms for WM's[Redacted] "private label" brand, "[Redacted, hereinafter HS]" (hereinafter "HS[Redacted]"). The contract provides standards for products sold to WM[Redacted], including allowed ingredients, a non-GMO requirement, product sustainability requirements, nutrition analysis, and taste standards.

6. In August 2020, CF[Redacted] produced mushrooms for approximately 7 to 12 retailers and food distributors, including WM[Redacted], [Redacted, hereinafter SK], [Redacted, hereinafter FT], and several smaller companies. CF[Redacted] previously supplied mushrooms for [Redacted, hereinafter RR], although the contract ended sometime before 2020.

7. The mushrooms CF[Redacted] sold to most customers were packaged in containers identified with the CF[Redacted] company name and label. However, mushrooms sold to WM[Redacted] were packaged in containers bearing the HS[Redacted] label. Similarly, mushrooms sold to RRs[Redacted] during the pendency of its contract were labeled with RRs[Redacted] private brand name(s).

8. Claimant's supervisor instructed her to harvest certain types and sizes of mushrooms each day. Claimant had no control over the assignments and did not know which customers would be receiving the mushrooms she harvested on any given day. Claimant does not know whether the mushrooms she was harvesting at the time of the injury were intended for WM[Redacted] or any other customer of CF[Redacted].

9. CF[Redacted] shipped mushrooms to WM[Redacted] under the HS[Redacted] label on August 10 and August 13, 2020. No mushrooms were shipped on August 7, 2020.

10. There is no persuasive evidence any mushrooms Claimant was harvesting at the time of her injury were sold and shipped to WM[Redacted] under the HS[Redacted] label.

11. Claimant failed to prove WM[Redacted] is a statutory employer with respect to her injury. There is no persuasive evidence that Claimant was harvesting mushrooms for WM's[Redacted] HS[Redacted] brand when the injury occurred.

CONCLUSIONS OF LAW

Under § 8-41-401(1)(a), a company that contracts out part or all its work to any subcontractor is considered the statutory employer of the subcontractor and the subcontractor's employees. If the subcontractor is uninsured, the subcontractor's employees may reach upstream to the statutory employer for workers' compensation benefits. *Finlay v. Storage Technology Corp*., 764 P.2d 62 (Colo. 1988). The purpose of the statutory employer provision is to prevent employers from avoiding liability for workers' compensation benefits by contracting out their regular business to uninsured independent contractors. *Id*.

The test for whether an employer is a "statutory employer" is whether the work contracted out is part of the employer's regular business as defined by its total business operation. *Finlay v. Storage Technology Corp., supra*; *Humphrey v. Whole Foods Market*, 250 P.3d 706 (Colo. App. 2010). In applying this test, courts should consider elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. *Id*. The work must be "such a part of [its] regular business operation as the statutory employer ordinarily would accomplish with [its] own employees." *Snook v. Joyce Homes, Inc*., 215 P.3d 1210, 1217 (Colo. App. 2009).

As found, Claimant failed to prove WM[Redacted] is a statutory employer with respect to her injury. Even if we accepted the premise that growing, harvesting, and packaging produce is sufficiently integral to WM's[Redacted] regular business to render it a statutory employer, there is no persuasive evidence that Claimant was processing mushrooms bound for WM[Redacted] at the time of her injury.

This deficiency is fatal to the claim. Under the Act, a defining element of an individual's status as an "employee" is the performance of services "*for* another." Section 8-40-202(2)(a) (emphasis added). Although the statutory employer provision expands the pool of entities that can be deemed a claimant's "employer," there is no persuasive basis to conclude it was intended to change the definition of an "employee," or obviate the fundamental requirement that an injury arise out of services performed "for" the putative employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits from WM[Redacted] and [Redacted, hereinafter ZH] is denied and dismissed.

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

DATED: December 13, 2023

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he was entitled to reasonably necessary and related medical benefits to include a left shoulder surgery recommended by Dr. Cary Motz.

FINDINGS OF FACT

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

A. Generally

1. Claimant was employed with Employer as a truck driver and would do rounds to pick up dumpsters and barrels full of grease.

2. On September 14, 2022 he had made a stop, which was hard because he would have to push the grease barrel across the parking lot, over a drain grate and up to the truck to dump it. The tank was fairly big, and when it was completely full, it would weight about 2,500.00 lbs. The tank was on small casters or wheels and had to be manipulated to move it. He would have to push, pull and use a pry bar in order to get it to the truck, attach the chains and dump the tank's contents. Sometimes he would just pump the grease out but in this case, the tank was so far away from the truck, it was impossible to do so.

B. The Accident

3. On September 14, 2022 at approximately 3 a.m. he was pushing the tank across the parking lot, up an incline when it got stuck on a grate. He was pushing and pulling, trying to hurry up because he was previously yelled at when he made too much noise at this stop. While he was doing this, he felt pain in both shoulders. It was a sharp pain in the front of his shoulders and above the glenohumeral joint. He stated that as the day and night progressed, he had more and more pain in the shoulder. By the time he went to bed the pain was really bad.

4. Once he reached home, he googled his symptoms, which lead him to a "beer can" test, and was something he did to see if there was anything wrong with his shoulder. He extended his arms out, as if he was holding a beer can, then he turned his arm so that the can would be upside down, then push on his hand to see if there was pain, which would be indicative of an injury to the shoulder. He felt an increase in pain.

C. Claimant's Testimony

5. He reported the injury to his bilateral shoulders to his supervisor.

6. Employer did not send him to be attended for a couple of days to see how he did. He was then seen at Workwell a few days later. He was examined and provided restrictions.

7. Claimant returned to modified work, riding with a new hire to instruct him on how to perform the job. But because he was getting worse, climbing in and out of the truck and driving, he was referred to get an MRI of the bilateral shoulders. He discussed the findings with both Dr. Bates and Dr. Javernick. Dr. Javernick conveyed that had a fairly large but not complete tear of the left rotator cuff. Claimant continued physical therapy and had an injection into the left shoulder, which improved the shoulder some for a short time, but the pain returned. Dr. Javernick then recommended surgery for both the right and the left shoulders, stating that the left side tear was larger than what the MRI report indicated. The pain in the left side was always more than that of the right side despite the complete tear on the right, compared to the partial tear on the left.

8. Claimant had an earlier incident in April 2022 when he was pushing a dumpster with his left knee and it popped. He had an MRI but the knee was intact so he had therapy and was released.

9. Claimant had a subsequent incident in October 2022, where he was getting into the cab of the truck, when his right shoulder pain was so bad that the arm suddenly gave out and he slipped off the truck step, falling on his left side and injuring his left knee. His left shoulder pain also caused some slight decrease in range of motion. He was sent to Concentra for treatment and eventually to Dr. Mark Failinger.

10. Claimant continued to have pain in his left shoulder with reaching, pulling, holding onto anything, had worse pain symptoms at night, and decreased strength. He was getting sharp pains and aching in his left shoulder when carrying something heavy. He was eventually transferred to Concentra to keep all his medical appointments at one clinic. He was seen by Dr. Failinger for the left shoulder, which was when Dr. Failinger advised him of his impending retirement, transferring Claimant's care to Dr. Cary Motz.

11. He did continue the physical therapy at Concentra but that did not really show much improvement or lasting benefit.

12. Dr. Motz recommended surgery and Claimant continues wanting to proceed with the left shoulder surgery recommended.

13. Claimant had never had any injuries to his left shoulder prior to September 14, 2022, nor any medical care.

D. Medical Records

14. Claimant was first evaluated by PA-C Donald Downs of Workwell on September 19, 2022. Claimant provided him a history that was consistent with Claimant's testimony. Mr. Downs noted that it was more likely than not that Claimant's history of injury and the physical exam that Claimant's complaints were work related. Claimant was positive for joint pain, had tenderness at the bicipital groove, good strength but pain with endpoints of overhead movements, increased pain with posterior beltline lift off, with empty can test, and a positive Hawkins' test. Mr. Downs found no ecchymosis, erythema or edema, and found good strength on belly press. Claimant was referred to physical

therapy, recommended ice and heat as needed for pain and swelling, provided medications and restrictions, and was given a diagnosis of strain of the left shoulder joint.

15. Claimant started physical therapy on the same day. David Schulteis, DPT documented that Claimant had bilateral shoulder pain that was getting worse and that before this work injury on September 14, 2022, Claimant did not have prior problems with the shoulders. Claimant gave a history of mechanism of injury that was consistent with his testimony. He noted that following the injury Claimant had weakness with manual muscle testing for shoulder abduction, a positive empty can testing, decreased range of motion (ROM), weakness, limited work tolerance, and limited functional tolerance.

16. On September 21, 2022 Claimant returned with continued bilateral shoulder pain, left greater than right. Dr. Daniel Bates evaluated Claimant stating that his primary problem was dull and sharp pain located in the left shoulder. Dr. Bates noted that Claimant had pain in the anterior bicipital groove, palpable biceps tendon in the groove with moderate tenderness, with tenderness to palpation along the supraspinatus muscle belly in the subacromial and a positive empty can test. He diagnosed left shoulder joint sprain. Dr. Bates noted that Claimant's complaints were likely work related.

17. Claimant returned to see Dr. Bates on September 27, 2022. Claimant was complaining of worsening symptoms of pain and discomfort from physical therapy and working, getting in and out of the truck, including bilateral shoulder pain though he had some relief with a TENS unit and icing. He documented tenderness to palpation of the left shoulder bicipital groove, subacromial tenderness, supraspinatus muscle belly tenderness, with positive Hawkins, Neer's, empty can test, with poor strength. Dr. Bates referred Claimant for an MRI of the left shoulder and discontinued physical therapy.

18. Claimant had an MRI performed at Health Images Fort Collings on September 30, 2022. Dr. Steven Ross noted a low to moderate grade intrasubstance supraspinatus tendon tear, a low grade intrasubstance subscapularis tendon tear, and significant inflammation of the acromioclavicular joint.

19. Dr. Bates reviewed the MRIs of the bilateral shoulders on October 5, 2022. He noted a mild to moderate tearing which was partial thickness tearing of the infraspinatus. He documented that Claimant continued to worsen. On exam he noted moderate tenderness to palpation over the infraspinatus muscle belly, and at the posterior inferior shoulder. He provided work restrictions of no use of the arm over shoulder height, and no lifting, pushing or pulling over 40 lbs., only from floor to waist. He continued to diagnose left shoulder joint sprain and made a referral to an orthopedic surgeon. He stated that objective findings were consistent with the work related mechanism of injury.

20. Claimant was seen by Justin Kutz, PTA on October 18, 2022. Claimant was improving with pain tolerance but had bilateral shoulder pain frequently, especially with reaching overhead with the left arm, when he would feel a very sharp pain.

21. On October 20, 2022 Dr. Bates noted that Claimant was awaiting authorization for the right full thickness tear surgery but would proceed with steroid injection into the left shoulder. On exam of the left shoulder, he documented that Claimant showed tenderness to palpation in the subacromial space and along the supraspinatus

muscle belly as well as a positive Hawkins, positive Neel's, and positive empty can. He performed no other exam or testing.

22. Claimant started treatment with Concentra for a left ACL injury on October 24, 2022 that happened when his right arm gave out while getting into the passenger side of the cab. Claimant also provided a history of the bilateral shoulder claims and that he was awaiting surgery. Claimant fell to the ground on his left side, causing worsening symptoms of his left shoulder. The October 25, 2022 note also provided a history of Claimant's treatment related to his prior left knee injury of April 18, 2022, which resolved with treatment. Dr. Wendy Carle recommended that Claimant be seen for any aggravation to the left shoulder related to this new fall onto his left side. She noted loss of range of motion of the left shoulder but did not document any other testing.

23. Dr. Bates continued seeing Claimant and documenting the same exam findings. He performed an ultrasound guided subacromial injection on October 28, 2022. At that time he reduced Claimant's weight limit to 25 lbs. lifting, pushing and pulling floor to waist, no kneeling, crawling, squatting or climbing and not commercial driving. In follow up visits he noted that insurer had yet to authorize the surgery for the right shoulder.

24. As found, the records from Workwell fail to show that any of the providers even assessed for AC joint pain or pathology by performing an O'Brien's test (an active compression test), a shear test or an AC joint provocation tests. As found, the Workwell providers listed those tests that were negative or normal in their reports, leading this ALJ to conclude that they simply did not test the AC joint for pain or tenderness.

25. John R. Schwappach, M.D. evaluated Claimant on January 20, 2023 for a Independent Medical Examination requested by Respondents. He issued a report on February 2, 2023. This report focused more on Claimant's knee ACL rupture than the shoulder injuries, though he noted that Dr. Failinger recommended shoulder surgery take place before completing ACL reconstruction. The physical exam only documented decreased range of motion measurements and no other physical findings regarding the shoulders, though he made normal findings regarding other body parts. He opined that the ACL findings were caused by Claimant's October 24, 2022 work injury and required reconstruction surgery.

26. Dr. Matthew A. Javernick of Orthopaedic & Spine Center of the Rockies evaluated Claimant on February 1, 2023. He read the left shoulder MRI as showing a high-grade interstitial tear greater than 50% of the supraspinatus. He recorded that Claimant had left greater than right shoulder pain, had pain with overhead activity, lifting objects away from the body and at night. He noted a positive Hawkins', Neer's, empty can test, though no tenderness of the AC joint at that point in time. Dr. Javernick commented that Claimant elected to proceed with surgery on the left, including rotator cuff repair, biceps tenotomy, subacromial decompression, "and any other indicated procedures."

27. Dr. Schwappach performed a medical records review on February 6, 2023 at Respondent's request. He noted a history generally consistent with Claimant's testimony. He reviewed the records from Workwell noting Claimant's ROM deficits of the left shoulder. He noted that the left shoulder MRI scan demonstrated a low grade intrasubstance tear of the supraspinatus tendon and subscapularis tendons. He opined

that it was most consistent with a rotator cuff strain as there was no full thickness rotator cuff tear or labral pathology detected in the left shoulder. He also noted the acromioclavicular inflammation. He stated that Claimant sustained an acute exacerbation to the right shoulder pathology and left shoulder rotator cuff strain, which was conservatively treated and that Claimant had reached maximum medical improvement (MMI) by October 20, 2022.

28. On March 15, 2023 Dr. Javernick's office finally reached the correct adjuster and noted a request for surgery would be faxed.

29. Claimant was evaluated by Mark Failinger on March 16, 2023 on his multiple issues including the left knee ACL, and the bilateral shoulder rotator cuff pathology. Claimant reported of the three body parts that the left shoulder was the worst and requested that the surgery for the left shoulder take place before the ACL reconstruction. He noted bilateral shoulder pain and left knee pain. Dr. Failinger noted that, while Claimant believed the adjuster was making arrangement for all three conditions be treated at Concentra, Dr. Failinger had no authority to proceed with assessment and treatment of the shoulder conditions. Dr. Failinger noted that, since he would be retiring that he would refer Claimant to Dr. Motz for further care.

30. Cary Motz, M.D., an orthopedic surgeon, issued a report on March 21, 2023 detailing Claimant's history of injuries beginning with the April 18, 2022 left knee injury which resolved with treatment, the bilateral shoulder injuries of September 14, 2022 and the subsequent left knee injury of October 24, 2022. At that time, Claimant was complaining of moderate left shoulder pain with pain at night, pain with overhead use and pain about the superior aspect of the shoulder. The right shoulder had moderate discomfort with use, pain with overhead use, and some pain at night. The left knee had occasional swelling and feelings of instability. On exam of the left shoulder he indicated that Claimant had moderate AC joint tenderness with positive cross-arm adduction test, mild limitation of motion with positive impingement Hawkins test and tenderness over the biceps tendon. He commented that the MRI showed partial thickness intrasubstance supraspinatus tear and significant edema in the distal clavicle at the AC joint with degenerative changes.

31. Dr. Motz opined that the September 14, 2022 work injury was the cause of Claimant's left shoulder pain and AC joint pain, showing signs of impingement. He noted that the subacromial steroid injection did not give much improvement. He recommended a steroid AC joint injection to determine if it provided diagnostic and therapeutic effects and that it was necessary to retain and/or regain further bodily function and return to pre-injury functionality, which was performed on that day, and also referred Claimant to further physical therapy for the left shoulder. Dr. Motz stated that, following the injection, if Claimant continued to have persistent issues, that he would be evaluated for rotator cuff surgical intervention and repair. He recommend that they repair the rotator cuff as the first procedure and then address Claimant's knee, but if they were going to be significantly delayed due to denial of prior authorization with the right shoulder, or for that matter the left shoulder, that Claimant required surgical intervention and that Dr. Motz would proceed with the ACL reconstruction in the interim.

32. Jeffrey Wallace, PA-C, attended Claimant on a telehealth visit. He assessed Claimant with a left AC sprain on March 24, 2023 and ordered physical therapy for the shoulders. He noted that the cases were being combined. As found, this is the point in time that Claimant fully transferred to Concentra for the left shoulder injury. PA Wallace also referred Claimant to Dr. Motz for the left shoulder.

33. Dr. Motz documented on April 5, 2023 that the injection gave Claimant good relief for a few days but his symptoms returned. He noted that surgery for the left ACL reconstructions was approved but both the left shoulder and right shoulder surgeries had been denied. Claimant continued to report that the left shoulder was the most painful of his injuries. On exam he noted AC joint tenderness of the left shoulder, positive cross arm adduction test, and mild limitation of motion. He also remarked that Claimant had signs of impingement and partial tearing of the rotator cuff and that the AC joint injection was diagnostic. He discussed an arthroscopy with debridement, decompression, and distal clavicle excision, which should significantly improve Claimant's symptoms in left shoulder and should be a fairly quick recovery

34. Dr. Schwappach issued a third report on April 5, 2023. He noted that the records reviewed were unable to demonstrate a surgical lesion of Claimant's left shoulder, and again opined that Claimant only sustained a left shoulder strain of the rotator cuff.

35. Mr. Wallace evaluated Claimant on April 10, 2023 and noted no issues with his shoulders and did not distinguish between the shoulders on exam, though he stated that Claimant had not progressed with either steroids or physical therapy and that Claimant was awaiting surgery. This report and subsequent reports from this provider were neither credible nor persuasive as the reports focused primarily on the lower extremity injury and repeated the exact same findings multiple times, causing this ALJ to believe that they were copied and pasted. He noted that objective findings were consistent with the work related mechanism of injury.

36. On April 24, 2023 Mr. Wallace ordered further PT for the left AC joint sprain and sequelae and provided work restrictions of less than light duty work.

37. Claimant's next visit, on May 30, 2023, was with Dr. Carle who noted that Claimant had limited range of motion of the left shoulder, with an 8/10 pain and symptoms worse at night, with joint pain, swelling and stiffness, and was still awaiting approval of left shoulder surgery. She found tenderness in the AC joint, in the superior shoulder and in the posterior shoulder, with abnormal ROM with pain (estimates) with forward flexion and abduction. The last report from Concentra still had a restriction of no driving commercial vehicles.

38. Physical therapy records for treatment of the left knee indicated that the Claimant recovered from the April 18, 2022 left knee injury after injections and 9 PT visits. There was little mention of the shoulder injury before March 30, 2023 other than to state Claimant was holding the knee surgery until after his shoulder surgery. Claimant was eventually transferred to a home exercise program for the knee. PT restarted on March 30, 2023 with assessment of the bilateral shoulders when care for the shoulders was transferred from Workwell to Concentra. Mr. Caymen Menard noted that they "[i]ntroduced ROM for B shoulders, light RTC activation/strengthening as well. Pt has ROM and strength deficits to be expected with ongoing B RTC injuries. Added B shoulder

goals to reflect pivot from knee to shoulders here in therapy." Mr. Menard found abnormal range of motion and worked with Claimant to improve motion.

39. On May 2, 2023 Mr. Menard noted that they would be stopping pre surgery PT for the shoulders as Claimant was to have knee surgery the following week. He noted that they would restart after the surgery. When Claimant restarted PT on May 31, 2023, it was only for the left knee. Mr. Menard documented that Claimant was having worsening shoulder symptoms as a result of using crutches following surgery. At that point, Claimant was only allowed to do toe touch weight bearing. Once he was allowed to discontinue the crutches, his shoulders started to improve again.

40. Claimant followed up with PA Wallace on June 13, 2023. He noted Claimant had tenderness in the AC joint and had a positive painful arc when performing rotator cuff test. He noted that Claimant was awaiting authorization for left shoulder surgery under Dr. Motz and that objective findings were consistent with the work related mechanism of injury.

E. Dr. Motz's Testimony

41. Cary Motz, M.D. testified, on behalf of Claimant, as a board certified expert in orthopedic sports medicine as well as a Level II accredited physician. He first evaluated Claimant on March 23, 2023. He took a history and reviewed the medical records, including the MRI images and reports of the left shoulder. He noted that the images showed an inflamed acromioclavicular joint with some mild arthritis, and a moderate partial thickness rotator cuff tear. He disagreed with the radiologist that the tear was low grade. In fact he agreed with Dr. Javernick, the other orthopedic surgeon, that Claimant had a high grade interstitial tear of the rotator cuff that appeared to be greater than fifty percent thickness as well as a low grade subscapularis tear. He did not have the prior surgeon's report though, when he reviewed the records originally. Dr. Motz opined that there was inflammation due to the trauma to the September 14, 2022 left shoulder injury and not some arthritic inflammatory process. He stated that the lack of prior problems with his shoulders indicated it was more likely to be traumatic in nature. He opined that it was more likely than not that the partial thickness left rotator cuff tear was related to the traumatic injury of September 14, 2022. He also opined that the symptoms caused by the partial thickness tear were consistent with the reported mechanism of injury.

42. On exam he noted that Claimant had signs of impingement syndrome and had pain in the AC joint and some weakness. Claimant had a positive cross-arm adduction test which indicated pain in the AC joint and was positive. Claimant also had positive impingement, and Hawkins signs showing that Claimant had either bursitis or symptomatic rotator cuff pathology. Dr. Motz also explained that an empty can test was also indicative of rotator cuff pathology or impingement. A positive Neer's test can also indicate rotator cuff pathology or impingement. These are all objective test performed by providers and he expected Claimant's tests to be positive given his MRI findings, with the impingement, Hawkins and empty can test confirming the partial thickness tear and the AC joint pain and crossed arm adduction test correlating to the AC joint pathology. He did discuss that Claimant only had mild loss of range of motion (ROM) of the shoulder though he had pain with ROM.

43. Following his exam, Dr. Motz recommended arthroscopy with a decompression and extensive debridement and an AC joint resection/distal clavicle excision and possible rotator cuff repair, upon evaluating the cuff during surgery to assess the cuff's condition. Further, because both the subacromial steroid injection and the AC joint steroid injection gave similar response, he opined that it was difficult to say whether the majority of the pathology and symptoms are coming from the rotator cuff or the AC joint. He stated he would be unable to say definitely until he could see the cuff first hand.

44. Dr. Motz stated that the purpose of the surgery would be to debride the bursitis, remove a section of the distal clavicle to decompress the AC joint, and evaluate the rotator cuff to see if it required repair. He opined that the left shoulder surgery was reasonable and necessary to proceed with since Claimant had been through over a year of conservative treatment, including more than one injection and extensive physical therapy, and Claimant met all the criteria for proceeding with surgery under the Medical Treatment Guidelines for the shoulder as well as it being necessary to alleviate his left shoulder pain.

45. Dr. Motz did both Claimant's left knee surgery in May 2023 and his right shoulder surgery in August 2023 and noted that Claimant had done really well from both surgeries. Dr. Motz expected the same from the left shoulder surgery.

46. He opined that Claimant had not reached MMI for the left shoulder injury because he needed the left shoulder surgery in order to reach MMI. He opined that the surgery was needed to address the September 14, 2022 work related injuries and trauma to the left shoulder. He opined that the small amount of arthritis in the AC joint was aggravated with the injury and that they had not been able to calm that down with "the injection and physical therapy and anti-inflammatories and topical treatments and all the other things" or treatments.

47. Dr. Motz opined that absent any other mechanisms, events, or history or injuries to the left shoulder, Claimant sustained a left shoulder injury on September 14th, 2022, and that the findings on the MRI of September 30, 2022 were causally related to the September 14, 2022. He explained that it was clear that the AC joint was inflamed, but there was also a moderate small partial thickness rotator cuff tear. He opined that the inflammation found in the AC joint was due to trauma. He also opined that the partial thickness tear was also more likely than not due to the traumatic work injury. He based his opinion, at least partially, on the fact that Claimant had no prior history of left shoulder problems, and had a mechanism injury sufficient enough to cause tears in the rotator cuffs.

48. He noted that the same analysis for causation that Dr. Schwappach used with regard to Claimant's knee injury would apply to Claimant's left shoulder. Specifically that in an otherwise health forty one year old with good left shoulder motion and no other contraindicated pathology, Claimant should have left shoulder surgery as recommended. Dr. Motz also stated that Dr. Schwappach failed to perform essential tests in order to render an opinion regarding the left shoulder including provocative maneuvers, empty can test, adduction, positive beltline, Neer's or Hawkins as he did not document those measurements. He further vehemently disagreed with Dr. Schwappach's opinion that Claimant's ongoing problems were not caused by the September 14, 2022 accident.

49. Dr. Motz was not suggesting or recommending a biceps tenotomy as recommended by Dr. Javernick. He opined that the Claimant's pain generator is a combination of the partial thickness tear and the AC joint inflammation. He stated that the MRI which took place two weeks after the accident showed both pathology and that Claimant had continuing problems with both the rotator cuff and the inflamed AC joint. Dr. Motz specifically opined that the pain was limiting his function, which needed to be addressed in order to restore and improve his function. He opined that the sources of Claimant's pain comes from both the inflamed AC joint and the rotator cuff and that both pathologies were present when he had his MRI. He continued to recommend a left shoulder arthroscopy to repair the rotator cuff, subacromial decompression to address the impingement or issues regarding a bone spur of the bone above the rotator cuff and resect the coracoacromial ligament, debridement, and distal clavicle excision to address the AC joint inflammation. He stated that the vast majority of shoulder surgeries were undertaken to alleviate the patient's pain symptoms.

F. Dr. Schwappach's testimony

50. John R. Schwappach, M.D. testified, on behalf of Respondents, as a board certified expert in orthopedic surgery and as a Level II accredited physician. He stated that he initially did a record review but he also performed an Independent Medical Examination of Claimant. He performed an examination that included range of motion of the shoulders as well as some provocative tests, which he did not record. He reviewed the MRI film of the left shoulder and disagreed with Dr. Javernick's and Dr. Motz's opinions that there was a high grade tear, stating he would consider it a low grade one. He stated that, based on his exam of the left shoulder, Claimant had a partial interstitial tearing but not a significant one, that is tearing within the fibers of the tendinous tissue, and that Claimant's findings were more consistent with a rotator cuff strain than a tear.

51. Dr. Schwappach stated that the MRI scan raised the question whether Claimant had inflammation from some sort of arthritic process at the AC joint, which was clearly present, or was it post-traumatic. The fact that there was change from the first surgical request from Dr. Javernick, to the second surgical recommendation told him that something was occurring in the pathology subsequent to the work event, the industrial accident, that was causing that change in symptoms. Dr. Schwappach opined that a different process was involved than the industrial accident in causing the need for the distal clavicle excision. He opined that the procedure might be an indicated procedure, but it did not fall under the auspice of the industrial accident. He did not state that the initial AC joint pathology had resolved, only that it was not related to the accident. He opined that the arthroscopy with a debridement, decompression, and distal clavicle excision recommended by Dr. Motz may be reasonably necessary but not related to the September 2022 work injury.

52. He explained that assessment of whether the partial tear was a high grade or a low grade tear was subjective depending on the reviewer's own subjective opinion and it was his opinion that Claimant had a low grade partial tear. This information was only one piece of information used to generate an opinion, the other was the physical exam. He also opined that the AC joint inflammation was due to arthritis and not any trauma to the joint.

G. Conclusive Findings

53. As found, Claimant did not have any problems or symptoms into his left shoulder until the September 14, 2022 incident where Claimant was pushing a very heavy container of grease across the parking lot when the small wheels got caught in a grate and Claimant had to struggle to get it out, and injured his bilateral shoulders. Despite the immediate pain, he continued to the truck on an incline in order to empty the container.

54. As found, Dr. Motz's opinions were more credible and persuasive than the contrary opinions of Dr. Schwappach. Dr. Motz' opinions that Claimant injured his left shoulder during the event of September 14, 2022, and that the ongoing symptoms and pathology were injured or aggravated at that time, especially the facts that the findings on the MRI of the left shoulder including the partial tear and the AC joint inflammation were caused by the September 14, 2022 work injury. Further, Dr. Motz credibly opined that the findings on the MRI were supported by his and other authorized provider's positive findings on exam, including Dr. Javernick's and Dr. Bates's opinions. On the other hand, Dr. Schwappach was not persuasive in his explanation that when he examined Claimant he performed all the provocative maneuvers and tests, found nothing, and simply did not document them in his report. Neither was Dr. Schwappach persuasive in his opinion that the pathology found on the MRI was not caused or aggravated by the September 14, 2022 accident.

55. As found, Dr. Motz was persuasive in explaining that Claimant has two distinct pathologies, the AC joint inflammation and the partial rotator cuff tear as found on MRI. As found, Dr. Motz's opinion with regard to the more likely cause of Claimant's ongoing symptoms is the AC joint pathology which was aggravated by the September 14, 2022 accident, though he had positive response, though short lived, to the injection of the AC joint and the subacromial space. As found, the AC pathology and significant inflammation of the acromioclavicular joint showed on the MRI only two weeks after the accident supported Dr. Motz's opinion that Claimant had an aggravation of his underlying AC pathology.

56. As found, Dr. Motz's recommendations for surgery including arthroscopy with decompression, extensive debridement, AC joint resection/distal clavicle excision and possible rotator cuff repair, are reasonably necessary and related to the admitted September 14, 2022 work injury which is intended to restore Claimant's function, ability to use his left upper extremity and either resolve or ameliorate his pain in the left shoulder.

57. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See Industrial Commission v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Authorized Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537, (ICAO May 31, 2006). A claimant must prove by preponderance of evidence direct and proximate causal relationship between an injury and the need for medical treatment sought. C.R.S. Sec. 8-43-301(b)-(c), *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999). Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). The claimant is entitled to medical benefits for treatment of pain so long as the pain is proximately caused by the employment related activities and not the underlying pre-existing condition. *Merriman v. Indus. Commission*, 120 Colo. 400, 210 P.2d 449 (1949). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colo. Springs School Dist*., W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

As found, Claimant was credible and persuasive that he was in the course and scope of his employment on September 14, 2022 when he was pushing a barrel full of grease across the parking lot and it got stuck on a grate. In pushing and pulling the barrel, and then pushing it up the parking lot incline, Claimant injured his left shoulder. Since the injury, Claimant consistently complained to his providers that his left shoulder pain was worse than either the right shoulder torn rotator cuff pain or the pain caused by ruptured ACL of the left knee. Claimant had no prior injuries or symptoms in the left shoulder before September 14, 2022. Further, as found, Claimant's testimony was consistent with the medical records in describing the mechanism of injury. This was also consistent with medical providers, including PA Downs who stated that it was more likely than not that Claimant's history of left shoulder injury, and the physical exam, that Claimant's complaints were work related. PA Wallace and Dr. Bates also stated that objective findings were consistent with the work related mechanism of injury.

Dr. Motz was also found more credible and persuasive over the contrary opinion provided by Dr. Schwappach. As found, Dr. Motz credibly explained that his physical examination of Claimant, including positive Hawkins', positive Neer's, and impingement signs and the pathology found on the left shoulder MRI imaging, all were consistent with rotator cuff pathology and cross body adduction which was consistent with the AC joint pathology. Dr. Motz's credible and persuasive opinion that the left shoulder pathology and subsequent symptoms were caused by the September 14, 2022 admitted work injury and that the surgery he was recommending, a decompression, extensive debridement, AC joint resection/distal clavicle excision and possible rotator cuff repair, was reasonably necessary and related to the September 14, 2022 accident were also credible and very persuasive. From the totality of the credible and persuasive evidence, Claimant has shown that the surgery recommended by Dr. Motz is reasonably necessary and related to cure and relieve Claimant of his admitted injuries of September 14, 2022, including the arthroscopy with decompression, extensive debridement, AC joint resection, distal clavicle excision and possible rotator cuff repair.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for the Claimant's left shoulder surgery as recommended by Dr. Cary Motz.

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

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

DATED this 14th day of December, 2023.

By: _____
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-220-534-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on October 25, 2022.

2. Whether Claimant has proven by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

3. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant chose Dr. Nelson at Concentra Medical Centers as his ATP and they are not responsible for medical treatment, including the January 27, 2023 lower back surgery, performed by John Rives Barker, M.D. at Rocky Mountain Spine Clinic, P.C.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his October 25, 2022 industrial injury.

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 26, 2022 through May 15, 2023.

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

FINDINGS OF FACT

1. Employer is a construction company with a primary focus on residential building and foundations. Claimant is a 17-year-old male. On September 14, 2022 Claimant was hired to work for Employer as a General Laborer. His job duties involved performing manual labor including carrying tools, digging holes and using basic tools.

2. Claimant asserted that on October 25, 2022 he sustained an injury to his lower back while working for Employer. He specifically contended that he was digging a trench and removing dirt using buckets with attached ropes when he felt a pain in his lower back.

3. For the six-week period that Claimant worked for Employer prior to his injury, he earned gross wages of $5,247.94. Dividing $5247.94 by 6 weeks equals an Average Weekly Wage (AWW) of $874.65.

4. On October 25, 2022 Claimant visited the office of Project Manager [Redacted, hereinafter AG] and reported that "[he had] to go to the chiropractor because [his] sciatic [was] acting up again." Claimant did not specifically report a work injury or how he injured his back. In additional text message exchanges with AG[Redacted], Claimant still did not report any specific work injury.

5. On October 26, 2022 Claimant also sent the following text message to Director of Sales Operations [Redacted, hereinafter PH]:

> Hey PH[Redacted], I talked to AG[Redacted] yesterday after work and took a day off today because I screwed up my back. Saw a doctor today.
>
> I have a herniated disc in my back. I've been unable to move today from inflammation.
>
> I'm getting MRI done and a bunch of chiropractic work. My doctor said I should not be working this week.
>
> I can get a note if it helps.

6. Claimant subsequently provided a note from chiropractor Kimberly Kesner, DC that mentioned a back strain and took him off work for four days. Notably, Claimant attended four chiropractic sessions between October 25, 2022 and October 31, 2022.

7. On October 27, 2022 Claimant visited Southmoor Emergency and Urgent Care Center. Claimant explained that he felt pain after lifting buckets out of a trench for an extended period of time at work. Further, the record reveals that Claimant was experiencing right-sided lower back pain with left-sided sciatica. Claimant explained that he subsequently could not work because of his symptoms. He noted that movement caused shooting pain.

8. On November 7, 2022 PH[Redacted] sent a text message to Claimant to check on his status. In response, Claimant informed PH[Redacted] that he had filed a claim for Workers' Compensation.

9. On November 9, 2022 Employer completed a First Report of Injury. The Report specified that on October 25, 2022 Claimant injured his back. Specifically, Claimant was lifting seven gallon buckets of dirt and rocks out of a 10-foot hole. After repeated motion for several hours Claimant's back began to tighten and he felt pain down his left leg from his hip to his ankle. Claimant told his foreman that he needed to cease working and rest. Although the record includes a First report of Injury, Claimant did not receive a list of at least four designated medical providers.

10. On November 18, 2022 Claimant began medical treatment with Barry Nelson, D.O. at Concentra Medical Centers. Claimant recounted that he felt pain in his lower back and hip after pulling rocks and dirt out of a hole. Dr. Nelson diagnosed

Claimant with: (1) lumbar back pain with radiculopathy affecting left lower extremity and (2) left hip pain. He determined that his objective findings were consistent with a work-related mechanism of injury. Dr. Nelson limited Claimant to modified duty with no lifting in excess of five pounds. He prescribed medications, ordered a left hip MRI and requested a lumbar spine MRI. Dr. Nelson also referred Claimant to a neurosurgeon, physiatrist, and physical therapy three times per week for two weeks.

11. On November 22, 2022 Claimant visited Michael J. Rauzzino, M.D. for a neurosurgery evaluation at Concentra. Claimant reported that he "felt his back gave out on him. He asked to be taken off his work, still his boss told him he could not stop working." Claimant then noted his pain became worse and localized in his back down his left leg. Dr. Rauzzino noted that Claimant likely had a herniated disc at L4-L5. He recommended an MRI and injection therapy.

12. On December 2, 2022, Claimant underwent MRIs of hip and lumbar spine. His lumbar spine MRI revealed multilevel, multifactorial, degenerative changes superimposed on a developmentally small spinal canal. There was also advanced spinal canal stenosis at L4-5 and L5-S1.

13. On December 20, 2022 Claimant returned to Dr. Rauzzino for an examination. After reviewing Claimant's MRI, Dr. Rauzzino noted a large herniated disc on the left side at L4-L5. He explained that Claimant was likely a candidate for an immediate decompression of the nerve. Additionally, Dr. Rauzzino offered to refer Claimant through Concentra. However, Claimant rejected the offer and noted he would likely seek treatment outside of the Workers' Compensation system because his claim had been denied. Notably, Dr. Rauzzino commented that Claimant had likely suffered a compensable occupational injury.

14. Claimant did not immediately pursue surgery. Instead, he took a vacation to Mexico around January 14, 2023.

15. After his vacation, Claimant attended an evaluation with John Rives Barker, M.D. on January 23, 2023 at Rocky Mountain Spine Clinic, P.C. The record does not reveal any referral from Concentra physicians. Claimant reported that he began developing back pain while removing dirt from a hole at work. Dr. Barker noted that Claimant had a large disc herniation at L4-L5 with severe stenosis. He recommended a decompression instead of a fusion or disc arthroplasty due to Claimant's young age. The recommended surgery consisted of a laminectomy at L4-5 and L5-S1 as well as a discectomy at L4-5. The surgery was scheduled for January 27, 2023.

16. On January 26, 2023 Claimant returned to Dr. Nelson at Concentra for an examination. Dr. Nelson reviewed Claimant's MRI and notes from Dr. Rauzzino. He remarked that Claimant was scheduled to undergo surgery with Dr. Barker on the following day.

17. On January 27, 2023 Claimant underwent surgery with Dr. Barker. The surgery specifically consisted of a laminectomy at L4-L5 and L5-S1 as well as a discectomy at L4-L5.

18. On February 9, 2023 Claimant underwent an Independent Medical Examination (IME) with Orthopedic Surgeon David H. Effenbein, M.D. Dr. Effenbeim recounted that Claimant is a 17-year-old male who was working for Employer as a Laborer. He noted that on October 25, 2022 Claimant was lifting buckets of dirt out of a ditch by pulling up on a rope. Claimant had to prop his left leg against something while he was bending over at the waist to lift the heavy buckets of dirt. After a few hours Claimant developed pain in his lower back and tingling in the left leg. After receiving conservative medical treatment, Claimant then underwent lower back surgery with Dr. Barker. After reviewing Claimant's medical records and conducting a physical examination, Dr. Effenbein concluded that Claimant's back injuries were related to his October 25, 2022 work activities. He concisely reasoned that Claimant "is a 17-year-old high school student. He had only been working as a laborer for six weeks when his injury happened. He reports no prior problems with his lower back or left leg." Dr. Effenbein also noted that Claimant's medical treatment was related to his October 25, 2022 work injuries.

19. On February 13, 2023 Claimant returned to Dr. Barker for a post-surgical follow-up. Dr. Barker noted some residual leg pain and increased Claimant's medications for continued healing. The record does not reveal any further notes from Dr. Barker.

20. On February 23, 2023 Claimant again visited Dr. Nelson for an examination. Dr. Nelson recommended beginning physical therapy in two weeks and noted that Claimant would continue to follow-up with Dr. Barker.

21. On April 26, 2023 Claimant returned to Dr. Nelson and reported continued symptoms. Notably, Dr. Barker had ordered a repeat MRI. Dr. Nelson commented that Claimant would continue to follow-up with Dr. Barker and would undergo the MRI as planned.

22. Claimant has established it is more probably true than not that he suffered a lower back injury during the course and scope of his employment with Employer on October 25, 2022. Claimant's testimony and the persuasive medical records reveal that Claimant injured his lower back while at work. Initially, Claimant explained that he was digging a trench and removing dirt by using buckets with attached ropes when he began developing lower back symptoms. Although Claimant mentioned back pain to AG[Redacted] on the date of the incident, he did not attribute his symptoms to his work activities. Furthermore, a text message on the following day to PH[Redacted] also reveals that Claimant injured his back and was going to seek chiropractic treatment, but Claimant did not connect his condition to his work activities. Claimant did not complete a First Report of Injury until November 9, 2022. Despite initially failing to delineate that he injured his back at work, the medical records reveal that Claimant suffered a compensable injury to his lower back area while performing his job duties on October 25, 2022.

23. On November 18, 2022 Claimant began medical treatment with Dr. Nelson at Concentra. Claimant recounted that he felt pain in his lower back and hip after pulling rocks and dirt from a hole at work. Dr. Nelson diagnosed Claimant with: (1) lumbar back pain with radiculopathy affecting left lower extremity and (2) left hip pain. He determined that his objective findings were consistent with a work-related mechanism of injury. Similarly, after reviewing Claimant's MRI, Dr. Rauzzino noted a large herniated disc on Claimant's left side at L4-L5. Notably, Dr. Rauzzino commented that Claimant had likely suffered a compensable occupational injury. Finally, at a February 9, 2023 IME with Dr. Effenbein, Claimant reported he was lifting buckets of dirt out of a ditch by pulling up on a rope. After a few hours he developed pain in his lower back and tingling in the left leg. Dr. Effenbein reasoned that Claimant's work activities on October 25, 2022 caused his lower back and left leg symptoms.

24. Based on Claimant's consistent account and a review of the persuasive medical records, Claimant suffered a lower back injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury on October 25, 2022.

25. Claimant has proven it is more probably true than not that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

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26. Because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose Concentra for treatment. Respondents have demonstrated by a preponderance of the evidence that Claimant chose Dr. Nelson at Concentra as his ATP. Respondents are thus not responsible for medical treatment, including the January 27, 2022 lower back surgery, provided by Dr. Barker.

27. Following his October 25, 2022 injury, Claimant waited several weeks and then specifically sought treatment with Dr. Nelson on November 18, 2023. Claimant subsequently continued to receive treatment through the referrals made by Dr. Nelson and Dr. Rauzzino. On December 20, 2022 Claimant rejected a surgical referral from Dr. Rauzzino and expressed his preference to go outside of the Workers' Compensation system for lower back surgery. Claimant then waited approximately one month, went on vacation to Mexico, and sought treatment with Dr. Barker at Rocky Mountain Spine Clinic, P.C. on January 23, 2023. The record does not reveal any referral from Concentra

physicians. On January 27, 2023 Claimant underwent surgery with Dr. Barker that consisted of a laminectomy at L4-L5 and L5-S1 as well as a discectomy at L4-L5.

28. Claimant did not suggest that he wished to change his ATP and continued to treat regularly with Dr. Nelson after his surgery. Claimant returned to Dr. Nelson for monthly follow-up visits on February 23, 2023, March 23, 2023 and April 26, 2023. The record thus reveals that Claimant has clearly demonstrated through his conduct that he has chosen Dr. Nelson as his ATP. Accordingly, by continuing to obtain treatment for several months at Concentra without concerns, Claimant exercised his right of selection.

29. Claimant has also failed to establish the existence of a medical emergency that required surgical intervention with Dr. Barker on January 27, 2023. Although Dr. Barker urged Claimant to obtain the surgery, Claimant had known about the likely need for surgery for approximately one month. Specifically, on December 20, 2022 ATP Dr. Rauzzino suggested that Claimant would be a candidate for surgery and offered to make a referral. Nevertheless, Claimant refused and suggested he would go outside of the Workers' Compensation system. Even with knowledge of the need for surgery, Claimant failed to seek treatment until he attended an evaluation with Dr. Barker on January 23, 2023. It appears that no emergency existed and Claimant had time to go on a vacation to Mexico approximately one or two weeks before his follow-up with Dr. Barker. Based on the extended timeframe and Claimant's knowledge that he required surgery as early as December 20, 2022, Dr. Barker's surgical intervention did not constitute a bona-fide emergency to justify an exception to the authorization requirement. Accordingly, Respondents are not liable for the unauthorized treatment, including the January 27, 2023 surgery, rendered by Dr. Barker.

30. Claimant has demonstrated it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his October 25, 2022 industrial injury. Specifically, Respondents are financially responsible for Claimant's treatment and referrals through Concentra. However, Claimant has submitted a number of medical bills and requests for mileage reimbursement that do not have corresponding supporting medical documentation. He has thus not met his burden to establish an entitlement to the medical benefits or mileage reimbursement. Specifically, Claimant has not provided medical documentation and Respondents are not liable for treatment with the following providers: (1) Dr. Sydney Dittman, Centura Health 5351 S. Rosyln St.; (2) Dr. Hashim Khan, Dr. Robert Gessman, Spine One Health, 8500 Park Meadows Dr.; (3) evaluations with Dr. John Barker following February 13, 2023; (4) Colorado Athletic Condition, 10450 Park Meadows Dr.; (5) Healthone Services, Rocky Mountain Spine Clinic, 10103 Ridge Gate Pkwy.

31. Claimant has proven it is more probably true than not that he is entitled to receive TTD benefits for the period October 26, 2022, through May 15, 2023. The record reveals that Claimant only provided initial work restrictions from his chiropractor Dr. Kesner for four days following October 26, 2023 or through October 30, 2022. On October 27, 2022 Claimant visited Southmoor Emergency and Urgent Care Center because of his lower back pain after lifting buckets out of a trench for an extended period of time at work. Claimant explained that he subsequently could not work because of his pain symptoms.

He specifically noted that movements caused shooting pain. Claimant did not provide additional work restrictions until he attended an evaluation with Dr. Nelson on November 18, 2022. Dr. Nelson specifically limited Claimant to modified duty with no lifting in excess of five pounds.

32. Although Claimant did not provide work restrictions for the period October 31, 2022 through November 17, 2022, his testimony reflects that he suffered an impairment of wage earning capacity as demonstrated by his inability to resume his prior work. Claimant's testimony, in conjunction with the work restrictions assigned by treating medical providers, reflects that his October 25, 2022 lower back injury impaired his ability to effectively and properly perform his regular employment. Claimant's October 25, 2022 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is thus entitled to receive TTD benefits for the period October 26, 2022 through May 15, 2023.

CONCLUSIONS OF LAW

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

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

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

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re*

Swanson, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

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

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

7. As found, Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on October 25, 2022. Claimant's testimony and the persuasive medical records reveal that Claimant injured his lower back while at work. Initially, Claimant explained that he was digging a trench and removing dirt by using buckets with attached ropes when he began developing lower back symptoms. Although Claimant mentioned back pain to AG[Redacted] on the date of the incident, he did not attribute his symptoms to his work activities. Furthermore, a text message on the following day to PH[Redacted] also reveals that Claimant injured his back and was going to seek chiropractic treatment, but Claimant did not connect his condition to his work activities. Claimant did not complete a First Report of Injury until November 9, 2022. Despite initially failing to delineate that he injured his back at work, the medical records reveal that Claimant suffered a compensable injury to his lower back area while performing his job duties on October 25, 2022.

8. As found, on November 18, 2022 Claimant began medical treatment with Dr. Nelson at Concentra. Claimant recounted that he felt pain in his lower back and hip after pulling rocks and dirt from a hole at work. Dr. Nelson diagnosed Claimant with: (1) lumbar back pain with radiculopathy affecting left lower extremity and (2) left hip pain. He determined that his objective findings were consistent with a work-related mechanism of injury. Similarly, after reviewing Claimant's MRI, Dr. Rauzzino noted a large herniated

disc on Claimant's left side at L4-L5. Notably, Dr. Rauzzino commented that Claimant had likely suffered a compensable occupational injury. Finally, at a February 9, 2023 IME with Dr. Effenbein, Claimant reported he was lifting buckets of dirt out of a ditch by pulling up on a rope. After a few hours he developed pain in his lower back and tingling in the left leg. Dr. Effenbein reasoned that Claimant's work activities on October 25, 2022 caused his lower back and left leg symptoms.

9. As found, based on Claimant's consistent account and a review of the persuasive medical records, Claimant suffered a lower back injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury on October 25, 2022.

Right of Selection/Authorized Treating Physician

10. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, 383 (Colo. App. 2006).

11. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

12. Although §8-43-404(5)(a), C.R.S. grants employers the initial authority to select the ATP, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical

provider. *Sims v. Indus. Claim Appeals Off,,* 797 P.2d 777, 781 (Colo. App. 1990). The purpose of the medical emergency exception is to allow an injured worker the ability to obtain immediate treatment without undergoing the delay inherent in notifying the employer and obtaining a referral or approval. *Delfosse v. Home Services Heroes, Inc.*, W.C. No. 5-075-625-001 (ICAO, Apr. 26, 2021). Once the emergency has ended the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, 384 (Colo. App. 2006); *see* W.C.R.P. 8-3. Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005).

13. As found, Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

14. As found, because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose Concentra for treatment. Respondents have demonstrated by a preponderance of the evidence that Claimant chose Dr. Nelson at Concentra as his ATP. Respondents are thus not responsible for medical treatment, including the January 27, 2022 lower back surgery, provided by Dr. Barker.

15. As found, following his October 25, 2022 injury, Claimant waited several weeks and then specifically sought treatment with Dr. Nelson on November 18, 2023. Claimant subsequently continued to receive treatment through the referrals made by Dr. Nelson and Dr. Rauzzino. On December 20, 2022 Claimant rejected a surgical referral from Dr. Rauzzino and expressed his preference to go outside of the Workers' Compensation system for lower back surgery. Claimant then waited approximately one month, went on vacation to Mexico, and sought treatment with Dr. Barker at Rocky Mountain Spine Clinic, P.C. on January 23, 2023. The record does not reveal any referral from Concentra physicians. On January 27, 2023 Claimant underwent surgery with Dr. Barker that consisted of a laminectomy at L4-L5 and L5-S1 as well as a discectomy at L4-L5.

16. As found, Claimant did not suggest that he wished to change his ATP and continued to treat regularly with Dr. Nelson after his surgery. Claimant returned to Dr. Nelson for monthly follow-up visits on February 23, 2023, March 23, 2023 and April 26, 2023. The record thus reveals that Claimant has clearly demonstrated through his conduct that he has chosen Dr. Nelson as his ATP. Accordingly, by continuing to obtain treatment for several months at Concentra without concerns, Claimant exercised his right of selection. *See Murphy-Tafoya v. Safeway, Inc.*, WC 5-153-600 (ICAO, Sept. 1, 2021) (where right of selection passed to the claimant, six months of treatment with personal

provider following her work injury demonstrated that the claimant had exercised her right of selection); *Rivas v. Cemex Inc*, WC 4-975-918 (ICAO, Mar. 15, 2016) (through his words and conduct in obtaining treatment from Workwell for five weeks the claimant selected Workwell as his authorized provider); *Pavelko v. Southwest Heating and Cooling*, WC 4-897-489 (ICAO, Sept. 4, 2015) (the claimant exercised his right of selection when he obtained treatment for two years from provider recommended by the employer); *Tidwell v. Spencer Technologies*, WC 4-917- 514 (ICAO, Mar. 2, 2015) (where the employer failed to designate an authorized medical provider and claimant obtained treatment from personal physician Kaiser for his industrial injury, the claimant selected Kaiser as his authorized treating physician through his words or conduct).

17. As found, Claimant has also failed to establish the existence of a medical emergency that required surgical intervention with Dr. Barker on January 27, 2023. Although Dr. Barker urged Claimant to obtain the surgery, Claimant had known about the likely need for surgery for approximately one month. Specifically, on December 20, 2022 ATP Dr. Rauzzino suggested that Claimant would be a candidate for surgery and offered to make a referral. Nevertheless, Claimant refused and suggested he would go outside of the Workers' Compensation system. Even with knowledge of the need for surgery, Claimant failed to seek treatment until he attended an evaluation with Dr. Barker on January 23, 2023. It appears that no emergency existed and Claimant had time to go on a vacation to Mexico approximately one or two weeks before his follow-up with Dr. Barker. Based on the extended timeframe and Claimant's knowledge that he required surgery as early as December 20, 2022, Dr. Barker's surgical intervention did not constitute a bona-fide emergency to justify an exception to the authorization requirement. Accordingly, Respondents are not liable for the unauthorized treatment, including the January 27, 2023 surgery, rendered by Dr. Barker.

Medical Benefits

18. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

19. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501

(Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that the surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

20. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his October 25, 2022 industrial injury. Specifically, Respondents are financially responsible for Claimant's treatment and referrals through Concentra. However, Claimant has submitted a number of medical bills and requests for mileage reimbursement that do not have corresponding supporting medical documentation. He has thus not met his burden to establish an entitlement to the medical benefits or mileage reimbursement. Specifically, Claimant has not provided medical documentation and Respondents are not liable for treatment with the following providers: (1) Dr. Sydney Dittman, Centura Health 5351 S. Rosyln St.; (2) Dr. Hashim Khan, Dr. Robert Gessman, Spine One Health, 8500 Park Meadows Dr.; (3) evaluations with Dr. John Barker following February 13, 2023; (4) Colorado Athletic Condition, 10450 Park Meadows Dr.; (5) Healthone Services, Rocky Mountain Spine Clinic, 10103 Ridge Gate Pkwy.

Temporary Total Disability Benefits

21. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is

sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

22. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 26, 2022, through May 15, 2023. The record reveals that Claimant only provided initial work restrictions from his chiropractor Dr. Kesner for four days following October 26, 2023 or through October 30, 2022. On October 27, 2022 Claimant visited Southmoor Emergency and Urgent Care Center because of his lower back pain after lifting buckets out of a trench for an extended period of time at work. Claimant explained that he subsequently could not work because of his pain symptoms. He specifically noted that movements caused shooting pain. Claimant did not provide additional work restrictions until he attended an evaluation with Dr. Nelson on November 18, 2022. Dr. Nelson specifically limited Claimant to modified duty with no lifting in excess of five pounds.

23. As found, although Claimant did not provide work restrictions for the period October 31, 2022 through November 17, 2022, his testimony reflects that he suffered an impairment of wage earning capacity as demonstrated by his inability to resume his prior work. Claimant's testimony, in conjunction with the work restrictions assigned by treating medical providers, reflects that his October 25, 2022 lower back injury impaired his ability to effectively and properly perform his regular employment. Claimant's October 25, 2022 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is thus entitled to receive TTD benefits for the period October 26, 2022 through May 15, 2023.

Average Weekly Wage

24. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury, the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether

fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of injury. *Id.*

25. As found, the record reveals that for the six-week period that Claimant worked for Employer prior to his injury, he earned gross wages of $5,247.94. Dividing $5247.94 by 6 weeks equals an AWW of $874.65. An AWW of $874.65 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

1. Claimant suffered a compensable lower back injury on October 25, 2022 during the course and scope of his employment with Employer.

2. The right to select an ATP passed to Claimant through Respondents' failure to provide a written list of at least four designated medical providers

3. Claimant selected Concentra as his ATP.

4. Respondents are financially responsible for payment of Claimant's authorized, reasonable and necessary medical expenses for the treatment of his lower back injury. However, Respondents are not liable for unauthorized treatment, including the January 27, 2023 surgery, rendered by Dr. Barker, Furthermore, Claimant has not provided medical documentation and Respondents are not liable for treatment with the following providers: (1) Dr. Sydney Dittman, Centura Health 5351 S. Rosyln St.; (2) Dr. Hashim Khan, Dr. Robert Gessman, Spine One Health, 8500 Park Meadows Dr.; (3) evaluations with Dr. John Barker following February 13, 2023; (4) Colorado Athletic Condition, 10450 Park Meadows Dr.; (5) Healthone Services, Rocky Mountain Spine Clinic, 10103 Ridge Gate Pkwy.

5. Claimant is entitled to receive TTD benefits for the period October 26, 2022 through May 15, 2023.

6. An AWW of $874.65 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

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

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

Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: December 14, 2023.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-128-978-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the medical procedure she underwent with Aaron Liddell, MD, DMD, FACS on September 8, 2023 was reasonable and necessary and causally related to her January 21, 2020 admitted industrial injury.

2. Whether Respondents should reimburse Claimant for the $5,039.00 she incurred in out-of-pocket expenses for fixed partial dentures and veneers.

NOTICE OF THE PROCEEDINGS

1. Respondents failed to attend the November 15, 2023 video hearing in this matter. Therefore, prior to entering an order, the ALJ must consider whether Claimant had adequate notice of the proceedings.

2. Office of Administrative Courts Rules of Procedure for Workers' Compensation Hearings (OACRP) Rule 24 governs the entry of orders against non-appearing parties at hearings. Rule 23 provides, in relevant part:

> If a party fails to appear at a hearing after the OAC has sent notice of the hearing to that party, prior to entering any orders against the non-appearing party as a result of that hearing, the judge will consider:
>
> A. The addresses to which the notice of hearing was sent are the most recent addresses provided by the non-appearing party to either the OAC or the Division of Workers' Compensation; or
>
> …
>
> C. A copy of a record or other written statement from the OAC or the Division of Workers' Compensation containing the most recent address provided by the non-appearing party to either of those agencies shall be sufficient to create a rebuttable presumption that the non-appearing party received notice of the hearing.

3. On September 8, 2023 the Office of Administrative Courts (OAC) sent a Notice of Hearing to Respondents' Claims Representative [Redacted, hereinafter MH] at [Redacted, hereinafter SK] with the following e-mail address: [Redacted, hereinafter MHE]. The Notice specified that the hearing would be conducted on November 15, 2023 at the OAC, 1525 Sherman St., 4th Floor Denver, CO 80203.

4. On November 6, 2023 PALJ Eley conducted a pre-hearing conference in the present matter. He recounted that Respondents had been notified of the proceeding, but failed to participate. PALJ Eley specified:

> The Division served notice of this prehearing conference (PHC) on 11/2/23. Notice was sent to MH[Redacted] at SK[Redacted] via email at MHE[Redacted]. A Google Meets invitation was sent to the same email address on 11/3/23 with instructions on attending the meeting. This PALJ attempted to contact MH[Redacted] by telephone at [Redacted, hereinafter MHP] at 9:02AM, again at approximately 9:10AM, and left voicemails. Despite these efforts, Respondents failed to appear or participate.

The Division sent a copy of the pre-hearing order to Respondents at the following address: Claims Representative MH[Redacted] MHE[Redacted].

5. On November 14, 2023 the OAC sent an Amended Notice of Hearing. The OAC emailed the parties details of the virtual hearing to be conducted on November 15, 2023 through Google Meet. The parties were notified of the option to attend either by video (by clicking the hyperlink) or by telephone. The telephone number and access code were provided on the invitation. The OAC again sent the Notice to Respondents' Claims Representative MH[Redacted] at SK[Redacted] with the following e-mail address: MHE[Redacted].

6. Despite the preceding notice of the November 15, 2023 video hearing, Respondents failed to appear. At the outset of the hearing, the ALJ reviewed the record to determine whether Respondents had received adequate and proper notice of the 8:30 a.m. hearing. Based on a review of the file and comments from Claimant's counsel, the ALJ was satisfied Claimant had proper and adequate notice of the matter. Because the case involved Claimant's Application for Hearing (AFH), the ALJ proceeded with the hearing.

7. The preceding chronology reflects that Respondents had adequate notice of the November 15, 2023 hearing in this matter. The Notice of Hearing was sent to Respondents' email address on file with the OAC. Moreover, on November 14, 2023 the OAC sent an Amended Notice of Hearing. The OAC emailed the parties details of the virtual hearing to be conducted on November 15, 2023 through Google Meet. The parties were notified of the option to attend either by video (by clicking the hyperlink) or by telephone. The record thus demonstrates sufficient evidence to create a rebuttable presumption that Respondents received notice of the hearing. Respondents have failed to rebut the presumption. Because Respondents had adequate notice of the November 14, 2023 hearing but chose not to appear, entry of an order is appropriate.

FINDINGS OF FACT

1. On January 21, 2020 Claimant suffered admitted industrial injuries to her face and mouth during the course and scope of her employment with Employer.

2. Claimant subsequently received medical treatment paid for and authorized by Respondents. The treatment included care with Aaron Liddell, MD, DMD, FACS at Colorado Oral Surgery.

3. On August 7, 2023 Dr. Liddell communicated with Respondents regarding Claimant's need for additional dental treatment. He detailed the following:

> I have been working with [Claimant] over the course of the past 3 years. In brief, she presented to my office s/p mechanical fall wherein she sustained an avulsive injury to tooth #9, in addition to bilateral mandibular condyle fractures. Ultimately, we have completed bilateral TMJ total joint replacement to rehabilitate her condyle fractures. This was because her condyle fractures were not able to be operated on at the time of the injury, based on the location of the fractures. She developed a secondary malocclusion which was addressed with orthodontics and joint replacement. She is now nearing completion of her orthodontic treatment. She is pending final reconstruction of her dentition, which will be completed with a fixed partial denture and veneers.

Dr. Liddell summarized that Claimant had completed significant treatment, but still required care in the form of fixed partial dentures and veneers.

4. MH[Redacted] is a Claims Representative for SK[Redacted]. MH[Redacted] has not responded to the provider at any time regarding the request for medical authorization for the fixed partial denture and veneers.

5. Respondents made no attempt to communicate with Claimant's counsel about the disputed issues in this matter. The record reveals that Respondents refused to attend multiple pre-hearing conferences and the scheduled hearing on November 15, 2023. MH[Redacted] has not communicated with Claimant's counsel since August 24, 2023.

6. In an attempt to regain use of her mouth and eat solid food, Claimant underwent the preceding reconstruction with Dr. Liddell on September 8, 2023. Claimant elected to pay out-of-pocket for the procedure. She specifically paid $5,039.00 for the dental work using her personal credit card on September 8, 2023.

7. Claimant has demonstrated it is more probably true than not that the medical procedure she underwent with Dr. Liddell on September 8, 2023 was reasonable, necessary and causally related to her January 21, 2020 admitted industrial injury. Initially, Claimant suffered facial and dental injuries while working for Employer. As persuasively recounted by Dr. Liddell, Claimant underwent significant dental treatment and required specific orthodontic care based on a secondary malocclusion. To complete the treatment, Claimant required final reconstruction of her dentition with a fixed partial denture and veneers. The record reveals that the treatment constituted causally related, reasonable and necessary care for her admitted industrial injuries.

8. Claimant is also entitled to recover the $5,039.00 she incurred in out-of-pocket expenses for her fixed partial denture and veneers. The record reveals that she underwent the procedure with Dr. Liddell on September 8, 2023 and incurred out-of-pocket expenses in the amount of $5,039.00. Respondents shall thus reimburse Claimant $5,039.00 for her costs.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition or the subsequent aggravation or acceleration of that condition is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

6. As found, Claimant has demonstrated by a preponderance of the evidence that the medical procedure she underwent with Dr. Liddell on September 8, 2023 was reasonable, necessary and causally related to her January 21, 2020 admitted industrial injury. Initially, Claimant suffered facial and dental injuries while working for Employer. As persuasively recounted by Dr. Liddell, Claimant underwent significant dental treatment and required specific orthodontic care based on a secondary malocclusion. To complete the treatment, Claimant required final reconstruction of her dentition with a fixed partial denture and veneers. The record reveals that the treatment constituted causally related, reasonable and necessary care for her admitted industrial injuries.

7. As found, Claimant is also entitled to recover the $5,039.00 she incurred in out-of-pocket expenses for her fixed partial denture and veneers. The record reveals that she underwent the procedure with Dr. Liddell on September 8, 2023 and incurred out-of-pocket expenses in the amount of $5,039.00. Respondents shall thus reimburse Claimant $5,039.00 for her costs.

ORDER

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

1. The medical procedure Claimant underwent with Dr. Liddell on September 8, 2023 was reasonable, necessary and causally related to her January 21, 2020 admitted industrial injury.

2. Respondents shall reimburse Claimant $5,039.00 for her out-of-pocket costs for her fixed partial denture and veneers.

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

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

DATED: December 18, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-219-793-001

ISSUE

1. Did Claimant overcome the Division Independent Medical Examination (DIME) physician's opinion that Claimant is at maximum medical improvement (MMI) by clear and convincing evidence?

FINDINGS OF FACT

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

1. Claimant is a 47 year-old male who worked for Employer. He was hired on February 28, 2022, to work as a carpenter. (Ex. A).

2. On May 2, 2022, Claimant was helping Employer with some cement work. Claimant testified they were pouring cement in a column when he slipped on a wet step, twisting his left leg. Claimant further testified that when he fell, his weight, including his tools, fell on his leg, causing him to hurt his leg and back. (Tr. 15: 1-19).

3. Later that day, Claimant went to Midtown Occupational Health Services, and he was evaluated by Marc Steinmetz, M.D. Claimant's safety supervisor, [Redacted, hereinafter OT], accompanied Claimant to the appointment. According to the medical record, Claimant reported that he "kind of slipped and almost fell and twisted his left knee." His chief complaint was knee pain. There was no mention of any back pain. Claimant was diagnosed with a left knee sprain, and was advised to treat with Advil, Tylenol, ice, and compression. (Ex. G).

4. OT[Redacted] testified that he filled out the Employer's First Report of Injury form on behalf of Claimant. (Tr. 30:23-31:11). Under the section "body part affected," OT[Redacted] wrote "twisted left knee" and under the description of the nature of the injury he wrote "slipped in mud cause[d] twisted left knee." (Ex. A).

5. Claimant had a follow-up appointment on May 4, 2022 with Dr. Steinmetz. He reported slight improvement with his left knee sprain. Claimant had less pain, swelling and stiffness. If Claimant continued to have medial knee joint pain, Dr. Steinmetz would consider ordering an MRI. (Ex. G).

6. On May 13, 2023, Claimant underwent an MRI of his left knee and left quadriceps area. Imaging of the knee revealed a complex degenerative tear of the medial meniscus; tricompartmental chondromalacia, including medial femoral, tibial, and patellofemoral compartment arthritis. The quadriceps MRI showed mild quadriceps tendinosis distally but there was no evidence of a muscle tear. (Ex. R, p. 140).

7. Dr. Steinmetz evaluated Claimant on May 16, 2022. Claimant reported feeling much better. He had a little discomfort in the distal lateral left thigh, but the knee joint did not bother him. Claimant had an appointment with an orthopedic surgeon to review the MRI. There was no documentation of Claimant complaining of back pain. (Ex. G).

8. Michael Hewitt, M.D. evaluated Claimant's left knee on May 18, 2022, and reviewed Claimant's MRI images. Dr. Hewitt reviewed the different treatment options for a medial meniscus tear. He recommended Claimant start with physical therapy, a brace, and anti-inflammatories. Claimant could also consider an injection. (Ex. 7).

9. Claimant participated in physical therapy from May 25, 2022 through June 30, 2022. The therapy addressed Claimant's left knee and distal thigh. There is nothing in the physical therapy records to indicate Claimant was experiencing any back issues. (Ex. J).

10. In June or July 2022, Claimant received a steroid injection in his left knee but it did not provide Claimant with long-term relief. (Ex. R, p. 142).

11. On July 13, 2022, Claimant saw Dr. Steinmetz for a follow-up appointment. Claimant told Dr. Steinmetz he was still experiencing pain in his left thigh distally. He also reported having some back pain "now." The record states, "[o]riginally he did not for [sic] back pain but he says he has some back pain now." The ALJ infers Dr. Steinmetz meant Claimant did not originally have back pain, but now was reporting back pain. Dr. Steinmetz examined Claimant's back. He noted that Claimant said his back was tender, but there was no spasm and Claimant had a grossly normal range of motion, and he had no sciatica. Dr. Steinmetz specifically noted in the medical record that "the notes don't currently support any back issues." With respect to Claimant's knee, Dr. Steinmetz noted that therapy was not likely helping, and he would follow up with Dr. Hewitt regarding surgery. Additionally, he referred Claimant to Samuel Chan, M.D. for an EMG consultation related to Claimant's leg numbness, which was a part of his original complaint. (Ex. K).

12. The ALJ finds that July 13, 2022, is the first time there is any documentation in Claimant's medical records referencing low back pain. The ALJ further finds that this is the first time Claimant reported having any back pain.

13. Claimant saw Dr. Hewitt on July 29, 2022. They discussed Claimant's minimal improvement following conservative management of his knee. Claimant elected to proceed with an arthroscopy of his left knee. (Ex. 7).

14. On August 5, 2022, Claimant had an initial physiatric consultation with Dr. Chan. Claimant's chief complaint was "numbness on outside of the quad." Dr. Chan examined Claimant, including his lumbar spine. Dr. Chan noted there was no tenderness to palpate over bilateral PSIS and sacral sulcus. Straight leg raising was negative, as was Patrick's, Gaenslen's, FABER's and Yeoman's testing. Dr. Chan performed EMG testing on Claimant's left lower extremity. He noted that the EMG was not diagnostic for mearalgia paresthetica. In other words, the EMG was normal. (Ex. L).

15. On August 23, 2022, Claimant underwent an arthroscopic meniscectomy and chondroplasy on his left knee with Dr. Hewitt. (Ex. P).

16. Claimant saw Dr. Steimetz, on October 7, 2022, for a follow-up appointment. Claimant's chief complaint was postop left knee numbness and pain. There is no mention in the medical records regarding Claimant experiencing back pain. To the contrary, under the physical examination section, it notes that Claimant's spine is normal without deformity or tenderness, and he has a normal range of motion. (Ex. M).

17. On October 12, 2022, Claimant went to Midtown Occupational Services as an unscheduled walk-in. Dr. Steinmetz was not there, so Claimant was examined by Lawrence Cedillo, D.O. Claimant complained of low back pain, and he rated his pain as being 10/10. Claimant reported having intermittent low back pain since the date of the work injury. He stated the pain had been at the 10/10 level since October 9, 2022. Claimant also said that he has had lumbar back pain at a 5-6/10 level since the date of his injury. Claimant reported to Dr. Cedillo that he told his coworkers about his back pain on the day of his injury, and that he also told the therapists and other providers he had seen about his back. Dr. Cedillo examined Claimant, and reviewed Claimant's past medical records. Dr. Cedillo opined that Claimant's current complaint of back pain was unrelated to his work injury on May 2, 2022. (Ex. 6).

18. Dr. Chan ordered an MRI of Claimant's lumbar spine. The impression was "[m]ultilevel degenerative changes . . . worse at L4-L5, without significant stenosis." (Ex. 8).

19. On November 16, 2022, Dr. Chan saw Claimant for a follow-up appointment. Dr. Chan placed Claimant at MMI. Dr. Chan assigned Claimant work restrictions and gave him a 12% impairment rating of the lower left extremity. Regarding Claimant's lumbar spine, Dr. Chan noted, "MRI has been reviewed and there are no correlated findings. Lumbar spine is not related to the case on May 2, 2022." (Ex. P).

20. Claimant returned to see Dr. Steinmetz on November 28, 2022. Dr. Steinmetz noted Claimant was at MMI per Dr. Chan. Claimant, however, wanted a different opinion because he still had knee pain, leg tingling and back pain. Dr. Steinmetz noted in the medical record "[h]is main issue is he wants a different opinion regarding MMI issues." (Ex. Q).

21. On December 30, 2022, Claimant presented to Carlos Cebrian, M.D., for an Independent Medical Examination (IME). Dr. Cebrian reviewed Claimant's medical records and examined him. He noted that Claimant's current complaints included left knee pain, left thigh numbness, and low back pain. Dr. Cebrian noted that the first documentation of lumbar spine complaints did not occur until over two months after the industrial injury. Dr. Cebrian agreed with Dr. Chan and Dr. Steinmetz that Claimant's lumbar spine complaints are not causally related to the May 2, 2022, work injury. Dr. Cebrian also agreed with Dr. Chan that Claimant reached MMI on November 16, 2022. Dr. Cebrian completed an IME report dated, December 30, 2022. (Ex. R).

22. On January 5, 2023, Respondents' filed a Final Admission of Liability (FAL) in accordance with Dr. Chan's report, and admitted to a 12% scheduled impairment rating of the lower left extremity, and a November 16, 2022 MMI date. (Ex. B).

23. Claimant objected to the FAL and requested a DIME. On April 6, 2023, DIME physician, S. D. Lindenbaum, M.D. evaluated Claimant. Dr. Lindenbaum opined that "there is no evidence . . . objectively of lumbar disease on MRI to substantiate an acute lumbar spine process. Furthermore, there was no documentation of any mentioned by the patient based on the clinic notes that were reviewed by several doctors of anything stating he had back pain until almost 5 months after the injury." Dr. Lindenbaum agreed with the November 16, 2022 MMI date, and he assigned claimant a 21% impairment rating for Claimant's left knee. (Ex. S).

24. As found, Claimant first reported back pain at his July 13, 2022 appointment with Dr. Steinmetz, approximately two and a half months after his injury. The ALJ infers that Dr. Lindenbaum is referencing Claimant's October 12, 2022 report of back pain of 10/10, which was five months after his injury. The ALJ finds that Dr. Lindenbaum's failure to reference Claimant's July 13, 2022 complaint of back pain does not affect the conclusions he reached regarding MMI. The ALJ finds Dr. Lindenbaum's opinion to be credible and persuasive.

25. On April 11, 2023, Respondents' filed a Final Admission of Liability in accordance with Dr. Lindenbaum's evaluation of a 21% scheduled impairment rating of the lower left extremity, and an MMI date of November 16, 2022. (Ex. D).

26. As found, Drs. Chan, Steinmetz, Cebrian, and Lindenbaum all declined to relate Claimant's lower back complaints to the workplace injury that occurred on May 2, 2022. They based this decision on clinical findings, imaging, and delayed onset of symptoms. The ALJ finds these opinions to be credible and persuasive.

27. Claimant testified he told Dr. Steinmetz about his back pain, but Dr. Steinmetz ignored him. (Tr. 17:3-19). The ALJ does not find this testimony to be credible nor persuasive. At Claimant's July 13, 2022 appointment with Dr. Steinmetz, Claimant complained of back pain. Dr. Steinmetz examined Claimant's back and noted upon examination Claimant said his back was tender, but there was no spasm and Claimant had a grossly normal range of motion, and no sciatica. (Ex. K). The ALJ finds that Dr. Steinmetz did not ignore Claimant's complaint of back pain.

28. At the hearing, Claimant's safety supervisor at the time of the incident, OT[Redacted], testified that Claimant complained of back pain from the onset of the initial injury. (Tr. 28:11-29:1). OT[Redacted] also testified that he completed the First Report of Injury on behalf of Claimant, and he did not document any injuries to Claimant's back. (Tr. 30:23-31:11). He only documented Claimant's injury to his left knee. (Ex. A). OT's[Redacted] testimony that Claimant complained of back pain at the time of the injury is not credible, nor is it persuasive.

29. As found, Claimant did not complain of back pain until July 13, 2022. The ALJ finds that Claimant's low back complaints are not causally related to the May 2, 2022 admitted work injury. The ALJ finds that Claimant did not prove by clear and convincing evidence that Dr. Chan's DIME opinion that Claimant reached MMI on November 6, 2022 is incorrect.

CONCLUSIONS OF LAW

Generally

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

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

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

Burden to Overcome DIME on MMI

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transp. v. Indus. Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Constr. Mgmt.,* WC 4-356-512 (ICAO, May 20, 2004).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colo. Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *Id.; MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

Claimant argues that the DIME in incorrect, and he is not at MMI because he is still experiencing back pain. Specifically, Claimant asserts that his low back pain complaints are causally related to the industrial accident and therefore necessitate medical treatment. The only evidence Claimant presented to support his assertion that he injured his back in the May 2, 2022 admitted work injury is his testimony, and the testimony of OT[Redacted]. As found, Mr. OT's[Redacted] testimony is inconsistent with his written statements generated at the time of the accident and it is neither credible nor persuasive. The medical records, the First Report of Injury, and the opinions of Dr.

Lindenbaum, Dr. Cebrian, Dr. Chan, and Dr. Steinmetz directly contradict Claimant's assertion that he experienced low back pain immediately following the industrial accident.

The weight of the evidence presented shows that Claimant's low back complaints are not causally related to the May 2, 2022 claim. Claimant has failed to demonstrate, by clear and convincing evidence, that Dr. Lindenbaum's DIME opinion is incorrect.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME's finding that Claimant is at MMI by clear and convincing evidence.

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

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

DATED: December 18, 2023

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

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that the prescription medication Ubrelvy is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement (MMI)?

2. Has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S.? Specifically, Claimant has requested reimbursement of costs totalling $1,703.52.

FINDINGS OF FACT

1. On December 31, 1998, Claimant suffered a compensable work injury. On that date, Claimant fell over 17 feet from an oil rig, striking his head on a steel beam. Claimant was hospitalized and underwent two surgical procedures to treat his head injury. Claimant testified that he underwent additional surgical procedures in June 1999 and then again in 2003 or 2004. Since the December 31, 1998 work injury, Claimant has experienced migraine headaches and neck pain.

2. On February 29, 2012, Respondents filed a Final Admission of Liability (FAL). In the FAL, Respondents admitted for 33 percent whole person impairment, and an MMI date of January 20, 2012. In addition, Respondents admitted for "post MMI medical treatment provided by the [authorized] treating physician that is reasonable, necessary [and] related to the compensable injury."

3. Since the December 31, 1998 work injury, Claimant has experienced migraine headaches and neck pain. Claimant testified that when he has a migraine it feels as though his left eye is being pulled from his eye socket.

4. During this claim, Claimant has undergone treatment for his migraines under the direction of his ATPs, Dr. Joel Dean[1] and Dr. Ellen Price. Under the care of Drs. Dean and Price, Claimant has been prescribed a number of medications. In addition, Dr. Price has administered Botox injections.

5. Based upon the medical records entered into evidence, Dr. Price first recommended Ubrelvy to Claimant on January 6, 2021. On February 12, 2021, Claimant returned to Dr. Price. The medical record of that date indicates that Claimant had tried the Ubrelvy and it was effective. Dr. Price provided Claimant with additional Ubrelvy samples and prescribed him 50 mg.

[1] Dr. Dean retired from practice in late 2022.

6. On May 14, 2021, Claimant reported to Dr. Price that the Botox injections were helping his symptoms. He also reported that he was using Ubrelvy, but "much less than before". Specifically, Claimant reported that he had been taking it three to four times per month, "but now he does not take it at all."

7. On February 10, 2023, Claimant returned to Dr. Price. At that time, Claimant reported that Ubrelvy samples were helpful in relieving his symptoms, but he was unable to get a prescription. Dr. Price provided Claimant with 100mg samples of Ubrelvy and prescribed 16 tablets per month.

8. On March 14, 2023, Claimant was seen by Dr. Price and again reported relief when using Ubrelvy. However, the prescription was not authorized by Insurer.

9. On March 27, 2023, Dr. Price submitted a prescription to Injured Workers Pharmacy for 100mg of Ubrelvy.

10. At the request of Respondents, on March 28, 2023, Dr. Eddie Sassoon reviewed the request for Ubrelvy. In his report, Dr. Sassoon recommended denial of Ubrelvy. In support of this recommendation, Dr. Sassoon noted that the "Guidelines" provide for the use of Ubrelvy as a first or second line treatment of migraines "with documentation or contraindication, failure, or intolerance to [two] or more triptans." Dr. Sassoon further noted that he did not see evidence that Claimant has failed first line triptans. The guidelines Dr. Sasson was referencing in his report were identified as "ODG"[2] It does not appear that Dr. Sassoon referenced the Colorado Medical Treatment Guidelines.

11. Based upon the opinions of Dr. Sassoon, Respondents denied authorization of Ubrelvy.

12. After the retirement of Dr. Dean, On May 12, 2023, Claimant was seen for a neurological consultation at the office of Dr. Seth Kareus. On that date, Claimant reported to Paulina Good, PA that he was using Ubrelvy to manage his migraines. PA Good noted the effectiveness of the Botox injections administered by Dr. Price. PA Good recommended a CGRP drug to address the breakthrough migraines, specifically Emgality. PA Good also recommended the continued use of 100mg of Ubrelvy because it had been very effective to treat Claimant's headaches, without side effects. PA Good did not recommend topiramate because of Claimant's history of kidney stones. She also did not recommend amitriptyline because of Claimant's age. Finally, PA Good did not recommend propranolol because of Claimant's history of depression.

13. On July 5, 2023, Claimant returned to Dr. Price and reported that the monthly Emgality injection was helping his symptoms. Dr. Price recommended Claimant continue Ubrelvy, but no more than 12 tablets per month.

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[2] The ALJ takes administrative notice that OOG appears to stand for Official Treatment Guidelines, which are utilized in Arizona, New Mexico, Oklahoma, and Tennessee. Colorado has not adopted the ODG.

14. On September 20, 2023, Dr. Price authored a letter in which she responded to a number of questions posed to her by Claimant's counsel. In that letter Dr. Price opined that Claimant's migraine headaches are related to the December 31, 1998 work injury. Dr. Price also opined that Ubrelvy was effective treatment of Claimant's migraines and was reasonable and necessary. Specifically, Dr. Price noted that with the use of Ubrelvy, Claimant has been able to "manage his headaches more effectively and be more functional". Dr. Price also noted that the other medications Claimant was using for his headaches, and the Botox treatments, work prophylactically to treat Claimant's migraines, while the Ubrelvy is an abortive treatment.

15. On October 11, 2023, Claimant reported to Dr. Price that the most recent Botox injections had provided 80 percent relief for four weeks. Claimant further reported that he was getting migraines 15 times per month, sometimes lasting as long as five hours. Claimant also reported that Ubrelvy was helping as much as the Emgality. In that same medical record, Dr. Price opined that Claimant should continue with Ubrelvy and Emgality.

16. Claimant testified that his current treatment regime of his migraines are Ubrelvy, Botox injections, Baclofen, and the monthly Emgality injection. Claimant explained that the Botox and Emgality are used before the onset of any migraine. When a migraine does occur, he then takes the Ubrelvy. Claimant further testified that before he used Ubrelvy, a migraine would result in him sitting on the couch, in the dark, until the migraine ended. Since using Ubrelvy, his migraines do not last as long, and he is able to function normally.

17. Dr. Ellen Price testified regarding her treatment of Claimant. Dr. Price began treating Claimant in 2006. Dr. Price explained that the focus of her treatment was Claimant's myofascial pain and headaches, including migraine headaches. Dr. Price testified that in an effort to address Claimant's migraines over the years he has been prescribed Trazadone, Baclofen, Vicodin, Corguard, Flexeril, and Topamax. Dr. Price explained that the newer CGRP drugs have fewer side effects when treating migraines. With regard to Claimant's treatment, Botox injections and Emgality have been effective in preventing the onset of migraines. However, when a migraine does occur, Ubrelvy acts as a "rescue" medication to abort the migraine symptoms, while also allowing Claimant to function. It continues to be Dr. Price's opinion that Ubrelvy is reasonable and necessary to treat Claimant's migraine headaches.

18. The ALJ credits the medical records, Claimant's testimony, and the opinions of Dr. Price over the contrary opinions of Dr. Sassoon. The ALJ finds that the use of Ubrelvy is effective in reducing Claimant's migraine symptoms while allowing him to maintain function. Therefore, ALJ finds that Claimant has successfully demonstrated that it is more likely than not that Claimant's continued use of Ubrelvy is reasonable medical treatment necessary to maintain Claimant at MMI.

19. The ALJ credits the records admitted into evidence and finds that Claimant has demonstrated that it is more likely than not that he has accrued costs totalling $1,703.52 in pursuing this matter.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. Although Dr. Sassoon recommended denial of Ubrelvy because of his understanding of the ODG, the ALJ finds Dr. Price's opinions on this issue to be more persuasive. As found, Claimant's use of Ubrelvy has been effective in treating his migraine symptoms, while also allowing him to remain functional. As found, Claimant has demonstrated, by a preponderance of the evidence, that the prescription medication

Ubrelvy is reasonable medical treatment necessary to maintain Claimant at MMI. Respondents shall pay for the requested prescription, Ubrelvy, pursuant to the Colorado Medical Fee Schedule.

6. The claimant has requested costs related to the current Application for Hearing. Section 8-42-101(5), C.R.S. provides:

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

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S. related to the requested prescription. As found, Claimant is entitled to costs totalling $1,703.52.

ORDER

It is therefore ordered:

1. Respondents shall pay for the requested prescription, Ubrelvy, pursuant to the Colorado Medical Fee Schedule.

2. Respondents shall pay $1,703.52 for the costs incurred as a result of this matter.

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

Dated December 19, 2023.

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

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

service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

INTERPRETER

[Redacted, hereinafter SS] was present to assist Claimant with interpretation and translation from Punjabi to English at Respondents' request. Claimant understands English and speaks English. He did not want word-for-word translation/interpretation, and the ALJ allowed Claimant to use the interpreter as needed.

EXHIBITS

After filing his hearing application on July 18, 2023, Claimant sent the OAC four PDFs of records presumably intended to be hearing submissions. Claimant's submissions were not organized, numbered or otherwise marked with a discernible method of identification. Included in Claimant's submissions were the following: (1) a 78 page packet of records submitted on November 2, 2023, identified by the ALJ at hearing as Claimant's Exhibit 1; (2) Claimant's hand written answers to Respondents' Interrogatories dated October 18, 2023, submitted to the OAC on October 18, 2023, identified by the ALJ at hearing as Claimant's Exhibit 2; (3) Respondents' Interrogatories to Claimant dated September 6, 2023, also submitted by Claimant to the OAC on October 18, 2023, identified by the ALJ at hearing as Claimant's Exhibit 3; and (4) a 148 page PDF of records submitted by Claimant at 6:50 p.m. on November 13, 2023, the night before hearing, identified by the ALJ as Claimant's Exhibit 4. The ALJ admitted Claimant's Exhibits 1-3 into evidence.

Exhibit 4 consists of various medical bills, Claimant's handwritten description of what he is entitled to, Claimant's apartment rental documents, additional UCHealth medical records, Respondents' Interrogatories to Claimant dated September 6, 2023, and Claimant's Responses to Interrogatories dated October 18, 2023. Respondents did not object to Claimant's November 8, 2023 UCHealth medical records, and they were admitted into evidence. However, Respondents objected to the remainder of Claimant's Hearing Exhibit 4 because the records were not timely exchanged and irrelevant. The ALJ sustained Respondents' objections. Therefore, the only record admitted into evidence contained within Claimant's Exhibit 4 is the November 8, 2023 UCHealth report of Peter Lennarson, M.D.

The ALJ admitted Respondents' Hearing Exhibits A-FF into evidence.

RELEVANT PROCEDURAL HISTORY

On October 16, 2020 a hearing was held before ALJ Kabler on Respondents' attempt to overcome the Division Independent Medical Examination (DIME) opinions of Ranee Shenoi, M.D. on cervical and mental permanent impairment. Claimant also raised issues that included: (1) overcoming Dr. Shenoi's DIME opinion on causation (lumbar/thoracic), MMI and permanent impairment; (2) a request for additional Temporary Total Disability (TTD) benefits, Permanent Total Disability (PTD) benefits, and additional medical benefits. On December 8, 2020 ALJ Kabler issued Findings of Fact, Conclusions

of Law, and Order, determining Respondents overcame Dr. Shenoi's opinion that Claimant sustained cervical spine injuries and mental impairment. He further determined that Claimant suffered no permanent impairment under the claim. ALJ Kabler also reasoned Claimant failed to overcome Dr. Shenoi's opinions regarding MMI, causation and permanent impairment. He further concluded that Claimant failed to prove entitlement to TTD benefits, PTD benefits, and additional medical benefits.

Claimant appealed ALJ Kabler's Order to the Industrial Claim Appeals Office (ICAO) and the ICAO affirmed. Claimant then appealed the ICAO's Order to the Colorado Court of Appeals, but the Court also affirmed. Finally, on February 21, 2023 the Colorado Supreme Court denied Claimant's Petition for Writ of Certiorari. Consequently, the issues determined in ALJ Kabler's December 8, 2020 Order, as subsequently acknowledged by Respondents in a January 12, 2021 Final Admission of Liability (FAL), closed by operation of law.

On March 15, 2023 Claimant applied for hearing on issues including medical benefits, Average Weekly Wage (AWW), disfigurement, TTD benefits, PPD benefits, PTD benefits, penalties, and "other issues." On April 4, 2023 Respondents filed a motion to strike Claimant's hearing application because the issues were closed by operation of law or moot. On April 11, 2023 ALJ Lovato issued an order granting in part Respondents' motion to strike Claimant's hearing application. ALJ Lovato specifically struck compensability, TTD benefits, PPD benefits, PTD benefits, medical benefits and AWW because each issue had been litigated and thus closed as a matter of law. The only issues that remained open and ripe for litigation involved disfigurement, penalties, and "other."

A hearing was then held before ALJ Goldman on July 18, 2023. ALJ Goldman determined that Claimant failed to identify any penalty that could be assessed under the Act. Furthermore, Claimant failed to identify and issue under the "other issues" section of his hearing application that was open and ripe for litigation. Thus, the only remaining issue for hearing was disfigurement. On September 5, 2023 ALJ Goldman issued Findings of Fact, Conclusions of Law, and Order denying and dismissing Claimant's request for disfigurement benefits. Because Claimant did not appeal the Order, disfigurement also closed by operation of law.

On July 18, 2023 Claimant also filed the present hearing application. Claimant identified many of the same issues previously litigated and closed, but on this occasion he also endorsed Petition to Reopen. On August 17, 2023 PALJ Sandberg issued a prehearing order granting Respondents' motion to clarify issues for hearing, striking certain issues as unripe, and finding that the only issue for hearing was reopening. PALJ Sandberg specifically noted "[a]ny and all claims for an increase in average weekly wage, additional temporary disability benefits or medical benefits, are contingent upon a finding of change (worsening) of medical condition as determined by the administrative law judge at hearing." On August 17, 2023 Respondents filed a Response to Application for Hearing endorsing reopening defenses.

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his Workers' Compensation claim based on error, mistake

or change in condition pursuant to §8-43-303(1), C.R.S. after reaching Maximum Medical Improvement (MMI) on November 14, 2019.

FINDINGS OF FACT

Pre-existing Medical History

1. The record reflects that Claimant has a significant history of injuries based on at least four motor vehicle accidents (MVAs) prior to the present claim. The MVAs occurred in 2004, on December 11, 2007, on April 12, 2015, and on May 12, 2017. Claimant's December 2007 MVA was reportedly a head-on collision at 55 mph – 60 mph.

2. Following his December 11, 2007 MVA, Claimant received extensive and continuous medical care leading up to his March 3, 2019 work injury. Claimant's symptoms involved his neck/cervical spine with radiculopathy into his arms/hands, bilateral shoulders, head/brain (including headaches/migraines), upper back/thoracic spine, chest/ribs, lower back including radiculopathy into his legs/feet, and mental disorders (depression, anxiety, PTSD, somatoform disorder). During the period Claimant received treatment for sleep disturbances, hypertension, dizziness, tinnitus, vestibular issues, neurological concerns, and memory problems. As a result of his plethora of medical issues, Claimant was totally disabled and continuously unemployed for more than ten years.

3. From 2007 to March 3, 2019 Claimant regularly received medications that included narcotics, muscle relaxers, anti-depressants, anti-anxiety medications, sleep aids, and anticonvulsants. He also underwent physical therapy, massage therapy, chiropractic care, acupuncture, cervical injections, trigger point injection. Claimant underwent seven cervical MRIs, and a multi-level cervical fusion was recommended but not pursued.

4. The record reveals that Claimant has a long history of a somatoform disorder. Notably, on July 7, 2011 J. Tashof Bernton, M.D. explained that Claimant

> has symptom magnification and/or somatoform problems in which emotional issues result in increased fixation on bodily symptoms and resultant physical complaints. The patient's clinical course is classic for a somatic presentation including a pattern of increasing symptoms over time, presentation to the emergency room for physical symptoms diagnosed as anxiety, failure of physically based treatments to result in improvement and multiple negative diagnostic evaluations. Disability seeking behavior and identification with the disabled role may play a significant part in the patient's pain complaints as well.

Four years later, on December 9, 2015, Randall J. Bjork, M.D. similarly noted Claimant had somatic fixation and engaged in extensive reporting of symptomatology. On March 1, 2016 Dr. Bjork diagnosed depression with somatic fixation in addition to post concussive headaches, neck pain, back pain, shoulder pain, and chronic PTSD.

5. In a report dated July 24, 2017 Jonathon Scott, M.D. at Blue Sky Neurology documented Claimant's history of chronic cervical issues, noting he had been on disability for years and had chronic disabling neck pain. On December 1, 2017, Dr. Scott noted that, because Claimant did not wish to pursue neck surgery, he had nothing else to offer. On July 19, 2018 Dr. Scott's partner Lisa Roeske-Anderson, M.D. referred Claimant to a pain clinic for cervical injections.

6. On October 1, 2018 Claimant began treatment with pain management specialist Giancarlo Checa, M.D. Claimant complained of neck pain with pain radiating down his arms to his hands with numbness and tingling, shoulder pain, upper thoracic/mid back pain, and lower back pain with symptoms radiating down his left leg. Dr. Checa's diagnoses included cervicalgia, myofascial pain syndrome, lumbar radiculopathy, and lumbago. He ordered a lumbar MRI, prescribed medications, and referred Claimant to spine surgeon Adam Smith, M.D. for an evaluation.

7. On October 26, 2018 Claimant visited Dr. Smith for an examination. He noted that Claimant reported years of neck and back pain with a previous cervical fusion recommendation. After reviewing Claimant's July 26, 2017 cervical MRI, Dr. Smith remarked that Claimant might require a C4-5 and C5-6 anterior cervical discectomy and fusion (ACDF). He also considered Claimant's MRI and recommended lumbar surgery.

8. On November 15, 2018 Claimant underwent lumbar surgery with Dr. Smith. The procedure was specifically described as a left L2, L3 and L4 hemilaminectomy, bilateral partial facetectomy of L2, L3, and L4, and intradural intramedullary resection of a conus/filum mass.

9. On January 8, 2019 Claimant returned to Dr. Smith complaining of continued severe neck pain and a litany of other chronic issues. Dr. Smith documented that Claimant continued to have limited cervical range of motion and high anxiety. He also noted Claimant "[c]ontinues to be very anxious. Fearful body wide pain never getting better. Fearful that he will not have his pain meds. He states: 'I'm uncontrolled. I can't survive without pain medication. If someone stopped my pain medication, I would just go to the ER every day.'" Dr. Smith determined Claimant needed to be weaned off of pain medications and control his anxiety before pursuing more surgery.

March 3, 2019 Workers' Compensation Injury

10. On March 3, 2019 Claimant was involved in a MVA while working as a taxi driver for Employer. The MVA is the basis for the present claim. He visited Rose Medical Center Emergency Department and reported left-sided neck pain. Claimant's attending physician observed "[p]atient with relatively minor mechanism of injury. Patient has no cervical spine tenderness. Patient has some mild left paracervical muscle tenderness. No neurological deficits. No other signs of serious injuries. Patient does not require any x-rays or CTs at this time. Supportive care with Tylenol, ibuprofen and muscle relaxer."

11. On March 6, 2019 Claimant began treatment with Authorized Treating Physician (ATP) Annu Ramaswamy, M.D. Dr. Ramaswamy ordered a thoracic x-ray (normal), a lumbar x-ray (spondylosis), and a chest x-ray (normal). Claimant's cervical x-ray showed only degenerative issues and muscle spasms.

12. On April 11, 2019 Claimant returned to Smith for an evaluation. Claimant's complaints were virtually identical to those documented by Dr. Smith prior to the MVA, including a 5/10 pain level, throbbing and clicking in his neck, and high anxiety. Claimant specified that if he missed even one dose of his narcotics he would have a panic attack. Dr. Smith reiterated that Claimant was not a surgical candidate because of psychological concerns and narcotic dependence.

13. On May 9, 2019 ATP Dr. Ramaswamy remarked that Claimant exhibited somatic complaints and pain behaviors. Similarly, on May 15, 2019 Lawrence Lesnak, D.O. noted a significant number of psychosocial factors affecting Claimant's symptoms, and he believed there was an underlying somatoform disorder. On June 5, 2019 Dr. Lesnak documented that Claimant's multitude of significant complaints did not correspond to objective findings. Similarly, on June 11, 2019 neuropsychologist Kevin Reilly, Psy.D., reported that Claimant's psychological testing showed symptom magnification and negative response bias indicative of non-organic factors. Claimant's testing also revealed symptom magnification.

14. On August 6, 2019 Dr. Ramaswamy determined Claimant was able to return to full duty work. On August 12, 2019 he explained that Claimant's work-related conditions had resolved.

15. On October 14, 2019 psychiatrist Stephen Moe, M.D. remarked that Claimant had reached psychiatric MMI for his work injury and assigned a 5% mental impairment rating. On November 6, 2019 Dr. Ramaswamy noted that he reviewed Dr. Moe's reports and concluded Claimant had reached MMI for all aspects of his March 3, 2019 MVA with a 5% mental impairment rating as determined by Dr. Moe. Dr. Ramaswamy also reviewed surveillance video and observed that Claimant was able to bend, turn his head and push a car without difficulty.

16. On March 15, 2020 Claimant underwent a Division Independent Medical Examination (DIME) with Ranee Shenoi, M.D. Dr. Shenoi addressed MMI, permanent impairment and apportionment of cervical, thoracic, lumbar, and psychological conditions. She determined that Claimant sustained a cervical strain as a result of the March 3, 2019 MVA. Dr. Shenoi determined Claimant reached MMI on November 14, 2019. She commented that Claimant suffered a cervical strain with reactive issues of anxiety exacerbation following the March 3, 2019 MVA.

17. Dr. Shenoi reasoned that Claimant's cervical spine and psychiatric condition qualified for permanent impairment ratings. She thus assigned a 12% whole person cervical rating and 5% mental impairment rating. In response to the DIME Unit requiring a basis for her mental impairment rating, Dr. Shenoi issued an addendum dated April 7, 2020 and stated she did not have time to conduct her own mental impairment evaluation. Dr. Shenoi simply confirmed Dr. Moe's rating. The DIME Unit then required Dr. Shenoi to review prior medical records and submit an addendum report. In an addendum report dated April 13, 2020, Dr. Shenoi stated that, after reviewing prior medical records, her opinions that Claimant sustained a 12% whole person cervical spine impairment rating and a 5% mental impairment rating related to the March 3, 2019 MVA had not changed. In support of her opinion that Claimant's cervical impairment was

related to the March 3, 2019 MVA, Dr. Shenoi noted that his pre-existing cervical condition had resolved prior to March 3, 2019.

18. After reviewing additional medical records Dr. Moe determined the March 3, 2019 work injury did not result in an onset of new symptoms. Claimant sustained no mental impairment related to his claim.

19. Respondents retained Kathleen D'Angelo, M.D. to perform a records review. In a report dated June 3, 2020 Dr. D'Angelo detailed Claimant's medical history before and after the March 3, 2019 MVA and summarized surveillance video. Dr. D'Angelo determined that Claimant did not sustain any work injury on March 3, 2019 except for cervical myofascial irritation. She explained Claimant had self-limited symptoms that required no further treatment, impairment, work modification or maintenance care. Dr. D'Angelo further reasoned that Claimant was at MMI for his work injury.

20. On December 8, 2020 ALJ Kabler issued Findings of Fact, Conclusions of Law, and Order. He found against Claimant on all litigated issues. ALJ Kabler concluded that Claimant achieved MMI on November 14, 2019 with no permanent impairment and no entitlement to additional medical care for his March 3, 2019 MVA. He specifically commented that, "[t]aking the evidence as a whole, the ALJ finds that it is highly probable and free from serious or substantial doubt that Claimant recovered from his March 3, 2019 work injury by at least August 12, 2019, and that physical symptoms and complaints he exhibited after that date were not related to the March 3, 2019 work injury." Therefore, whatever physical issues Claimant experienced subsequent to August 12, 2019 were not causally related to his claim.

Claimant's Subsequent Treatment

22. After Dr. Ramaswamy released him from care, Claimant sought medical treatment outside the Workers' Compensation system primarily through UCHealth. On October 22, 2021 Claimant was evaluated by Chantal O'Brien, M.D. in the UCHealth Neurology Headache Clinic. Claimant presented with chronic migraines without aura, cervicogenic headaches and psychophysiological insomnia. Dr. O'Brien identified a long list of other medical care and work-up Claimant had received, including medications, Botox injections, spinal MRIs, occipital blocks, trigger point injections (TPIs), selective nerve blocks, cervical facet injections, and costochondral steroid injections. She did not perform a causation evaluation or address whether any of Claimant's work-related symptoms had worsened since he reached MMI in November 2019.

23. On May 13, 2022 Claimant returned to Dr. O'Brien's Headache Clinic. Claimant reported symptoms including neck pain, myofascial muscle pain, cervical pain, chronic bilateral low back pain with sciatica, chronic pain syndrome, nonintractable chronic migraine, headache, visual disturbance, and chronic migraine without aura. Dr. O'Brien specifically did not relate any of Claimant's symptoms to his work injury or worsening of condition since he reached MMI on November 14, 2019.

24. On September 6, 2023 Respondents served Claimant with interrogatories directed at the reopening issues. Notably, Respondents' Interrogatory Number 3 asked

Claimant if he believed his claim should be reopened secondary to error or mistake. Claimant answered "I don't know what you taking about what error or mistake on this claim …." Respondents' Interrogatory Number 5 asked Claimant to state whether he agreed with Dr. Sharma's statement that he was not at MMI as of November 14, 2019. In response, Claimant wrote "Yes I agree with Doctor Sharma on June, 2023 assessment about Nov 14, 2019 he not reached maximum medical improvement do agree."

25. Respondents' Interrogatory Number 6 specifically asked Claimant whether his condition had improved, worsened or stayed the same since November 14, 2019. Respondents' Interrogatory 7 queried: "If you believe your condition has worsened since November 14, 2019, state how you were doing on November 14, 2019, and what condition(s) have worsened since November 14, 2019, and in what respect have those identified conditions worsened." Claimant responded that he is now better than before and he did not believe his condition had worsened since November 14, 2019. Instead, his condition has worsened since his work accident.

26. Jeffrey Raschbacher, M.D. performed a comprehensive records review of Claimant's claim. In a report dated October 20, 2023 he specifically considered whether Claimant's Workers' Compensation claim should be reopened. Dr. Raschbacher concluded:

> [t]here is no objective basis or objective finding that warrants re-opening this case. Prior reported symptoms are not supported by objective findings and are not likely true and accurate reports of subjective symptoms (or lack thereof). My medical opinion is that the opinions of Dr. Sharma are without merit. Treatment at UC or elsewhere are not supported by medical evidence or objective findings. He remains at MMI, with no medical evidence supporting a reopening of the case.

Dr. Raschbacher summarized that Claimant has not sustained a worsening or change of his work-related condition since he reached MMI on November 14, 2019.

27. On November 8, 2023 Claimant visited Peter Lennarson, M.D. at the UCHealth Neurology clinic. Dr. Lennarson noted

> [w]e had a somewhat frustrating visit and I wanted more information about his prior symptoms and in particular what symptoms he had prior to his lumbar surgery as I tried to explain a tethered cord could cause a variety of symptoms as well but he did not want to discuss any of that and only wanted to focus on 'getting a paper' saying whether or not he needed neck surgery. I told him that based on his neck MRI and some of his symptoms that surgery for decompression at C45, C56, C67 would be potentially helpful especially for his left arm symptoms and less certain for his neck pain.

There is no suggestion in the preceding report that Dr. Lennarson was aware of Claimant's injury history. Dr. Lennarson also did not provide a causation opinion, did not relate Claimant's conditions to the March 3, 2019 MVA, and did not specify a worsening of condition since Claimant reached MMI.

28. Claimant testified at the hearing in this matter. He explained that at the time of his March 3, 2019 MVA he was not able to see or think, and had electrical shocks through his brain. In addressing whether his claim should be reopened based on a change in condition, Claimant stated "no, no its not" (getting worse). Claimant then stated he wanted to open his claim because when he went to hearing before ALJ Kabler his treatment was not done. Claimant specifically disagreed with Dr. Ramaswamy terminating his medical care and returning him to work in 2019. He felt he had chest, blood pressure and breathing issues that had not been addressed. Claimant explained that, because Dr. Ramaswamy would not provide care, he sought treatment from personal providers at Denver Health and UCHealth. He contended his vision has worsened since his MVA. Claimant also testified he now requires oxygen, and cannot sleep without a sleep apnea machine. Claimant also commented that he requires medications and Botox injections every two months. Finally, he noted his left hand, right hand, and left foot go numb and he is completely losing balance. The preceding testimony reflects that Claimant is presumably alleging all of his current symptoms are related to his March 3, 2019 MVA and his condition has worsened.

29. Claimant has failed to establish it is more probably true than not that he should be permitted to reopen his claim based on error or mistake pursuant to §8-43-303(1), C.R.S. Initially, Claimant suffered industrial injuries on March 3, 2019 when he was involved in a MVA while working as a taxi driver for Employer. He reached MMI on November 14, 2019 with no permanent impairment. Although Claimant has not identified a specific error or mistake as a basis for reopening his claim, his July 18, 2023 hearing application and answers to interrogatories suggest that he is challenging ALJ Kabler's December 8, 2020 Findings of Fact, Conclusions of Law, and Order. ALJ Kabler ruled against Claimant on all litigated issues. He concluded that Claimant achieved MMI on November 14, 2019 with no permanent impairment and no entitlement to additional medical care for his March 3, 2019 MVA.

30. Claimant has not identified a specific mistake or error made by ALJ Kabler that would warrant reopening. Instead, he contends that every aspect of the Order was incorrect. However, ALJ Kabler's Order has repeatedly been affirmed on appeal. Notably, the ICAO affirmed ALJ Kabler's decision that Claimant reached MMI on November 14, 2019 with no impairment, and no entitlement to additional TTD, PPD, PTD or medical benefits including maintenance care. On June 30, 2022 the Colorado Court of Appeals affirmed the ICAO and the Colorado Supreme Court subsequently denied certiorari. Nevertheless, Claimant again contends that ALJ Kabler erroneously decided all issues without identifying a specific error or mistake that warrants reopening. Notably, Claimant testified that he seeks to reopen his claim because, when he went to hearing before ALJ Kabler, his treatment had not concluded. Claimant specifically disagreed with Dr. Ramaswamy terminating his medical care and returning him to work in 2019.

31. Claimant has simply failed to provide persuasive new evidence of mistake or error. Although Claimant and his personal physicians may believe ALJ Kabler was erroneous, the disagreement with ALJ Kabler's decision does not warrant reopening based upon error or mistake. All issues decided by ALJ Kabler were closed following the exhaustion of Claimant's appeals. The record reveals that Claimant has not produced new evidence of any error or mistake. He has not identified a mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. Accordingly, Claimant's

request to reopen his claim based on error or mistake is denied and dismissed.

32. Claimant has also failed to demonstrate it is more probably true than not that he should be permitted to reopen his claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Claimant has not identified a change in condition of his original compensable injury or of his physical or mental condition that is causally connected to his March 3, 2019 MVA. In his answers to interrogatories Claimant noted that he is not claiming his condition has changed or worsened since he reached MMI on November 14, 2019. Rather, he claims he never reached MMI. To the extent Claimant is alleging he sustained disability and requires additional medical care, he has failed to prove the treatment is causally related to the present claim.

33. The record demonstrates that Claimant has suffered from numerous pre-existing conditions prior to his March 3, 2019 MVA. The symptoms included severe cervical, upper extremity, shoulder, head, rib/chest, lumbar, lower extremity, balance, vision, and sleep conditions. Claimant also suffered from a somatoform disorder and psychological conditions including severe anxiety, depression, and PTSD. To the extent Claimant's low speed MVA on March 3, 2019 aggravated or exacerbated any of the preceding conditions, they were temporary, and completely resolved by November 14, 2019. Although Claimant attributes his conditions and symptoms to his March 3, 2019 MVA, he has failed to establish that any of his symptoms after November 14, 2019 were causally related to his March 3, 2019 MVA. The bulk of the evidence does not support his position. Instead, the conclusions of numerous physicians and comprehensive Order of ALJ Kabler reveal that Claimant's work-related conditions resolved by his November 14, 2019 date of MMI.

34. The record reveals significant, persuasive evidence proving Claimant's current complaints are not causally related to his MVA, and his work-related condition has not changed or worsened. On August 12, 2019 Dr. Ramaswamy commented that all of Claimant's work-related conditions had resolved. On November 6, 2019 he concluded Claimant had reached MMI for all aspects of his March 3, 2019 MVA. Furthermore, on June 3, 2020 Dr. D'Angelo determined that Claimant's only work injury on March 3, 2019 was cervical myofascial irritation. She explained Claimant had self-limited symptoms that required no further treatment, impairment, work modification or maintenance care. Moreover, Dr. Raschbacher summarized that Claimant has not sustained a worsening or change of his work-related condition since he reached MMI on November 14, 2019. Finally, ALJ Kabler notably commented that "it is highly probable and free from serious or substantial doubt that Claimant recovered from his March 3, 2019 work injury by at least August 12, 2019, and that physical symptoms and complaints that he exhibited after that date were not related to the March 3, 2019 work injury." Therefore, any symptoms Claimant experienced subsequent to August 12, 2019 were not causally related to his claim.

35. The overwhelming evidence in the record reflects that Claimant's work-related symptoms as a result of his March 3, 2019 MVA resolved by the time he reached MMI on November 14, 2019. Although Claimant contends that his condition has changed, he has failed to demonstrate that any worsening is causally related to his March 3, 2019 MVA as opposed to his pre-existing myriad of physical and psychological conditions. Thus, because none of his symptoms subsequent to November 14, 2019 are causally

related to the present claim, Claimant has failed to prove a worsening of condition that warrants reopening. Accordingly, Claimant's request to reopen his claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. At any time within six years of the date of injury, an ALJ may reopen an award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. The intent of the statute is to provide a remedy to claimants who are entitled to awards of both medical and disability benefits. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186 (Colo. App. 2002). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004). An ALJ's decision to grant or deny a petition to reopen may therefore "be reversed only for fraud or clear abuse of discretion." *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *see also Heinicke* 197 P.3d at 222 ("In the absence of fraud or clear abuse of discretion, the ALJ's decision concerning reopening is binding on appeal.").

5. Reopening of a closed claim may be granted based on a mistake of fact. §8-43-303(1), C.R.S. Error or mistake refers to mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. *Renz v. Larimer Cty. School Dist.*, 924 P.2d 1177 (Colo.App. 1996). When a party seeks to reopen a closed claim based on

mistake, the ALJ must determine whether a mistake was made, and if so, whether it was the type of mistake that justifies reopening. *Travelers Insurance Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo.App. 1981). When determining whether a mistake justifies reopening the ALJ may consider whether the alleged mistake could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Klosterman v. Indus. Comm'n*, 694 P.2d 873, 876 (Colo. App. 1984). The power to reopen is permissive and is therefore committed to the ALJ's sound discretion. *Cordova v. Indus. Claim Appeals Off*., 55 P/3d 186, 189 (Colo. App. 2002)

6. Section 8-43-303(1), C.R.S., provides that a Workers' Compensation award may be reopened based on a change in condition. In seeking to reopen a claim based on a change in condition, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

7. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his claim based on error or mistake pursuant to §8-43-303(1), C.R.S. Initially, Claimant suffered industrial injuries on March 3, 2019 when he was involved in a MVA while working as a taxi driver for Employer. He reached MMI on November 14, 2019 with no permanent impairment. Although Claimant has not identified a specific error or mistake as a basis for reopening his claim, his July 18, 2023 hearing application and answers to interrogatories suggest that he is challenging ALJ Kabler's December 8, 2020 Findings of Fact, Conclusions of Law, and Order. ALJ Kabler ruled against Claimant on all litigated issues. He concluded that Claimant achieved MMI on November 14, 2019 with no permanent impairment and no entitlement to additional medical care for his March 3, 2019 MVA.

8. As found, Claimant has not identified a specific mistake or error made by ALJ Kabler that would warrant reopening. Instead, he contends that every aspect of the Order was incorrect. However, ALJ Kabler's Order has repeatedly been affirmed on appeal. Notably, the ICAO affirmed ALJ Kabler's decision that Claimant reached MMI on November 14, 2019 with no impairment, and no entitlement to additional TTD, PPD, PTD or medical benefits including maintenance care. On June 30, 2022 the Colorado Court of Appeals affirmed the ICAO and the Colorado Supreme Court subsequently denied certiorari. Nevertheless, Claimant again contends that ALJ Kabler erroneously decided all issues without identifying a specific error or mistake that warrants reopening. Notably, Claimant testified that he seeks to reopen his claim because, when he went to hearing before ALJ Kabler, his treatment had not concluded. Claimant specifically disagreed with

Dr. Ramaswamy terminating his medical care and returning him to work in 2019.

9. As found, Claimant has simply failed to provide persuasive new evidence of mistake or error. Although Claimant and his personal physicians may believe ALJ Kabler was erroneous, the disagreement with ALJ Kabler's decision does not warrant reopening based upon error or mistake. All issues decided by ALJ Kabler were closed following the exhaustion of Claimant's appeals. The record reveals that Claimant has not produced new evidence of any error or mistake. He has not identified a mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. Accordingly, Claimant's request to reopen his claim based on error or mistake is denied and dismissed.

10. As found, Claimant has also failed to demonstrate by a preponderance of the evidence that he should be permitted to reopen his claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Claimant has not identified a change in condition of his original compensable injury or of his physical or mental condition that is causally connected to his March 3, 2019 MVA. In his answers to interrogatories Claimant noted that he is not claiming his condition has changed or worsened since he reached MMI on November 14, 2019. Rather, he claims he never reached MMI. To the extent Claimant is alleging he sustained disability and requires additional medical care, he has failed to prove the treatment is causally related to the present claim.

11. As found, the record demonstrates that Claimant has suffered from numerous pre-existing conditions prior to his March 3, 2019 MVA. The symptoms included severe cervical, upper extremity, shoulder, head, rib/chest, lumbar, lower extremity, balance, vision, and sleep conditions. Claimant also suffered from a somatoform disorder and psychological conditions including severe anxiety, depression, and PTSD. To the extent Claimant's low speed MVA on March 3, 2019 aggravated or exacerbated any of the preceding conditions, they were temporary, and completely resolved by November 14, 2019. Although Claimant attributes his conditions and symptoms to his March 3, 2019 MVA, he has failed to establish that any of his symptoms after November 14, 2019 were causally related to his March 3, 2019 MVA. The bulk of the evidence does not support his position. Instead, the conclusions of numerous physicians and comprehensive Order of ALJ Kabler reveal that Claimant's work-related conditions resolved by his November 14, 2019 date of MMI.

12. As found, the record reveals significant, persuasive evidence proving Claimant's current complaints are not causally related to his MVA, and his work-related condition has not changed or worsened. On August 12, 2019 Dr. Ramaswamy commented that all of Claimant's work-related conditions had resolved. On November 6, 2019 he concluded Claimant had reached MMI for all aspects of his March 3, 2019 MVA. Furthermore, on June 3, 2020 Dr. D'Angelo determined that Claimant's only work injury on March 3, 2019 was cervical myofascial irritation. She explained Claimant had self-limited symptoms that required no further treatment, impairment, work modification or maintenance care. Moreover, Dr. Raschbacher summarized that Claimant has not sustained a worsening or change of his work-related condition since he reached MMI on November 14, 2019. Finally, ALJ Kabler notably commented that "it is highly probable and free from serious or substantial doubt that Claimant recovered from his March 3, 2019 work injury by at least August 12, 2019, and that physical symptoms and complaints that he exhibited after that date were not related to the March 3, 2019 work injury." Therefore,

any symptoms Claimant experienced subsequent to August 12, 2019 were not causally related to his claim.

13. As found, the overwhelming evidence in the record reflects that Claimant's work-related symptoms as a result of his March 3, 2019 MVA resolved by the time he reached MMI on November 14, 2019. Although Claimant contends that his condition has changed, he has failed to demonstrate that any worsening is causally related to his March 3, 2019 MVA as opposed to his pre-existing myriad of physical and psychological conditions. Thus, because none of his symptoms subsequent to November 14, 2019 are causally related to the present claim, Claimant has failed to prove a worsening of condition that warrants reopening. Accordingly, Claimant's request to reopen his claim based on a change in condition is denied and dismissed.

ORDER

1. Claimant's request to reopen his March 3, 2019 claim based on error, mistake or a change in condition pursuant to §8-43-303(1), C.R.S. is denied and dismissed.

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

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

DATED: December 21, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-206-591-001

ISSUES

- Did Claimant prove by a preponderance of the evidence she suffered a whole person impairment to her right shoulder?
- If Claimant proved a whole person impairment, did Respondent overcome the DIME's 7% whole person rating by clear and convincing evidence?
- Did Claimant prove by clear and convincing evidence the DIME erred by not providing a cervical or thoracic spine rating?
- Did Claimant prove a right shoulder surgery performed by Dr. Derek Purcell was reasonably needed and causally related to the admitted injury?
- Did Claimant prove Dr. Purcell is an authorized provider?
- Did Claimant prove entitlement to TTD benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 22, 2023?
- At the hearing, the parties discussed submission of photographs to evaluate Claimant's eligibility for a disfigurement award. No photographs were submitted, and the issue of disfigurement will be reserved for future determination.

FINDINGS OF FACT

1. Claimant works for Employer as a Police Officer. She suffered admitted injuries on May 11, 2021 when she fell while chasing a burglary suspect.

2. Claimant sought treatment at the Memorial Hospital emergency department the evening of the accident. She reported pain in her right shoulder, right knee, and left hip. She did not immediately feel any neck or upper back symptoms. Claimant was diagnosed with multiple abrasions, contusions, and acute shoulder pain.

3. Claimant saw PA-C Magan Grigg at Employer's occupational medicine clinic on May 14, 2021. She reported right shoulder pain radiating to the chest, right pectoral muscle, and right scapula. She denied neck pain. Physical examination showed tenderness to palpation at the subscapularis insertion on the right shoulder with reduced strength of multiple rotator cuff muscles. Impingement signs were negative. Ms. Grigg ordered a shoulder MRI to rule out internal derangement, and referred Claimant to PT.

4. A right shoulder MRI was completed on May 17, 2021. It showed full-thickness supraspinatus tendinopathy but no rotator cuff tear, and mild intra-articular biceps tendinopathy.

5. Claimant returned to the occupational medicine clinic on May 27, 2021 and saw PA-C Paula Homberger. Claimant's knee felt better but her shoulder was worse. She described constant 2/10 right shoulder pain, radiating to the neck and mid back. Ms. Homberger advised Claimant the MRI showed no rotator cuff tear and she should improve quickly with conservative treatment. Ms. Homberger recommended Claimant continue PT.

6. Dr. Nicholas Kurz evaluated Claimant on June 15, 2021. Her shoulder pain had improved to 1/10, but still radiated to the right neck, trapezius, and scapular area. Dr. Kurz recommended four more weeks of PT.

7. On July 15, 2021, Ms. Homberger documented Claimant's right shoulder and neck pain had worsened. She recommended additional PT. That same day, Claimant's therapist noted pain radiating to Claimant's neck and a large trigger point in the right upper trapezius.

8. On August 3, 2021, Ms. Homberger noted pain throughout the shoulder girdle region, including the right trapezius and rhomboid muscles. She referred Claimant to Dr. Chad Abercrombie for chiropractic treatment.

9. Claimant had an initial evaluation with Dr. Abercrombie on August 30, 2021. She reported pain in the right shoulder, right neck, and right upper back. The examination showed tenderness and trigger points along the right trapezius and levator scapula. Dr. Abercrombie also noted increased tone and tenderness at the anterior deltoid, coracobrachialis, pectoralis minor, and proximal bicipital tendon region. Dr. Abercrombie diagnosed a right shoulder strain, cervicothoracic strain, and scapulothoracic pain. He recommended myofascial release techniques, chiropractic manipulation, and dry needling.

10. Claimant treated with Dr. Abercrombie for several months, during which time he consistently documented proximal symptoms affecting the shoulder girdle and right upper quadrant, including the right trapezius, rhomboids, levator scapulae, and pectoralis muscles.

11. On October 20, 2021, Claimant had an orthopedic evaluation with Dr. Michael Simpson. Dr. Simpson noted "pretty significant" rotator cuff tendinitis/tendinosis per the MRI. Physical examination showed positive impingement signs, pain with supraspinatus strength testing, mildly positive Speed's test, and crepitation with dynamic labral testing. Shoulder range of motion was normal. Dr. Simpson diagnosed a right shoulder strain and impingement syndrome and administered a subacromial steroid injection.

12. Claimant followed up with Dr. Simpson on November 17, 2021. The injection had helped, but only lasted two weeks. As a result, Dr. Simpson did not think another injection was warranted. Instead, he recommended platelet rich plasma (PRP) injections.

13. Dr. Kurz re-evaluated Claimant on November 23, 2021. Claimant stated her shoulder was feeling much better after the shoulder injection. She was having no pain at rest, and only 1-2/10 when using the shoulder. The examination showed full range of motion of the shoulder and neck, with no tenderness to palpation or spasm. Dr. Kurz advised Claimant that PRP injections were no longer recommended under the MTGs, and in any event were only previously approved when used to avoid surgery. Claimant had completed treatment with Dr. Abercrombie and was doing a home exercise program. Dr. Kurz put Claimant at MMI with no impairment and released her with no restrictions and no need for maintenance care.

14. On February 24, 2022, Claimant returned to Ms. Homberger because of worsening symptoms. She stated her neck and upper back had not fully resolved when she was discharged in November 2021, and had worsened in early January. She described daily headaches and difficulty sleeping. Her shoulder pain had also gotten worse in the interim. Claimant's pain diagram endorsed pain in the right shoulder radiating to the scapulothoracic region, base of the neck, and back of the head. Ms. Homberger noted tenderness and tightness with palpation of the right trapezius, periscapular area, and occipital muscles showed. Ms. Homberger opined Claimant was no longer at MMI and recommended additional PT and chiropractic treatment. She added a diagnosis of "cervicothoracic strain, previously treated, not listed formally as a diagnosis, worsened."

15. Claimant started PT on February 28, 2022. She reported sharp pain at the base of the neck causing intermittent headaches. She was having difficulty reaching behind her back and sleeping because of shoulder, neck and scapulothoracic pain. The therapist documented tenderness and trigger points in the right trapezius, right supraspinatus, and along the right rib area.

16. Claimant resumed treatment with Dr. Abercrombie on March 1, 2022. She reported continued right-sided neck and upper back pain that had escalated over the past few months with no new injury. Palpation revealed increased muscle tone across the right upper trapezius into the levator scapula, rhomboids, latissimus dorsi and serratus anterior. Dr. Abercrombie performed dry needling to the trapezial ridge, rhomboids and levator scapula.

17. Claimant saw Dr. Kurz on March 24, 2022. Her neck and upper back were "in knots." She denied any new incident, injury, or change in activity that could be responsible for her symptoms. Dr. Kurz stated Claimant remained at MMI but ordered an updated right shoulder MRI to look for "objective worsening." He opined the cervical and upper back symptoms "were not original complaints, and with no new work-related injury, are more medically likely unrelated to her original DOI."

18. The right shoulder MRI was completed on March 27, 2022. The radiologist opined the findings were "not significantly changed" since the prior MRI.

19. Claimant next saw Dr. Kurz on July 1, 2022. Because the MRI showed no new pathology, Dr. Kurz opined Claimant remained at MMI and "no additional treatment is necessary or reasonable as causally or temporally related to her initial mechanism of

injury." He further opined that treatment for Claimant's nonwork-related cervicothoracic pain and headaches "should continue to be followed privately by her PCP, outside of the WC system."

20. Dr. Nicholas Olsen performed an IME for Respondent on August 8, 2022. Claimant described ongoing neck pain and headaches as her most bothersome symptoms at that time. She rated her shoulder pain as 1/10. Dr. Olsen inquired if Claimant had ever had neck or midback issues before. She related an episode of right trapezius pain in 2020, which resolved after a course of therapy. She said her current symptoms were "nothing like" the episode in 2020. Dr. Olsen told Claimant it was difficult to square her description of symptoms and associated limitations with her low reported pain levels. On examination, Dr. Olsen noted normal range of motion of the right shoulder and neck. Impingement signs were negative. Palpatory examination demonstrated mild tenderness over the biceps tendon and moderate tenderness in the upper trapezius. He also noted mild somatic dysfunction in the midthoracic spine with tenderness along the right side. No trigger points were identified. Dr. Olsen agreed Claimant was at MMI and no additional treatment was warranted for the right shoulder. He further opined that Claimant's cervicothoracic pain and right upper trapezius pain were not work-related. Finally, Olsen opined the situs of any functional impairment from the shoulder injury was distal to the glenohumeral joint and would not represent a whole person impairment.

21. Claimant subsequently pursued additional evaluations and treatment for the right shoulder from her PCP, who referred her to Dr. Derek Purcell, an orthopedic surgeon. She was evaluated by PA Matthew Albrecht in Dr. Purcell's office on September 6, 2022. She described persistent pain and dysfunction in the right shoulder since the work accident on May 11, 2021. She also described right-sided neck and thoracic pain. Impingement signs, O'Brien's test, Speed's test, and Yergason's test were positive. Mr. Albrecht personally reviewed the March 2022 MRI images. He agreed with the radiologist's interpretation of mild supraspinatus tendinosis but also noted moderate tendinopathy of the long head of the biceps tendon. He diagnosed shoulder impingement syndrome and referred Claimant to PT. They discussed other treatment options, including surgery.

22. Dr. Derek Purcell performed right shoulder arthroscopic surgery on September 26, 2022. He confirmed tendinopathy of the long head of the biceps tendon as noted by Mr. Albrecht, for which he performed a biceps tenodesis. He also debrided a degenerative labral tear. Finally, Dr. Purcell performed a subacromial decompression to address "extensive" subacromial bursitis.

23. Dr. Purcell restricted Claimant from work after the surgery. Because Claimant had pursued the surgery outside of her workers' compensation claim, she utilized Employer's procedures regarding nonwork-related leave.

24. Claimant was off work from September 26, 2022, through November 1, 2022, during which time she was in a sling and body wrap. On November 2, she returned to part-time "light duty," and continued in that capacity through March 22, 2023. She

received a combination of wages and short-term disability benefits while on light duty. Claimant returned to full duties at full wages on March 23, 2023.

25. Claimant underwent a Division IME with Dr. John Bissell on December 12, 2022. Dr. Bissell opined the surgery performed by Dr. Purcell was causally related to the work accident. Dr. Bissell determined Claimant was not at MMI inasmuch as she was still recovering from surgery and had not completed post-operative rehabilitation.

26. Respondent filed a General Admission of Liability (GAL) on January 9, 2023, accepting that Claimant was not at MMI. But Respondent denied liability for the surgery as "unauthorized," and denied that Claimant was entitled to any temporary disability caused by the surgery.

27. Post-surgical records from Mr. Albrecht describe Claimant generally "doing well" and making steady improvement.

28. Claimant attended a follow-up DIME with Dr. Bissell on June 6, 2023. Claimant reported ongoing pain in the right shoulder, neck, and mid back. Her shoulder pain was improving. Examination of the shoulder showed tenderness to palpation about the right parascapular region. The last treatment record available to Dr. Bissell, dated March 22, 2023, showed Claimant progressing well and working light duty, with an expected return to full duty shortly thereafter. Dr. Bissell determined Claimant was at MMI as of March 22, 2023. He assigned an 11% upper extremity rating based on 5% for the subacromial decompression and 6% for range of motion, which converts to 7% whole person. Consistent with the Division's Impairment Rating Tips, Dr. Bissell justified the 5% surgical rating because Claimant also had a labral debridement and biceps tenodesis as additional work-related conditions unaccounted for by other methods. Dr. Bissell opined Claimant had no ratable impairment to any other body part, and maintained his belief that the cervical and thoracic myofascial symptoms were pre-existing and unrelated to the industrial injury.

29. Dr. Olsen performed a second IME for Respondent on July 20, 2023. He was "surprised" Claimant had undergone surgery given the minimal 1/10 pain level described in his previous IME. Claimant clarified that her typical shoulder pain before the surgery was 1/10 but it frequently flared to 5/10 or 6/10 and interfered with activities. She reported significant benefit from the surgery. Dr. Olsen's examination showed negative impingement signs and essentially full range of motion. Dr. Olsen opined the surgery was not reasonably needed based on the minimal findings at his prior IME and lack of significant pathology shown on the MRIs. To the extent Dr. Purcell identified any reasons for surgery, Dr. Olsen did not believe they were causally related to the work accident. Dr. Olsen disagreed with Dr. Bissell's impairment rating. He did not think the 5% surgical rating was warranted under the Rating Tips, and he found normal shoulder range of motion.

30. Claimant saw Dr. Miguel Castrejon on September 12, 2023 for an IME at the request of her counsel. Claimant described intermittent pain from the base of the neck, through the shoulder, and extending below the right scapula. Claimant told Dr. Castrejon

she did not recall experiencing any neck or midback pain immediately after the accident, but started experiencing stiffness in the neck and midback within two weeks of the accident. Claimant reported "substantial benefit" from the shoulder surgery, although she still had some residual symptoms and limitations. Physical examination showed tenderness throughout the right upper quadrant, including the cervical paraspinals, trapezius, rhomboids, and right scapula. The proximal biceps tendon was also tender.

31. Dr. Castrejon agreed Claimant was at MMI with permanent impairment to the right shoulder. He assigned a 10% upper extremity rating for the right shoulder, which converts to 6% whole person.[1] Dr. Castrejon agreed with Dr. Bissell that Claimant has no ratable cervical or thoracic impairment under Table 53 of the *AMA Guides*. But Dr. Castrejon was impressed by the voluminous documentation of symptoms and treatment directed to areas proximal to the glenohumeral joint including the right paracervical muscles, trapezius, rhomboids, and scapula. He saw no evidence of any significant pre-injury neck pain, treatment, or functional limitations. As a result, Dr. Castrejon thought Claimant met the criteria set forth in the Impairment Rating Tips for a cervical range of motion rating despite the absence of a Table 53 specific disorder impairment. He calculated an 8% whole person rating based on cervical ROM deficits, which he combined with the 6% shoulder rating for an overall rating of 14% whole person.

32. Dr. Olsen testified at hearing consistent with his reports. He reiterated that the surgery was not warranted given Claimant's minimal symptoms and lack of identified pathology. He dismissed Mr. Albrecht's reading of the MRI and Dr. Purcell's intraoperative findings in favor of the radiologist's reports. He also opined the surgery did not meaningfully improve Claimant's overall surgery, despite her reports to multiple IME physicians that she appreciated substantial benefit from the procedure. He disagreed with Dr. Bissell and Dr. Castrejon that Claimant warranted a rating for the right shoulder. But to the extent that Claimant may be found to have impairment, Dr. Olsen opined it is a purely scheduled impairment that only affects Claimant's arm, and all proximal symptoms are unrelated to the work injury.

33. Dr. Bissell and Dr. Castrejon's opinions regarding Claimant's right shoulder impairment are credible and more persuasive than the contrary opinions offered by Dr. Olsen.

34. Claimant's testimony is generally credible.

35. Claimant proved by a preponderance of the evidence that she suffered functional impairment to her right shoulder not listed on the schedule.

36. Respondent failed to overcome Dr. Bissell's 7% whole person right shoulder rating by clear and convincing evidence.

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[1] Dr. Castrejon used the same methodology as Dr. Bissell to calculate the shoulder rating but obtained slightly different ROM measurements, which accounts for the slight variance in their respective ratings.

37. Claimant failed to overcome Dr. Bissell's determination that she has no ratable impairment to the cervical or thoracic spine by clear and convincing evidence.

38. Claimant proved the September 26, 2022 right shoulder surgery performed by Dr. Purcell was reasonably needed to cure and relieve the effects of her industrial injury.

39. Claimant failed to prove Dr. Purcell is an authorized provider.

40. Claimant proved she is entitled to TTD benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 21, 2023.

CONCLUSIONS OF LAW

A. Burdens and standards of proof

The parties have raised several interrelated issues regarding permanent impairment. The DIME provided an impairment rating for Claimant's right shoulder, which may reflect whole person or scheduled impairment. Claimant believes she suffered whole person impairment to her shoulder, whereas Respondent believes any impairment is confined to the schedule. Additionally, Claimant argues the DIME erred by failing to include a rating for the cervical spine.

As postured, the issues create split burdens of proof. Additionally, there are preliminary questions regarding which of the DIME's findings are entitled to presumptive weight, and which are evaluated based on a preponderance of the evidence. Regarding the shoulder, the initial consideration is whether it constitutes a scheduled or whole person impairment. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance of the evidence.

Whether a claimant sustained a scheduled or non-scheduled impairment is a threshold question of fact for determination by the ALJ. The heightened burden of proof that attends a DIME rating only applies if the claimant establishes by a preponderance of the evidence that the industrial injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (August 16, 2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

In light of the foregoing principles, the burdens of proof are allocated as follows: (1) Claimant must prove by a preponderance of the evidence she sustained whole person impairment to the right shoulder; (2) if Claimant has whole person impairment to her shoulder, Respondents must overcome the DIME rating by clear and convincing evidence; (3), if Claimant does not have a whole person impairment, Claimant must prove the proper shoulder rating by a preponderance of the evidence; (4) Claimant must prove

by clear and convincing evidence the DIME erred by not providing a cervical spine rating; (5) if either party overcomes the DIME by clear and convicing evidence in any respect, the proper rating is a factual question based on a preponderance of the evidence.

B. Claimant proved whole person impairment to her right shoulder

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

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered a whole person impairment to her right shoulder. Claimant reported pain radiating to her neck and mid-back at the first appointment with Ms. Homberger on May 27, 2021. The record thereafter is replete with reports of symptoms affecting structures proximal to the arm, including the trapezius, rhomboids, and right scapula. These proximal symptoms have interfered with activities such as reaching overhead, reaching behind her back, sleeping, and exercising. The argument that all of Claimant's proximal symptoms and associated limitations are pre-

existing and unrelated to the work accident is unconvincing. Claimant acknowledged prior episodes of neck and trapezius pain, but credibly testified the issues resolved after a short course of therapy. As Dr. Castrejon noted, there is no documentation of neck or midback pain, treatment, or functional limitations immediately before the May 2021 work accident. To the contrary, Claimant was working full time in a physically demanding occupation as a police officer without difficulty, and there is no persuasive reason to think she otherwise would have had these symptoms absent the injury to her right shoulder.

C. Respondent failed to overcome the DIME shoulder rating

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

Respondent failed to overcome Dr. Bissell's 7% whole person right shoulder rating by clear and convincing evidence. Claimant suffered an admitted injury to her shoulder in May 2021, and remained symptomatic nearly two years later. There is no persuasive evidence connecting her ongoing shoulder symptoms to any nonwork-related cause. Claimant received extensive treatment for the shoulder, including eventual surgery. Dr. Bissell determined the surgery was reasonably needed and causally related to the work injury, as did Dr. Castrejon. Both Dr. Bissell and Dr. Castrejon assigned a 5% rating for the subacromial decompression, pursuant to the Division's Rating Tips. The remainder of Dr. Bissell's rating was appropriately based on ROM deficits he personally measured at the DIME. Although Dr. Olsen found normal shoulder ROM during his IME, Dr. Bissell expressed no concern about the validity of the measurements he obtained at the DIME. Dr. Castrejon's similar measurements lend further credence to Dr. Bissell's rating. At most, Dr. Olsen and Dr. Kurz's determinations that Claimant has no impairment are "mere differences of opinion," and do not rise to the level of clear and convincing evidence.

D. Claimant failed to overcome Dr. Bissell's rating

As found, Claimant failed to overcome Dr. Bissell's determination she has no ratable impairment to the cervical or thoracic spine. Claimant's IME agreed no thoracic spine rating is warranted, and there is no opinion in the record to the contrary. Regarding the cervical spine, no treating or evaluating Level II physician has found impairment under Table 53, which is generally a threshold requirement for a spinal rating under the *AMA Guides*. *E.g., Rojahn v. Monaco Rehabilitation*, W.C. No. 4-055-695-02 (October 5, 2017).

Dr. Castrejon acknowledged Claimant does not qualify for a Table 53 rating, but invoked the exception outlined in the Division's Rating Tips that allows an isolated cervical ROM impairment in "unusual cases" involving a "severe" shoulder injury. The language used in the Rating Tips reflects an element of discretion on the part of the rating physician, stating that a rating is "allowed" where the rater believes it can be "well justified." But there does not appear to be any scenario where such a rating is mandatory under the Tips. Claimant failed to prove by clear and convincing evidence that Dr. Bissell erred by declining to assign a cervical ROM rating without a corresponding Table 53 rating.

E. The September 26, 2022 shoulder surgery was reasonably needed to cure and relieve the effects of the admitted injury

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Claimant proved the September 26, 2022 right shoulder surgery performed by Dr. Purcell was reasonably needed and causally related to her industrial injury. Claimant credibly explained that her right shoulder was minimally painful at rest, but it repeatedly flared and interfered with her ability to engage in activities. Mr. Albrecht concluded Claimant's clinical presentation and MRI findings were sufficient to justify surgery, and Dr. Purcell obviously agreed. Dr. Bissell and Dr. Castrejon concurred the surgery was reasonably needed and related to the work accident. Intraoperatively, Dr. Purcell observed and treated pathology in the right shoulder that was not fully appreciated by the radiologists who read the MRIs. The surgery ultimately improved Claimant's symptomology and function even though it did not completely resolve the condition.

F. Dr. Purcell is not an authorized provider

Besides showing treatment is reasonably necessary, the claimant must also prove the treatment is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). "Authorization" refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Authorization is distinct from whether treatment is "reasonably needed" within the meaning of § 8-42-101(1)(a). *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Claimant failed to prove Dr. Purcell is an authorized provider. Claimant was referred to Dr. Purcell by her PCP, whom she saw after being put at MMI and released by Dr. Kurz. No authorized provider referred Claimant to her PCP or Dr. Purcell for treatment related to her right shoulder. Admittedly, Dr. Kurz advised Claimant to follow up with her personal physicians for what he considered nonwork-related *cervical and upper back complaints*. But while that might constitute a referral for treatment of the neck and upper back under *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008), it did not authorize Claimant to choose her own physician to treat the right shoulder. Dr. Kurz specifically opined Claimant's right shoulder injury was at MMI and required no additional treatment. That opinion is consistent with the statutory definition of MMI, which is reached "when no additional treatment is reasonably expected to improve the condition." Section 8-40-201(11.5). An ATP's determination of MMI does not entitle a claimant to unilaterally change physicians to pursue additional treatment at the respondents' expense. *E.g.*, Story v. Industrial Claim Appeals Office, 910 P.2d 80 (Colo. App. 1995); *Gosselova v. Vail Resorts*, W.C. No. 4-975-232-02 (December 24, 2018); *Edelen v. BCW Enterprises, LTD*., W.C. No. 4-155-609 (September 20, 1995). Because Dr. Purcell was not authorized, Respondent is not liable for the surgery, notwithstanding that it was otherwise reasonably needed.

G. Claimant proved entitlement to TTD and TPD benefits after surgery

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes them to leave work, and they miss more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). To receive TTD benefits, a claimant must establish a causal connection between a work-related injury and the subsequent wage loss. Section 8-42-103(1)(a). Once commenced, TTD benefits shall continue until one of the terminating events enumerated in § 8-42-105(3), including return to work.

A temporarily partially disabled claimant is entitled to TPD benefits calculated at two-thirds of the difference between the average weekly wage and their earnings during the period of partial disability. Section 8-42-106(1). Entitlement to TPD benefits ends when the claimant reaches MMI. Section 8-42-106(2)(a).

Claimant proved she was disabled by the September 26, 2022 surgery which proximately caused a wage loss. The ALJ credits the opinions of Dr. Purcell, Dr. Bissell, and Dr. Castrejon that the surgery was reasonably needed, and credits Dr. Bissell and Dr. Castrejon that the surgery was causally related to the work injury. The fact that the surgery was unauthorized does not preclude an award of temporary disability benefits. The issue of authorization pertains to liability for treatment, and not whether the treatment was reasonably needed to cure and relieve the effects of an injury. Despite Dr. Purcell's unauthorized status, Respondent is still liable for any disability following the treatment. *E.g., Mennonite Hospital v. Corley*, 476 P.2d 274 (Colo. App. 1970); *Cordova v. Butterball*, W.C. No. 4-755-343 (March 9, 2010).

Claimant was off work from September 26, 2022 through November 1, 2022. She returned to part-time light duty on November 2, 2022, and continued working in that capacity until she reached MMI on March 22, 2023. Therefore, she is entitled to TTD

benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 21, 2023.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant PPD benefits based on the DIME's 7% whole person rating for the right shoulder.

2. Respondent's request to overcome the DIME's whole person shoulder rating is denied and dismissed.

3. Claimant's request to overcome the DIME regarding spinal impairment is denied and dismissed.

4. Respondent shall pay Claimant TTD benefits from September 26, 2022 through November 1, 2022.

5. Respondent shall pay Claimant TPD benefits from November 2, 2022 through March 21, 2023.

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

7. Claimant's request for payment of treatment provided by Dr. Derek Purcell, including the September 26, 2022 surgery, is denied and dismissed.

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

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

DATED: December 22, 2023

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-228-663-001

ISSUES

I. Whether the claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury on November 30, 2022.

II. Whether the claimant has proven, by a preponderance of the evidence, that he is entitled to medical benefits.

III. Whether the claimant has proven, by a preponderance of the evidence, that he is entitled to temporary disability benefits.

IV. What is the claimant's average weekly wage?

FINDINGS OF FACT

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

1. The claimant is employed as the Senior Vice President of Claim Operations for the employer and has worked for them for about three years.
2. The employer provides property insurance adjusters to insurance companies across the country during catastrophic events, such as hurricanes, floods, hailstorms, tornados; or anytime Insurance carriers do not have adequate field staff to handle their claims – which mostly involve homeowners.
3. Due the unpredictable demand for adjusters – which depends on catastrophes – the employer does not maintain a staff of adjusters waiting for deployment. Instead, the Employer relies on independent adjusters who are recruited and retained when needed. These independent adjusters, or "1099 independent contractors," or contingent workers are the bloodline of the Employer's business. As a result, the need to maintain excellent working relationships with skilled independent adjusters is critical to the overall functioning and profitability of the Employer's business. In essence, the employer must recruit independent adjusters to work for the employer, versus working for a competitor.
4. As the Senior Vice President of Claims, the claimant's position required him to oversee the claims process from the time each claim is assigned by the insurer until the claim is returned to the insurer.
5. The claimant's job description specifically provides that:

> [Claimant], along with the VPs of Claim Operations, assume the responsibility of retaining and growing the firm's existing book of business, actively developing additional client relationships, expanding the firm's trusted network of claims professionals and building a strong

> supporting operation to ensure that [Redacted, hereinafter EL] continues to deliver the highest quality service in the industry. The incumbent is expected to maintain a motivated, engaged and effective workforce across the country…

6. Thus, the claimant was tasked with the engagement, retention, and recruitment of the independent contractor adjustors, which were integral to the employer's business.
7. As credibly testified to by the claimant, all of their claims' adjusters worked as 1099 independent contractors. There is also a significant amount of competition between the multiple firms that contract with independent adjustors for catastrophic claim work. Accordingly, a large part of the claimant's role with the employer was to develop and train existing adjustors as well as retain and recruit new adjustors, for the benefit of the business because the independent adjusters are the bloodline of their business.
8. Claimant's compensation package consists of a base salary, a discretionary bonus, and a performance bonus. The bonus portion of his compensation depends on the performance of the adjusters with whom the employer contracts. Thus, the more productive the adjusters are, the more money the claimant makes, via his bonus pay. As a result, the claimant was incentivized to maintain good working relationships with the independent adjusters – especially the high performing ones - for the overall financial benefit of the company and himself.
9. [Redacted, hereinafter MG] is an independent claims adjuster who had contracted and worked with the employer. MG[Redacted] was a top producing claims adjuster. As a top producing claims adjuster, MG's[Redacted] work helped the claimant meet the employer's financial goals, which in turn had a positive impact on the employer's bottom line as well as the claimant's compensation.
10. Claimant's normal place of business was at his home office in Berthoud, Colorado. Thus, he worked remotely. However, travel was required as a part of his job.
11. Claimant's work schedule was dictated by circumstances, and he was on call 24 hours per day, 7 days per week. When traveling to an event/catastrophe, his workdays could run from morning to night and while working from his home office, his workdays could be a more traditional 9-5.
12. Claimant's co-workers and 1099 independent contractor claims adjustors live across the country and, largely, work remotely as well. Claimant had tried to use remote team-building activities during the pandemic, but that it just did not work the same as in-person team building and bonding activities.
13. Whenever a catastrophic event occurred, the claimant would take advantage of the situation and get as much face-to-face time as possible with his remote employees and 1099 independent claims adjusters. It was during those times, when everyone was displaced from their homes and traveling, that they would spend time in the evenings, eating dinner, connecting, and primarily talking about work. After these catastrophic events, the support team would also make time to come together with team dinners and other events to connect, share stories, get input, and talk shop.

14. The Vice Presidents (VPs), working beneath the claimant were afforded discretion and full authority in setting up team dinners and events and they only needed to consult the claimant if they needed a budget for the event.

15. One of the VPs that reported to the claimant, [Redacted, hereinafter NG], decided to co-host a team dinner with one of the independent adjusters, MG[Redacted]. The team dinner was scheduled for November 30, 2022, and would be held at MG's[Redacted] house. NG[Redacted] told the claimant about the team dinner approximately a month in advance – so the claimant could attend.

16. On November 30, 2022, the claimant left work at his home office in Berthoud, Colorado, and traveled to Lakewood, Colorado. Upon reaching Lakewood, the claimant checked into a hotel, the [Redacted, hereinafter FI], which was located across the street from the employer's corporate office. Claimant traveled to Lakewood so that he could spend time with his team, attend the November 30, 2022, team dinner at MG's[Redacted] house, complete year-end reviews, and attend the Employer's Christmas party on December 2, 2022, where annual bonuses would be announced.

17. From November 30, 2022, until he was finished with the Christmas party and reviews, the claimant intended to stay at the hotel in Lakewood and not return home. This was the same schedule he had the prior year when he also stayed at a hotel during year-end performance reviews, bonuses, and the Christmas party and because it allowed him to maximize his face-to-face time with his team. Thus, the claimant was required to be away from his home for an extended period to effectuate and promote the employer's business interests from November 30 through December 3, 2022.

18. Together with the claimant staying at the hotel, NG[Redacted], the VP that reports to the claimant, and NG's[Redacted] team, which included [Redacted, hereinafter CM], a Vice President, [Redacted, hereinafter AQ], [Redacted, hereinafter BR], and [Redacted, hereinafter JH] - claims managers, were also staying at the FI[Redacted] and arrived on November 30, 2022.

19. The employer has a Company Travel and Entertainment Policy that states hotels, rental cars, and ride share/taxis may all be used by the employees for business purposes and are reimbursable so long as the employee's direct supervisor approves the expense, and the expense is business related.

20. The employer covered Claimant's travel related expenses, including his hotel lodging on November 30, 2022, as they were business-related expenses. Any ride-sharing fees for travel to and from the team dinner at MG's[Redacted] house would also be covered and paid for by the employer as a business expense.

21. As found above, MG[Redacted] was one of the Employer's top revenue-producing independent adjustors. Several months prior, records show that NG[Redacted] had taken MG[Redacted] on an appreciation dinner as a top 5 billing adjuster.

22. As a top 5 billing adjustor for the employer, MG's[Redacted] continued work, as a 1099 contractor, with the employer was integral to maintaining and expanding the business. Moreover, MG's[Redacted] production and quality of work with for the employer had a direct and positive impact on NG[Redacted] and Claimant's year-end bonuses, which were based on reaching company created goals.

23. As stated by the claimant, MG[Redacted] was a very valuable resource to the Employer, stating, “MG’s[Redacted] production, from a quality and cycle/time response time is vital for, for the financial performance that helps us retain our client relations; also give the opportunity for future business…”

24. The claimant had previously spent time with MG[Redacted]. For example, the claimant and MG[Redacted] had shared time together while dealing with the aftermath of Hurricane Ian in October of that year, when they both had been dispatched to Florida.

25. NG[Redacted] had also co-hosted a team dinner at MG’s[Redacted] home the year prior (2021) before the employer’s Christmas party. The claimant explained that NG’s[Redacted] team, when they are all able to physically get-together, schedules team dinners and activities and that it was expected that, on the evening of November 30, 2021, that NG’s[Redacted] team would all attend the team dinner at MG’s[Redacted] home in Thornton, Colorado.

26. The claimant was going to the team dinner at MG’s[Redacted] home as part of his job duties as the Senior Vice President of Claim Operations. The claimant went to the team dinner to maintain his relationship with MG[Redacted] and to continue their business relationship. In other words, the purpose for the claimant attending the team dinner was business development, i.e., retention and recruiting efforts towards MG[Redacted].

27. On November 30, 2022, NG’s[Redacted] team took a rideshare, from the hotel to the team dinner at MG’s[Redacted] home. NG’s[Redacted] flight was delayed, so the claimant waited for him to arrive and rode in his rental car to MG’s[Redacted] home.

28. The cost for all transportation services (ride share and rental car) and hotel stays were reimbursed and covered by the employer as a business-related expense.

29. It was vital and critical for the business of the employer for the claimant and upper-level team members to be at the team dinner that was being co-hosted by NG[Redacted] and being held at MG’s[Redacted] house to maintain and foster the relationship with a top performing adjuster, MG[Redacted].

30. MG’s[Redacted] party was not a “holiday” or “Christmas” party for the employer and their employees. The employer’s Christmas party was scheduled for December 2, 2022. The team dinner at MG’s[Redacted] was a business dinner to further the interests of the employer.

31. The claimant, MG[Redacted], NG[Redacted], CM[Redacted], BR[Redacted], AQ[Redacted], and JH[Redacted] – all members of NG’s[Redacted] team – attended the team dinner. Additionally, [Redacted, hereinafter NB] and [Redacted, hereinafter JR], members of another team who had not all arrived yet, also joined the team dinner on November 30, 2022. Further, all employees in attendance at the team dinner were upper-level managers.

32. During the team dinner, business or “shop talk” occurred, as usual, and NG[Redacted] completed BR’s[Redacted] year-end performance review over the course of the evening. One of the objectives, during this facetime period, was to have performance/year-end reviews, in the time leading up to the Christmas party where individuals received their annual bonus.

33. During the team dinner, the claimant and MG[Redacted] shared discussions about their work experiences, stories, development of future clients, and take-aways from their work year. Thus, they conducted business.

34. During the team dinner, the claimant and MG[Redacted] drank some alcohol, which was common at a team dinner. The drinking was kept at an acceptable and professional level and rideshares, which were paid for by the employer, were important to get everyone back safely to the hotel.

35. It was getting late in the evening, and everyone had meetings the next day, so the team dinner was concluded. Rideshares were summoned. While waiting for their rideshares to arrive, the team gathered at the front of the house and in the garage. The first rideshare arrived and everyone but Claimant, NG[Redacted], NG's[Redacted] wife and BR[Redacted] left in it. While waiting for the second rideshare to arrive, MG[Redacted] asked the claimant if he wanted to go for a quick ride in his UTV/ATV - a Utility Task Vehicle or an All-Terrain Vehicle - that was parked in the garage. The evidence did not establish that there had been any discussions between the Claimant and MG[Redacted] about riding the UTV/ATV; that the claimant had an independent desire to go for a ride in the UTV/ATV; or that the claimant requested to go for a ride in it. It was just a spur of the moment request made by MG[Redacted] of the claimant.

36. Claimant felt obliged to say yes to the ride – since MG[Redacted] was a top producer – and one of the primary reasons the claimant was at the dinner was to foster the relationship with MG[Redacted]. As a result, Claimant said yes to MG's[Redacted] request.

37. Claimant's decision to say yes and take a short ride in MG's[Redacted] UTV/ATV was to further the interests of the business relationship. It was not to engage in a recreational activity for recreational purposes. It was part and parcel of attending the team dinner to maintain and foster a good working relationship with MG[Redacted] for the benefit of the Employer. In other words, it was not established that the claimant intended to engage in a separate recreational activity for his own personal benefit when he got into the UTV/ATV.

38. The claimant also stated that they were in a residential area. As a result, he thought that they would be taking a short ride around the block. At no time did he think MG[Redacted] planned to take him off roading. Moreover, at no time did he think MG[Redacted] would drive in an aggressive and careless manner. As a result, the claimant neither intended, nor agreed, to participate in a dangerous activity in which he would be going off road in a vehicle that would be driven in an aggressive and careless manner.

39. The UTV/ATV is similar to a dune buggy, with two seats, a roll cage, big tires, and half-doors. When he got in the vehicle, the claimant tried to put on the shoulder harness, but it was too small/narrow to fit over him. MG[Redacted] told the claimant he would not need to put on the harness because they were not going far.

40. MG[Redacted] proceeded down the street. But instead of staying on the neighborhood street, as the claimant assumed he would, MG[Redacted] turned onto

a walking path and drove across some railroad tracks and to a field at a middle school. Then, MG[Redacted] started to drive in circles, i.e., doing donuts or cookies. While MG[Redacted] was driving in circles, the tires caught on the frozen ground and the UTV/ATV rolled and the claimant was ejected from the vehicle.

41. The claimant was seriously injured and could not move his arms or legs. He told MG[Redacted] to call 911. The claimant was paralyzed from the neck down and taken via ambulance to North Suburban Hospital.

42. At the hospital, the claimant was diagnosed with C5-C6 fractures and fractures at the L2, L3 and L4 levels and a cervical spinal cord injury.

43. The claimant underwent emergency cervical surgery on December 1, 2022. He remained at North Suburban Hospital until December 12, 2022, when he was released to the care of Craig Hospital.

44. The claimant underwent a second cervical fusion surgery on December 23, 2022, at Swedish Hospital, which is connected to Craig Hospital. The claimant remained in-patient at Craig Hospital until February 8, 2023.

45. The claimant was severely impaired during that time but at some point, he managed to start working very part time from the hospital. He used his PTO to cover his lost time from December 1, 2023, until it was exhausted on February 5, 2023.

46. While the claimant was hospitalized at Craig Hospital, their social workers applied for SSDI benefits on his behalf. Benefits were approved in April 2023 to commence on May 9, 2023. The claimant testified that he still receives those benefits despite telling the Social Security Administration that he had returned to work.

47. The claimant also worked with [Redacted, hereinafter SA], HR representative for the Employer, to apply for short-term disability benefits until April 19, 2023, when the claimant returned to work.

48. The claimant remains employed by the Employer as the Senior Vice President of Claim Operations.

49. SA[Redacted] is the Divisional Chief, People and Culture Officer, for the Employer. She testified that she and Claimant are both senior level employees and peers. She credibly testified that she was familiar with Claimant's job duties, and they required that he go out with other employees. She stated that she was unaware of the co-sponsored team dinner at MG's[Redacted] residence until after the claimant was injured. But there is no indication that she had to authorize the team dinner.

50. SA[Redacted] also testified that she does not schedule nor normally know about team dinners/team events. She credibly testified that both NG[Redacted] and the claimant have autonomy in their positions to schedule team dinners, team building activities, and team meetings, etc. She explained that the expense for ride shares back and forth from team dinners to hotels would fall under the umbrella of approved business-related travel expenses. Thus, NG[Redacted] had the authority to plan and co-host the dinner, and the claimant had the authority to participate and attend the dinner, and both used that authority for the benefit of the employer for business purposes.

51. In 2021, the claimant's total gross pay was $296,570.03. This was comprised of a salary of $147,576.18, an annual bonus of $61,607, a discretionary bonus of $34,807, a moving bonus of $34,188.77, life insurance of $505.56, holiday pay of $5,123.36, and paid time off of $12,762.16.

52. In 2022, the claimant's total earnings were $263,879.50. This was comprised of a salary of $150,269.34, an annual bonus of $41,929, a discretionary bonus of $50,000, floating holiday pay of $657.76, life insurance of $527.24, holiday pay of $4,604.32, and paid time off of $15,891.84.

53. The claimant's 2022 bonuses were based on the performance of the claimant and the company over the entire year and then determined at the end of the year. There is a lack of credible evidence to establish that the claimant's bonuses accrued on a regular basis throughout the year and that the claimant could access and obtain a calculatable portion of his bonus at any time before the end of the year. Thus, the claimant's bonuses did not have a reasonable, present-day, cash equivalent value throughout the year. As a result, the claimant did not establish that he had access to his bonuses on a day-to-day basis or had an immediate expectation or interest in receiving the bonuses under appropriate or reasonable circumstances at any time throughout the year.

54. The claimant's testimony is found to be credible and persuasive and the ALJ has credited his testimony.

Ultimate Findings of Fact

55. The team building dinner at MG's[Redacted] home, co-sponsored by NG[Redacted], was within the guidelines of conducting the employer's business as described by the claimant, SA[Redacted], and contained in the employer's Company and Entertainment Policy. As a result, the business dinner at MG's[Redacted] house was a work event that was in furtherance of the employer's business. The team dinner was neither a recreational event nor a mere social event. Instead, the team dinner had a significant business purpose and was a business event.

56. There is a lack of credible evidence to establish that the claimant went to the team dinner for personal and social reasons – and not work reasons. The team dinner was not an independent holiday party that the claimant attended in order to just boost morale. It was a team dinner in which the primary purpose of the claimant's attendance was to further the business interests of the employer – which was to retain MG[Redacted] as an independent adjuster working for the employer.

57. Since the claimant was away from his home in Berthoud, Colorado, at the time of the team dinner, he was in travel status. Moreover, at the time of the team dinner, which was a business event, the claimant was furthering the business interests of the employer while also in travel status.

58. Because the purpose of the team dinner was to conduct business and further the interests of the employer, the team dinner was not a personal deviation from the claimant's employment obligations. The team dinner was a business obligation that furthered the interests of the employer.

59. While still at the team dinner, the claimant did not embark on a deviation from his employment when he went for a ride with MG[Redacted] in MG's[Redacted] UTV/ATV. After being asked by MG[Redacted] to go for a short ride, the claimant agreed to go for a short ride while waiting for his rideshare to arrive. The decision to accept the offer from MG[Redacted] was inextricably intertwined with the business purpose of the team dinner – which was to support the business relationship with MG[Redacted] – who was a top performing adjuster. This was a business dinner and event that the claimant attended to help ensure MG[Redacted] would continue contracting with the employer – instead of another adjusting company. Attending the event to further the interests of the employer was the claimant's job as the Vice President of Claims. In other words, the claimant was working to retain MG[Redacted] as an adjuster and/or recruit him for future work, which is one of his job duties.

60. The benefit to the employer of the claimant attending the team dinner was beyond the intangible value of team building and increased morale. Attending the team dinner to maintain the relationship with MG[Redacted] was required to further the business interests of the employer.

61. The claimant's decision to go for a ride with MG[Redacted] in his UTV/ATV was not for recreational purposes. There is a lack of credible evidence to establish that the claimant asked to go for a ride in the vehicle, that the claimant had any interest whatsoever in going for a ride in the vehicle, or that the claimant intended the ride to be recreational. Claimant merely acquiesced in MG's[Redacted] request to join him for a ride. As a result, the ride in the UTV/ATV was not a recreational activity, separate and distinct from the team dinner. Thus, the UTV/ATV was not a separate and distinct deviation from employment for recreational purposes or a distinct recreational activity.

62. The claimant's attendance at the team dinner and ride with MG[Redacted] is considered to be within the course, conduct, and scope of his job duties.

63. By going for a ride in the UTV/ATV, the claimant did not agree to engage in a dangerous activity that might be considered a deviation from his employment and sever the relationship between the team dinner and the work related nature of the dinner.

64. Due to his injury, the claimant required medical treatment and obtained medical treatment.

65. Due to his injury, the claimant missed more than three days from work. However, due to the various wages and benefits paid to the claimant after his work injury, the ALJ cannot determine whether temporary disability benefits are payable. Therefore, the issue of temporary disability benefits is reserved.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at

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

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

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

I. Whether the claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury on November 30, 2022.

To be compensable under the Workers' Compensation Act, an injury sustained by an employee must arise out of and in the course of the employee's employment. *See* § 8-41-301(1)(b), (c), C.R.S. 2022; *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207 (Colo. 1996).

Travel Status – Recreational Activity- Deviation

A. Travel Status

An employee who is away from home on business remains under continuous workers' compensation coverage from the time of the departure until the employee returns home. *SkyWest Airlines v. Industrial Comm'n*, 487 P.3d 1267 (Colo. App. 2020); *Silver Eng'g Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973). Under this rule of law, which is commonly referred to as "travel status," the risks associated with the necessities of eating, sleeping, and ministering to personal needs while away from home

are considered incidental to, and within the scope of, the traveling employee's employment. *Id*., *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). The essence of the travel status exception is that when the employer requires the Claimant to travel beyond a fixed location to perform his job duties, the risk of travel becomes the risk of the employment. *Briedenbach v. Black Diamond, Inc*., W.C. No. 4-761-479 (December 30, 2009).

In this case, the claimant lives in Berthoud Colorado, and the employer's office is in Lakewood, Colorado. As found, the claimant mainly works remotely out of his house in Berthoud. Since it was the end of the year, the claimant drove to Lakewood to spend time with his team to complete year-end reviews, attend the November 30, 2022, team dinner at MG's[Redacted] house, and attend the employer's Christmas party on December 2, 2022, where year-end bonuses would be given out to the claimant's team members.

In order to perform all these tasks, in the Metro Denver area, and with his team members, the claimant planned to drive to Lakewood on November 30, 2022, and check in at the FI[Redacted] Hotel, across the street from the Employer's office, in Lakewood, Colorado – as he did the year before – and stay until December 3, 2022, the day after the Christmas party.

On November 30, 2022, the claimant drove to Lakewood and checked in at the hotel so he could attend the team dinner that evening, perform reviews during the days following the team dinner, and then attend the employer's Christmas party. Thus, the claimant was required to be away from his home for an extended period of time to in furtherance of the employer's business. As a result, once the claimant left his home in Berthoud on November 30, 2022, he was in travel status. Thus, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that he was in travel status of November 30, 2022, the day of the accident.

B. Recreational Activity

Under § 8-40-201(8), "employment" does not include "the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Section 8-40-301(1) similarly provides that the term "employee" excludes any person who, while participating in a recreational activity, is relieved of and is not performing any duties of employment.

In determining whether an event at which an employee was injured was a recreational activity, courts consider the factors first articulated in *City & County of Denver v. Lee*, 450 P.2d 352, 355 (1969). The factors consist of:

i. Whether the activity occurred during working hours;

ii. Whether the activity was on or off the employer's premises;

iii. Whether participation was required;

iv. Whether the employer initiated, organized, sponsored, or financially supported the event; and

v. Whether the employer derived benefit from the event.

See Dover Elevator Co. v. Indus. Claim Appeals Off., 961 P.2d 1141 (Colo. App. 1998) (applying *Lee* and affirming ALJ's determination that injury sustained while bowling during off-premises company party arranged by employer was compensable). In addition, other factors may be present which indicate the employer is sufficiently close to the activity to identify with it and make it incidental to employment. See *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207 (Colo. 1996)

While the first two *Lee* factors are generally given greater weight, *see Price v. Indus. Claim Appeals Off., supra*, compensability may be established even where those factors suggest a recreational activity if there is a strong contrary showing upon application of the other factors. *Dover Elevator Co. v. Indus. Claim Appeals Off., supra; see White v. Indus. Claim Appeals Off.*, 8 P.3d 621 (Colo. App. 2000) (claimant's weightlifting was a recreational activity outside course and scope of his employment, even though it occurred during workday and on employer's premises, where other relevant factors supported ALJ's finding of recreational activity). *See Dynalectron Corp. v. Indus. Comm'n*, 660 P.2d 915 (Colo. App. 1982) (injuries compensable where, although they occurred following off premises dinner held after normal working hours, record showed claimant attended at implied direction of employer and employer received direct benefit from conduct of business at dinner).

i. Whether Team Dinner was a Recreational Activity

First, in this case, the team dinner did not occur during traditional working hours. Second, the activity was not on the employer's premises. Third, while attendance was not mandatory, participation and attendance at the team dinner was required for the claimant to perform the functions of his job. The claimant was Senior Vice President of Claims. In his position, the claimant was required retain adjusters—the bloodline of the employer's business. In order to retain MG[Redacted], a top performing adjuster, the claimant's presence was required at the team dinner. Fourth, the employer initiated the event, through Vice President of Claims, NG[Redacted], co-hosting the event at MG's[Redacted] home and the claimant's attendance at the event. As found, MG[Redacted] and the claimant had the authority to initiate and attend team dinners for the benefit of the employer. Fifth, the employer derived a direct benefit through the claimant's attendance at the event by promoting the business relationship between the employer and MG[Redacted]. In essence, the claimant's attendance at the team dinner is the same as a salesperson attempting to retain a current customer or obtain the business of a new customer. In this case, the claimant was at the team dinner to retain, or recruit on an ongoing basis, MG[Redacted]. Thus, the primary reason the claimant attended the team dinner was to further the business relationship with MG[Redacted] for the benefit of the employer.

Thus, the ALJ finds and concludes that the benefit to the employer is a significant factor in determining whether the team dinner was a recreational activity. In the end, the ALJ finds and concludes that the team dinner was not a recreational activity. The ALJ finds and concludes that the claimant established that his attendance at the team dinner was not a recreational activity, but a business activity to further the interests of the employer. The claimant has therefore established by a preponderance of the evidence that he was within the course and scope of his employment while at the team dinner.

ii. Whether the claimant's agreement to ride in the UTV/ATV was a deviation from his employment.

The Colorado courts have held that if the traveling employee makes a distinct departure on a personal errand or deviation, then the workers' compensation coverage will cease. *Pat's Power Tongs, Inc. v. Miller*, 172 Colo. 541, 474 P.2d 613 (1970); *Wild W. Radio v. Indus. Claim Appeals Off.*, 905 P.2d 6 (Colo. App. 1995); *Phillips Contracting v. Hirst*, 905 P.2d 9 (Colo. App. 1995). When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *See Phillips, supra.* Whether an injured employee was in travel status or on a personal deviation at the time of his injury is a question of fact the administrative law judge decides. Although the burden of proof is on the employer to show that the employee made a distinct departure from the scope of employment while on travel status, the burden of proof is on the claimant to show a return to the course and scope of employment. *SkyWest Airlines v. Indus. Claim Appeals Off. of Colo., 487 P.3d 1267, 1269.*

In this case, and as found, the claimant was at the team dinner and getting ready to leave when MG[Redacted] asked him whether he wanted to go for a short ride with him in his UTV/ATV. It was not established that there had been a prior discussion between the claimant and MG[Redacted], or a prior plan, to ride the UTV/ATV. Nor was it established that Claimant had an independent desire to go for a ride in the UTV/ATV or that the claimant requested to go for a ride in it. It was just a spur of the moment request made by MG[Redacted], and the claimant said yes, because he felt obligated to say yes. The claimant felt obligated to say yes because the primary reason the claimant was at the team dinner was to foster the relationship with MG[Redacted] for the benefit of the business.

As stated above, the claimant's decision to say yes and take a short ride in MG's[Redacted] UTV/ATV was to further the interests of the business relationship. It was not for the claimant to intentionally engage in a recreational activity for recreational purposes. It was part and parcel of attending the team dinner which was to maintain and foster a good working relationship with MG[Redacted] for the benefit of the employer. In other words, the claimant did not intend to engage in a separate recreational activity for his own personal benefit with MG[Redacted] when he got into the UTV/ATV. The request made by MG[Redacted], to go for a ride, was an extension of the team dinner and thereby inextricably intertwined with, or part of, the team dinner. It was not a deviation from the team dinner.

Moreover, the claimant and MG[Redacted] were in a residential area. As a result, the claimant thought that they would be taking a short ride around the block. At no time did he think MG[Redacted] would take him off roading. Moreover, at no time did he think MG[Redacted] would drive in an aggressive and careless manner. As a result, the claimant neither intended, nor agreed, to participate in a dangerous activity in which he would be going off-road in a vehicle that would be driven in an aggressive and careless manner.

Respondents contend that the facts here are similar to *Silver Eng'g Works, Inc. v. Simmons*, 505 P.2d 966 (Colo. 1973). In *Simmons*, the decedent was on travel status on behalf of his employer on a trip to Mexico. The decedent was in Mexico to assist and be trained in the operation of certain machinery. During a period when the plant was shut down for the Easter weekend, the decedent, and several other employees, drove to a remote beach to swim and fish. The decedent went swimming and met his death by drowning. The Court stated that:

> The traveling employee was capable of departing on a personal errand as any other type of employee, thereby losing the right to compensation benefits from accidents occurring during such departures. The Claimant had stepped aside from his employment and was attending to a matter of personal recreation, which was beyond that necessary to the normal ministration to needs of an employee on a business trip.

Simmons, supra.

The Court also noted that:

> Such an employee is continuous employment, day and night. This does not mean that he cannot step aside from his employment for personal reasons, just as might an ordinary employee…He might rob a bank; he might attend a dance; or he might engage in other activities equally conceivable for his own pleasure and gratification, and ordinarily, none of these acts would be beneficial to his employment." *Id*.

The ALJ does not find *Simmons* to be persuasive and finds it distinguishable from this case. In *Simmons*, the decedent went with co-workers to go swimming and fishing for personal reasons. There was no indication the decedent was pursuing a business purpose by going swimming or fishing. In this case, the claimant was at a business dinner and pursuing business with the person with whom he went with on the UTV/ATV. Thus, riding on the UTV/ATV was inextricably intertwined with the team dinner that was for business purposes.

The respondents seem to contend that any activity that results in an injury, which in isolation, could be considered a recreational activity, or deviation from employment, is not work related. For example, the respondents seem to contend that if the claimant was injured while fishing or hunting, regardless of the connection with a work-related purpose, such activity could not result in a compensable work injury. Such reasoning, however, has been rejected in numerous jurisdictions. Numerous cases have found that injuries while hunting or fishing are compensable when the activity occurs in furtherance of the employer's business.

For example, when an employee is authorized to entertain customers, the employee is considered in the course and scope of employment when injured during a hunting or fishing trip with customers. *See Bechen v. Am. Guar. & Liab. Ins.,* 298 F. Supp. 2d 806 (W.D. Wis. 2003) (employee injured during bear hunting and fishing trip with a customer deemed work related.) As the *Bechen* court aptly noted, sometimes play is work and work is play. *See Becham at* 811. *See also Lewis v. Lowe & Campbell Athletic Goods Co*., 247 S.W.2d 800 (Mo. 1952) (athletic goods salesperson killed in highway

accident while on a hunting trip with customers. The court held that the injury was compensable. The employer recommended such weekend social functions with the customers.); *Employers Mut. Liab. Ins. Co. of Wisc. v. Sanderfer*, 382 S.W.2d 144 (Tex. Ct. App. 1964) (the claimant was injured while hunting. He was trying to promote good-will for his company by associating with potential customers who were at the hunting camp. His employer had suggested and approved this trip. Compensation was awarded.); *Continental Cas. Co. v. Industrial Comm'n*, 132 N.W.2d 584 (1964) (the decedent was on a trip with another employee to acquaint the decedent with the operations of the business. They also went on a hunting trip with a customer. On the return trip, the decedent was killed in an auto accident. The court held that the hunting trip was in the nature of entertaining customers and part of the business. The claim was found compensable.)

The ALJ is cognizant that there are times when an employee will state that an activity was pursued for business purposes, but the facts and circumstances do not support such a finding. For example, if an employee goes hunting with others with whom he does business, merely to have companions, and not to entertain for business purposes, the injury is not work related. *See Aetna Cas. & Sur. Co. v. Indus. Com.*, 255 P.2d 961, 962 (Colo. 1953).

In this case, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that his injury occurred within the course and scope of employment and is compensable. It was not established that claimant was injured during a recreational activity or deviation from his employment.

II. Whether the claimant has proven, by a preponderance of the evidence, that he is entitled to medical benefits.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Off.*, 53 P.3d 1192 (Colo. App. 2002).

In this case, the claimant suffered a serious accident on November 30, 2022. There is no dispute that the accident caused the need for medical treatment. As a result, the claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment to cure and relieve him from the effects of his work injury.

III. Whether the claimant has proven, by a preponderance of the evidence, that he is entitled to temporary disability benefits.

To establish an entitlement to temporary disability benefits, the claimant must prove that the industrial injury caused a disability, that he left work as a result of the disability, that he was disabled for more than three regular workdays, and that he suffered an actual wage loss. Section 8-42-103(1)(b), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The period of temporary disability is measured from the day after the employee leaves work as a result of the injury. *See Ralston Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991).

Temporary disability benefits are designed to replace the claimant's actual lost wages during the period he is recovering from the industrial injury. *Broadmoor Hotel v. Industrial Claim Appeals Off.*, 939 P.2d 460 (Colo. App. 1996); *PDM Molding, Inc. v. Stanberg, supra; Mesa Manor v. Indus. Claim Appeals Off.*, 881 P.2d 443 (Colo. App. 1994). We agree with the ALJ that a claimant is not considered "disabled" for purposes of recovering temporary disability benefits if the claimant does not sustain a wage loss from his injury. *See Atencio v. JBQ Allen, Inc*. W.C. No. 4-350-555 (May 19, 2000); *See Matus v. David Matus* W.C. No. 4-740-062 (July 13, 2010)(claimant not entitled to temporary disability benefits where the claimant's business and financial records supported findings that the claimant did not suffer any actual wage loss) ; *Hendricks v. Keebler Co., W.C. No. 4-373-392 (June 11, 1999)* (temporary disability benefits precluded during the time the claimant performed modified duty and earned pre-injury wage.)

Here, the claimant's injury was disabling and caused him to miss more than three days from work. But the claimant testified that the employer continued to pay his wages after his work injury. The claimant also testified that he received various wage replacement benefits, such as short-term disability benefits and social security disability benefits. Moreover, the issue of offsets is unclear.

As a result, based on the current record, the ALJ cannot determine whether the claimant suffered a wage loss and is entitled to temporary disability benefits. Therefore, the ALJ will not rule on the issue of temporary disability benefits at this time but will reserve the matter for future determination.

IV. What is the claimant's average weekly wage?

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

However, section 8-42-102(2), C.R.S. requires the ALJ to base Claimant's AWW on his earnings at the time of the injury. In order for a particular payment to be considered "wages" it must have a "reasonable, present-day, cash equivalent value," and Claimant must have access to the benefit on a day-to-day basis, or an immediate expectation of interest in receiving the benefit under appropriate and reasonable circumstances. *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*; 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3); C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine Claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity.

Ebersbach v. United Food & Commercial Workers Local No. 7, W.C. No. 4-240-475 (ICAO, May 7; 2007).

Section 8-40-201(19)(a), C.R.S., defines wage as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of injury." Section 8-40-201(19)(b), C.R.S., provides that "wages" shall include the value of certain fringe benefits including health insurance, and the reasonable value of board, rent, housing, and lodging. However, it also states that wages, "shall not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19).

In *Meeker v. Provenant Health Partners*, 929 P.2d 26, the Colorado Court of Appeals developed a test for whether an employer-paid benefit is a wage or enumerated fringe benefit. *Meeker* held that an employer-paid benefit constitutes wages if it has a "reasonable, present-day, cash equivalent value," and the employee has access to the benefit on a "reasonable day-to-day basis," or has "an immediate expectation of interest in receiving the benefit under appropriate, reasonable circumstances." *Id*.

In *Dan Yex v. ABC Supply Company and Ace/ESIS Insurance*, W.C. No. 4-910-373 (May 16, 2014), ICAP relied on the *Meeker* case, and its progeny *Orrell v. Coors Porcelain*, WC No. 4-251-934 (May 22, 1997), and determined that an employee's bonus earned during the employer's busy season was properly excluded from the AWW. The Claimant in *Yex* had injured his back in December 2012 and asserted he received a bonus in April 2012. The ALJ found the employees were awarded bonuses if their branch showed a profit in the previous calendar year. Some years resulted in a bonus and others did not. Under *Meeker*, the ALJ reasoned that the bonus did not have a present-day cash equivalent value, Claimant did not have access to the proceeds of the bonus on a day-to-day basis and did not have an immediate expectation of receiving the bonus. Thus, the bonus was appropriately identified as a fringe benefit not included in the calculation of wages.

As found, the claimant's bonuses were paid at the end of the year based on his performance and the performance of the company. The claimant did not establish that he had access to a specific and calculatable portion of his bonus on a day-to-day basis. The claimant also did not established that he had an immediate expectation of receiving the bonuses under appropriate or reasonable circumstances, at any time of the year.

As a result, the ALJ determines that most reasonable manner in which to calculate the claimant's AWW under the circumstances is to take his annual salary for 2022 of $150,269.34 and divide it by 52 weeks. This results in an AWW of $2,889.80. [1]

ORDER

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

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[1] Whether any other payment set forth in this order or the claimant's wage records should be included in Claimant's AWW is reserved since the record was not fully developed regarding those payments. For example, the parties did not develop the record as to whether the claimant's holiday pay, PTO, or the cost of the claimant's life insurance should be included in his AWW. The only benefit, other than his salary, that was developed to some extent, was his bonus pay.

1. Claimant suffered a compensable injury on November 30, 2022.
2. Respondents shall pay for the claimant's reasonable, necessary, and related medical treatment to cure and relieve him from the effects of his work injury.
3. The issue of temporary disability benefits is reserved for future determination.
4. The Claimant's average weekly wage is $2,889.80, subject to modification for other payments not addressed in this order.
5. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: December 26, 2023

s/ *Glen Goldman*

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-245-164-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits for the period of April 23, 2023 to June 12, 2023.

2. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked as an assistant manager for Employer's pawn shop from April 13, 2022 until June 24, 2023. Claimant testified that on February 15, 2023, he went into Employer's warehouse where he tripped and fell on his left side, sustaining a rib fracture. Claimant testified he went to the UC Health emergency department where he was treated and released. Claimant returned to work that day, without restrictions. No medical records from UC Health were offered or admitted into evidence.

2. On February 16, 2023, Claimant's supervisor [Redacted, hereinafter AR], completed a First Report of Injury indicating claimant tripped and fell on his ribs, and received treatment at an emergency room on that date. A body diagram on the First Report of Injury circled only Claimant's left chest area. (Ex. A).

3. Claimant testified that approximately two months later, on the morning of April 22, 2023, he began experiencing numbness from his elbows to his fingers in both arms while at home. Claimant testified he went to the UC Health emergency department, where he underwent an MRI. Claimant further testified he underwent emergency surgery at UC Health on April 22, 2023, on his neck for a C4-5 disc injury. No medical records related to any examination, treatment or evaluation of Claimant's cervical injury were offered or admitted into evidence.

4. Claimant testified that he was off work from April 23, 2023 until returning on June 12, 2023, after recovering from his surgery.

5. Claimant attributes his need for the April 22, 2023 surgery to his work-related fall on February 15, 2023. He testified that he had no neck trauma after February 15, 2023 which would have caused his neck symptoms. Claimant also asserts that his time off from work from April 23, 2023 to June 12, 2023 was the result of his February 15, 2023 injury. In support of his contention, Claimant submitted a May 1, 2023 work excuse from Daniel Norton, PA-C, of Salud Family Health Centers, which requested that Claimant be excused from work from May 24, 2023 to June 18, 2023, due to "recent neck surgery." (Ex. 1). The Salud work-excuse form does not mention a work-related injury.

6. With the exception of the Salud work-excuse form, no medical records of any kind were offered or admitted into evidence.

7. On July 19, 2023, Claimant submitted a Worker's Claim for Compensation which alleged that, in addition to fractured ribs, he was "diagnosed with C5-6 herniated disc which doctors stated related to DOI injury." (Ex. F).

8. On August 11, 2023, Respondents filed a General Admission of Liability admitting for medical benefits only. (Ex. 2).

9. On November 7, 2023, Respondents obtained a report from orthopedic surgeon Quin-Min Chen, M.D., regarding the relatedness of Claimant's cervical surgery to his February 15, 2023 work accident. Dr. Chen was not provided medical records, other than the May 1, 2023 work excuse, and information regarding medications from April 23 to April 26, 2023. Dr. Chen indicated that it would be "highly doubtful that the claimant will require neck surgery for this particular claim, but again, I would know more if I had access to MRI reports and some additional records to detail the thought process as to why the claimant required surgery." (Ex. D)

10. At the time of his injury, Claimant earned $18.25 per hour, plus a commission on sales. Claimant testified that he earned an average of $700 per week in wages, plus $480 per week in commissions. Claimant's testimony regarding his wages earned is not supported by the wage records in evidence.

11. Claimant submitted no wage records reflecting his earnings prior to date of his injury. Claimant's wage records consist of reports of wages from June 4, 2023 to July 1, 2023, and reports of commissions earned from April 1, 2023 to June 30, 2023. Claimant's wage report (Ex. E, p. 13) shows Claimant's "year-to-date" commissions totaled $4,774.95 as of June 30, 2023. Excluding the period of April 23, 2023 through June 12, 2023 - the time Claimant did not work while recovering from surgery – and assuming Claimant had no other time off, Claimant worked a total of 17 3/7 weeks from January 1, 2023 to June 23, 2023. Based on Claimant's submitted wage records, commissions averaged $273.11 per week for the above-period.

12. Respondents submitted a document purporting to set out Claimant's earnings from November 30, 2022 to January 28, 2023. (Ex. E). Exhibit E shows Claimant received commissions and wages totaling $11,008.05 for this 13-week period, including commissions totaling $1,260.35. (Ex. E). Based on Respondents' Exhibit E, Claimant's average weekly wage was calculated at $846.77. The ALJ does not find Respondents' Exhibit E reliable. No credible evidence was admitted indicating the source of the document, or how the information was compiled. Moreover, the document lists four weeks Claimant worked in excess of 40 hours, but the "gross payment" on the document is calculated based on an hourly wage of $18.22, without the inclusion of overtime wages.

13. The ALJ finds credible Claimant's testimony that he earned $700 per week in wages prior to his injury. Based on the available evidence, the ALJ finds that Claimant earned $273.11 per week in commissions at the time of this injury. Claimant's average weekly wage at the time of injury was $973.11.

CONCLUSIONS OF LAW

Generally

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

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

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

Temporary Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD

benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant has failed to establish an entitlement to temporary total disability benefits related to his cervical surgery on April 22, 2023. Claimant was off work from April 23, 2023 to June 12, 2023 to recover from cervical surgery. Claimant has failed to establish that he sustained a cervical injury or that the need for surgery was related to his February 15, 2023 work-injury. Because no medical records were offered or admitted into evidence, the ALJ is unable to determine the nature of Claimant’s cervical injury, or the surgery performed. The lack of medical documentation prevents the ALJ from determining whether Claimant’s treating physicians determined that Claimant’s need for surgery was the result of an injury that occurred in the course of his employment, or due to a condition unrelated to his February 15, 2023 rib injury. Although a compensability determination does not require medical evidence, Claimant offered no cogent or credible explanation as to how his February injury caused a cervical injury that did not manifest until April 22, 2023. The mere fact that Claimant’s neck symptoms began two months after his work injury is insufficient to establish a causal relationship between the two events. Because Claimant has failed to establish that the need for cervical surgery was related to his work injury, he has failed to meet his burden of proving entitlement to temporary total disability benefits for that his loss of earnings from April 23, 2023 to June 12, 2023.

Average Weekly Wage

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

For the reasons set forth in Findings of Fact 10-13, the ALJ concludes that a fair approximation of Claimant's average weekly wage as of February 15, 2023 was $973.11.

ORDER

It is therefore ordered that:

1. Claimant request for temporary total disability benefits is denied and dismissed.

2. Claimant's average weekly wage as of February 15, 2023 was $973.11.

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

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

DATED: December 26, 2023

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a low back and cervical spine injury in the course and scope of his employment on January 31, 2023.

IF CLAIMANT SUSTAINED A WORK RELATED INJURY, THEN:

II. Whether Claimant proved by a preponderance of the evidence that Claimant was entitled to authorized, reasonably necessary medical benefits that were causally related to the January 31, 2023 work injury.

III. Whether Claimant proved by a preponderance of the evidence that selection of a physician passed to Claimant, who selected Bradley R. Hakim, D.O. at Spine One, Spine & Sport Medical Center.

IV. Whether Claimant proved by a preponderance of the evidence that the cervical surgeries performed by Michael Rauzzino, M.D. on May 25 and 26, 2023 were reasonable, necessary, and related to the January 31, 2023 work injury.

V. Whether Claimant proved by a preponderance of the evidence what his average weekly wage ("AWW") was at the time of the work injury.

VI. Whether Claimant proved by a preponderance of the evidence entitlement to temporary partial disability ("TPD") benefits from February 9, 2023 ongoing until terminated by law.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on March 31, 2023 on the issues of compensability, medical benefits, authorized provider, AWW, and TTD/TPD benefits from February 9, 2023 ongoing. Respondents filed a Response to "Claimant's March 31, 2023 Application for Hearing" on May 1, 2023. No additional issues were listed.

Claimant testified on his own behalf in this matter. Respondents tendered the deposition testimonies of N. Neil Brown, M.D. and Michael Rauzzino, M.D., under Exhibits I and J, respectively.

Respondents indicated that Employer's witness and Claimant's supervisor, who was under subpoena, was unavailable to testify due to a family emergency, and this ALJ authorized the parties to take a post hearing deposition of the witness, which later took place on December 1, 2023. The parties submitted position statements on December 15, 2023.

FINDINGS OF FACT

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

1. Claimant was 60 years old at the time of hearing. Claimant was a service manager for Employer since May 25, 2022, having been hired on November 21, 2019 in a different position. As a service manager, Claimant was required to meet with customers, write up proposals, occasionally move parts and return parts that were ordered, but not needed, for Employer's business of repairing cars. Claimant would generally work a 44 hour week, and in addition to hourly pay of approximately $26.23, was provided with "spiffs" or additional compensation, which were monetary compensation when certain thresholds were reached.

2. Claimant had an extensive pre-injury history of medical treatment to his cervical and lumbar spine. Claimant credibly testified that he had a previous neck surgery at C6-C7 in 2005, and at C5-C7 in 2015. Claimant testified that he had a right-sided lumbar treatment at L4-S1 in 2018.

3. On May 17, 2018 Claimant reported to Lydia Prusinowski, PA-C at the Medical Center of Aurora emergency room (ER), that he had been reaching for a coffee pot and had an acute flare of low back pain. The next records is from September 5, 2021 when Claimant presented to the same ER after he was walking down the stairs and missed the last couple steps, falling and striking his head on a concrete wall, reporting neck pain with no acute findings and a concussion diagnosis, and a right ankle pain with soft tissue swelling and an avulsion fracture of the right ankle. He had full range of motion of the neck but there was no mention of symptoms of the lumbar spine.

4. Claimant was attended by Dr. Bradley Duhon, a neurosurgeon at Front Range Spine, on October 20, 2021 primarily for his lumbar radicular symptoms. Claimant reported bilateral lower extremity radicular pain in a similar distribution in both legs, primarily down the lateral aspect of the thigh, which occasionally traveled down the anterior/posterior aspect of the thigh as well. Claimant had diminished sensation to light touch in the lateral aspect of the left calf and left thigh. Dr. Duhon personally reviewed the MRI of the lumbar spine, which showed surgical decompression and laminotomy defect with a slight central disc protrusion but otherwise he stated that they showed "absolutely no ongoing stenosis at the L4-S1 levels." He ordered a new MRI though and an EMG. There was no mention of the cervical spine during this visit.

5. Claimant had an MRI of the cervical spine performed on March 18, 2020 which noted that showed no herniation or foraminal stenosis of C2-C4 and C7-T1. It showed a tiny osteophyte complex with mild foraminal stenosis with unchanged degenerative disc at C4-5. It showed the spinal fusion at the C5-7 levels with bilateral facet arthrosis which was unchanged. Dr. Robert Leibold specifically noted no changes since March 14, 2019. An MRI of the lumbar spine was performed on November 4, 2021 that showed multiple Schmorl's nodes, small protrusions from T11-12 to L5-S1, mild left lateral recess narrowing at L2-3 and no recurrent protrusions or central canal narrowing at L4-5 or L5-S1. Another MRI was performed on November 22, 2021 which noted a broad based protrusion at the C3-4 and C4-5 levels otherwise no significant issues other than multilevel facet joint arthritis.

6. Although the medical records have many diagnostic tests performed after Claimant's cervical surgery in 2015 and lumbar surgery in 2018, no treatment records were produced after 2018 and prior to Claimant's fall on January 31, 2023 other than the September 5, 2021 fall where Claimant hit his head and the evaluation on October 2021 for the lumbar spine.

7. Claimant was seen on September 9, 2022 at the Belmar emergency Department after he fell against a wall, hitting his head. They took a CT of the head and cervical spine, which showed no acute lesion, and the ACDF[1] C5-C7 without complete osseous fusion across the disc spaces or pseudarthrosis.

8. Claimant credibly testified that he had no physical limitations imposed upon him following this date and was able to carry out his job without difficulties, despite having the occasional headache, neck ache or back ache, which he was able to handle.

9. Claimant credibly testified that on January 31, 2023, he parked in a handicapped spot because the other spots in Employer's parking lot and the [Redacted, hereinafter CA] parking lot adjacent to Employer's premises were all full, and Claimant had a valid handicapped tag from a prior disability. While exiting his vehicle, Claimant slipped on ice, falling, hitting his head, and landing on his low back. A customer approached him, Claimant was able to pick himself up off the ground and entered the building.

10. Claimant immediately reported his injury to his manager, who was his supervisor (hereinafter Supervisor). Claimant was hunched over, holding his right arm and explained what had happened including that he had a large bump on his head and asked her to look at it, which she did not. Claimant was dazed and a little light headed. She pulled out a bottle of roll-on cream and instructed him to put some cream on the areas of pain and return to work. Supervisor confirmed most of this testimony.

11. Claimant was not provided with a list of medical providers when he reported his injury. As his condition worsened, he chose to treat at Spine One, having seen a commercial on television. Supervisor confirmed his testimony. Claimant testified that he had never treated with Spine One prior to the accident on January 31, 2023.

12. Supervisor confirmed that she did not become aware of the procedure to provide a list of four medical providers until another employee was injured and obtained them from [Redacted, hereinafter MR]. She confirmed that Claimant reported the injury and accident to her on the day that it happened but that she did not report the injury to MR[Redacted] until February 14 or February 15, 2023.

13. On February 9, 2023, Claimant reported to Spine One, Spine & Sport Medical Center where he was evaluated by Bradley R. Hakim, D.O., complaining of neck pain following "1/31/2023 slipped on ice walking in to work." Claimant was complaining of stabbing, aching, burning, tingling, numbness. Dr. Hakim took a history of present illness:

> The patient is a 59-year-old male with PMHx C5-7 ACDF, L4-S1 decompressive surgery who presents to the clinic today with neck, right upper extremity, mid back,

[1] ACDF refers to an anterior cervical discectomy and fusion.

low back and bilateral lower extremity pain which began after a slip and fall on 1/31/2023. The patient slipped on ice while walking work.

Neck and right upper extremity pain: The patient describes his pain as 7-10 out of 10 in severity. 85% of the pain is in the neck and 50% and is his right upper extremity. He describes aching to sharp pain in the neck, burning pain with paresthesias in the upper extremity. He does experience subjective extremity weakness on the right. His pain radiates in roughly a C6-8 distribution. Right rotation particularly worsens his symptoms. His sleep is affected. Valsalva is positive. He denies bowel bladder changes. He has a history of C5-7 ACDF in 2015, he did have C6-7 ACDF in 2011 prior to that which was extended. He has not recently tried physical therapy or chiropractic care and his *pain was controlled before the slip and fall*. He does use Advil and CBD cream.

Mid back pain: The patient describes his mid back pain is about 4 out of 10 in severity. This is beneath the scapula roughly around T9. He denies any anterior radiating pain here

Low back and bilateral lower extremity pain: The patient describes his low back pain as 4-6 out of 10 in severity**.** This is in the low back and extends on the left lower extremity in roughly an L5 distribution, and on the right side to the groin. His pain is constant, aching to sharp in quality. There is no position of relief. His sleep is affected. Valsalva is positive. He does have a history of L4-S1 decompressive surgery in 2018. (*Emphasis added.*)

Dr. Hakim provided Claimant a note stating Claimant was to be off work for the following two weeks and "beginning today and ending on 2/23/23." He diagnosed cervical radiculitis, thoracic spondylosis without myelopathy and lumbar radiculitis. He noted that Claimant's pain and symptoms significantly worsened and he began to have radicular type pain after the slip and fall on ice on January 31, 2023. He ordered x-rays, diagnostic imaging, and medications as medically necessary and related to the work injury.

14. Claimant provided the release from work from Spine One to Supervisor after his February 9, 2023 visit. Claimant was not provided a doctor's list from Respondent Employer.

15. On February 14, 2023 there was a MR[Redacted] Triage Incident Report. The initial contact stated Claimant was not present during the call. Supervisor alleged that about 15 days prior to the call Claimant was getting out of his truck, when he slipped on ice and fell. Claimant sought treatment at his primary care doctor and was restricted from work until February 23, 2023. Claimant then called in to complete the report, reporting he had hit his head on the ground and needed further treatment. Claimant reported he had worsening tingling in the lower back, neck, fingers and toes. The nurse advised Claimant to contact the claim adjuster about his follow up care needs.

16. The follow up MR[Redacted] report stated that Claimant was present when the call was made. It reported that Employer was notified of the January 31, 2023 incident on the day of the accident. It specified that Claimant injured his bilateral neck, that there was a referral to a provider that was not in the Employer's designated network. It specifically noted "EE states he prefers to seek treatment with the initial treating provider," and that Claimant would advise them of the physician utilized. No provider is listed on the form.

17. Respondent Employer filed a "First Report of Injury or Illness" on February 15, 2023, indicating that Claimant had notified Employer on January 31, 2023 of Claimant's multiple body injuries from falling after getting out of his truck. It stated that:

> EE not present at time of call. *Supr alleges about 15 days ago EE was getting out of his truck,* not clocked in when EE slipped on ice and fell. *EE sought treatment at his primary care doctor at Spine Doctor* 8500 Pine One 80124, 303-367-2225[2] and EE is restricted from work until 2/23/23. Supr stated that EE had previous injuries to his head. Complete demographic info unavailable at time of call. Caller agrees to have EE call MR[Redacted] Injury Triage for completion of report. Fall or Slip Injury Fall/Slip on Ice or Snow (*Emphasis added.*)

Supervisor completed the FROI noting Claimant was being seen by Spine Doctor in Lone Tree and this ALJ infers that it was "Spine One."

18. On February 16, 2023, Claimant was evaluated by William E. Ballas, PA-C at Spine One. On exam he observed, tenderness to palpation (TTP) of the cervical spine facet joints, increased with facet loading, positive Spurling's, normal strength, an absent deep tendon reflex at the biceps and triceps bilaterally. He was TTP over the thoracic facet joints, especially over the T6-10. Claimant was TTP over the lumbar facet joints, had increased pain with lumbar flexion, EHL,[3] positive straight leg test on the left greater than the right. PA Ballas noted that Claimant had undergone imaging of his cervical spine on February 14, 2023, which Dr. Malisa Lester of Park Meadows Imaging, interpreted as follows:

> C2-3*: Mild disc bulge with foraminal extension, eccentric to the left*. Mild left uncovertebral arthrosis with moderate left and minimal right facet arthrosis. Moderate to severe left foraminal stenosis *with encroachment of the let C3 nerve root*. No significant central or right foraminal stenosis.
>
> C3-4*: Mild to moderate disc bulge with foraminal extension***,** eccentric to the right. Mild to moderate (right greater than left) uncovertebral arthrosis with moderate left facet arthrosis as well as a small right facet joint effusion. Right-sided extra-spinal synovial cyst along the posterior facet joint. Mild ligamentous hypertrophy. Flattening of the ventral thecal sac, without significant central stenosis. Moderate to severe (right greater than left) biforaminal stenosis *with encroachment of the bilateral C4 nerve roots***.**
>
> C4-5: *Mild to moderate disc bulge with foraminal extension, eccentric to the left.* Mild (left greater than right) uncovertebral arthrosis with mild to moderate (left slightly greater than right) bilateral facet arthrosis and trace left facet joint effusion. Mild ligamentous hypertrophy. Flattening of the ventral thecal sac without significant central stenosis. Moderate left and mild to moderate right foraminal stenosis *with encroachment of the bilateral C5 nerve roots* (left greater than right). (*Emphasis Added*.)

PA Ballas' impressions included post-surgical changes, moderate to severe C2-3 and C3-4 biforaminal stenosis with encroachment of the C3 and C4 nerve root, advanced facet

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[2] Spine One's correct address was Spine One, 8500 Park Meadows Drive, Suite 200, Lone Tree, CO 80124; (P) 303-367-2225.

[3] EHL may refer to the Extensor Hallucis Longus muscle, which typically indicates pain radiating into the first metatarsal and great toe.

arthrosis, as well as moderate left and mild right foraminal stenosis of the C4-5 with bilateral encroachment of the C5 nerve root. He continued to assess cervical and lumbar radiculopathy and thoracic spondylosis. He ordered an epidural steroid injection of the cervical spine, and thoracic spine as well as medial branch block for the lumbar spine. PA Ballas provided a work restrictions of no lifting, pushing, pulling, twisting, bending, carrying, or climbing with any weight over 10 lbs.

19. Claimant was evaluated at the emergency room on February 22, 2023 by Dr. Kimberly Moreland with concerns of numbness and tingling in his face. A head and neck CT revealed no evidence of vascular dissection, thrombosis, aneurysm, intracranial hemorrhage, intracranial mass lesion and no other acute findings on exam.

20. On February 23, 2023 PA Ballas reported that Claimant had a prior neck surgery and some degenerative changes but he was doing well until the January 31, 2023 fall, causing some disc protrusions, pain and symptoms. On February 27, 2023 he recommended Claimant continue to be off work through mid-March as Claimant's pain continued to be high and stroke had been ruled out from a visit to the emergency room and exam continued to be consistent with prior evaluations. PA Ballas also referred Claimant for bilateral cervical MBB for diagnostic facet mediated pain and to be evaluated by a Neuro/Spine surgeon.

21. On February 24, 2023, Claimant filed with the State of Colorado a Worker's Claim for Compensation alleging injuries to his "head, neck, middle and lower back affecting arms and legs." Claimant wrote that he had "parked in handicap (have plates) got out of my truck, slipped on ice, falling, hitting my head and landing on my back." He noted that he had multiple bulges in his neck compressing the nerves. Claimant indicated he reported the injuries to Supervisor on January 31, 2023. He provided the name of his physician at Spine One as Dr. Hakim.

22. On March 14, 2023 Respondents filed a Notice of Contest for further investigation of preexisting injury, and review of prior medical records.[4]

23. PA Ballas issued another work restriction report on March 14, 2023 keeping Claimant off work until after his upcoming procedure is done and he is reevaluated. On March 20, 2023 he referred Claimant to neurosurgery and continued off work.

24. Claimant underwent the CMBB with Dr. Hakim on March 17, 2023 with directions to complete a pain log. PA Ballas referred Claimant to Dr. Michael Rauzzino, a neurosurgeon for evaluation on March 20, 2023, noting Claimant had no improvement with the C7-T1 ESI but had improvement from the CMBB at the C2, C3, C4, C7 and C8 levels.

25. Claimant was evaluated by Dr. Rauzzino, the neurosurgeon, and Stephen Ladd, PA-C, on March 28, 2023.[5] He stated that:

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[4] A second Notice of Contests was filed on June 7, 2023 still for investigation of preexisting conditions.

[5] The March 28, 2023 report states that the "rendering provider" was Dr. Rauzzino but the report was authored by PA Ladd. Dr. Rauzzino indicated that he examined Claimant with his PA and the PA wrote the report. This ALJ makes the logical choice to conclude that both providers saw Claimant and that PA Ladd completed the final report.

> It was not until January 2023, when he slipped and fell at work on some ice, I believe, and hit his head, and that he developed increased neck pain with shooting pain down the right arm and some numbness and tingling in his hand, especially with range of motion. He rates the pain around 6/10 to 7/10. It is aggravated by such things as sleeping, lying down, coughing, sneezing, or significant range of motion of his spine. He has had a hard time at work due to this injury and pain. He ultimately went to SpineOne and is getting treatment in the form of an epidural steroid injection, which did not provide any significant relief. In March, he underwent medial branch blocks in the cervical spine with about 85% to 90% relief over a day or so before wearing off. He has not had an ablation rhizotomy as of yet, only medial branch blocks.

PA Ladd reviewed x-ray and MRI of the cervical spine and noted they showed advanced facet arthrosis throughout his upper cervical spine with worsening at C3-C4 with edema within the facet joint and some posterior facet cysts and a possible cleft in the implant at the C5-6 when compared to the C6-7 level. He ordered an additional CT to review the fusion stability and noted that Claimant might benefit from cervical injections.

26. Dr. Rauzzino ordered a CT of the cervical spine, which took place at Park Meadows Imaging on March 30, 2023, which Dr. Lester found unchanged from the MRI of February 14, 2023.

27. On April 17, 2023 Claimant was "quite miserable" and not getting any better with a pain at 7/10 to 8/10 which is dull, stabbing, aching, burning and throbbing in nature, with symptoms radiating to his arms and hands. Following multiple considerations regarding Claimant's options, Dr. Rauzzino recommended an ACDF at the C3-4 and C4-5 levels to take place at Skyridge Medical Center on May 25, 2023. This was documented by Derrick Winckler, PA-C.

28. Claimant had an independent medical evaluation by N. Neil Brown, M.D. at Respondents' request, who issued a report on May 4, 2023. He took a history consistent with Claimant's testimony at hearing including that "he had a large bump on his head and he had pain in his neck and shoulders, into the right arm, minimal into the left arm, his midback, low back, and bilateral legs." Dr. Brown noted Claimant had reported the injuries to his manager and was given ointment but not sent to a provider, so he chose one. On exam he noted an unremarkable neurologic exam except for decreased light sensation in his left lateral thigh. Claimant had difficulty standing up from a sitting position, decreased cervical lordosis, and tenderness in the paraspinal muscles, trapezius muscles and mild spasms. He had painful range of motion, with extension worse than flexion, pins and needles sensation with 30 degrees of flexion of the neck. In the low back Claimant was TTP in the midline. He reviewed the medical records including imaging. He concluded that "aside from the cervicogenic headaches, the malfusion of the previously operated levels at C5-6 and C6-7, the cervical degenerative disc disease and cervical spondylosis are preexisting." He also opined that "[T]his gentleman has had an aggravation of his pre-existing cervical and lumbar degenerative processes," but that the proposed surgery at the C3-4 and C4-5 levels is not medically necessary.

29. On July 1, 2023 Dr. Rauzzino wrote a response to Dr. Brown's report and specifically contested Dr. Brown's positions, noting that:

I have had the opportunity to treat [Claimant] as a patient in our neurosurgery clinic. I am asked to discuss the causality of his need for surgery related to the injury sustained on 01/31/23. I have reviewed imaging and have had the opportunity to review the independent medical evaluation provided by Dr. N. Neil Brown dated 05/04/23.

Dr. Brown noted that he did not have my records available to him to incorporate into his evaluation. This limits the accuracy and effectiveness of his report to a significant degree.

* * *

Dr. Brown is in fact correct about a number of points. He is correct in stating that [Claimant] had significant preexisting cervical degenerative disc disease that in itself was not caused by the accident and existed at the time of the accident. He is also correct in that the patient likely had a pseudoarthrosis at C5-C7 at the time of the accident. Most importantly correct that [Claimant] sustained an injury to the cervical spine and that [Claimant]'s cervical spine conditioned (sic.) had been aggravated by the fall. It is the aggravation of [Claimant]'s pre-existing condition that led for the need for new treatment and eventually surgery.

I disagree with his opinion on the need for the proposed surgery at C3-C4 and C4-C5. Dr. Brown does not provide any information to indicate that [Claimant] was being actively treated for severe neck pain in the period immediately prior to his fall. [Claimant]'s [sic.] was then *asymptomatic* from a treatment standpoint prior to the fall.

* * *

I believe [Claimant]'s case to be relatively straightforward.

[Claimant] has had previous surgery which caused advanced preexisting degeneration at the levels above that surgery.

He was more prone than is the average person to sustain injury in a fall because of his previous surgery.

[Claimant] was not being actively treated for severe neck pain in the period immediately prior to his fall.

The fall is an appropriate mechanism to produce injury to the cervical spine and his preexisting degenerative arthritis was aggravated significantly to the point that he could not be treated non-surgically and required surgical treatment of the symptomatic degenerated discs and facets at C3-C4 and C4-C5 with an anterior/posterior fusion.

* * *

[Claimant] had a fall, his neck became symptomatic, he failed conservative therapy, and he underwent surgery which was an appropriate treatment. At the time of surgery, I had to consider that in addition to the injured discs at C3-C4 and C4-C5, he may have aggravated preexisting pseudarthrosis at C5-C6 and C6-C7; this was also treated at the time of surgery.

30. Respondents took the deposition of IME physician, Dr. Brown on July 7, 2023, a board certified neurosurgeon that has been a Level II accredited physician for the past three years. Dr. Brown agreed that it would be helpful if there were clinical

examinations to document what symptoms Claimant was having, rather than just radiological studies prior to the date of the injury. He noted that the right sided facet joint effusion was not a part of the preexisting condition but could not state whether it was caused by the incident of January 31, 2022. He also enquired regarding pre-injury symptoms and none were documented immediately before the accident other than what he had had years before. Claimant's findings on exam relied on the subjective complaints of the patient during the exam and the comparison to prior records, and tenderness of the facets was a really deep muscle palpation and could be related to the fall.

31. Dr. Brown agreed that the reason to operate was symptoms, and that many people had failed fusions, but did not have symptoms. A neurosurgeon would not operate based on diagnostics alone. It was Dr. Brown's opinion that the restrictions assigned on February 9, 2023 by Bradley R. Hakim, D.O. were appropriate for the symptoms Claimant was complaining of following his injury, and that Claimant had no restrictions prior to February 9, 2023. Dr. Brown also agreed that the restrictions assigned on February 16, 2023 were appropriate. However, Dr. Brown was unable to say "greater than 50%" that the symptoms Claimant was complaining of on February 9, 2023 were related to his fall on January 31, 2023. He questioned whether there was, in fact, an incident, since he did not have anything from employer reporting the incident.

32. Dr. Brown was of the opinion that surgery at C5-C6, C6-C7 was reasonable and necessary, but he was unwilling to give an opinion on the relatedness of that surgery. Further, he was unwilling to give an opinion as to whether the surgery at C3-C4, C4-C5 was reasonable because he stated it was uncommon for Canadian neurosurgeons like himself to proceed with surgery without radicular symptoms, just neck pain, unlike Colorado neurosurgeons that are more aggressive in their treatment plans. Lastly, he questioned why the radiographs in 2021 and 2022 were ordered without having corresponding physician clinical notes. Despite this, he also agreed with Dr. Rauzzino that Claimant was more prone than the average person to sustain an injury in a fall because of his previous surgery and pseudarthrosis because there was stress concentration at the level immediately above and the level immediately below his prior fusion, which were more susceptible to injuries.

33. On August 14, 2023 Dr. Rauzzino kept Claimant under restrictions due to his neck surgery.

34. On September 25, 2023 Respondents took the deposition of Dr. Rauzzino, Claimant's treating provider, a neurosurgeon who performed Claimant's cervical spine surgery and had been Level II accredited for approximately 15 years. Dr. Rauzzino continued to opine, at his deposition, that Claimant had not received treatment for his neck before Claimant's fall, specifically noting as follows:

> Q. You've not been provided with any treatment records, though, relating for treatment on the neck before my client's fall, have you?
>
> A. No. In fact, when he saw Dr. Duhon in 2021 after the fall, Dr. Duhon would have been in a position to discuss cervical symptoms with him. But in that office visit he only discussed with him leg pain. If [Redacted, hereinafter RS] had, you know, significant neck pain that he's sitting – he had the opportunity to visit with a neurosurgeon, who is a doctor who treats

neck and back pain, and yet on that visit there was no mention made of neck pain, there was no request for treatment, there was no request for imaging or anything like that.

So my guess is – or not my guess – my impression of looking at this case is that RS[Redacted] did have some neck pain, and that's not surprising after a two-level fusion and after having some arthritic changes above it.

It's my opinion as a Level II provider that after the fall he developed new, worsening symptoms as a result of the fall that he didn't have prior, and that's what necessitated the additional treatment. And from a causation standpoint, that would be the causality, that were it not for the fall, he wouldn't have the abrupt change in the symptoms because he had the opportunity to seek injections and all those things in the period prior to all of this, but there is no record of him seeing a doctor at SpineOne for other symptoms in 2021, 2022, it was only immediately after he had this new injury that he sought treatment in the form of these injections and required additional treatment and then surgery.

Q. It appears then you have not changed the opinions you set forth in your letter of July 1st, 2023, based on the questioning today?

A. No, sir.

Q. And finally, Doctor, in light of the fact that you're not going to be there at hearing but RS[Redacted] is going to testify that the pain complaints following his fall have now gone away following the surgery you performed, does that anecdotal information support the decision you made to recommend surgery and proceed with the surgeries you performed?

A. Yes.

35. As found, Dr. Rauzzino's opinion is found more credible and persuasive than the contrary opinion of Dr. Brown. As found the diagnostic testing performed following the January 31, 2023 work related accident were significantly different than those performed prior to this date.

36. As found, Claimant's testimony is in direct contradiction to Dr. Brown's findings that the pain was preexisting. There were no medical treatment notes to support that Claimant was receiving active treatment immediately before January 31, 2023, for the lumbar spine or cervical spine, other than the diagnostic testing.

37. As found, Dr. Brown's opinion that Claimant did not suffer an injury, and if he did, that any accident did not result in the need for surgery at C3-C4, C4-C5 is not persuasive, is found not to be reasonable based on all the evidence.

38. As found, following Claimant's February 9, 2023 evaluation, he was assigned a restriction of "be off work for the next 2 weeks beginning today and ending on 2/23/23," which Claimant provided to his supervisor. Supervisor testified she did not ask Claimant if the restrictions were due to his January 31, 2023 injury. As found,

Respondents did not provide Claimant work within his restrictions at any time subsequent to this date until Claimant returned to work for employer.

39. As found, Claimant credibly testified after providing the document to Supervisor, he was not permitted to work, and requested TPD benefits starting on February 9, 2023, as his employer continued to pay him some funds even though he was not working.

40. As found, Claimant's AWW was $2,377.13, based upon his year-to-date earnings the year immediately prior to his injury. Claimant credibly testified that in 2022 he was on a leave of absence for an unrelated concussion injury and did not commence work until May 25, 2022. Claimant provided a W-2 reflecting that he had earned $75,051.37, and that between May 25, 2022 and December 31, 2022, a period of 221 days, his daily rate was $339.59, which results in an AWW of $2,377.13. Respondents maintained that Claimant's hourly pay was $26.23, and did not dispute that he was required to work 44 hours a week, but challenged Claimant's entitlement to include other compensation in the AWW calculation because the other compensation was not guaranteed. However, Respondents provided pay records after February 9, 2023 through June 2023, which reflected that Claimant continued to receive his other compensation on a monthly basis throughout the entire time following his January 31, 2023 injury, even though he was not working. Therefore, this ALJ concluded that Claimant was entitled to the additional compensation despite not working and the fair calculation of Claimant's AWW should include all of Claimant's social security wages.

41. Because Claimant continued to receive other compensation, although he was not working, Claimant was not entitled to TTD benefits, but rather TPD for any week beginning as of the week of February 9, 2023 when he did not earn his AWW of $2,377.13.

42. After he was taken off of work, Claimant was awarded social security benefits in the amount of $2,138.00 per month from approximately February 9, 2023 through approximately August 2023.[6] He was also initially awarded short-term disability benefits at the rate of $327.00 per week, of which some of it was paid back to Employer from Claimant's earnings upon his return to work. However, the exact amount was not clear.[7]

43. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

[6] There is some uncertainty of whether this was a full seven months. Claimant should provide the documentation of each payment received to Respondents.

[7] If Employer took back approximately $2,574.00 yet Claimant received $327.00 per week for the short-term disability for the full multiple weeks this could very well have exceeded the amount reimbursed and Respondents should get credit for any overpayments, or vice versa.

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Compensability

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

A preexisting condition does not preclude a claim for compensation and an injury is compensable if an industrial injury aggravates, accelerates, or combines with the preexisting condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a preexisting condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1959); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the preexisting condition. *Finn v. Industrial* Commission, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the preexisting condition. *Faulkner v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, *supra*; *Allee v. Contractors, Inc.,* 783 P.2d 273 (Colo. 1989); *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 85 (Colo. App. 1986), overruled on other grounds, *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

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

Causation may be established entirely through circumstantial evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Medical evidence is neither required nor determinative of causation. A claimant's testimony, if credited, may alone constitute substantial evidence to support an ALJ's determination concerning the cause of the claimant's condition. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997);

Apache Corp. v. Industrial Commission, 717 P.2d 1000 (Colo. App. 1986); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

As found, Claimant has credibly and persuasively shown that he slipped and fell on January 31, 2023 while exiting his vehicle at work. He has further shown by a preponderance of the evidence that it is more likely than not that he suffered injuries arising out of and in the course of his employment while exiting his vehicle on the Employer's premises. As found, Claimant's accident directly and proximately caused the injuries to his cervical and lumbar spine which included substantial aggravation of his preexisting condition. Dr. Rauzzino's opinions are persuasive and support the claim that it is more likely than not that Claimant had an aggravation of the underlying degenerative condition of his cervical spine requiring surgical repair. Dr. Hazim's opinions are persuasive that Claimant aggravated his lumbar spine and required further therapy and other treatments, including injections in order to bring him back to baseline.

As found, on February 9, 2023, Dr. Hakim noted neck and low back pain from a slip on ice at work. Dr. Hakim placed Claimant on work restrictions and ordered MRIs. As further found, following the incident and accident of January 31, 2023, PA Ballas noted on February 16, 2023 that Claimant had disc bulges at C3-C4 and C4-C5. As found, Dr. Hakim and PA Ballas credibly and persuasively documented Claimant's increase in physical findings. As found, Claimant credibly and persuasively testified to this increasing symptom of pain in his lumbar spine and limitations in range of motion in his cervical spine triggered by the January 31, 2023 accident and consequently triggered the Claimant's need for medical treatment. As found, Claimant's need for treatment and disability (as Claimant was placed on temporary work restrictions) were the proximate result of the January 31, 2023 work related injury and were not just the natural consequence of the preexisting condition. As concluded, had the injury not occurred Claimant would have likely continued to work without restrictions, Claimant would have likely continued to maintain his symptoms under control without requiring further care. As further concluded, but for the accident of January 31, 2023, Claimant would not have required the treatment currently being recommended. As found, Dr. Rauzzino's opinions are persuasive and support the claim that it is more likely than not that Claimant had an aggravation of the underlying degenerative condition of his cervical spine requiring surgical repair. As found, Dr. Hazim's opinions are persuasive that Claimant aggravated his lumbar spine and required further therapy and other treatments in order to bring him back to baseline. These opinions are more credible and persuasive as well as more convincing than the contrary opinions of Dr. Brown. As found and concluded, Claimant has shown by a preponderance of the evidence that it is more likely than not that Claimant suffered a compensable aggravation of his preexisting condition to his lumbar and cervical spine when he exited his vehicle and slipped on the ice on January 31, 2023.

B. Authorized, Reasonably, Necessary and Related Medical Benefits

Respondents are liable for authorized medical treatment which is reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101(a), C.R.S. (2023); *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including

medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course and scope of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Clam Appeals Office*, *supra at* 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability, but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co*., *supra* at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, *supra*.

The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, *supra* at 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents provide injured workers with a list of at least four designated treatment providers. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2 additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office*, *supra*; *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom an ATP refers the claimant in the normal progression of authorized treatment or chain of referral. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v.*

Dunagan, *supra*. Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office*, 197 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 6-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation*, WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonably necessary and causally related medical benefits for his work related injuries caused by the fall of January 31, 2023, including care for his low back and cervical spine. Supervisor testified that she had notice of the injury on January 31, 2023 when Claimant reported the injury to her and Supervisor later documented that notification on the FROI. Supervisor was Employer's representative and was deemed to know how to supervise the employees that reported to her. There is no record that Respondents provided Claimant a designated provider list within the seven days as required by law. In fact, Supervisor testified that she was not aware of the requirement to provide the four provider list until a little before her testimony, after another employee was injured. Therefore, selection of an authorized treating provided passed to Claimant and Claimant selected Dr. Hakim and Spine One. Claimant was evaluated by Dr. Hakim for acute neck and low back pain on February 9, 2022, and Claimant provided the note from that evaluation to Employer, but Claimant was still not provided with a list of four providers. Claimant then followed up with Spine One on February 15, 2023. Further, Claimant's care from Dr. Rauzzino at Front Range Spine was within the chain of referral, as PA Ballas, Dr. Hakim's PA, and was reasonable, necessary medical care related to the January 31, 2023 work injury. Claimant was never provided an appointment with a designated provider.

Claimant is credible and persuasive in his testimony that Supervisor advised Claimant to continue to treat at Spine One. As found, Supervisor, in effect, advised Claimant to pursue care with his primary care provider ("PCP") at Spine One, which was, in effect, a referral to his PCP. Claimant's Application for Hearing specifically notified Respondents of Respondents' refusal to treat. No other persuasive evidence that Respondents responded to the notice was within the records or evidence provided at hearing. Claimant identified Spine One to be the provider. As further found, the refusal to treat and Respondents' failure to identify a provider that was willing to treat Claimant caused the right of selection to pass to Claimant and Claimant designated Spine One, who is now Claimant's treating provider, together with the providers within the chain of referral including Front Range Spine, Sky Ridge Medical Center and Park Meadows Imaging.

As found, Claimant has proven by a preponderance of the evidence that he was entitled to receive reasonably necessary and causally related medical benefits for his work related injuries caused by the fall of January 31, 2023, including care for his low back and cervical spine. Respondents noted that they had notice of the injury on January 31, 2023 listing the date of their notice on the FROI.

Respondents argued that Claimant's need for surgery, as supported by Dr. Brown's opinion, was from his preexisting conditions, despite the accident of January 31,

2023 (if there was an accident) because it was inevitable due to the arthritic and degenerative process caused by the prior injuries and surgeries, not because of any aggravation caused by any fall. Dr. Brown's opinions are not found persuasive. As explained by Dr. Rauzzino, Claimant's need for surgery was caused by traumatic forces on the preexisting condition. The degenerative spine alone did not cause the need for a cervical fusion. The exponential increase in symptoms is what caused the need for surgery. And this is well supported by Claimant's testimony that while he had some pain and discomfort prior to the January 31, 2023 accident, those symptoms were controlled by some medications, but Claimant was able to carry out his job, which occasionally required him to lift and carry heavy items. As found, following the work injury of January 31, 2023, the pain was not tolerable, the symptoms were frequent and Claimant's range of motion in the cervical spine was limited. All these new symptoms and serious pain were the cause for the need for cervical fusions at C3-C4 and C4-C5 recommended and performed by Dr. Rauzzino on May 25, and 26, 2023. All of these new symptoms aggravated the underlying preexisting condition, and proximally cause the compensable work related injury of January 31, 2023. As found, Claimant has shown by a preponderance of the evidence that it was more likely than not that the cervical fusions were reasonably needed and related to the January 31, 2023 work related injury.

D. Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine Claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 2007).

Claimant credibly testified that in 2022 he was on a leave of absence for an unrelated concussion injury and did not commence work until May 25, 2022. Claimant provided a W-2 reflecting that he had earned $75,051.37, for earnings between May 25, 2022 and December 31, 2022. This was a period of 221 days, providing a daily rate of $339.59, which resulted in an AWW of $2,377.13.

Respondents maintained that Claimant's hourly pay was $26.23, and did not dispute that he was required to work 44 hours a week, but challenged Claimant's entitlement to other compensation. It was Respondents' position that Claimant's

entitlement to other compensation was not guaranteed. However, Respondents provided pay records after February 9, 2023 through June 2023, which reflected that Claimant continued to receive his other compensation on a monthly basis throughout the entire time following his January 31, 2023 injury, even though he was not working. Therefore, this ALJ concludes that Claimant was entitled to the additional compensation despite not working and the fair calculation of Claimant's AWW should include all of Claimant's social security wages. The fair calculation of Claimant's AWW was $2,377.13 based upon his year-to-date earnings the year immediately prior to his injury.

C. Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-103(1)(a); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain indemnity benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric,* 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office,* P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic, supra*.

To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Thus, if the injury in part contributes to the wage loss, TPD benefits must continue until one of the elements of Sec. 8-42-106(2), C.R.S, is satisfied. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). Section 8-42-106(2)(a), *supra*, provides that TPD benefits cease when the employee reaches maximum medical improvement.

Following Claimant's February 9, 2023 evaluation, he was assigned work restriction be off work for the next 2 weeks, which Claimant provided to his supervisor. Supervisor testified she did not ask Claimant if the restrictions were due to his January 31, 2023 injury. As found, Respondents did not provide Claimant work within his restrictions at any time subsequent to this date until Claimant returned to work for employer months later. Further, as found, Claimant credibly testified after providing the document to Supervisor, he was not permitted to work, and he requested TPD benefits starting on February 9, 2023 and ongoing. Because Claimant continued to receive other compensation, although he was not working after February 9, 2023, when looking at his wage records, Claimant was not entitled to temporary total disability (TTD) benefits, but

rather TPD based upon any week after February 9, 2023 when he did not earn his AWW of $2,377.13.

After he was taken off of work, Claimant was, awarded short term disability benefits for a period of time though the parties did not provide paperwork showing exact payments. The payments were partially credited back to Employer in the amount of $2,574.00 from Claimant's earnings upon his return to work. However, the exact amount Claimant received was not clear. Claimant was also awarded social security benefits in the amount of $2,138.00 per month from February 9, 2023 until he returned to work, though this again is not clear. Therefore, Claimant proved by a preponderance of the evidence that he was entitled to temporary partial disability benefit beginning February 9, 2023 when his authorized medical provider gave him a work restriction note, which Claimant provided to his Supervisor.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work related injury to his low back and cervical spine in the course and scope of his employment on January 31, 2023.

2. Respondents shall pay for all authorized reasonably necessary and related medical benefits including the cervical fusions performed by Dr. Rauzzino on May 25, and May 26, 2023, as well as all providers from Spine One as well as all providers within the chain of referral, including Front Range Spine, Sky Ridge Medical Center, Park Meadows Imaging and any other the facility where Claimant was treated within the chain of referral. All payments to providers shall be in accordance with the Colorado Medical Fee Schedule.

3. If Medicare or Medicaid have paid any portion of the medical benefits, Respondents shall reimburse them in accordance with Section 8-42-101(6)(a), C.R.S. Further, if Claimant has paid any funds out of pocket, Respondents shall reimburse Claimant the full amount paid by Claimant, even if more than is required by the fee schedule pursuant to Sec. 8-42-101(6)(b), C.R.S.

4. Claimant's average weekly wage is $2,377.13.

5. Within ten days of this order, the parties shall exchange information regarding the payments of social security benefits and short term disability benefits as well as any credits taken by Employer.

6. Respondents shall pay temporary partial disability benefits from February 9, 2023 and ongoing, until terminated by law, subject to applicable offsets and credits following calculations after the above exchange of information.

7. Claimant has established that some of his short term disability benefits were returned to Employer by withholding Claimant's wages. Respondents shall consider these and any other returned wages in the calculation of benefits. The parties shall calculate the exact amount of indemnity benefits owed considering all offsets and credits.

8. Respondents shall pay Claimant statutory interest in the amount of eight percent (8%) per annum due to Claimant and not paid when due.

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

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

DATED this 27th day of December, 2023.

Digital Signature

By: _____
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-215-083-003

ISSUES

- Did Claimant prove he sustained a compensable injury?
- Is Claimant entitled to medical benefits?
- Did Claimant prove he is entitled to temporary disability benefits?
- What is Claimant's Average Weekly Wage?

FINDINGS OF FACT

1. Claimant was employed as a production truck driver for [Redacted, hereinafter TM]. He worked there for approximately 5 years. He would work 12 hour shifts, four on, four off, rotating schedule. His job consisted of hauling coal from a conveyor belt located in a tight area where he filled a front end loader with the coal and then maneuvered the vehicle in a tight area and deposited the coal at the other end of the pit. Claimant estimated that it would take 3 maneuvers to exit the area where he picked up the coal. Claimant alleges that he sustained a repetitive work injury on June 6, 2022 as the result of operating the coal truck and front end loader.

2. Claimant testified that prior to the coal front end loader, he was on the dirt crew with newer trucks. It was not until after he started driving the coal front end loader that he began having pain in both shoulders.

3. The coal front end loader uses joy stick controls to maneuver the truck around. The joystick on the left moves the vehicle forward and reverse. The two joysticks on his right lifted and tilted the bucket. He also testified that he experienced a rough ride since the vehicle bounced quite a bit as he drove over rough terrain. As he bounced in the vehicle, it would jar both of his shoulders. Claimant would also operate a coal truck and sometimes a bull dozer. The coal truck was a smaller haul truck and they were old trucks. They had an automatic transmission shifter. They were harder to drive that the dirt trucks. A lot of times the power steering wouldn't work. He would have to crank the steering wheel and that would cause his pain in both his shoulders.

4. Sara Nowotny, a vocational evaluator, performed a job demands analysis for the Claimant's job duties on February 21, 2023. This included observing other employees performing the job duties that Claimant did when he had the onset of shoulder pain. She issued a report dated February 24, 2023. In her report, she found that Claimant's job duties did not have risk factors present for the claimant's shoulder diagnoses including vibrations, awkward positions, repetitive activities or forceful and repetitive activities.

5. Claimant continued to work full duty as scheduled on and after June 6, 2023 until August 24, 2023, when he reported the claim to his employer.

MEDICAL EVIDENCE

6. On the day he reported his claimed injury, Claimant sought treatment at Memorial Regional Health Clinic in Craig, Colorado. Physician's assistant Jordan Fisher obtained the following history "[Redacted, hereinafter JT] is a 62 yr male presenting for evaluation of bilateral shoulder pain. The patient is the primary historian. This is a workman's compensation visit. Patient states symptoms started in June. This did not start with a particular incident or injury. Patient works at TM[Redacted] and states he operatives (sic) heavy equipment. He is concerned that repeated movements at work have caused his shoulder pain. States pain is predominantly in the deltoid areas. It is worse in the right shoulder than the left. It has been particularly bad the past couple of days after patient has been driving large trucks where he has to pull very hard on the steering wheel. Also reports he was using a joystick a few weeks ago and this made the pain worse as well". Additionally, the chart indicated that Claimant will be referred to orthopedics for further evaluation.

7. Claimant returned to Memorial Regional Health Clinic on September 1, 2022, and saw Aaron Stewart, D.O. that day. Claimant told Dr. Stewart his bilateral shoulder pain, right worse than left, continued and had worsened over the past month. Dr. Stewart wrote, "The pain is located on his lateral shoulder and is made worse with movement of his arm. He works as a heavy machinery operator and using the joysticks and controllers on the machines has been steadily worsening the pain. He denies radiation of pain, numbness, tingling, or muscle weakness." Claimant's physical exam was interpreted to show, "Decreased RUE AROM in overhead movement. TTP overlying deltoid area, normal muscle strength in flexion, extension, internal/external rotation, pain elicited on R empty can test. TTP overlying L deltoid region." Dr. Stewart did not discuss claimant's job tasks, identify repetitive job activities, obtain a job description, discuss the repetitive injury sections of the Workers' Compensation Treatment Guidelines, or perform a causation analysis. However, he wrote, "Work related pain of b/l shoulders, R worse than left." He thought claimant's December 2021 right biceps tendon tear, "[S]eems unrelated to the pain he is currently having." He thought Claimant had a likely "overuse injury." He referred Claimant to physical therapy, and stated claimant was unable to work from August 24 until October 7, 2022.

8. Claimant began physical therapy on September 19, 2022.

9. Claimant began treatment with Steamboat Orthopedics and Spine on October 26, 2022. He was referred there by Dr. Stewart. An MRI of the right shoulder was performed at the facility on that day. The MRI report showed Moderate right supraspinatus tendinosis with a mostly high-grade articular surface tear of the tendon anteriorly at the insertion with a small superimposed full-thickness component of supraspinatus tendon tear seen on a single image; Mild subscapularis tendinosis; Marked long head biceps tendinosis; Mild AC joint osteoarthritis; and Non-arthrogram findings suspicious for nondisplaced tears in the posterior labrum at the 9:00 position and the superior labrum

just anterior to the biceps anchor.

10. Claimant discussed the MRI that was taken with P.A. Fleming. He performed a cortisone injection to his right shoulder. He also discussed potential surgery to the right shoulder, but noted that any potential surgery would have to occur after he lowered his A1c level, which was at a 9.

11. Dr. Sauerbrey saw claimant on December 13, 2022. Dr. Sauerbrey wrote, "He hurt himself about 6 months ago. He is a coal miner. That history is outlined in the chart. The right shoulder is really the one that it all started with. When he injured his right shoulder, he was having to use his left shoulder more and that became symptomatic." Dr. Sauerbrey saw claimant's biceps tendon rupture in his examination, and said he understood it happened, "[B]ack in January. That was not worked up." He reviewed claimant's right shoulder MRI, and thought the images showed, "There is a high-grade articular surface tear of the supraspinatus tendon with some full-thickness component seen anteriorly. There is tendinosis of the subscapularis. The biceps tendon is obviously ruptured with a remnant tendon there and there is AC joint arthritis." Dr. Sauerbrey also did not perform a causation analysis or assess claimant's shoulder based on the Colorado Workers' Compensation Medical Treatment Guidelines. Dr. Sauerbrey made assumptions about the specifics of claimant's job duties, hours, activities, repetitive activities, whether the shoulders were involved in any repetitive work activities, or how claimant performed his job duties.

12. Dr. Raschbacher testified that he performed an IME on April 27, 2023. He evaluated the Claimant in person and took a history from the Claimant. He also reviewed the medical records provided and specifically reviewed the job demands analysis prepared by Sara Nowotny.

13. After review of the medical records, Claimant's history and Ms. Nowotny's report, Dr. Raschbacher provided a causation analysis. He states, in response to a query from Respondent's counsel "The physical activities described by JT[Redacted] and those activities in the job description are not medically likely to be sufficient to cause anatomic or physiologic injury to the right shoulder or the left shoulder. He had preexisting degenerative disease at both shoulders, clearly not caused by any particular physical activity. He did not have risk factors delineated in the job description or in his own description that would or likely would cause injury to either the left shoulder or the right shoulder, by the rotator cuff or other types of injury. There is simply not a mechanism of injury that would likely cause anatomic injury or disruption, particularly to both shoulders".

CONCLUSIONS OF LAW

A. Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In assessing credibility in this case, I have considered the testimony of the Claimant and the testimony of the other witness presented by both parties.

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

B. Compensability

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

Claimant has failed to sustain his burden of proof that his shoulder symptoms are causally related to his work duties with the employer. I have considered Dr. Sauerbrey's opinions as to the causal relationship of the Claimant's shoulders to Claimant's work. However, Dr. Sauerbrey's conclusory opinions are not based on a critical analysis of the facts or Claimant's job duties. I conclude that the job demand analysis performed by Sara Nowotny is credible and persuasive in describing the job duties of Claimant with respect to his work on the coal crew. The analysis does not identify any significant risk factors that would account for the Claimant's shoulder complaints. I also conclude that testimony and written opinions of Dr. Raschbacher are credible and persuasive that the physical activities performed by Claimant would not have been sufficient to cause anatomic or physiologic injury to either shoulder. These opinions as to causation are persuasive since they are based on a consideration of the job demand analysis performed by Sara

Nowotny, as well as the history given Claimant and the available medical records, taken as a whole.

ORDER

It is therefore ordered that:

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

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

DATED: December 27, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-210-684-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on May 19, 2022.

2. Whether Claimant established by a preponderance of the evidence entitlement to reasonable and necessary medical benefits to cure or relieve the effects of an industrial injury, including surgery recommended by Jeffrey Oster, DPM.

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage is $2,150.00.

FINDINGS OF FACT

1. Claimant has worked for Employer for nearly twenty-four years as an substation journeyman electrician. Claimant's job requires him to maintain electrical service for customers in the Alamosa, Colorado area. Claimant's job duties included responding to electrical service calls, walking, standing, climbing, and driving. Claimant credibly testified that worked 10-12 hours per day, four days per week, with frequent overtime, and that he spent approximately 80 percent of his working hours on his feet. To perform his job duties, including climbing utility poles, Claimant wore lineman's boots, which Claimant described as tight, lace up boots.

2. Claimant testified that on May 19, 2022, he was working for Employer and needed to go to the Employer's service center for training. He parked his truck in the service center parking lot, and exited his truck. After taking a couple of steps, he noticed a sharp pain in his left ankle that he had never experienced before. Claimant testified that the pain was located at the back of his ankle, where the bottom of the Achilles tendon connects to the heel. He testified that his ankle was bruised, swollen, and tender, with a large bump on his heel. Claimant credibly testified that he had no prior issues with his left ankle or heel, and had not had pain in his heel or ankle prior to May 18, 2022.

3. Claimant testified that when the pain did not go away, he notified his supervisor, [Redacted, hereinafter JI], and was advised to contact the company nurse and safety hotline. Claimant contacted the company nurse, and was ultimately given the option to see several different providers. Claimant elected to go to the SLV health Occupational Medicine Clinic.

4. On May 26, 2022, Claimant saw Tasha Alexis, M.D., at the SLV Health Occupational Medicine clinic in Alamosa. Claimant reported he was walking across a

parking lot and started to feel pain in his left ankle. Claimant denied falling, tripping, or rolling his ankle. On examination, Claimant's posterior ankle was tender to palpation, with bruising and redness. Dr. Alexis diagnosed Claimant with an strain of the left Achilles tendon, and referred him to podiatrist Jeffrey Oster, DPM. (Ex. B).

5. Claimant saw Dr. Oster on June 20, 2022. Dr. Oster's examination revealed pain in the posterior lateral aspect of the left heel consistent with Haglund's deformity, and mild hypertrophy over the posterior left heel compared to the right. Dr. Oster considered differential diagnoses of insertional Achilles tendinitis versus Haglund's deformity (a bony growth on the heel bone), and recommended a trial heel lift to help determine the more likely diagnosis. (Ex. 6).

6. Claimant returned to Dr. Oster on July 12, 2022 after using the heel lift for approximately three weeks. Dr. Oster noted the heel lift helped establish that Claimant's symptoms were specific to insertional Achilles tendinitis, and not simple Haglund's deformity. He discussed a surgical procedure to correct his condition, including removal of the Achilles tendon, and resection of the posterior left heel with reattachment. (Ex. 6).

7. At his August 2, 2022, visit with Dr. Oster, Claimant discussed his desire to pursue a partial resection of the heel and transposition of the Achilles tendon, recommended by Dr. Oester. Dr. Oster reiterated that Claimant's condition was specific to insertional Achilles tendonitis. He noted that "[Claimant] correlates with overuse syndrome of the left heel associated with working greater than 20 years on his feet as a lineman." (Ex. 6).

8. On August 22, 2022, Respondents filed a Notice of Contest regarding Claimant's claim, indicating the claim was contested for further investigation. (Ex. G).

9. Claimant returned to Dr. Alexis several times over the following months. Dr. Alexis opined that Claimant's injury was due to prolonged standing and walking while performing his job duties. Claimant reported his condition was progressively worsening, and was aggravated by work activities. (Ex. 5).

10. On December 23, 2022, Claimant filed a second Worker's Claim for Compensation related to the May 19, 2022 incident. In this report, the May 19, 2022 incident was described as follows: "I twisted my foot/ankle while jumping out of my F350 work truck. I felt immediate pain upon landing on the ground." (Ex. 2). The incident description contained in the December 23, 2022 claim form is inconsistent with Claimant's testimony and Claimant's medical records.

11. On March 7, 2023, Dr. Oster responded to correspondent from Respondents regarding the cause of Claimant's condition. In response to the question "is [Claimant's] work incident of 5/19/22 the proximate cause of his current condition?" Dr. Oster checked "NO" and wrote "This is a problem with insidious onset and cannot be specifically relational to one incident." In response to the question "Is [Claimant's] condition as described above, with medical certainty, directly related to his employment?" Dr. Oster checked "No" and wrote "This condition would have occurred regardless of employment type." (Ex. 6).

12. On April 26, 2023, Claimant had an MRI of the left ankle, which showed partial-thickness tearing and tendinosis at the insertion of the Achilles tendon; a cyst-like change at the Haglund's deformity; and other non-symptomatic conditions.[1] (Ex. E).

13. On May 31, 2023, Dr. Alexis documented that she was "closing this claim" and that Claimant was placed at maximum medical improvement (MMI). However, Dr. Alexis also noted that Claimant was not at MMI and that he had not had any meaningful intervention for his left ankle/foot condition. The ALJ infers that Dr. Alexis' MMI determination was not based on Claimant reaching a point of MMI from a medical perspective. (Ex. 5).

14. On October 2, 2023, Claimant underwent an independent medical examination (IME) with Barry Ogin, M.D., at Respondent's request. Dr. Ogin testified at hearing, and was admitted as an expert in physical medicine and rehabilitation, and occupational medicine. Based on his review of medical records and examination of Claimant, Dr. Ogin opined that had a congenital Haglund's deformity, retrocalcaneal bursitis, and Achilles tendinopathy, with MRI evidence of partial-thickness tearing and moderate to severe tendinosis at the distal Achilles insertion. Dr. Ogin opined that Claimant's left foot and ankle condition was not work-related, that the condition occurred insidiously. He testified that wearing tight work boots, walking, and standing can cause symptoms in the Achilles area, because the Achilles tendon runs over the Haglund's deformity. However, these activities would not have caused Haglund's deformity itself.

15. Dr. Ogin agreed that the surgery recommended by Dr. Oster is reasonable and necessary, but does not believe Claimant's condition is causally related to his employment, and would have occurred regardless of employment. Dr. Ogin opined that Claimant did not sustain a specific traumatic injury to his Achilles, and that while walking across a parking lot, Claimant's underlying intrinsic heel pathology became symptomatic. He further noted that after the initial onset of pain, Claimant continued to report pain in the posterior heel, which became significant after a full day of work, and upon standing in the morning. He noted this was consistent with Achilles tendinopathy.

16. Dr. Ogin opined that the development of Claimant's condition was not due to occupational activities because "simply walking and getting out of a truck would be considered an activity of daily living." Dr. Ogin's opinion regarding the legal compensability of Claimant's claim, rather than medical causation, is not within his expertise, and is of no evidentiary value.

CONCLUSIONS OF LAW

Generally

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

[1] Respondents' expert, Dr. Ogin credibly testified that the remaining findings on the MRI did not contribute to Claimant's current condition.

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability

or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. "To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident." In re Claim of Frank O'Neil Cambria, 050719 WC No. 5-066-531-002 (ICAO May 7, 2019). Compensability of aggravation cases turns on whether work activities made the preexisting condition worse in some manner or simply demonstrated the natural progression of the preexisting condition. *Bryant v. Mesa Cty. Valley Sch. Dist. #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

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

Claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer. Specifically, the conditions of Claimant's employment, including walking in lineman's boots, combined with Claimant's pre-existing Haglund's deformity to aggravate his Achilles tendon, resulting in insertional tendonitis that manifested on May 19, 2022, while walking to the service center for training. Claimant had a pre-existing, asymptomatic Haglund's deformity in his left heel. Dr. Ogin testified that wearing tight boots, walking, and standing can cause Achilles symptoms in the heel due to the presence of a Haglund's deformity. Claimant's symptoms did not merely "occur" at work, they were caused by his work activity. At the time of his injury, Claimant was in the course of his employment with Employer, and was walking from his truck to the service center for training. Getting from his vehicle to the service center for training is sufficiently related to Claimant's work-related functions to be considered part of his service to Employer. The ALJ does not find credible Dr. Ogin's testimony or Dr. Oster's opinion that Claimant would have developed the same condition regardless of his employment.

Claimant credibly testified that before May 19, 2022, he had no pain or medical issues with his left ankle/heel area, and no credible evidence was admitted suggesting otherwise. Claimant's testimony that his ankle was bruised, swollen, and tender after the May 19, 2022 incident is confirmed by Dr. Alexis' objective findings during her May 26,

2022 examination. The presence of swelling, bruising, and tenderness is indicative of an injury to Claimant's heel or ankle. Based on these symptoms, Claimant sought and received medical treatment, which he would not have received but for his employment.

MEDICAL TREATMENT

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has established a compensable injury, Claimant has also established an entitlement to authorized medical treatment that his reasonable and necessary to cure or relieve the effects of his injury. Based on Dr. Oster's surgical recommendation, and Dr. Ogin agreement that such treatment is reasonable and necessary, Claimant's request for authorization of surgery is granted.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his left heel (insertional tendonitis of the Achilles tendon) arising out of the course of his employment on May 19, 2022.

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

3. Claimant's request for authorization of the surgery recommended by Dr. Oster is granted.

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

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

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

DATED: December 27, 2023

_____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-206-617-003

STIPULATIONS

1. Claimant is not at Maximum Medical Improvement for her left knee injury.

2. Dr. Simpson, an ATP, has recommended a second series of PRP (Platelet Rich Plasma) injections which has been denied based on an opinion of physician advisor, Dr. Hewitt.

3. Dr. Simpson has requested a repeat series of physical therapy, but [Redacted, hereinafter PL] has denied that medical care based on a report from its physician advisor, Dr. Hewitt.

4. After appeal by Dr. Simpson's office, PL[Redacted] again denied authorization for repeat PRP injections based on Dr. Ciccone's record review as well as Dr. Hewitt's report.

5. PL[Redacted] denied Dr. Simpson's request for prior authorization of additional physical therapy sessions based on the opinions of Drs. Ciccone and Hewitt.

ISSUES

- Did Claimant prove by a preponderance of the evidence that a PRP knee injection was causally related to her admitted February 8, 2022 industrial accident?

- If Claimant proved the requisite causal nexus, was the treatment reasonably necessary?

- Whether the physical therapy prescribed by Dr. Simpson is reasonable, necessary and related?

FINDINGS OF FACT

1. Claimant worked for Employer as an LPN (Licensed Practical Nurse) on February 8, 2022. On that date, she was in an exam room preparing the room for the next patient. As she was doing that, her shoe caught the bottom of a wheelchair scale. She fell forward to the floor, striking her left knee and scraping her right shoulder. She felt pain in her left knee and right shoulder. She reported the injury to her employer on the same day. The claim was admitted.

2. Claimant sought treatment with Concentra in Colorado Springs. She was seen by Dr. George Johnson on February 10, 2022. In her history, she described her fall and injuring her left knee and right shoulder. Claimant also gave a history of bilateral arthritis in both knees and that she received injections as needed. The last injection prior to this initial visit was 1 year prior. Claimant also indicated that she took meloxicam 15 mg. one time per day for pain. In his examination of the Claimant, Dr. Johnson noted that she was tender around the left knee and right shoulder and had bruising on her right shoulder. His diagnoses were contusion of her left knee and sprain of her right shoulder. He also wrote, "This appears to be a fairly minor injury". Dr. Johnson provided restrictions of no lifting greater than 5 pounds, pushing and pulling up to 10 pounds and up to 1 hour of walking or standing.

3. When she returned to work, she was doing sedentary work using the telephone. When she did the sedentary work, the pain lessened since she was not on her feet 8 hours per day. During this time, she was also receiving physical therapy which helped with pain and swelling.

4. With respect to the meloxicam, Claimant testified that Dr. Johnson prescribed this medication. This is contrary to Dr. Johnson's note on the following visit on February 11, 2022 that Mobic (meloxicam) was prescribed by Claimant's PCM[1]. Based on this information, I find that the need for meloxicam was related to Claimant's preexisting arthritis.

5. The Claimant did have previous radiologic evidence of arthritis in the left knee, but did not have treatment or symptoms in the left knee. Claimant testified that it did not affect her ability to work for her previous employer, Kaiser Permanente. She did not have any treatment for her left knee prior to this work injury. Claimant did have treatment for her right knee prior to this incident, including injections to the right knee.

6. On March 11, 2022, Claimant requested that she be allowed to return to work full duty to see if she had improved enough to work her regular duty job and that the claim be closed. However, she testified that she was not able to do her full duty without pain. So, she sought treatment with P.A. Sheunk via telemedicine on May 5, 2022. She was again prescribed physical therapy. Claimant was also given restrictions of 5 pounds lifting, 10 pounds pushing and pulling and alternating sitting and standing/walking every 15 minutes. P.A. Sheunk ordered an MRI of Claimant's knee.

7. Claimant saw Dr. Peterson on May 27, 2022. He restricted Claimant from working on that date. Claimant has not worked since then. Dr. Peterson recommended an MRI of the knee.

8. Claimant began treating with Dr. Simpson on May 16, 2022. Claimant was referred to him by P.A. Gottus at Concentra. Dr. Simpson recommended a steroid injection at this visit.

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[1] Presumably, the abbreviation "PCM" refers to patient care management in this context.

9. Claimant testified that she had three PRP (Platelet Rich Plasma) injections that reduced the pain from an 8 out of 10 to 3 out of 10. The interval between the shots were months apart instead of 2 weeks apart. Even though the shots were not properly/timely administered, Claimant said they did help. Based on this, Dr. Simpson recommended another series of 3 PRP injections to be done weeks apart instead of months apart as previously done for the initial series. Dr. Simpson also recommended physical therapy (PT). Claimant testified that the prior PT improved her symptoms.

10. Claimant prefers the PRP injections in order to avoid a 6th surgery in the span of around 15 months. She would also like to prolong the need for a total knee replacement, which has been recommended.

11. Claimant was seen by Dr. Failinger for an IME on July 13, 2023 at the request of Respondents. Dr. Failinger issued an initial report on July 13, 2023 and an addendum on August 6, 2023.

12. The Claimant disputed some on the statements that Dr. Failinger included in his report. Specifically, he recited a statement attributed to Dr. Ciccone that Claimant admitted to having symptomatic arthritis in the left knee that required injections. The Claimant specifically denied this statement from Dr. Ciccone. She also denied some of Dr. Failinger's direct statements including a statement that Claimant had pain in the left knee over the years.

13. It is Dr. Failinger's opinion that the need for PRP injections and physical therapy is due to the Claimant's preexisting osteoarthritis and not due to the incident on February 8, 2022. Exhibit A, pp. 34 – 35.

14. Although Claimant initially denied any treatment or symptoms in her left knee, the Kaiser Permanente records do indicate that she was seen on September 22, 2017 for various conditions including left knee pain. Exhibit H, p. 300. Claimant continued to deny pain in left knee despite the medical evidence to the contrary. Additionally, Kaiser documented pain in left knee requiring a cane due to overcompensating for right knee pain. Exhibit H, p. 309.

15. Another inconsistency between the medical records and Claimant's testimony is with respect to Dr. Johnson's initial encounter with the Claimant. He states in his report that "She has a past medical history of bilateral arthritis in both knees. She gets injections in her knees when needed. The last was 1 year ago. She take meloxicam 15 mg 1 time per day for pain". Exhibit D, p. 46.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v.*

City of Aurora, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a).

The existence of a preexisting condition does not disqualify a claim for compensation if an industrial accident aggravates, accelerates, or combines with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

After reviewing the evidence presented, the ALJ concludes need for PRP injections and physical therapy is not causally related to the work injury and is due to Claimant's preexisting arthritis in the left knee. Having determined that Claimant did not prove the requisite causal nexus, the question of reasonableness and necessity is moot. With respect to the inconsistencies between the medical records from Kaiser and Dr. Johnson and the testimony of the Claimant, I credit the medical records as accurate over the testimony of the Claimant to the contrary.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits for PRP and physical therapy is denied and dismissed.

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

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

DATED: November 2, 2023

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant was an "employee" of Respondent within the meaning of § 8-40-202(a)(2), C.R.S., on August 13, 2022.

2. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of employment with Respondent on August 13, 2022.

3. If compensable, whether Claimant established by a preponderance of the evidence entitlement to reasonable and necessary medical benefits causally related to a work-related injury.

4. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability (TTD) benefits due to a work-related injury from August 13, 2022 until terminated pursuant to statute, rule, or further order. .

5. Determination of Claimant's average weekly wage (AWW).

6. If Claimant proves a compensable injury, whether Claimant established by a preponderance of the evidence the penalties should be imposed pursuant to 7 CCR 1101-3, Rule 3-6, for Respondent's alleged failure obtain and maintain workers' compensation insurance.

7. Whether Claimant has established by a preponderance of the evidence that penalties should be imposed against Respondent for alleged violation of § 8-72-114, C.R.S.

FINDINGS OF FACT

1. Claimant is a 71-year-old woman who has been a dog groomer for more than thirty years. Respondent operates a dog grooming business (the "[Redacted, hereinafter DS]"). In June 2022, Claimant approached [Redacted, hereinafter PB] – Respondent's owner – about working at the DS[Redacted] to supplement her income. On or about June 25, 2022, Claimant and PB[Redacted] agreed Claimant would work at the DS[Redacted] on days Claimant was available, and that Claimant would only groom small dogs. Claimant began working at the DS[Redacted] on August 4, 2022. At the time, Claimant was also working for a different dog grooming business but stopped that position at the beginning of August 2022. Neither party presented evidence that they executed a written contract or other written document setting forth the terms of Claimant's employment status.

2. On August 13, 2022, Claimant was grooming a dog at an adjustable-height grooming table, using a foot pedal that raised and lowered the table. Claimant was sitting on a stool with her knees and feet under the table. While lowering the grooming table,

Claimant's foot became stuck, and the tabletop lowered onto the top of her right knee, trapping it. As a result, Claimant sustained injuries to her knee and right ankle. With the assistance of the other groomers at the DS[Redacted], Claimant freed herself from the table, and rolled off the stool to the floor, landing on her left side. In the process, Claimant sustained a laceration to her left elbow.

3. Respondent was aware of Claimant's injury when it occurred. Respondent did not initiate a workers' compensation claim, and did not provide Claimant with a list of designated providers as required by § 8-43-404 (5)(a)(I)(A), C.R.S. Because Respondent did not provide the required list of designated providers, the right of selection of authorized treating provider (ATP), passed to Claimant.

4. On August 13, 2022, Claimant saw Elizabeth Rosenberg, M.D., at Care Now Urgent Care for an injury to her right knee, right quadriceps muscle, and laceration of her left elbow. Claimant reported the incident as it occurred, including reporting falling to her left side to extricate herself from the table. Claimant reported no other injured body parts. Dr. Rosenberg diagnosed Claimant with a right knee sprain. She noted Claimant had undergone knee replacement surgery in August 2021, and referred Claimant to Robert Thomas, M.D., at Panorama Orthopedics for further evaluation. Dr. Rosenberg recommended a temporary work restriction, limiting Claimant to "primarily seated work." (Ex. 9). Claimant, by her actions, selected Care Now and Dr. Rosenberg as her ATP.

5. On August 22, 2022, Claimant returned to Care Now, and saw Ramon Fernandez-Valle, M.D. Claimant reported her right ankle was also injured, after being forced into dorsiflexion by the grooming table. Dr. Fernandez-Valle noted swelling and slight bruising of the right ankle, and added a diagnosis of right ankle sprain. Dr. Fernandez-Valle indicated Claimant was able to ambulate without the need for a cane, and continued Claimant's temporary work restriction of "primarily seated work" until September 6, 2022. (Ex. 10).

6. On August 24, 2022, Claimant saw Robert Thomas, M.D., at Panorama Orthopedics. Dr. Thomas performed Claimant's total right knee replacement in August 2021. Claimant reported the injury to her right knee and left elbow. Dr. Thomas noted swelling and ecchymosis of the right knee, and the contusion to Claimant's left elbow. Claimant's right knee range of motion was 0-100 degrees. He indicated Claimant sustained no structural damage to the right knee or surrounding structures. He recommended "activities as tolerated" and low-impact exercises, but did not recommend work restrictions. (Ex. 14). By virtue of Dr. Rosenberg's referral, Dr. Thomas was also an ATP.

7. Claimant's next documented medical examination was on January 25, 2023, when she returned to Dr. Thomas. Claimant reported her right knee pain was unchanged, and described it as occurring intermittently, rating a 4/10 in severity, and exacerbated by standing and stretching. Claimant also reported pain while walking. On examination, Dr. Thomas noted an indentation in Claimant's right knee, a "divot in the soft tissue;" tenderness over the joint adjacent to the patella and quadriceps tendon, and a mildly antalgic gait. Claimant's right knee range of motion was noted to be 1-130 degrees. Dr.

Thomas opined Claimant's right knee indentation was likely permanent, and would likely remain painful, but would not cause a true functional deficit. He placed Claimant at maximum medical improvement (MMI), and encouraged Claimant to maintain leg strength. (Ex. 14).

8. On February 3, 2023, Claimant saw Celia Elias, M.D., for an annual wellness examination, at Optima Medical, in Tucson Arizona. Claimant reported her right knee injury. Claimant also reported, for the first time, experiencing left hip and lower back pain. On examination, Dr. Elias noted Claimant's spine was non-tender, and that she had normal range of motion and strength of the upper and lower extremities, with no joint enlargement or tenderness. She noted a large 3-4 cm linear area of indentation on Claimant's right knee, above the patella, with no swelling and good range of motion. Dr. Elias ordered x-rays of Claimant's left hip and lumbar spine, and prescribed ciprofloxacin (an antibiotic) for lower back pain. (Ex. 12). No credible evidence was admitted indicating Claimant's ATPs referred Claimant to Dr. Elias for treatment of her work-related injuries.

9. Claimant underwent a left hip x-ray as ordered by Dr. Elias on February 17, 2023. The x-ray did not show fractures or dislocations, and demonstrated the hip joint spaces were well-preserved. (Ex. 16).

10. On April 27, 2023, Claimant apparently saw Stephen L. Curtin, M.D., at Tucson Orthopaedic Institute. No narrative medical records from this date were offered or admitted into evidence. The exhibits submitted by Claimant indicate a lumbar MRI was ordered for a suspected diagnosis of lumbar radiculopathy. Although two images which appear to be from an MRI were included in Claimant's Exhibit 18, no radiologist report or other interpretation of the images was offered or admitted into evidence. Claimant was apparently then referred for physical therapy for a diagnosis of lumbar spondylosis without myelopathy or radiculopathy. (Ex. 18). No credible evidence was admitted indicating Claimant's ATPs referred her to Dr. Curtin for treatment of her work-related injuries.

11. The record contains no credible evidence that Claimant's complaints of lower back pain or left hip pain, or any treatment or evaluation for those conditions, are causally related to her August 13, 2022 injuries.

12. The treatment Claimant received from ATPs at Care Now Urgent Care and Panorama Orthopedics was reasonable and necessary to cure or relieve the effects of her industrial injury.

13. The treatment Claimant received from Dr. Elias and Dr. Curtain was not authorized, and was not reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

14. As the result of her injuries, Claimant incurred the following medical expenses for treatment that was authorized, reasonable, and necessary to cure or relieve the effects of her industrial injury:

Provider	Date of Treatment	Expenses	Exhibit
Care Now Urgent Care	8/13/22	$456.00	Ex. 11
Care Now Urgent Care	8/22/22	$336.00	Ex. 11
Panorama Orthopedics	8/24/22	$204.00	Ex. 15
Panorama Orthopedics	1/25/23	$204.00	Ex. 15
TOTAL		**$1,200.00**	

Claimant's Employment Status and Wages

15. Claimant worked a total of eight days for Respondent from August 4, 2022 to August 20, 2022. During this time, Claimant performed dog grooming services for Respondent's clients, who were booked and scheduled through Respondent. On the days Claimant was scheduled to work, Respondent required her to be at the dog spa at 9:00 a.m., and to provide services for the times scheduled by Respondent.

16. Respondent employed three people, including PB[Redacted] and two dog groomers (other than Claimant). Respondent considered Claimant an independent contractor. Respondent paid the employed groomers 50% of the amount charged for services, plus tips, and provided the grooming tools necessary to perform their duties. Claimant was paid 55% of the of the amount charged by Respondent for services she performed, plus tips. Respondent provided some equipment necessary for Claimant to work as a dog groomer, including a grooming table, tubs for bathing, towels, shampoo, and blow dryers. Claimant supplied her own grooming tools, including combs, clippers, and blades.

17. Claimant received two paychecks from Respondent. On August 18, 2022, Respondent paid Claimant $376.75 for work performed from August 4 to August 6, 2022. On September 1, 2022, Respondent paid Claimant $665.75 for the period of August 11, 2022 through August 20, 2022. The September 1, 2022 paycheck included tips Claimant received totaling $181.75, and was paid through Respondent's payroll system. (Ex. 20). In total, Claimant received gross wages and tips of $1,042.50 during her 17 days of working for Respondent. Claimant's average weekly wage (AWW) during this time was $429.24 per week (*i.e.*, $1,042.50 ÷ 17 days = $61.32 per day x 7 days = $429.24 per week).

Claimant's Return to Work

18. Claimant worked two days for Respondent the week after her injuries, but did not return after August 20, 2022. Claimant testified she could not continue working due to her pain, and that she remains unable to work.

19. After the August 13, 2022 incident, Claimant consulted with an attorney regarding a possible lawsuit against the table manufacturer. Thereafter, on advice of her attorney, Claimant elected not to return to work for Respondent. PB[Redacted] credibly testified that Claimant told her she was advised not to return to work by her attorney. Claimant testified she did not return to work based on the advice of her physicians and her attorney. However, the admitted medical records demonstrate that Claimant's treating providers provided work restrictions limiting her to "primarily seated work," but did not impose a total work restriction. It was unclear from Claimant's testimony whether she believes she is currently unable to work due to her work-related knee, ankle, and elbow injuries, or whether her inability to return is due to her non-work-related lower back and hip complaints. Notwithstanding, Claimant's testimony that she was and is unable to work as a dog groomer is not credible.

20. No credible evidence was admitted indicating Claimant's treating health care providers have expressed the opinion that Claimant is unable to work as a result of the injuries she sustained on August 13, 2022.

21. At the time of Claimant's injury, Respondent did not have workers' compensation insurance. PB[Redacted] testified that Respondent has since obtained workers' compensation insurance, but did not know if Claimant's claim was covered under that insurance. No insurer entered an appearance, and none of Claimant's medical expenses have been paid by either Respondent or a workers' compensation insurance carrier. The ALJ finds that Respondent did not have the required workers' compensation insurance for coverage of Claimant's injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the ALJ's exclusive domain. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

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

Employee vs. Independent Contractor Status

Pursuant to § 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession or business related to the service performed." Claimant has established by a preponderance of the evidence that she provided services to Respondent and was paid for her services. Thus, Claimant is a presumptive employee under § 8-40-202 (2)(a), C.R.S.

A putative employer may establish a presumed employee is an independent contractor by proving the presence of some or all of the nine criteria enumerated in § 8-40-202(2)(b)(II), C.R.S., to prove independence. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). These nine criteria are that the putative employer must not:

> (A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
>
> (B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
>
> (C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
>
> (D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
>
> (E) Provide more than minimal training for the individual;
>
> (F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

(H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

§ 8-40-202(2)(b)(II), C.R.S.

If the parties have executed a written document that demonstrates by a preponderance of the evidence the existence of these factors, the document creates a rebuttable presumption of an independent contractor relationship between the parties. § 8-40-202 (2)(b)(III) and (IV), C.R.S. Neither party presented evidence that the parties executed such written document.

Because the evidence establishes Claimant was performing services for pay, and there is no written document establishing Claimant's independent contractor status, the burden of proof rests upon Respondent to rebut the presumption that Claimant was an employee. *Baker v.* BV *Properties, LLC,* W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether respondent has overcome the presumption is one of fact for the ALJ. *Nelson v. Indus. Claim Appeals Office, supra; Indus. Claim Appeals Office v. Softrock Geological Servs., Inc*., 325 P.3d 560 (Colo. 2015)

The statute creates a "balancing test," but does not establish a precise number or combination of factors that must be established to rebut the presumption of employment. *Allen v. America's Best Carpet Cleaning Serv.*, W.C. No. 4-776-542 (ICAO Dec. 1, 2009). C.R.S. *Donahue v. Danley Investigations*, W.C. No. 4-698-600 (ICAO Feb. 5, 2008). The ALJ must determine "as a matter of fact whether or not particular factors are present, and ultimately, whether the claimant is an employee or independent contractor based on the totality of the evidence concerning the statutory factors." *Allen, supra*.

Respondent has failed to prove by a preponderance of the evidence that Claimant was not an "employee" within the meaning of the Colorado Workers' Compensation Act. Respondent did not establish that the parties maintained separate and distinct business operations. Instead, Claimant's services were incorporated into Respondent's business operations in several respects. Claimant provided grooming services for Respondent's clients, and was assigned clients by Respondent. Respondent dictated the time of performance, by requiring Claimant on the days she worked to be at the DS[Redacted] at 9:00 a.m., and working at the time clients were scheduled by Respondent. Respondent provided some tools, and supplies, such as blow dryers, towels, and shampoo. Respondent paid Claimant in the same manner as her other employees, although at a higher percentage of revenues generated. Respondent also paid Claimant personally,

and at least once through Respondent's payroll system. Finally, no credible evidence was admitted indicating that Respondent could only terminate Claimant for violating the terms of a contract, or failed to meet results specified in a contract.

Several factors weigh in favor of independent contractor status, such as Claimant's long history as a professional dog groomer, providing her own grooming tools, requiring no training or supervision in dog grooming. These factors, however, are more indicative of Claimant's experience in the field than her employment status. The ALJ finds these factors outweighed by the other factors discussed above. Based on the totality of the evidence, the ALJ concludes that Claimant was an "employee" and not an independent contractor.

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has established by the preponderance of the evidence that she sustained compensable injuries to her right knee, right ankle, and left elbow arising out of the course of her employment with Respondent, while grooming a dog. Respondent admitted the August 13, 2022 incident occurred, and that Claimant sustained some injury. Claimant immediately sought treatment for her knee and elbow, and had objective evidence of injury to her right ankle at her August 22, 2022 visit at Care Now.

Claimant has failed to establish by a preponderance of the evidence that she sustained compensable injuries to her lower back or left hip arising out of the course of her employment with Respondent. Claimant did not report injuries to her hip or lower back in her four visits with her ATPs. The first documented complaints of lower back and hip pain were to Claimant's primary care doctor, Dr. Elias, on February 3, 2023, nearly six months after her initial injuries. Notwithstanding the delay in reporting symptoms, none of Claimant's treating providers have credibly opined that Claimant's hip and lower back conditions are causally-related to the August 13, 2022 incident.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits to cure or relieve the effects of her industrial injury. Specifically, Claimant is entitled to medical benefits directed toward her right knee, right ankle, and left elbow injuries. Respondent is responsible for and shall pay general medical benefits that are reasonable and necessary to cure or relieve the effects of Claimant's August 13, 2022 industrial injuries to her right knee, right ankle, and left elbow. Because Claimant has been placed at MMI, these expenses are limited to the authorized, reasonable, and necessary treatment rendered to date.

Claimant's Medical Expenses to Date

Claimant's post-MMI treatment is not compensable because the treatment was not "authorized." Compensable medical treatment must be reasonable, necessary, and provided by an "authorized" treating physician. "Authorization" is a physician's legal status to treat an industrial injury at the respondents' expense. *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Indus. Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997).

The Act requires respondents to provide injured workers with a list of at least four designated treatment providers. § 8-43-404(5)(a)(I)(A), C.R.S. WCRP 8-2 (A)(2) clarifies that the designated provider list must be provided within seven (7) business days after the employer has notice of the injury. If the employer does not timely designate an ATP, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987), *see also* W.C.R.P. 8-2 (E). An employer is notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

Once an ATP is established, a claimant may not seek treatment from other physicians without obtaining permission from respondents or an ALJ, unless the new physician is in the chain of referral from an ATP. If a claimant does change physicians, respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999)

Respondent had knowledge of Claimant's injury on August 13, 2022, and did not provide a designated provider list. Consequently, the right of selection passed to Claimant. Claimant pursued treatment from Dr. Rosenberg and Care Now Urgent Care.

Therefore, Dr. Rosenberg was Claimant's ATP. Dr. Thomas was also an ATP by virtue of Dr. Rosenberg's referral. Claimant's treatment at Care Now on August 13, 2022, and August 22, 2022, and from Dr. Thomas on August 24, 2022 and January 25, 2023 was "authorized" under the Act. The care was also reasonable and necessary to cure or relieve the effects of her industrial injury.

No credible evidence was admitted showing that Dr. Rosenberg or Dr. Thomas referred Claimant to Dr. Elias or Dr. Curtin, or recommended additional medical care or diagnostic studies after Claimant reached MMI on January 25, 2023. There is no evidence that Claimant sought or obtained permission to change ATP, or to designate Dr. Elias or Dr. Curtin authorized as an ATP. Consequently, any care Claimant received after January 25, 2023, was not "authorized," or compensable.

Respondent shall pay for medical treatment Claimant received from Care Now on August 13, 2022, and August 22, 2022, and from Panorama Orthopedics on August 24, 2022 and January 25, 2023.

Temporary Total Disability

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103 (1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006).

"Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from

employment." Gilmore, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Construction Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011). Implicit in the termination statutes is a requirement that Respondents prove Claimant committed an "act" which formed the basis for his termination. Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Claimant has failed to establish by a preponderance of the evidence an entitlement to TTD benefits. Claimant returned to work for Employer for one week after the August 13, 2022 injuries, and did not return after August 20, 2022. No evidence was presented that Respondent terminated Claimant. Claimant testified she did not return based on the recommendations of her physicians, and because she could not physically perform the job. However, that testimony is not credible, and Claimant offered no cogent explanation as to why she could not perform her job as a dog groomer due to her knee, ankle, or elbow. The medical evidence indicates that none of Claimant's treating physicians placed work restrictions upon her that would prevent her from performing her work as a dog groomer. The only restriction was that Claimant should work from a seated position. Claimant offered no evidence that she Claimant has failed to establish that she sustained a disability which prevented her from performing or returning to her employment as a dog groomer after August 20, 2022.

The ALJ also finds that Claimant voluntarily terminated her employment on August 20, 2022 for reasons other than the physical limitations placed upon her by the work-related injury. Specifically, Claimant did not return to work based on the advice of her attorneys because she intended to pursue a civil suit against the manufacturer of the dog grooming table. Claimant was, therefore, responsible for her own termination, and the resulting loss in income after August 20, 2022.

Average Weekly Wage

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

As found, Claimant's average weekly wage at the time of injury was $429.24.

Penalties

Failure to Maintain Insurance

Claimant seeks penalties for Respondents' failure to maintain workers' compensation insurance but has not specified the statute for those penalties. The references in Claimant's Application for Hearing and Position Statement to "7 CCR 1101-3-6," are presumed to refer to 7 CCR 1101-3, Rule 3-6. WCRP Rule 3-6 provides guidance to Director of the Division of Workers' Compensation (DOWC) on imposing fines after determining an employer failed to obtain or maintain workers' compensation insurance under § 8-43-409, C.R.S. While this section allows the Director to impose fines, it does not grant a claimant the right to assert a penalty claim.

Section 8-43-409 (1) outlines the Director's role in investigating and notifying employers about their default in insurance obligations, and it authorizes the Director to set the issue for a hearing according to established procedures. Under the statute, "it is the role of the director to conduct a preliminary investigation and determine whether the matter should be set for a hearing before an ALJ on the issue of whether to impose a fine for an employer's failure to maintain workers' compensation insurance." *Gant v. Etcetera*, W.C. No. 4-586-030 (ICAO Sep. 17, 2004). It is the Directors' prerogative to decide if a hearing is "necessary." Therefore, the actions authorized by § 8-43-409 (1), are for the Director, and not an ALJ at the request of a claimant. *Id.*

Furthermore, fines imposed under § 8-43-409 (or 7 CCR 1101-3, Rule 3-6) "are not intended as a remedy to injured claimants whose employer is uninsured." *Gant, supra*. Instead, fines collected by the Director are go to the state treasurer, who credits the "total amount of the fine to the Colorado uninsured employer fund…." § 8-43-409 (7), C.R.S. Because neither 7-CCR 1101-3, Rule 3-6, nor § 8-43-409, C.R.S., authorize a claimant to seek penalties for a respondent's failure to maintain workers' compensation insurance, Claimant's request for penalties is denied.

Alleged Violation of § 8-72-114, C.R.S.

Claimant has not shown a basis for imposing of penalties for an alleged violation of § 8-72-114, C.R.S. The "penalty" Claimant asserts does not arise under the Workers' Compensation Act, and may not be imposed by ALJ or the DOWC.

ALJs are limited to the "jurisdiction, powers, duties, and authority" provided by the Workers' Compensation Act. *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905, 908 (Colo. App. 1995). The Act confines that authority to issues arising under articles 40 to 47 of title 8. § 8-43-207 (1), C.R.S. Section 8-43-304 (1), C.R.S., authorizes penalties in cases involving violations of articles 40 to 47 of title 8; failure to perform lawfully imposed duties within the time prescribed the director[1], and failure to obey lawful orders, judgments, or decrees. Because an ALJ lacks authority to create a "penalty" where none exists, penalties not enumerated in the Act may not be imposed. *See Baker v. Weld County School Dist.*, W.C. No. 4-993-326-004 (ICAO April 20, 2021).

[1] The "director" is the director of the DOWC. See § 8-40-201 (5), C.R.S.

Claimant does not seek a penalty under the Workers' Compensation Act. Instead, Claimant alleges Respondent "willfully misclassified [Claimant's] arrangement, pursuant to C.R.S. § 8-72-114." Section 8-72-114 falls under the Colorado Employment Security Act,[2] which is administered by the Colorado Division of Unemployment Insurance ("DOUI") and its Director. § 8-71-102, C.R.S.

Section 8-72-114 allows the DOUI Director[3] to investigate misclassification complaints and impose fines for willful misclassification of employees in the context of unemployment insurance. § 8-72-114 (3)(e)(III)(a), C.R.S. The statute does not confer authority on the DOWC or its Director in any respect. It also does not permit a workers' compensation claimant to recover penalties for its alleged violation. Claimant has cited no authority otherwise. Because the requested "penalty" is not within articles 40 to 47 of title 8, the ALJ may not impose it.

Claimant's request to refer the matter "to the Director of Workers' Compensation for further review or [to] obtain permission from the Director to allow the [ALJ] to enforce this matter pursuant to § 8-72-114(IV)(c)(9)[4]," is unfounded. The ALJ presumes Claimant seeks this remedy under § 8-72-114 (9)(a), which states: "Subject to the approval of the executive director, the director may enter into an interagency agreement with the department of law for assistance in enforcing this section." The "director" referenced is the DOUI Director, not the DOWC Director. The statute does not empower the DOWC or Director to provide such permission. Moreover, the Office of Administrative Courts is not part of the department of law. The statute does not provide Claimant a remedy.

Claimant's request for "penalties" for an alleged violation of § 8-72-114, C.R.S. under the Colorado Employment Security Act is denied.

ORDER

It is therefore ordered that:

1. Claimant was an "employee" of Respondent within the meaning of the Colorado Workers' Compensation Act on August 13 2022.

2. Claimant sustained compensable injuries to her right knee, right ankle, and left elbow arising out of the course of her employment with Respondent on August 13, 2022.

3. Respondent shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's industrial injuries to her right knee, right ankle, and left elbow.

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[2] § 8-70-101, C.R.S.

[3] The "division" and "director" referenced in § 8-72-114 are the Division of Unemployment Insurance, § 8-70-103 (8), C.R.S.; and its director, § 8-72-114 (2)(c), C.R.S.

[4] Section 8-72-114(IV)(c)(9), C.R.S., does not exist.

4. Respondent shall pay for the medical treatment Claimant received from Care Now Urgent Care on August 13, 2022 and August 22, 2022, and for treatment Claimant received from Panorama Orthopedics on August 24, 2022, and January 24, 2023.

5. Claimant's request for temporary disability benefits is denied.

6. Claimant's average weekly wage at the time of her injury was $429.24.

7. Claimant's request for penalties under 7 CCR 1101-3, Rule 3-6, for failure to maintain workers' compensation insurance is denied.

8. Claimant's request for penalties for alleged non-compliance with § 8-72-114, C.R.S., is denied.

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

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

DATED: November 2, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-173-570-001

ISSUES

I. Whether Respondent has proven by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician, Dr. Hugh Macaulay, was incorrect in his opinion regarding causation, maximum medical improvement (MMI) and permanent impairment.

II. If Respondent overcame the DIME physician's opinion with regard to MMI, what is the MMI date?

III. If Respondent overcame the DIME physician's opinion with regard to permanent impairment, what is the permanent partial disability benefit?

IV. Whether Claimant has shown by a preponderance of the evidence she is entitled to medical benefits reasonably necessary and related to the injury of March 24, 2021.

V. Whether Claimant has shown by a preponderance of the evidence that she is entitled to reimbursement of out of pocket medical expenses.

VI. Whether Claimant has shown by a preponderance of the evidence that she is entitled to interest of eight percent (8%) for benefits which were not paid when due, pursuant to Sec. 8-43-410(2), C.R.S. in accordance with D.O.W.C. Rule 12.

PROCEDURAL HISTORY

Respondent filed a Final Admission of Liability (FAL) on August 18, 2022 pursuant to Dr. O'Toole's report of August 9, 2022, which provided a 0% impairment and admitted to reasonably necessary and related maintenance medical benefits. The parties disclosed that Claimant objected to the FAL and applied for a DIME. Dr. Macaulay was selected to perform the DIME.

Respondents filed an Application for Hearing on March 21, 2023 on issues which included overcoming the DIME physician's MMI and impairment determinations.

Claimant filed a Response to Application for Hearing on issues that included upholding the DIME physician's opinions, medical benefits, permanent partial disability benefits, out of pocket expenses and interest on benefits which were not paid when due.

Claimant requested this ALJ take judicial notice of the Rules of Evidence, specifically W.C.R.P. Rule 12; the Medical Treatment Guidelines for Traumatic Brain Injury, W.C.R.P. Rule 17, Exhibit 2A; and the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*), Chapter 3, Table 53.

FINDINGS OF FACT

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

A. Generally

1. Claimant was 35 years old at the time of the hearing and reported she had worked as a Social Caseworker II for Employer since 2016. She would travel to and from clients' homes, complete reports, enter data into their system and prepare letters for the court, among other things.

2. On March 24, 2021, towards the end of the day, Claimant was coming to a stop when she was rear-ended in a motor vehicle accident (MVA) in the course and scope of her employment with Employer. This was not contested. The police was called to the scene of the accident in Fort Collins, off of Prospect and Riverside, and the parties exchanged insurance information.

3. While still at the scene of the accident, Claimant called her supervisor to report the accident. Claimant also called the client, she was in-route to, to cancel the appointment. Claimant took pictures of the vehicle to document the damage. Claimant was driving a Toyota Rav 4 and was hit by a Chevrolet Trailblazer. Claimant then proceeded to her mother's house in Greeley, CO, where her child was being cared for. At the time of the accident Claimant had been living with her partner in Windsor, Colorado.

4. Claimant reported that she went to the emergency room that evening, after the accident, because she had developed a headache and felt her speech was becoming slurred. She felt her processing was beginning to slow down, her neck was hurting and parts of her back were also hurting. She was also having visual disturbances though not quite double vision or blurred vision. She also reported having light sensitivity. She did not believe she had any loss of consciousness and the airbags did not deploy during the accident.

B. Prior Work Injury

5. The Division of Workers' Compensation file shows Claimant was injured on July 31, 2012. It listed the lumbar spine and sacral as body parts injured.

6. Claimant was placed at MMI as of February 14, 2013 by Dr. Gregory Reichhardt of Rehabilitation Associates of Colorado. He noted Claimant continued to have some low back pain on the right side and was taking medication (Tramadol). Her knee pain had resolved. Dr. Reichhardt provided a diagnosis of low back pain caused by bending over and picking up a basket with an MRI demonstrating a mild L4-5 disc bulge without nerve root impingement and mild right foraminal encroachment. He recommended maintenance medical benefits including follow ups, laboratory tests and medication, which she was taking one tablet up to three times a week.

7. A Final Admission of Liability was filed on April 2, 2013 for 8% whole person impairment paying an amount of $13,176.03 at $239.40 per week for 55 weeks.

8. On February 16, 2015 Dr. Reichhardt noted that Claimant may require greater than the two years of maintenance care previously anticipated.

9. On May 23, 2017 Claimant was seen at the UCHealth Internal Medicine Clinic for back pain and a request for physical therapy.

10. On April 4, 2018 PAC Kathryn Milizio last review Claimant's problem list, which included "back pain, thoracic (midback) -- chronic issue, and the UCHealth ER staff included it in their March 24, 2021 report. They also included, under "Past Medical History," that Claimant had a history of back pain.

11. On January 27, 2019 Claimant had an incident where she had neck pain and a tingling sensation on her right cheek. Claimant was cleared and was advised to see her primary provider. The head and neck CT were negative.

12. No other records were provided in the interim between the last 2019 visit and Claimant's MVA.

C. Medical Records

13. Claimant proceeded to the emergency room (ER) at UCHealth in Greeley, CO on March 24, 2021 where the ER staff documented she complained of headaches, neck pain and low back pain, though her exam was within normal limits, including range of motion. She provided a history of rolling to a stop at approximately 10 miles per hour when she was rear-ended by another vehicle travelling approximately 30 miles per hour. She reported development of diffuse head pain following the MVA as well as neck pain especially to the right lateral aspect of her neck. She also reported feeling nausea right after the crash. Claimant was injected with Norflex, a muscle relaxant, and Ketorolac (Toradol), an inti-inflammatory drug and released.

14. On March 30, 2021 Claimant was seen at ESP, where she reported an MVA consistent with prior history recorded. She was complaining of pain in her head, neck, back and right side of her rib cage. They also noted sensitivity to light, muscle spasms, fatigue, stiffness and tightness, mood changes, insomnia and irritability. At that time, she believed that she had been diagnosed with a concussion and whiplash in the ER but had no structural injuries. She was also complaining of problems sleeping, difficulty with screen time for extended periods, and getting comfortable, with a pain of 5/10 to 8/10. She noted numbness in both hands, around the little finger on the right and around the thumb on the left. She reported pain that was deep, shooting, constant, and sharp with stabbing, throbbing, weakness and numbness. Things that made her pain worse included light, movement, lifting, twisting, sitting, standing, time on screens, and driving. She was provided with myofascial release to the head, neck, shoulders, and back by Kim Schemahorn, LMT.

15. On April 8, 2021 Claimant was evaluated by Dr. Kevin O'Toole of UCHealth Harmony. Dr. O'Toole took a history consistent with Claimant's testimony. She reported symptoms of low back soreness and tightness and developed a headache, upset stomach and tightness in the neck approximately 30 minutes following the accident. She did not want to move a lot, she described muscle spasms and tingling. Claimant reported she continued working though was taking rest breaks as needed and was limiting her screen time. At the time of the exam, she was complaining of light sensitivity, stabbing headache pain behind her eyes, neck stiffness, fatigue, losing track of time, back spasm, swollen limbs, could not feel her ring and small finger, sore shoulder blades, right rib cage soreness, poor sleep, and slow processing. She reported that she normally had an excellent memory and was very quick. She denied having prior work restrictions. She

reported recreational activities of playing softball, dancing, fishing, camping, hiking, and enjoying family and friends.

16. During the visit at UCHealth Harmony, she requested that the lights be turned off in the exam room. On exam, Dr. O'Toole noted that Claimant had some aversion to the light of the otoscope as well as had jerky movements during eye exam. He noted allodynia over the cervical spine musculature and right supraclavicular space, and loss of range of motion. Otherwise she had a normal neurologic exam including a normal Romberg test, though she was withdrawn by the end of the visit. Dr. O'Toole assessed neck pain, headaches above the eye region, photophobia of both eyes, acute bilateral thoracic, low back and rib pain, right hand paresthesia and vestibular equilibrium. He referred claimant for medical massage, biofeedback, and vestibular therapies, as well as for a neuropsychological evaluation with Dr. Gregory Thwaites. He provided work restrictions and medications and commented that Claimant's subjective complaints were greater than expected from a low velocity MVA. He was concerned about symptom magnification and questioned the consistency of the subjective complaints. He specifically noted that "her response to the change in treating provider is a significant red flag for delayed recovery" and that the work relatedness of the injuries were only "tentatively and weakly supported."

17. Claimant was treated by Michelle Hykes, RMT, of Medical Massage of the Rockies, who documented Claimant had a concussion, was sensitive to light, memory loss, headaches, timeless, thought processing, whiplash, cervical pain, mid-back pain, stabbing pain, and pain in her rib region. She noted Claimant had spasms in her lumbar spine, and swelling in her extremities. She recommended further massage treatment.

18. On May 11, 2021, the claimant was seen by neuropsychologist Gregory Thwaites, Ph.D. Claimant reported disequilibrium when standing, which she stated she reported to the ER physician. She reported that she walked very "specifically and deliberately" because her gait was "very off." She described that she experienced light sensitivity and dysarthric speech, both of which began before or upon arrival to the ER, and blurred vision, since the evening of the accident.

19. Dr. Thwaites noted that overall neuropsychological testing at 21 one days was unremarkable other than subtle difficulties with speed processing. Dr. Thwaites opined Claimant would benefit from seeing a clinical psychologist with experience in delayed recovery and who had experience in psychological factors contributing to a medical condition. He noted that "This would assist with differential psychological diagnosis, apportionment, and treatment planning." He stated that diagnosis and treatment of headache and pain complaints were outside his area of expertise and he would defer to the medical team regarding the headache complaints. He did recommend a sleep study and labs outside of the workers compensation system.

20. Dr. Thwaites determined that the claimant did not sustain a concussion in the motor vehicle accident. He certified that he spent one (1) hour reviewing the records and dictating his nine (9) page report.

21. On June 16, 2021 Dr. O'Toole recommended continued medical massage for additional visits.

22. Claimant treated with a chiropractor at Colorado Chiropractic and Sports Injury Specialists beginning June 30, 2021. Dr. Scott Parker diagnosed cervicothoracic and lumbar strain and pain complaints. He treated her with manual traction, soft tissue mobilization, neuromuscular reeducation, and kinesiologic joint mobilization at least through July 2021. He advised to apply ice, take Epson salt baths, be involved in functional activities and home self-management techniques, and recommended further chiropractic care.

23. On July 21, 2021 Claimant was evaluated by Lynn Parry, M.D., a neurologist, at Claimant's request. She recounted the mechanism of injury consistent with Claimant's testimony. On her physical examination she noted findings that were "consistent with a skew deviation[1] or ocular nerve paresis." She also found issues with paracervical musculature, lumbar spine musculature and right sacroiliac joint. She felt that the findings were consistent with a mild traumatic brain injury or vestibular concussion. She noted that Claimant had both cervical and low back strains as well as headaches that had a postconcussive and cervicogenic components.

24. Dr. Parry diagnosed probable brainstem concussion with residual oculomotor and vestibular pathway dysfunction, cervical strain, post-concussive headaches, cervicogenic headaches and low back strain. She recommended radiographs of the cervical and lumbar spines and a brain MRI, an ENT evaluation, neuroptometric evaluation, physical therapy and holding further neuropsychometric evaluation until all of the issues had been addressed. She noted that neuropsychiatric evaluations were not helpful early in recovery from any type of TBI unless there were specific areas of dysfunction that were better identified of specific deficit. Overall function could not be reliably assessed because of recurring injuries.

25. Jason R. Meyer, M.D., of Eye Center of Norther Colorado, documented Claimant was having double vision and light sensitivity, in addition to dizziness, headaches, blurred vision, with possible post-concussion related to the March 24, 2021 accident. Following the eye exam, he recommended Claimant be seen by Dr. Arnold regarding the double vision and possible phoria.[2]

26. Claimant had an audiology evaluation by Rachel White, Au.D. of All About Hearing on August 17, 2021 and was tested with a videonystagmography. She found Claimant had VOR Dysfunction,[3] diagnosed dizziness and giddiness as well as unspecified disorder of vestibular function of the right ear and recommended vestibular therapy.

27. Claimant was evaluated by Blake J. Hyde, M.D. of Alpine Ear, Nose Y Throat and issued a report on August 21, 2021. Dr. Hyde noted that Claimant presented for lingering overt dizziness/vertigo sensation with certain head movements suspicious for BPPV which was not active on exam that day, possibly recently treated as well as generalized imbalance and "on a boat" sensation. He recommended VNG and VEMP test

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[1] This ALJ infers that a skew deviation is a neurological condition characterized by a vertical misalignment of the eyes.

[2] This ALJ understands that "phoria" is a type of eye misalignment or latent deviation of the eyes while the eyes are open and can be caused by mTBI.

[3] Vestibulo-Ocular Reflex Dysfunction.

to clarify peripheral versus central but strongly suspicious for central etiology with her residual symptoms and characteristics.

28. Claimant returned for VEMP[4] testing on September 16, 2021 with Cheryl Hadlock, Au.D., and she found that Claimant had left ear reduced function of the vestibular nerve.

29. On September 22, 2021 Dr. Hyde determined that Claimant had developed dizziness following the MVA, which persisted, consistent with left weakness isolating to the saccule which leads to the type of symptoms she was experiencing like rocking on a boat.

30. Claimant returned to Dr. O'Toole who continued to assess headaches, neck pain, thoracic back pain, vestibular disequilibrium, diplopia (double vision) and alternating exotropia.[5]

31. Claimant proceeded with therapy with Hannah Lamitie, M.S., P.T. of Alpine from September 27, 2021, including balance stability.

32. On November 3, 2021 Dr. O'Toole noted that Claimant continued to take a rest break at least once per day. She continued physical therapy, continue massage therapy and vestibular therapy.

33. Claimant had a CT on November 4, 2021 and read by Dr. Nathan Kim, which showed normal temporal bones.

34. Patrick D. Arnold, M.D. of Eye Center of Norther Colorado noted on November 24, 2021, that Claimant continued to complain of blurry vision, both for near and far vision. His impression was alternating exotropia and convergence insufficiency in both eyes secondary to concussion. He recommended continued orthoptics therapy.

35. On December 1, 2021 Dr. O'Toole was recommending continued massage therapy and would request authorization for additional visits. He continued to diagnose headaches above the eye region, neck, thoracic and lumbar pain, and vestibular disequilibrium.

36. J. Raschbacher, M.D. issued a Rule 16 medical record review report on December 7, 2021. He opined that Claimant did not have any diagnosis related to the MVA and did not require further massage treatment under the work related claim.

37. On February 4, 2022 Dr. O'Toole noted that Claimant was diagnosed with headaches and convergence insufficiency and should continue with computer orthoptics treatment. The following visit on March 29, 2022 he noted that Claimant reported she still had some headaches associated with neck pain and tightness. He noted that she had done well with the central vision tasks but was having difficulty with peripheral vision tasks. He assessed improved headaches above the eye region, improved neck pain and stiffness as well as improving convergence insufficiency. He ordered her to take rest breaks as needed, perform light aerobic exercises daily, and continue with orthoptics with Dr. Arnold.

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[4] Vestibular-evoked myogenic potential testing

[5] This ALJ infers that alternating exotropia is a misalignment of the eyes.

38. Claimant was evaluated by Dr. Arnold on August 2, 2022. He diagnosed her with convergence insufficiency secondary to concussion. He stated that Claimant had improved but had been unable to complete her computer orthoptics. He stated she could discontinue them and restart computer orthoptics if she was having more trouble in the future.

39. On August 9, 2022, Dr. O'Toole placed Claimant at MMI with no impairment and ordered maintenance medical benefits. This exam was done via video over a 15-minute period, with no range of motion (ROM) testing. It also included time to write the actual report.

40. On November 28, 2022 Dr. Hugh Macaulay performed a Division Independent Medical Examination (DIME) of Claimant for consideration of Claimant's complaints, with chief symptoms from the MVA of cervical thoracic and lumbar pain, and vertigo. Dr. Macaulay reviewed the medical records and took a history consistent with Claimant's testimony.

41. Dr. Macaulay documented that Claimant complained of problems thinking, including memory, scattered thinking, and tracking; change in behavior, including a short fuse, lessened focus, sleep difficulties and exhaustion; neck and upper back pain, lower back pain and headaches. She noted that she had extremity numbness and tingling, which resolved with treatment. Dr. Macaulay documented that Claimant had frequent problems with dizziness, slurred speech and memory loss, some degree of motion sickness or vertigo, discomfort in her shoulders and occasional discomfort in her arms, elbows and wrists, in the lower extremities as well extending from the hips to the feet. Claimant reported that she had improvement from the time of her injury but continued to have multiple difficulties.

42. She benefited from physical therapy, massage therapy and chiropractic care, which was ultimately discontinued due to Claimant's lack of noticeable progress. She also benefited from medications and muscle relaxants, ice and heat, which she continues to use, vision therapy, vestibular therapy and a TENS unit.

43. Dr. Macaulay commented that Claimant felt her ATP, Dr. O'Toole, was very perfunctory in his follow up evaluations and dismissive of her complaints, just checking boxes.

44. On exam, Dr. Macaulay noted that Claimant had a somewhat slow gait, but appeared normal, with decreased sensation over the left lateral thigh compatible with meralgia paresthetica, mild paracervical tenderness with functional range of motion, mild parathoracic muscular tenderness, functional lumbar range of motion, mild paralumbar tenderness and an unremarkable Faber's test.

45. Claimant informed Dr. Macaulay that she had moved in with her mother because she could not do all the cooking and cleaning, and pay all her bills. She explained that her co-workers have had to help her, whereas before she was able to do things alone. She noted tightness, achiness, and shooting pains in her lumbar, thoracic, and cervical spine regions. She reported a "dead feeling" in her left thigh for the previous couple months.

46. He specifically cited to the MTGs, Section D.8 which states that "If a patient has persistent symptoms or complaints at 60 days and the initial portion of this guideline has been completed, it is suggested that a referral be made to a neurologist or physiatrist with extensive experience in mTBI treatment."

47. Dr. Macaulay found Claimant "not at MMI," indicating that she needed additional diagnostic evaluations and treatment for her work-related injuries. He recommended a psychological evaluation and impairment rating, a neuropsychological evaluation, and MRI of her brain, a CT of her temporal bone, a neurological consultation for determination of mTBI, an ENT follow-up for determination of etiology of vertigo, an ophthalmology follow-up for her convergence dysfunction and impairment rating, x-rays of the cervical, thoracic, and lumbar spine, and an MRI of those areas if clinically indicated.

48. Bruce Morgenstern, M.D., a neurologist, performed a record review on March 23, 2023 at Respondent's request. He described a concussion as follows:

> A concussion is a subset of mild traumatic brain injury resulting from biomechanically induced physiologic disruption of brain function. Concussion is characterized by the fifth immediate and typically transient onset of cognitive and memory symptoms such as alteration in mental state, confusion, disorientation, or post-traumatic antegrade or retrograde amnesia, typically lasting less than twenty-four hours. Concussion may or may not involve loss of consciousness, and Intracranial imaging and the neurological exam are typically normal.

49. Dr. Morganstern opined that Claimant did not meet the criteria of a concussion. He further stated that it was based on the lack of findings or documentation in the initial presentation at UCHealth and then at the appointment with Dr. O'Toole of April 8, 2021 that described a patient that continued to work, though complained of head pain, neck stiffness fatigue, back spasms, sore shoulder blade, right rib cage soreness and insomnia and slowed mental processing. He attributed Claimant's symptoms to long COVID sequelae sustained some four months or so before the MVA, which is not documented in any of the medical records submitted to this ALJ other than referenced based on information provided by Claimant to other providers.[6] He stated that there was no documentation to support the diagnosis of concussion and disagreed with Dr. Parry's diagnosis. He also opined that Claimant's headaches post-MVA were disproportionate to her initial trauma, and that the whiplash neck pain sustained in the MVA should have resolved within six months.

50. William Boyd, Ph.D. performed a neuropsychological evaluation at Respondent's request, on April 13, 2023, and issued a supplemental report on July 20, 2023. Claimant reported a diffuse pattern of cognitive difficulties including memory problems, difficulties with attention and concentration, and possible confusion. She complained about memory problems, had low tolerance for frustration, did not cope well with stress, and experienced difficulties in attention and/or concentration on her MMPI-3[7]

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[6] This ALJ only found that COVID symptoms were reported to Dr. Thwaites and Dr. Morganstern extrapolated from there.

[7] The MMPI-3 stand for Minnesota Multiphasic Personality Inventory-3. This ALJ infers that it is a tool used by neuropsychologists to assess psychological aspects of a patient's individual personalities and psychopathology.

protocol testing. There were no indications of emotional-internalizing dysfunction, disordered thinking, and maladaptive externalizing. He ultimately opined, based on all testing, that Claimant did not suffer from a concussion based on the lack of medical records documentation, the fact that Claimant did not hit her head and there was no loss of consciousness. He further stated that, even if there were neurocognitive problems that they had resolved by the time Claimant underwent the neuropsychological testing.

51. On May 31, 2023 Dr. Kathleen D'Angelo of Advanced Medical and Forensic Consultants was retained by Respondents to conduct an Independent Medical Evaluation and examination. She provided a lengthy medical records review and provided critique of Claimant's reports of symptoms as well as some commentary regarding discrepancies in the records. For example, she stated that there were contradictions regarding gait discrepancies, noting that "while significant peripheral vertigo may cause gait imbalance, neither Dr. O'Toole's 4/8/21 evaluation nor Dr. Thwaites initial evaluation describe she complaining of significant ongoing vertigo during their evaluations." However, Dr. O'Toole specifically diagnosed vestibular disequilibrium, which this ALJ infers that Claimant was having vestibular problems that caused balance issues. She opined that Claimant was at MMI on August 9, 2022 and only suffered from cervical and thoracic myofascial irritation in the MVA of March 24, 2021, suffered no impairment and that any other conditions, such as the "alleged" post concussive complaints, were not related. Dr. D'Angelo is simply not persuasive in her opinions and the parties likely did not think so either since they did not cite to any portion of her 85 page report in their position statements filed following the hearing.

52. Claimant was evaluated at Claimant's request by Dr. Sander Orent on June 8, 2023. Dr. Orent reviewed the medical records, took a history consistent with Claimant's testimony, and performed a virtual examination of Claimant.[8] He stated that following the accident, Claimant drove to Greeley and her headache became severe. Her family noticed slurred speech so took her to the emergency room, where they gave her medications and patches and released her. He noted that Claimant's symptoms became progressively worse within the next day or so. Claimant reported she felt dismissed by Dr. O'Toole, once Respondents' third party administrator finally contacted her and requested she attend the workers' compensation provider.

53. Claimant reported to Dr. Orent that, despite what the testing performed by Dr. Thwaites showed, she felt a diminution in function, having headaches, visual disturbances with photophobia and diplopia and very fatigued. He documented that, when a headache came on, she had to go into a dark room and take medication and try to sleep. She treated them prophylactically by taking breaks, stretching, and sometimes used caffeine.

54. She continued to have neck pain that would radiate to the 4th and 5th fingers of both hands and paid for massage on her own as it provided some relief. She had ongoing pain between her shoulder blades that has never been evaluated, even with x-rays. She continued to have low back pain accompanied by left lateral thigh numbness,

[8] Dr. Orent's exam was virtual because his wife has just undergone a kidney transplant and was immunocompromised.

and worsened with sitting, standing, and bending. She also complained of sleep difficulties which were much better.

55. Claimant reported to Dr. Orent that, due to the MVA she lost a 10 year relationship because of changes in her personality, and had to rely on her mother for chores, such as cooking and cleaning, because she had trouble both functionally and cognitively. She had been returning to some of her normal activities such as softball, though she took several seasons off. There are multiple other recreational activities that she had to abandon or modify due to her symptoms.

56. He opined that Claimant had serious sequelae of her accident "all of which have been inadequately managed." He felt that she still had an inadequately assessed diagnosis with regard to her closed head injury, that she had ongoing headaches which were posttraumatic migraines and that she had ongoing problems in the cervical, thoracic and lumbar spine, all of which needed to be further addressed. This opinion directly contradicted Respondents' IMEs but were in line with that of the DIME, Dr. Macaulay, and Dr. Parry.

57. Dr. Boyd issued a supplemental records review report on July 20, 2023 but did not change his opinions.

58. Finally, Dr. Parry issued a supplemental record review report on August 10, 2023 commenting that what was clear from her evaluation of [Claimant] that she had suffered an acceleration/deceleration injury and she had findings consistent with whiplash. Dr. Parry also stated as follows:

> … presented to me, shortly after her accident, to Dr. Macaulay, the DIME examiner, and to Dr. Orent as a believable patient with ongoing problems directly related to her automobile accident. The mechanics of the automobile accident were straightforward and reported initially. The patient reported to her different providers that she completely braced herself which even at a low speed would mean that the amount of acceleration and deceleration movement would be applied only to the cervical spine since she braced her body to the extent that she could against the seat with her arms and her right leg. The oblique restraint of the seatbelts, and she was restrained would also account for more torsional component as well to the thoracic and lumbar area as demonstrated by her dominant right shoulder girdle problems when I saw her. The mechanics of the injury and the subsequent complaints are all entirely consistent with a whiplash/mild traumatic brain injury particularly in terms of the headache, of the vestibular and visual tracking abnormalities and the problems with focusing. [Claimant] is a high level functioning woman who has continued to work full time at her job.

59. Dr. Parry opined that Respondent's IME opinions were in error because they relied primarily on the paucity of documentation in the ER records. She stated that the ER, under EMTALA,[9] is obliged to assess patients for acute injuries and determine whether they are acute enough to be admitted. She stated that the ER is not equipped to do a detailed subtle neurologic exam for cognitive deficit, and that if the patient can answer questions, move all four extremities, have a normal Glasgow Coma Scale test,

[9] This ALJ infers that EMTALA stands for Emergency Medical Treatment and Labor Act.

and does not have hyperreflexia they are essentially cleared, but the assessment is NOT a cognitive assessment or an assessment to establish a plan of treatment. Dr. Parry further opined that the ER does not excel, in her experience as a neurologist, in assessing mTBIs. She stated that those who relied on this assessment, did a disservice to Claimant who continued to have visual disturbances, dizziness, and cognitive fluctuations.

60. What is particularly credible and persuasive is Dr. Parry's opinion that Claimant experienced explicit biased based on dismissal of her complaints and inability to take into account her individual presentation of symptoms in the context of her cultural background. As an example, she identified Claimant's "complaint that she had a feeling that she was in a boat appears to have been understood only by Dr. Hyde as a recognizable vestibular abnormality."

61. Dr. Parry further stated that Claimant did not recall everything at impact but remembered hearing a thud but not all the details of movement. She opined that Claimant's ability to perform automatic tasks does not mean that she was mentally completely alert at the time of the accident and the emergency room evaluation did no testing that was documented in terms of memory, concentration or attention other than a Glascow Coma Scale and noting that she did not "lose consciousness."

62. She opined that Claimant's subsequent development of headaches, which have been persistent, and clearly different from her COVID infection, are consistent with both postconcussive migraine as well as a component of cervicogenic headache. She opined that Claimant's vestibular abnormalities, which occurred only after her automobile accident were "pathognomonic for the type of problems following a mild TBI and in and of themselves are consistent with her having sustained a mild head injury."

63. Dr. Parry stated that the sequelae of head injury, including headaches, sleep disorder, sleep apnea, vestibular and visual tracking problems can all occur with normal neuropsychometric testing. She stated that "[P]atients with mild cognitive difficulties after head injury particularly with a high level of education can test within normal limits." She commented that "[I]n fact Dr. Thwaits' (sic.) early evaluation showed some deficits which were cleared by the time Dr. Boyd saw her and did not rule out the need for some brief cognitive skill training."

64. Dr. Parry ultimately agreed with Dr. Macaulay and Dr. Orent that Claimant was not at MMI and required further treatment, including assessment, diagnostic, vestibular and visual tracking therapy.

D. Employer records

65. On March 26, 2021 Claimant completed paperwork, including an Exposure Report, which stated that the accident had occurred at approximately 4:10 p.m. on March 24, 2021 noting that

> I was driving my car to a home visit scheduled with a family when I was rear ended by another vehicle. The other driver reported that he was following too closely and had looked away for a second and couldn't stop in time. I called 911, my clients, and my supervisor to report the accident.

Claimant described the accident as an "automobile accident concussion and whiplash with pain in the lower back ribs shoulders and head" and reported she had a "tightness throughout my lower back, right side of ribs, along shoulder blades into the neck, plus a concussion causing light…"[10] Claimant was provided with a Designated Medical Provider List (DPL) at that time listing UCHealth, WorkWell and Banner Occupational Health.

66. The Employment Performance Evaluation form dated April 13, 2022 addressed various components of Claimant's work. Claimant's supervisor stated that Claimant had improved this year[11] on timely documentation, had taken the time to meet with other caseworkers regarding organization ideas and ways to keep track of her assignments, that her timeliness and organization had improved, noting that timeliness of court letters, documentation and case closure had been a struggle for Claimant,

E. Claimant's testimony

67. Claimant scheduled appointments with ESP Sports Medicine in Lafayette, on her own, as well as scheduling with Dr. O'Toole, the workers' compensation designated provider at UCHealth. She identified ESP after speaking with a coworker who had gone there before. She went to ESP on March 30, 2021 for a massage. She did not recall if they discussed a concussion but agreed that the records documented it that way, in addition to light sensitivity. She also reported she had blurred and double vision, slurred speech, urinary urgency, dizziness, altered gait, swollen limbs, though not all of these were documented in the March 30, 2021 report.

68. She later saw Dr. Kevin O'Toole, pursuant to Employer's request, on April 8, 2021. She agreed she reported complaints of light sensitivity, fatigue, loosing track of time, back spasms, swollen limbs. She stated that she did not have these complaints prior to the March 24, 2021 work injury.

69. She did agree that she had a work related injury to her back on July 31, 2012, for which she complained of gait problems, sitting and standing, radiating pain to the right buttock, and down to the right foot and was eventually placed at maximum medical improvement by Dr. Reichhardt on February 14, 2013 and given a rating. At that time, she was given work restrictions of limited lifting, pushing, pulling and carrying of 40 lbs. occasionally and 20 lbs. frequently as well as limited bending and twisting.

70. Claimant reported that she continued to have difficulties performing her full time job, especially with time management, fatigue, paperwork, screen work, driving for extended periods, as she has to take breaks with ongoing breaks throughout the day for both mental and physical stretching. She continued to do a lot of management within her day to maintain her pain level. She meets with her supervisor twice a month since her accident. She also meets with a colleague to help her prioritize and manage day to day tasks and to make sure she keeps on top of all her assigned work.

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[10] It is clear that the sentence was not finished due to lack of space or that Employer did not include the missing page from this report.

[11] It is presumed that this is for activities that took place after April 2021, through April 2022.

71. Due to the ongoing pain, headaches and fatigue, she sometimes sleeps during the day or takes naps, so she works into the evening hours or weekends to meet her 40 hour requirement. She has had to do this to keep her full time job. Everything now just takes her longer since the work injury. If she is fatigued during the day, she has problems with her eyes and has to rest them. She has light sensitivity during "bad head days." She has had to employ multiple tools to keep her head pain from spiking such as taking breaks, reducing screen time, or taking a nap when she feels a headache coming on, all of which help control her headaches, and vision symptoms.

72. After the MVA Claimant broke up with her partner and moved in with her mother because she had difficulty with time management. She was unable to keep her work life and personal life activities going in a normal manner, so her personal life suffered as she had to focus primarily on mandatory tasks. She continues to suffer from her injuries. She has to set multiple alarms throughout the day to keep herself on task and not let time lapse. She continues to struggle with word finding, or word recollection as well as memory. She used to be able to write her reports for the day from memory and now has to take notes. She meets regularly with her co-worker to help her stay on top of deadlines and prioritize. Because of fatigue, she has to take multiple breaks during the day and manage her symptoms so they do not flare up and overload herself. She used to be able to work without problems. She continues to have occasional headaches, back pain, neck pain and she manages them as best she can with stretching and exercise.

73. Claimant is now wearing prism glasses due to her eye movement disorder. She had never worn glasses before her work injury. The workers' compensation provider had advised her that Respondent may not cover the prism glasses, so she declined to purchase them from Dr. Arnold's office because of the high cost. She never declined to have prism glasses, she just had to go to a different location to obtain them because of her out of pocket costs. She generally wears the glasses during the day, when she is not outside in the sun. She requires sunglasses in the sun. She especially needs them when she is fatigued.

74. She has difficulty with slurred speech on "bad-brain days," when she has difficulties. She experiences dizziness, for example, when she gets off elevators, when she is a passenger in a car, when her eyes are doing weird movement. It is a dizziness/motion sickness issue. She does her therapy to alleviate the feeling.

75. She was not aware that she could return to Dr. O'Toole for treatment since her release. She has obtained psychological treatment, which she pays for.

76. Claimant testified that this accident has had a significant impact on her life and continues to do so but she would like to have the recommended diagnostic testing and medical care in order to get better.

F. Testimony of Supervisor

77. Claimant's supervisor (Supervisor) testified at hearing. She stated that she had started as Claimant's supervisor since May 2020, supervising a team of five case workers and supporting them in assessments and ongoing case load, though she had known Claimant since she started in 2016. She has regular communication with Claimant at least every other day either by text, phone calls, and emails or in person. She directly

oversees Claimant's work. Supervisor reported that Claimant consistently meets expectations, is great at engaging with her families, meets with them, both parents and children when required, and did overall excellent work engaging and communicating with them. Over time, documentation, paperwork and computer work had been fluctuating, including documenting visits, writing letters or updates to the court, documenting in the system, making referrals, though she did not have a big drop off after the March 2021 accident.

78. Supervisor did not recall how often she saw Claimant in the 2020-2022 period in person or by video but likely around twice a month. She did not recall seeing Claimant wearing sun glasses inside when they had team meetings at a restaurant or other venue. She did state that Claimant has played softball since she has known Claimant.

79. Supervisor explained that they did not make formal accommodations for Claimant through Human Services but had informally discussed and approved Claimant taking breaks when needed and getting her work arranged around her symptoms and need for breaks, so long as she was keeping up with the work. They had also discussed time management issues between face-to-face work and the documentation piece of the work. Supervisor reported that Claimant's timeliness had improved over the last year but she could not establish if there was a connection to the injury or not. She has set up for Claimant to meet twice a month with coworkers, "just to get things on track and keep things on track."

80. Claimant is accountable and is able to work through a problem to fix it where needed or ask for help when needed. Supervisor has received a complaint against Claimant recently, which is the only complaint she has received while in her supervisory position. Supervisor emphasized that Claimant had a strong work ethic and worked really hard with her assigned families. Supervisor stated that she trusts Claimant, and opined that Claimant was honest and had integrity.

81. Due to work performance issues, Supervisor offered to take on some of the more tedious computer tasks like data entry. She stated that the work involved a lot of paperwork, a lot of documentation, meeting with families of different cultures, backgrounds, and often angry people, which was taxing, though there were ebbs and flows to the work. She stated that it was emotional work, emotionally taxing and stressful work.

G. Testimony of Dr. William Boyd

82. Dr. Boyd testified as a board certified neuropsychologist on behalf of Respondents, who was retired by the date of the hearing. While practicing he specialized in mild traumatic brain injury, concussions, post-concussive syndrome and evidenced based approach to neuropsychology. He would typically see patients after they had had extensive evaluations and treatment. He would evaluate for neurocognitive issues and make recommendations for medical treatment, vision and vestibular therapies, and any needed rehabilitation. He would treat with cognitive behavioral therapy and provide psychological strategies to help patients get beyond any symptoms of post-concussion syndrome.

83. Dr. Boyd stated that he was asked to perform the April 14, 2023 evaluation by Respondents. Dr. Boyd reviewed the records, including the negative temple bone scan, did not find evidence of retrograde amnesia, anterograde amnesia, loss of consciousness, or any trauma to the head. He noted that Claimant was able to return to function and that there was no particular head trauma. He administered multiple tests which showed Claimant was not suffering any measurable lingering brain dysfunction and had no neuropsychological impairments when compared to the general population. However, he did find that she had short term memory impairment and made a mathematical arithmetic error. His impression was that Claimant most likely did not suffer a concussion in the motor vehicle accident. He agreed that when Dr. Thwaites tested Claimant, Claimant had slowed processing speed and only an average IQ score. He agreed that Claimant had performed better with his tests than the prior tests overall. He generally liked to wait to perform neuropsychological testing until about six months to a year following the incident to determine any permanency or impairments.

84. Dr. Boyd agreed he did not have the ER report when he issued his initial report but that he did not require them because he was only testing neurocognitive impairment at the time of his testing. He did not note the vision problems Claimant had other than through review of the medical records and was not aware of whether they were related to the MVA. Dr. Boyd believed that post-concussive syndrome was not an mTBI diagnosis. He failed to note that the records showed Claimant had frequent headaches, and sleep disturbances. He agreed that whiplash can cause TBIs.

85. He also agreed that he did not have Dr. Parry's report nor the DIME report but that having the neurologists report would have been important in assessing for a brain injury. Nevertheless, Dr. Boyd did not change his opinion that Claimant did not suffer from any neurocognitive impairments, and early testing was not good for determining persisting or permanent impairments.

86. Dr. Boyd noted that on the ER report visit, which was approximately three hours after the accident, there were no symptoms reported that were concerning but if there was only a mild concussion, there might not have been any outward symptoms. He did agree that Claimant's complaints on arrival were for whiplash, back pain, headache, right rib cage and neck pain.

H. Testimony of Dr. Kevin O'Toole

87. Dr. O'Toole testified as a board certified occupational medicine physician, which he had been practicing full time since 2006 seeing anywhere from 12 to 20 patients in a day. He reviewed the past records including the ER visit notes prior to seeing Claimant initially and there was no concern for concussion or cognitive problems noted. He listed the presence of symptom magnification based on the ER records and his unremarkable examination.

88. Dr. O'Toole stated that, in cases of mTBI, he would expect worse symptoms with early onset and then gradual improvement, though in this case there were symptoms expressed later, including severe concussion. He noted that at no time did he think Claimant was faking her symptoms but was put in a difficult position by other medical professionals who had misdiagnosed issues, causing Claimant other symptoms,

including anxiety about the effects of the trauma. He did not record any symptoms of slurred speech, dizziness, or altered gait at the initial visit, though he remarked that on the following visit, Claimant complained that he had not documented all her symptoms.

89. He noted that patients frequently forget to report prior injuries, especially if they are focused on the current symptomology they believe related to the most recent in time event, whether or not they can be attributable to that event.

90. Dr. O'Toole stated that he referred Claimant to Dr. Thwaites because of complaints that were not supported by the clinical exam and Claimant's apprehension of having to treat with a new provider.

91. He noted that the next visit with him was not until June 16, 2021, and that is when Claimant complained to Dr. O'Toole that he had not documented the slurred speech and memory lapses.

92. Dr. O'Toole did place a referral for an ENT evaluation based on Dr. Parry's recommendation. By February 4, 2022 Claimant was ninety percent better, managing her pain and symptoms with stretching and breaks, performing vestibular therapy exercises, wearing the prism prescription glasses.

93. By the time he placed Claimant at MMI on August 9, 2022, Claimant continued to have the occasional headache, had being going through vision treatment and computer orthoptics training including jumpduction, the final phase of the computer work with which she continued to have difficulty and which was being discussed with Dr. Arnold, so he left her medical benefits open for maintenance.

94. Dr. O'Toole reviewed the DIME exam by Dr. Macaulay but stated that Dr. Macaulay's findings of muscular tenderness were not significant and he did not believe that they would qualify Claimant for an impairment rating.

95. He noted that his own later exams were not comprehensive and only noted normal range of motion (not measured), some pinpoint complaints with chin to chest flexion and no palpatory exams. He also remarked that he considered Dr. Thwaites' recommendation for Claimant to see a psychologist outside of the workers' compensation system and that he did not consider she had any depression related to the MVA.

96. He stated that there may be some merit to having Claimant referred for a psychological evaluation in accordance with the DIME physician's recommendation, though he believed some of the psychosocial factors may be related to litigation compensation.

97. Dr. O'Toole disagreed that Dr. Macaulay's recommendations were appropriate, with the exception of an ENT/ophthalmology follow up with Dr. Arnold to assess the prism glasses and to determine if an impairment was appropriate as well as, potentially, a psychological evaluation.

98. Lastly, Dr. O'Toole believed that the *AMA Guides*, Third Edition (*Revised*) were antiquated and that there was "newer guidance with regard – how to determine impairment. And – and the intent is – is not to assign unnecessary impairment for pain if there is not clinical evidence of a – of a functional problem," and he did not believe Claimant had a functional problem because she had return to full time employment. He

opined that, even if he used an inclinometer, it may not have been helpful because he did not know what Claimant's pre-motor vehicle measurements were for Claimant. As found, Dr. O'Toole simply did not believe it was necessary to follow the *Third Edition*, though he could see why other providers would perform the range of motion testing and provide a rating, but he disagreed with them. Dr. O'Toole was not persuasive in this matter despite his assertions that he followed Colorado requirements.

I. Testimony of Dr. Sander Orent

99. Dr. Sander Orent testified on behalf of Claimant as an expert in occupational and environmental medicine, internal medicine and toxicology as well as a Level II accredited physician and expert in the Medical Treatment Guidelines and *AMA Guides*, Third Edition (*Revised*).

100. He noted that he reviewed the extensive records in this case before anything else, which is his normal procedure when conducting an IME, and it helps him understand the claim better. He took a history from Claimant, including her symptoms, occupational history, recreational history, history of treatment and response to treatments. He specifically noted he had become an expert with COVID issues in the workers' compensation system in the last few years. He disagreed with the Respondent IMEs and Dr. Thwaites in this matter regarding COVID having any lingering effects as Claimant may have had COVID in November 2020 but that it resolved in six (6) weeks. He stated that any mention of a history of COVID in Claimant's case was a "red herring" as there was no medical documentation that Claimant ever sought treatment for COVID or had lingering effects of COVID.

101. Dr. Orent disagreed with the interpretations of the neuropsychological testing as there were internal contradictions and agreed with Dr. Macaulay that Claimant required a completely independent neuropsychological evaluation.

102. Dr. Orent agreed with Dr. Parry's recommendation with regard to further diagnostic testing and treatment recommendations, her finding of intermittent nystagmus which required the prism glasses to correct, as Claimant was at the end stage of the cranial nerve trauma that caused diplopia and visual problems.

103. He also agreed with the DIME physician, Dr. Macaulay's recommendations for further evaluation and treatment and that Claimant was not at MMI until the recommended diagnostic testing and treatment took place to relieve Claimant from the effects of the injury.

104. He explained that the episode for which she was seen at UCHealth in 2019 for neck pain was actually torticollis, an acute spasm of the neck muscles that obviously resolved.

J. Mild Traumatic Brain Injury Medical Treatment Guidelines (mTBI MTGs)

105. The MTGs state that "any alteration of mental status at the time of the injury, for example, feeling dazed, disorientated or confused, within 72 hours of the accident may be signs of a traumatically induced physiological disruption of brain function, indicating an mTBI.

106. They further indicate that a risk factor for ongoing symptoms following an mTBI is a very demanding or stressful vocation or job, preinjury issues with general health or psychological wellbeing as well as a history of preinjury migraines or recurrent headaches.

107. Common mTBI symptoms include headaches, sleep disturbances, dizziness, nausea, visual disturbances, photophobia, attention and memory problems, difficulty multi-tasking, increased distractibility, losing focus, feeling foggy, and fatigue.

108. The MTGs note that post-concussive syndrome was an accepted diagnosis that is generally determined by a number of symptoms present after an mTBI and how long they persist, though the symptoms of PCS are commonly present in those without mTBIs.

K. Conclusory Findings

109. This ALJ infers from Employer's Injury Exposure Report that the incomplete statement of "plus a concussion causing light…" would be that Claimant had "light sensitivity." Two days following the accident Claimant was describing a condition that included a concussion and problems with light sensitivity. Claimant believed that she had a concussion despite the lack of documentation in the emergency room records.

110. As found, Claimant is not at MMI as determined by Dr. Macaulay, the DIME physician. As found, Claimant suffered a mild traumatic injury, which caused concussion and nerve damage which resulted in vision and vestibular injuries to Claimant, in addition to injuries to her cervical spine, thoracic spine, an aggravation of the lumbar spine and aggravation of her preexisting depression. As found, Claimant is credible and persuasive. She continues to suffer from the effects of the mTBI, including headaches, vision and vestibular issues with occasional difficulties focusing, time management and depression, all of which should be accurately evaluated and treated within the confines of this March 24, 2021 work related injury.

111. As found, Dr. Parry, Dr. Orent Dr. Arnold, Dr. Hyde, Dr. Hadlock, Dr. White, Dr. Mayer and the DIME physician, Dr. Macaulay, are very credible and persuasive in their opinions over the opinions of Dr. Thwaites, Dr. Boyd, Dr. Morgenstern, and Dr. O'Toole. Dr. D'Angelo is found not credible. And while Dr. Thwaites, Dr. Boyd, Dr. Morgenstern, and Dr. O'Toole have portions of their reports and testimony that are credible, they were not persuasive in their opinions regarding causation, evaluations, diagnosis and treatment of Claimant regarding this claim.

112. As found, the providers should not have only relied on the incomplete evaluation performed at the emergency room. Dr. Parry was persuasive and credible in her explanation of the procedures of the ER, where they are focusing on those issues that might be cause for admission of the particular patient they are evaluating. Here, Claimant had very subtle issues to identify, which were clearly not detected by the ER staff, including the dizziness, vision issues, light sensitivity, cognitive issues, and other issues better identified and described by Claimant, such as slurred speech, blurred vision, ongoing headaches, slowed processing speed. These are frequently issues that might not be readily noticeable by someone other than immediate family, friends or Claimant, or individuals that know Claimant really well. Even Claimant's supervisor noted that

Claimant needed assistance in time management and was meeting with Claimant frequently. Further, she agreed that Claimant was meeting bi-weekly with a co-worker to help her with time management and prioritizing tasks that had to be completed. As found, Claimant had to change the manner in which she worked, including taking breaks away from her computer screen in order to manager her symptoms caused by the mTBI.

113. As found, the opinions of Dr. Thwaites, Dr. Boyd, Dr. Morgenstern, and Dr. O'Toole do not rise to the level of clear and convincing to overcome the DIME physician's opinions with regard to maximum medical improvement or impairment. Their opinions are simply differences of opinion and any opinions they have given stating that the DIME physician was in error are not credible or persuasive.

114. As found, a determination of impairment is premature, as Claimant is not at MMI. Claimant is entitled to a full scope of evaluations as recommended by Dr. Macaulay to determine the exact sequelae of the mTBI and likely impairment.

115. As found Claimant has shown by a preponderance of the evidence she is entitled to medical benefits that are reasonably necessary and related to the injury of March 24, 2021. This treatment included the prism glasses recommended by Dr. Arnold and the massage therapy as recommended by Dr. O'Toole, despite the contrary opinion of Dr. Raschbacher that it was not reasonably necessary and related to the injury.

116. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they

seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Overcoming the DIME physician's opinions

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S.

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Sec. 8-42-107(8)(b)(III), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. E.g., *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523- 097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). Further, a finding

of MMI inherently involves issues of diagnosis because the physician must determine what medical conditions exist and which are causally related to the industrial injury. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). Because the determination of causation is an inherent part of the diagnostic process, the DIME physician's finding that a condition is or is not related to the industrial injury must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office, supra.*

If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]; *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005); In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

The party challenging the DIME bears the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339, ICAO, (June 17, 2005); *Gurule v. Western Forge*, W. C. No. 4-351-883, ICAO, (December 26, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. ICAO, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. ICAO, supra.*

Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In the case at bench, Respondents had the burden of proof to overcome, by clear and convincing evidence, the opinions of Dr. Macaulay, the DIME physician regarding causation, MMI, and impairment. Respondents relied on the opinions of Dr. O'Toole, Dr. Raschbacher, Dr. Boyd, Dr. D'Angelo and Dr. Thwaites as well as other medical reports, to support their contentions. However, these physician's opinions regarding diagnosis and causation of injuries, as well as MMI and impairment, were simply a difference of

opinions and were either not credible or not persuasive. The opinions of Dr. Macaulay, Dr. Parry and Dr. Orent were credible and persuasive that Claimant had not reached MMI as she required further work-up and treatment to address her conditions related to the injuries she sustained in the March 24, 2021 MVA. This included neurological evaluations, psychological treatment, visual therapy and vestibular evaluations. Under the Impairment Rating Tips, Desk Aid 11, DIME Panel Physician Notes, Section 6., it states that "[i]f there is a reasonable possibility that the results of a diagnostic test will change the patient's MMI status, then in most instances, the patient will not be at MMI." They also state at Section 5, that a "recommendation for therapies that present a reasonable prospect for improving physical function may be viewed as evidence that the claimant's condition is not stable." Here it is clear that, while Claimant is an extremely strong individual that has kept working full time despite her limitations, treatment will likely improve her condition regarding her difficulties in focusing, processing information, management of her symptoms, visual disturbances, vestibular and psychological impacts the March 24, 2021 work injury have had on Claimant.

Respondents also rely on discrepancies in the record regarding what Claimant reported and the timeline of those issues. This was not persuasive. As explained by Dr. O'Toole, when injured workers are being seen for the first time, that is the time when they are asked about their prior history, and it is common for them to forget prior injuries because they are not present on their mind or are focusing on the injury itself. Dr. O'Toole also stated he reviewed the ER records and those documented Claimant's past history of back pain. In fact, if Dr. O'Toole had access to Claimant UCHealth records, he would have seen her past history of chronic low back pain. While Claimant had a prior workers' compensation injury in 2012, she clearly aggravated that condition during the MVA. She had been working full time without limitation or restrictions and pursuing all of her hobbies without difficulties for some time. The last report in evidence, prior to the March 24, 2021 accident, was a 2019 torticollis (stiff neck) condition, which resolved. The last mention of low back problems was in 2017, four years prior to the MVA.

The argument that Claimant's symptoms are a residual of Claimant's "long COVID" is not credible or persuasive. Dr. Parry and Dr. Orent credibly and persuasively explained that, if she had COVID, which was not documented in any medical records, her symptoms were likely resolved within six weeks. This ALJ was persuaded by Dr. Orent that the opinion of the providers that indicated Claimant's symptoms were caused by COVID which occurred the prior November 2020, a full four months before the MVA, was speculative and did not cause Claimant's ongoing symptoms.

Respondents' argument that Dr. Macaulay was basing his opinions only on Claimant's subjective complaints is incorrect. Dr. Macaulay reviewed the records, including Dr. Parry's report explaining that the neuropsychological evaluation performed by Dr. Thwaites on April 14, 2021, a mere 21 days after the motor vehicle accident of March 24, 2021, was premature and likely invalid. He was persuaded by Dr. Parry's analysis of what happened including her findings of neurologic problems such as a skew of her eye, which was later confirmed by Dr. Arnold, for which he prescribed the prism glasses. Further, Dr. Macaulay reviewed all of Dr. O'Toole's, Dr. Thwaites', the UCHealth ER's and other available records to reach his determination, citing to them and the reason he opined that further testing and evaluations were necessary. While Dr. O'Toole was

credible, he simply had a different opinion regarding Claimant's medical needs and conditions related to the MVA. This did not stop him from making multiple referrals including for physical therapy, massage therapy, biofeedback, chiropractic care, vestibular therapy, vision evaluation and therapy, all of which addressed Claimant's physical conditions related to the MVA and the results of the mTBI. And, he opined that the treatment he provided Claimant was reasonably necessary and related to the March 24, 2021 injury. At his first evaluation he provided an assessment that Claimant had neck pain, headache above the eye region, photophobia, thoracic and lumbar pain, rib pain and vestibular disequilibrium. At his last evaluation of Claimant, he provided the diagnosis that Claimant had convergence insufficiency and neck pain. His opinions regarding whether or not Claimant suffered from an mTBI or concussion related to the March 24, 2021 was not persuasive, and, certainly, did not rise to the level of proving by clear and convincing evidence that Dr. Macaulay's opinion, as the DIME physician, was overcome. This is especially so since Dr. O'Toole was the one to make the referrals for treatment for her neck, mid and low back as well as for the vestibular disorder and vision problems.

Lastly, the argument that Dr. Macaulay erred in assigning an impairment rating is also not persuasive. The point of Dr. Macaulay recommending further evaluations and treatment is to provide the care Claimant needs to reach MMI and then be appropriately rated under the *AMA Guides*. Level II providers are asked to provide provisional impairments. Desk-Aid 11, DIME Panel Physician Notes, Sec. 4 specifically states "*If the party requesting the DIME has asked that impairment be addressed, and if you find the patient* ***not at MMI*** *for that work-related injury, you should nevertheless provide a rating for that injury*." Dr. Macaulay found that Claimant had loss of range of motion of the spine, which is an objective findings, in and of itself, as well as spine tenderness. Further, he documented that Claimant continued to have pain in her spine. The records document ongoing symptoms of the cervical, thoracic and lumbar spine since her injury of March 24, 2021. This is substantial evidence to justify a finding that Claimant is entitled to a Table 53IIB rating under the *AMA Guides* as Claimant had a medically documented injury and a minimum of six months of documented pain and rigidity. Dr. Macaulay properly identified the injuries he found causally related to the motor vehicle accident of March 24, 2021 and which he proceeded to rate based on the information he had available.

As found and concluded, the Claimant suffered an mTBI that resulted in vestibular, visual and psychological problems, as well as physical injuries to her head (headaches), neck, mid and low back. As found and concluded, Respondents have failed to show by clear and convincing evidence that Dr. Macaulay's opinions have been overcome. Moreover, his opinions are supported by the credible and persuasive opinions of both Dr. Orent and Dr. Parry who assessed the Claimant's conditions and the effect they had on her related to the March 24, 2021 work related injuries, and provided similar recommendations than Dr. Macaulay.

Since Claimant is not at MMI, the issue of permanent partial impairment and interest, related to benefits owed and not paid when due, are premature and will not be addressed by this order.

C. Medical Benefits

Employer is liable for medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

As previously found, Claimant suffered an mTBI that resulted in vestibular, visual and psychological problems, as well as physical injuries to her head (headaches), neck, mid and low back. Dr. O'Toole prescribed additional massage therapy, which was later denied when Dr. Raschbacher issued a Rule 16 opinion that it was not reasonably necessary and related to the injury. As found, such treatment was and is reasonably necessary and related to the March 24, 2021 work injury as it was addressing the headaches caused by the mTBI as well as neck pain. Claimant stated that she had been paying for her own massage therapy and that she wished to continue receiving medical care for her work related medical conditions. The massage therapy was helping Claimant manage her chronic pain and to continue working full time. This is functional gain. Claimant has shown she is entitled to medical benefits that are reasonably necessary and related. As found, the treatment prescribed by Dr. O'Toole was reasonably necessary and related to the March 24, 2021 work injury. Claimant should be reimbursed for the costs of her massage therapy.

Dr. Arnold prescribed prism glasses. Dr. Arnold's office advised Claimant that Respondent would likely not pay for the prism glasses, therefore, she resorted to find a most cost effective provider and purchased them due to ongoing need and visual problems. The prism glasses were reasonably necessary to address Claimant's vision problems brought about by the mTBI by cause the March 24, 2021 MVA. Claimant has shown by a preponderance of the evidence that she is entitled to reimbursement for the cost of the prism glasses.

The panel in *Deane v. Regis Corp*., W.C. No. 4-664-891, I.C.A.O. (August 7, 2023) determined that an ALJ was unable to direct a medical professional to administer a particular treatment the professional did not believe was appropriate because it was not a matter arising under articles 40 to 47 of title 8 for which the ALJ is provided authority by Sec. 8-43-201(1), C.R.S. and Sec. 8-43-503(3), C.R.S. (employers, insurer. claimant or their representative shall not dictate to any physician the type or duration of treatment...). The panel emphasized that, should a party dispute the reasonableness and necessity of a recommended medical care, they remained free to file an application for hearing pursuant to Sec. 8-43-207, C.R.S., *Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997),* or to possibly request a utilization review under Sec. 8-43-501(2),

C.R.S. See *Deane v. Regis Corp., supra*; *Torres v. City & County of Denver*, W.C. No. 4-937-329-03, I.C.A.O. (May 15, 2018) and *Short v. Property Management of Telluride*, W.C. No. 3-100-726, I.C.A.O. (May 4, 1995).

W.C.R.P. Rule 11-7(A), CCRC states in pertinent part as follows:

> If a DIME physician determines that a claimant has not reached MMI and recommends additional treatment, a follow-up DIME examination shall be scheduled with the same DIME physician, unless the physician is unavailable or declines to perform the examination. Either party may file the Follow-Up DIME form *after the claimant completes all additional recommended treatment. (Emphasis added).*

With regard to medical benefits specifically recommended by Dr. Macaulay, this ALJ has no jurisdiction to dictate what care Claimant's treating providers are to provide, only that Dr. Macaulay was correct in his determination that Claimant was not at MMI and requires further medical care to assess her work related injuries and provide the care she requires to reach MMI. However, the rules also indicates that a follow-up DIME cannot take place until "after the claimant completes all additional recommended treatment" recommended by the DIME physician. It is found that the treatment recommended by Dr. Macaulay is reasonably necessary and related to Claimant's March 24, 2021 work injury. Claimant has proven by a preponderance of the evidence that she is entitled to reasonably necessary medical care related to the March 24, 2021 work related injuries but it is up to the authorized providers to prescribe the recommended treatment.

ORDER

IT IS THEREFORE ORDERED:

1. Respondent failed to prove by clear and convincing evidence that the DIME physician was incorrect. Claimant is not at maximum medical improvement and requires further diagnostic and medical care related to the compensable injuries to her head, cervical, thoracic and lumbar spine as well as for her vision and vestibular conditions related to the mTBI.

2. Claimant is not at MMI as determined by the DIME physician, Dr. Hugh Macaulay.

3. Respondent shall pay for reasonably necessary and medical care related to the March 24, 2021 work injury, in accordance with the Colorado Fee Schedule, to cure and relieve her of the compensable injury.

4. Respondent shall reimburse Claimant for the costs of the massage therapy and prism glasses which were reasonably necessary and related to the March 24, 2021 work related injuries.

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

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

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

DATED this 3rd day of November, 2023.

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS

DIGITAL SIGNATURE

By: _____

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a closed period of Temporary Total Disability (TTD) benefits extending from March 4, 2022 through April 24, 2023.

FINDINGS OF FACT

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

1. Claimant works as a package delivery driver for Employer. (Tr., p. 14, ll. 11-19). She suffered an admitted injury to her left ankle on October 7, 2021, while delivering packages for Employer. According to Claimant, she had delivered a package to a customer's house and was walking down a steep flight of steps when she rolled her ankle "kind of fell over". (Tr., p. 15, ll. 7-13).

2. Claimant has a prior history of injury to her left ankle on March 27, 2021, while working for [Redacted, hereinafter US] in Las Vegas, Nevada. (RHE E, p. 28; Tr. p. 29, ll. 16-24).

3. Claimant was ultimately referred to and began treating her October 7, 2021 work-related ankle injury at Concentra Medical Centers on December 1, 2021. (RHE E, p. 28). During her December 1, 2021 appointment at Concentra, Nurse Practitioner (NP) Valerie Joyce documented the following history regarding Claimant's prior left ankle injury, the mechanism of injury (MOI) on October 7, 2021 injury and Claimant's referral to Concentra:

> MOI – walking back to her truck and coming down a customer's stairs, stepped down on the stairs and rolled her left ankle, she saw her PCP when it was injured, now instructed to be seen by work comp to take over care, hx of injuring left ankle in July 2021 when living in Vegas and was seen by a work company – completed PT, since DOI she has been working a light route to help keep the pain controlled, its most painful when she has to get in and out of the company truck, wearing left ankle brace, elevates and uses ice as much as possible.

4. Following her initial evaluation of Claimant on December 1, 2021, NP Joyce started Claimant on Naproxen, referred her to physical therapy (PT) and ordered x-rays. (RHE E, pp. 29-30). Claimant was instructed to wear an ankle brace, ice as needed and perform home exercise. *Id.* at p. 30. The report from this date of visit also indicates that the "Supervising physician reviewed the chart and concurs with the final

disposition". *Id.* at p. 31. The supervising physician on this date of visit was identified as George P. Johnson. *Id*. Dr. Johnson amended NP Joyce's report on 5:24 p.m. to reflect the imposition of work restrictions to include no lifting or carrying greater than 15 pounds, pushing/pulling 20 pounds, no standing/walking greater than 30 mins./hour, no kneeling or squatting, no use of ladders, minimal use of stairs and no driving of company vehicles. *Id.* Claimant was returned to modified duty with these restrictions until her next appointment scheduled for December 3, 2021. *Id.*

5. Although there is no persuasive evidence that she personally evaluated Claimant on December 1, 2021, Dr. Trina Bogart completed a WC 164 form outlining the information contained in NP Joyce and Dr. Johnson's narrative report from December 1, 2021. (RHE E, p. 27).

6. Following the imposition of work restrictions on December 1, 2021, temporary disability benefits were paid pursuant to an Amended General Admission of Liability filed February 2, 2022. (CHE 1, p. 1).

7. Claimant proceeded through conservative care as directed by NP Joyce under the direction of Dr. Johnson, who would review and amend the record to reflect any changes in Claimant's activity status. (RHE E, pp. 37-42).

8. Claimant was evaluated during a follow-up visit by Dr. Kristina Robinson on December 16, 2021. (RHE E, pp. 43-48). Claimant described worsening pain during this visit. *Id.* at p. 43. Accordingly, Dr. Robinson ordered an MRI of the ankle without contrast. *Id.* at p. 46.

9. Dr. Morgan Meury evaluated Claimant on January 18, 2022. He noted that Claimant had contracted COVID, which delayed her follow-ups and further left ankle injury work-up. (RHE E, p. 52). By this appointment date, Claimant still had not had the requested left ankle MRI. *Id.* It was also noted that Claimant was continuing her work in PT and that she had been working modified duty prior to her bout of COVID and that her employer was "under the impression" that she was cleared for full duty, which she reportedly did not feel ready for." *Id*. at p. 53. Dr. Johnson opined that Claimant could return to modified duty work with the same restrictions he had imposed on December 1, 2021; however, the evidence presented supports a finding that Claimant's employer elected not to accommodate her restrictions as Insurer began paying temporary total disability benefits on January 19, 2022. (CHE 1, p. 1).

10. Authorization to proceed with the left ankle MRI was denied. (RHE E, p. 60. However, NP Joyce reordered the study on February 15, 2022, because Claimant was "not progressing in improvement per PT sessions. *Id.* (See also, RHE E, p. 68).

11. Claimant underwent an MRI of the left ankle as requested on February 25, 2022, at Colorado Springs Imaging. The study revealed evidence of "[p]rior lateral ankle sprain with scarring/thickening of the ATFL (anterior talofibular ligament) and CFL" (calcaneofibular ligament) but no full thickness tearing. (RHE G, pp. 121-122).

12. Claimant returned to Concentra on March 4, 2022, where she was once again evaluated by NP Joyce. (RHE E, pp. 71-74). NP Joyce opined that Claimant was "at functional goal" and "ready for discharge". *Id.* at p. 73. NP Joyce placed Claimant at maximum medical improvement (MMI) without impairment and returned her to full work without restriction or maintenance care. *Id.* Claimant expressed her concern about returning to full duty work. *Id*.

13. Dr. Bogart then completed a WC 164 form placing Claimant at MMI without impairment or maintenance care as referenced in NP Joyce's March 4, 2022 narrative report. (RHE E, p. 70). The WC 164 form completed by Dr. Bogart indicates that Claimant was able to return to full unrestricted work on March 4, 2022. *Id.* Based upon the evidence presented, the ALJ finds no convincing support a conclusion that Dr. Bogart actually saw Claimant before completing the March 4, 2022 WC 164 form. Indeed, there is no indication that NP Joyce shared her report with Dr. Bogart as she had with Dr. Johnson or that Dr. Bogart amended or signed off on NP Joyce's report. (RHE E, pp. 71-74).

14. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Bogart's opinions regarding MMI and impairment on March 18, 2022. (CHE 1, p. 2). The admission terminated Claimant's TTD benefits as of March 3, 2022. *Id.*

15. Claimant objected to the FAL and would subsequently undergo a Division Independent Medical Examination (DIME) with Dr. Lloyd Thurston on January 24, 2023. (CHE 2, pp. 7-13). In the interim, Claimant, who was reportedly still experiencing pain and instability, sought treatment with her primary care physician ("PCP") who referred her to Dr. John Shank for an orthopedic evaluation.

16. Dr. Shank evaluated Claimant on April 7, 2022 during which he documented the following history:

> [Claimant] worked for US[Redacted] and reports that approximately a year ago; when she was in Las Vegas, she had an inversion injury. She had lateral sided ankle pain, bruising and swelling after the injury. She was treated with a brace and physical therapy. She improved somewhat after the injury but continued to have instability symptoms. She reports that again at work at US[Redacted] in Colorado in November she had another inversion injury.

(CHE 2, p. 16).

17. Dr. Shank reviewed Claimant's MRI noting that it demonstrated "chronic tearing about the region of the ATFL and calcaneofibular ligament. (CHE 2, p. 16). Because she had not improved with conservative care, Dr. Shank raised the option of proceeding with a "left ankle arthroscopic synovectomy debridement and possible microfracture with a modified Brostrom Gould repair with an internal brace. *Id*. at p. 17. Claimant expressed a desire to proceed with surgery. Accordingly, she was taken to the operating room on April 13, 2022 where Dr. Shank performed the aforementioned

procedures. *Id.* at p. 18-20. Dr. Shank noted as part of his postoperative plan that Claimant placed on non-weightbearing status and instructed to return for a follow-up appointment in two weeks.

18. During a follow-up appointment on April 28, 2022, Dr. Shank noted that Claimant was to begin weightbearing. (CHE 2, p. 21). Nevertheless, he added that Claimant would "likely not be able to return to her normal job for 3 to 12 months depending on the progress with her recovery". *Id*.

19. US[Redacted] was unable to accommodate Claimant in her regular position post-surgically; however, they accommodated her in a temporary position. Because US[Redacted] only accommodates employees in transitional duty for up to 30 days, which had been exhausted between the date of Claimant's injury and Dr. Bogart placing her at MMI on March 4, 2022, Claimant applied for and was ultimately awarded short-term disability benefits. (Tr., p. 17, ll. 12-25, pp. 18-19, ll. 1-11). Claimant was paid short-term disability benefits by US[Redacted] from April 20, 2022, through October 18, 2022 totaling $12,005.76. (CHE-3).

20. Claimant continued to treat with Dr. Shank through April 25, 2023, when he indicated that she was doing "very well" one year after her left ankle injury. He added that Claimant could return to full duty work. (CHE 2, p. 30). The ALJ interprets Dr. Shank's April 25, 2023 note to constitute Claimant's release to full duty work.

21. As noted above, Dr. Thurston performed a DIME on January 24, 2023. Following his examination, Dr. Thurston prepared a written report outlining his findings/opinions. (CHE 2, pp. 7-13). In his January 27, 2023 report, Dr. Thurston opined that Claimant was erroneously placed at MMI. *Id.* Based upon his discussion with Claimant and review of the available medical records, Dr. Thurston felt it was clear that Claimant was not recovering consistently with the MRI interpretation. *Id*. Accordingly, he opined that she "acted appropriately in seeking additional orthopedic care for her injured left ankle". *Id*. at p. 9. Noting that Dr. Shank planned to release Claimant to full duty work at an upcoming follow-up appointment in April 2023, one year after her surgery, Dr. Thurston concluded that Claimant was not at MMI on March 4, 2023 as found by Dr. Bogart. *Id.* at p. 10.

22. A follow up DIME with Dr. Thurston was never scheduled. Rather, Counsel for Respondents advised the ALJ that an amended GAL was filed in lieu of scheduling a follow up DIME. Counsel also informed the ALJ that Respondents were no longer pursuing the issue of overcoming the DIME with regard to Dr. Thurston's MMI determination. (Tr., p. 4, ll. 22-25; p. 5, ll. 1).

23. Dr. Bogart testified as a board certified emergency medicine physician. (Tr., p. 38, ll. 3-4). Between Claimant's date of injury (October 7, 2021) and March 4, 2022, Dr. Bogart worked for Concentra as the Director of Medical Operations in Colorado. *Id*. at p. 38, ll. 15-16.

24. Dr. Bogart testified that although her name was placed on the March 4, 2022 WC 164 form, she never actually saw Claimant or reviewed/cosigned any of Claimant's Concentra related documentation.[1] (Tr., p. 39, ll. 3-13). Accordingly, she testified that she was not an authorized treating physician for Claimant.[2] *Id.*

25. Dr. Bogart testified that she did review the DIME report of Dr. Thurston, including the DIME packet sent to Dr. Thurston. (Tr., p. 41, ll. 4-16).

26. Dr. Bogart testified that after review of the records, including the PT notes, that she should not have placed Claimant at MMI on March 4, 2022. (Tr., p. 42, ll. 1-10). Indeed, Dr. Bogart testified that in retrospect Claimant's case was "prematurely closed" which should not have happened because Claimant still had persistent deficits in range of motion, strength and her gait. *Id*. at ll. 13-20. Instead of placing Claimant at MMI, Dr. Bogart testified that the "next best steps should have been a referral to an orthopedic surgeon for evaluation". *Id*. at ll. 20-23. Accordingly, Dr. Bogart testified that the referral to Dr. Shank was an appropriate course of treatment, and Claimant should have continued restrictions after March 4, 2022. (Tr., p. 42, ll. 24-25- p. 43, ll. 1-2).

27. Dr. Bogart testified the restrictions of lifting and carrying up to 15 pounds; pushing and pulling 20 pounds, no standing or walking more than 30 minutes per hour; no kneeling or squatting; no ladders; minimal stairs; and no driving were never advanced or changed over Claimant's five month treatment course, but because she never examined Claimant she couldn't really opine on what they should have been. (Tr., p. 43, ll. 10-23). Nonetheless, she felt these restrictions were "appropriate based on what physical therapy was showing with her range of motion and her gait and her difficulties with, you know, her daily activities." Id. at p. 43, ll. 22-25- p. 44, ll. 1-2.

28. During cross-examination, Dr. Bogart testified that while NP Joyce may have examined Claimant and believed that she could return to full duty work, she (Dr. Bogart) disagreed with that clinical decision-making.

29. Based upon the evidence presented, the ALJ finds that Dr. Bogart is not an attending physician who treated Claimant during her appointments at Concentra. Claimant's contrary testimony is unpersuasive and probably inaccurate.

30. The ALJ credits Dr. Bogart's testimony to find that Claimant was erroneously placed at MMI and wrongly released to regular employment on March 4, 2022. The ALJ furthers credits Dr. Bogart's testimony to find that Claimant's

CONCLUSIONS OF LAW

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

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1 Claimant disputes Dr. Bogart's testimony that she never evaluated her. (Tr., p. 48, ll. 7-17).

2 Dr. Bogart reiterated her contention that she was not an ATP because she did not treat Claimant and had "no visibility to this particular case". (Tr., p. 46, ll. 19-23).

Generally

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

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

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

Claimant's Entitlement to Temporary Total Disability

D. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P. 3d 872 (Colo. App. 2001).

E. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions, which impair the Claimant's ability effectively, and properly to perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits terminate upon a written release to full, i.e. regular duty work by the attending physician. C.R.S. § 8-42-105(3)(c).

F. Whether or not a physician is the attending physician is a question of fact for the ALJ. *Popke v. ICAO*, 944 P.2d 677, 681 (Colo. App. 1997). "… [T]he ALJ might consider the identity of the initial treating physicians, the length of time the claimant treated with a particular physician, and whether a release to regular employment was approved by the initial treating physician." *In the Matter of the Claim of: Carrie Bitz v. Boulder Valley School District*, W.C. No. 5-067-944-003 (Colo. Ind. Cl. App. Off. 2022)(referring to *Popke*, 944 P.2d at 680). "These criteria were not meant to be exclusive." *Id.* (citing *Herb v. Mariner Post Acute Network*, W.C. No. 4-496-527 (Colo. Ind. Cl. App. Off. 2003)). Nonetheless, an ALJ may not disregard an attending physician's opinion of the claimant's ability to perform his/her regular employment unless there are conflicting medical opinions from multiple attending physicians or a single physician's reports are subject to conflicting inferences. *Burns v. Robinson Dairy, Inc*., 911 P.2d 661 (Colo.App.1995); *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d. 680 (Colo. App. 1999); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997).

G. In concluding that Claimant has proven that she is entitled to additional TTD benefits from March 4, 2022 through April 25, 2023, the ALJ finds the case of *Thim Keo Ly v. Imperial Headwear, Inc. and Liberty Mutual Insurance Company*, W.C. No. 4-375-030 (2000) instructive. In *Keo Ly*, a Panel from the Industrial Claims Appeals Office (Panel) affirmed the conclusions of a hearing ALJ that Ms. Ly was not at MMI and respondents were liable for retroactive TTD benefits. Based upon a reading of the *Keo Ly* decision and considering the evidence in the instant matter, the undersigned ALJ concludes that the issues presented in *Keo Ly* and the present case are analogous to one another.

H. In *Keo Ly* the Panel found that the claimant was injured on January 9, 1998 and referred to Dr. Brodie for treatment. In reports dated January 26th, 28th and 30th, 1998, Dr. Brodie restricted claimant to modified employment. Dr. Brodie also recommended physical therapy. The claimant initiated physical therapy but missed several appointments. Accordingly, on February 18, 1998, Dr. Brodie issued a report, which placed claimant at MMI, without permanent impairment. The report also released claimant to return to regular employment and discharged her from further treatment. The parties subsequently agreed to a binding independent medical examination (IME) by Dr. Pham on the issue of MMI. Dr. Pham determined the claimant required additional treatment. Consequently, Dr. Pham opined that the claimant was not at MMI. *Id.* As in the present case, Ms. Ly requested reinstatement of retroactive TTD benefits. The respondents refused to reinstate retroactive benefits and argued that her TTD benefits properly terminated when the ATP (Dr. Brodie) released her to regular employment. The ALJ found the February 18, 1998 report by Dr. Brodie did not accurately reflect claimant's ability to perform her regular employment. Therefore, the ALJ granted claimant's request for the reinstatement of retroactive TTD benefits.

I. On appeal, the Panel also determined that the ALJ had found Dr. Brodie's medical reports inconsistent and subject to conflicting inferences. Noting that the ALJ had resolved these conflicts against the respondents, the Panel affirmed the ALJs

finding that Dr. Brodie's February 18 report did not reflect a determination that the claimant was medically capable of performing her regular employment. Consequently, the Panel affirmed the ALJs award of additional temporary disability benefits. *Id.* As in the present case, the respondents' in *Keo Ly* argued that Ms. Ly's attending physician had returned her to regular employment. The respondents in the *Keo Ly* case therefore asserted the DIME's opinion on MMI was "immaterial". *Id.* Nonetheless, the ALJ found an "internal conflict" between "Dr. Brodie's January 1998 medical reports…and the February 18, 1999, release to regular employment." Because the conflicting inferences contained in Dr. Brodie's reports were resolved by the ALJ and the ALJ's resolution of the conflict had support in the record, the Panel noted that it would "not be disturbed on review".

J. In the present case, there are significant inconsistencies/conflicts regarding Claimant's release to return to work regular duty on March 4, 2022. They include:

- Dr. Thurston's opinion that Claimant was not at MMI on March 4, 2022 and required additional treatment. In fact, he stated it was appropriate for Claimant to seek treatment, as quickly as possible, by her PCP since her workers' compensation claim was closed. He also opined she should have seen Dr. Shank and the surgery was work-related. Respondents are not challenging the DIME opinion.
- Dr. Shank's opinion that Claimant's surgery was work-related and required restrictions that were unable to be accommodated by US[Redacted]. Consequently, she received short-term disability benefits from US[Redacted].
- Dr. Bogart's conflicting medical opinions regarding MMI, Claimant's ability to return to regular duty employment and Claimant's need for additional treatment.
- Employer's understanding that Claimant was unable to work full duty as accommodated by transitional work tasks.

K. While it is true that Claimant testified that she recalled being seen by Dr. Bogart, the more persuasive evidence supports a conclusion that this recollection is mistaken. Indeed, there is no convincing record evidence that Dr. Bogart saw Claimant or co-signed any of NP Joyce's notes. Based upon the evidence presented, the ALJ is not convinced that Dr. Bogart qualifies as Claimant's attending physician. Even if Dr. Bogart is considered Claimant's attending physician, she testified in conflict of her March 4, 2022 WC 164 form, noting that while NP Joyce released Claimant to full duty as of March 4, 2022, she did not co-sign that note and further disagreed with such clinical decision making on the part of NP Joyce.

L. As presented, the evidence persuades the ALJ that Claimant has proven that she is entitled to further TTD benefits beginning March 4, 2022 and continuing through April 24, 2023, given that Dr. Shank placed her at MMI on April 25, 2023. Nonetheless, Claimant conceded that Respondents are entitled to a short-term disability

offset due to Claimant's receipt of short-term disability after March 4, 2022. Claimant's Exhibit 3 shows that Claimant received $12,005.76 in short-term disability payments from April 20, 2022 through October 18, 2022. Respondents are entitled to credit the amount of short-term disability benefits paid against TTD benefits owed.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence she is entitled to additional TTD benefits beginning March 4, 2022 and continuing through April 24, 2023. Such TTD benefits will terminate on April 25, 2023, the date of MMI per Dr. Shank.

2. Respondents shall be entitled to credit the amount of short-term disability benefits paid between April 209, 2022 and October 18, 2022 against TTD benefits owed.

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

4. Any issues not determined herein, or otherwise closed by operation of law, are reserved for future determination.

DATED: November 3, 2023

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-202-333-001

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that he sustained a compensable work injury on April 1, 2022?

- If Claimant suffered a compensable injury, are Respondents required to pay for medical benefits to cure and relieve the effects of the injury sustained on April 1, 2022?

PROCEDURAL STATUS

A Summary Order was issued by the ALJ on September 25, 2023 and served on September 27, 2023. On October 11, 2023, Respondents requested a full Order. Neither Claimant nor Respondents filed Amended Proposed Findings of Fact, Conclusions of Law and Order. This Order follows.

FINDINGS OF FACT

1. Claimant was hired on about December 14, 2021 and worked as a security guard for Employer.

2. He testified that he monitored the hallways, reported on incidents and called the police when necessary. Claimant said he worked 32 hours per week.

3. The medical records admitted at hearing showed Claimant treated for migraine headaches and an impinged disk on February 20, 2021 and July 29, 2021. No respiratory issues were noted in those evaluations, although he was congested at the latter appointment. Claimant testified that he had not experienced cardiovascular problems prior to 2022.

4. On September 16, 2021, Claimant was treated for migraines and a sinus infection. He underwent a CT of the maxillofacial sinuses and the films were read by David Dungan, M.D. Dr. Dungan's impression was: filling of the right, ostiomeatal complex and front recess with near complete filling of the right maxillary and anterior ethmoid sinuses. No adjacent intraorbital or facial swelling or fluid collection was present that would suggest transosseous spread of infection. Claimant was also evaluated by John Winkler, M.D that day, who diagnosed a sinus infection.

5. Claimant testified he has been a smoker, but never suffered from shortness of breath prior to the April 2022 incident. The medical records that predated the injury did not reference treatment for chronic shortness of breath.

6. On April 1, 2022, Claimant was working his shift, and went to the office after walking through the property. Claimant testified that he walked by a coworker ([Redacted, hereinafter ML]), who sprayed two bottles of cleaner and the fan in the room blew it directly into his face. Claimant said he immediately felt that his eyes were irritated and went to the bathroom to try to rinse them with water. Claimant testified he also felt his lungs tighten up.

7. Claimant prepared a written description of the incident titled ”incident report” on April 2, 2022. He placed the time of the incident at approximately 2300 hours.

8. The ALJ reviewed the video of the incident on the day in question. The video depicted Claimant and his coworker in the office and showed the coworker spraying bottles into the air. The ALJ found that the video corroborated Claimant‘s version of the events that evening.

9. There was no evidence in the record that Claimant was referred to an Authorized Treating Physician after the incident on April 1, 2022.

10. [Redacted, hereinafter RS] testified as a representative of Respondent-Employer. She works for a [Redacted, hereinafter GY] as the regional manager for Colorado and Wyoming, which is the new owner. RS[Redacted] previously worked at [Redacted, hereinafter MS] starting in 2015. In that capacity, she checks on the properties, review safety, and training.

11. RS[Redacted] testified that she did not know whether ML[Redacted] (Claimant’s coworker) was trained about the location of the MSDS sheets and proper use of those chemicals. RS[Redacted] stated one chemical was used to clean and the other was to make things smell good. She did not believe anyone had mixed Clorox in with cleaning chemicals, as the head housekeeper or laundry person fills up the chemical bottles.

12. RS[Redacted] testified that the laundry person has been there for 6 to 7 years and the head housekeeper had been there for some time. There is a machine in the laundry area that fills up the cleaning bottles. She was not aware of any incident in which Clorox or bleach was mixed into the cleaning materials.

13. Claimant was treated at the Medical Center of Aurora April 1, 2022 (with initial testing started at 23:48 p.m.) and the medical records noted that instructions for eye irrigation were given. Claimant was evaluated by Gilbert Pineda. M.D., who noted the chemical agents appeared to be a noncontrasted disinfectant and a static air freshener. Claimant symptoms of shortness of breath and dyspnea. Claimant also

reported a migraine headache after his arrival. Dr. Pineda reviewed the X-rays taken at that time, which showed no radiographic evidence for acute cardiopulmonary disease. Fluoresecein Sodium eye drops were used at the Emergency Department as a diagnostic agent and Proparacaine HCL was administered when Claimant was discharged.

14. Dr. Pineda's clinical impression was: chemical exposure of the eye, with a secondary diagnosis of exposure to chemical inhalation, inhalation of a cleaning agent, and a migraine headache. Dr. Pineda prescribed Albuterol. Claimant was discharged, with the last documented test at 04:56 a.m. Claimant was advised to make an appointment for follow-up care. The ALJ concluded that Claimant required this treatment because of the chemical exposure at work.

15. On April 9, 2022, Claimant was evaluated by Shawn Zemlicka, P.A. at Kaiser Permanente (Urgent Care) for shortness of breath, as well as fatigue since the incident. PA Zemlicka opined that Claimant's symptoms could be the result of exposure to hazardous chemicals. Claimant was prescribed Ventolin for his symptoms.

16. Claimant was evaluated by Shannon Lee, M.D. at Kaiser on April 11, 2022. Dr. Lee's diagnoses were: shortness of breath; exposure to potentially hazardous chemicals. Dr. Lee noted that the pulmonary examination was unremarkable and ordered spirometry, which was competed on April 13, 2022. Dr. Lee also prescribed Prednisone. The ALJ concluded that Claimant was evaluated and prescribed medication because of the chemical exposure at work.

17. Claimant his burden of proof and established by a preponderance of the evidence that he was injured as a result of the chemical exposure on April 1, 2022.

18. On April 13, 2022, Dr. Lee noted the spirometry testing showed an obstructive pattern consistent with asthma and referred Claimant for a pulmonology consult. Dr. Lee ordered pulmonary function testing on April 25, 2022.

19. Claimant was evaluated by Suzanne Fishman, M.D. on April 26, 2022, whose diagnosis was: reactive airway disease-unspecified. He was evaluated by Andrew Port, M.D on May 3, 2022, who ordered a nebulizer for use at home. At a follow-up telemedicine appointment on June 9, 2022 with Ozioma Gab-Ojukwu, M.D. Claimant noted he was still experiencing shortness of breath and treating with a pulmonologist. The ALJ credited the opinions of the Kaiser physicians that the shortness of breath and other symptoms were caused by the workplace exposure on April 1, 2022 and that Claimant required testing/treatment.

20. Claimant met his burden of proof and established he required medical treatment because of his work injury.

21. An Employer‘s First Report of Injury ("E-1") was prepared under about April 14, 2022 by [Redacted, hereinafter CK]. The E-1 stated a coworker, sprayed clinic

chemicals in employee‘s face and the employee suffered chemical burns to eyes, face, and lungs.

22. A Notice of Contest was filed on behalf of Respondents and further investigation was listed as the reason the claim was contested/denied. Respondents’ cover sheet for the exhibits specified that this pleading was served on May 6, 2022, although the Court‘s copy did not have a completed certificate of mailing.

23. Claimant was taken off work from May 6 through May 20, 2022 (Exhibit K, p. 96.) There was no evidence that any of the physician who treated Claimant took him off work or issued restrictions after May 20, 2022.

24. The ALJ found that the time Claimant missed from work was caused by the work injury.

25. There was no indication in the medical records admitted as hearing that Claimant received additional medical treatment after June 2022.

26. Dr. Lesnak performed an independent medical examination at the request of Respondents on July 22, 2022. Claimant reported he had difficulty breathing and shortness of breath at nighttime, as well as constant fatigue. Dr. Lesnak stated the physical examination of Claimant was within normal limits and he did not find any abnormalities with Claimant’s breathing.

27. Dr. Lesnak opined that Claimant had no reproducible objective findings on examination. He stated Claimant’s pulmonary and cardiac examination did not reveal any abnormalities. Dr. Lesnak said that although there may have been an incident on April 1, 2022, there was no medical evidence to support that Claimant had any medical diagnoses or evidence of any type of injuries that would pertain to the occupational incident.

28. Dr. Lesnak also said that there were appear to be significant psychosocial/psychological issues pertaining to Claimant that may be responsible for his current symptoms. Dr. Lesnak stated Claimant‘s prognosis was excellent, even though he had a myriad of subjective complaints. Dr. Lesnak opined that because there was no evidence Claimant sustained injuries, his status with regard to MMI was not applicable. He did not believe Claimant required additional medical treatment. The ALJ credited this opinion regarding the need for additional treatment, as there was no evidence in the record that Claimant received additional medical treatment after June 2022.

29. Dr. Lesnak testified as an expert witness, and his testimony was consistent with the findings at the time of the IME. Dr. Lesnak testified that he did not question that there was a reported incident on April 1, 2022, but did not have any medical evidence to support Claimant suffered injuries as a result of the incident. (Lesnak Dep. Tr. p. 13:3-6). Dr. Lesnak stated that he thought the emergency room

physician prescribed Claimant Albuterol based on his subjective complaints and not reproducible objective findings. (Lesnak Dep. Tr. p. 16:4-14).[1] He also said Claimant's prescription was continued and a nebulizer was also prescribed based purely on his subjective complaints and not on objective findings by physicians at Kaiser. (Lesnak Dep. Tr. p. 17:25-18:11).

30. Dr. Lesnak opined that Claimant reached MMI as of July 22, 2022 when there were no reproducible findings on exam. (Lesnak Dep. Tr. p. 13:19-14:1). He did not believe there was any basis for an impairment rating, as there were no objective findings or test results upon which to base an impairment. (Lesnak Dep. Tr. p. 14:2-10). The ALJ credited the opinions of the treating physicians over those offered by Dr. Lesnak.

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

CONCLUSIONS OF LAW

General

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

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

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

[1] Dr. Lesnak admitted he was not an emergency room physician and did not have that certification. He was testifying from his experience approximately 30 years ago.

P.2d 1205 (1936); CJI, Civil 3:16 (2005). The issue of compensability turned on the credibility of the witnesses.

Compensability

In the case at bar, Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S. (2020). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As a starting point, the evidence first established Claimant was working on April 1, 2022. In this regard, Respondents did not dispute that an incident occurred that day; namely that Claimant was sprayed with chemicals by a coworker. (Findings of Fact 6-8). As found, the incident in question was corroborated by video taken that evening. *Id.* The ALJ concluded Claimant suffered a compensable injury when he was sprayed with an identified chemicals on April 1, 2022. (Finding of Fact 17). As found the chemical exposure required Claimant to seek medical treatment, which he received both at Kaiser Permanente and Aurora Medical Center. (Findings of Fact 13-16).

Second, the ALJ determined the chemical exposure required medical treatment with treating physicians prescribing medications, including eye drops and prednisone. Thus, Claimant established by a preponderance of the evidence that it was more likely than not that he was injured as a result of the chemical exposure on April 1, 2022. This was based upon the reports of the physicians treating Claimant. These documented both symptoms and treatment by the physicians. The ALJ credited the opinions of these physicians that the shortness of breath and other symptoms were caused by the workplace exposure on April 1, 2022. The ALJ also credited the opinions of the treating physicians that Claimant required testing and treatment after the incident. (Findings of Fact 17-19). Under these facts, the ALJ concluded there was a requisite causal connection between the incident of April 1, 20022 and Claimant's symptoms/need for treatment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

In coming to this conclusion, the ALJ considered Respondents' argument that while the incident occurred, it did not cause an injury. Respondents averred the physicians treated Claimant for his subjective complaints alone and there was no evidence of objective findings or need for treatment. Respondents cited Dr. Lesnak's report and testimony in support of their argument. As found, the incident of April 1,

2022 required Claimant to seek treatment and he required evaluations/treatment for a period of at least two months after the incident. Therefore, the ALJ concluded Claimant met his burden of proof in the case at bench.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In the case at bar, the ALJ concluded Claimant met his burden of proof to show that his required medical treatment as result of the work injury. (Finding of Fact 20). Respondents are therefore liable to pay for treatment to cure and relieve the effects of the injury. This includes the treatment at Medical Center of Aurora and Dr. Pineda and Kaiser Permanente as well as referrals from those providers.

ORDER

It is therefore ordered:

1. Claimant is entitled to benefits under the Colorado Workers' Compensation Act, as he suffered a compensable injury on April 1, 2022.

2. Respondents shall pay for Claimant's medical treatment at Medical Center of Aurora and Dr. Pineda and Kaiser Permanente as well as referrals from the providers, pursuant to the Colorado Worker's Compensation Medical Fee Schedule.

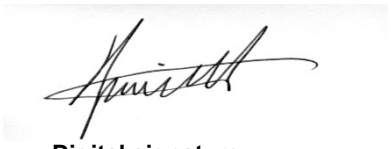
3. All other issues are reserved for later determination.

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

access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 3, 2023

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-291-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course of his employment with Employer?

- If Claimant has proven a compensable occupational disease, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the Claimant from the effects of the occupational disease?

- If Claimant has proven a compensable occupational disease, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of January 15, 2023 through March 23, 2023?

FINDINGS OF FACT

1. Claimant was employed by Employer as a painter. Claimant is 42 years old and has worked for Employer off and on since he was a teenager. Employer is a painting company that is owned and operated by Claimant's brother. Claimant testified that his work with Employer included residential painting with some commercial property painting.

2. Claimant testified that his job duties for Employer included using sprayers and brushes to apply paints, primers, lacquers, lacquer thinners, muriatic acid, sealants, epoxy, stains and paint removers. Claimant testified he worked with sprayers approximately 50% of the time compared to brushes. Claimant testified he worked outdoor 40-50% of the time and exterior work was performed in the Summer. Claimant testified he worked 38-50 hours per week and more than one-half of that time was spent working with chemicals.

3. Documentation entered into evidence at hearing along with testimony from Claimant and Employer establish that Claimant worked for Employer for short periods in 2016 and 2017, from April 2018 through August 2020 and from March 2021 through January 2023. Claimant testified he went to work for a property company and performed mold mitigation beginning in 2019. Claimant testified he wore full body protection when performing mold mitigation. Claimant testified he left that job because he was asked to do things he was not comfortable with.

4. With regard to Claimant's work for Employer, Claimant testified that Employer failed to provide Claimant or other employees with protective gear. Claimant

testified he would have to purchase his own masks and respiratory cartridges on their own, although the owner, CK[Redacted], occasionally would purchase masks and respirator cartridges for Employees. Claimant testified that when he asked Employer to provide additional protective gear, he was told by Employer that Employer was "losing money" and Claimant needed to "man up" and "get the job done".

5. CK[Redacted] testified at hearing in this matter. [Redacted, hereinafter CK] testified that he employs four people currently and has employed up to eleven employees. CK[Redacted] testified that his policy was to have his employees wear respirators 100% of the time that the employees are exposed to chemicals. CK[Redacted] testified that employees were allowed to get respirator cartridges at the [Redacted, hereinafter SW] store and put the cost of the respirators on Employer's account with SW[Redacted].

6. With regard to this conflict in the testimony as to whether Claimant was provided with personal protection equipment by Employer or needed to pay for his equipment himself, the ALJ credits the testimony of Employer over Claimant.

7. Claimant testified that he began having issues with his lungs dating back to 2018. Claimant reported in his medical records that he had started smoking at age 16. Claimant testified at hearing that he may have started smoking earlier than age 16. Claimant testified he smoked a pack of cigarettes every 2-3 days until age 38. Claimant testified he had a history of marijuana use that lasted from age 21 to age 34. Claimant testified he began using meth after his mother passed away and used meth for 6-7 years. Claimant testified he would occasionally smoke meth, but the main way he would consume meth was by snorting or eating meth. Claimant testified he didn't smoke cigarettes very often when smoking meth.

8. Claimant testified that in 2021 he experienced tightness in his lungs, shortness of breath, coughing, and burning in his lungs. Claimant testified he would experience these symptoms right away when working with muriatic acid. Claimant testified he went to the Pagosa Springs Medical Center when he experienced these symptoms.

9. Claimant's medical records document that Claimant sought medical treatment with Dr. Orndorff at Mercy Medical Center in Durango in May 2016 for a cough. Claimant underwent a chest x-ray that showed no chest abnormality. Claimant was evaluated by Dr. Washburn in May 2018. Claimant underwent a computed tomography ("CT") scan of his lungs that showed bilateral pulmonary nodules measuring up to 7 mm. Spirometry tests per1ormed on June 25, 2018 were noted to be normal. It was recommended that Claimant return for follow up CT scan in 12 months. Claimant reported he was able to per1orm his job painting without any difficulties. Claimant reported he only recently started using respiratory protection while at work.

10. Claimant underwent an x-ray of the chest on January 16, 2020. The x-ray showed no radiographic evidence for acute cardiopulmonary disease. Claimant underwent a CT scan of the chest and sinuses on January 23; 2020. The CT scan showed right lower pulmonary nodules that were unchanged since the May 4, 2018 CT

scan. The CT scan of the sinuses showed mild polypoid opacification posterior ethmoid air cells and inferior maxillary sinuses.

11. Claimant returned to Mercy Medical Center on July 22, 2022 with complaints of a cough and shortness of breath as well as some back pain. Claimant reported he did not smoke and worked around chemicals, but does use a respirator. Claimant complained of some pain and numbness down his right leg in addition to the back pain. Claimant was referred for a magnetic resonance image ("MRI") of the low back and x-rays of the chest. Claimant was prescribed medications for his back pain.

12. Claimant returned to Pagosa Springs Medical Center on August 8, 2022 with complaints of marked fatigue having trouble getting through a workday, visual blurring off and on throughout the day helped somewhat by glasses, trouble with concentration and memory, weakness in the extremities to where he has to stop and rest along with complaints of numbness and tingling distally in the extremities and intermittent muscle spasm. Claimant reported he had worked as a painter for over 25 years and therefore has had a lot of exposure to paint, solvents, and other products that are involved in his profession. Claimant reported that several years ago, "they all started wearing respirators." Claimant reported he had a history of some lung "nodules". Dr. Bentley, the examining physician, noted that his "first bet" is that due to Claimant's marked ongoing anxiety and perhaps for other stressors, that we are dealing with a somatization disorder. Dr. Bentley explained that this meant that by producing too much adrenaline type chemical influence in his system, it interteres with other daily important functions and that treating the anxiety and stress could *very* much help his physical symptoms. Dr. Bentley also noted that another possibility would be that of gradual or significant toxic exposure over the years. Dr. Bentley noted he was not exactly sure how to tie in his complaints of the lung problem, but recommended Claimant undergo a toxicology consultation.

13. The ALJ notes that Claimant's report to Dr. Bentley on this visit that "they all started wearing respirators" several years ago is consistent with Employer's testimony at hearing that the respirators were provided by Employer for the employees. The ALJ notes that if Claimant were providing his own personal protection equipment, he likely would not have referred to the use of the equipment in the plural sense of "they all started wearing" . The ALJ takes this into consideration when considering the credibility of the conflicting testimony between Claimant and Employer.

14. Claimant returned to Pagosa Springs Medical Center on September 7, 2022 with multiple concerns, including low back pain with bilateral leg weakness and numbness intermittently. Claimant reported he had a spinal fusion about 9 years ago and "it has progressively gotten worse". Claimant reported he was having trouble working because of the pain. Claimant also reported still having right knee pain and noted he had knee surgery with Dr. Webb not long ago. Claimant also requested a referral to pulmonology at National Jewish. Claimant reported he had "reactive airway for his lungs" and felt it was related to chemical exposure at work as a painter. The Medical Center noted that Claimant had some lung nodules that were followed with

repeat CT scans that did not change, but Claimant was still very nervous that there was something wrong with the nodules.

15. Claimant was initially evaluated at National Jewish Health Center on December 1, 2022 at which time he underwent spirometry testing by Mr. Townsley. Claimant was examined by Dr. Pacheco with National Jewish Health Center on December 2, 2022. Dr. Pacheco noted in her report that Claimant had symptoms over the past 7-8 years that have gradually gotten worse in severity. Claimant reported that he gasps for air when moving ladders at work and often needs to stop to catch his breath. Claimant reported he gets short of breath with bending over to pain baseboards, while walking on level ground, and occasionally at rest. Claimant reported that stopping to perform deep breathing exercises seems to help his dyspnea after 10- 20 minutes. Claimant reported a feeling of chest tightness with dyspnea, and on rare occasion, develops sharp, non-radiating, substernal chest pain that self resolves after a few minutes. Claimant reported to Dr. Pacheco that he notes a significant difference when spraying paints and lacquer products. In particular, Claimant noted the greatest amount of chest burning when spraying lacquer with a spray gun. Dr. Pacheco noted that Claimant's primary care provider had started him on a Flovent inhaler for maintenance and albuterol inhaler as needed. Claimant reported not noticing any improvement with his symptoms from using the albuterol once daily and the Flovent 1-2 times per week. Claimant reported a history to Dr. Pacheco of smoking 2-4 cigarettes per day currently.

16. Dr. Pacheco ordered various testing to be performed, and following the testing, diagnosed Claimant with "asthma with positive methacholine challenge testing (PC20 FEV1 <0.0625 mg/ml). Dr. Pacheco noted Claimant had occupational exposures during 25 years as a painter including aerosolized lacquer with added catalysts, urethane and acrylic latex paint, paint primers, painVlacquer thinners, two-part industrial epoxies and spray foam insulations. Dr. Pacheco noted Claimant had other occupational exposures include mold for one year in 2019 working for a mold mitigation company. Dr. Pacheco noted that Claiimant would pick up the lacquer from SW[Redacted] where a store worker adds a catalyst prior to purchase, and Claimant would load the lacquer into a spray gun machine and spray it onto wood surfaces. Claimant reported he used to apply 55 gallons of lacquer in a single day.

17. Dr. Pacheco noted that the pulmonary function tests were normal, but methacholine challenge was strongly positive (PC20 FEV1 < 0.0625 mg.ml) indicting a diagnosis of asthma. Dr. Pacheco noted that she was concerned for work-related asthma from his workplace exposures, especially the lacquers, urethane paints, and primers. Dr. Pacheco ultimately diagnosed Claimant with asthma with positive methacholine challenge most likely work-related from Claimant's occupational exposures. Dr. Pacheco requested Claimant perform Peak Expiratory Flow Response ("PEFR") measurements of his breathing four times daily at work and away from work to compare Claimant's breathing ability in both places.

18. Claimant returned to Dr. Pacheco on December 16, 2022. Dr. Pacheco reviewed Claimant's PEFR data and noted that Claimant's breathing ability decreased

at work compared to at home. Dr. Pacheco noted that Claimant's PERF demonstrated a 20% or more decline in his measurements while at work compared to at home. Dr. Pacheco opined that Claimant was suffering from asthma that was caused by his work related exposures to various products at work.

19. Claimant testified that after he was advised by Dr. Pacheco that his asthma was work related, he decided to file a Workers' Claim tor Compensation. Claimant testified he initially asked his brother to file the claim for him, but when Employer failed to file the claim, he filed the Workers' Claim for Compensation. The Workers' Claim for Compensation was filed on January 24, 2023.

20. CK[Redacted] testified at hearing that when his brother advised him that he had a work injury, CK[Redacted] initially believed he was referring to a back injury. CK[Redacted] testified that after his brother filed the Workers' Claim for Compensation, he asked Insurer to look into whether the claim was valid. A Notice of Contest was filed on February 7, 2023.

21. Claimant returned to Pagosa Springs Medical Center on February 7, 2023 and was evaluated by Physician's Assistant ("PA-C") Mashburn. PA-C Mashburn noted that Claimant had been diagnosed with work-related asthma by National Jewish Health. Ms. Mashburn noted that National Jewish had provided Claimant with a note to avoid all pain and paint product exposure while working, but his employer did not have any desk jobs for him so he had been unable to work. PA-C Mashburn noted she was referring Claimant to a Level II accredited physician for his workers compensation case.

22. Claimant returned to Dr. Pacheco on February 10, 2023 and reported that he had some improvement in his symptoms and had not returned to work. Dr. Pacheco noted that Claimant's PEFR data showed values between 400-500 Uminute, though they tend to vary by no more than 40ml across a single day. Dr. Pacheco continued to provide a diagnosis of work-related asthma. Dr. Pacheco noted that the chest CT scan showed subtle centrilobular nodules that suggest a diagnosis of respiratory bronchiolitis from cigarette use, but noted this diagnosis would not cause a positive methacholine challenge or acute peak expiratory flow decline while at work.

23. Respondents obtain an independent medical examination ("IME") with Dr. Jeffrey Schwartz on April 19, 2023. Dr. Schwartz reviewed Claimant's medical records, obtained a medical history and performed a physical examination, which included spirometry testing, as part of his IME. Dr. Schwartz also requested a complete copy of the data from National Jewish Health with regard to the methocholine challenge test.

24. Dr. Schwartz issued a report dated June 5, 2023 that noted issues with regard to the methacholine challenge testing results, which included that the methacholine challenge test showed the volume-time curves for each of Claimant's FVC efforts during the test. Dr. Schwartz noted that the two lower curves represented Claimant's reported FVC maneuvers performed after Claimant inhaled methacholine. Dr. Schwartz noted that it was noteworthy that Claimant's two volume-time curves for his post-methacholine tests showed obvious differences which should not occur if

Claimant's efforts are reproducible under ATS standards. Dr. Schwartz reported that the numerical data for Claimant's post-methacholine spirometries showed Claimant preformed three FVC maneuvers in the minute after his methacholine dose but Claimant's report showed his best effort, based on his FVC and FEV1 at 12:21:55, did not have the accompanying flow-volume curve required per ATS quality confirmation. Dr. Schwartz opined that based on the two post-methacholine FEV1s with accompanying flow-volume curves which showed a difference of 210 ml, Claimant's "positive test" was not acceptable because it failed the reproducibility criterion, and, therefore, there was no evidence Claimant's low post-methacholine spirometry values represented maximal expiratory efforts. Dr. Schwartz hypothesized that Claimant's failure to perform reproducible spirometry after he inhaled methacholine was not a result of possible asthma, but likely represented Claimant's malingering, as Claimant was able to perform reproducible expiratory efforts before and after his immediate post- methacholine testing. Dr. Schwartz further noted that Claimant's post-methacholine spirometry did not show the airflow obstruction expected with Claimant's significant fall in FEV1, a finding that would be typical of poor inspiratory or expiratory efforts that lead to a reduced FEV1 but a normal FEV1/FVC.

25. Dr. Schwartz testified consistent with his IME report at his deposition in this matter. Following Dr. Schwartz' testimony in this matter, Claimant presented the rebuttal testimony of Dr. Pacheco. Dr. Pacheco testified that the methacholine challenge test is the gold standard test for asthma. Dr. Pacheco testified that she did not agree that the methacholine challenge test results were not acceptable. However, Dr. Pacheco noted that the test results were interpreted by a pulmonologist, and Dr. Pacheco relied on the pulmonologists judgment that the test was acceptable.

26. Dr. Pacheco took issue with Dr. Schwartz' conclusion that the test results of the methacholine challenge test were influenced by Claimant's effort during the test and noted that Claimant would not know which test he was not to perform well at during the administration of the test. Dr. Pacheco testified on cross-examination that she relied on interpretation of data that had been performed by other people in her office, including the technician performing the test and the pulmonologist.

27. Dr. Schwartz testified on sur-rebuttal and reiterated his testimony that the methacholine challenge test did not meet the ATS testing standards. Dr. Schwartz noted that it appeared that Dr. Pacheco was given improper information as to whether the Claimant met the ATS standards in the methacholine challenge test. Dr. Schwartz testified that it appeared that Claimant's one positive test for asthma was based on improper testing, as all of Claimant's other testing was normal.

28. The ALJ credits the testimony of Dr. Schwartz and finds that the methacholine challenge test resulted in findings that did not meet the ATS testing standards. The ALJ notes that the testimony of Dr. Pacheco does not establish that the findings of the methacholine challenge test should be relied upon in light of the failure to meet the ATS testing standards. The ALJ therefore credits the testimony of Dr. Schwartz over the conflicting testimony of Dr. Pacheco and finds that Claimant has

failed to establish that it is more probable than not that Claimant is suffering from work related asthma.

29. Based on the finding that Claimant has failed to establish that he is suffering from work related asthma, the ALJ need not address the issue of whether the condition is related to Claimant's employment with Employer.

CONCLUSIONS OF LAW

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

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2022. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

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

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational

disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin* & *Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992).

6. As found, the ALJ credits the testimony and opinions expressed by Dr. Schwartz over the conflicting testimony and opinions by Dr. Pacheco and finds that Claimant has failed to establish by a preponderance of the evidence that he contracted work related asthma as a result of an occupation disease Claimant sustained at work with Employer. As found, the testimony and opinion of Dr. Schwartz that the methacholine challenge test findings were based off of test results that did not meet ATS standards is found to be credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits for an occupational disease related to his work with Employer is denied and dismissed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dp/oac/forms-WC.htm. In **addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac:9it@state.co.us.**

DATED: November 6,, 2023

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-221-180-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with employer on or about March 5, 2022.

2. If compensable, whether Claimant established by a preponderance of the evidence entitlement to temporary disability benefits.

3. If compensable, whether Claimant established by a preponderance of the evidence that right shoulder decompression surgery is reasonable and necessary to cure or relieve the effects of an industrial injury.

4. If compensable, determination of Claimant's authorized treating physician.

5. If compensable, determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 67-year-old woman who worked for Employer as a warehouse worker, beginning in September 2020. (Ex. 3). Claimant previously worked for Employer in Nashville, Tennessee in 2018 and 2019. Claimant's job required her to prepare products for delivery by drivers by selecting products from the warehouse, placing them into a "tote," and taking the loaded totes to a station for delivery drivers. Claimant testified that on March 5, 2022, she was retrieving a tote from an overhead shelf when she felt a "pull" and pain in her right shoulder.

2. Claimant testified she reported the incident to her "lead" who instructed her to take ibuprofen and ice her shoulder. Claimant testified the lead did not ask Claimant to complete paperwork, and did not provide her a list of places to obtain medical treatment. Claimant did not work the following day due to her shoulder pain, and was not scheduled to work the next three days. She returned to work on Thursday, March 10, 2022, and continued to work after returning. Claimant's time records from this period show Claimant worked approximately 24 minutes on Sunday, March 6, 2022, and took voluntary time off the remainder of the day. Claimant returned to work on Thursday, March 10, 2023, and worked approximately four hours. (Ex. 9). Claimant continued to work after March 10, 2022, but did not work full shifts.

3. She testified that by the first week of April 2022, she continued to have pain and sought treatment at Peak Vista on April 4, 2022. At that visit, Claimant saw Iana Shamah, PA-C, and reported upper back, shoulder, and hand pain. Claimant did not report a specific injury causing her shoulder pain, and reported an onset of one month earlier, the record states "Context: no injury," and no mechanism of injury was discussed. Claimant's symptoms were aggravated by lifting and movement, and diagnosed her with a right

shoulder sprain. Although Ms. Shamah documented an assessment of "generalized body aches," Claimant's examination was focused on her right shoulder, and demonstrated limited strength and motion in the right shoulder, with tenderness to palpation and pain on motion. Examination of Claimant's left shoulder, spine, neck, and hands was normal. A right shoulder x-ray showed mild arthritis in the glenohumeral and acromioclavicular joints. Claimant was instructed to take ibuprofen and Tylenol for discomfort, and to return if her symptoms did not improve. Claimant declined a physical therapy referral. No work restrictions were imposed. (Ex. C).

4. Claimant returned to Peak Vista on April 26, 2022, reporting that her right shoulder pain was constant and worsening. She reported an onset two months earlier, with aching, and sharp pain. The record again documents "no injury." Ms. Shamah recommended an MRI of the right shoulder and referred Claimant for an orthopedic evaluation. (Ex. C).

5. The right shoulder MRI performed on May 31, 2022, was interpreted as showing age-related rotator cuff tendinosis, partial-thickness tearing of the proximal supraspinatus, intrasubstance tearing within the distal tendon; and osteoarthritic changes in the glenohumeral joint with small effusion, biceps tendinitis. (Ex. E).

6. Claimant returned to Peak Vista on June 3, 2022, reporting continued right shoulder pain. Claimant had begun physical therapy and noted that it helped . (Ex. E).

7. On June 7, 2022, Claimant saw Richard Stockelman, M.D., at Colorado Springs Orthopaedic Group, reporting reported right shoulder pain in the superior aspect that began insidiously and was worse with reaching and use of the right arm. Claimant had been in physical therapy for 6 weeks and noted that treatment to date had not resolved her pain. Dr. Stockelman reviewed Claimant's MRI and diagnosed Claimant with right shoulder pain, subacromial bursitis, rotator cuff tendonitis, and acromioclavicular joint degeneration. Dr. Stockelman performed a right shoulder subacromial steroid injection, and recommended Claimant return in three weeks. (Ex. 6).

8. On June 29, 2022, Claimant returned to Dr. Stockelman reporting three-days relief from the subacromial injection, but no lasting benefit. Dr. Stockelman prescribed an oral steroid and scheduled a follow up in three weeks. (Ex. 6)

9. On July 20, 2022, Claimant saw Dr. Stockelman and again reported no change in her symptoms. She indicated she would pursue a workers' compensation claim, because "she knows she is better when she is not going to work and doing all the lifting required in her job." Dr. Stockelman recommended proceeding with an arthroscopic subacromial decompression, but delayed performing the procedure until Claimant determined whether to pursue the treatment through workers' compensation or private insurance. (Ex. 6).

10. On August 5, 2022, Dr. Stockelman assigned Claimant work restrictions, and indicated her right shoulder condition was "thought to be secondary to overuse." The work restrictions included no lifting greater than five pounds overhead, no repetitive lifting or motions overhead, and a weight restriction of 10 pounds. He indicated the restrictions would remain in effect until October 1, 2022. (Ex. 6)

11. Claimant returned to Dr. Stockelman on October 3, 2022, requesting authorization to be off work for an additional two months, which the doctor provided. Claimant indicated she was considering surgery and pursuing a workers' compensation claim. Dr. Stockelman's impression was subacromial bursitis of the right shoulder. (Ex. 6). ON October 26, 2022, Dr. Stockelman completed a work restriction form for Employer indicating there were no accommodations that would permit Claimant to return to work until December 1, 2022. (Ex. 6).

12. On October 5, 2022, Claimant was seen at Peak Vista, and reported that she was trying to open a workers' compensation case. (Ex. D).

13. On November 15, 2022, Claimant saw Daniel Peterson, M.D., at Concentra. Claimant reported, for the first time, that the initial injury occurred at work while lifting boxes. Claimant reported that Employer did not offer medical care, so she saw her primary care provider at Peak Vista. On examination, Dr. Peterson noted tenderness in the acromioclavicular and glenohumeral joints, with limited range of motion in all planes. Claimant also had positive rotator cuff tests including painful arc, Hawkin's, Neer, and empty can tests, and positive biceps tests. He diagnosed Claimant with a traumatic incomplete tear of the right rotator cuff, a sprain of the right acromioclavicular ligament, and right shoulder arthritis. Dr. Peterson referred Claimant to Dr. Stockelman for evaluation and treatment as a workers' compensation case. Dr. Peterson noted claimant "clearly has pre-existing arthritis in her [right] shoulder but worked without difficulty for 17 months doing heavy lifting without any problem until March of 2022 when she started having marked [right] shoulder pain. Based on her [history] and her MRI she clearly has an exacerbation of a pre-existing condition to the point where she will need surgery for her right shoulder to return her to her prior function. I will refer her to Dr. Stockelman under WC to proceed with surgical repair." (Ex. 7).

14. Claimant saw Dr. Stockelman again on November 18, 2022, for a pre-surgical visit. On November 22, 2022, Dr. Stockelman requested authorization from Insurer to perform the recommended surgery. (Ex. D).

15. Claimant saw Dr. Peterson again on December 2, 2022, he noted that he did not believe Claimant was safe to return to work. On January 3, 2022, he opined that Claimant was approximately 25% of the way toward meeting the physical requirements of her job. (Ex. 7).

16. On January 31, 2023, Respondents filed a Notice of Contest, indicating that Claimant's injury was not work-related. (Ex. 4)

17. On February 22, 2023, Claimant filed a Workers' Claim for Compensation, alleging that she "was working on March 5, 2022, performing daily picking, stowing, and staging duties. I reached up over my head to pull a tote from the shelf and experienced a tightness in my muscle of right arm." Claimant indicated that she reported the incident to "[Redacted, hereinafter BE] also [Redacted, hereinafter JN]." (Ex. 3)

18. Claimant returned to Peak Vista on April 19, 2023, reporting continued right shoulder pain, and that she had not returned to work. Claimant reported her pain had improved, but she still could not lift, and her range of motion was poor. (Ex. 5).

19. Claimant has not had the surgery recommended by Dr. Stockelman and Dr. Peterson.

20. On July 11, 2023, Timothy O'Brien, M.D., performed a record review at Respondents' request. Dr. O'Brien was admitted as an expert in orthopedic surgery, and testified through deposition. Dr. O'Brien opined that Claimant did not sustain a work-related injury to her shoulder. He further opined that Claimant's MRI shows only age-related conditions, and no sign of an acute injury. He opined that the shoulder surgery recommended by Dr. Stockelman is reasonable, although he believes it is not work-related and unlikely to completely relieve Claimant's symptoms. Dr. O'Brien's opinions regarding causation of Claimant's injury are not persuasive.

21. Claimant testified that she has not had any right shoulder symptoms or treatment in the five years before March 5, 2022, and was able to perform her job duties. Claimant testified that after March 5, 2022, she continued to perform her job, but her shoulder condition continued to worsen, so she worked reduced hours. Claimant's wage records indicate that she averaged approximately 42.5 hours per week in the 14 weeks before March 5, 2022, and approximately 30.5 hours per week in the 14 weeks after March 5, 2022. Claimant testified that in June 2022, she made an accommodation request and Employer placed her on a leave of absence. (No document evidencing the accommodation request was admitted into evidence).

22. On June 18, 2022, Claimant was placed on a leave of absence until October 2022. Claimant testified that Employer required her to take a leave of absence because they could not accommodate her work restrictions. Claimant attempted to return to work pm October 2, 2022, and was paid for 6.68 hours, according to her wage records. (Ex. 9). Claimant has not returned to work for Employer since October 2022.

23. Claimant testified that she reported to providers at Peak Vista and Dr. Stockelman, that she first experienced shoulder pain when lifting a tote off a shelf while working for Employer.

24. In position statements, Claimant and Respondent agree that Claimant's average weekly wage was $851.18. After reviewing Claimant's wage records, the ALJ finds this to be a fair approximation of Claimant's AWW.

CONCLUSIONS OF LAW

Generally

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

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury “has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee’s service to the employer in connection with the contract of employment.” *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm’n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int’l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No.4-894-311-03, (ICAO Apr. 9, 2014). All results flowing proximately and naturally from an industrial injury are compensable. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right shoulder arising out of the course of her employment with Employer. The ALJ finds credible Claimant’s testimony that she sustained an injury to her right shoulder on March 5, 2022, while working for Employer. When Claimant saw her Peak Vista on April 4, 2022, she reported an onset of her symptoms one-month earlier, which corresponds to her testimony. Moreover, Claimant's wage records correspond to her testimony that she took time off work the following day, and that she had difficulty working her full shifts after March 5, 2022.

Although, the several physicians documented “no injury” or an “insidious onset’ of her symptoms, this does not rule out a work-related injury. While the evidence is contradictory on whether the symptoms Claimant experienced on March 5, 2022 were caused by an acute injury, or the manifestation of an injury resulting from overuse, the evidence does establish an onset of symptoms arising out of the course of Claimant’s employment with Employer. That Claimant may have described different mechanisms of injury is not dispositive. Claimant is not required “to understand the exact mechanism of the injury to prove a compensable injury, nor is [a claimant] required to explain in the medical, physiological, or anatomical terms of an expert the way in which the accident resulted in the symptoms.” *In Re Montoya*, W.C. No. 4-633-835 (ICAO, April 26, 2006).

The ALJ finds credible the opinion of Dr. Peterson that Claimant aggravated a pre-existing condition in the course of her employment. Claimant credibly testified she had no right shoulder symptoms or treatment in the five years before March 5, 2022, and no credible evidence was admitted contradicting that testimony. Claimant had also performed her warehouse job for Employer for approximately three years in Colorado, and also from 2018 to 2019 for one of Employer’s facilities in Nashville, Tennessee. It is unlikely Claimant could have worked in her position with a shoulder injury.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Rule 8-2 (A)(2) clarifies that, "[a] copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." The term "business days" refers to any day other than a Saturday, Sunday, or legal holiday. W.C.R.P. 1-2 (C).

An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). If upon notice of the injury the employer does not timely designate an ATP, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987), *see also* W.C.R.P. 8-2 (E) ("If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing.")

Claimant's authorized treating physician is Dr. Peterson at Concentra. Claimant has failed to establish that Employer was aware of her work-related injury until sometime in October 2022. The record contains insufficient credible evidence to determine the date Employer became aware Claimant sustained a work-related injury. The ALJ does not find credible Claimant's testimony that she reported her work injury to Employer on March 5, 2022. Moreover, had Claimant reported a work-related injury, the ALJ finds it unlikely Employer would have required to take a non-workers' compensation leave of absence in June 2022.

The first credible evidence in the record that Claimant was considering pursuing a workers' compensation claim was July 20, 2022, when she informed Dr. Stockelman she intended to pursue a claim However, October 3, 2022, was the first time Claimant indicated she was actively pursuing a workers' compensation claim. Her previous reports to physicians were prospective statements of intent, but no indication she was actively pursuing a claim. A report in October 2022 is also consistent with Claimant first seeing Dr. Peterson at Concentra on November 15, 2022, and beginning treatment with him as her ATP. Dr. Stockelman became an ATP by virtue of Dr. Peterson's November 15, 2022 referral, and was an ATP after that referral, but not before. The treatment and evaluations Claimant received from Peak Vista were not provided by an ATP.

Specific Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and

is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Stockelman is reasonable, necessary and causally related to her industrial injury. The ALJ finds persuasive Dr. Peterson's opinion that Claimant requires surgery to address an aggravation or exacerbation of her pre-existing osteoarthritis. Dr. O'Brien agreed that the surgery was reasonable, but did not believe it was related to her injury. Having found the Claimant's injury compensable, and accepting that the surgery is intended to address the aggravation of her pre-existing conditions, the ALJ concludes that, more likely than not, the surgery recommended by Dr. Stockelman is compensable medical treatment.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Temporary disability benefits continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.; See also § 8-42-106 (1)(b), C.R.S. (for temporary partial disability benefits) The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) *citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

Claimant has established an entitlement to temporary disability benefits beginning March 6, 2022. The evidence demonstrates that Claimant was medically incapacitated due to her work-related injury, and sustained a loss of earning capacity for more than three work shifts. Claimant's wage records demonstrate that Claimant worked 2.97 hours the week following her injury. She was then able to return to work at a slightly diminished capacity for approximately 14 weeks, until she was placed on a leave of absence on June 18, 2022. No credible evidence was admitted indicating that the criteria for termination of temporary disability benefits has been satisfied. Respondents shall pay Claimant

temporary disability benefits from March 6, 2022 until terminated by statute, or order, subject to applicable offsets. Per agreement of the parties, what, if any, offsets are to be applied to Claimant's temporary disability benefits is reserved for future determination.

Per the request of the parties, the issue of offsets is reserved.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's average weekly wage (AWW) based on a claimant's monthly, weekly, daily, hourly, or other earnings. The overall objective in calculating the AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., *supra*; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007).

As found, the parties agree Claimant's AWW at the time of injury was $851.18. The ALJ has reviewed Claimant's wage records contained in Exhibits 9 and F, and finds that $851.18 is a fair approximation of Claimant's AWW at the time of injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to her right shoulder arising out of the course of her employment on or about March 5, 2022.

2. Claimant's authorized treating physician is Daniel Peterson, M.D. Richard Stockelman, M.D., became an authorized treating physician on November 15, 2022, by virtue of Dr. Peterson's referral.

3. Claimant's request for authorization of the surgery recommended by Dr. Stockelman is granted.

4. Claimant is entitled to temporary disability benefits from March 5, 2022, until terminated by statute or further order, subject to applicable offsets. The determination of amount and applicable offsets is reserved for future determination.

5. Claimant's average weekly wage is $851.18.

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

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

DATED: November 7, 2023

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

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury to his back in the course and scope of his employment on March 15, 2023?

2. If Claimant proved he suffered a compensable injury, did Claimant prove by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical benefits?

FINDINGS OF FACT

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

1. Claimant is a 62 year-old male who worked as a cashier for Employer. On Wednesday, March 15, 2023, Claimant was assisting an elderly customer who was refilling a five-gallon water bottle. Claimant credibly testified that he bent over to lift the water bottle to put it in her shopping cart. When he did this, he immediately felt a pop in his back. Claimant's supervisor, [Redacted, hereinafter RN], was next to him and saw the event. Claimant credibly testified that RN[Redacted] asked if Claimant needed a break. Claimant took a brief break and went to the bathroom. Shortly thereafter, he returned and completed his shift. (Tr. 11:16-25).

2. Claimant worked part-time for Employer. Claimant was not scheduled to work Thursday, March 16, 2023 or Saturday, March 18, 2023. Claimant continued to experience back pain, so he "called in" to work on Friday, March 17, 2023, and Sunday, March 19, 2023. (Tr. 12:6-13). Claimant credibly testified that he experienced immediate pain in his lower back, and later the evening of March 15, 2023, he began experiencing left leg symptoms. (Tr. 16:1-11).

3. Claimant testified that from March 15, 2023 to March 19, 2023 he tried home remedies for his back pain. He tried a heating pad, ice, over-the-counter medications like ibuprofen, Tylenol and patches, but these did not relieve his symptoms. (Tr. 12:14-19).

4. On Sunday, March 19, 2023, Claimant went to the Emergency Room at St. Anthony North Health Campus. He complained of left-sided low back pain and left leg pain that he had been experiencing since Wednesday, March 15, 2023. According to the medical records, Claimant reported that while at work, he lifted a large bottle of water, and developed left low back pain that radiated into his left leg. He described the pain as aching, sharp and throbbing. (Ex. 6 p. 10). In the same medical record, there is an ED Triage Note from Monica L. Monnin, describing Claimant as reporting that he "[c]ould have lifted something wrong at work, unsure what caused the pain which started

Wednesday." (Ex. 6, p.12). Claimant credibly testified that he consistently reported his mechanism of injury as lifting a five-gallon water bottle at work. (Tr. 25:4-9). The ALJ credits Claimant's testimony and does not find the triage note to be persuasive.

5. Maris Drazek, PA-C treated Claimant in the emergency room. She ordered lumbar spine x-rays and read them as showing Claimant having scoliosis and degenerative changes. Ms. Drazek diagnosed Claimant with acute left-sided low back pain with left-sided sciatica. She prescribed Claimant Robaxin, Gabapentin, and lidocaine patches, and advised Claimant to follow up with his PCP. She gave Claimant a note that he may return to work on March 23, 2023. (Ex. 6 pp. 9-10). Claimant credibly testified that he took this one-page note to his Employer on Monday, March 20, 2023. (Tr. 12:25-13:6 and 24:4-9). This testimony was uncontroverted.

6. Claimant credibly testified that while he was off of work, he called several chiropractors to try to get an appointment, and he called his primary physician to try to get an appointment. (Tr. 13: 7-11).

7. Claimant was able to schedule a chiropractic appointment with Kyle Zachgo, D.C, on March 20, 2023. Dr. Zachgo noted in the record that Claimant "comes in today with low back pain that started last week when he was lifting a bucket at work. He didn't feel pain initially but throughout the next few days he started noticing significant pain. He went to St. Anthony's yesterday to get looked at, they diagnosed [him] with sciatica and referred him to me. They gave him medication that did not help." (Ex. 8). As found, Claimant credibly testified that he consistently reported his mechanism of injury as lifting a five-gallon water bottle at work. (Tr. 24:21-25:9). The ALJ credits Claimant's testimony and does not find the reference to lifting a bucket at work to be persuasive.

8. At Claimant's March 20, 2023 chiropractic appointment, Dr. Zachgo performed dry needling, but noted Claimant did not respond well to care. (Ex. 8). This is consistent with Claimant's testimony that the dry needling did not relieve his symptoms. (Tr. 13:23-25).

9. Claimant returned to Dr. Zachgo on March 24, 2023 for a follow-up appointment, and reported having no improvement in his symptoms. Claimant testified he was unable to undergo manual manipulation because he was too sore and swollen. (Tr. 13:12-16). This is consistent with Dr. Zachgo's records that he performed no treatment, and suggested Claimant go to his primary care provider to get an MRI and possible injection to relieve his symptoms. (Ex. 8).

10. On April 10, 2023, Claimant went to the emergency room with chief complaints of urinary retention and flank pain. According to the medical record, Claimant was getting up seven times a night to urinate, and experienced pain with urination that radiated through his perineum to his back. At the emergency room, Claimant gave a urine sample without any difficulty. No emergent causes for his symptoms were identified. His urine test was normal and there was no evidence of infections or kidney stones. Claimant was given a urology referral, and he was advised to follow up with his primary care physician. (Ex. 6 pp. 15-21).

11. Claimant saw his primary care physician, Taylor Hart, M.D. on April 13, 2023, with a chief complaint of acute left-sided low back pain with left-sided sciatica. Dr. Hart was concerned about disc protrusion/herniation and nerve compression. Claimant also reported difficulty urinating over the past few weeks. Dr. Hart noted Claimant's recent low back pain, and Claimant's strong family history of prostate cancer. He did not have concern for acute cauda equine syndrome, but wanted Claimant to have a lumbar MRI. (Ex. 9).

12. On March 22, 2023, Claimant completed an "Employee Incident Questionable Claim Form." On the form, Claimant wrote he "was assisting a customer with P.O.S. I lifted a 5 gal water bottle to put in the cart." He listed the date of injury as March 15, 2022. The document was to be completed by store management, but it was completed by Claimant. (Ex. 14 p. 107).

13. Claimant's supervisor, RN[Redacted] , completed an Associate Incident Report Packet on March 22, 2023. [Redacted, hereinafter KS] signed the form on April 20, 2023 and wrote the following "updated/notified." (Ex. 14 p. 103). No evidence was offered to explain why KS[Redacted] signed the form on April 20, 2023, indicating that is when she was notified.

14. Claimant completed an "Associate Work Related Injury/Illness Report" on April 20, 2023. He noted an injury date of March 15, 2023, and stated "I was assisting a[n] elderly woman with a[n] [Redacted, hereinafter EO] 5 gallon exchange. I kneed [sic] down, pulled out the full water bottle and set in on the ground in front of the EO[Redacted] water station. The customer brought her cart closer and then I lifted it to her cart." There was no evidence offered as to why this form was not completed earlier. (Ex. 14 p. 108).

15. Employer's First Report of Injury was completed on April 20, 2023. According to the Report, Claimant injured his lower back on March 15, 2023 when he was lifting a water bottle for a customer, and he notified Employer of the injury to his lower back on March 20, 2023. (Ex. 2). The ALJ finds that Claimant notified Employer of his back injury on or about March 20, 2023.

16. Claimant went to Concentra on May 16, 2023, and was evaluated by ATP, Michelle Viola-Lewis, M.D. There is no objective evidence in the record as to why Claimant was not sent to Concentra before this date. Claimant explained to Dr. Viola-Lewis that on March 15, 2023, he was helping a customer with a five-gallon water bottle when he injured the left side of his lower back. Dr. Viola-Lewis recorded that he went to the emergency room initially because the pain kept him from sleeping. He also developed urinary retention and was referred to a urologist. She further noted that his May 15, 2023 MRI showed significant bulging of the L4 disc with impingement of the nerve root as well as degenerative changes in the L4-L5 area. Dr. Viola-Lewis referred Claimant to an orthopedic spine specialist and to physical therapy. She gave Claimant restrictions of being allowed to sit as needed, and no lifting, pushing, pulling or tugging greater than 10 pounds. On the WC164 Form, she noted Claimant's work-related medical diagnoses as: L4-L5 disc bulge, injury of sciatica nerve, and neurogenic bladder. (Ex. 10).

17. On May 18, 2023, Claimant had an MRI of his spine. The MRI showed a large extruded disc at L4-5 with severe stenosis in the left-sided neural foramen. This was also pushing on the cauda equine. The MRI also indicated degenerative disc disease. (Ex. 12).

18. ATP, Stephen Pehler, an orthopedic spine specialist, evaluated Claimant on May 18 and 29, 2023. Dr. Pehler noted that since the March 15, 2023 work-related injury, Claimant experienced increasing back pain with buttock and left greater than right lower extremity pain, and Claimant was having urinary retention and difficulty with voiding. Dr. Pehler concluded Claimant had evolving symptoms of cauda equine syndrome from a large disc herniation, spinal stenosis and a spondylolisthesis. He believed Claimant's condition was severe and approaching a critical nature. Dr. Pehler opined that proceeding with conservative care was contraindicated. He and Claimant discussed moving forward with decompression fusion with interbody placement at the L4-5 level. Dr. Pehler also made sure Claimant was aware that if his symptoms of cauda equine syndrome evolved, he would need emergent surgery. (Ex. 11).

19. Claimant returned to Concentra on May 26, 2023 for a follow-up appointment. Nathan Adams, P.A. noted in the medical record that Claimant saw Dr. Pehler who recommended surgery, and felt physical therapy would not be helpful. (Ex. 10).

20. On June 12, 2023, Respondent filed a Notice of Contest asserting Claimant's injury was not work-related. (Ex. L)

21. Claimant saw Qing-Min Chen, M.D., an Orthopedic Surgeon, for an Independent Medical Examination on July 1, 2023. Dr. Chen evaluated Claimant and conducted a records review. Claimant denied any prior symptoms or issues with his back. (Ex. A).

22. Dr. Chen opined that based on the May 13, 2023 MRI, Claimant had bone marrow edema at L4-5 endplates suggestive of chronically degenerated discs. According to Dr. Chen this "suggests the claimant already had a compromised disc and a compromised annulus." He further opines "the mechanism of injury could have caused this particular issue in an otherwise compromised disc. In a normal healthy spine, this would not have occurred." (Ex. A).

23. Dr. Chen ultimately opined that the surgery recommended by Dr. Pehler is reasonable and necessary, but is not related to the claim. In Dr. Chen's opinion, '[t]his is just a natural progression of claimant's underlying disease. Disc herniations in this setting are kind of like a pimple that is waiting to be popped. This disc was already ready to go, and again the body should be able to lift a 5-gallon jug of water without any compromise. This was only a matter [of] time regardless of whether or not the claimant was picking up a jug of water, whether he was bending over to put on his socks, whether or not he coughs and herniates the disc. Any of those things could have occurred given how compromised his back was at that time." (Ex. A).

24. Both Dr. Pehler and Dr. Chen credibly opined that the recommended spinal surgery is reasonable and necessary. (Ex. 11 and Ex. A).

25. Claimant credibly testified he had no prior back issues or treatment for his back prior to the incident on March 15, 2023. (Tr.17:14-22). This testimony was uncontroverted. The ALJ finds that Claimant did not have back issues nor did he have any treatment for his back prior to March 15, 2023.

26. The ALJ finds Dr. Chen's opinion regarding relatedness to be credible, but not persuasive. As found, Claimant did not have any back issues prior to lifting the five-gallon water bottle for a customer on March 15, 2023. And as Dr. Chen stated, this mechanism of injury could have caused a disc herniation in a compromised disc, and Claimant had degenerative discs.

27. Claimant testified he was scheduled to have surgery on August 15, 2023. Claimant scheduled surgery, even though it had not been authorized, because he was fearful of his symptoms becoming permanent. (Tr. 17:1-9).

28. Based on the totality of the evidence, the ALJ finds that Claimant proved by a preponderance of the evidence that he suffered a compensable injury on March 15, 2023. The ALJ further finds that the surgery recommended by Dr. Pehler is reasonable, necessary and related to Claimant's March 15, 2023 workplace injury.

CONCLUSIONS OF LAW

Generally

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

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

Cordova v. Indus. Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Compensability

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

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley Sch. District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

The mere occurrence of symptoms at work, however, does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the

requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant was asymptomatic prior to the March 15, 2023 work-injury. Even if Claimant was susceptible to disc herniation as Dr. Chen posits, it was the March 15, 2023 work-related lifting event that caused Claimant to become symptomatic and led to the need for a spinal decompression surgery. Claimant's back was aggravated by his work-related injury and his need for treatment accelerated by the same.

Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs Sch. Dist. #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, WC 4-517-537 (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* WC 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997).

If an injury is found to be causally related to an industrial accident, respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the industrial injury. § 8-42-101, C.R.S.; *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Put another way, the right to medical benefits "arises only when an injured employee initially establishes, by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment." *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Delta Drywall v. Indus. Claims Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

The totality of evidence and testimony proves Claimant sustained a compensable injury in the course and scope of his employment on March 15, 2023. Respondents are liable for all medical treatment that is reasonable, necessary, and related to relieve Claimant of the effects of the March 15, 2023 lumbar injury, including but not limited to the surgery recommended by Dr. Pehler.

ORDER

It is therefore ordered that:

1. Claimant sustained a work-related injury to his back on March 15, 2023.

2. Respondents are responsible for all medical treatment needed to relieve the effects of the industrial injury to Claimant's back, including, but not limited to, the surgery recommended and performed by Dr. Pehler.

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

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

DATED: November 7, 2023

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

ISSUES

- Did Claimant prove by a preponderance of the evidence she is permanently and totally disabled?

- The parties stipulated that Respondents are entitled to a statutory offset for Social Security Disability Insurance (SSDI) benefits if Claimant is awarded PTD benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as an Animal Control Officer. The job entailed responding to situations involving various wild and domesticated animals, including game animals. The job was physically demanding and required lifting and carrying more than 50 pounds.

2. Claimant suffered admitted injuries on September 21, 2016, while removing the carcasses of two dead pigs from Highway 115. Claimant developed pain in her left hip, left buttock, and low back after struggling to load the carcasses into her vehicle.

3. Claimant initially thought she had "pulled a muscle," but the pain persisted and worsened over the next few days.

4. Employer referred Claimant to CCOM for authorized treatment. At the initial evaluation, Claimant reported pain in her low back and left hip, radiating pain down her left leg, with numbness in her left foot. She was diagnosed with left hip and lumbar strains and referred for MRIs. She was also taken off work.

5. The left hip MRI was unremarkable. The lumbar MRI showed multiple disc bulges and a central disc herniation at L4-5, but no stenosis or nerve compression to account for the lower extremity radicular symptoms.

6. Claimant was evaluated by Dr. Michael Sparr on October 20, 2016. She reported aching pain in the left buttock and low back, stabbing pain in the buttock and left leg, and numbness and tingling in the lateral left leg and left foot. Her 4th and 5th left toes were numb. Her leg pain increased with ambulation. Dr. Sparr observed she walked with a steppage gait due to apparent foot drop. She was exquisitely tender over the left L5-S1 facet and left SI joint, and deep palpation reproduced radiating symptoms in the left leg and foot. Dr. Sparr appreciated mild atrophy of the left anterior and posterior leg. Left leg strength was "profoundly abnormal," with 3-/5 and 4-/5 strength in multiple muscles. Dr. Sparr opined Claimant suffered a severe left sacroiliac strain that caused a traction injury to the left sciatic nerve resulting in profound left foot weakness. He recommended an EMG, a piriformis injection, and a left SI joint injection. He prescribed Gralise (a name brand formulation of gabapentin) for neuropathic pain.

7. The EMG testing was completed on November 16, 2016. It showed sciatic neuropathy, without evidence of lumbar radiculopathy. Dr. Sparr noted Claimant could not increase her dose of Gralise above 600mg because it was too sedating.

8. Claimant had a left SI joint injection and lumbar ESIs in November and December 2016. The injections provided temporary relief but no sustained benefit.

9. On January 3, 2017, Dr. Sparr noted Claimant's gait had improved slightly with the use of an AFO. Her lower extremity strength was still "profoundly" abnormal but somewhat improved from previous evaluations. She found active release treatment and acupuncture to be beneficial. Claimant asked if she could go back to work on limited duty. Dr. Sparr released Claimant to sedentary activities with no lifting over 10-15 pounds.

10. Claimant followed up with CCOM on January 17, 2017. CCOM released Claimant to modified duty with no lifting over 15 pounds, no crawling or squatting, minimal stairs, and the opportunity to alternate walking, standing, and sitting every 30 minutes as needed.

11. Employer could not accommodate Claimant's restrictions and she was terminated.

12. In March 2017, Dr. Sparr documented Claimant had been able to increase the Gralise to 1200 mg at night before bed, which was helpful. However, she continued to have severe numbness and stabbing pain in her lower leg and left foot. Her gait remained abnormal, although not as awkward as noted previously. Lower extremity strength testing also showed some improvement.

13. Dr. Centi took over as Claimant's primary ATP on May 16, 2017. The foot drop was slowly improving, and Claimant was walking slightly better. Dr. Centi amended Claimant's restrictions to no lifting and carrying more than 10 pounds, no kneeling or squatting, and minimal stairs. He did not indicate why he removed the restriction about changing positions as needed.

14. In June 2017, Dr. Sparr documented some improvement in Claimant's foot and ankle strength, although she was still reporting severe nerve pain in her lateral thigh and leg and deep aching in her low back and buttock. She had decreased the Gralise because the 1200 mg dosage was "causing her to feel stupid." Physical examination still showed significant lower extremity weakness and difficulty lifting her toes.

15. On August 8, 2017, Dr. Sparr advised Claimant to wear the AFO brace at all times when outside her home.

16. On September 18, 2017, Dr. Centi further liberalized Claimant's work restrictions to allow lifting and carrying up to 15 pounds, and minimal squatting or kneeling. Those formal restrictions were subsequently carried forward through the remainder of the claim, with no additional discussion or analysis.

17. Claimant continued to receive massage therapy, chiropractic treatment, injections, and medication management through 2018, with limited benefit beyond temporary symptom relief.

18. Dr. Nicholas Olsen performed an IME for Respondents on December 19, 2018. Claimant reported ongoing symptoms and functional limitations, with minimal improvement since the date of injury. She walked with an antalgic gait and objectively demonstrated significant weakness in her left ankle dorsiflexors. Dr. Olsen observed atrophy of the anterior tibialis. Strength was significantly diminished in the left ankle dorsiflexors and EHL. Sensation was decreased in the L4, L5, and S1 dermatomes. Dr. Olsen opined Claimant's symptoms were likely related to a subluxing proximal tibiofibular joint and peroneal neuropathy. He recommended a left knee MRI with particular attention paid to the proximal tibiofibular joint and a repeat MRI of the pelvis. He thought Claimant would probably require surgery to address the proximal tibiofibular joint instability. Given the long duration of her problems, he expected she would continue to need an AFO indefinitely.

19. Claimant had a left knee MRI on February 18, 2019. It showed a bone bruise in the femoral condyle, consistent with proximal tibiofibular instability. Dr. Olsen recommended evaluation by an orthopedic surgeon.

20. Dr. Derek Purcell performed a left knee open peroneal nerve release surgery on July 22, 2019.

21. Claimant saw Dr. Olson at CCOM on August 1, 2019, and reported some improvement in her left foot function and return of sensation in her shin area after surgery.

22. On April 15, 2020, Dr. Sparr documented that Claimant appreciated "some mild benefit" from the surgery, but still had a complete foot drop on the left. She had received a custom AFO, but it did not fit with any of her shoes, and necessary modifications had been delayed by COVID restrictions. She was using a functional electrical stimulator almost constantly and found it helpful. Claimant had ongoing burning pain in the buttock radiating to the thigh, and asked about an ablation procedure. Dr. Sparr ordered a lateral branch block of the left SI joint and would consider rhizotomy depending on her response.

23. The SI joint injection was performed on May 13, 2020. At a follow up appointment with Dr. Sparr on June 4, Claimant reported a significant decrease in her pain for several hours after the injection. Dr. Sparr considered this an excellent diagnostic response to the block, and recommended SI joint rhizotomy.

24. Claimant had the rhizotomy on July 1, 2020. It initially helped with the buttock and SI joint-related pain, but she subsequently worsened. Dr. Sparr provided additional trigger point injections.

25. On August 5, 2020, Claimant asked for a second opinion because she had not made sustained progress with the treatments offered by Dr. Sparr. Dr. Centi referred her to Dr. Scott Primack.

26. Claimant saw Dr. Primack on August 9, 2020. She described pain in her low back, left buttock, and left leg, with numbness and tingling in the left leg and foot. These symptoms caused difficulty with prolonged standing, walking, and sitting. On examination, Dr. Primack noted strength deficits in the dorsiflexors and plantar flexors, and atrophy of the left leg musculature. Sensation was reduced over the dorsal surface of the left toot. Dr. Primack ordered a left knee MRI neurogram to evaluate the common fibular nerve and the tibial nerve.

27. The MRI was completed on December 11, 2020. It showed increased signal in the tibial nerve, which Dr. Primack opined was the source of Claimant's foot drop. At a follow up appointment on January 4, 2021, Dr. Primack told Claimant her treatment options were (1) medication management with drugs such as Lyrica, (2) a left tibial nerve hydrodissection, (3) neuromodulation with a peripheral nerve stimulator or spinal cord stimulator, or (4) surgery. He referred Claimant to Dr. Tanya Oswald for a surgical evaluation.

28. A repeat EMG on April 19, 2021 showed left sciatic neuropathy affecting the common fibular and tibial nerves.

29. Claimant was evaluated by Dr. Oswald regarding surgical options on July 12, 2021. Dr. Oswald was not enthusiastic about nerve release surgery, as this would not guarantee resolution of her pain. Nor would it likely improve the foot drop given the length of time the nerves had been compressed. According to Dr. Oswald, Claimant's primary options were ankle fusion, tendon transfer, or replacing her AFO splint. Claimant preferred to try a new AFO.

30. Claimant had a second IME with Dr. Olsen on November 11, 2021. Claimant indicated she had no significant benefit from the surgery by Dr. Purcell or rhizotomy. She reported "pain in her buttock and lies on a heating pad." She also described pain-related fatigue, frequent swelling in her left leg at the end of the day, and difficulty with balance because of the leg weakness. Dr. Olsen again documented objective sensory and motor deficits in the left foot. Claimant was not interested in repeating the rhizotomy, pursuing a spinal cord stimulator, or any surgical procedure mentioned by Dr. Oswald. Claimant was at MMI as of January 4, 2021, and. He assigned a 38% lower extremity rating based on range of motion deficits and sensory loss.

31. Claimant saw Dr. Timothy Sandell on January 25, 2022, to discuss pain management options. She described constant burning and stabbing pain radiating down her left leg, weakness in the leg, and a left foot drop. Her pain was aggravated by cold weather and prolonged sitting. Dr. Sandell opined a significant portion of Claimant's pain was neuropathic in nature. Because Lyrica and Gralise had caused Claimant to experience "confusion," Dr. Sandell recommended Topamax. He also prescribed Norco, Celebrex, and nortriptyline.

32. Claimant developed severe constitutional symptoms in February 2022, and was diagnosed with Stage IV colorectal cancer. She was started on chemotherapy.

33. On July 13, 2022, Dr. Kathryn Murray at Concentra assumed the role of primary ATP. Claimant reported ongoing severe left lower extremity symptoms, which made it "hard to walk and stand." She had a 24-month DIME scheduled for the following month. Examination showed sensory and strength deficits in the left leg and foot, trigger points in the lumbar spine, and a gait disturbance. Dr. Murray intended to await the DIME report before determining what, if any, additional treatment Claimant would be provided. Dr. Murray maintained the same work restrictions that had been placed by Dr. Centi in September 2017.

34. Dr. William Watson performed the 24-month DIME on August 9, 2022. Claimant reported ongoing low back and left buttock pain radiating down the left leg. Claimant appeared uncomfortable during the examination. Dr. Watson noted paraspinal muscle spasm in the lumbar spine and tenderness in the left buttock. Lumbar range of motion was limited in all directions. Sensation was markedly decreased in the L4, L5, and S1 distribution on the left. There was profound grade 0/5 weakness of the ankle dorsiflexors and toe extensors. She had no eversion. Dr. Watson opined no additional treatment was likely to materially change her condition, and agreed Claimant was at MMI as of her evaluation with Dr. Olsen on November 11, 2021. Dr. Watson assigned a 24% whole person rating, including 10% for the lumbar spine and 15% whole person for impairment of the common peroneal nerve.[1] He thought a lumbar spine rating was warranted "because she has complained and been treated for this since the initial injury." Regarding work restrictions, Dr. Watson opined, "Currently, she can only do sedentary-type work. Another complicating factor is that she is being treated currently with chemotherapy for stage IV colorectal cancer."

35. Insurer filed a Final Admission of Liability (FAL) on September 2, 2022, admitting for Dr. Watson's DIME rating. No PPD benefits were owed, because Claimant had been paid TTD benefits greater than the applicable benefit "cap". The FAL claimed an overpayment of TTD benefits paid after the date of MMI and reserved the right to recover the overpayment from future indemnity benefits.

36. Claimant timely objected to the FAL and requested a hearing on permanent total disability (PTD) benefits.

37. Dr. Olsen performed a third IME on October 13, 2022. Claimant stated her symptoms remained the same since the previous IME in November 2021. Aggravating factors included sitting, standing, laying down, and lifting. Claimant had decreased appetite because of the cancer and had lost 15 pounds. She reported excessive fatigue due to the cancer, but stated "her leg pain exhausts her" as well. The leg pain was interfering with her sleep and causing her to awaken repeatedly during the night when rolling over in bed. She was suffering from depression, which she attributed to both the cancer and her leg symptoms. Dr. Olsen stated Claimant's symptoms were "similar, if not identical, to the previous IME" in November 2021. Dr. Olsen reviewed Dr. Watson's DIME report and agreed it was reasonable to include a rating for the lumbar spine. Dr. Olsen

[1] Dr. Watson calculated 38% lower extremity for the peroneal nerve—the same rating as provided by Dr. Olsen. This converts to 15% whole person.

tested Claimant's lumbar range of motion and obtained measurements that were "very similar" to the numbers Dr. Watson referenced in his report.

38. Regarding work restrictions, Dr. Olsen noted the work restrictions from Claimant's ATPs had remained unchanged for several years. Specifically, Claimant was restricted to lifting and carrying no more than 15 pounds, no crawling or climbing, and minimal squatting or kneeling. Dr. Olsen opined those restrictions were appropriate for the work injury. He also noted she now has unspecified "additional" restrictions due to the diagnosis of metastatic colorectal cancer.

39. Dr. Olsen provided a supplemental report dated November 10, 2022, to clarify his opinion about Claimant's work capacity. He thought the the longstanding restrictions from CCOM and Concentra were appropriate as pertains to the work injury. However, he opened Claimant could not work in any capacity at the time of his IME because of the cancer.

40. In his deposition, Dr. Olsen testified that Claimant's presentation changed significantly between the November 11, 2021 IME and the October 13, 2022 evaluation. Specifically, he testified she exhibited fatigue, generalized malaise, muscle wasting, and generally "appeared quite ill when compared from one exam to the other." He opined these changes were related to the cancer. Dr. Olsen affirmed his opinion that Claimant's medical condition attributable to the work injury does not support any limitations on sitting, standing, and walking.

41. Claimant was approved for Social Security Disability Insurance benefits in January 2023. The SSA Notice of Award lists the disability onset date as January 30, 2022, which the ALJ infers coincides with the cancer diagnosis. After satisfying the 5-month wait period, Claimant was entitled to SSDI benefits commencing July 1, 2022. The parties stipulated that Respondents are entitled to a statutory offset for SSDI benefits if Claimant is awarded PTD benefits.

42. Robert Van Iderstine performed a vocational evaluation at the request of Claimant's counsel on October 22, 2022. Claimant described ongoing severe low back and leg symptoms that significantly limited her ability to perform routine activities. She said she can stand and walk approximately 20 minutes before needing to rest. She also reported difficulty with prolonged sitting despite constantly shifting her weight to manage discomfort. She maintains a restrictive lifestyle because of her symptoms. Although they briefly discussed Claimant's cancer diagnosis, Mr. Van Iderstine noted the primary focus of the evaluation was Claimant's medical condition and functional limitations related to the work injury.

43. Katie Montoya performed a vocational evaluation for Respondents on December 21, 2022. She initially tried to do a Zoom meeting but had to switch to a telephone interview because of poor connectivity on Claimant's end. Claimant described symptoms and functional limitations consistent with what she previously told Mr. Van Iderstine. Claimant reported significant pain in her low back, left leg and left foot from the work injury. She noted difficulty with prolonged sitting, standing, and walking. She needs

to be cautious to avoid tripping and falling. She occasionally uses a cane but often feels the cane is more of a hazard for her. Claimant referred to herself as a “couch mommy” or “bed mommy.” She spends much of her day trying to find a comfortable position. When asked about limitations related to the cancer, Claimant described frequent nausea and vomiting.

44. Regarding her educational and vocational history, Claimant is a high school graduate with one year of college courses but no college degree. She subsequently received an EMT certificate from [Redacted, hereinafter PP] and worked as an EMT for approximately 10 years. She left the job in 2012 or 2013 because it was too difficult to manage the long shifts while caring for her small children. She subsequently worked as an Emergency Room Technician for [Redacted, hereinafter MH], for approximately one year. She next worked as a 911 Dispatcher, initially for the [Redacted, hereinafter FD], later transitioning to the [Redacted, hereinafter FS] who assumed the 911 responsibilities. The job required 12-hour shifts and long periods of static sitting with minimal breaks. She performed the dispatch job for 2 years before taking the job as an Animal Control Officer in 2015.

45. Ms. Montoya and Mr. Van Iderstine used a similar process of evaluating Claimant’s ability to work, but their analyses diverged in a handful of important respects. First, Ms. Montoya identified Claimant’s commutable labor market as Canon City, Florence, and Pueblo West. Mr. Van Iderstine agreed that Canon City and Florence were suitable, but excluded Pueblo West because he did not believe Claimant told tolerate commuting that far.

46. Ms. Montoya and Mr. Van Iderstine’s analyses diverged more significantly when considering Claimant’s residual functional capacity. Ms. Montoya relied principally on the medical restrictions from CCOM/Concentra and Dr. Olsen. By contrast, Mr. Van Iderstine also incorporated Claimant’s self-reported limitations, including difficulty with prolonged sitting, standing, and walking and the need to change positions frequently.

47. Both vocational experts agreed that Claimant cannot return to any of her past work. But Ms. Montoya concluded that Claimant can transfer her acquired skills to jobs in medical-related fields such as patient representative and general medical office. She also identified the unskilled occupations of cashier and customer service as consistent with the restrictions from CCOM/Concentra and Dr. Olsen. Notably, Ms. Montoya stated she did not identify any work-from-home options because of the poor internet and phone service at Claimant’s relatively rural property.

48. Mr. Van Iderstine opined Claimant cannot perform any work within her commutable labor market. Although Claimant has previously worked in skilled and semi-skilled occupations, he opined her skills are not transferable to any occupations within her residual functional capacity. Additionally, Mr. Van Iderstine opined that light level jobs such as cashier are inappropriate for Claimant because of the amount of standing and walking required. Considering Claimant’s need for frequent position changes, Mr. Van Iderstine opined she is realistically limited to sedentary occupations that allow the worker to change from sitting to standing as needed. He also noted she will likely require extra

breaks during a work shift, perhaps as often as every 30 minutes. As a result, even if Claimant were hired for a position, it is unlikely she could sustain the job.

49. In her hearing testimony, Claimant described constant "gnawing" and "burning" nerve pain, which causes her to change positions frequently. The nerve pain substantially impairs her sleep. Years of disrupted sleep since the injury have resulted in significant generalized fatigue. Claimant needs to lie down and rest intermittently during the day. She described difficulty concentrating because of pain and the effects of medications. Claimant only drives short distances because of her pain and the need to change positions frequently. Claimant does not believe she can tolerate even a part-time job requiring significant standing, such as a cashier position. Furthermore, any job she could do would also need to accommodate her need to change positions and use ice packs to relieve back and leg pain. Additionally, she does not believe she can reliably work on consecutive days, as even family outings and basic activities cause flares that can last for a day or more. Claimant testified that the above-described limitations are caused by her low back and leg issues that were present before she was diagnosed with cancer.

50. Claimant's testimony regarding her injury-related symptoms and associated functional limitations is generally credible.

51. Dr. Olsen's opinion that Claimant has no injury-related limitations on standing and walking is not persuasive. Claimant has consistently reported severe symptoms affecting her left leg and foot, including pain and numbness. Multiple providers have objectively documented "profound" motor deficits that significantly interfere with her gait and station, despite regular use of an AFO and external nerve stimulator. In light of these long-standing lower extremity issues, it is unrealistic to conclude that Claimant can tolerate unlimited standing and walking in a competitive work setting. Additionally, Claimant has consistently and credibly reported difficulty maintaining a static posture, including sitting for long periods of time. These limitations must also be factored into the residual functional capacity determination.

52. At most, Claimant is capable of sedentary-level work that allows her to change positions from sitting to standing and walking at her discretion to manage low back and leg symptoms. Claimant will also probably need extra breaks during a work shift because of her low back and leg problems. She is limited to unskilled work due to her lack of transferrable skills coupled with documented "confusion" and "brain fog."

53. The likelihood that Claimant can obtain and sustain employment within her limited residual functional capacity is severely reduced by her relatively small commutable labor market and the inability to consider work-from-home options.

54. Mr. Van Iderstine's opinions are credible and more persuasive than the contrary opinions offered by Ms. Montoya. Mr. Van Iderstine's analysis better accounts for Claimant's non-exertional limitations including the need for frequent postural changes and extra breaks and lack of transferrable skills. Mr. Van Iderstine persuasively opined

there are no jobs consistent with Claimant's residual functional capacity in her commutable labor market.

55. Claimant proved by a preponderance of the evidence that she cannot earn any wages in the same or other employment.

CONCLUSIONS OF LAW

A claimant is considered permanently and totally disabled if they cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant's physical condition, mental abilities, age, employment history, education, training, and the "availability of work" the claimant can perform within her commutable labor market. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within their limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. *See e.g., Case v. The Earthgrains Co*., W.C. No. 4-541-544 (September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (January 16, 1997). If the evidence shows the claimant cannot "sustain" employment, the ALJ can find they cannot earn wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001). Although the industrial injury need not be the sole cause of a claimant's inability to earn wages, it must be a "significant causative factor" in the disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). This means the claimant must prove a "direct causal relationship" between the work injury and the disability. *Id*. Under this test, the ALJ must determine whether the residual impairment caused by the injury is sufficient to render the claimant totally disabled without regard to the effects of subsequent intervening events or preexisting conditions. *E.g., Wallace v. Current USA, Inc*., W.C. No. 4-886-464 (December 24, 2014).

As found, Claimant proved she cannot earn any wages in the same or other employment. Claimant's testimony regarding her injury-related symptoms and associated limitations is credible. The argument that Claimant can perform light-level work with no limitations on standing and walking is not persuasive. Her difficulties with standing, walking, and prolonged sitting were documented by multiple providers before she was diagnosed with cancer. At most, Claimant is capable of unskilled sedentary-level work with the freedom to change positions at her discretion to manage low back and leg symptoms. Claimant will also need extra breaks during a work shift because of her low back and leg problems. These limitations are caused by the effects of the work injury. Claimant's ability to obtain and sustain employment is further limited by her relatively small commutable labor market and the inability to consider work-from-home options. Dr. Van Iderstine's vocational opinions are credible and more persuasive than the contrary opinions offered by Ms. Montoya. While Claimant undoubtedly has additional limitations

attributable to the diagnosis of and treatment for cancer, the persuasive evidence shows she is totally disabled irrespective of the cancer.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant permanent total disability benefits, based on the admitted average weekly wage, commencing November 11, 2021.

2. Insurer may take a statutory offset based on Claimant's award of Social Security Disability Insurance benefits.

3. Insurer may take credit for any TTD benefits paid on or after November 11, 2021.

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

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

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

DATED: November 8, 2023

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a work related injury or occupational disease to her left shoulder on or about October 14, 2022 or October 15, 2022.

IF THE CLAIM IS DEEMED COMPENSABLE:

II. Whether Claimant has proven by a preponderance of the evidence that she was attended by an authorized treating physician and whether she was entitled to reasonably necessary and related medical care for the compensable work related injury.

III. Whether Claimant has proven by a preponderance of the evidence what her average weekly wage was.

IV. Whether Claimant has proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from March 2, 2023 until terminated by law.

STIPULATIONS OF THE PARTIES AND PROCEDURAL MATTERS

The parties stipulated that the only body part in question was the left shoulder injury and did not involve a cervical spine injury, only shoulder symptoms that radiated into the neck and have now resolved following surgery.

Further, if the claim was found compensable and Claimant is entitled to temporary disability benefits, the parties stipulated to benefits from March 2, 2023, when the surgery took place, through May 17, 2023, after which Claimant returned to work full time.

Lastly, this ALJ takes administrative notice of the Workers' Compensation Rules of Procedure including the Medical Treatment Guidelines as they are used by multiple providers in this matter.

FINDINGS OF FACT

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

A. Generally

1. Claimant worked for Employer for approximately 9 years, since 2014. At the time of the hearing she was 54 years old and measured five foot three inches in height. She worked as a bus driver going from county to county, shuttling skiers in the winter and workers year round.

2. On October 14, 2022 Claimant took over an older bus, [Redacted, hereinafter BN], from another worker and she noticed that the emergency brake was very

difficult to engage and disengage. It would snap so hard that it would hit her hand causing numbness in her fingers. That evening she felt pain going into her neck, with stiffness and soreness in her arm and in her shoulder. She did not recall a specific moment in time where she felt a sharp pain, other than the dull pain in her shoulder and neck.

3. On October 15, 2022, the second night, she noted she had the same bus, BN[Redacted], with the hard brakes. It was extremely hard to engage the brake. She had to pull it up with her shoulder at an awkward angle. She had to exert a lot of pressure to pull it up and push it down, while operating the older bus. After still having the pain and stiffness from the night before, she engaged the brake and fell extreme pain in the shoulder. After that, it caused a lot of pain to operate the destination signs. At one break she took some Tylenol and massaged her shoulder, to see if the pain would subside some. She was able to finish her routes, but she could not change the destination sign and had to use both hands to deploy and disengage the emergency brakes. She just did the minimum, not even operating the heater, because the pain was so intense. She did not hear any specific snap or pop as there was always a lot of noise on the bus and she had to be concentrating very hard on driving the big bus, making sure that the bus and passengers were safe.

4. She generally operated a 40 foot bus or a 35 foot bus. The steering wheel was 14 inches, which was approximately 2 ½ inches wider than a normal steering wheel but it seemed so much larger to Claimant. It was not easy to rotate, especially with windy roads or when there were bumps on the road. Some areas required harsh turns, like going into the bus barn, Claimant would be required to really crack the wheel. She would drive to one county and then pick up a different bus. She would normally start at 12:30 p.m. and got back home around 12:30 a.m., with several breaks, while getting into the office, changing buses and for lunch. She worked four days a week. She was required to pull the emergency brake at each stop. In a typical two and one half hour route, she would typically pull the brakes and release the lever approximately 18 times each in addition to making all the other maneuvers of driving the bus.

5. To operate the emergency brake in one of the buses, Claimant would have to extend her left arm downward and forward, inverting her arm with the palm up and pulling on the lever between her index and middle finger, pressing with her thumb on top of the lever, almost reaching the area of her knee.

6. In another bus, she would have to raise her shoulder to operate the emergency brake that was on the left side console at the approximate level of her waist, and three inches above her thigh level, pulling on the lever and pushing on the lever to operate it. While she drove with both hands on the wheel for the most part, Claimant indicated that almost everything was operated with the left hand.

7. At a typical stop, she would pull the emergency brake, flip the hazard lights on, put the vehicle in neutral and open the doors. She would also have to operate the destination sign, which was found above her head on the left hand side. The only thing, other than steering, that she operated with her right hand was the intercom. She would have to turn her neck to look out the various mirrors to make sure that no one was coming when she was turning, looking all the way down the 40 foot bus to make sure there were no cars before getting on the interstate or merging into traffic. She had to move around

in her seat a lot to make sure she could see around the panels of the bus for oncoming traffic, especially going into the roundabouts. She had to use her whole body to drive the bus and it was difficult and exhausting work.

B. Medical Records

8. On October 24, 2022 Claimant was examined by PA Zachary Feldman of CCOM Frisco with a chief complaint of left shoulder injury with radiating pain going into the neck. She provided a history generally consistent with her testimony noting significant soreness after having driven a bus with a particularly hard to operate brake. On exam he noted a very positive Hawkins test for impingement. Her range of motion was good though she had pain with lowering her arm. He diagnosed impingement syndrome of the left shoulder, and muscle, fascia and tendon strain of the neck. He prescribed a Medrol Dosepak, recommended ice, heat, Epsom salt soaks, BenGay rubs, and ordered physical therapy at Panorama Physical Therapy. Dr. Braden Reiter provided work restrictions of no lifting, repetitive lifting, pushing, pulling, carrying greater than 5 lbs. with the left upper extremity and no commercial driving, limiting her to administrative or desk work. On November 3, 2022 Claimant continued to have a positive Hawkins (impingement) test. P.T. had not started yet. PA Feldman referred her to P.T. again and continued her modified duty.

9. [Redacted, hereinafter SN] issued a Physical Demands Analysis and Risk Factor Assessment on November 7, 2022, which was conducted on November 1, 2022. Claimant was interviewed by telephone and one of Claimant's co-workers was observed performing the duties.[1] The report was issued based on a sampling of a 2 lbs. pinch force and a 10 lbs. hand force three times or more per minute and work that required shoulder movement at the rate of 15-36 repetitions per minute and no 2 second pauses for 80% of the work cycle. SN[Redacted] concluded that there were no risk factors associated with Claimant's work based on the Division's Medical Treatment Guidelines for cumulative disorders.

10. PA Feldman followed up with Claimant on November 10, 2022. He stated he reviewed the ergonomic evaluation performed. Claimant explained the motions she made including that she exerted 20 pounds of pressure to engage the emergency brake. On exam Claimant had good range of motion of the shoulder and neck but continued to have a positive Hawkins test.

11. Claimant started PT at Panorama PT on November 14, 2022, which included PT evaluation, therapeutic exercises and activities, manual therapy and neuromuscular reeducation. It continued through December 23, 2022.

12. Respondents sent Dr. Braden Reiter a letter on November 23, 2022 enquiring whether he agreed with the Job Assessment completed by [Redacted, hereinafter GX] on November 1, 2022. He disagreed that there were no risk factors. He stated that he disagreed because Claimant performed multiple motions done in an

[1] The other workers' physical measurements and characteristics were not detailed in the report or likened to Claimant's 5'3" height and BMI.

awkward position with her arm externally rotated and adducted to pull the brake handle.[2] He opined that this was enough to cause the injury described by Claimant.

13. By November 28, 2022 Claimant's neck pain was essentially resolved but Claimant continued to have a positive Hawkins showing impingement.

14. On December 15, 2022 Claimant continued to improve with physical therapy, but Dr. Reiter noted she continued to have symptoms of impingement with an empty can tests and positive impingement test but a negative Spurling's.[3] Dr. Reiter referred Claimant for an MRI of the left shoulder and continued her work restrictions.

15. The MRI took place at St. Anthony Summit Medical Center on December 26, 2022. Dr. Saidmunib Sana noted that there was severe tendinosis of the intra-articular long head biceps tendon, moderate subscapularis tendinosis with a tiny low grade intrasubstance footprint tear, severe tendinosis of the anterior third fibers of the supraspinatus tendon, full-thickness tearing of the middle third fibers of the supraspinatus tendon, a moderate infraspinatus tendinosis with some low grade partial thickness tear and mild AC joint arthritis.

16. The December 26, 2022 St. Anthony Summit Medical records showed Respondent Insurer as having provided verbal authorization for the MRI.

17. On January 3, 2023 PA Feldman noted that Claimant was handling administrative work well, but continued to have a positive empty can test and impingement signs though a negative drop arm test. Dr. Reiter continued Claimant's work restrictions and advised she follow up with the orthopedist.

18. Claimant was evaluated by Aaron K. Black, M.D. on January 4, 2023 at Panorama Summit Orthopedics. He reviewed the imaging which showed a full thickness supraspinatus tendon tear with a 1 cm retraction. He took a history which included her prior injury treated by Dr. Benedetti and which resolved with physical therapy. He noted a history of injury consistent with Claimant's testimony though included that Claimant believed she exerted greater than 20 lbs. of force while using the emergency brake. He noted that she had a positive empty can tests, weakness with external rotation at the side but had good strength with belly press and internal rotation at the side. He noted that PT had been of benefit but had not resolved her pain.

19. Dr. Black diagnosed strain of the tendon of left rotator cuff, left rotator cuff tear, biceps tendonitis, and bicipital tendinitis of the left shoulder. He recommended Claimant continue working administrative or desk work, and no lifting or carrying greater than 10 lbs. Dr. Black considered conservative care had failed and since her exam and imaging were consistent with a rotator cuff tear, that moving forward with left arthroscopic rotator cuff repair, biceps tenodesis and PRP augmentation were indicated. A referral and authorization for surgery was issued the same day.

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[2] This ALJ infers that if Claimant had to adduct to pull the brake lever, she would have to abduct to push the lever, with adduction meaning towards the body center and abduct meaning away from the body center.

[3] This ALJ notes that a Spurling's test is a cervical compression test to assess the presence of cervical nerve compression.

20. Upon Respondents' request, Dr. William Ciccone II issued a medical records review dated January 9, 2023. Following his review of the records, he stated that he did not believe Claimant had suffered a work-related injury to the left shoulder as the physical demands analysis showed no primary or secondary risk factors for overuse and no mechanism of injury was described that would cause the rotator cuff tear. He also stated that he was in agreement with the orthopedic plan of care but not as related to any work event and the authorization for surgery should be denied.

21. On January 10, 2023 Respondents sent Dr. Black a denial of the request for prior authorization based on Dr. Ciccone's record review.

22. Claimant returned to see PA Feldman on February 2, 2023. They discussed the surgery denial and the hopes of an appeal. She continued to have a positive empty can test and impingement signs. PA Feldman stated that he felt that her reported injury was not an exacerbation of her prior old injury but was having pain related to her activities as a bus drive, specifically engaging and disengaging the emergency brake. Dr. Reiter extended her anticipated MMI date and requested she follow up with the orthopedic specialist.

23. Dr. Black issued a letter on February 6, 2023 concerning the denial of Claimant's workers' compensation claim. He stated in part:

> She has a chronic rotator cuff injury, this could certainly be multifactorial. Clearly she had an increase in symptoms that occurred with her workplace activities. Whether or not she had a preexisting injury is immaterial as she was likely hired with this and cleared for her job requirements after which she went from asymptomatic to symptomatic during workplace activity. As such, this certainly appears to be related to her job.

24. A bill for $1,222.57 was issued by Centura on March 13, 2023 for the December 26, 2022 MRI. Further, Insurer confirmed having received the billing statement on March 20, 2023.

25. Claimant was evaluated by Dr. Nicholas K. Olsen on June 1, 2023 via telephone at Respondents' request. Dr. Olsen took a history consistent with Claimant's testimony, including Claimant's bus routes and how hard the emergency brakes were to operate on some buses. He documented that Claimant had no issues before October 14, 2022. Upon finishing her route, she felt her arm was weak and when she finished her shift she had pain in her neck. The following morning she had pain in her shoulder and rubbed on BenGay on her neck and shoulder. She went to work but when she went to push down on the brake, she felt a lot of pain in her neck and in the front of her shoulder. Despite her symptoms, she finished her route.

26. Dr. Olsen stated that the activity Claimant describes as aggravating her complaints was performed with her hand and arm at 90 degrees bent at the elbow while applying force to operate the brake. Claimant reported to him that "[W]hen I went to push down on the brake, I felt so much pain in my neck and in the front of my shoulder."

27. He opined, within a reasonable degree of medical probability, that the activity described by Claimant did not result in the rotator cuff tear identified on her December 26, 2022 MRI. In reviewing the GX[Redacted] physical demands analysis and

risk factor assessment as well as the description of her responsibilities as a bus driver, none of these activities were highly repetitive or performed at a frequency to result in a rotator cuff injury. He also opined that she did not detail any activities that put her arm in an extended position for impingement where the arm is lifting above shoulder height on a repetitive basis. Lastly, he stated that it was minimally probable that Claimant injured her shoulder in 2020 when she felt an electric lightening-like feeling in her left shoulder with overhead lifting, while opening up an emergency overhead access on a bus.

C. Prior Injury Records

28. Nurse Colleen Ihnken, at Summit Community Care Clinic, issued a report on July 29, 2020, noting Claimant had intermittent left shoulder pain aggravated by overuse at work. Claimant had returned after PT, chiropractic, and dry needling without resolution. She noted that her ROM was intact, so concern for rotator cuff tear was low, though remarked that she could have a strain. She stated that she had been reaching up and had sudden onset of sharp pain and tingling. Nurse Ihnken assessed that Claimant had an aggravation due to overuse at work and referred her to orthopedics anticipating she would probably be given a steroid injection.

29. Claimant was attended at Panorama Summit Orthopedics by Dr. Gary Benedetti on July 30, 2020 for tendonitis of the left shoulder. On exam, Claimant had no muscle atrophy, excellent shoulder range of motion without stiffness, a negative drop arm, though she did have a positive impingement sign, she had a negative push-off and normal gross motor function. X-rays showed only some subtle changes in her AC joint but no other significant bony or soft tissue abnormalities. He issued a referral for the physical therapist to provide her with a Thera-Band program. Claimant was to return in three months to consider a subacromial injections, if she had not improved. This ALJ did not find any other evidence of treatment between July 2020 and October 2022.

D. Employer Records

30. Employer's job description detailed physically demands including work for long periods of sitting/driving, repetitive motions, occasional heavy lifting (up to 40 pounds), ability to climb in & out of buses and other Employer vehicles, walking, seeing, stooping, standing, bending, kneeling, grasping, carrying, driving, and listening/observing with a high degree of public contact. It required Claimant to do pre-trips, pre-relief and post trip inspections, reporting to scheduled trips and stations on time, announcing stops, helping passengers on and off the bus if needed, and maintaining an up to date DOT physical.

31. The Workers' Claim for Compensation is written in the third person and seems to have been completed by Claimant's supervisor, though it is not dated. It reported that "[A]s a bus driver, one of the buses *she* drives has a brake that is incredibly hard to engage. Was engaging and felt sharp pain in her shoulder." (*Emphasis added*).

It noted a torn rotator cuff, and neck soreness. It listed an average weekly wage of $1,230.20 and identified Dr. Black as a treating provider.[4]

32. Employer's First Report of Injury of October 21, 2022 indicated that Claimant was injured on October 15, 2022 and Employer was notified on October 19, 2022. It showed that Claimant's average weekly wage was $1,095.60 and she was injured while in a bus by pushing and disengaging the emergency brake repeatedly during her shift.

33. From the detailed check history issued by Employer, Claimant was earning $1,202.35 per week in the 32 weeks from pay period ending (PPE) April 8, 2022 through PPE October 21, 2022, as Claimant earned a total of $38,475.46.[5]

34. As this did not include the winter time month check stubs for the height of the ski season, this ALJ calculated the AWW based on the year to date earnings for 2022. Claimant's year to date earnings showed as $63,118.79 for pay period ending December 26, 2022, with a check date of December 30, 2022. This ALJ presumes that this is for the full 52 weeks that would have been shown on her W-2. It provided an AWW of $1,213.82, which is not significantly different from the 32 week period of wages provided by employer and would include post injury earnings, which should not be considered.

35. As found, the fair computation of Claimant's AWW was $1,202.35 based on the first calculation.

E. Medical Treatment Guidelines

36. The Cumulative Trauma Conditions Medical Treatment Guidelines, W.C.R.P. Rule 17, Exhibit 5, addresses cumulative trauma exposure of upper extremity conditions. Under Using Risk Factors for Medical Causation Assessment of CTC, Sec. D.3.a and b, it states that "[U]sing the history, physical examination and supporting studies, a medical diagnosis must be established" by referring to Section F and Section G of the CTC MTGs.

37. Sections F and G refer to diagnosis referring to digit, hand and wrist osteoarthritis, De Quervain's disease, epicondylitis, extensor tendon disorders of the digits or writs, flexor tendon disorders, TFCC, trigger digits, carpal tunnel syndrome, cubital tunnel syndrome, guyon canal syndrome, posterior interosseous nerve entrapment (elbow or forearm), pronator syndrome, and radial tunnel syndrome. None of these conditions involve the shoulder other than tangentially.

38. It further states that "[T]he medical causation assessment for cumulative trauma conditions is not a substitute for a legal determination of causation/compensability by an Administrative Law Judge. Legal causation is based on the totality of medical and non-medical evidence, …"

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[4] This ALJ infers that this report was issued after Claimant started seeing Dr. Black and had already had a diagnosis of a torn rotator cuff.

[5] The Check History shows the earnings as a "NET." However, when adding all the deductions and earnings (DDNET), it shows that the amount under NET is actually the gross wages.

39. The Shoulder Injury Medical Treatment Guidelines, W.C.R.P. Rule 17, Exhibit 4, Sec. C.2 addresses principles of causation of occupational shoulder diagnosis stating that work-related conditions of the shoulder may occur from the following:

> • a specific incident or injury,
>
> • aggravation of a previous symptomatic condition, or
>
> • a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment.
>
> …
>
> Cumulative work-related causation for shoulder disorders is difficult to quantify given
>
> > 1) the variable techniques used to measure work exposures and the paucity of studies which have measured exposures,
> >
> > 2) the lack of verified clinical exams and
> >
> > 3) the lack of prospective studies.

40. As found, the third option in Exh. 4, Sec. C.2, addresses occupational exposures, in other words, occupational diseases or cumulative trauma exposures to the shoulder. This ALJ infers from this that Exhibit 4 applies to shoulder conditions and not Exhibit 5.

41. The same section C.2 also stated that a cross-sectional study provided some evidence that "upper arm elevation above 90° increases the odds of shoulder pain with disability, … and supraspinatus tendinitis, with a greater than fourfold increase when the upper arm is elevated at that level for more than 6% of working time (about 30 minutes per day)."

42. It further stated that "[G]iven the lack of multiple high quality studies it is necessary to consider each case individually when dealing with the likelihood of cumulative trauma contributing to or causing shoulder pathology."

F. Claimant's Testimony

43. Claimant stated that she liked to go on walks to the lake and some hiking on the Colorado Trail but nothing that would involve her upper extremities like her co-workers that skied and climbed. At home she would take care of her children, her home and her pets but tried to avoid doing much as she came home exhausted from driving and would have to take the time to rest a lot.

44. Claimant had a prior injury in 2020, when she was closing an emergency hatch on the roof of a bus and injured her left shoulder. Claimant asserted she was treated by Dr. Benedetti with physical therapy and Claimant's symptoms resolved. Claimant was able to return to her regular work as a bus driver.

45. Claimant stated that it was sometimes normal to have a stiff neck or shoulder or back following a 10 hour bus route as she would be in her seat the whole time operating the controls, where the seat was bouncing, while she was holding onto the steering wheel, feeling the vibration of the tires and every single bump in the road. When

there was a pothole, it was twice as bad, causing the impact to go from the steering wheel, up her arms and into her shoulders.

46. Claimant explained that the pain she experienced after the October 15, 2022 incident was very different from the symptoms she had had when she was treated by Dr. Benedetti, because that was only soreness compared to the pain she experienced after this injury. This time she had difficulty lifting her arm and had excruciating pain. She rested for a couple of days but it did not get better. She attended a company barbeque, tried to lift a can of soda and dropped it because the pain was so bad.

47. That same day of the BBQ she completed the workers' compensation paperwork. She turned it in to her supervisor the next day and asked her boss if she could see a doctor. Her supervisor made the appointment for her for the following Monday with CCOM. In the interim she took a lot of Tylenol and Advil.

48. Claimant had not had any kind of problems with her neck or shoulder other than the work related incident of 2020.

49. Claimant presented to CCOM on October 24, 2022 and saw PA Feldman.

50. She had surgery on March 2, 2022 to repair her left shoulder rotator cuff. Since then, on May 18, 2023 she started a new position with Employer as a dispatcher and she no longer drove buses or interact with the public. Though she continued to work with the same people as she did before, while she was driving.

51. She noted that she was not available for the job assessment performed by SN[Redacted] but another dispatcher, who had also been a bus driver before she became a dispatcher, was the one to do it.

G. Dr. Olsen Testimony

52. Dr. Nicholas K. Olsen testified as a board certified physical medicine and rehabilitation expert as well as a physician generally. His practice involved treating patients, conducting independent medical evaluations, performing electrodiagnostic examinations, and doing interventional spine care. He conducted an IME on Respondents' behalf and prepared a report dated June 1, 2023, which contained his findings and conclusions. He reviewed the medical records and interviewed Claimant by phone, not in person. He was asked to determine whether Claimant had an acute injury to her left shoulder and whether the work activities of a bus driver resulted in an occupational disease to her left shoulder.

53. Dr. Olsen noted that Claimant had a full thickness rotator cuff tear and underwent surgical repair. He stated that when the rotator cuff was repeatedly placed in a position of impingement by lifting high overhead, and left there repeatedly, or if there was a lot of force, a patient could experience a rotator cuff tear due to stress on the rotator cuff and resultant breakdown of the rotator cuff causing the full-thickness tear. Having the arm at the shoulder level can decrease the blood supply and place tension across the rotator cuff. It is a critical zone that as individuals age, have less blood supply. The critical zone is an area that demands blood supply.

54. Dr. Olsen opined that the muscle groups used by Claimant to engage and disengage the brake did not involve the shoulder in any form and that the rotator cuff tears seen on the December 26, 2022 MRI were not caused by her work activities as a driver.

55. He testified to the risk factors associated with shoulder occupational diseases as well, identifying the Medical Treatment Guidelines for cumulative trauma disorders, that address risk factors for the hands, wrist and forearms, which he opined also applied to the shoulder. He addressed several steps, including diagnosis, history of work activities, identifying activities with necessary force, frequency and duration to cause body party injuries as well as adequate rest and recovery periods between stresses to that body part. He opined that there was insufficient force used to affect the shoulder that would contribute to an occupational disease to the shoulder and to cause a rotator cuff tear. He stated that the rest time between each activity was sufficient recovery time and that none of her activities were sufficiently repetitive to result in a rotator cuff tear. He opined that Claimant's rotator cuff tear was simply a sign of aging due to the decrease in blood supply and the course of time.

H. Conclusive Findings

56. As found, Claimant was operating a bus with a very hard emergency brake that was located on the left side panel, approximately three inches above her thigh at approximately her waist level. The operation panel was an undetermined amount of space away from her but no less than 6 inches away. Claimant is 5'3" in height. The picture at Respondents' Exhibit D, bate 55 showed an individual who is not Claimant, and is of an indeterminate height.

57. As found, this ALJ observed Claimant's demonstrative postures at hearing, used while operating the emergency brake on BN[Redacted]. This ALJ observed how she was lifting her arm to the side, at approximately waist level, in an awkward position with her arm externally rotated and abducted to pull the brake lever and adducted to push the lever. The shoulder was shrugged up, and the upper arm was at or above 90 degrees at the shoulder.

58. As found, Claimant credibly testified that she was operating the stiff emergency brake on October 15, 2022 when she felt an extreme pain in her shoulder. She was then unable to change the overhead location signs and had to brake using both her hands in order to operate the emergency brake. As found, this was the time Claimant injured her rotator cuff causing the need for treatment, including surgical repair of the rotator cuff.

59. As found Claimant has shown by a preponderance of the evidence that she sustained a specific injury on October 15, 2022 while operating the emergency brake, tearing her rotator cuff in the course and scope of her employment. As found, Claimant had a prior impingement syndrome that contributed to an underlying pathology that was asymptomatic at the time of the current work related injury but was aggravated, causing the current disability and need for medical care. Further, due to her age and body habitus, Claimant likely had a weakened rotator cuff due to decreased blood supply to this critical area.

60. As found Dr. Reiter and Dr. Black are more credible and persuasive than the contrary opinions of Dr. Olsen and Dr. Ciccone. Dr. Reiter credibly stated that Claimant sustained an occupational injury with exerting up to 20 lbs. of force by externally rotating and adducting her shoulder to engage the brake of the bus in an awkward position. Further, Dr. Black opined that the rotator cuff tear was an occupational injury as claimant was asymptomatic before the event and symptomatic following the event of engaging the emergency brake.

61. While Dr. Olsen described that the muscle group Claimant would be using to operate the brake, was the hand, wrist and forearm, this ALJ viewed Claimant's motions and considered her description on video that she was having to use her arm by putting her elbow directly back and to the side, with her upper arm directly out and her shoulder lifted, and making a pulling and pushing motion at the side of her. The motion described by Dr. Olsen was not the one for BN[Redacted] when Claimant was injured.

62. What external rotation means to this ALJ is that the infraspinatus muscle rotates the humerus in the outward position together with the posterior deltoid and teres minor that assist in external rotation of the arm, but if the individual engages the trapezius and rhomboid muscle that can affect the muscles going into the neck. While there can be external rotation at higher degree levels such as 45 or 90 degrees or higher, this does not mean that external rotation cannot be achieved with the arm close to the body. But if Claimant was having difficulty with the brake, this ALJ concludes that she was putting pressure on her shoulder to externally rotate and, because she likely had a weakened shoulder cuff, she tore the rotator cuff when she engaged the stiff brake, causing an aggravation to preexisting weakness and a full rotator cuff tear, which required surgical repair.

63. As found, the Job Assessment by SN[Redacted] considered the risk factors of cumulative traumas for the elbow, forearm, wrist, hand and digits, not the shoulder, in the second risk factor assessment, and did not apply to this case. Further, she failed to assess the operation on BN[Redacted] or measure the specific force used to operate the emergency brake, as well as failed to consider Claimant's specific physical characteristics and underlying weakness in the left shoulder when reaching her conclusions.

64. Even if Claimant had not sustained a specific incident, the movements Claimant made to operate the hard emergency brake on BN[Redacted] was sufficient to cause an occupational disease.

65. As found, Claimant reported her injury and was referred to CCOM for medical treatment and was seen by PA Feldman and Dr. Reiter, who referred Claimant to her surgeon, Dr. Black. These physicians are within the chain of referral and are authorized.

66. As found, Claimant sustained a work related injury that required medical care, including evaluations, physical therapy, diagnostic tests and surgical repair. The medical care was reasonably necessary and related to the October 15, 2022 work injury.

67. As found, Claimant's average weekly wage was $1,202.35.

68. As found, Claimant had surgery performed by Dr. Black, an authorized treating provider, on March 2, 2023 to repair the rotator cuff tears. Claimant returned to

work on May 18, 2023. Claimant has shown she is entitled to temporary total disability benefits from March 2, 2023 through May 17, 2023.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley,* 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO,* 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office,* 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO,* 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the

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

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

B. Compensability

Two theories of the case were advanced by Claimant. A specific injury which happened on October 14, 2022 or October 15, 2022; or that Claimant suffered an occupational disease.

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

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

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." Sec. 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. Sec. 8-41-301(1)(b) & (c), C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

"Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co., supra.* An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. See *Triad Painting Co, supra*; *Hubbard v. City Market*, W.C. No. 4-934-689-01, ICAO (Nov. 21, 2014). The "arising out of" element is narrower and requires Claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez,* 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment.

A claimant is required to prove by a preponderance of the evidence that an alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.*

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015). Moreover, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Finn v. Indus. Comm'n*, 437 P.2d 542 (Colo. 1968); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017); *Sanchez v. Honnen Equip. Co*., W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce the need for medical treatment or disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

The Medical Treatment Guidelines (MTGs), contained in Workers' Compensation Rule of Procedure 17, 7 CCR 1101-3, provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. Sec. 8-42-101(3)(b), C.R.S. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. The Guidelines are regarded as accepted professional standards for care under the Workers'

Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in making determinations. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005). The ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (Jan. 25, 2011). The Guidelines, however, do not constitute evidentiary rules, and an expert's compliance with them does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the Guidelines may affect the weight given by the ALJ to any particular medical opinion. *Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (February 23, 2009); *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009; *In re Claim of Foust*, 102120 W.C. No. 5-113-596, I.C.A.O. (October 21, 2020). However, the Guidelines are not definitive and the ALJ need not utilize the medical treatment guidelines as the sole basis for determinations of benefits. Sec. 8-43-201(3), C.R.S. See also *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009); *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150, I.C.A.O. (May 5, 2006), affirmed *Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (NSOP); *In re Claim of Reyes*, W.C. No. 4-968-907-04, I.C.A.O. (December 4, 2017)

Claimant has established that it was more likely than not that she sustained a compensable injury arising from the course and scope of her employment with Employer on October 15, 2022 when she was operating BN[Redacted], which had a hard to manage emergency brake. She pulled on the brake lever and felt pain in her neck and shoulder. The lever was at her side, approximately three inches above her thigh level and at least six inches away from her body and she had to use her upper arm extended at or above shoulder level, externally rotating her arm, while her shoulder was shrugging, when her rotator cuff tore. Claimant was credible in her description that she felt pain while operating the emergency brake and that she had not had symptoms like these before the October 15, 2022 shoulder injury. Further, Claimant's description was consistent and supported by this ALJ's observation of the Claimant's demonstration of the motions she used to operate the emergency brake. Claimant did have an underlying asymptomatic impingement syndrome which was aggravated at the time of the October 15, 2022 incident. While Claimant's initial symptoms included neck pain, this was determined to be caused by the overcompensation related to use of the trapezius and adjunct muscles of the cervical spine, as Claimant was unable to properly utilize her shoulder and arm. Claimant did not sustain a neck injury and any symptoms of neck pain resolved with physical therapy and the subsequent rotator cuff surgery. Dr. Reiter was persuasive and credible in his opinion that the Claimant's awkward movement in having to use the emergency brake, caused the rotator cuff tear. He explained that Claimant performed multiple motions done in an awkward position with her arm externally rotated and adducted to pull the brake handle, which were sufficient to cause the injury to Claimant's rotator cuff. Further, Dr. Black was also credible and persuasive that Claimant sustained a work related injury in the performance of her job as a driver.

While Dr. Ciccone and Dr. Olsen may have been credible in certain regards, they were not persuasive. Both Dr. Ciccone and Dr. Olsen relied on SN's[Redacted] job assessment without making a sufficient analysis of Claimant's circumstances and underlying asymptomatic preexisting weakness, failing to take into consideration all

factors affecting Claimant, such as how many years she had been working the job without significant problems and the force necessary to actually operate the emergency brake on BN[Redacted], as opposed to other buses and did not have the benefit of having a demonstration by Claimant of the movements required to operate the emergency brakes on BN[Redacted]. Nothing in SN's[Redacted] analysis indicates that she considered the hard to handle emergency brake or discussed that the test was performed on that same vehicle, considered Claimant's height, or other factors, such as age, gender, BMI, which are necessary to make a full determination. In fact, SN[Redacted] stated that Claimant never exerted forces of greater than 5 lbs., yet the medical records document that she exerted approximately 20 lbs. of force while externally rotating her extended upper arm. Further, Employer's records credibly showed that Claimant, as a bus driver, had to occasionally assist individuals onto and off the bus, perform repetitive motions, and occasional lifting up to 40 pounds. While she noted that Claimant occasionally used her upper extremities to push/pull, while "setting/releasing emergency brake," she did not assess the pounds of force needed to do so. She also stated that Claimant used both left and right hand to operate the brake. She predominately used the cumulative trauma MTGs to assess the risks of exposure. SN's[Redacted] evaluation is found not persuasive. Further, neither Dr. Olsen nor Dr. Ciccone examined Claimant or discussed in sufficient detail the multiple other factors that might have had an impact on the Claimant's weakened rotator cuff that made her susceptible to this work injury. What was credible in Dr. Olsen's testimony was that the shoulder was a critical zone, and that age and overhead use decreased the blood supply to the critical zone, causing weakness of the shoulder tissue. PA Feldman, Dr. Reiter and Claimant's surgeon, Dr. Black all credibly and persuasively opined that Claimant's shoulder injury was caused by Claimant's work related activities, over the contrary opinions of Dr. Olsen and Dr. Ciccone in this matter. Further, Claimant was persuasive and credible. Claimant has proven by a preponderance of the evidence that she sustained a compensable work related injury on October 15, 2022.

While there is evidence that Claimant may have sustained an occupational disease, instead of a specific incident, this ALJ finds to the contrary. Here, there was a specific time, place and cause of Claimant's injury. Claimant was operating the emergency brake while driving a particular bus in the course of her work for employer, and the operation of the hard emergency brake caused her left shoulder injury on October 15, 2022. This ALJ finds that whether Claimant correctly perceived the extent of the shoulder injury at the time that it happened was not significantly germane to the issue of compensability.

C. Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals*

Office, 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colo. Springs School Dist.*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

"Authorization" refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005). Further, a claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission*, 701 P.2d 168, 170 (Colo. App. 1985); see also, *Brickell v. Business Machines, Inc.,* 817 P.2d 536. Lastly, an insurer may, by their conduct, waive the right to object that the medical provider was not an authorized provider. *Wielgosz v. Denver Post Corporation*, W. C. No. 4-285-153, (ICAP, December 3, 1998).

Claimant reported her injury to her supervisor and, after the paperwork was completed, Employer scheduled her to see a provider at CCOM. Claimant was attended by Dr. Reiter and PA Feldman at CCOM. Dr. Reiter referred Claimant for an MRI and to Dr. Black. Claimant proceeded with care in accordance with that prescribed by her authorized providers, including surgical repair of her rotator cuff tears, physical therapy, massage therapy and medications as well as the MRI ordered by Dr. Reiter. All this care was authorized, reasonably necessary and related to the October 15, 2022 work related injury to her left shoulder.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. Campbell v. IBM Corporation, supra. Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. Coates, Reid & Waldron v. Vigil, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. Ebersbach v. United Food & Commercial Workers Local No. 7, W.C. No. 4-240-475 (ICAO, May 7, 2007).

From the detailed check history issued by Employer, Claimant earned a total of $38,475.46 the 32 weeks from pay period ending (PPE) April 8, 2022 through PPE October 21, 2022. This ALJ considered other computational alternatives to calculate the average weekly wage and rejected them. The Claimant's fair approximation of her wage

loss and diminished earning capacity was based these earnings. Claimant's average weekly wage was $1,202.35 for her October 15, 2022 work related injury.

E. Temporary disability benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

Claimant had surgery under Dr. Black, an authorized treating physician, on March 2, 2023 for her left shoulder rotator cuff tears related to the October 15, 2022 work related injury. Claimant was credible when she testified that she was unable to return to work until May 18, 2023. Claimant has shown that she is entitled to temporary total disability benefits from March 2, 2023 through May 17, 2023. Further, Claimant is entitled to statutory interest of eight percent (8%) on all benefits not paid when due. Benefits are calculated as follows:

Name:	DeAnn Quintana
Bi-Weekly benefit amount that should have been paid:	1603.14
Bi-weekly amount that has been paid:	0
Beginning date of unpaid benefits:	03/02/2023
Ending date of unpaid benefits:	05/18/2023 **5/18/2023**
Date benefits were or will be paid:	11/09/2023 **11/9/2023 11/9/2023**
Annual Interest rate:	8
Number of days benefits are due:	78.00
Number of days benefit not paid when due:	175
Total bi-weekly benefits accrued through 5/18/2023	$8,931.78
Total interest accrued through 5/18/2023	$414.03
Total benefits and interest accrued	$9,345.81
Daily interest after 11/9/2023	$2.05

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a compensable work related injury to her left shoulder on October 15, 2022.

2. Respondents shall pay for all authorized, reasonably necessary and related medical care for her left shoulder injury, including CCOM, Dr. Black, and the Summit Group of providers, pursuant to the Colorado Fee Schedule.

3. Claimant's average weekly wage is $1,202.35 and her TTD rate is $801.57.

4. Respondents shall pay TTD benefits from March 2, 2023 through May 17, 2023 in the amount of $8,931.78 plus interest of $414.03, for a total of $9,345.81 in indemnity and interest benefits. Respondents shall pay interests through the day that benefits are issued to Claimant.

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

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

DATED this 9th day of November, 2023.

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-203-210-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable industrial injury to his leg/thigh area during the course and scope of his employment with Employer on April 4, 2022.

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

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits.

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

FINDINGS OF FACT

1. On February 1, 2022 Claimant began working for Employer as a Receiver. Claimant asserts that he sustained an industrial leg/thigh injury on April 5, 2022 when he tripped on uneven concrete in the recycling area of Employer's facility. However, the record reveals he did not work on April 5, 2022. Claimant subsequently amended the alleged date of injury to April 4, 2022.

2. Upon receiving notice of the alleged injury, Employer initiated its standard accident investigation protocol and prepared a written report authored by Safety Coordinator [Redacted, hereinafter ES]. The investigation involved reviewing camera footage of the premises on the days in question, examining timecards, conducting employee interviews and obtaining co-worker statements.

3. The Accident Investigation Report determined that camera footage "does not support the alleged incident." Importantly, Claimant arrived at work limping on April 4, 2022. Specifically, the Accident report noted "Camera footage shows the EE exciting the passenger side of a white vehicle and limping into work at 12:12pm on 4/4/22." The report documented that from 12:14pm to 3:07pm Claimant "can be seen limping in the recycling area while cutting wires, sweeping, moving bins about, attending the daily safety meeting, and sorting bins." Moreover, the report concludes that Claimant "cannot be seen tripping and falling at any point in time during the partial shift he worked on 4/4/22." Finally, the Accident report noted that, when "management saw that [Claimant] was limping and spoke to him about it in the office, the EE is said to have told management that he hit [h]is leg on a table at home and he was not injured at work."

4. The record includes a medical report from Swedish Medical Center dated March 31, 2022 or five days before the alleged work incident. The document specifies that Claimant presented "with pain to his left thigh after hitting it on the table."

5. ES[Redacted] testified at the hearing in this matter. He explained the following:

a. He reviewed video footage on both April 4, 2022 and April 5, 2022;

b. He prepared the Employer Accident Investigation Report;

c. It is standard protocol at Employer to review video, conduct interviews, and take employee statements when someone alleges an industrial accident at work;

d. Employer has cameras all over the premises that run 24/7 including in the receiving area where Claimant contends he was injured on April 4, 2022;

e. The video does not reflect that Claimant tripped or fell as alleged on April 4, 2022. Rather, the video recorded Claimant coming into work already limping on April 4, 2022 before his shift ever began;

f. The reason Claimant was taken to the office was because co-workers saw him limping when he came to work on April 4, 2022. Employer then provided a fit for duty form for Claimant to complete. If he claimed at the time he sustained an injury at work, he would have filled out the proper Workers' Compensation paperwork based on company policy;

g. Employees for Employer are not discouraged from reporting injuries when they occur at work, but rather are encouraged to report them no matter how small.

6. The record also reveals a number of witness statements regarding the incident. Store Manager [Redacted, hereinafter KW] commented that she noticed Claimant was limping at work on April 4, 2022. She asked Claimant what had happened and he responded that he struck his leg on a table at home. Claimant denied that he injured his leg at work. Similarly, supervisor [Redacted, hereinafter DA] asked Claimant whether he had injured his leg at work on April 4, 2021. Claimant answered that he did not injure his leg at work but pulled a muscle at home.

7. Claimant did not appear for the hearing July 11, 2023 hearing in this matter. Claimant received the opportunity to have his deposition taken, but elected not to proceed. Claimant therefore offered no testimony at hearing, deposition, or otherwise.

8. Claimant has failed to establish it is more probably true than not that he suffered a compensable industrial injury to his leg/thigh area during the course and scope of his employment with Employer on April 4, 2022. The totality of the evidence reflects that Claimant did not sustain a work injury during the course and scope of his employment with Employer. ES[Redacted] conducted an investigation by reviewing camera footage of the premises on the days in question, examining timecards, conducting employee interviews and obtaining co-worker statements. The surveillance video as documented in the Accident Investigation Report

reveals that Claimant was limping when he arrived at Employer's facility on April 4, 2022. The video also demonstrates that Claimant did not trip and fall at any time during his work shift on April 4, 2022.

9. ES'[Redacted] credible testimony is consistent with the Accident Investigation Report and video footage that Claimant arrived at work on April 4, 2022 already limping and did not trip or fall while performing his job duties. Furthermore, statements from co-workers establish that Claimant injured his leg at home and not while working for Employer. Importantly, a March 31, 2022 report from Swedish Medical Center specifies that Claimant presented "with pain to his left thigh after hitting it on the table." Therefore, the premises video, testimony of ES[Redacted], statements of co-workers and Accident Investigation Report demonstrate that Claimant did not sustain an industrial injury while working for Employer. Rather, the evidence strongly suggests that Claimant injured himself prior to April 4, 2022 outside of work. Accordingly, Claimant has failed to demonstrate that his work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. His claim is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

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

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

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

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable industrial injury to his leg/thigh area during the course and scope of his employment with Employer on April 4, 2022. The totality of the evidence reflects that Claimant did not sustain a work injury during the course and scope of his employment with Employer. ES[Redacted] conducted an investigation by reviewing camera footage of the premises on the days in question, examining timecards, conducting employee interviews and obtaining co-worker statements. The surveillance video as documented in the Accident Investigation Report reveals that Claimant was limping when he arrived at Employer's facility

on April 4, 2022. The video also demonstrates that Claimant did not trip and fall at any time during his work shift on April 4, 2022.

9. As found, ES'[Redacted] credible testimony is consistent with the Accident Investigation Report and video footage that Claimant arrived at work on April 4, 2022 already limping and did not trip or fall while performing his job duties. Furthermore, statements from co-workers establish that Claimant injured his leg at home and not while working for Employer. Importantly, a March 31, 2022 report from Swedish Medical Center specifies that Claimant presented "with pain to his left thigh after hitting it on the table." Therefore, the premises video, testimony of ES[Redacted], statements of co-workers and Accident Investigation Report demonstrate that Claimant did not sustain an industrial injury while working for Employer. Rather, the evidence strongly suggests that Claimant injured himself prior to April 4, 2022 outside of work. Accordingly, Claimant has failed to demonstrate that his work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. His claim is thus denied and dismissed.

ORDER

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

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

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

DATED: November 9, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $2,337.14.

2. The issue of Temporary Total Disability (TTD) benefits for the period August 22, 2021 through October 4, 2021 has been resolved. Claimant also withdrew the issue of reinstatement of vacation hours, sick time, and PTO.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover Temporary Partial Disability (TPD) benefits for the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of WCRP 5-5(B) by filing a medical-only General Admission of Liability (GAL) on March 29, 2022.

FINDINGS OF FACT

1. Claimant works as a Truck Driver for Employer. On August 21, 2021 Claimant sustained a work-related injury to his lower back after lifting boxes and bags.

2. Claimant testified that Employer did not direct him to a physician for treatment after he reported the injury. He thus visited personal physician Frances C. Hindt, M.D. at Kaiser Permanente. Dr. Hindt originally took him off work until October 5, 2021 for severe pain when walking, standing, and resting.

3. Claimant returned to Dr. Hindt for an examination on September 27, 2021. She noted Claimant's lumbar MRI revealed multilevel degenerative disc disease and facet osteoarthropathy. Dr. Hindt diagnosed Claimant with spinal stenosis of the lumbar spine with neurogenic claudication. She permitted Claimant to return to work, but expressed the following concerns, "I do think it is okay for him to return to work now cautiously. If he does have more pain upon return to work I want him to stop and take a step back." Dr. Hindt commented that Claimant's work consists of heavy lifting in a dock and he has been unable to perform his job since August.

4. Subsequent visits to Kaiser reveal that Claimant continued to suffer from aggravating factors including bending, lifting, sitting, driving, transitioning positions,

walking, and standing. Claimant underwent physical therapy and received injections for his lower back condition.

5. On January 11, 2022 Claimant underwent an Independent Medical Examination (IME) with John Burris, M.D. After conducting a physical examination, Dr. Burris concluded Claimant likely sustained a minor soft tissue strain of the lumbosacral spine on August 21, 2021.

6. At the time of the initial evaluation, Dr. Burris did not have Claimant's medical records. He subsequently performed a medical records review on March 11, 2022 and issued an addendum report. Dr. Burris determined the medical records supported his opinions as expressed in his original IME report. After reviewing a lumbar MRI, Dr. Burris explained that Claimant only suffered from multilevel degenerative changes.

7. Dr. Burris also testified at the hearing in this matter. He commented that there were no positive objective findings during his physical examination, Claimant told him he had returned to unrestricted duty, and there were no formal restrictions assigned by Claimant's providers. Dr. Burris thus concluded Claimant could return to regular duty employment. Nevertheless, Dr. Burris acknowledged that Claimant's Kaiser physicians advised him to "watch what he lifts, and he is able to self-monitor his activities at work to avoid heavy lifting." Dr. Burris also agreed that Claimant reported he was following the advice of his Kaiser physicians to watch what he lifts. Moreover, Claimant told Dr. Burris that "this event had made him realize that he cannot continue to engage in such a physically demanding job." Finally, Dr. Burris was not aware of any medical records that Claimant had symptoms, restrictions, or limitations in his activities before he was injured on August 21, 2021.

8. Since the injury of August 21, 2021 Claimant has been performing his job differently and "being cautious." Claimant noted he cannot lift like he used to, and has to monitor his lifting activities. He uses the forklift more often and obtains help from coworkers for lifting heavy materials. Claimant remarked that he is only able to walk or stand for a certain amount of time before his back becomes tight and he must sit down. Moreover, Claimant commented the back injury limits bending and stooping because he has to spread his legs to pick up items from the ground to relieve the pressure on his back. He summarized the injury has, "really inhibited me from doing my work at 100 percent."

9. Claimant seeks TPD benefits of $30,900.44 as documented in modified Exhibit 9 for the period October 5, 2021 through August 20, 2023 because his earnings have been lower than his AWW of $2,337.14. When Claimant returned to work for the period October 5, 2021 through August 20, 2023, he did not receive the full hours he had been working prior to his lower back injury. As Claimant specified "I was getting same rate of wage, but I wasn't getting the full overtime hours that would have changed that rate." Claimant explained that he does not have control over how many overtime hours he receives. He remarked that, in some instances, he is required to take the overtime. However, he sometimes has the choice of whether or not to accept overtime. Notably, Claimant has

not refused overtime hours after his return to work because of his back injury, and "absolutely" takes the hours if offered. Claimant remarked he was unaware whether the overtime hours have changed because his work duties moved to a different job site.

10. The differences between Claimant's AWW and weekly earnings are documented in Claimant's modified Exhibit 9. Moreover, Claimant's Exhibit 7 outlines the per week calculation of TPD benefits during the relevant period. Claimant's Exhibit 8 provides the supporting pay stubs. Claimant acknowledged that he is not entitled to receive benefits for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Specifically, Claimant withdrew any claim for TPD benefits for the weeks of January 13, 2022 and October 20, 2022 even though he only missed one day in each of those weeks for an unrelated issue, *i.e.,* a CDL exam or a shoulder exam. He also withdrew any request for TPD benefits during the weeks that he either was out with Covid-19 or suspected Covid-19, *i.e.* December 6, 2021 and July 11, 2022.

11. In Insurer's claim notes, Claims Adjuster [Redacted, hereinafter LM] remarked on November 4, 2021 that Claimant's claim was "medical only" for a lower back injury. However, on the following day the claims notes reflect that there was a "Type Change From 'Medical Only' To 'Indemnity.'" The claim was then labeled a "NEW IND CLAIM," and the adjuster changed from LM[Redacted] to [Redacted, hereinafter BS]. [Redacted, hereinafter SK] Claimant Management Adjuster [Redacted, hereinafter EY] testified that "NEW IND CLAIM" means "new indemnity claim."

12. On March 28, 2022 BS[Redacted] wrote in the claim notes that "we recommend admitting to the claim and filing a GAL. Claimant was out of work for a matter of weeks but has since returned. Therefore, temporary indemnity exposure is minimal."

13. Respondents finally filed a General Admission of Liability (GAL) on March 29, 2022 that was for medical benefits only. The document noted "[t]emporary and permanent benefits are denied until such time it is deemed otherwise in accordance with Rule 5-5(B). If temporary and/or permanent indemnity benefits are sustained, an amended admission will be issued." In an email on the same day between Respondents' former attorney and Claimant's former attorney, Respondents' counsel wrote,

> Attached is a GA filed today. It is medical only, and we will amend for indemnity. I had originally recommended a medical only GA based on our emails last week, and this was filed earlier today prior to yours and my conversation. It will be amended to account for the temporary indemnity period, however at this time the claim rep does not have the wage information from the employer to assess the TTD period/AWW. We are working to get that asap but wanted to at least get a medical only GA filed. In light of this, will Claimant withdraw the app for hearing?

14. On March 28, 2023 Claimant filed an Application for Hearing (AFH) seeking AWW, TPD, TTD and penalties. On April 12, 2023 Respondents filed a Response to the AFH asserting that Claimant was not owed any TPD or TTD benefits.

15. Despite the March 29, 2022 correspondence between counsel and Claimant's March 28, 2023 AFH, Respondents did not file an amended GAL that admitted for indemnity benefits or an AWW until July 19, 2023. While Respondents acknowledged TTD benefits from August 22, 2021 through October 4, 2021, they also terminated all temporary benefits as of October 4, 2021 due to an alleged return to full wages/full hours of work.

16. EY[Redacted] testified she began working on Claimant's file on March 1, 2023 after she took over the matter from BS[Redacted]. She commented that, as a seasoned adjuster for SK[Redacted], she is familiar with both the statute and the rules. EY[Redacted] agreed that, if an injured worker misses more than three working shifts because of an admitted work injury, the injury is an indemnity or lost-time claim. Furthermore, if an adjuster is aware that an injured worker has missed more than three working shifts, then a GAL should not be filed as a medical-only admission. EY[Redacted] noted that it would be standard procedure for a new claims adjuster to be assigned when there has been a switch from a medical-only claim to an indemnity claim.

17. Claimant has demonstrated it is more probably true than not that he is entitled to recover TPD benefits for the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Initially, on August 21, 2021 Claimant sustained a work-related injury to his lower back after lifting boxes and bags. Because Employer did not direct him to a medical provider, he sought treatment with personal physician Dr. Hindt at Kaiser. By September 27, 2021 Dr. Hindt permitted Claimant to return to work, but expressed concerns due to Claimant's heavy lifting, and encouraged him to exercise caution. She noted "[i]f he does have more pain upon return to work I want him to stop and take a step back." Subsequent visits to Kaiser reveal that Claimant continued to suffer from aggravating factors including bending, lifting, sitting, driving, transitioning position, walking, and standing. Claimant underwent physical therapy and received injections for his lower back condition.

18. In contrast, IME physician Dr. Burris concluded that Claimant could return to regular duty employment. However, Dr. Burris acknowledged that Claimant's Kaiser physician advised him to "watch what he lifts, and he is able to self-monitor his activities at work to avoid heavy lifting." Moreover, Claimant credibly testified that his lifting abilities have been limited since his work injury and he more often uses a forklift. Claimant also remarked that he is only able to walk or stand for a certain amount of time before his back becomes tight and he must sit down. Finally, Claimant commented that his back injury limits bending and stooping and has, "really inhibited me from doing my work at 100 percent." Therefore, despite Dr. Burris' opinion, the record reveals that Claimant's lower back injury has limited his ability to perform his regular job duties.

19. As a result of his August 21, 2021 industrial injury, Claimant's earnings have been lower than his AWW of $2,337.14. When Claimant returned to work for the period October 5, 2021 through August 20, 2023 he did not receive the full hours, including overtime, he had been working prior to his lower back injury. The differences between

Claimant's AWW and weekly earnings are documented in Claimant's modified Exhibit 9. Fewer overtime hours caused a reduction in wages that was causally connected to Claimant's lower back injury. The effects of the injury placed Claimant at a competitive disadvantage relative to other employees in procuring overtime hours. As a result, Respondents are required to pay TPD benefits based on the difference between Claimant's AWW and his actual earnings during the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Based on Claimant's impaired earning capacity and reduction in hours due to his August 21, 2021 work injury, he is entitled to receive TPD benefits in the total amount of $30,900.44 as documented in modified Exhibit 9.

20. Claimant has established it is more probably true than not that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of WCRP 5-5(B) by filing a medical-only GAL on March 29, 2022. Despite the mandatory language of Rule 5-5(B), Respondents filed a medical-only GAL on March 29, 2022 without explanation. Moreover, Respondents violation was objectively unreasonable because it was not based on a rational argument in law or fact. Therefore, Claimant is entitled to an award of penalties for the period from March 29, 2022 until July 19, 2023 for a total of 478 days.

21. The record reveals that the day before Insurer filed a medical-only GAL, the adjuster knew it was a lost-time claim. Specifically, in Insurer's claim notes, adjuster LM[Redacted] remarked on November 4, 2021 that Claimant's claim was "medical only" for a lower back injury. However, on the following day the claims notes reflect that there was a "Type Change" from "Medical Only" to an indemnity claim. The adjuster specifically knew Claimant had missed a number of weeks of work because of the work injury. The filing of a medical-only GAL under the circumstances constituted a violation of Rule 5-5(B). Insurer had notice of the problem and promised to address it on the same day the medical-only GAL was filed on March 29, 2022. Respondents' former attorney specified in an e-mail that the medical-only GAL would be amended "to account for the temporary indemnity period, however at this time the claim rep does not have the wage information from the employer to assess the TTD period/AWW." Nevertheless, Insurer did not fix the problem and admit for TTD benefits until July 19, 2023 or almost 16 months later. Moreover, Respondents did not cure the violation within 20 days of when Claimant filed the AFH on March 28, 2023. Instead, Respondents filed a Response to the AFH asserting that Claimant was not entitled to any TPD or TTD benefits.

22. EY[Redacted] credibly explained she began working on Claimant's file on March 1, 2023 after she took over the matter from BS[Redacted]. She agreed that, if an injured worker misses more than three working shifts because of an admitted work injury, the injury is an indemnity or lost-time claim. Furthermore, if an adjuster is aware that an injured worker has missed more than three working shifts, then a GAL should not be filed as a medical-only admission. EY[Redacted] noted that it would be standard procedure for a new claims adjuster to be assigned when there has been a switch from a medical-only claim to an indemnity claim.

23. Respondents filed a medical-only GAL on March 29, 2022 and waited approximately 16 months to file an amended GAL that admitted for indemnity benefits and an AWW. While Respondents acknowledged TTD benefits from August 22, 2021 through October 4, 2021 in the amended GAL, they also terminated all temporary benefits as of October 4, 2021 due to an alleged return to full wages/full hours of work. The record reveals that Respondents conduct in failing to file an amended GAL for approximately 16 months while aware that a medical-only GAL constituted a Rule violation, was objectively unreasonable because it was not based on a rational argument in law or fact. Insurer was aware that Claimant had missed more than three working shifts but still filed a GAL as a medical-only admission. Based on Respondents violation of Rule 5-5(B) and unreasonable conduct, Claimant has established the right to a penalty of $25 per day from March 29, 2022 through July 19, 2023 for a total of 478 days. The total penalty equals $11,950. A penalty of $11,950 is sufficient to penalize Respondents' conduct in violating Rule 5-5(B) and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

CONCLUSIONS OF LAW

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

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

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

Temporary Partial Disability Benefits

4. Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between a claimant's AWW at the time of injury and earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Once a claimant establishes that the injury has caused "disability" in the sense that the injury impairs a claimant's ability to perform his regular duties, the right to temporary disability benefits is measured by a claimant's wage loss. *See Black Roofing Inc. v. West*, 967 P.2d 195 (Colo. App. 1998). Further, "economic unemployment or underemployment" is not a claimant's "fault" and does not serve to sever the causal relationship between the injury and the wage loss. This is true because the physical restrictions caused by the injury affect a claimant's prospects for finding alternative employment. *J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989); *Kaminski v. Grand County Roofing & Sheet Metal, Inc.,* WC 4-525-562 (ICAO, Mar. 21, 2003). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

5. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover TPD benefits for the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Initially, on August 21, 2021 Claimant sustained a work-related injury to his lower back after lifting boxes and bags. Because Employer did not direct him to a medical provider, he sought treatment with personal physician Dr. Hindt at Kaiser. By September 27, 2021 Dr. Hindt permitted Claimant to return to work, but expressed concerns due to Claimant's heavy lifting, and encouraged him to exercise caution. She noted "[i]f he does have more pain upon return to work I want him to stop and take a step back." Subsequent visits to Kaiser reveal that Claimant continued to suffer from aggravating factors including bending, lifting, sitting, driving, transitioning position, walking, and standing. Claimant underwent physical therapy and received injections for his lower back condition.

6. As found, in contrast, IME physician Dr. Burris concluded that Claimant could return to regular duty employment. However, Dr. Burris acknowledged that Claimant's Kaiser physician advised him to "watch what he lifts, and he is able to self-monitor his activities at work to avoid heavy lifting." Moreover, Claimant credibly testified that his lifting abilities have been limited since his work injury and he more often uses a forklift. Claimant also remarked that he is only able to walk or stand for a certain amount of

time before his back becomes tight and he must sit down. Finally, Claimant commented that his back injury limits bending and stooping and has, "really inhibited me from doing my work at 100 percent." Therefore, despite Dr. Burris' opinion, the record reveals that Claimant's lower back injury has limited his ability to perform his regular job duties.

7. As found, as a result of his August 21, 2021 industrial injury, Claimant's earnings have been lower than his AWW of $2,337.14. When Claimant returned to work for the period October 5, 2021 through August 20, 2023 he did not receive the full hours, including overtime, he had been working prior to his lower back injury. The differences between Claimant's AWW and weekly earnings are documented in Claimant's modified Exhibit 9. Fewer overtime hours caused a reduction in wages that was causally connected to Claimant's lower back injury. The effects of the injury placed Claimant at a competitive disadvantage relative to other employees in procuring overtime hours. As a result, Respondents are required to pay TPD benefits based on the difference between Claimant's AWW and his actual earnings during the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Based on Claimant's impaired earning capacity and reduction in hours due to his August 21, 2021 work injury, he is entitled to receive TPD benefits in the total amount of $30,900.44 as documented in modified Exhibit 9.

Penalties

8. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Off.,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

9. The cure provision of §8-43-304(4), C.R.S., provides that,

> After the date of mailing of [any application for hearing for any penalty pursuant to subsection (1)], an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking the penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed….

10. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain

whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.") *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

11. An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. no. 4-619-954 (ICAO. May 5, 2006). However, any penalty assessed should not be excessive or grossly disproportionate to the conduct in question. When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the other party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Indus. Claim Appeals Off.,* 126 P.3d 323 (Colo. App. 2005).

12. The Colorado Division of Workers' Compensation Rules of Procedure Rule 5-5 addresses admissions of liability. Rule 5-5(B) specifically provides that "[a]n admission filed for medical benefits only shall state the basis for denial of temporary and permanent disability benefits within the remarks section of the admission."

13. As found, Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of WCRP 5-5(B) by filing a medical-only GAL on March 29, 2022. Despite the mandatory language of Rule 5-5(B), Respondents filed a medical-only GAL on March 29, 2022 without explanation. Moreover, Respondents violation was objectively unreasonable because it was not based on a rational argument in law or fact. Therefore, Claimant is entitled to an award of penalties for the period from March 29, 2022 until July 19, 2023 for a total of 478 days.

14. As found, the record reveals that the day before Insurer filed a medical-only GAL, the adjuster knew it was a lost-time claim. Specifically, in Insurer's claim notes, adjuster LM[Redacted] remarked on November 4, 2021 that Claimant's claim was "medical only" for a lower back injury. However, on the following day the claims notes reflect that there was a "Type Change" from "Medical Only" to an indemnity claim. The adjuster specifically knew Claimant had missed a number of weeks of work because of the work injury. The filing of a medical-only GAL under the circumstances constituted a violation of Rule 5-5(B). Insurer had notice of the problem and promised to address it on the same day the medical-only GAL was filed on March 29, 2022. Respondents' former attorney specified in an e-mail that the medical-only GAL would be amended "to account for the

temporary indemnity period, however at this time the claim rep does not have the wage information from the employer to assess the TTD period/AWW." Nevertheless, Insurer did not fix the problem and admit for TTD benefits until July 19, 2023 or almost 16 months later. Moreover, Respondents did not cure the violation within 20 days of when Claimant filed the AFH on March 28, 2023. Instead, Respondents filed a Response to the AFH asserting that Claimant was not entitled to any TPD or TTD benefits.

15. As found, EY[Redacted] credibly explained she began working on Claimant's file on March 1, 2023 after she took over the matter from BS[Redacted]. She agreed that, if an injured worker misses more than three working shifts because of an admitted work injury, the injury is an indemnity or lost-time claim. Furthermore, if an adjuster is aware that an injured worker has missed more than three working shifts, then a GAL should not be filed as a medical-only admission. EY[Redacted] noted that it would be standard procedure for a new claims adjuster to be assigned when there has been a switch from a medical-only claim to an indemnity claim.

16. As found, Respondents filed a medical-only GAL on March 29, 2022 and waited approximately 16 months to file an amended GAL that admitted for indemnity benefits and an AWW. While Respondents acknowledged TTD benefits from August 22, 2021 through October 4, 2021 in the amended GAL, they also terminated all temporary benefits as of October 4, 2021 due to an alleged return to full wages/full hours of work. The record reveals that Respondents conduct in failing to file an amended GAL for approximately 16 months while aware that a medical-only GAL constituted a Rule violation, was objectively unreasonable because it was not based on a rational argument in law or fact. Insurer was aware that Claimant had missed more than three working shifts but still filed a GAL as a medical-only admission. Based on Respondents violation of Rule 5-5(B) and unreasonable conduct, Claimant has established the right to a penalty of $25 per day from March 29, 2022 through July 19, 2023 for a total of 478 days. The total penalty equals $11,950. A penalty of $11,950 is sufficient to penalize Respondents' conduct in violating Rule 5-5(B) and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

ORDER

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

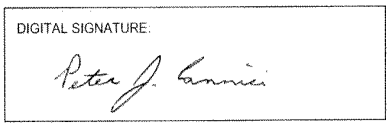
1. Claimant shall receive TPD benefits in the total amount of $30,900.44 as documented in modified Exhibit 9.

2. Respondents shall pay a penalty of $25 per day from March 29, 2022 through July 19, 2023, or 478 days, totaling $11,950. The amount is sufficient to penalize Respondents' conduct in violating Rule 5-5(B) and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

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

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

DATED: November 9, 2023.



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

ISSUES

- Whether Respondents produced clear and convincing evidence to overcome the MMI determination of Dr. Dwight Caughfield?

- If Respondents overcame Dr. Caughfield's MMI determination, whether they also established, by clear and convincing evidence, that Dr. Caughfield erred in assigning Claimant 13% cervical spine impairment.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Lesnak, the ALJ enters the following findings of fact:

1. Claimant is employed as a field service technician for Employer. While in the field, Claimant uses a large bucket truck to complete his work duties. (Respondents' Hearing Exhibit (RHE) B, p. 19). On October 24, 2022, Claimant was involved in a roll over motor vehicle accident after being struck by a vehicle that unexpectedly pulled out in front of him. *Id*.

2. Emergency personnel responded to the scene of Claimant's accident. (RHE F, p. 109). Claimant was evaluated by EMT, [Redacted, hereinafter RS]. *Id.* While Claimant accepted EMS care, he refused transport to the hospital, agreeing instead to follow-up in the emergency room (ER) via personal vehicle.[1] *Id.*

3. Claimant presented to the ER at St. Francis Medical Center for further evaluation. (RHE D, p. 88, 91). He was evaluated by both Physician Assistant (PA) Kelly Marie Torres and Dr. Christopher Thomas Layton. *Id.* at pp. 88-95. Claimant underwent a CT of the head, neck and facial bones given his report of head trauma without loss of consciousness and right-sided neck pain. *Id.* at pp. 88, 91. Claimant's CT of the head and facial bones were read as "normal", i.e. without evidence of skull or facial fracture and no intracranial hemorrhage. *Id*. at pp. 88-89. The CT of the neck demonstrated no acute spinal fractures. There was an incidental finding of a "[c]hronic C7 spinous process tip fracture deformity" and "[m]ild but increased left C2-C3 facet arthropathy". *Id*. at p. 89. A focused physical examination revealed Claimant's neck to be supple, without midline tenderness; however, there were a "few scattered abrasions on the left lateral and base of the neck" from the seatbelt and tenderness over the sternocleidomastoid muscle extending down to the right shoulder. *Id.* at p. 92.

[1] Claimant testified he declined ambulance transport because he was able to walk but noted he had "a lot of head pain" at the scene. (Hrg. Tr. p. 15, ln. 14-19).

4. Dr. Layton noted that Claimant was found to have "soft tissue injuries but no other significant trauma. (RHE D, p. 90). Moreover, Dr. Layton opined that there was "no evidence of any significant TBI (traumatic brain injury). *Id*. Claimant was treated with anti-inflammatories and muscle relaxants for his symptoms and discharged from the ER. *Id.* at p. 90, 95.

5. Claimant was evaluated the day after the accident (10/25/2022) by PA Mendy Peterson at Concentra Medical Centers (Concentra). (RHE C, pp. 27-33). During this encounter, Claimant reported "pain pretty much everywhere" but noted most of the pain was in the following delineated locations: "right scalp, right shoulder, left knee, right wrist, lumbar area, and hips." *Id*. Claimant did not specifically indicate that he had neck pain. The physical examination of the cervical spine noted there was "normal lordosis, no tenderness and full range of motion." Among other things, Claimant was assessed with a closed head injury, a right shoulder strain, and neck strain. Claimant was then referred for physical therapy and given work restrictions that precluded him from driving a company vehicle "due to functional limitations" caused by decreased range of motion in the neck. *Id*. at pp. 28-30.

6. Claimant retuned to Concentra on October 28, 2022 with complaints of blurriness in the right eye, headaches and neck pain. He was referred for an ophthalmology evaluation. (RHE C, p. 37). PA Peterson noted that Claimant would be seen by the attending physician at his next visit. *Id.* at p. 39. She also limited Claimant to four hours of desk work per day and continued to preclude his driving company vehicles due to limited range of motion in the neck. *Id*. She anticipated that Claimant would reach maximum medical improvement on November 20, 2022. *Id*.

7. Claimant saw Dr. Marcie Wilde at Concentra on November 2, 2022. (RHE C, p. 41). Dr. Wilde noted that Claimant had suffered a "mild TBI without LOC" (loss of consciousness). *Id.* During this appointment, Claimant reported persistent "confusion, headache, trouble [with] concentration, sensitivity to light and sleep". *Id.* Claimant reported attending physical therapy noting that he felt that it had been beneficial. *Id.* No mention of pain or functional limitation concerning the cervical spine were documented in Dr. Wilde's 11/2/2022 report. Indeed, the only musculoskeletal pain noted was limited to the left hip and examination of the cervical spine revealed a "normal lordosis, no tenderness and full range of motion". *Id*. at pp. 42-43. Dr. Wilde renewed Claimant's order for PT for the lumbar spine, the neck and the right shoulder. *Id*. at pp. 43-44. No changes were made to Claimant's work restrictions. Id. at p. 46.

8. Dr. Wilde focused her treatment to Claimant's low back and hips during his November 9, 2022 appointment. Dr. Wilde, who is an osteopathic medicine specialist, performed osteopathic manipulative treatment to the right ASIS (anterior superior iliac spine) and PSIS (posterior superior iliac spine) and noted further that Claimant "[c]ontinues to have marked struggles with symptoms from head injury. *Id*. at pp. 50-51. Physical therapy was continued as was Claimant's restriction on driving company vehicles. *Id*. at p. 51, 53.

9. By his November 16, 2022 follow-up appointment, Claimant had resumed driving. (RHE C, p. 55). PA Peterson noted that Claimant was "approximately 50% toward meeting the physical requirements of his job". *Id.* at p. 58.

10. Claimant returned to Concentra on November 30, 2022, where he was reevaluated by Dr. Wilde. (RHE C, p. 61). Claimant reported persistent headaches and feeling "foggy" and a little lightheaded. *Id*. He also reported no improvement with his neck pain, complaining that it felt like it need to "pop". Id. at p. 62. While the range of motion in his neck was "better than before", Claimant reported sensitivity to touch on the lateral side of the neck which intensified his headaches. *Id.* at p. 61. Claimant was started on Ergotamine-Caffeine tablet for his headaches and given a referral for a chiropractic evaluation for his neck strain complaints. *Id*. at p. 66. Claimant was anticipated to reach MMI in two months. *Id*. at p. 68.

11. Claimant's first chiropractic visit with Dr. Lance Weidner took place on December 13, 2022. (CHE 8, p. 231). Dr. Weidner documented that Claimant was there because of an injury to his neck and right eye with a concussion and headaches. *Id.* Physical examination was completed and provocative testing done. *Id.* at p. 235. Claimant was noted to have a positive cervicocerebral vascular test which caused dizziness, headache and visual changes, which Dr. Weidner opined was an "absolute" contra-indication for cervical manipulation. *Id*. at p. 236. Accordingly, Dr. Weidner referred Claimant back to Dr. Wilde to rule out vertebral artery or other vascular injury from his MVA. *Id.*

12. Claimant returned to Dr. Wilde the following day, December 14, 2022. (RHE C, p. 70). She noted Dr. Weidner raised concern for a possible vascular disorder given Claimant's positive cervicocerebral vascular test with dizziness, headache, and visual change. *Id*. at p. 71. Dr. Wilde ordered a CT scan of the head and brain with contrast. *Id.* at p. 74. She also ordered an arteriogram of the neck. *Id.* at p. 75. Finally, Dr. Wilde placed Claimant's PT on hold pending the results of Claimant's additional imaging. *Id*. Dr. Wilde renewed Claimant's driving restriction due to reduced range of motion in the neck and opined that MMI was not anticipated for another two months. *Id.* at p. 77.

13. Claimant returned to Concentra on December 28, 2022 with complaints of a migraine headache. (RHE C, p. 78). PA Peterson documented that Claimant was not a good candidate for chiropractic care, and that he had completed his last PT session two weeks prior. *Id.* at p. 79. PA Peterson noted that Claimant had deferred medications to help with his persistent headaches and demanded a referral to a neurologist and for an MRI, which PA Peterson noted were not indicated given Claimant's normal physical examination. *Id*. PA Peterson noted that Claimant became irate stating that he thought the treatment process was "getting ridiculous" and that he would let his "attorney handle this from here on out." *Id.* PA Peterson characterized Claimant as being "angry and evasive", noting further that Claimant's objective findings [did] not support his subjective complaints" and it appeared that he was amplifying his symptoms. *Id*. at p. 82. She noted that Claimant had reached a period of stability and was capable of full duty work. Claimant was placed at MMI, without impairment and

released to full duty work. *Id*. at p. 85. At the time of MMI, it was anticipated that Claimant may experience flares of pain or loss of function, but that these flares would not require treatment beyond conservative home measures. Id at p. 83. Dr. George Johnson signed off on the report and completed a WC 164 form. *Id.*; CHE 4, p. 28. At the time he was placed at MMI, Claimant had undergone work-ups and treatment:

- Ophthalmology evaluation;
- CT scans of head and neck;
- Physical therapy for neck, back and shoulder, including dry needling;
- Chiropractic – although he was noted to be not a candidate as his findings of positive Georges' test resulting in ptosis, headache, dizziness, and visual changes;
- Osteopathic manipulation

14. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Johnson's opinions regarding MMI and impairment on January 12, 2023. (CHE 4, p. 10).

15. Claimant objected to Respondents FAL requested a Division Independent Medical Examination (DIME). Dr. Dwight Caughfield was identified as the DIME doctor and he completed the requested examination on April 25, 2023. (RHE B). Dr. Caughfield issued a report outlining his opinions concerning MMI and impairment on May 8, 2023. Dr. Caughfield diagnosed Claimant with work-related occipital neuralgia following blunt head trauma, chronic daily headaches, and cervical pain. Id. at p. 21. After a review of the medical records, taking a history from Claimant, and personally examining him, Dr. Caughfield opined that Claimant was not at MMI for his work-related injuries. *Id*. In support of his opinion, Dr. Caughfield noted:

> Chronic daily headaches (both cervicogenic and migraines) are addressed under the Mild Traumatic Brain Injury Guidelines per Cervical injury guidelines page 9 2nd paragraph [Refer to the Mild Traumatic Brain Injury Medical Treatment Guidelines (MTGs) for information on cervicogenic headache] He has undergone treatments to include passive and active physical therapy, cervical mobilizations, as well as dry needling but his headaches persist. He has returned to full duties and is independent in ADLs but reports having to go to bed early to manage his headaches indicating he has not returned to his pre-injury level of function. The Mild Traumatic Brain Injury treatment guidelines page 69 indicate further treatment require functional impairment for further procedures and treatment commended [sic]. Since he does report headaches that require him to go to bed early for relief, I believe further evaluation and treatment per the treatment algorithm are merited.
>
> Further recommended treatments include medication trials (such as Amitriptyline) and evaluation for diagnostic blocks. mTBI guidelines

> discuss diagnostic nerve blocks (Page 47 E.2.f) which can be beneficial to establish a greater occipital neuralgia while cervical guidelines Section 9.a.iv page 45 discuss medial branch blocks for upper cervical pain which can also be involved in his daily headaches.
>
> I do not feel he has reached MMI until further treatment trials for his chronic headaches have been completed to include a course of medication trials. Chiropractic manipulation, and possible right C2-C3 medial branch blocks/greater occipital nerve block. An MRI of the upper cervical spine is appropriate prior to manipulation and injections given the complaints of dizziness when his neck pops (Possible vertebrobasilar pathology as contraindication to manipulation cervical spine injury guidelines page 34).
>
> He should also be screened for psychological risk factors prior to injections per recommendation 106 page 46 of the cervical injury treatment guidelines.

(RHE B, p. 21).

16. Dr. Caughfield provided a provisional whole person impairment rating of 5% for Claimant's ongoing headaches and a 13% rating for his cervical spine: 4% for Table 53 and 9% for range of motion loss of the cervical spine. *Id.* at 21-22. Dr. Caughfield provided these ratings because his primary complaint remained his daily headaches that require him to go to bed earlier than normal for relief, but Claimant was also having significant upper neck pain, especially on extension suggesting possible facet syndrome. *Id.* at p. 21. Dr. Caughfield opined that although Claimant was able to perform his job, he was performing it in a modified, sedentary capacity, and that his headaches were still interfering with his functional abilities. *Id.* Dr. Caughfield concluded the ongoing, functionally interfering conditions require further treatment as merited per the mTBI headache treatment guidelines as outlined in section J." *Id.*

17. Respondents disagreed with the opinions of Dr. Caughfield and filed an application for hearing to overcome his MMI determination and opinions regarding permanent impairment. They also sought the opinions of Dr. Lawrence Lesnak. Indeed, Dr. Lesnak completed an independent medical examination (IME) at Respondents request on July 17, 2023. (RHE A, pp. 3-16). After taking a history from Claimant and completing a physical examination[2] and a records review, Dr. Lesnak opined that while Claimant probably sustained a mild closed head injury as a result of his MVA, there was no "medical evidence to support that [he] sustained any specific injuries to his cervical spine" related to the October 24, 2022 accident. *Id*. at p. 14.

[2] The cervical examination performed by Dr. Lesnak showed full active range of motion in all planes, negative Spurling's maneuver and Lhermitte's sign. Cervical facet joint loading activities on the left produced no symptoms, on the right, it caused some right-sided suboccipital tenderness. (RHE A, p. 12).

Indeed, Dr. Lesnak added that at the time of his IME there was no "clinical evidence of any symptomatic cervical spine pathology or any medical diagnosis involving the cervical spine that would in any way pertain to [Claimant's] work-related injury claim of 10/24/2022. *Id.*

18. Regarding Claimant's head injury, Dr. Lesnak noted that while Claimant may have "residual intermittent right greater occipital neuritis/neuralgia (which he could not reproduce during examination), he had reached MMI for this injury because dry needling for his headaches had been tried without significant relief and because the medical records document that he "declined any prescription medications that were offered to him previously". (RHE A, p. 14). Regarding Dr. Caughfield's treatment recommendations, Dr. Lesnak noted that Claimant may likely decline additional injection type treatments given his experience with dry needling. Nonetheless, Dr. Lesnak felt it may be appropriate to offer Claimant a greater occipital nerve branch block trial, which he opined should be done on a post MMI maintenance basis. Id. at pp. 14-15.

19. As noted above, Dr. Lawrence Lesnak testified by deposition on September 18, 2023. He testified that in the context of an emergency evaluation following a motor vehicle accident where a patient complains of headache, completion of cervical and head CTs are routine and there completion in this case did not necessarily mean that Claimant sustained a cervical spine injury. Dr. Lesnak testified these scans can assist in checking for reasons/causes for headaches. (Depo Tr. p. 20, ll. 5-19; RHE D, pp. 88-89). As noted above, the physical examination at ER shortly after the accident indicated the neck was "supple," which Dr. Lesnak testified meant there was no tenderness or range of motion abnormalities. He further clarified that the physical examination showed a couple of small abrasions on the neck, but no evidence that would support a diagnosis of a neck strain. (Depo Tr. p. 38, ll. 4-10; RHE D, p. 89).

20. Dr. Lesnak testified the initial cervical CT scan obtained in the ER on the date of Claimant's accident did not show any evidence of acute trauma or injury. Rather, he explained the study demonstrated an old C-7 spinous process tip fracture that was unrelated to the car accident long with facet arthropathy, which was age related and to be expected in a patient of Claimant's age. (Depo. Tr. p. 20-21).

21. Dr. Lesnak testified that the second cervical CT scan was not performed for neck pain, but for headaches and head pressure. He noted the reason for obtaining this second study was the providers wanted to make sure that there was nothing in the cervical spine causing the claimant's headaches. (Depo. Tr. p. 21-22). Based upon the evidence presented, including Dr. Wilde's December 14, 2022 report, the ALJ finds Dr. Lesnak's characterization regarding the reason Dr. Wilde ordered a second CT scan of the neck is misleading. The evidence presented persuades the ALJ that Dr. Wilde ordered a second CT scan of the neck to rule out a vascular injury caused by Claimant's MVA rather than headaches and head pressure. Indeed, Dr. Wilde's December 14, 2022 report supports a finding that she ordered a CT of the *brain* because of "eye pressure" and "intractable acute post-traumatic headache" due to a motor vehicle accident. (RHE C, pp. 74-75)(Emphasis added).

22. Dr. Lesnak testified that through the majority of Claimant's course of treatment, his main complaint was suboccipital pain and pressure, which he noted was different in character from neck pain. He identified suboccipital pain as located at the base of the head and not indicative of neck injury or even neck symptoms. (Depo. Tr. p. 22-23). Claimant testified that, as of the hearing, his sole complaint was that of ongoing headaches, that started in the lower right part of his skull wrapping up to his ear and top of his head on the right side. (Hrg. Tr. p. 35, ln. 1-16).

23. Dr. Lesnak testified that in addition to Claimant's negative imaging, the medical records documented no reproducible objective findings or any positive provocative maneuvers involving the cervical spine to suggest that Claimant injured his neck. He testified the entirety of Claimant's evaluations at Concentra paired with the imaging supported a finding that there was no impairment of the cervical spine. (Depo. Tr. p. 24-25).

24. Dr. Lesnak testified that Dr. Caughfield erred in assigning impairment for the cervical spine as Claimant had no medical diagnosis under Table 53 of the *AMA Guides* that would qualify him for an impairment rating. According to Dr. Lesnak, without that diagnosis, there was no basis for providing an impairment rating for the neck, regardless of causality. (Depo. Tr. p. 25-26).

25. Dr. Lesnak testified that based on his evaluation of Claimant, the fact that the medical records from Concentra documented consistent full pain-free range of motion of the neck, and that there were two cervical CT scans that showed no evidence of any type of injury or trauma-related pathology, Claimant had a "more than adequate workup for someone who doesn't have complaints of specific neck pains." (Depo. Tr. p. 23, ll. 14-23). The ALJ interprets this testimony to infer that Dr. Lesnak believes that had Claimant suffered a neck injury during the October 24, 2022 MVA, he would be at MMI for any injury sustained.

26. Regarding Claimant's persistent headaches, Dr. Lesnak testified that while Claimant continued to have headaches, these headaches do not affect his MMI status. Rather, where a claimant had a permanent impairment for headaches (below, he notes 5% whole person impairment for episodic neurologic conditions), Dr. Lesnak testified that one would anticipate ongoing headaches that are episodic. (Depo. Tr. p. 18-19). Accordingly, Dr. Lesnak testified that even if Claimant wanted to try a medication trial or injections as referenced by Dr. Caughfield, both of these modalities could be pursued on a maintenance basis. (Depo. Tr. p. 14, ll. 2-16). Because this treatment would not change the claimant's underlying anatomic condition and would not be expected to result in improvement in Claimant's function (given that he had returned to work and was performing normal activities), Dr. Lesnak agreed that Claimant had reached a point of stability from a medical standpoint." (Depo. Tr. p. 9, ll. 7-13). Accordingly, Dr. Lesnak opined that Dr. Caughfield erred in concluding that Claimant not at MMI simply because Claimant could try these modalities. (Depo. Tr. p. 17, ll. 4-18). Dr. Lesnak concurred with the December 28, 2022 date of MMI as assigned by Dr. Johnson. (Depo. Tr. p. 26, ll. 8-12).

27. While he disagreed with the assessed provisional impairment of 13% whole person for a cervical spine injury[3], Dr. Lesnak fully agreed with the assignment of 5% whole person impairment for Claimant's headache condition that slightly interfered with his daily living. (RHE A, p. 15; Depo. Tr. p. 26, ll. 16-23).

28. Claimant testified that he continues to suffer from persistent relentless headaches and neck pain. (Hrg. Tr. pp. 20-23). He described his pain as being located deep inside the base of the skull and radiating upwards, circling behind his right eye. (Hrg. Tr. p. 22, ll. 4-20). He believes that his headaches may be emanating from his neck. *Id.* at p. 21. Claimant testified that he is more than willing to try different medications and undergo additional care that may help alleviate his symptoms. *Id.* at p. 23. Claimant testified that he did not decline additional treatment or medications during his December 28, 2022 appointment with PA Peterson. Rather, he noted that he spoke to Dr. Wilde about the caffeine pills and reported to her that they were not providing any relief. (Hrg. Tr. p. 18, ll. 9-13). No other medication, aside from Ibuprofen, was attempted. *Id.* Claimant was then asked about PA Peterson's record stating Claimant was deferring any additional medications for his headaches. *Id.* at 19. According to Claimant, he informed PA Peterson that he was continuing to have headaches. *Id*. at p. 19, ll. 20-22. Claimant asked what could be done for the headaches and she asked him what he would like her to give him. *Id*. at ll. 22-23. Claimant then said, "You're the doctor. I don't know." *Id.* at ll. 23-24. Claimant testified at this point, the conversation turned "snippy" and he "got a little angry" because he was still having headaches and was given no additional treatment options. Id. at p. 20, ll. 1-22.

29. The ALJ credits the reports and opinions of PA Peterson and Dr. Johnson to find that Claimant reached MMI for the sequela related to his October 24, 2022 industrial injury on December 28, 2022. Based upon the evidence presented, the ALJ finds that Respondents have clearly and convincingly overcome the MMI determination of Dr. Caughfield.

30. The ALJ credits the medical record, particularly the ER report and the PT records as well as the DIME report of Dr. Caughfield to find that Claimant suffered a cervical spine strain as a consequence of his October 24, 2023 MVA. Indeed the record evidence supports a finding that Claimant suffered a medically documented "soft tissue lesion" in the cervical spine resulting in "six months of medically documented pain and rigidity with or without muscle spasm, associated with *none to minimal* degenerative changes on structural tests". (AMA Guides to the Evaluation of Permanent Impairment,

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[3] Here, Dr. Lesnak testified that the Division IME clearly erred by assigning impairment (provisional) for a cervical condition. Noting that Claimant had full pain-free range of motion in the records and during his physical examination combined with any identifiable trauma related pathology identified on CT imaging, Dr. Lesnak reiterated his opinion that there was no permanent medical diagnosis under Table 53 of the *AMA Guides* that would qualify Claimant for or support any cervical impairment. Consequently, Dr. Lesnak testified that Dr. Caughfield erred in assigning such cervical impairment. (Depo. Tr. p. 24-26).

Third Edition (Revised), Table 53, II. B, p. 80). As presented, the evidence persuades the ALJ that Claimant experienced secondary range of motion loss in the cervical spine as a consequence of his cervical spine strain. The contrary opinions of Dr. Lesnak are not persuasive. Accordingly, Respondents have failed to establish, by clear and convincing evidence, that Dr. Caughfield's cervical spine impairment rating is highly probably incorrect.

CONCLUSIONS OF LAW

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

Generally

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

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

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

Overcoming the DIME Opinion of Dr. Caughfield Regarding MMI and Impairment

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). Careful review and comparison of Dr. Hall's written report and oral testimony with the balance of the more persuasive medical record convinces the ALJ that Claimant reached MMI for the effects of his industrially based injuries on December 28, 2022 as opined by Dr. Johnson.

F. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. The requirement or need for periodic care after MMI to prevent deterioration of a claimant's condition does not vitiate a finding of MMI. *See Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). To affect a finding of MMI, the requirement for future care must "significantly improve the condition." § 8-40-201(11.5), C.R.S. The mere "possibility of improvement" shall not affect a finding of MMI. *Id.*

G. The Act requires Respondents to provide treatment which is reasonable and necessary to *cure* and *relieve* the claimant from the effects of an injury. § 8-42-101(1)(a), C.R.S. However, the obligation to provide treatment to *cure* the condition terminates when the claimant reaches MMI. *Corley v. Bridgestone Americas, Inc.* W.C. No. 4-993-719-004 (Feburary 26, 2020). *Grover* allows for an award of ongoing medical benefits after MMI where the treatment will be necessary to *relieve* the effects of the industrial injury. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). While there is no bright line test to distinguish treatment designed to *cure* versus that which is designed to *relieve*, the panel has previously noted that it is not the type of treatment that is significant but the reason for the treatment. *See Hayword v. UNISYS Corp.,* W.C. No. 4-230-686 (July 2, 2002). The fact that the treatment may have an incidental effect on increasing functionality does not define whether a treatment is curative or relieving. *See McCardie v. Transit Mix Concrete*, W.C. No. 4-964-260-0001

(October 1, 2019) (noting that a spinal cord stimulator aimed at addressing pain levels and improving function can be maintenance care aimed at relieving the effects of the work injury).

H. Here, the weight of the persuasive evidence demonstrates that it is highly probable that the Division IME physician erred in determining that Claimant had not reached MMI. Dr. Caughfield recommended chiropractic treatment, medication trials, and injections prior to placement at MMI.[4] However, the totality of the evidence shows that both the ATP and a reviewing chiropractor determined unequivocally the claimant was not a candidate for chiropractic care. Moreover, while Claimant denies indicating that he rejected medication trials and may be willing to try this and additional injection therapy (despite significant evidence that he did not care for trigger point injections, which provided no relief), Dr. Lesnak persuasively testified these modalities would not improve Claimant's condition and could be provided as maintenance care as such treatment might temporarily relieve the claimant's symptoms. See, *Corley, supra* (finding a neurotomy was treatment aimed at relieving the claimant's symptoms and maintaining MMI status rather than treatment designed to cure the condition). As presented, the evidence persuades the ALJ that Dr. Caughfield's recommended treatment modalities are not designed to cure, but rather temporarily relieve Claimant's persistent symptoms. Indeed, in this case, Dr. Caughfield's "recommendations" are silent as to whether the treatments will "cure" versus "relieve" Claimant's alleged complaints. He discusses options using speculative language such as "can be beneficial" while also recommending permanent impairment recognizing that Claimant may have headaches that slightly interfere with daily living on a permanent basis. That Dr. Caughfield hoped for more function (he believes further treatment is merited because the claimant still goes to bed early for relief), does not alone dictate that the recommendations are "curative." *McCardie*, *supra*.

I. Based on the totality of the evidence presented, including the persuasive testimony of Dr. Lesnak, the ALJ agrees with Respondents contention that Claimant was properly placed at MMI on December 28, 2022 as the ALJ concludes that Dr. Caughfield's recommended treatment properly classified as maintenance care aimed at maintaining MMI status rather than curing Claimant's condition. Accordingly, Respondents have overcome Dr. Caughfield's MMI determination by clear and convincing evidence. Claimant reached MMI for the effects of his industrial injury as of December 28, 2022.

J. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of a claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols.

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[4] Dr. Caughfield does not appear to assess that any cervical condition is not at MMI; rather, that he does "not feel that [Claimant] has reached MMI until further treatment trials for his chronic headaches have been completed." All recommended treatment then relates to Claimant's persistent headaches rather than to management of a neck injury. (RHE B, p. 21).

Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon a preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). In this case, Respondents, relying principally on the testimony of Dr. Lesnak, contend that there are no physical findings on examination and/or imaging that supports Dr. Caughfield's conclusion that Claimant suffered cervical pathology that qualified him for impairment under Table 53 diagnosis and without a Table 53 diagnosis, Claimant is also not entitled to impairment for reduced range of motion. Respondents assert further that at the time Claimant reached MMI, only two months had passed since the date of injury. Accordingly, Respondents contend that Dr. Caughfield erred, as a matter of law, in concluding that Claimant qualified for a Table 53 II.B rating since Claimant failed to show that he suffered six months of documented pain and rigidity prior to MMI. The ALJ is not convinced.

K. In this case, the undersigned concludes that Dr. Caughfield's impairment rating for spinal disorders, i.e. 4% from Table 53, II, B of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised*), hereinafter the "AMA Guides", is supported by the record. Contrary to Dr. Lesnak's testimony, the written record, particularly the PT records are replete with references to neck pain, tenderness, myofascial involvement, restricted movement and the need for driving restrictions due to limited cervical range of motion. As presented, the evidence persuades the ALJ that Dr. Lesnak relied on the erroneous premise of full, pain-free range of motion of the cervical spine. While it is true that PA Peterson and Dr. Wilde documented normal exam of the cervical spine with full range of motion, their notes contradict themselves on this issue. Indeed, Claimant was diagnosed with a neck strain and was given driving restrictions *specifically due to loss of range of motion in Claimant's neck*. *Id.* at 91. (Emphasis added). Moreover, PT was ordered, which therapy focused on treatment of the neck among other things. It is evident from the evidence presented, that Dr. Lesnak did not review or simply ignored the content of the physical therapy records, as they contradict the foundation for his opinion. (See e.g., CHE 7, pp. 18-24, 38-42, 62-67, 113-117, 124-127). Claimant's physical therapy note from October 28, 2022, further contradicts the notion of full, pain-free range of motion. (CHE 7, p. 105). Indeed, the physical therapist obtained actual range of motion measurements on October 28, 2022, and Claimant's range of motion was reduced in flexion, extension, right side bending, left side bending, right rotation, and left rotation. *Id.* Consequently, the ALJ finds Dr. Lesnak's opinions regarding the condition of Claimant's neck unpersuasive.

L. Concerning Respondents suggestion that Claimant is not entitled to spinal impairment because "there is no evidence the claimant sustained six months of pain and rigidity to support a cervical rating under Table 53(II)(b)", the ALJ finds the case of *McLane Western Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999) instructive. In *McLane* the claimant injured her low back approximately five months before she was determined to be at MMI. Her treating physician therefore determined she had no ratable impairment. However, the DIME doctor saw her a few months later and documented her complaints of low back pain and rigidity which was then in excess of six months duration. He therefore provided a 5% rating pursuant to

Table 53 II, and an additional 4% for range of motion deficits. The respondents argued that because six months of pain had not have been experienced by the claimant prior to attaining MMI, Table 53, as a matter of law, was not available as a source for an impairment rating. The *McLane Western* decision rejected this argument and approved of the DIME's rating. In the present case, Respondents similarly contend that because Claimant did not suffer medically documented pain for the six months after his injury, and prior to MMI, no impairment rating could be assessed under Table 53 as a matter of law. In other words, Respondents maintain that the MMI date is determinative of whether Claimant has shown six months of documented pain for the purposes of applying Table 53. As noted, the decision announced in *McLane* rejects the contention that the AMA Guides require that the documented pain occur prior to MMI and subsequent Panel decisions from the Industrial Claims Appeals Office have consistently applied interpretations of Table 53 identical to those in *McLane Western*. See, *Martinez v. MCI Communications*, W.C. No. 4-207-987 (July 24, 1996); *Velasquez v. Roaring Fork Redi-Mix*, W.C. No. 4-324-686 (September 4, 1998); *Jackson v. RBM Precisions Metal Products*, W.C. No. 4-377-460 (May 15, 2000); *Lopez v. Cargill Meat Solutions*, W.C. No. 4-757-408 (September 9, 2010); *Lopez v. Evangelical Lutheran Good Samaritan Society*, W.C. No. 4-972-365-01 (August 16, 2016), and *Wallace v. Phil Long Ford Motor City*, W.C. No. 5-106-788-001 (September 22, 2020).

M. In this case, the evidence supports a conclusion that during his April 25, 2023 DIME, approximately six months after his October 24, 2022 MVA, Claimant reported continued "constant upper neck and suboccipital pain similar to what he experienced after his MVA. He also demonstrated range of motion loss similar to that he was determined to have previously as documented in his PT records. Based upon the evidence presented, the ALJ concludes that there is sufficient support for Dr. Caughfield's assignment of cervical spine impairment pursuant to Table 53, II. B in this case. Moreover, while Dr. Lesnak apparently found no range of motion deficits during his examination on July 17, 2023, the ALJ infers that the difference of opinions between Dr. Caughfield and Dr. Lesnak concerning the existence of ratable cervical spine impairment, based upon range of motion loss, is likely due to the passage of time and/or examination techniques. See *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ free to credit one medical opinion to the exclusion of a contrary medical opinion). While Dr. Caughfield and Dr. Lesnak differ regarding the existence of cervical range of motion loss, a professional difference of opinion between medical experts does not rise to the level of clear and convincing evidence that is required to overcome Dr. Caughfield's opinions concerning impairment. See generally*, Gonzales v. Browning Farris Indust. of Colorado,* W.C. No. 4-350-356 (March 22, 2000), Consequently, Respondents have failed to meet their required legal burden to set the cervical spine impairment determination aside. This ALJ adopts Dr. Caughfield's impairment rating to find and conclude that Claimant is at MMI with 17% whole person impairment.

ORDER

It is therefore ordered that:

1. Respondent's request to set aside the MMI determination of Dr. Caughfield is GRANTED. As determined above, Claimant is at MMI with 17% whole person impairment as determined by Dr. Caughfield. Respondent shall pay permanent partial disability (PPD) benefits consistent with the 17% whole person impairment rating assigned by Dr. Caughfield.

2. Any and all issues not determined herein are reserved for future decision.

DATED: November 9, 2023

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-210-685-002

STIPULATIONS

1. The parties stipulated on the record that Respondents have not filed a general admission on the claim.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury on May 7, 2022, arising out of and in the course of his employment with Respondent-Employer.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits.

3. Claimant's average weekly wage.

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 7, 2022, to present.

FINDINGS OF FACT

1. Claimant began working for Respondent-Employer on April 13, 2022, as a heavy equipment operator. Claimant worked at [Redacted, hereinafter CM] at an elevation of approximately 11,000 feet above sea level. Claimant would work seven days on followed by seven days off. Each seven-day series of shifts would be either day shifts or night shifts, alternating between each series. Claimant earned $30.00 per hour plus a project allowance of $7.00 per hour. Claimant testified that his average weekly wage was $1,747.69.

2. On May 7, 2022, Claimant was working a night shift, his fourth shift that week. Claimant was admitted to St. Anthony Summit Hospital Emergency Department later that night for complaints of mid and low back pain. Claimant reported that he had been sitting in the cab of his truck in the driver seat with his seatbelt on when a large loader dropped a pile of heavy rocks into the bed of the truck, causing him to get jolted in his seat. X-rays were performed of Claimant's lumbar spine. They showed multilevel degenerative changes of the lumbar spine, but no acute osseous abnormalities. On physical exam, the attending physician noted no

evidence of torso trauma or extremity injury. The attending physician noted that Claimant was hypoxic with 82% saturation. Claimant declined supplemental oxygen or any further treatment. He was discharged that same night.

3. Claimant returned to the Emergency Room two days later complaining of a fever, fatigue, and memory issues, decreased urine output consistent with acute kidney injury, and symptoms consistent with encephalopathy. The attending physician noted Claimant to be hypoxic and tachypneic and was placed on supplemental oxygen. The physician suspected sepsis. A chest X-ray showed multifocal pneumonia, and a CT scan showed what appeared to be infectious infiltrates. Claimant was given antibiotics. Initially, the attending physician was concerned of sepsis that was possibly urinary or pulmonary in origin, though the urinalysis was not consistent with an infection. Ultimately, Claimant was diagnosed with severe sepsis, acute hypoxemic respiratory failure, and pulmonary embolism. Although his diagnosis was sepsis, and Claimant had elevated white blood cell counts, tests performed with blood cultures and sputum cultures for Influenza, legionella, streptococcus, and COVID-19 did not reveal any specific infections. He was intubated and placed in the intensive care unit.

4. On May 19, 2022, Claimant underwent repeat chest X-rays that showed multiple pulmonary embolisms with a clot primarily in his right lung. The embolisms were treated with anticoagulation. He was extubated on May 27, 2022. On June 1, 2022, Claimant developed a peritoneal hemorrhage in his abdomen resulting from the anticoagulants. Claimant was taken off the anticoagulation and an IVC filter was placed on June 3, 2022, to prevent a blood clot from reaching his lungs.

5. Claimant was transferred to an inpatient rehabilitation facility on June 9, 2022, and transferred to Elkhorn Valley Rehab Hospital on June 23, 2022. While at the facility, Claimant complained of uncontrolled back pain, right foot and leg weakness and tingling in the groin, and neuropathic pain. Claimant was diagnosed with right lower extremity weakness due to lumbosacral plexopathy. Claimant underwent a lumbar MRI. The MRI of the lumbar spine showed the retroperitoneal hematoma “extends along the R lateral margin of the L1-L5 vertebral bodies. Exiting R L1-L4 nerve roots seen at the medial margin or abutting the R retroperitoneal hematoma collection.” The attending physician, Dr. Michele Mohr, felt Claimant’s right lower extremity symptoms were related to Claimant’s hematoma.

6. Claimant was discharged from Elkhorn Valley Rehab Hospital on July 9, 2022, and began care at Casper Home Health. Claimant followed up with his primary care doctor, Dr. Christina Jara on July 21, 2022. She noted that since being out of the hospital, Claimant had developed right leg weakness and pain and numbness and that Claimant had been falling. Dr. Jara felt that Claimant’s pain complaints were related to the hematoma. She reasoned that the MRI showed the right L1-L4 nerve roots at the medial margin or abutting the right retroperitoneal hematoma collection.

7. Claimant was evaluated at Casper Orthopedics on August 15, 2022, for meralgia parasthetica. Claimant underwent X-rays and an EMG of his lumbar spine. The X-rays showed "a mild asymmetric collapse at the L3-4 level. There is disc height loss at the L4-5 level. The SI joints reveal degenerative changes." The EMG showed right sided "traumatic lumbosacral plexopathy."

8. On October 11, 2022, Claimant was evaluated by Dr. Jara at Banner Health. Dr. Jara stated Claimant's injuries "seemed to be a work-related injury and he could have had either a compression or traction injury given the movement of the truck at the time of that injury. He is not fit to go back to work at his current condition."

9. On October 13, 2022, Claimant was examined by Dr. Gessel at Casper Orthopedics. Dr. Gessel stated Claimant "has sustained a significant neurologic injury from a work-related injury in May of 2022. His neurologic injury is causing significant functional impairment . . . and requires further treatment and workup to fully determine and characterize the injury."

10. On October 28, 2022, Claimant returned to Casper Orthopedics for follow-up. Claimant had MRIs performed on his lumbar spine which showed a "disc bulge with central protrusion at L4-5" and "a disc osteophyte complex that is causing lateral recess narrowing at L2-3 and that is likely catching the traversing L3 nerve root and also at L4-5 and L3-4." Dr. Gessel stated about Claimant's right lower extremity numbness and weakness, "we are trying to figure out how much is related to lumbosacral plexopathy versus lumbar radiculopathy."

11. On November 30, 2022, Claimant received a right L3-4 and L4-5 transforaminal epidural steroid injection. Claimant said the injection made his pain go from "8/10 to 5/10" and "helped a bunch of his symptoms for approximately 2 to 3 weeks." Dr. Gessel stated "for his back pain itself, I think he is also getting some pain secondary to facet arthritis and that was likely worsened by the work injury as well."

12. On January 3, 2022, Dr. Gessel stated Claimant was under his care for "what seems to now be a lumbosacral plexopathy, which he sustained while working at [Redacted, hereinafter TM] . . . He also has back pain that correlated with the time of his injury at TM[Redacted]. I suspect that injury has worsened the back arthritis he has, and that is causing his low back pain. We are treating that separate from the lumbosacral plexopathy, but both are being caused by that initial injury."

13. On January 11, 2023, Dr. Gessel stated "John has sustained a work-related traumatic lumbosacral plexopathy leading to significant right leg weakness which is causing right quadriceps atrophy."

14. Dr. Ogin determined that Claimant's right leg weakness and numbness were the direct result of a lumbosacral plexus injury due to the retroperitoneal hematoma, which was in turn the result of Claimant's anticoagulation treatment for multiple

pulmonary emboli during his hospitalization for pneumonia and sepsis. Dr. Ogin relied on Claimant's distribution of symptoms, the MRI, and electrodiagnostic studies that were more consistent with a pathology at the lumbosacral plexus rather than in the lumbar spine.

15. Dr. Ogin could not identify any connection between Claimant's development of pneumonia and Claimant's alleged injury on May 7, 2021, though, he speculated that it may have been related to underlying COPD coupled with an infectious source.

16. On March 8, 2023, Claimant underwent his own independent medical examination with Dr. John Hughes. Dr. Hughes noted that Claimant had "no past history of lumbar spine injuries or problems" and "no history of pulmonary disease prior to May 7, 2022," and that Claimant also had no history of smoking. In reviewing Claimant's records, Dr. Hughes opined, "it is clear that he sustained lumbar spinal injuries as a result of vehicular jarring that occurred May 7, 2022," and that the retroperitoneal hematoma "appears to be the proximate cause of [Redacted, hereinafter SN] right lumbosacral plexopathy." Dr. Hughes opined Claimant was "not yet at MMI with respect to his spine injuries of May 7, 2022," and "medical evaluation and treatment to date under the direction of Dr. Gessel appears to me to be reasonable, necessary and related to his lumbar spine injuries of May 7, 2022." Dr. Hughes assessed Claimant's lumbar spine impairment to be 18% whole person impairment and recommended Claimant receive continued therapies and injections.

17. Regarding Claimant's onset of pneumonia, Dr. Hughes did not specifically opine on its cause:

> "A perplexing fact is SN[Redacted] hypoxemia of May 8, 2022. He has no history of prior pulmonary disease and was listed by Dr. Doucette as a never smoker; however, it is clear that 2 days later, SN[Redacted] was admitted for acute respiratory failure with hypoxia. He subsequently underwent a complex course of inpatient and intensive care unit medical care, happily resulting in resolution of his pulmonary condition."

18. Dr. Ogin later testified at hearing as well. Dr. Ogin testified that Claimant was diagnosed with thoracic and lumbar back pain and hypoxia, for which he was prescribed Hydrocodone, a medication known to cause drowsiness. Regarding Claimant's hypoxia, Dr. Ogin testified that it had the potential to cause various health issues, including cardiac problems, stroke, loss of consciousness, memory difficulties, and cognitive impairment.

19. Dr. Ogin further testified that Claimant's health deteriorated when he sought emergency care again on May 10, 2022, for septic pneumonia, and that Claimant experienced a severe complication due to his use of blood thinners, resulting in a

retroperitoneal hematoma. Dr. Ogin emphasized that Claimant's pneumonia and its associated complications were unrelated to the workplace injury.

20. Dr. Ogin also testified regarding the possibility of lumbosacral plexopathy and noted that such conditions could manifest traumatically. However, he disagreed with the assertion that the traumatic jostling in the truck was the primary cause of Claimant's lumbosacral plexopathy. Instead, he emphasized that Claimant's extended hospitalization, bed rest, minimal physical activity, and a series of falls were significant factors contributing to his back pain. Dr. Ogin was clear in his opinion that Claimant's leg symptoms were a result of the retroperitoneal hematoma and unrelated to a back injury.

21. Respondents also obtained an expert opinion from Robert T. Lynch, P.E., to evaluate the matter from an forensic engineering perspective. Mr. Lynch issued a report in which he estimated the forces exerted on Claimant at the time of the alleged accident. Mr. Lynch credibly opined, based on the size of the truck and the estimates of the loads dropped into the bed of the truck, that the acceleration that Claimant would have experienced while in his seat was less than 2.3g.[1] Mr. Lynch further clarified that the acceleration would have been mitigated by Claimant's seat cushion and the suspension system. Based on this, Mr. Lynch concluded that there was no significant "jarring" of the haul truck as described by Claimant.

22. Mr. Lynch later testified at hearing largely consistently with his report. He admitted on cross-examination that he had not personally visited the site or equipment involved. When asked about whether Mr. Lynch should have considered the other dirt in the loader and not just the largest boulder, Mr. Lynch explained that the boulder would have caused a greater acceleration than the distributed impact of the dirt, so his analysis was focused on the boulder itself. Regarding the crack in the windshield, Mr. Lynch explained that the spiderweb crack radiating out from the middle of the windshield was more consistent with a rock hitting the windshield rather than from a vibratory source, which would have resulted in a crack radiating from the edge of the windshield, working its way in. The Court finds Mr. Lynch's analysis to be credible and persuasive.

23. Respondents also obtained an expert opinion from Dr. Robert Nobilini, Ph.D, to provide a biomechanical analysis of the mechanism of injury alleged by Claimant. Dr. Nobilini explained in his report that the acceleration experienced by Claimant during the incident was well within the range of accelerations that are incurred during everyday, non-injurious activities of daily living, and well within the range of decelerations considered safe. He later testified at hearing that his opinions were based on the forces and acceleration calculated by Mr. Lynch. Dr. Nobilini also explained that the forces experienced by the truck due to downward acceleration would not be the same as those experienced by Claimant inside the cab of the

[1] The unit "g" is a unit of acceleration equal to that which is experienced by an object at the Earth's surface as a result of the Earth's gravitational pull.

truck. Furthermore, he opined that the acceleration Claimant would have experienced would be insufficient to cause injury. The Court finds Dr. Nobilini's analysis to be credible and persuasive.

24. On June 27, 2023, Claimant testified at hearing. Claimant testified he sustained a work-related injury on May 7, 2022. Claimant began working for TM[Redacted] in April 2022. Claimant stated before he could begin working for Employer, he had to undergo a preemployment physical and fit-to-work test. Claimant testified the preemployment physical and testing were performed at Cedar Health in Casper, Wyoming. The testing included checking Claimant's breathing, hearing, vision, and an x-ray on his back. Claimant testified he was cleared to begin working following the examination.

25. Claimant testified he worked for Employer as a heavy equipment operator. Claimant testified his job duties for operating the haul truck included a pre-shift inspection of the truck, filling out a pre-shift inspection report, loading the truck with the mined materials, and then driving the truck to dump the materials. Claimant testified he had extensive experience as a heavy equipment operator and had worked at mines the past 25 years operating a variety of large equipment vehicles including haul trucks, bulldozers, and excavators.

26. Claimant testified to the nature of his schedule and pay structure by Employer because Claimant's schedule was unconventional. Claimant testified he was shuttled in to begin his work in Climax, Colorado on the morning of Wednesday, May 4, 2022, and he began working in the mines that night. Claimant testified he would work 7 P.M. to 7 A.M. each night for seven days in a row. Following a week of work, Claimant testified Employer would then pay to fly employees home and employees would have seven days off. Claimant testified even while employees were in their rest week, they were always considered employed by Employer. Claimant explained Employer's pay structure ran a pay period from Sunday to Saturday with work initiating on a Wednesday so employees would get four and three days each week of the pay period. Claimant testified he worked 48 and then 36 hours alternating on the normal schedule. Claimant testified he was paid $37.00 an hour for 40 hours, along with time and a half for the eight hours of overtime one week in addition to $37.00 for 36 hours the next week. Claimant testified to the accuracy of his pay records admitted as Claimant's Exhibit 16. Claimant testified his average weekly wage was $1,747.69.

27. Claimant testified to the events that occurred May 7, 2022, the day Claimant sustained his workplace injury. Claimant testified he followed his normal job duties for operating the haul truck including performing a pre-shift inspection and report. Claimant put on his seatbelt and proceeded to the loading unit and had performed several loads without incident prior to the injury. Claimant additionally testified that he had experience as a mechanic and his understanding of the gas-charged struts of haul trucks and how the gas charge can impact the pressure a load applies to the truck. Claimant testified a large boulder was dropped in the truck which caused

the truck to bounce and shake. Claimant testified the truck's windshield was shattered resulting from "the thrust of the rock" and "the bouncing the truck." Claimant called the operator of the excavator dropping loads into his truck on the radio immediately after his windshield shattered. Despite the shattered windshield, Claimant testified his truck continued to be loaded and stated "when you are in an accident, you should shut down right then. He shouldn't have kept loading the truck." Claimant testified he felt the onset on pain about thirty minutes later. Claimant testified he was jostled around when the load with the large boulder was dumped in his truck.

28. Following the incident of Claimant's workplace injury, Claimant testified he immediately called his supervisor, [Redacted, hereinafter JB], and relayed the incident with the broken windshield. Claimant told JB[Redacted] he needed to have his back examined due to the pain and JB[Redacted] took him to get medical treatment at St. Anthony Summit Medical Center.

29. At St. Anthony Summit Medical, Claimant testified he told the doctor he had back pain, he had been wearing his seat belt, and that his truck was jolted when the boulder fell. Claimant testified the doctor gave him medication, X-rays on his back, and informed Claimant his breathing level was low. Claimant testified the doctor wanted to put Claimant on oxygen, but he declined. Claimant testified he was discharged and returned to his hotel room where he slept for two days until he was asked to return to the clinic to be reevaluated. Claimant testified upon reevaluation at the clinic, the doctor examining him sent him to the emergency room and he was transported by ambulance.

30. Claimant testified that on May 10, 2022, he returned to Summit Medical with many health issues including bad memory, back pain, leg pain and numbness in his right leg, fever, and breathing problems. Claimant testified he was suffering septic pneumonia. Claimant testified "it was all going so fast" as he was intubated and stated "I was code blue. I was dead there for a while- then they revived me." Claimant testified he was "life-flighted" to St. Anthony's Hospital where Claimant stated "I was in a coma for two weeks, and then I was in intensive care for another two weeks. And then I did three weeks or so in therapy, and then I transferred to Elkhorn Rehabilitation Hospital and did another three weeks of therapy." Additionally, Claimant testified he had no prior contributory health issues such as smoking, pulmonary disease, COPD, asthma, heart issues, or other breathing issues.

31. Claimant testified he was unable to walk without crutches and his knee would give out without a warning. Claimant testified he had been unable to work due to his injuries and he was told by Employer HR that the company "doesn't have any jobs for a one-legged man." Claimant testified he was still unable to walk without crutches and used a leg brace and he was additionally suffering back pain, a numb leg, and sleep disturbances. The ALJ finds Claimant's testimony credible.

32. The Court finds Dr. Ogin's medical opinions as expressed in his report and testimony to be more persuasive than those of Dr. Hughes.

33. The Court finds that Claimant has not proven that it is more likely than not that Claimant sustained a low back injury on May 7, 2022. Although Claimant complained of back pain on May 7, 2022, and in fact sought treatment, the Court finds, based on the testimony of Mr. Lynch and Dr. Nobilini, that the forces involved in the incident were benign and insufficient to cause a low back injury requiring medical treatment. That is, the Court finds that Claimant experienced forces resulting from an acceleration of less than 2.3g, which would have been mitigated by Claimant's seat cushion and the suspension system, and which was well within the range of accelerations that are incurred during everyday, non-injurious activities of daily living, and well within the range of decelerations considered safe.

34. The Court finds that Claimant has not proven that it is more likely than not that his pneumonia, sepsis, and associated conditions arose out of and in the course of his employment on May 7, 2022. The Court finds that there is a near consensus among Claimant's treating and examining physicians that Claimant's pneumonia and sepsis arose from an infectious source. Although it is possible that Claimant contracted the infection at work, there is no credible evidence to that effect. Dr. Ogin credibly testified that Claimant's inhalation of dust would not have caused an infection. Claimant did not provide any credible evidence of how such an infection would have developed in the workplace. Absent such evidence, the Court finds that Claimant has not proven that it is more likely than not that his pneumonia, sepsis, and associated symptoms arose out of and in the course of his employment.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App.

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

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

Compensability

An injury must "arise out of and occur in the course of" employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S. *See also Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). An injury "arises out of" the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Popovich*, 811 P.2d at 383.

As found above, Claimant has not proven by a preponderance of the evidence that he injured his low back on May 7, 2023. Although Claimant complained of back pain on May 7, 2022, and in fact sought treatment, the forces involved in the incident were benign and insufficient to cause a low back injury requiring medical treatment. Claimant experienced forces resulting from an acceleration of less than 2.3g, which would have been mitigated by Claimant's seat cushion and the suspension system, and which was well within the range of accelerations that are incurred during everyday, non-injurious activities of daily living, and well within the range of decelerations considered safe. Therefore, as found above, it is more likely than not that Claimant did not sustain a low back injury on May 7, 2022.

Claimant has also not proven that it is more likely than not that his pneumonia, sepsis, and associated conditions arose out of his employment on May 7, 2022. As found above, there is a near consensus among Claimant's treating and examining physicians that Claimant's pneumonia and sepsis arose from an infectious source. Although it is possible that Claimant contracted the infection at work, there is no credible evidence to that effect. Dr. Ogin credibly testified that Claimant's inhalation of dust would not have caused an infection. Claimant did not provide any credible evidence of how such an infection would have developed in the workplace. Absent such evidence, Claimant has not proven that it is more likely than not that his pneumonia, sepsis, and associated symptoms arose out of and in the course of his employment.

Therefore, the Court concludes that Claimant has not met his burden to prove that it is more likely than not that he sustained an injury on May 7, 2022, arising out of and in the course of his employment.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation for a date of injury of May 7, 2022, is denied and dismissed.

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

DATED: November 10, 2023.

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the medical treatment he received for his low back condition was reasonable medical treatment necessary to maintain Claimant at maximum medical improvement ("MMI")?

FINDINGS OF FACT

1. Claimant was employed by Employer as a ski instructor. Claimant testified he sustained an injury to his low back on January 5, 2014 while skiing with clients. As a result of the low back injury, Claimant underwent two low back operations to his L4-L5 region. Claimant testified that the first operation helped partially, but he needed a second operation in February 2019 after the first operation failed.

2. According to the medical records, Claimant underwent a left sided L4-5 hemilaminectomy, facetectomy, foraminotomy and microdiscectomy on September 16, 2015. Claimant subsequently underwent an L4-5 laminectomy of L4-5 fusion on January 29, 2019.

3. Claimant was placed at MMI by Dr. Gisleson on September 26, 2019. Claimant was provided with an impairment rating of 21% whole person on January 17, 2020 by Dr. Lorah. With regard to post-MMI medical treatment, Dr. Lorah noted Claimant was not scheduled for neurosurgical follow up and recommended ongoing use of cyclobenzaprine for at least the next 12 months and an additional 10 to 15 physical therapy visits over the next 12 months to be used at Claimant's convenience and would be helpful in case of a flare. Dr. Lorah noted Claimant may be a candidate of Gabapentin or Lyrica if it was determined to be appropriate by his treating physicians. Dr. Lorah also recommended that Claimant continue his home exercise program, maintain a healthy weight and work on core strength and flexibility.

4. Respondent filed a final admission of liability ("FAL") on April 11, 2020 admitting for the 21% whole person impairment along with maintenance medical treatment.

5. Claimant testified that after being placed at MMI, he had five flare ups of his low back pain. Claimant testified he treating three of these flare ups at home and sought medical treatment for the other two. Claimant testified his first flare up of his low back condition occurred when he was shooting baskets and felt a twinge in his lower back and he jumped to put up a layup. The medical records document that Claimant sought treatment on March 23, 2021 after he had an acute exacerbation of the low back while playing basketball two months ago when he was reaching out for a rebound and felt something give on his right side of his back. Dr. Gisleson noted that Claimant had

been doing physical therapy but unfortunately continued to experience radicular symptoms down the legs past the knee along with additional feelings of weakness in his legs. Dr. Gislason recommended additional evaluation for nerve pain and prescribed gabapentin, anti-inflammatories and Flexeril.

6. Claimant received treatment with Dr. Campian on referral from Dr. Gisleson on April 7, 2021. Dr. Campian noted Claimant's complaints of low back pain radiating to both knees through the back after he jumped while playing basketball and landed funny. Dr. Campian noted Claimant's history of a low back injury at work and recommended Claimant treat his back pain with prednisone, a repeat MRI and physical therapy.

7. Claimant underwent an x-ray of his lumbar spine on April 7, 2021 that showed normal alignment and L4-L5 posterior fusion without evidence of surgical complication.

8. Claimant testified at hearing that he ended up getting a shot of Toradol and was able to get back to baseline.

9. Claimant testified that he had a second flare up of his low back pain when he was standing up from the toilet and felt a pop in his back. Claimant testified he tried to treat this flare up at home, but had additional pain when he was getting out of his truck three months later.

10. According to the medical records, Claimant returned to his physical therapist in April 2023 and reported a recent exacerbation of his symptoms. The physical therapist noted that often times a seemingly innocuous position or movement can flair up symptoms and it can take weeks to return to baseline. According to the records, Claimant underwent seven (7) physical therapy appointments between April 21, 2023 and May 26, 2023.

11. Claimant then sought treatment for this flare on June 28, 2023 with Dr. Giselson. Claimant reported at that time that he had ongoing issues with his low back from December 2022 when he was getting off a toilet seat and felt a twinge in his low back with persistent right sided discomfort and right sided radiculopathy. Dr. Gisleson noted Claimant had a known history of impingement at L4-L5 with previous lumbar spinal surgery and fusion. Dr. Gisleson recommended that Claimant use a muscle relaxer to relieve his muscle spasm, continue physical therapy and consider x-rays to determine if there has been any shift in his hardware and consider an MRI if there was no improvement.

12. Claimant testified at hearing that he was able to eventually get back to his baseline level of pain and function in 2023 after medical treatment including physical therapy and medications prescribed by Dr. Gisleson.

13. Respondent obtained an independent medical examination ("IME") with Dr. Cebrian on August 23, 2023. Dr. Cebrian reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his

IME. Dr. Cebrian noted Claimant's history of a low back injury while employed with Employer and subsequent surgeries. Dr. Cebrian noted that after Claimant was placed at MMI, he was doing well until early 2021 when he aggravated his back while playing basketball. Claimant reported to Dr. Cebrian that he received some physical therapy until June 2021 and improved.

14. Dr. Cebrian noted that Claimant had ongoing discomfort and was given Baclofen, a muscle relaxer by Dr. Gisleson. Claimant reported to Dr. Cebrian that in December 2022, he got off the toilet and had increased pain throughout January and February. Claimant reported to Dr. Cebrian that he then had another incident when he was getting out of his truck and had increased symptoms. Claimant reported that he continued to go to physical therapy and was performing stretching, but would only improve to a certain point. Claimant reported ongoing symptoms that included numbness in both feet, with numbness in the lateral right leg along with occasional sciatica that would go down both legs to the mid hamstrings.

15. Dr. Cebrian opined in his report that Claimant had a peripheral polyneuropathy that was not claim related as there is not a mechanism for a lumbar spine injury to cause a peripheral polyneuropathy. Dr. Cebrian opined that Claimant did not have any new findings of radiculopathy at other levels of his lumbar spine, and noted that Claimant's injury was at his L4-5 level. Dr. Cebrian opined in his report that further medical care was no longer medically reasonable, necessary and related to the claim of January 5, 2014 and recommended the closure of all maintenance care and Grover medications. Dr. Cebrian opined that Cliamant had a non-claim related intervening event while playing basketball in January of 2021.

16. Dr. Cebrian testified at hearing in this matter consistent with his IME report. Dr. Cebrian testified that based on his review of the records and the medical history he received from Claimant, Claimant was doing well until the 2021 basketball incident which resulted in medication and treatment for Claimant's low back condition. Dr. Cebrian testified that it was his opinion that the basketball incident was an intervening event that cause the Claimant to need medical treatment.

17. The ALJ credits Claimant's testimony at hearing and finds that Claimant has proven that it is more likely than not that the medical treatment he received after getting up off the toilet in 2022 represents reasonable medical care necessary to maintain Claimant at MMI and related to Claimant's January 5, 2014 work injury. The ALJ credits Claimant's testimony regarding the basketball incident in 2021 and finds that this incident does not represent an intervening injury that severs Respondent's liability for ongoing maintenance medical care. The ALJ notes that Claimant's medical treatment in this case, including ongoing physical therapy and additional medications prescribed by Claimant's treating physician, are consistent with the maintenance medical treatment recommendation made by Dr. Lorah in his January 17, 2020 report and admitted to by Respondent in the April 11, 2020 FAL.

18. The ALJ credits Claimant's testimony at hearing and finds that the basketball incident was a minor incident that caused a flare in Claimant's symptoms

related to his January 5, 2014 work injury and resulted in the need for maintenance medical treatment. The ALJ therefore does not credit the opinion of Dr. Cebrian that the basketball incident was an intervening injury that severed Respondent's liability for ongoing maintenance medical treatment. The ALJ notes that the medical records do not document under objective evidence of Claimant's underlying condition being changed as a result of the basketball incident, and finds that the evidence does not establish that Claimant sustained an intervening injury based on the minor incident that occurred while playing basketball as described in Claimant's testimony and reflected in the medical records.

19. The ALJ further credits the testimony of Claimant at hearing and finds that the medical treatment Claimant received from Dr. Gislason after a flare of Claimant's symptoms when getting up from a toilet represents reasonable medical treatment necessary to maintain Claimant at MMI. Specifically, the ALJ credits the testimony of Claimant that his symptoms related to the workers' compensation injury and subsequent surgeries were flared by the incident in December 2022 and resulted in Claimant needing to undergo treatment with Dr. Gislason and physical therapy sessions before returning to his baseline level that he was at when placed at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S., 2013 The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent

further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. As found, Claimant has proven by a preponderance of the evidence that the medical treatment he received after the flare up of his symptoms in December 2022 was reasonable medical treatment necessary to maintain Claimant at MMI. Therefore, Respondent is liability for the cost of the medical treatment incurred by Claimant including his treatment with Dr. Gislason in June 2023 and the physical therapy sessions related to treatment of Claimant's flare of his low back symptoms.

ORDER

It is therefore ordered that:

1. Respondent is liable for the medical treatment Claimant received that was reasonable and necessary to maintain Claimant at MMI, including the physical therapy Claimant undeiwent in April and May 2023 and the treatment with Dr. Gislason pursuant to the Colorado Medical Fee Schedule.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otheiwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. In **addition,** it **is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: November 13 2023

Keith E. Mottram
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. W.C. 5-179-036-003

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he was an employee of Employer [Redacted, hereinafter RS] on July 9, 2021.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonably necessary medical benefits as a result of his July 9, 2021 accident.

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

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) or Temporary Total Disability (TTD) benefits for the period July 9, 2021 through July 9, 2022.

5. Whether Employer [Redacted, hereinafter AB] has proven by a preponderance of the evidence that it was insured by [Redacted, hereinafter LM] in the state of Colorado on July 9, 2021.

FINDINGS OF FACT

1. [Redacted, hereinafter CG] worked for Employer RS[Redacted] as a Cutter. His position involved installing granite and stone countertops. CG[Redacted] acknowledged that on July 9, 2021 he was not a managerial employee of RS[Redacted] with the authority to hire employees.

2. Claimant lived with CG[Redacted]. CG[Redacted] explained that Claimant was looking for a job and asked whether RS[Redacted] was hiring. He offered Claimant the opportunity to visit the RS[Redacted] jobsite to see if he "liked the job."

3. [Redacted, hereinafter AR] is the owner of RS[Redacted]. AR[Redacted] explained that he was solely responsible for the hiring and firing of employees. He commented that he never hired Claimant to work for RS[Redacted]. In fact, he did not know Claimant and had never spoken to Claimant. He emphasized that CG[Redacted] was not a supervisory employee and had no authority to hire new employees.

4. On July 9, 2021 CG[Redacted] brought Claimant to the RS[Redacted] job site. Claimant did not complete any paperwork before visiting the location. Moreover, AR[Redacted] was unaware that Claimant was visiting the job site. CG[Redacted] commented that no one told him to bring anyone with him to the location.

5. Claimant acknowledged that he never spoke to, or met with, AR[Redacted].

He never had any conversations with AR[Redacted] concerning anticipated wages. Importantly, AR[Redacted] did not know Claimant was at the jobsite on July 9, 2021. Claimant explained that AR[Redacted] was teaching him about the job.

6. After lunch on July 9, 2021 Claimant was attempting to move six or seven slabs of stone that weighed approximately 600 pounds each. However, the slabs fell on Claimant's right leg and caused a fracture of the medial femoral condyle and the proximal fibula. Claimant was transported to a hospital and underwent surgical repair on July 10, 2021. Claimant testified he believed he was an employee of RS[Redacted] on July 9, 2021 because "[i]f I wouldn't have gotten injured, it was a job that was going to be given to me."

7. Prior to the date of Claimant's injury RS[Redacted] had been hired by Employer AB[Redacted] as a subcontractor. On August 20, 2020 Respondent Insurer LM[Redacted] issued Workers' Compensation [Redacted, hereinafter PN] to AB[Redacted] for the policy period August 20, 2020 until August 20, 2021 (the policy). Item 3.A. of the policy specified insurance coverage applied to the Workers' Compensation Laws of the states of Texas and Florida. Item 3.C. of the policy noted, "Other States Insurance" applies to all states except North Dakota, Ohio, Washington, and Wyoming, in addition to Texas and Florida. Pursuant to Part Three at paragraph 4, the "Other States Insurance" clause provides, "[i]f you have work on the effective date of this policy in any state not listed in Item 3.A of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days." Under Part Three B, the insured is required to advise LM[Redacted] "at once if you begin work in any state listed in Item 3.C. of the information page." Claims Manager for LM[Redacted] [Redacted, hereinafter MP] testified LM[Redacted] was not notified of Claimant's July 9, 2021 accident until sometime in September 2021.

8. On September 17, 2021 LM[Redacted] issued a coverage denial letter to ATB. The letter specified that all the conditions of Part Three- "Other States Insurance," had not been satisfied. There was no thus insurance coverage for Claimant's claim in Colorado. The LM[Redacted] investigation had revealed that AB[Redacted] was working in Colorado prior to the inception date of the policy. LM[Redacted] also had not been notified of AB's[Redacted] work in Colorado within 30 days. Therefore, LM[Redacted] denied coverage.

9. Claimant has failed to demonstrate it is more probably true than not that he was an employee of RS[Redacted] when he was injured on July 9, 2021. Initially, CG[Redacted] explained that Claimant was looking for a job and asked whether RS[Redacted] was hiring. He offered Claimant the opportunity to visit the RS[Redacted] jobsite to see if he "liked the job." AR[Redacted] was not a supervisory employee and had no authority to hire new employees. AR[Redacted] explained that, as the owner of RS[Redacted], he was solely responsible for the hiring and firing of employees. He remarked that he never hired Claimant. In fact, he did not know Claimant and had never spoken to Claimant.

10. On July 9, 2021 CG[Redacted] brought Claimant to the RS[Redacted] jobsite. Claimant was attempting to move six or seven slabs of stone weighing approximately 600 pounds each when they fell and injured his right leg. Although Claimant was injured on the RS[Redacted] jobsite on July 9, 2021, there is a dearth of evidence in the record that he was an employee of RS[Redacted]. Claimant failed to prove that on July 9, 2021 he was performing services for RS[Redacted] under a contract of hire. Specifically, AR[Redacted] and Claimant had never spoken and the parties did not execute a valid contract of hire. Claimant was simply at the RS[Redacted] jobsite to determine whether he might pursue a job opportunity with the company. He did not have a "meeting of the minds" with AR[Redacted].

11. Based on the credible testimony of CG[Redacted] and AR[Redacted], Claimant had not been hired by RS[Redacted]. The record reveals there was no written documentation, consideration, or mutual agreement. Because there were additional requirements before Claimant could begin formal employment with RS[Redacted], there was no valid employment contract. Claimant was thus not an employee of RS[Redacted] on July 9, 2021 and his claim for Workers' Compensation benefits is denied and dismissed.

12. Employer AB[Redacted] has failed to prove by a preponderance of the evidence that it was insured by Insurer LM[Redacted] in the state of Colorado on July 9, 2021. On September 17, 2021 LM[Redacted] issued a coverage denial letter to AB[Redacted] because the conditions of Part Three- "Other States Insurance" in the insurance policy were not satisfied. The LM[Redacted] investigation revealed that AB[Redacted] was working in Colorado prior to the inception date of the policy. LM[Redacted] had not been notified of AB's[Redacted] work in Colorado within 30 days as required by the insurance agreement. Based on AB's[Redacted] failure to notify LM[Redacted]l that it was working in Colorado as required for coverage under the policy, AB[Redacted] was not insured on July 9, 2021. Finally, AB[Redacted] has not produced any additional evidence that it was insured for Workers' Compensation coverage in Colorado on July 9, 2021.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the

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

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

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

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

6. Generally, an “employee” is a person performing services under a contract of hire whether express or implied. §§ 8-40-201(6), 8-40-202(b); 8-40-203(1)(b); 8-41-301(1)(a), C.R.S.; *Aspen Highlands Skiing Corp. v Apostolou*, 866 P.2d 1384 (Colo. 1994). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. See *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. 1957); *Tressell v. Alpha Therapy Services, LLC.*, W.C. No. 4-322-755 (ICAO, Dec. 15, 1999). Where the parties ascribe different meanings to a material term of the contract and the term is ambiguous, the parties have not “manifested mutual assent.” There is thus no “meeting of the minds” and no valid contract exists. *Dell v. Jaz Con, LLC*, W.C. No. 4-777-941 (ICAO, Nov. 4, 2009); *see Sunshine v. M.R. Mansfield Realty, Inc.*, 575 P.2d 847 (Colo. 1978). Whether parties enter into a contract is a factual determination for the ALJ. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.,* 713 P.2d 882 (Colo. 1986).

7. In *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991) the Colorado Supreme Court concluded that no employment contract was created by an applicant participating in pre-employment testing when the successful completion of the tests merely qualified a pool of candidates for final selection. The claimant voluntarily

applied for a position as a police officer and was taking the test for her own benefit so that she would be eligible for employment. If the claimant had successfully completed the physical agility test she would still have been required to pass background checks, polygraph tests, and a medical examination merely to qualify for the pool of candidates. The Court thus concluded there was no mutual agreement between the parties sufficient to create an employer-employee relationship that would justify an award of Workers' Compensation benefits. *Id.* Similarly, in *Lopez v. Colorado State University*, (W.C. No. 4-772-544 (ICAO, Dec. 29, 2009), the Panel upheld the ALJ's determination that a contract of hire did not exist when the claimant suffered an injury while performing a pre-employment physical. Because the applicant failed to complete additional requirements including production of a valid picture ID, bank account, and Social Security card, there was no contract.

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he was an employee of RS[Redacted] when he was injured on July 9, 2021. Initially, AR[Redacted] explained that Claimant was looking for a job and asked whether RS[Redacted] was hiring. He offered Claimant the opportunity to visit the RS[Redacted] jobsite to see if he "liked the job." AR[Redacted] was not a supervisory employee and had no authority to hire new employees. AR[Redacted] explained that, as the owner of RS[Redacted], he was solely responsible for the hiring and firing of employees. He remarked that he never hired Claimant. In fact, he did not know Claimant and had never spoken to Claimant.

9. As found, on July 9, 2021 AR[Redacted] brought Claimant to the RS[Redacted] jobsite. Claimant was attempting to move six or seven slabs of stone weighing approximately 600 pounds each when they fell and injured his right leg. Although Claimant was injured on the RS[Redacted] jobsite on July 9, 2021, there is a dearth of evidence in the record that he was an employee of RS[Redacted]. Claimant failed to prove that on July 9, 2021 he was performing services for RS[Redacted] under a contract of hire. Specifically, AR[Redacted] and Claimant had never spoken and the parties did not execute a valid contract of hire. Claimant was simply at the RS[Redacted] jobsite to determine whether he might pursue a job opportunity with the company. He did not have a "meeting of the minds" with AR[Redacted].

10. As found, based on the credible testimony of CG[Redacted] and AR[Redacted], Claimant had not been hired by RS[Redacted]. The record reveals there was no written documentation, consideration, or mutual agreement. Because there were additional requirements before Claimant could begin formal employment with RS[Redacted], there was no valid employment contract. Claimant was thus not an employee of RS[Redacted] on July 9, 2021 and his claim for Workers' Compensation benefits is denied and dismissed.

11. As found, Employer AB[Redacted] has failed to prove by a preponderance of the evidence that it was insured by Insurer LM[Redacted] in the state of Colorado on July 9, 2021. On September 17, 2021 LM[Redacted] issued a coverage denial letter to AB[Redacted] because the conditions of Part Three- "Other States Insurance" in the

insurance policy were not satisfied. The LM[Redacted] investigation revealed that AB[Redacted] was working in Colorado prior to the inception date of the policy. LM[Redacted] had not been notified of AB's[Redacted] work in Colorado within 30 days as required by the insurance agreement. Based on AB's[Redacted] failure to notify LM[Redacted] that it was working in Colorado as required for coverage under the policy, AB[Redacted] was not insured on July 9, 2021. Finally, AB[Redacted] has not produced any additional evidence that it was insured for Workers' Compensation coverage in Colorado on July 9, 2021.

ORDER

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

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

2. AB[Redacted] was not insured for Workers' Compensation coverage in Colorado on July 9, 2021.

3. Any issues not resolved by this Order are reserved for future determination.

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

DATED: November 15, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge

Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. W.C. No. 5-141-572

1. Whether Claimant overcame the DIME and established by clear and convincing evidence that he is not at MMI, or if at MMI, that he is entitled to a higher impairment rating.
2. Whether Claimant's condition has worsened since being placed at MMI and his claim reopened.
3. Whether Claimant is entitled to TTD and/or TPD.
4. Whether Respondent is entitled to an offset for Claimant's receipt of short-term disability benefits.
5. Medical benefits.
    a. Whether the treatment Claimant received was authorized.
    b. Whether the treatment Claimant received was reasonably necessary to treat Claimant from the effects of his work injury.
    c. Reimbursement to Claimant and his medical providers for the medical treatment he received.
6. Average weekly wage.

II. W.C. No. 5-183-168

1. Whether Claimant suffered a compensable injury on August 31, 2021.
2. Whether Claimant is entitled to TTD and TPD.
3. Whether Respondent is entitled to an offset for Claimant's receipt of short-term disability benefits.
4. Medical benefits.
    a. Whether the treatment Claimant received was authorized.
    b. Whether the treatment Claimant received was reasonably necessary to treat Claimant from the effects of his work injury.
    c. Reimbursement to Claimant and his medical providers for the medical treatment he received.
5. Average weekly wage.

FINDINGS OF FACT

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

Unrelated Back Injury

1. Claimant underwent low back surgery at L5-S1 in 2018 and 2019. (Ex. Q). This surgery was not under the workers' compensation system. (Hearing Transcript (hereinafter "Hrg. Tr."), p. 128 ll 6-11).

Admitted Work Injury

2. On June 3, 2020, Claimant sustained an admitted work injury when he was pinned or crushed by a gate while working for Employer at the [Redacted, hereinafter TL] in Canon City, Colorado. (Hrg. Tr., pp. 88 ll 23-25, 89 ll 1-2).
3. Claimant was provided a designated provider list that same day. (Ex. D, p. 49-50).
4. After the accident, Claimant went to the emergency room and underwent a CT scan of his chest, abdomen, and pelvis. The CT scan did not show any significant findings. (Ex. 3, p. 37). (*See generally* Ex. 3 and K).
5. On June 8, 2020, Claimant presented to Dr. Reasoner, at Centura Urgent Care, a designated provider. (Hrg, p. 129). At this appointment, Claimant complained of pain along his sternum that he rated at 5/10. Dr. Reasoner diagnosed Claimant with acute costochondritis and a chest wall contusion. (Ex. 3, p. 37-42).
6. On June 15, 2020, Claimant returned to Dr. Reasoner at Centura. At this appointment, Claimant reported he was having "mild episodic discomfort" but reported new right lower quadrant and periumbilical discomfort. It was noted that the CT scan of his chest, abdomen, and pelvis from June 3rd showed no acute findings. Claimant stated he was not using any pain medication. On exam, there was no distention in his abdomen, no mass, negative Murphy's and McBurney's sign, no hernia was present. But despite the development of right lower quadrant and periumbilical discomfort, which developed after Claimant's work accident, Dr. Reasoner placed claimant at maximum medical improvement (MMI) without any permanent impairment. (Ex. 3, pp. 43-48).
7. The ALJ finds that Claimant was timely provided with a designated provider list and selected Dr. Reasoner, at Centura, as the authorized treating provider for the June 3, 2020, injury.
8. On June 26, 2020, Claimant presented to the emergency room stating at about 7:30 p.m. that night he felt a pop in his umbilicus, but he was able to "pop it back in" but it has been painful since and radiates towards the right. (Ex. 3, p. 55). Claimant reported he had been helping his wife make dinner at the time. (Ex. G, p. 142).
9. The June 27, 2020, report notes the CT scan showed uncomplicated umbilical hernia and slight swirling of the right upper quadrant mesenteric vessels without signs of bowel obstruction or ischemia. (Ex. 3, p. 53).
10. On July 10, 2020, and despite the findings of the CT scan finding a hernia, a Final Admission of Liability consistent with Dr. Reasoner's MMI report. (Ex. 1, pp. 7-20).

Claimant's Initial DIME on November 2, 2020, with Dr. Higginbotham

11. On November 2, 2020, Claimant underwent a Division Independent Medical Exam (DIME) with Dr. Thomas Higginbotham. (Ex. 3, pp. 72-86). Dr. Higginbotham reviewed Claimant's medical records and examined Claimant. He noted Claimant was evaluated by Dr. Botolin at his request as she was his previous general surgeon. He noted Dr. Botolin's report from July 2, 2020, showed "minimal abdominal discomfort," that the "abdominal CT showed no evidence of obvious internal hernia," and Dr. Botolin reassured Claimant that the "instrumentation from his L5-S1 fusion was not disrupted from the crush event." (Ex. 3, p. 78). Claimant informed Dr. Higginbotham that his L5-S1 fusion has not bothered him since the work-related event, "what has concerned him is periumbilical pain and swelling about the midline of the abdomen and above the umbilicus." (*Id.*). Claimant reported that "he experiences chronic pain about both lower extremities stemming from his low back conditions." (*Id*. at 80). Claimant stated his chest was "fine now." (*Id*. at 81). On exam, Dr. Higginbotham found no umbilical hernia, but found a moderate-large ventral protrusion about the midline of the abdomen. (*Id*.).

12. Dr. Higginbotham diagnosed torso crush injury, ventral hernia, periumbilical hernia (presently reduced/absent), diffuse abdominal pains, and resolved traumatic costochondritis. (*Id*. at 82). Dr. Higginbotham opined Claimant was not at MMI and recommended he return to the general surgeon for "reconfirmation of ventral hernia" and "discussion of treatment options." (*Id.* at 83). According to the initial DIME report, Claimant did not make any complaints of right lower quadrant pain. (*See generally* Ex. 3, pp. 73-84).

13. On December 29, 2020, and after the DIME report of Dr. Higginbotham, Claimant's claim was re-opened via a General Admission of Liability. (Ex. 1, pp. 5-6).

14. On January 27, 2021, Claimant underwent surgery with Dr. Botolin for a ventral hernia repair with mesh. (Ex. L, pp. 275-276).

15. On March 4, 2021, Claimant returned to Dr. Botolin. At this follow-up appointment, which was over a month after surgery, all of Claimant's symptoms had resolved and he was off pain medication. Thus, a work release was provided. (Ex. L, p. 274).

16. On March 9, 2021, Claimant was seen by his primary care physician Dr. Pennington – who noted Claimant had "no abdominal tenderness." (Ex. I, p. 212).

17. On May 10, 2021, Claimant was evaluated by PA Quakenbush, at Centura, because of a request of the insurance carrier. (Ex. K, p. 269). It was noted Dr. Botolin, the surgeon, released Claimant to full unrestricted work duty on March 10, 2021. Claimant reported he had been doing well but was "having some return of previously noted abdominal wall weakness symptoms" specifically "mid ventral abdominal wall weakness with straining" (Ex. K, pp. 269, 271). Claimant requested a return to Dr. Botolin. Claimant's full duty release continued. (*Id*. at 272). There was no mention of right lower quadrant pain during this medical visit. (*Id.*).

18. On May 21, 2021, Claimant was involved in a non-work-related motor vehicle accident. Claimant testified he was the driver of the vehicle and had his seatbelt on. (Hrg. Tr., p. 130 ll 9-15). The ALJ notes that the area in which the seatbelt would hit appears to be his right side and appears to be in the same area in which Claimant indicates his pain is

located and reportedly received the nerve block injection which relieved his pain. (Hrg. Tr., p. 111).

19. On August 6, 2021, an ultrasound was performed, and it showed no gross evidence of hernia or fascial wall defect. (Ex. R, p. 360).

20. On August 27, 2021, Claimant returned to his treating provider and was seen by PA-C Quakenbush. The August 6, 2021, ultrasound, with and without Valsalva maneuvers, was discussed and noted no gross evidence of hernia or fascial wall defect. Claimant, however, reported "stabbing abdominal pain." (Ex. K, p. 265). Thus, Claimant was to return to Dr. Botolin for re-evaluation for further surgery. (*Id*.).

Alleged August 31, 2021, Injury

21. On August 31, 2021, Claimant climbed a ladder to go to the roof regarding issues with a swamp cooler for his job. He assessed the situation, climbed back down the ladder, went to the shop to get parts and returned to repair the swamp cooler. After coming back down the ladder he reported that he felt a sharp burning, stabbing sensation just above his belly button where he understood the mesh implant to be. (Hrg. Tr., pp 104 ll 8-23, 105 ll 4-8).

22. Claimant reported a new injury from the August 31st incident and was provided a designated provider list by the employer on the same day. (Ex. D, pp. 51-53).

23. On September 1, 2021, Claimant presented to Centura Urgent Care for evaluation related to the August 31st incident. (Ex. K, pp. 258-263). Claimant reported he "did not have a significant event of pain such as a pop or swelling." Claimant stated he believed this was related to a prior workers' compensation injury where he was injured in a gate and that he was trying to visit with his surgeon for that claim. (*See id*., p. 259-260). On exam, there was no swelling, no palpable defect, and no significant tenderness. (Ex. K, p. 262). Work-relatedness was "undetermined." (*Id*. at 258).

24. Claimant testified he spoke to the workers' compensation claim adjuster, [Redacted, hereinafter MT], regarding the August 31st claim and told her that it was the same pain in the same spot that he had been dealing with for months prior to August 31st incident. (Hrg. Tr., p. 135 ll 7-18).

25. On September 7, 2021, Claimant returned to the ATP to follow-up regarding the August 31st incident. It was noted his history did not reveal any specific new injury. (Ex. K, p. 249). His "minimal" pain was once again noted to be "mid abdominal." (*Id*. at 250, 251). On exam, there was no inguinal tenderness, and he was able to flex and rotate his hips without limitation or pain. (*Id*. at 251). He was to return on October 7, 2021. (Ex. K, p. 257). Work-relatedness continued to be undetermined. (*Id*.). Work restrictions were 5 lbs. lifting, carrying, pushing, pulling were recommended. (*Id*.).

26. The ALJ finds that Claimant was timely provided with a designated provider list for the August 31, 2021, alleged work injury and again selected the Centura Urgent Care center as the ATP for care related to that incident.

27. Claimant testified that Dr. Botolin said she did not need to see him after the ultrasound results were negative. (Hrg. Tr., p. 132 ll 1-13; *see also* Ex. M, p. 306).

28. A Notice of Contest was filed for the August 31, 2021, claim (Ex. 2, p. 33), but the June 3, 2020, claim was still under a General Admission of Liability dated December 29, 2020. (Ex. 1, p. 5).

29. Claimant, however, did not return to his ATPs at Centura Urgent Care after September 7, 2021. (Hrg. Tr., pp. 135 ll 19-25, 136 ll 1-2). Moreover, there is a lack of credible and persuasive evidence that he was refused treatment for non-medical reasons under his June 2020 claim.

30. Rather than seek ongoing treatment under his June 2020 Claim with Centura, Claimant sought an evaluation and treatment with his primary care provider (PCP), Kaiser, on October 27, 2021. At this visit, Claimant reported "central abdominal pain." (Ex. M, p. 306). On exam, mid-line tenderness was noted, there is no mention of right lower quadrant pain. (*Id*. at 307). He was referred to general surgery for a second opinion. (*Id*. at 305).

31. Claimant testified he did not get permission from the claim adjuster, MT[Redacted], to treat or evaluate with his PCP Dr. Pennington or Kaiser. (Hrg. Tr., p. 138 ll 7-18).

32. Claimant saw Dr. Hess, a surgeon at Kaiser, on November 10, 2021. (Ex. M, pp. 301-302). Dr. Hess' report indicates notes from Kaiser documents a "fairly extensive past medical history including chronic fatigue, chronic pain disorder, history of lumbar compression fracture, type 2 diabetes, and nerve pain and migraines." (*Id*. at 301). Claimant reported ongoing pain in his "upper abdomen," with no mention of right lower quadrant pain. (*Id*. at 302). On exam, there was no obvious defects palpable, with "diffuse tenderness with palpation of the upper midline abdomen" with no evidence of recurrent hernia. (*Id*.). Dr. Hess recommended a CT scan to evaluate for recurrence of the hernia, but he felt exploratory surgery to remove the mesh would be high risk with uncertain benefit considering his pain. (*Id*.).

33. Claimant testified Dr. Hess did not recommend any surgery. (Hrg. Tr., pp. 136 ll 12-25, p. 137 ll 1-7).

34. Despite receiving a surgical evaluation, which is what Claimant testified that Centura Urgent Care was waiting for before seeing him again, Claimant still did not return to the ATP after this evaluation.

35. In November 2021, Claimant moved to Cheyenne Wyoming. (Hrg. Tr., p. 88 ll 19-22). He did not, however, advise the insurer at this time that he was moving and needed a new designated provider.

36. Claimant's wife found Dr. Tierney a surgeon, in Loveland Colorado, at UCHealth via a Google search and that he was a doctor that dealt with difficult abdominal issues. (Hrg. Tr., pp. 137 ll 11-25, p. 138 ll 1, and Ex. H, p. 194).

37. On December 27, 2021, Claimant was evaluated by Dr. Tierney. Claimant reported he believed he had a recurrent hernia. (Ex. H, p. 203). Dr. Tierney did not feel Claimant had a recurrent hernia. He thought the abdomen exam was more consistent with diastasis recti, but recommended a CT scan to better evaluate Claimant's complaints. (*Id*. at 202, 203).

38. Claimant testified that Dr. Tierney did not recommend any surgery. (Hrg. Tr., p. 138 ll 2-6).

39. Claimant also testified he did not obtain permission from the claim adjuster to be evaluated or to treat with Dr. Tierney. (*Id*. at ll 19-22).

40. On January 14, 2022, Claimant underwent an abdominal CT scan for "recurrent upper abdominal wall pain." The CT scan showed nothing to suggest a recurrent abdominal wall hernia. (Ex. R, pp. 357-358).

41. On February 1, 2022, Claimant presented to Dr. Khoi Le at Banner Health. Claimant reported that he was told he does not have a hernia and there is nothing to be done by the surgeon who performed the robotic assisted hernia repair (Dr. Botolin) and a second general surgeon (Dr. Tierney) at Loveland MCR. (Ex. N, p. 330). Dr. Le reviewed the CT scan report and noted the mesh was in place and Claimant has diastases, without evidence of a hernia. (*Id*.). Claimant reported he cannot sit for long periods of time, cannot walk long distances, and is otherwise hindered in his daily activity secondary to the pain in his diastases. (*Id*.). On exam, Claimant had obvious diastases present in the mid to upper abdomen. (*Id*.). Dr. Le thought it best to refer Claimant to a plastic surgeon for plication and other techniques for repair of the symptomatic diastases. Dr. Le provided work restrictions of 20-30 lbs. until his repair. (*Id*. at 331).

42. On February 3, 2022, Claimant was seen by Dr. Nathan Narasimhan, plastic surgeon with Banner Health. Dr. Narasimhan advised Claimant that pain can be difficult to treat and that surgery could be done with open approach but that this may not have a significant impact on his pain and recommended an evaluation with pain management. (Ex. N, p. 327).

43. On February 7, 2022, Claimant presented to his PCP at Kaiser. He requested a referral for his "Spine Pain" (Ex. M, p. 292). A referral was made for neurosurgery, noting a "history of spinal fracture at L5 and radicular vs. neuropathic symptoms. Had posterior fusion at L5/S1 but with persistent radiculopathy. Would like to consider ablation if this is an option." (*Id*. at 291).

44. On February 22, 2022, Claimant was evaluated by Kaiser pain management physician, Dr. Patrick Russell, for bilateral foot pain. (Ex. M, p. 280). It was noted Claimant had underlying spondylolisthesis and is now status post fusion, but Claimant reported the surgery "was not helpful" therefore persistent radiculopathy would be in the differential. (*Id*. at 281). The treatment plan included consideration for a spinal cord stimulator. (*Id*.).

45. Claimant received short term disability benefits from October 1, 2021, through February 27, 2022 totaling $3,094.27. (Ex. P, p. 340).

46. On April 7, 2022, Claimant underwent diagnostic laparoscopy with Dr. Le. Adhesions were found attached to the mesh and were removed. It was decided to leave the mesh in place. (Ex. N, p. 317-318). No recurrent hernia or other acute trauma was identified.

47. Claimant did not deny that he also found Dr. Le at Banner Health through a Google search. (Hrg. Tr., pp. 138 ll 23-25, 139 ll 1-8). He testified that Dr. Le referred him to Dr. Narasimhan, who referred him back to Dr. Le. (*Id*. at 139 ll 9-21). Claimant testified he did not get permission from the claim adjuster to treat or evaluate with Banner Health, or Dr. Le, or Dr. Narasimhan. (*Id*. at 140 ll 9-17).

Subsequent Employer – June 14, 2022

48. On June 14, 2022, Claimant started working for Belfour Beatty Military Housing Management. (Hrg. Tr., p. 148 ll 22-25). Claimant obtained health insurance for himself and his wife through [Redacted, hereinafter BR]. (Hrg. Tr., pp. 149 ll 20-25, 150 ll 1-5; *see* Ex. B).

49. Without advising the Employer of his move to Wyoming or new job, Claimant advised Employer of his voluntarily resignation/retirement effective July 1, 2022, via email. (Ex. D, p. 48).

Follow-up DIME – July 14, 2022

50. On July 14, 2022, Claimant returned for a follow-up DIME with Dr. Higginbotham in regard to the June 3, 2020, claim. (Ex. A, pp. 13-26). Dr. Higginbotham reviewed Claimant's medical records and took a verbal history from Claimant. Claimant reported he underwent surgery with Dr. Le in April 2022. He reports the surgery was planned earlier but rescheduled because of a family medical emergency of Dr. Le. (*Id*. at 18). Claimant reported that Dr. Le informed him that a "silver dollar-size scar was on the underside of the middle of his large mesh and had to be broken up and was likely accounting for his abdominal pains." (*Id.*). Claimant reported pain with his right lower quadrant but all other abdominal pain improved or was gone. (*Id*.). Claimant also reported he contracted COVID in June 2021. (*Id*. at 19). Claimant described persistent twinges of abdominal discomfort since being released to full duty after surgery in January 2021. (*Id*.). Claimant reported that he experienced continued swelling about the mid-abdomen especially when sitting up from supine or when bending forward or lifting weight greater than 35 lbs. (*Id*.).

51. Claimant testified that he reported all of his ongoing problems to Dr. Higginbotham at the July 14, 2022, DIME, including that he had an incident at work on August 31, 2021, in which he had increased pain and that he thought his current pain may be due to another adhesion. (Hrg. Tr., pp. 140 ll 18-25, 141 ll 1-22).

52. Dr. Higginbotham found Claimant reached MMI as of July 14, 2022. (*Id.* at 21). He found no mental/behavioral condition that warranted impairment consideration. (*Id*.). Dr. Higginbotham provided Claimant a 5% whole person rating under AMA *Guides*, chapter 10, Table 6, Class I p. 196. (*Id*.). In support of the impairment rating, Dr. Higginbotham specifically noted that Claimant "has a palpable defect in his abdominal wall and a slight protrusion at the site of defect with increased abdominal pressure that was regularly reducible." (*Id*. at 22). Dr. Higginbotham recommended maintenance care for follow-up with the last general surgeon (Dr. Le) one year from the surgery.

53. A Final Admission of Liability was filed on August 10, 2022, in the June 3, 2020, claim consistent with Dr. Higginbotham's report, which admitted for maintenance care. (Ex. A).

54. Claimant testified his wife found Dr. Jason Caswell online and referred him. (Hrg. Tr., p. 142 ll 9-16). Claimant testified he did not get permission from the claim adjuster to treat or evaluate with Dr. Caswell. (*Id*. at ll 17-24).

55. On November 1, 2022, Claimant presented to Dr. Caswell. Dr. Caswell noted Claimant had lysis of adhesions due to abdominal pain resulting from ventral surgery with mesh, "however his pain at this point is different. It is described as vague, right sided mostly" which Claimant likened to "having his guts ripped out." (Ex. O, p. 335). Claimant also

reported a burning and pulling sensation in his upper abdominal region. (*Id*.). Dr. Caswell's report indicates Claimant reported his symptoms started after a work-related injury "necessitating multiple intra-abdominal surgeries culminating with a small bowel resection and ventral herniorrhaphy with mesh." (*Id*.) He also noted that Claimant said that his pain is getting progressively worse and more severe. (*Id*.) In order to assist in determining the cause of Claimant's abdominal pain, Dr. Caswell performed an injection with a local anesthetic around Claimant's ilioinguinal nerve. Subjectively, the injection significantly reduced Claimant's pain. As a result, Dr. Caswell referred Claimant to Dr. Jeremy Gates, surgeon, for evaluation of potential adhesions and to Dr. Natalie Winter, pain management, for permanent ablation. (*Id*. at 334).

56. On November 7, 2022, Respondents sent a letter to Claimant advising him that they had recently learned that he moved to Wyoming and because of such, they were designating a new authorized treating provider. Respondents designated Dr. Robert Dupper at Workwell Occupational Medicine in Loveland Colorado. Claimant testified that he received the letter from Respondent about designation of a doctor in Loveland, Colorado, but that he chose not to see that provider. (*See* Hrg. Tr., pp. 114 ll 15-25, 115 ll 1-2; and Ex. C). As a result, Claimant decided to continue seeking treatment from unauthorized providers.

57. On December 22, 2022, Claimant obtained an Independent Medical Examination (IME) with Dr. John Hughes. (Ex. 3, pp. 126-132). Dr. Hughes agreed with Dr. Higginbotham that Claimant should be re-evaluated by a general surgeon. In fact, this was the primary reason for which Dr. Hughes concluded that Claimant was not at MMI (*Id*. at 131); however, Dr. Hughes himself did not see any indication to proceed with abdominal surgery nor did he recommend any additional treatment that was necessary to get Claimant to MMI. (*Id*.). Dr. Hughes did not diagnose Claimant with a nerve injury related to the June 3, 2020, injury. While he was aware of Claimant's reported pain following the described August 31, 2021, incident, he also did not conclude that the August 2021 incident resulted in a new injury. (*See* Ex. 3, pp. 126-132). Dr. Hughes disagreed with the assignment of a 5% whole person rating and believed that objective pathology described by Dr. Higginbotham justified a Class 2 categorization rather than a Class 1 as provided by Dr. Higginbotham. (*Id*. at 131). Dr. Hughes noted Claimant also reported that 3 weeks ago he was involved in installing two dishwashers and a microwave and that he "was jacked up that week." (*Id*. at 129).

58. On January 2, 2023, Claimant presented to Dr. Jeremy Gates at Cheyenne Regional Medical Center for a "a third surgical opinion regarding an abdominal wall hernia versus scar tissue within the peritoneal cavity." (Ex. F, p. 118). Claimant reported that he had a "door" at a business he was working at strike him in the chest and abdomen in 2020 causing a crush injury. (*Id*.). Claimant reported that after his hernia repair in 2021 he developed "a burning sensation of the abdominal wall to the right of midline as well as a burning sensation in the right inguinal region." (*Id*. at 119). Dr. Gates noted the prior two surgeons (initial surgeon and Dr. Le) stated there was no hernia. (*Id*.). Dr. Caswell performed an ilioinguinal nerve block and Claimant reported that all of his right inguinal symptoms resolved. (*Id*.). Claimant was requesting repeat surgical intervention for lysis of adhesions as the cause of his burning sensation of the right hemiabdomen. (*Id*.). On exam, Dr. Gates noted a "small rectus diastases present with no evidence of herniation."

(*Id*. at 121). Dr. Gates concluded that based on Claimant's reports and physical examination he would not offer surgical intervention and discussed that any additional surgery within the peritoneal cavity would cause additional scarring. (*Id.).*

59. Claimant testified that he did not get permission from the claim adjuster to treat or evaluate with Dr. Gates. (Hrg. Tr., p. 143 ll 20-22).

60. On February 1, 2023, Claimant presented to Dr. Natalie Winter for pain management evaluation. (Ex. F, pp. 103-117). Dr. Winter discussed that a lot of Claimant's pain was consistent with myofascial pain in his right lower abdomen, with evidence of several trigger points. (*Id*. at 108). She strongly suggested physical therapy to help with the myofascial trigger points and trigger point injections to help with pain relief as he does physical therapy. (Id. at 109). Claimant "was not sure he wanted to go that route." (*Id*.).

61. Claimant testified he did not get permission from the claim adjuster to treat or be evaluated by Dr. Winter. (Hrg. Tr., p. 143 ll 7-10).

62. On February 24, 2023, Claimant underwent an IME with Dr. Kathleen D'Angelo at the request of Respondent. (Ex. G). In Dr. D'Angelo's report, she includes an extensive review and summary of medical records. Dr. D'Angelo concluded that Claimant did not sustain a new injury on August 31, 2021. (*Id*. at 181). Dr. D'Angelo noted that Claimant had reported abdominal pain since his return to regular duty in March 2021 and his symptoms of pain did not change after the August 2021 incident. (*Id*.). She also agreed with Dr. Higginbotham that Claimant reached MMI for the June 3, 2020, injury as of July 14, 2022. (*Id.* at 182). Based on her physical exam, she agreed the appropriate impairment rating is 5% whole person rating pursuant to Class I p. 196 of the *AMA Guides*, as similar to Dr. Higginbotham she noted a slight protrusion in her physical exam, which is also consistent with Dr. Gates' examination in which he noted a "small rectus diastases." (*Id*. at 183-184).

63. On March 2, 2023, Dr. Hughes issued a case review. In essence, his opinions remained the same.

64. The ALJ is more persuaded by the consistent opinions of Drs. Higginbotham, D'Angelo, and Gates that Claimant's abdominal protrusion is small, over any opinion to the contrary.

65. The ALJ is also persuaded by Dr. D'Angelo's opinion that Claimant was properly placed at MMI as of July 14, 2022, as found by Dr. Higginbotham. The ALJ is further persuaded by Dr. D'Angelo's opinion that the August 31, 2021, incident did not result in a separate injury. This opinion is supported by the operative report of Dr. Le who, upon exploratory surgery did not find evidence of any recurrent hernia or other trauma, only adhesions to the mesh implant. The ALJ is also persuaded by Dr. D'Angelo's report that Claimant did not suffer a worsening of condition since she found that Claimant remained at MMI as of July 14, 2022.

66. Claimant's wife started receiving her own health insurance through her own employer on March 1, 2023. (Hrg. Tr., p. 150 ll 6-18).

67. Dr. Caswell then referred Claimant to Dr. George Girardi, another pain management specialist.

68. On March 20, 2023, Claimant saw Dr. Girardi. Dr. Girardi noted Claimant's current complaint as "low back pain with right groin pain and bilateral lower extremity pain." (Ex. H, p. 189). He noted an ilioinguinal nerve block gave him a fair amount of relief in the groin but did not affect his lower extremities. (*Id*.). Dr. Girardi assessed "back pain with bilateral leg pain which I think is multifactorial. I do think a big component is due to failed back surgery syndrome." (*Id*.). On exam, Dr. Girardi noted Claimant was "quite tender to palpation in his lumbar sacral area" and had "discomfort with any type of movements in his lower extremities." (*Id*. at 190-191). Visit diagnoses were: "Primary: Chronic pain syndrome" and "postlaminectomy syndrome of lumbar spine." (*Id.* at 193). The plan was for scans of his thoracic and lumbar spines and potentially trial him for spinal cord stimulator. (*Id*. at 189).

69. Claimant testified he did not get permission from the claim adjuster to treat or evaluate with Dr. Girardi. (Hrg. Tr., p. 144 ll 8-10).

70. On April 20, 2023, Claimant returned to Dr. Girardi's office. The history of Claimant's pain syndrome included: "back pain which has not responded to 3 months of appropriate conservative therapy…the pain is interfering with functional activities, the pain is radicular in it does extend into lower abdomen and lower extremities in a dermatomal pattern, the patient's low back is exacerbated by extension…the patient is suffering with neurological deficit…" (Ex. 3, p. 209). Assessment included lumbar radiculopathy. (*Id*. at 210). Claimant was referred to Dr. Corcoran for psychological evaluation before spinal cord stimulator trial. (*Id*. at 211).

71. On May 13, 2023, Claimant helped a co-worker at BR[Redacted] move an empty water heater, which weighed approximately 100-130 lbs., after which he had 10/10 pain. (Hrg. Tr., pp. 144 ll 21-25, 145 ll 1-16).

72. On May 16, 2023, Claimant saw Corcoran for psychological evaluation. He determined Claimant could proceed with a trial of a spinal cord stimulator and surgery to implant the stimulator if indicated. (*Id*. at 216).

73. Claimant testified that he did not get permission from the claim adjuster for evaluation or treatment with Dr. Corcoran. (Hrg. Tr., p. 144 ll 17-20).

74. On or about July 10, 2023, Claimant sent an email to Dr. Girardi's office requesting that he change his reports to indicate that the primary reason for the spinal cord stimulator was "chronic lower right abdominal pain due to work-related crush injury on 6/3/20" and the secondary reason was "bilateral nerve damage in feet due to failed back surgery in 2018/2019". (Ex. 3, p. 239-240).

75. Despite this request, the August 28, 2023, report from Dr. Girardi's office still documents treatment for active problems: "1. Postlaminectomy syndrome of lumbar region; 2. Lumbar radiculopathy, chronic; 3. Status post insertion of spinal cord stimulator, 4. Chronic pain syndrome." (Ex. H, p. 186).

76. During his testimony, Dr. Caswell stated Dr. Girardi is the subject matter expert and he trusted him explicitly. (Hrg. Tr., pp. 70 ll 18-25, 71 ll 1-3).

77. The ALJ finds that it remains Dr. Girardi's opinion that the spinal cord stimulator is due to treatment of lumbar radiculopathy due to failed back surgery, which is unrelated to either the June 2020 claim or the August 2021 alleged claim. The ALJ find Dr. Girardi's opinion

is consistent with Dr. Russell's opinion regarding Claimant's bilateral foot pain could be related to persistent lumbar radiculopathy and a spinal cord stimulator could be considered. The ALJ is more persuaded by these medical opinions than any opinion to the contrary and finds the need for the spinal cord stimulator and treatment related to same is not causally related to either the June 2020 or August 2021 claims.

Claimant's Additional Testimony

78. Claimant testified that the bills dated November 15, 2021, and December 20, 2021 from Centura Health were paid by workers' compensation. (Hrg. Tr., pp. 146 ll 4-124, 151 ll 5-9).

79. He also testified that since working at BR[Redacted] he has missed time from work unrelated to his work injury. (Hrg. Tr., p. 149 ll 4-11).

Testimony of Dr. Caswell

80. Dr. Caswell also testified at the hearing. In essence, Dr. Caswell testified that after taking a patient history and evaluating Claimant, he thought that Claimant's abdominal pain might be due to a nerve injury that occurred when the door crushed Claimant. Therefore, he decided to perform a diagnostic nerve block to determine whether Claimant's pain was nerve related. Based on the Claimant's subjective response to the nerve block-that the nerve block significantly reduced his pain for a short period of time-Dr. Caswell concluded that the Claimant's abdominal pain is due to a nerve injury.

81. During his testimony, Dr. Caswell also indicated that his opinion is also supported by his contention that Claimant's prior surgery, or surgeries, alleviated Claimant's nerve pain. Dr. Caswell testified that when Claimant underwent surgery, he was given a nerve block, and that block would have also alleviated Claimant's nerve pain – like the injection he performed. That said, a review of the medical records does not indicate that the Claimant's pain was only temporarily relieved by the nerve block performed during his first surgery. Instead, the medical records establish that Claimant's pain was relieved for weeks after the surgery, thus countering the opinion of Dr. Caswell.[1]

82. Moreover, despite Dr. Caswell stating that it was his opinion that Claimant's suffered a nerve injury during the June 2020 work accident, he still referred Claimant to a surgeon to see if the pain was being caused by adhesions. (*See* Ex. 3, p. 122). Thus, even Dr. Caswell did not conclusively think the Claimant's subjective response to the injection established Claimant's pain complaints were due to a nerve injury.

83. While Dr. Caswell's opinions seem reasonable on the surface, the ALJ does not find his opinions to be highly persuasive when considering the competing evidence and opinions contained in the record. Claimant has seen several physicians and surgeons, and the

[1] As found, on January 27, 2021, Claimant underwent surgery with Dr. Botolin for a ventral hernia repair with mesh. On March 4, 2021, approximately 5 weeks later, Claimant returned to Dr. Botolin and indicated that all of his symptoms had resolved and that he was off pain medications. Then, on March 9, 2021, Claimant was seen by his primary care physician Dr. Pennington – who noted Claimant had "no abdominal tenderness." Thereafter, almost 15 weeks later, Claimant returned for treatment and saw PA-C Quakenbush. Claimant reported he had been doing well but was "having some return of previously noted abdominal wall weakness symptoms" specifically "mid ventral abdominal wall weakness with straining." But, there was no mention of right lower quadrant pain during this medical visit.

ALJ does not find that Dr. Caswell is the only one who has been able to make a proper diagnosis and find the pain generator. As a result, the ALJ does not find Dr. Caswell's opinions to rise to the level of clear and convincing evidence that Claimant is not at MMI because he suffered a non-diagnosed nerve injury that still requires treatment. Moreover, the ALJ does not find his opinion persuasive evidence to find that Claimant's condition has worsened.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. W.C. No. 5-141-572-006

1. Whether Claimant overcame the DIME and established by clear and convincing evidence that he is not at MMI, or if at MMI, that he is entitled to a higher impairment rating.

a. Maximum Medical Improvement

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

In this case, Dr. Higginbotham, the DIME physician, evaluated claimant twice – first on November 2, 2020, then in follow-up on July 14, 2022. At the first DIME appointment, Claimant reported pain and discomfort about the mid-abdominal areas and denied any numbness or tingling sensations. Claimant reported that his chest was "fine" and non-tender. Dr. Higginbotham noted the June 3, 2020, study did not mention an umbilical hernia. At the November 2, 2020, DIME appointment, Dr. Higginbotham opined Claimant had a readily noticeable, moderately large, ventral hernia evidence with Valsalva maneuver for which he had not been properly evaluated and was not at MMI. Claimant subsequently returned for treatment, including a ventral hernia repair with mesh implant in January 2021 with Dr. Botolin, to whom he reported complete resolution of all his symptoms in March 2021. Additionally, Claimant saw the ATP on May 10, 2021, several months after the surgery, and reported return of abdominal wall weakness, but no lower right quadrant pain. Claimant subsequently underwent "exploratory" surgery with Dr. Le in April 2022 at which time a mesh adhesion was identified, and lysis performed, but no acute trauma or recurrent hernia was identified that could relate to the August 31, 2021, incident.

Claimant returned for a follow-up DIME with Dr. Higginbotham on July 14, 2022. Claimant reported continued swelling in the mid-abdomen, he reported persistent twinges of abdominal discomfort. According to Claimant's testimony, he also reported to the DIME all of his ongoing problems to Dr. Higginbotham at the July 14, 2022, DIME, including that he had an incident at work on August 31, 2021, in which he had increased pain and that he thought his current pain may be due to another adhesion. According to the follow-up DIME report, Claimant did not mention any lower right quadrant pain.

Since the July 14, 2022, follow-up DIME, Claimant has been evaluated by several physicians for abdominal pain. Dr. Hughes performed an IME on behalf of Claimant. Dr. Hughes concluded that Claimant was not at MMI just because he felt Claimant should

have a surgical re-evaluation. Claimant did have a surgical evaluation with Dr. Gates, who did not recommend any surgical intervention. In neither of his reports did Dr. Hughes conclude that Claimant had a nerve injury related to the work accident that required additional treatment prior to being placed at MMI. Dr. Caswell is the only physician who opined Claimant may have suffered a nerve injury proximately related to the June 2020 work accident. However, Dr. Caswell has not opined that Claimant is not at MMI or that additional medical treatment, including injections and/or physical therapy as recommended by Dr. Winter, would not be appropriate maintenance care. Additionally, a second pain management specialist, Dr. Girardi, opined that a spinal cord stimulator was appropriate for the primary diagnosis of failed low back surgery, despite Claimant's request for him to change his opinion to reflect the purpose of the spinal cord stimulator was for his abdominal pain. The ALJ finds the opinions of Drs. Hughes and Caswell at most amount to mere differences of opinion that do not rise to the level of clear and convincing evidence to support a finding that Claimant is not at MMI.

As a result, the ALJ finds and concludes Claimant has failed to overcome by clear and convincing evidence the DIME opinion regarding MMI.

b. Impairment Rating

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The question of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

In this case, the DIME Dr. Higginbotham assigned a 5% whole person impairment rating pursuant to the AMA *Guides* Chapter 10, Table 6, Class I of page 196. The ALJ takes judicial notice that Class I of Table 6 "Classes of Hernial Impairment" on page 196 of the AMA *Guides to the Evaluation of Permanent Impairment*, 3rd Ed. Revised allows for a 0-5% whole person impairment rating. Respondent's IME Dr. D'Angelo's physical examination of Claimant in February 2023 indicates a "slight protrusion" and Dr. Gates' physical examination of Claimant in January 2023 noted a "small rectus diastases," which the ALJ finds consistent with the DIME's findings of a "slight protrusion" and basis for his determination of a 5% whole person rating in this matter.

Claimant's expert, Dr. Hughes Dr. Hughes disagreed with the assignment of a 5% whole person rating and believed that objective pathology described by Dr. Higginbotham

justified a Class 2 categorization rather than a Class 1 as provided by Dr. Higginbotham and therefore entitled Claimant to a 10% whole person rating.

In this case, the ALJ finds that the difference of opinion between the DIME physician and Dr. Hughes is merely a difference of opinion and does not rise to the level of clear and convincing evidence. Plus, Dr. Higginbotham's impairment rating is also supported by Dr. D'Angelo.

As a result, the ALJ finds and concludes Claimant has failed to prove the DIME's 5% whole person impairment rating is "highly probably" incorrect. The ALJ finds Claimant has failed to overcome the DIME opinion regarding permanent impairment by clear and convincing evidence.

2. Whether Claimant's condition has worsened since being placed at MMI and his claim reopened.

To reopen a workers' compensation claim, a claimant must demonstrate that he has experienced a change in condition which is causally related to, or a natural consequence of, the admitted injury. *Justiniano v. Indus. Claim Appeals Office*, 410 P.3d 659, 661 (Colo. App. 2016). The power to reopen under the provisions of §8-43-303, C.R.S. is permissive and left to the sound discretion of the ALJ. *Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177, 1181 (Colo. App. 1996).

In the June 2020 claim, Claimant testified, and the medical records document, that Claimant was still symptomatic with reports of abdominal pain at the time of the follow-up DIME. Nevertheless, the DIME physician concluded Claimant was at MMI as of July 14, 2022. Claimant was seen by several physicians after the DIME appointment, including a surgeon, none of whom opined Claimant's condition was worse than it was at the time of the DIME and finding of MMI nor that his condition required additional surgery related to the June 2020 injury.

Moreover, the ALJ does not find that Claimant's own IME with Dr. Hughes supports a finding that Claimant's condition is worse since the follow-up DIME appointment. While it is true that additional treatment, including injections and physical therapy, have been recommended by unauthorized providers to treat Claimant's ongoing symptoms, this recommended treatment does not establish a worsened condition. To the extent Claimant argues that the need for the spinal cord stimulator surgery is evidence of a worsened condition, the ALJ does not find this argument persuasive as the physician who recommended the spinal cord stimulator, Dr. Girardi, specifically noted the spinal cord stimulator was due to persistent lumbar radiculopathy due to failed low back surgery, which is not causally related to the June 2020 claim. This opinion is also supported by the February 22, 2022, report of Dr. Russell at Claimant's PCP at Kaiser, who evaluated Claimant's bilateral foot pain and opined that it could be caused by persistent radiculopathy and that a spinal cord stimulator may be considered.

Based on the above, the ALJ finds and concludes that Claimant has failed to prove by a preponderance of the evidence that he suffered a worsening of condition causally related to the June 2020 work injury.

3. **Whether Claimant is entitled to TTD and/or TPD.**

Because Claimant remains at MMI as of July 14, 2022, and Claimant's condition has not worsened, Claimant is not entitled to additional temporary disability benefits.

4. Whether Respondents are entitled to an offset.

Evidence regarding the offset for Claimant's receipt of short term and/or long-term disability benefits was not fully developed at hearing and in the proposed orders. For example, there is a lack of evidence to determine who financed, and to the extent financed, Claimant's short and/or long-term disability benefits. Moreover, the payment of short-term disability from October 1, 2021, through February 27, 2022, does not cover a period in which temporary disability benefits were admitted and paid to Claimant, as set forth in the Final Admission of Liability. Additionally, the payment of long-term disability benefits from February 28, 2022, through May 11, 2022, does not cover a period in which temporary disability benefits were admitted and paid, as set forth in the Final Admission of Liability. Therefore, this issue is reserved.

5. Medical benefits.

a. Whether the treatment Claimant received was authorized.

b. Whether the treatment Claimant received was reasonably necessary to treat Claimant from the effects of his work injury.

c. Reimbursement to Claimant and his medical providers for the medical treatment he received.

Authorization of Care

The claimant shoulders the burden of proving entitlement to benefits, including medical treatment, by a preponderance of the evidence. §8-43-201, C.R.S.; *see Synder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Once a claimant has established a compensable work injury they are entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. §8-42-101, C.R.S.; *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Section 8-43-404(5), C.R.S. affords the employer or insurer the statutory right, in the first instance, to select a physician to treat the industrial injury, and that the right of first selection does not pass to the claimant unless the employer or insurer fail to provide a physician willing to treat the injury. §8-43-404(5), C.R.S.; *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228, 229 (Colo. App. 1999), *cert. denied*.

Section 8-43-404(5)(a), C.R.S. provides that a claimant may not change physicians without permission from the employer, insurer, or ALJ. §8-43-404(5)(a), C.R.S.; *Yeck*, 996 P.2d at 229.

Respondents are only liable for authorized treatment. §8-43-404(7)(a), C.R.S. Authorization to provide medical treatment refers to a medical provider's legal authority to provide treatment to the claimant with the expectation that the provider will be compensated by the insurer for said services. *Mason Jar Rest. V. Indus. Claim Appeals Office*, 862 P.2d 1026, 1029 (Colo. App. 1993); *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006). Authorized providers include those medical personnel to whom the claimant is directly referred by the employer, as well as providers to whom an authorized provider refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3s 513 (Colo. App. 2002). Consequently, treatment is compensable under the Act where it is provided by an "authorized treating physician." *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). If an injured worker obtains unauthorized care, the respondents are not required to pay for it. *In Re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO June 18, 2010); *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colo. State Hospital*, 513 P.2d 228 (Colo. 1973).

In this case, Claimant timely received a copy of the designated provider list from the Employer after both the June 2020 injury and alleged August 2021 injury. In both instances, Claimant sought medical treatment with Centura Urgent Care, who was on each of the Employer's designated provider lists. Centura Urgent Care thus became the authorized treating provider (ATP) for each claim. Centura Urgent Care provided evaluation and treatment to Claimant from June 8, 2020, through September 7, 2021. Despite a follow-up appointment having been scheduled for Claimant to return on October 7, 2021, Claimant testified he did not return to Centura Urgent Care because his August 31, 2021, claim had been denied by the Respondent's third-party administrator ([Redacted, hereinafter CV]) and because the ATP had wanted him to see a surgeon and Dr. Botolin would not see him because the August 6, 2021, ultrasound was negative. Despite being evaluated by two other general surgeons, Dr. Hess and Dr. Tierney, on November 21, 2021, and December 27, 2021, respectively, Claimant never returned to the ATP for re-evaluation.

To the extent Claimant argues the right of selection passed to him to choose a different treating provider due to the denial of his August 31, 2021, claim and CV's[Redacted] refusal to pay for medical benefits for that claim, the ALJ rejects this argument. This is the same argument the Court of Appeals rejected in *Yeck*, instead holding the right of selection of the physician is not conditioned on an admission of liability. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

Claimant testified that the claim adjuster did not give him permission to see any of the following medical providers: Valley Wide Health/Dr. Pennington, Kaiser/Dr. Hess, Dr. Tierney, Banner Health/Dr. Le/Dr. Narasimhan, Dr. Caswell, Cheyenne Regional Medical Center/Dr. Winter/Dr. Gates, UCHealth/Dr. Girardi, or Dr. Corcoran.

Additionally, the medical evidence documents that the treatment with these providers took place over a matter of months during routine office visits, physical

examinations, diagnostic testing and ultimately elective surgeries with Drs. Le and Girardi. None of the care was provided in an emergency room. Moreover, the surgeries Claimant underwent with Drs. Le and Girardi were scheduled and planned weeks if not months in advance. For these reasons, the ALJ is convinced that the treatment rendered by: Valley Wide Health/Dr. Pennington, Kaiser/Dr. Hess, Dr. Tierney, Banner Health/Dr. Le/Dr. Narasimhan, Dr. Caswell, Cheyenne Regional Medical Center/Dr. Winter/Dr. Gates, UCHealth/Dr. Girardi, and Dr. Corcoran, including the surgery performed by Dr. Le and the procedures related to the spinal cord stimulator by Dr. Girardi, was not emergent in nature.

Nor has Claimant established another way by which the aforementioned providers became authorized, *i.e*., there is no credible evidence Centura Urgent Care refused to treat Claimant for non-medical reasons, in fact they had a follow-up scheduled with Claimant to return on October 7, 2021, which would indicate they were willing to provide care for his work injuries. Here, Claimant presented no persuasive evidence that Centura Urgent Care refused to provide treatment for non-medical reasons. Moreover, Claimant testified that Respondent designated a provider in Loveland, Colorado to continue and monitor medical care for his June 2020 work injury after his move to Wyoming but he chose not to see that provider.

Consequently, the ALJ finds and concludes that Valley Wide Health/Dr. Pennington, Kaiser/Dr. Hess, Dr. Tierney, Banner Health/Dr. Le/Dr. Narasimhan, Dr. Caswell, Cheyenne Regional Medical Center/Dr. Winter/Dr. Gates, UCHealth/Dr. Girardi, and Dr. Corcoran, and any other provider not within the chain of referral from Centura Urgent Care, are not authorized providers. Accordingly, their care and treatment was and is also unauthorized.

Because the treatment Claimant received was not provided by an authorized provider, Respondents are not responsible for that treatment, regardless of whether it is reasonably necessary and related. As a result, the ALJ finds and concludes that Respondents are not liable for the medical treatment Claimant received from unauthorized providers.

5. Average Weekly Wage.

Claimant agreed to the admitted average weekly wage in his proposed order. Plus, additional temporary disability benefits are not being awarded. Therefore, it appears that the issue of Claimant's AWW is moot. If the issue is still in dispute, either party may file an application for hearing to resolve the issue.

II. W.C. No. 5-183-168-004

1. Whether Claimant suffered a compensable injury on August 31, 2021.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant alleges an injury occurring on August 31, 2021. On that day, Claimant reported experiencing pain in his abdomen where the ventral hernia mesh placed for the June 3, 2020, injury had been placed after climbing up/down a ladder to repair a swamp cooler at work. Claimant reported to the selected ATP Centura Urgent Care related to the August 31, 2021, incident on September 1, 2021. Claimant reported he "did not have a significant event of pain such as a pop or swelling." Claimant stated he believed this was related to a prior workers' compensation injury where he was injured in a gate and that he was trying to visit with his surgeon for that claim. The ATP noted work-relatedness was "undetermined." Consistent with his report to the ATP, Claimant testified he told the claim adjuster that the August 31, 2021, experience of pain was the same pain he had been dealing with for months, as such, a Notice of Contest was filed.

Dr. D'Angelo evaluated the Claimant's complaints related to the August 31, 2021, incident and noted that Claimant had reported abdominal pain since his return to regular duty in March 2021 and his symptoms of pain did not change after the August 2021 incident. The ALJ finds this opinion to be supported by the operative report of Dr. Le who, during exploratory surgery in April 2022, did not find any evidence of recurrent hernia or other trauma, only adhesions to a mesh which were related to the January 2021 surgery and not caused by anything that would have occurred on August 31, 2021.

The ALJ is more persuaded by the opinion of Dr. D'Angelo than any opinion to the contrary. As a result, the ALJ finds and concludes that Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on August 31, 2021.

Because the August 31, 2021, claim is not compensable, the remaining issues under this claim are moot.

ORDER

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

1. Claimant has failed to overcome by clear and convincing evidence the DIME physician's determinations that he reached MMI for his June 3, 2020, claim as of July 14, 2022, or that he has sustained a 5% whole person impairment rating. As a result, his claim to overcome the DIME is denied and dismissed.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a worsening of condition that is causally related to a compensable injury. His petition to reopen W.C. No. 5-141-572 (DOI 6/3/20) is denied and dismissed.

3. Claimant's request for medical benefits in connection with unauthorized treatment from Valley Wide Health/Dr. Pennington, Kaiser/Dr. Hess, Dr. Tierney, Banner Health/Dr. Le/Dr. Narasimhan, Dr. Caswell, Cheyenne Regional Medical Center/Dr. Winter/Dr. Gates, UCHealth/Dr. Girardi, and Dr. Corcoran is denied and dismissed.

4. Claimant's claim for compensation under W.C. No. 5-183-168, for an August 31, 2021, date of injury, is denied and dismissed.

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

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

DATED: November 16, 2023

/s/ Glen Goldman

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

Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a whole person impairment to his right shoulder?
- Did Claimant prove he is entitled to TTD benefits from April 6, 2022 through November 21, 2022? In the alternative, did Claimant prove entitlement to TTD from May 24, 2022 through November 21, 2022?
- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Relatedness and authorization of certain treatment paid by Medicaid.
- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for Employer as a line cook, primarily at the grill station. In addition to cooking, he cleaned the grills and other kitchen areas. The job was physically demanding and required lifting over 50 pounds. Many tasks involved overhead activity, such as cleaning the grill hoods and stocking the freezer.

2. In March 2021, Claimant started to experience left shoulder pain while performing cleaning tasks and lifting heavy cookware. The pain gradually worsened over the next few weeks.

3. Claimant saw Dr. Jack Chapman on April 6, 2021 for a flare of chronic low back pain. He also reported severe left-sided neck pain with radiation into the left shoulder and upper arm. Dr. Chapman diagnosed cervical radiculopathy and ordered a cervical MRI.

4. Later that day, Claimant went to the St. Mary Corwin Hospital emergency department for his low back pain. He also reported left shoulder pain and his shoulder was "cold and numb." He stated the shoulder symptoms were similar to those he experienced several years before when he tore the rotator cuff in his right shoulder.

5. Claimant saw Elizabeth Skelly, NP at Southern Colorado Family Medicine (SCFM) on April 8, 2021. He reported anterior shoulder pain that had been present for a month. He attributed the shoulder pain to repetitive activities. Ms. Skelly ordered an MRI of the left shoulder.

6. On April 13, 2021, Claimant experienced a painful pop and a tearing sensation in his left shoulder while reaching for a plate at approximately eye level.

7. Claimant went to the St. Mary Corwin Hospital emergency room the evening of April 13, 2021 to have his left shoulder evaluated. He described aching, cramping, and shooting pain in the left shoulder. Examination showed tenderness and limited shoulder ROM. X-rays showed mild AC joint degenerative changes but no fracture or other acute findings. Claimant was placed in a sling, prescribed oxycodone, and discharged.

8. Claimant saw Dr. Lloyd at SCFM on April 15, 2021, "to request a letter from doctor to his employer stating that they needed to open workman's comp case." Dr. Lloyd advised Claimant that SCFM "does not do any workmans comp cases though we will continue to provide general medical care while his case is ongoing." She recommended that Claimant speak with Employer about the shoulder injury.

9. Claimant reported the injury to Employer and was referred to Concentra. There is no persuasive evidence that Claimant reported the injury before April 15, 2021.

10. The left shoulder MRI was completed on April 22, 2021. It showed partial-width tears of the subscapularis and infraspinatus tendons and a full-thickness tear of the supraspinatus tendon.

11. Concentra referred Claimant to Dr. Jennifer FitzPatrick, an orthopedic surgeon.

12. Claimant saw Dr. FitzPatrick on May 10, 2021. He described ongoing 10/10 shoulder pain and left-sided radiating neck pain. He also reported periscapular pain around the AC joint that Dr. FitzPatrick believed "may be compensatory." Dr. FitzPatrick recommended surgery.

13. Dr. FitzPatrick performed a left shoulder arthroscopic rotator cuff repair, biceps tenodesis, and distal clavicle excision on May 21, 2021 at Parkview Medical Center.

14. Claimant started post-operative therapy at Momentum Physical Therapy on June 7, 2021. He reported 9/10 pain at the initial visit in the shoulder and around his collar bone.

15. Claimant began treatment with Dr. Pollack on June 21, 2021, for his chronic pain, primarily related to his pre-existing low back condition. Claimant was referred to Dr. Pollack by his PCP. Claimant explained that Dr. FitzPatrick had initially prescribed Percocet (oxycodone) for post-surgical pain but was unwilling to continue prescribing pain medication if Dr. Pollack would also be prescribing medication for other conditions. Dr. Pollack conferred with Dr. FitzPatrick, and they decided Dr. Pollack would assume responsibility for any additional post-operative pain medication. Dr. Pollack refilled the Percocet "a few" times to allow Claimant to wean off the narcotic. Records show Claimant last refilled Percocet on July 6, 2021. That was the last prescription Dr. Pollack wrote for any injury-related symptoms. Claimant continued treating with Dr. Pollack and received Suboxone and other medications for noninjury-related chronic pain.

16. On June 30, 2021, Dr. FitzPatrick documented Claimant was still having "significant pain around the collarbone." The collarbone was tender to palpation, but Dr. FitzPatrick saw no swelling. Examination also showed pain in the trapezial region. Claimant's therapist thought some of his shoulder pain may be referred from the neck, so Dr. FitzPatrick recommended a cervical MRI to investigate the source of his shoulder symptoms.

17. The cervical MRI was completed on July 8, 2021 at Parkview Medical Center. It showed multilevel degenerative changes greatest at C6-7 with mild-to-moderate foraminal stenosis. That same date, Claimant had a lumbar MRI for noninjury-related low back issues.

18. Dr. Pollack noted on July 19, 2021 that Claimant had increased neck pain following surgery.

19. Claimant followed up with Dr. FitzPatrick on July 28, 2021. He was still having pain in the shoulder, lateral left neck, and distal clavicle. The cervical pain was reproduced with left lateral bending. Dr. FitzPatrick recommended Claimant continue PT, "including cervical spine."

20. Dr. Jack Rook performed an IME at the request of Claimant's counsel on September 28, 2021. Claimant indicated his range of motion had improved since the surgery but he still had severe left shoulder pain from his neck to the shoulder joint. He slept poorly because he could not get comfortable and could not lie on his left side. On examination, Dr. Rook noted exquisite tenderness along the anterior shoulder capsule and with palpation of the AC joint where the distal clavicle resection was done. There was moderate tenderness with spasm in the left upper trapezius and left-sided paracervical musculature. Dr. Rook opined Claimant's shoulder issues were work-related. He believed Claimant initially developed an occupational disease from work activities such as scrubbing grills, frequent heavy lifting, repetitive reaching, and mopping. These activities probably caused rotator cuff tendonitis. Claimant then suffered a traumatic rotator cuff tear on April 13, 2021 while reaching for the plate.

21. Dr. Carlos Cebrian performed an IME for Respondents on October 4, 2021. Dr. Cebrian opined the "minimal" incident on April 13, 2021 would not cause, aggravate, or accelerate a rotator cuff tear. He further opined Claimant's work did not cause an occupational disease involving the shoulder. He concluded Claimant's left shoulder complaints and need for treatment were incidental and unrelated to his work for Employer.

22. Dr. FitzPatrick ordered a repeat left shoulder MRI on October 28, 2021 to evaluate Claimant's persistent symptoms.

23. The shoulder MRI was completed on November 18, 2021. It showed mild subdeltoid bursitis with post-surgical changes and no gross evidence of recurrent rotator cuff tear. There was muscular atrophy that could be secondary to disuse.

24. Claimant attended regular PT sessions at Momentum until March 2022. Among other findings, the physical therapist repeatedly documented Claimant was "highly tender" to palpation at the attachment of the left pectoralis major.

25. Claimant was discharged from PT on March 3, 2022. At the time of discharge, Claimant reported 6/10 pain at worst with current complaints at 4/10. Claimant reported that he was confident to perform home exercises on his own.

26. A hearing was held before Judge Richard Lamphere on December 19, 2021 to determine the compensability of Claimant's injury. On February 22, 2022, Judge Lamphere issued Findings of Fact, Conclusions of Law and an Order finding the claim compensable and awarding medical benefits and TTD benefits.

27. Claimant saw PA-C Daniel Czarniawski at Concentra for a demand appointment on April 6, 2022. Mr. Czarniawski released Claimant from care. Dr. Trina Bogart at Concentra reviewed Claimant's chart and concurred that Claimant was at MMI with no impairment on April 6, 2022. Dr. Bogart also released Claimant to work with no restrictions.

28. Claimant returned to Concentra on May 7, 2022, and saw Jennifer Livingston, FNP. Claimant reported ongoing pain, range of motion deficits, and weakness affecting the left shoulder. Examination of Claimant's neck showed tenderness and muscle spasm affecting the left paraspinals and trapezius muscle. Cervical range of motion was limited. Oddly, examination of the left shoulder was described as entirely normal. Ms. Livingston stated Claimant was "at MMI but will have permanent restrictions and/or permanent partial disability." An FCE was pending, and Claimant was to be scheduled with a Level II provider for an impairment rating.

29. Claimant was evaluated by Dr. Daniel Peterson at Concentra on May 24, 2022. Claimant reported ongoing left shoulder and clavicle pain. Examination of the shoulder showed tenderness in the bicipital groove, midshaft clavicle, anterior shoulder, and lateral shoulder, with limited range of motion in all planes. Dr. Peterson determined Claimant was not at MMI, cancelled the FCE, and imposed work restrictions no lifting, carrying, pushing, or pulling more than four pounds. He referred Claimant to Dr. David Weinstein for a second opinion.

30. Claimant was involved in a motor vehicle accident on June 19, 2022, when he was struck by a vehicle moving at a high rate of speed. Claimant was transported to the emergency department, where he complained of pain in his head, neck, left chest, and left knee. CT scans of the head, cervical spine, and pelvis were negative. The provider wrote, "Patient has a mild cervical strain but no significant traumatic injury."

31. Claimant returned to SCFM on June 24, 2022, to discuss some incidental lung findings on x-rays taken after the MVA. The report states, "He has some residual aches and pains [from the MVA] but is near baseline for this."

32. On June 29, 2022, Claimant called SCFM and requested a referral to PT for the neck, lower back, and left knee. The ALJ infers this was in relation to the MVA. Claimant was referred back to Momentum PT.

33. Claimant saw Ms. Livingston at Concentra on July 5, 2022. Insurer had denied the referral to Dr. Weinstein for the second opinion regarding the clavicle pain. Claimant stated he was having "increased pain" from the MVA but did not specify the location of the increased pain. The examination findings of the left shoulder were the same as noted by Dr. Peterson on May 24, 2022 (before the MVA). Ms. Livingston referred Claimant to Dr. Kenneth Finn for a physiatry evaluation.

34. Claimant started PT at Momentum on July 7, 2022 for the MVA, and was seen by a new therapist, Cody Payne, DPT. He reported pain in multiple areas including "neck, L shoulder/arm, L side, and L knee following MVA." Claimant stated he was "pretty sure I have a concussion and whiplash." The intake form states the referral was from Claimant's primary care physician, Dr. Alexander Grover, for treatment of "MVA." There was no referral from any ATP to Momentum after the MVA. Treatment at Momentum PT on and after July 7, 2022 was unauthorized and unrelated to the work injury.

35. Claimant saw Dr. Weinstein for a second orthopedic opinion on August 15, 2022. Claimant reported constant moderate pain in the anterior and posterior aspects of his shoulder radiating up to his neck. Dr. Weinstein noted, "it appears he did have discomfort prior to his [MVA] which has significantly exacerbated his symptoms." Dr. Weinstein opined Claimant's symptoms were primarily myofascial in origin. He stated, "it is difficult to tell whether it is related to his motor vehicle accident or persistent from his original Workman's Compensation injury." Dr. Weinstein further noted, "he does have mild inflammation of the rotator cuff, which is residual from the surgery, as well as mild adhesive capsulitis, again difficult to know what his motion was prior to his motor vehicle accident." Dr. Weinstein administered a cortisone injection to Claimant's left shoulder and recommended 6 weeks of PT with myofascial treatment and joint mobilization.

36. Claimant attended several sessions of PT at Concentra in September 2022. The exam at the initial appointment showed rotator cuff weakness and multiple myofascial trigger points. Claimant was treated with therapeutic activities and dry needling.

37. Claimant saw Dr. Finn on August 22, 2022. He reported left shoulder pain with radiation to the scapula, clavicle, and left neck. Claimant told Dr. Finn he did not think the MVA had permanently aggravated the left shoulder condition. Examination showed tenderness of the left AC joint, sternoclavicular joint, and biceps grove. Dr. Finn also noted mild tenderness and spasm of the left infraspinatus. Left shoulder strength and ROM were reduced. Dr. Finn opined Claimant's residual symptoms were probably musculoskeletal in nature, but recommended a repeat MRI to be sure there was no other anatomic basis for his shoulder pain. He also indicated Claimant could consider trigger point injections in the sternoclavicular joint.

38. The left shoulder MRI was completed on September 12, 2022. It showed post-operative changes and ongoing supraspinatus and infraspinatus tearing.

39. Claimant followed up with Dr. Finn on September 20, 2022. Dr. Finn noted decreased shoulder range of motion with positive impingement signs. He recommended Claimant follow up with Dr. Weinstein.

40. Dr. Weinstein re-evaluated Claimant on October 12, 2022. He stated the rotator cuff repair had healed and Claimant's symptoms were related to left upper extremity and paracervical myofascial inflammation. He saw no indication for additional surgery and released Claimant back to Concentra to determine MMI and impairment.

41. Claimant completed an FCE on November 7, 2022. He reported 9/10 pain in the left shoulder and clavicle with pins/needles at the left side of his neck. The evaluator determined Claimant was capable of Medium level work.

42. Claimant was put at MMI on November 22, 2022 by Dr. Kathryn Murray at Concentra. Claimant described difficulty with activities that require reaching overhead or behind his back, such as donning a t-shirt, pulling up his pants, and washing his back. His sleep was poor because of inability to find a comfortable position. He also reported difficulty with recreational activities such as golfing, playing pool, bowling, and volleyball because of the shoulder. Examination showed tenderness to palpation over the left clavicle, trapezius and parascapular muscles. Dr. Murray noted rotator cuff weakness and limited range of motion. Dr. Murray assigned a 26% upper extremity rating, consisting of 18% for range of motion deficits and 10% for the distal clavicle excision. The extremity rating converts to 16% whole person. She gave Claimant permanent work restrictions of occasional lifting and carrying up to 20 pounds, and occasional pushing/pulling up to 40 pounds. Dr. Murray opined Claimant required no maintenance treatment and released him from care.

43. Respondents filed a Final Admission of Liability on February 15, 2023, admitting for a 26% scheduled impairment rating and denying maintenance medical care per Dr. Murray's report.

44. Dr. Cebrian conducted a records review and issued a report dated June 7, 2023 addressing permanent impairment. Dr. Cebrian opined that the June 19, 2022 MVA was an intervening injury that aggravated Claimant's cervical spine, left shoulder, upper back, and low back. Accordingly, Dr. Cebrian opined Claimant's current complaints involving the neck, trapezius, and shoulder blade are secondary to the motor vehicle accident rather than the work injury. He further opined that any claim-related functional impairment was limited to the left arm and did not extend to the neck or trunk, as the ongoing complaints involving these body parts were unrelated to the work injury. Dr. Cebrian also opined that the distal clavicle resection performed did not inhibit function beyond the arm at the shoulder. Finally, Dr. Cebrian opined that no further claim-related medical care was necessary.

45. Claimant proved he suffered functional impairment not listed on the schedule of disabilities. Claimant's testimony regarding the symptoms and functional impairment related to his left shoulder is credible and persuasive. Dr. Cebrian's opinion that Claimant has no injury-related functional impairment beyond the arm is not

persuasive. Claimant's testimony is supported by medical records showing shoulder-related pain affecting areas of his torso including the left clavicle, left pectoralis muscle, trapezius, and left periscapular muscles. These issues were documented before the June 19, 2022 MVA, including in Dr. Peterson's May 24, 2022 report. The most closely contemporary records after the MVA referenced "a mild cervical strain but no significant traumatic injury," and indicated he was close to "baseline" less than a week after the accident. The accident may have caused some temporary increase in Claimant's neck pain, but the persuasive evidence shows the great majority of Claimant's proximal symptoms are related to the admitted shoulder injury. Although Claimant had some documented neck pain before the work accident, the injury aggravated and perpetuated the symptoms.

46. Claimant proved TTD benefits should be reinstated effective May 24, 2022. Claimant's TTD benefits were terminated on April 6, 2022, based on Dr. Bogart's opinion that Claimant was at MMI with no restrictions. Absent a DIME, the ALJ lacks jurisdiction to question Dr. Bogart's determination that Claimant was at MMI on April 6, 2022. However, Dr. Peterson subsequently determined Claimant was not at MMI and reinstated work restrictions. Respondents have conceded that Claimant is entitled to additional TTD benefits from May 24, 2022 through November 21, 2022, when Claimant was again put at MMI.

47. Claimant failed to prove entitlement to a general award of medical benefits after MMI. No treating or examining provider has recommended any ongoing treatment related to the work injury. Dr. Cebrian's opinion that Claimant requires no maintenance treatment is persuasive. Claimant is not a candidate for surgery, additional injections, or other active interventions. He completed PT and has been instructed in a home exercise program. He has not been prescribed medication for any injury-related condition in more than a year. Although Claimant continues to have symptoms, there is no persuasive evidence he needs treatment to relieve symptoms or prevent deterioration of his condition.

48. At the hearing, Claimant demonstrated visible disfigurement consisting of: five ½-inch diameter irregularly shaped, discolored arthroscopic surgery portal scars, and a ¾-inch diameter irregularly shaped, discolored surgical scar on the left shoulder. The ALJ finds that Claimant should be awarded $1,500 for disfigurement.

MEDICAID LIEN

49. The Colorado Department of Healthcare Policy and Financing (HCPF) issued a notice to Respondents' counsel on March 9, 2023 with an extensive Medicaid lien totaling $35,668.43, as of that date. The notice stated HCPF must be reimbursed for the amounts specified by statute if a settlement is reached on the claim.

50. The Medicaid lien includes charges for treatment unrelated to the workers' compensation claim and from providers not authorized to treat under the workers' compensation claim. These include charges from Dr. Pollack, Metamorphosis Pain

Management, Broadway Pharmacy (for Buprenorphine and Naloxone), and from Momentum PT after the June 19, 2022 motor vehicle accident.

51. Claimant sought treatment at the St. Mary Corwin emergency department shortly after the work accident on April 13, 2021. This treatment was reasonably needed and authorized as "emergency" treatment for the work injury. Respondents are liable for these charges.

52. Claimant saw Dr. Lloyd at Southern Colorado Family Medicine on April 15, 2021. Although the appointment was related to Claimant's left shoulder injury, it was not emergent in nature and occurred before Employer was given notice of Claimant's injury. Accordingly, the treatment was unauthorized. Respondents are not liable for the April 15, 2021 office visit at SCFM.

53. Claimant underwent an MRI of the left shoulder on April 22, 2021 at St. Mary Corwin Medical Center. This MRI was ordered by his PCP **before** the April 13, 2021 work injury. The April 22 MRI was unauthorized and not the responsibility of Respondents.

54. Dr. Jennifer FitzPatrick is an ATP per referral from Concentra. Medicaid paid for the following office visits with Dr. FitzPatrick: May 10, September 22, October 20, and December 1, 2021, and February 9, 2022. Those visits should have been covered by Respondents.

55. Dr. FitzPatrick performed left shoulder surgery at Parkview Medical Center on May 25, 2021. PA-C Catherine Fitzgerald assisted during the surgery. Anesthesia and other ancillary services were also provided in connection with the surgery and billed separately. The surgery was reasonably needed to cure and relieve the effects of the work injury. Accordingly, Respondents must reimburse Medicaid for all surgery-related charges from May 25, 2021.

56. Dr. FitzPatrick prescribed oxycodone for post-surgical pain management. She subsequently transferred responsibility for post-operative pain medication to Dr. Pollack. Medicaid paid for oxycodone prescriptions filled on May 25, June 7, 15, 22, and 30, and July 6, 2021 through Catholic Health Initiatives. Respondents must reimburse Medicaid for these charges.

57. Dr. FitzPatrick referred Claimant to post-operative physical therapy at Momentum Physical Therapy. Claimant treated with multiple therapists, including Kaitlin McGrath, Cydne Rossi, Kasey Ro, Justin Dirks, and Nathan Baratta. Respondents must reimburse Medicaid for these PT sessions at Momentum between June 7, 2021 and March 3, 2022.

58. Claimant had a cervical MRI on July 8, 2021 at Dr. FitzPatrick's request. The purpose of the MRI was to investigate whether Claimant's neck pain was related to the work accident or noninjury-related conditions. This diagnostic evaluation was reasonably needed and causally related to the industrial injury.

59. A repeat left shoulder MRI was performed on November 18, 2021 at Dr. FitzPatrick's request. The MRI was initially interpreted by Dr. Krynn Stegelmeier. The November 18, 2021 MRI was reasonably needed and causally related to the work accident.

60. Claimant had another left shoulder MRI on September 12, 2022 at Dr. Finn's request. This MRI should have been covered by Respondents.

CONCLUSIONS OF LAW

A. Whole Person Impairment

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

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius or scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved he suffered functional impairment not listed on the schedule. Claimant has consistently reported symptoms and associated functional limitations affecting multiple areas proximal to the glenohumeral joint, including his left clavicle, pectoral muscle, trapezius, scapula, and paracervical muscles. The surgery performed by Dr. FitzPatrick objectively changed the anatomy of structures beyond the arm, including the clavicle. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008); *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). These symptoms interfere with his ability to perform routine activies, and contributed to the imposition of significant permanent work restrictions. Admittedly, the question of causation is confounded by the June 2022 MVA. But the aforementioned issues were documented before the MVA, including in Dr. Peterson's May 24, 2022 report. While the accident may have caused some temporary increase in Claimant's neck pain, the persuasive evidence shows the lion's share of Claimant's proximal symptoms are related to the admitted shoulder injury.

B. TTD benefits after April 5, 2022

Judge Lamphere awarded TTD benefits commencing April 14, 2021. Once commenced, TTD benefits "shall continue" until the occurrence of a terminating event enumerated in § 8-42-105(3)(a). Those terminating events include reaching MMI and being released to return regular employment.

Respondents terminated TTD benefits effective April 6, 2022, based on Dr. Bogart's opinion that Claimant was at MMI and could return to work with no restrictions. Although Claimant argues Claimant could not have performed his regular work at that time, that is immaterial because the declaration of MMI was an independent basis for termination of TTD. Any ATP has the authority to put a claimant at MMI, and there is no requirement of a prior treatment relationship or in-person evaluation. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *Rosten v. City of Durango*, W.C. No. 5-128-609 (September 8, 2022). The ALJ lacks jurisdiction to question Dr. Bogart's determination that Claimant was at MMI on April 6, 2022.

However, Dr. Peterson subsequently determined Claimant was not at MMI as of May 24, 2022, referred Claimant for more evaluations and treatment, and reimposed work restrictions. Respondents have conceded that Claimant is entitled to reinstatement of TTD benefits on May 24, 2022, and continuing until he was put at MMI by Dr. Murray.

C. Medical benefits after MMI

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain

a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove entitlement to a general award of medical benefits after MMI. No treating or examining provider has recommended any ongoing treatment related to the work injury. Dr. Cebrian's opinion that Claimant requires no maintenance care is persuasive. Claimant is not a candidate for surgery, additional injections, or other active interventions. He completed PT and has been instructed in a home exercise program. He has not been prescribed medication for any injury-related condition for well over a year. Although Claimant remains symptomatic, there is no persuasive evidence he needs treatment to relieve symptoms or prevent deterioration of his condition.

D. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of his industrial injury. The ALJ concludes Claimant should be awarded $1,500 for disfigurement.

E. Medicaid Lien

If Medicaid pays for medical treatment for which a third party is liable, the Colorado Department of Health Care Policy and Financing has an automatic stautory lien for all such payments. Section 25.5-4-301(4), (5) C.R.S. The respondents are liable for medical treatment from authorized providers reasonably needed to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The respondents are also liable for diagnostic testing where such tests have a reasonable prospect of defining the claimant's condition and suggesting a course of treatment. *E.g., Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

Besides showing that treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). "Authorization" refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Authorization is distinct from whether treatment is "reasonably needed" within the meaning of § 8-42-101(1)(a). *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals

made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

The mere fact that respondents deny a claim does not automatically entitle the claimant to select their own physicians. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Unless the ATP refuses to treat based on lack of authorization or advises the claimant to follow up with their personal providers, the respondents are not liable for treatment the claimant pursues outside the chain of referral. *E.g.*, *Ruybal v. University of Colorado Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988); *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). However, once the emergency has ended, the claimant must notify the employer of the need for continuing medical treatment and the employer then has the right to select a physician. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

As found, Medicaid paid medical expenses for which Respondents are liable. However, the March 9, 2023 lien notice from HCPF includes expenses that are not recoverable as part of Claimant's workers' compensation claim. The valid elements of the Medicaid lien are outlined in Findings of Fact Nos. 49-60 and will not be repeated here. For ease of reference, the parties may refer to the attached "Appendix A," wherein the charges that must be reimbursed by Respondents have been identified with a green checkmark.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on a 16% whole person impairment rating. Insurer may take credit for any PPD benefits previously paid in this claim.

2. Insurer shall pay Claimant TTD benefits, at the admitted rate of $333.33 per week, from May 24, 2022 through November 21, 2022.

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

4. Claimant's claim for TTD benefits from April 6, 2022 through May 23, 2022 is denied and dismissed.

5. Insurer shall pay Claimant $1,500 for disfigurement.

6. Claimant's claim for medical benefits after MMI is denied and dismissed.

7. Insurer shall reimburse the Colorado Department of Health Care Policy and Financing for injury-related expenses paid by Medicaid as set forth in the findings of fact and conclusions of law herein.

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

DATED: November 17, 2023

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that a spinal cord stimulator trial should be approved as reasonable and necessary maintenance medical treatment for Claimant's workers' compensation claim.

FINDINGS OF FACT

1. Claimant sustained a crush injury to his right leg on May 4, 2012, and underwent eight surgeries in 2012 for repair of a tibial metadiaphyseal fracture and a transverse process fracture. Dr. Caroline Gellrick was Claimant's primary provider who placed Claimant at maximum medical improvement (MMI) on February 27, 2014. Dr. Gellrick noted at MMI that an EMG/nerve conduction study occurred on September 3, 2013, showed a peroneal nerve impairment. Claimant had a thermography and a triple phase bone scan on September 25, 2013, which were negative for CRPS. Claimant continued treatment under maintenance care.

2. On April 6, 2017, Claimant saw Dr. Dominique Schiffer at UC Health. He complained that his ankle and foot felt like they were in a vice all day and that he would experience pain that extended from the lateral part of the knee and which had a sensation similar to a person stabbing a sharp rod down into his foot. Claimant also complained that he had sensitivity in his anterior shin area. Dr. Schiffer observed some hair changes, but suspected those were attributable to Claimant's multiple operations and skin grafts. She also noted Claimant's skin was warm and dry with no color changes observed. Nevertheless, Dr. Schiffer diagnosed Claimant with chronic regional pain syndrome (CRPS). Due to failure of more conservative treatments, Dr. Schiffer recommended lumbar sympathetic blocks under fluoroscopic guidance with a consideration of a spinal cord stimulator if the blocks were not effective.

3. On May 4, 2017, Dr. Kathy McCranie performed a record review to address the recommendation for lumbar sympathetic blocks. Dr. McCranie reviewed Claimant's medical history and noted that Claimant's symptoms did not meet the Budapest criteria for determining whether Claimant had CRPS. Specifically, she noted that although Claimant exhibited allodynia, Claimant did not exhibit other criteria, such as loss of range of motion or hair changes. Dr. McCranie felt that the

blocks were indicated only if Claimant had CRPS, which, in her opinion, Claimant did not.

4. Claimant nevertheless underwent lumbar sympathetic blocks on September 11, 2017.

5. The next day, Respondents sent a letter to Dr. Schiffer requesting clarification as to Dr. Schiffer's CRPS diagnosis. Dr. Schiffer responded, explaining that Claimant exhibited pseudomotor symptoms of sweating and swelling, allodynia, vasomotor signs of temperature symptoms compared to his other extremity, and "hair loss on the normal skin on his injured leg, i.e., not the scarred area."

6. Dr. McCranie performed a second record review on October 5, 2017, to address the need for a second lumbar sympathetic block. Dr. McCranie noted that the first injection was not beneficial. Dr. McCranie also noted that the Medical Treatment Guidelines allow for diagnostic sympathetic blocks for patients who exhibit clinical signs of CRPS, but that "further complex treatment would require a confirmed diagnosis." Because Claimant's medical records documenting his first visit with Dr. Schiffer did not demonstrate symptoms consistent with the Budapest criteria, Dr. McCranie felt that a CRPS diagnosis was not appropriate.

7. Dr. Schiffer referred Claimant to Dr. George Schakaraschwili for an infrared stress thermogram and automatic testing battery, including QSART, to evaluate Claimant for CRPS. Claimant saw Dr. Schakaraschwili on October 27, 2017, and complained of occasional ankle swelling with pain throughout his right lower leg that varied between five and nine out of ten. On examination, Dr. Schakaraschwili observed no swelling or discoloration, no abnormal skin temperatures, no trophic skin, hair, or nail changes (other than the skin grafts), and no hyperhidrosis. Claimant did complain of decreased sensation in the common peroneal and saphenous nerve distributions, and he exhibited decreased ankle range of motion. Dr. Schakaraschwili performed the infrared stress thermogram and the QSART. The thermogram showed no areas of significant temperature asymmetry, except where it corresponded with a skin graft. The QSART also showed findings consistent with a low probability for CRPS, noting only some sweat output asymmetry in an area corresponding to the saphenous nerve. Based on Claimant's history of diagnostic studies and Claimant's non-response to the lumbar sympathetic block, Dr. Schakaraschwili felt that Claimant's pain did not originate from the sympathetic nervous system and that Claimant did not meet the diagnostic criteria for CRPS.

8. Dr. Schiffer reviewed the results of Dr. Schakaraschwili's evaluation on November 7, 2017, and referred Claimant for an evaluation for a spinal cord stimulator.

9. Claimant underwent an IME with Dr. McCranie sometime around January 2, 2018. On physical examination, Dr. McCranie noted that Claimant exhibited decreased vibratory sensation in the right ankle and decreased pinprick sensation in the medial and lateral lower leg, as well as "right first web space and lateral right foot with allodynia along the right anterior tibialis and first web space in the right lower leg." Dr. McCranie observed no swelling in the lower extremities, though she noted the right ankle girth to be 0.5cm greater than the left. She observed no discrepancies in hair growth, besides the scarring, and no sudomotor or temperature asymmetries or discoloration of the skin.

10. Dr. McCranie ultimately opined that Claimant did not have CRPS, given the absence of symptoms consistent with the Budapest criteria, but instead had right peroneal neuropathy. Dr. McCranie felt that Claimant did not need any further diagnostic testing nor any changes to Claimant's treatment, aside from some possible modifications of his prescription medications.

11. Claimant returned to Dr. Schiffer on May 18, 2018. Dr. Schiffer observed that Claimant exhibited allodynia and hyperalgesia on the anterior and medial aspects of his right leg and the dorsum of his right foot as well as temperature asymmetry between his right and left feet. After thirty minutes of standing in the room while barefoot, Claimant's right foot was palpably cooler on the entire medial aspect and mild edema developed around his medial malleolus. Dr. Schiffer felt that Claimant's symptoms continued to meet the Budapest criteria for CRPS and that there was no other diagnosis that would better explain his symptoms.

12. Dr. David Orgel performed a record review of the matter on June 18, 2019, to address an out-of-state referral for a CRPS pain management and Dr. Schiffer's determination that Claimant's symptoms met the Budapest criteria for CRPS. Dr. Orgel opined that Claimant did not have CRPS based on "a negative response to a sympathetic block in September 2017, normal triple-phase bone scan in October 2017, a negative thermogram in October 2017, and a negative QSART in October 2017." Dr. Orgel agreed with Dr. McCranie that Claimant more likely had peripheral neuropathy.

13. An MRI was performed on March 3, 2020. The impressions were of no evidence of active CRPS.

14. On March 12, 2020, the parties held a *Samms* conference with Dr. Schiffer to discuss her referral of Claimant to an out-of-state treater in California. Dr. Schiffer agreed to instead refer Claimant back for repeat CRPS testing with Dr. Schakaraschwili.

15. Claimant returned to Dr. Schiffer on July 24, 2020. Dr. Schiffer continued to recommend a trial of a spinal cord stimulator, a peripheral nerve stimulation, or sympathetic nerve blocks. Dr. Schiffer also recommended that Claimant continue with his pain medications, use of his TENS unit, acupuncture, massage, and behavioral therapy to help manage the pain-related stress.

16. Claimant underwent an IME with Dr. Kathleen D'Angelo on March 17, 2021, to address, in part, the reasonableness and necessity of Claimant's ongoing medical treatments.[1] Ultimately, Dr. D'Angelo concluded that none of Claimant's ongoing maintenance medical treatment was reasonable and related and that the only reasonably necessary ongoing maintenance would be weaning off the pain medications.

17. Claimant returned to Dr. Schiffer on July 30, 2021. In her report, Dr. Schiffer wrote: "Will refer back to Dr. Rzasa Lynn for a second opinion as to how to get [Redacted, hereinafter JM] a stimulator trial. He is becoming more and more despondent regarding his pain; feeling no one can help him. I strongly believe he should have a stimulator trial. If it were to work, it would be life changing for JM[Redacted].

18. Claimant saw Dr. Yamamoto of Peak to Peak Family Medicine for the first time on October 1, 2021. Dr. Yamamoto reviewed Claimant's medical history and addressed the issue of CRPS and the need for a spinal cord stimulator. Dr. Yamamoto felt that it would not be beneficial, though he reserved the right to change his opinion "depending on [Claimant's] presentation."

19. On October 14, 2021, Claimant underwent another IME with Dr. McCranie. Dr. McCranie was again asked to address the question of whether Claimant's symptoms arose from CRPS. Dr. McCranie again opined that Claimant's presentation did not meet the diagnostic criteria for CRPS. Despite Claimant reporting allodynia and hyperalgesia, Dr. McCranie noted that Claimant exhibited no diagnostic asymmetries in skin temperature or color nor any edema, unusual sweating, or trophic changes. Regarding Dr. Schiffer's finding that Claimant exhibited edema and temperature changes after standing in bare feet for thirty minutes, Dr. McCranie felt that findings when seen at rest were more indicative of CRPS. Claimant's mild decreases in dorsiflexion and hyperalgesia, per Dr. McCranie, were explained by Claimant's history of peroneal neuropathy. Therefore, Dr. McCranie opined that Claimant was not a candidate for a spinal cord stimulator.

20. Claimant underwent additional testing with Dr. Schakaraschwili on December 9, 2021. The electrodiagnostic testing showed a severe peroneal nerve injury. The

[1] Dr. D'Angelo primarily addressed in the report questions related to an injury unrelated to this matter.

thermogram was normal and identical to the prior study, and the QSART was similarly low probability for CRPS, though there were some temperature abnormalities. Claimant also had a negative bone scan and a negative response to sympathetic blocks. Dr. Schakaraschwili opined that Claimant likely had a peripheral nerve injury and was likely experiencing neuropathic pain from that injury, and he further opined that Claimant was not a candidate for a spinal cord stimulator, though he could be a candidate for a peripheral nerve stimulator.

21. On August 27, 2022, Claimant saw Dr. Roberta Anderson-Oeser at Premier Spina & Pain Institute at Dr. Yamamoto's referral. Dr. Anderson-Oeser noted that Claimant had significant pain in a right peroneal nerve distribution. She noted Dr. Schakaraschwili's recommendation for an evaluation for a peripheral nerve stimulator. Therefore, Dr. Anderson-Oeser recommended visits with a Dr. Boyd as well as Dr. Giancarlo Barolat for evaluation for a peripheral nerve stimulator trial.

22. Claimant saw Dr. Barolat on October 19, 2022. Claimant reported that his pain would spread into the proximal thigh as well as into the posterior aspect of the thigh and that he noticed swelling of the leg, particularly at the ankle. Claimant also reported that none of the medications (Percocet, Butrans, morphine, and Lyrica) had been very effective in relieving his pain, and that he had not weaned himself off of all the medications. On physical examination, Dr. Barolat observed that Claimant had significant atrophy in the right leg and an area of severe allodynia on the anterior aspect of his lower leg. Dr. Barolat felt that lumbar sympathetic blocks would not be indicated since the symptomology had been present for so long and the blocks would have an "extremely low yield." Dr. Barolat considered peripheral nerve stimulation versus nerve root stimulation and spinal cord stimulation. He felt that because Claimant's distribution of pain involved the sciatic nerves and femoral nerves as well, Claimant's pain was too widespread to be amenable to stimulation limited to peripheral nerves and that stimulation of the L3 through S1 nerve roots would be more effective. Dr. Barolat also felt that such an approach would be reasonably necessary to possibly prevent further spread of CRPS. He based his opinions on his "experience with 10,000 neurostimulation implants over the past 40 years." Dr. Barolat submitted to Respondents a request for prior authorization for a trial spinal cord stimulator pursuant to Rule 16, W.C.R.P.

23. In response to Dr. Barolat's Rule 16 request for prior authorization, Respondents obtained a medical record review performed by Dr. Albert Hattem on November 15, 2022. Dr. Hattem noted that the Medical Treatment Guidelines for chronic pain (Rule 17, W.C.R.P., Exhibit 9) provided that the only indications for a spinal cord stimulator is where a patient has persistent radicular pain after lumbosacral spine surgery or has CRPS type 1 that failed conventional medical management. Dr.

Hattem, noting Claimant's multiple negative diagnostic tests for CRPS, felt that Claimant was not a candidate for a spinal cord stimulator.

24. Dr. Barolat submitted a new request for prior authorization for the same procedure on February 6, 2023. In an addendum to his request, he clarified his findings regarding the Budapest criteria:

> "The patient does report severe pain with allodynia in the right lower extremity. He also reports temperature asymmetry and skin color changes. He also reports weakness and decreased range of motion. At the time of the examination, there was clear evidence of allodynia. There was also evidence of decreased range of motion as well as weakness in the right lower extremity. The patient therefore qualifies for the clinical Budapest criteria for the diagnosis of complex regional pain syndrome."

25. Respondents submitted Dr. Barolat's second request for another medical record review by Dr. Hattem. Dr. Hattem's opinion remained unchanged, despite Dr. Barolat's findings regarding the Budapest criteria. Dr. Hattem reiterated that Claimant had undergone diagnostic studies on three separate occasions, all of which were negative for CRPS.

26. Respondents also obtained an opinion from Dr. McCranie regarding Dr. Barolat's second request. Based on her review of the additional records, Dr. McCranie felt that a spinal cord stimulator trial was not appropriate as "CRPS has been definitively ruled out."

27. Dr. McCranie also performed another IME in this case on July 25, 2023. At that examination, Claimant reported that all of his symptoms had worsened in that they had spread up his right leg into both hips, including his left knee. On physical examination, Dr. McCranie observed an area of hypersensitivity in the scarred area and in the distribution of the peroneal nerve. She observed no mottling or other skin color changes, no trophic changes in the hair, nails, or skin, and no sudomotor changes, edema or temperature changes. Dr. McCranie again opined that Claimant did not meet the criteria for CRPS, citing the following:

> Thermogram negative x 3 (09-23-2013, 10-27-2017, and 12-02-2021).
> Triple-phase bone scan negative for CRPS, 09-25-2013.
> QSART negative x 2 (10-27-2017, 12-02-2021).
> No benefit from lumbar sympathetic blocks, 09-20-2017.

28. Dr. McCranie reiterated that she felt the symptoms were limited to a peroneal nerve distribution.

29. Dr. Barolat testified that he was a specialist and board-certified neurosurgeon in both the United States and Italy. He had treated neuropathic pain and CRPS since 1985 and had treated, ever since then, thousands of patients with those conditions, including implantation of ten thousand nerve stimulators. Regarding his diagnosis of Claimant, Dr. Barolat testified that this was based on Claimant's history and his examination of Claimant.

30. In Dr. Barolat's opinion, Claimant sustained a major nerve injury to his right leg, which in turn developed into CRPS. He clarified that CRPS would cause allodynia—a condition where even the slightest touch will cause terrible pain—as well as atrophy and temperature changes. Dr. Barolat clarified that the spinal cord stimulator trial that he recommended would involve surgical implantation of electrical leads and that the leads would be removed if Claimant did not obtain a benefit from the stimulation.

31. Dr. Barolat was questioned regarding the Medical Treatment Guidelines on chronic pain. Dr. Barolat testified that there had been advancements in research regarding CRPS since the current version of the Medical Treatment Guidelines on chronic pain were issued in 2017. Specifically, there were advancements in understanding the underlying mechanisms of CRPS and more evidence that the condition is maintained by the autoimmune system.

32. Dr. Barolat was also questioned regarding Claimant's negative response to the sympathetic nerve blocks. Dr. Barolat explained that a high percentage of patients with CRPS will not respond to nerve blocks long after their injury, even if they would have responded early on. He felt that there was no significance in Claimant's non-response to nerve blocks, and, furthermore, outside of the workers' compensation context physicians do not give much value on those tests.

33. Although several other providers and examining physicians opined that Claimant's nerve injury was limited to the peroneal nerve, Dr. Barolat disagreed. Dr. Barolat testified that he believed that all the spinal nerve roots from L3 down were involved, as well as several other nerves noted in his report, as Claimant's complaints involved symptoms in dermatomes corresponding with those other non-peroneal nerves. And, although Claimant's injury involved the peroneal nerve, it was Dr. Barolat's testimony that a peroneal nerve injury can spread and develop into CRPS.

34. Claimant testified at hearing on his own behalf as well. Claimant testified that the pain was making it hard for him to focus or concentrate, that he would grind his teeth, and that he could not lift his right foot, and would sometimes catch the foot on things, causing him to fall. He testified that he was absolutely interested in

pursuing the spinal cord stimulator trial and had discussed the risks with Dr. Barolat.

35. Respondents called Dr. McCranie to testify at hearing. Dr. McCranie testified that she specialized in physical medicine and rehabilitation and pain management, and that part of her practice for the past thirty years has involved treating patients with CRPS.

36. Dr. McCranie also testified that she participated in the 2017 draft of the Medical Treatment Guidelines on chronic pain and CRPS, though her focus was on chronic pain portion. She testified that the Medical Treatment Guidelines are based on medical literature and research, and she disagreed with Dr. Barolat that only in Colorado do medical providers consider the Medical Treatment Guidelines. Furthermore, Dr. McCranie testified that she agreed with the statement in the Medical Treatment Guidelines that "Clinical criteria alone are not dependable nor necessarily reliable and require objective testing." She explained that doctors may disagree on what they observe when examining a particular patient.

37. Regarding Claimant's presentation, Dr. McCranie testified that one should look at the Budapest criteria. She observed that one of the criteria is whether the symptoms can be explained by another diagnosis. She felt that Claimant's symptoms could be explained by another diagnosis: peroneal neuropathy.

38. The Medical Treatment Guidelines, define spinal cord stimulation as "the delivery of low-voltage electrical stimulation to the spinal cord or peripheral nerves to inhibit or block the sensation of pain.[2] The system uses implanted electrical leads and a battery powered implanted pulse generator."

39. The Guidelines also note that "spinal cord stimulation devices have been FDA approved as an aid in the management of chronic intractable pain of the trunk and/or limbs, including unilateral and bilateral pain associated with the following: failed back surgery syndrome, intractable low back pain and leg pain."[3]

40. The Guidelines also describe a "spinal cord neurostimulation screening test" as one in which "a temporary lead is implanted at the level of pain and attached to an external source to validate therapy effectiveness." The test is positive if the patient either experiences a 50% reduction in radicular or CRPS pain and "demonstrates objective functional gains."

[2] Rule 17, W.C.R.P., Exhibit 7.
[3] Rule 17, W.C.R.P., Exhibit 9.

41. The Guidelines also address peripheral nerve stimulation. They recommend peripheral nerve stimulation for "proven occipital, ulnar, median, and other *isolated* nerve injuries."[4]

42. Dr. Barolat credibly testified and opined in his reports that Claimant's nerve injuries have spread beyond Claimant's peroneal nerve. It is well documented in Dr. Schakaraschwili's October 27, 2017 examination that Claimant's symptoms involved the saphenous nerve dermatome as well. Indeed, the peroneal and saphenous nerves arise from entirely separate nerve plexus, the sciatic and femoral respectively.[5] Based on this, Dr. Barolat credibly opined that peroneal nerve stimulation would not be sufficient to address Claimant's symptoms. This appears consistent with the Medical Treatment Guidelines recommendation that peripheral nerve stimulation be only for isolated nerve injuries. While it is not entirely clear whether Claimant in fact has CRPS, the Court finds it more probable than not that Claimant's nerve injuries have spread beyond the peroneal nerve distribution.

43. Based on Dr. Barolat's extensive experience treating neuropathic injuries and CRPS and his extensive experience with roughly ten thousand nerve stimulator implants, the Court finds Dr. Barolat credible insofar as he opined that stimulation of the L3 through S1 nerve roots would be more effective than focusing solely on the peroneal nerve and insofar as Dr. Barolat opined that a trial of a spinal cord stimulator would be reasonably necessary to address Claimant's ongoing lower extremity symptoms and to prevent possible CRPS from spreading.

44. To the extent that Drs. McCranie, Hattem, Schakaraschwili, and Yamamoto find the negative CRPS diagnostic tests to be the end of the analysis when addressing the need for a spinal cord stimulator trial, and to the extent they recommend only peripheral nerve stimulation, the Court finds those opinions less persuasive than those of Dr. Barolat.

45. Weighing the potential benefits of such a trial and the failure of other reasonable modalities in managing Claimant's pain, allodynia, and other symptoms, against the invasiveness of the treatment and the possibility of complications, the Court finds the spinal cord stimulator trial recommended by Dr. Barolat to be reasonably necessary maintenance medical care.

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[4] Rule 17, W.C.R.P., Exhibit 9 (emphasis added.).
[5] *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, Table 48.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Benefits – Spinal Cord Stimulator Trial

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S.

Even where a respondent has admitted for ongoing maintenance medical benefits, it is not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). Further, when the respondent contests liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1998); *Snyder*, 942 P.2d 1337.

As found above, the Court finds that the spinal cord stimulator trial recommended by Dr. Barolat is reasonably necessary to address Claimant's ongoing lower extremity symptoms and to prevent possible CRPS from spreading. Therefore, Claimant has proven by a preponderance of the evidence that the spinal cord stimulator trial recommended by Dr. Barolat is reasonably necessary maintenance medical treatment.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the spinal cord stimulator trial recommended by Dr. Barolat.

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

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

DATED: November 17, 2023.

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-227-822-001

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage of $337.50.

2. The correct date of injury is November 16, 2022.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on November 16, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his November 16, 2022 industrial injury.

3. If Claimant sustained a compensable injury, whether a penalty should be assessed against him for late reporting pursuant to §8-43-102(1)(a) C.R.S.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 11, 2023 until terminated by statute.

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

FINDINGS OF FACT

1. Employer is a temporary staffing agency that employed Claimant. On November 15, 2022 Claimant was assigned to begin work at a [Redacted, hereinafter BR] facility that processes propane tanks. His job duties involved preparing propane tanks for washing and reuse.

2. On November 16, 2022 Claimant began work at 4:00 a.m. Claimant explained he was removing a full propane tank from a pallet. As he twisted, the tank fell and he experienced pulling in his back. Claimant advised his Floor Supervisor [Redacted,

hereinafter DM] of his injury. DM[Redacted] took Claimant into the office of BR's[Redacted[Production Supervisor [Redacted, hereinafter JS].

3. Claimant testified he received a list of providers and selected Concentra Medical Centers. He planned to visit the Broomfield Concentra Center, but first drove from the BR[Redacted] facility in Henderson to his home in Thornton. Claimant took an Advil and laid down at home. He then called Employer, stated he did not need to visit Concentra, and would return to work on Monday.

4. The record reveals that Claimant has a significant history of lower back symptoms radiating into his legs. On June 28, 2018 Claimant presented to Salud Family Health Centers for sciatic pain, radiating from his right buttock down to his toes, that had been continuing for one year. He also reported lateral right thigh pain in his hip area. Claimant's medications included Neurontin 600 mg. X-rays revealed partial lumbarization of the S1 vertebral body with fusion on the left. Providers referred Claimant to physical therapy, orthopedics, and for an MRI.

5. On March 10, 2022, or approximately eight months before his alleged work injury, Claimant visited the emergency department at St. Anthony North for right-sided lumbar pain and radiculopathy. Coughing exacerbated his chronic, right lumbar back pain. A lumbar MRI revealed a 2 mm left sub articular-foraminal disc protrusion resulting in impingement on the emerging left S1 nerve root and severe left lateral recess narrowing. The imaging also reflected severe left and moderately severe right foraminal narrowing at L5-S1. Providers recommended repeat MRIs for further evaluation. Claimant's medical history included "chronic pain disorder" of the back.

6. Claimant returned to the BR[Redacted] facility on the following Monday, November 21, 2022, and worked for the first three days of the week. He was off work on Thursday and Friday for the Thanksgiving Holiday. Claimant testified he continued to complete his regular duties after returning to work, but could not perform as usual. He specifically had to take breaks by sitting down to rest his back and leg every 30-40 minutes. Claimant remarked he struggled to keep up with his job duties until he stopped working at the BR[Redacted] facility on November 30, 2022. Claimant acknowledged he had prior back problems, but his November 16, 2022 symptoms were on a different side.

7. JS[Redacted] testified that on November 16, 2022 Claimant reported he dropped a propane tank and tried catch it, but it struck him in the knee. In fact, Claimant was wearing a sleeve from a propane tank around his knee. JS[Redacted] inquired whether Claimant desired medical attention, but he declined. He gave Claimant a list of authorized medical providers and Claimant chose Concentra-Thornton Parkway. JS[Redacted] asked Claimant to complete a written injury form and interviewed Claimant's co-workers. The completed form stated Claimant had injured his knee, but did mention his lower back. Claimant then left the BR[Redacted] facility to obtain medical care, but later called JS[Redacted] stating he did not wish to receive any treatment and would return to work on Monday.

8. JS[Redacted] explained that he continued to check on Claimant during the following week. Claimant remarked he was feeling fine and continued to wear a self-

fashioned knee brace. JS[Redacted] commented that Claimant then advised him he would be ending his job assignment on November 30, 2022. Claimant specified that the cold and physical nature of the work, combined with his previous medical issues, were too much for him. JS[Redacted] explained he could accommodate light duty, even for temporary employees, if an individual provided a physician's note of restrictions. However, Claimant never requested light duty. JS[Redacted] emphasized that he did not receive any information that Claimant had injured his lower back. On January 11, 2023, when Claimant reported his lower back injury to Employer, JS[Redacted] completed a written statement.

9. On December 1, 2022, approximately two weeks after his alleged work injury and the day following his last day at BR[Redacted], Claimant presented to Salud Family Health Centers for a telehealth visit. He reported lower back pain with radiating symptoms down the left lower extremity. Claimant commented he "has had Sx's intermittently for years." He also stated he felt pins and needles in his feet. Notably, the report did not include any mention of a work injury. Claimant remarked he had been sent for an MRI and ortho/spine referral back in 2018 but was unable to schedule at the time. His current medications included Neurontin 600 mg. Providers referred Claimant for an MRI and to a spine specialist.

10. On December 15, 2022 Claimant returned to Salud for an evaluation. He again did not report any work injury.

11. On January 4, 2023 Claimant underwent a lumbar spine MRI at St. Anthony North without contrast. He completed an MRI safety screening form and stated his injury occurred on Saturday, November 19, 2022. Claimant did not list Employer as a responsible party, but only included himself and Medicaid. Claimant had also undergone previous lumbar imaging on March 10, 2022. In comparing the MRIs, Craig Stewart, M.D. noted the following impressions:

1. Overall similar appearance of multilevel lumbar spondylosis and scoliosis when compared with 3/10/22.
2. Multifactorial multilevel spinal stenosis again noted, greatest at the L3-L4 and L4-L5 levels although generally similar in the interval.
3. Multilevel neural foraminal stenosis, appearing most severe but unchanged on the left at L5-S1.
4. Degenerative endplate Modic changes at L3-L4 and L4-5, most likely degenerative/reactive and similar to prior, although a potential source of pain.

12. On January 9, 2023 Claimant again attended a telehealth visit at Salud. Claimant did not mention a work injury. He stated he had not been contacted by Spine West, despite a referral, and did not call for an appointment.

13. On January 11, 2023 Claimant reported his back injury to Employer. He visited Gordon Arnott, M.D. at Concentra in Broomfield. Claimant recounted that he was unloading the top level of propane tanks from approximately six feet high onto a conveyor belt. As he was lowering a tank, he twisted to his left to place it on a conveyor belt.

Claimant then experienced a strong, sharp pain similar to a muscle pull in his lower back. He denied any significant past medical history. On physical examination, Dr. Arnott noted a 10% loss of strength in the left lower extremity due to radicular symptoms and a positive straight leg raising test. He diagnosed Claimant with a lumbar strain and radicular leg pain. Dr. Arnott documented that his objective findings were consistent with the history and/or work-related mechanism of injury/illness. He referred Claimant for physical therapy, prescribed medications, and assigned restrictions of only working from one to four hours each day.

14. On January 16, 2023 Claimant returned to Dr. Arnott at Concentra. Dr. Arnott recorded that Claimant was a little better since his last visit after taking prescribed steroids. Claimant had not yet started physical therapy, but due to the severity of the left leg radicular symptoms, Dr. Arnott referred him for a neurosurgical consultation. Dr. Arnott again determined his objective findings were consistent with the history and/or work-related mechanism of injury/illness. He modified Claimant's work restrictions to only working up to four hours per day, sitting 95% of the time on a chair with a back, and performing only office work.

15. After two physical therapy visits, Claimant visited Michael Rauzzino, M.D. for a neurosurgical consultation on February 13, 2023. Dr. Rauzzino noted Claimant underwent an MRI on January 4, 2023 that had been compared to a study from March 30, 2020 or approximately seven months prior to the present injury. He commented that the findings were unchanged. Claimant denied prior back problems and was not sure why the MRI had been performed. Dr. Rauzzino stated it appeared Claimant had a chronic back condition. He concluded there was some question regarding the validity of the claim, but assuming Claimant experienced a flare-up of an unknown chronic condition, Dr. Rauzzino recommended an epidural steroid injection. Respondents subsequently denied Claimant's claim and he received no further treatment from either Concentra or any other Workers' Compensation provider.

16. On June 7, 2023 Claimant underwent an Independent Medical Examination (IME) with Lawrence A. Lesnak, D.O. Claimant explained that he was injured when he lowered an approximately 35-pound propane tank onto a waist-level conveyor belt and felt an acute "pull" in his left, lower back region. He remarked that he had never experienced any type of lower back symptoms and denied any prior lower back injuries. Dr. Lesnak determined that, although there may have been some type of incident on November 16, 2022, there was insufficient evidence to support any type of medical diagnoses as a result of the occupational incident. Notably, Claimant's reported history was inconsistent with the medical records that Dr. Lesnak reviewed. Specifically, Claimant suffered "symptomatic lumbar spine pathology that clearly predated 11/15/2022, for which he had undergone multiple medical evaluations in the past including an MRI on 03/10/2022, and a lumbar spine x-ray in June 2018." Dr. Lesnak commented there was no documented evidence of significant changes on the January 4, 2023 lumbar spine MRI when compared to the March 10, 2022 imaging. He explained that, although mild, soft tissue strain injuries may not be identified on lumbar spine MRIs, if Claimant had any injuries to his discs, nerve roots, facet joints, or lumbar vertebral bodies, they would have been clearly visible.

17. Dr. Lesnak testified at the hearing in this matter. He maintained that Claimant did not sustain any injury to his lower back on or November 16, 2022. Dr. Lesnak explained that Claimant denied any back or leg symptoms prior to mid-November, 2022. He reasoned that Claimant's denial of any prior back treatment or issues was inconsistent with the medical records. Moreover, Claimant's current complaints were identical to his symptoms at the time of his pre-injury treatment as noted in the records of Salud in June of 2018 and St. Anthony North in March of 2022. Dr. Lesnak also detailed that the March 10, 2022 MRI showed significant spinal pathology. He emphasized Claimant's spinal pathology predated his alleged November 16, 2022 work injury, it remained the same, and he was symptomatic both before and after the propane tank incident. Furthermore, Claimant did not report any work injury to the first medical provider he visited after the accident, and the December 1, 2022 report noted Claimant had experienced lower back pain radiating into the left lower extremity intermittently for years. Finally, Claimant's testing results from a psychosocial screening questionnaire suggested an underlying somatoform disorder in which patients commonly exaggerate or embellish symptoms.

18. Claimant has failed to establish it is more probably true than not that he suffered a lower back injury during the course and scope of his employment with Employer on November 16, 2022. Initially, Claimant explained that, as he was lowering a propane tank from a pallet onto a waist-level conveyor belt, he felt an acute pull in his lower back region. In contrast, JS[Redacted] testified that on November 16, 2022 Claimant reported he dropped a propane tank and tried to catch it, but it struck him in the knee. Claimant completed a written injury form specifying that he had injured his knee, but did mention his lower back. He did not obtain medical treatment, but returned to work at the BR[Redacted] facility on the following Monday. On December 1, 2022, approximately two weeks after his alleged work injury and one day after he ceased working at BR[Redacted], Claimant visited Salud and reported lower back pain with radiating symptoms down the left lower extremity. Claimant commented he had experienced the symptoms intermittently for years, but did not mention any specific injury on November 16, 2021. In fact, the record reveals that Claimant has suffered a chronic history of lower back symptoms for years.

19. Claimant also did not provide accurate and complete information to his Workers Compensation medical providers. He did not disclose his prior medical history to four different providers. In contrast to his medical records, Claimant simply denied any prior lower back injuries or treatment. Furthermore, Claimant sustained a felony conviction in the last five years for failing to register as a sex offender by falsifying his address. He also did not disclose his conviction in his answers to interrogatories. The felony specifically impeaches Claimant's credibility under §13-90-101, C.R.S. and CRE 608(B) due to his lack of character for truthfulness.

20. Dr. Lesnak also persuasively maintained that Claimant did not suffer any lower back injury on November 16, 2022. He explained that Claimant denied any back or leg symptoms prior to mid-November, 2022. However, Claimant's denial of any prior back treatment or issues was inconsistent with the medical records. Moreover, Claimant's current complaints were identical to his symptoms at the time of his pre-injury treatment as noted in the records from Salud in June of 2018 and St. Anthony North in March of

2022. Dr. Lesnak also emphasized that Claimant's spinal pathology predated his alleged November 16, 2022 work accident, his condition remained the same, and he was symptomatic both before and after the propane tank incident. Furthermore, Claimant did not report any work injury to the first medical provider he visited after the incident, and the December 1, 2021 report noted Claimant had experienced lower back pain radiating to the left lower extremity intermittently for years. Finally, Claimant's testing results from a psychosocial screening questionnaire suggested an underlying somatoform disorder in which patients commonly exaggerate or embellish symptoms. Dr. Lesnak summarized that, although there may have been some type of incident on November 16, 2021, there was insufficient medical evidence to support any type of medical diagnoses caused by the event.

21. Based on Claimant's lack of credibility, his pre-existing back condition, the credible testimony of JS[Redacted], and the persuasive opinion of Dr. Lesnak, it is unlikely that Claimant suffered a lower back injury while working at the BR[Redacted] facility on November 16, 2021. Accordingly, Claimant has failed to demonstrate that his work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. His Workers' Compensation claim is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on November 16, 2022. Initially, Claimant explained that, as he was lowering a propane tank from a pallet onto a waist-level conveyor belt, he felt an acute pull in his lower back region. In contrast, JS[Redacted] testified that on November 16, 2022 Claimant reported he dropped a propane tank and tried to catch it, but it struck him in the knee. Claimant completed a written injury form specifying that he had injured his knee, but did mention his lower back. He did not obtain medical treatment, but returned to work at the BR[Redacted] facility on the following Monday. On December 1, 2022, approximately two weeks after his alleged work injury and one day after he ceased working at BR[Redacted], Claimant visited Salud and reported lower back pain with radiating symptoms down the left lower extremity. Claimant commented he had experienced the symptoms intermittently for years, but did not mention any specific injury on November 16, 2021. In fact, the record reveals that Claimant has suffered a chronic history of lower back symptoms for years.

9. As found, Claimant also did not provide accurate and complete information to his Workers Compensation medical providers. He did not disclose his prior medical history to four different providers. In contrast to his medical records, Claimant simply denied any prior lower back injuries or treatment. Furthermore, Claimant sustained a felony conviction in the last five years for failing to register as a sex offender by falsifying his address. He also did not disclose his conviction in his answers to interrogatories. The felony specifically impeaches Claimant's credibility under §13-90-101, C.R.S. and CRE 608(B) due to his lack of character for truthfulness.

10. As found, Dr. Lesnak also persuasively maintained that Claimant did not suffer any lower back injury on November 16, 2022. He explained that Claimant denied any back or leg symptoms prior to mid-November, 2022. However, Claimant's denial of any prior back treatment or issues was inconsistent with the medical records. Moreover, Claimant's current complaints were identical to his symptoms at the time of his pre-injury treatment as noted in the records from Salud in June of 2018 and St. Anthony North in March of 2022. Dr. Lesnak also emphasized that Claimant's spinal pathology predated his alleged November 16, 2022 work accident, his condition remained the same, and he was symptomatic both before and after the propane tank incident. Furthermore, Claimant did not report any work injury to the first medical provider he visited after the incident, and the December 1, 2021 report noted Claimant had experienced lower back pain radiating to the left lower extremity intermittently for years. Finally, Claimant's testing results from a psychosocial screening questionnaire suggested an underlying somatoform disorder in which patients commonly exaggerate or embellish symptoms. Dr. Lesnak summarized that, although there may have been some type of incident on November 16, 2021, there was insufficient medical evidence to support any type of medical diagnoses caused by the event.

11. As found, based on Claimant's lack of credibility, his pre-existing back condition, the credible testimony of JS[Redacted], and the persuasive opinion of Dr. Lesnak, it is unlikely that Claimant suffered a lower back injury while working at the

BR[Redacted] facility on November 16, 2021. Accordingly, Claimant has failed to demonstrate that his work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. His Workers' Compensation claim is thus denied and dismissed.

ORDER

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

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

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

DATED: November 20, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-212-306-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Employer 1, Employer 2 and Employer 3 had notice of the hearing.

II. Whether Respondents were uninsured Employers as if July 15, 2022.

III. Whether Claimant proved by a preponderance of the evidence who her employer was on July 15, 2022.

IV. Whether Claimant proved by a preponderance of evidence that she was injured in the course and scope of her employer with one or all of the employers on July 15, 2022.

IF THE CLAIM IS DEEMED COMPENSABLE:

V. Whether Claimant has shown by a preponderance of the evidence whether she was entitled to medical benefits related to her July 15, 2022 work related injuries.

VI. Whether Claimant proved by a preponderance of the evidence who her authorized medical providers are.

VII. Whether Respondents should pay Claimant interest on unpaid medical bills.

VIII. Whether Claimant proved what her average weekly wage (AWW) was at the time of the injury.

IX. Whether Claimant has shown that she was entitled to temporary total disability benefits (TTD), including statutory interest on any unpaid TTD.

X. Whether Claimant has proven by a preponderance of the evidence that Respondents should be penalized for failure to admit or deny the claim and for failure to carry workers' compensation insurance.

XI. Whether Respondents should post a bond to secure payment of benefits due.

PROCEDURAL HISTORY

A Prehearing Conference Order was issued by Prehearing Administrative Law Judge Gregory W. Plank on June 5, 2023 listed as employers Employer 1, Employer 2, and Employer 3.

Claimant filed an Application for Hearing dated June 13, 2023 on issues that included compensability, medical benefits that were authorized, reasonably necessary and related, temporary total and partial disability benefits, and multiple penalties. In addition, Insurer was listed. No response was filed by any of the listed employers or the listed insurer.

OAC sent Respondents a Notice of Hearing dated June 30, 2023 to their agent, Employer 2.

At the end of the hearing, Counsel requested that the record remain open for submission of multiple photographs, which were received, with the exception of one of Employer 2's truck. Counsel indicated that the photograph showed Employer 2's license plate and a sticker stating "Jesus is Glory."

FINDINGS OF FACT

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

A. Jurisdiction:

1. Respondents failed to appear at the hearing. Claimant provided a history of proper service to Employer 1 and Employer 2, including showing that Employer 1's website has Employer 2's email address, which is the same as the one listed on the Notice of Hearing.

2. This ALJ confirmed with the OAC staff that no emails were returned or bounced back to the OAC after emailing the NOH.[1]

3. Claimant sent multiple other pleadings to Employer 1, Employer 2 and Employer 3 without response, including notice of the Application for Hearing, notice of prehearing conferences, and the Notice of Hearing, as well as exchange of the exhibits.

4. Employer 1's website shows that they were a masonry company in the Denver Metro area and for all of Colorado. They noted they had greater than 17 years' experience and knowledge. They offered services in brick, block, stone, think brick, "tuckpointing," and all kinds of repairs. The only contact information for Employer 1, other than completing the online contact form, was Employer 2's email address.

5. Counsel indicated that he did not receive any undelivered mail from Employer 1 or Employer 2 but did receive returned mail sent to Employer 3. This was made as an offer of proof and was accepted as this is also shown in the evidence. As found, Employers 1 and Employer 2 had notice of the hearing.

6. Employer 3 listed Employer 2's name on a business card, showing Employer 2 as the company's "Project Manager." As found, Employer 3 had notice by virtue of the fact that Employer 2 was provided notice of the hearing, the pleadings listed Employer 3 and Employer 2 had notice of the hearing.

7. This ALJ found and concluded that this ALJ had jurisdiction to hear the matter as proper notice was sent to all three employers, by virtue of listing Employer 2's contact information on Employer 1's website and Employer 3 listing Employer 2 on their business card, respectively, as their contact agent.

B. Insurance Coverage:

[1] See Exhibit 15.

8. Claimant conceded that Insurer, who was listed on the pleadings, including the Application for Hearing, did not insure either Employer 1 nor Employer 3. Claimant moved to strike the listed Insurer. This ALJ granted the motion and issued a Bench Order on October 11, 2023 noting that Insurer was not a party to this claim and ordered they be removed as a party in this matter.

9. Claimant advised this ALJ that the Colorado Uninsured Employer's Fund's third party administrator had notice of the hearing and declined to participate.

C. Generally

10. Claimant was 35 years old at the time of the hearing and went to the 9th grade in Maracaibo, Venezuela.

11. Claimant was hired by her supervisor, Employer 2. She found Employer 2 through Facebook when looking for employment in Denver, under an employment group page for the Denver area with different employers advertising, including Employer 1. It provided a phone number, which Claimant contacted and spoke directly with Employer 2.

12. This phone number was the same number Claimant had in her string of texts on [Redacted, hereinafter WP], including Employer 2's profile picture that was generated by her supervisor. She generally communicated with Employer 2 via WP[Redacted] daily with regard to her work. While the profile picture changed, Claimant captured a photo of him before the hearing took place. She would have had a different picture of Employer 2 on his boat at his home address, if she had taken a screen shot a few weeks earlier, as the profile picture had recently changed. At the time of the hearing, Claimant showed this ALJ her WP[Redacted] page for Employer 2, which then contained a meme or caricature of a laughing man instead of a photograph of Employer 2.

13. Employer 2 lived off of [Redacted, hereinafter WV] in Denver. Employer 2 took Claimant there once, when they went to exchange a vehicle, because he had to have his truck repaired. Employer 2 indicated to Claimant that this WV[Redacted] address was his home. She identified the cream colored house in the picture at Exhibit 17 as Employer 2's house. Approximately 5 days before the hearing, Claimant's husband took a picture of Employer 2 working at an address on [Redacted, hereinafter CH], in Denver.

14. Claimant spoke with Employer 2 about the work advertised as masonry type of work, and Employer 2 offered her a job. He advised her that it would be hard work in construction. He advised Claimant that he would pay her $18.00 an hour for 40 hours a week. She was just newly arrived in the state, so needed and she accepted the work. She worked Monday through Friday though she sometimes also worked on Saturdays at least twice in the four weeks she worked before her accident, working six hours though Employer 2 only paid her straight time, instead of overtime.

15. Claimant started work on June 6, 2022. [Redacted, hereinafter GO] was the one to train her, including how to mix and carry the gravel, how to fill the cinder blocks, and how to use the pulley system to get the gravel to where she was working. Employer 2 was her boss the whole time she worked in construction up to the day she had her accident.

16. Employer 2 paid her cash every Friday and when she worked Saturdays, he would pay her for the Saturday work separately. Employer 2 was the only one to hand her and pay her the cash. She never noticed any signs of a construction company on the job sites and never thought to look for any. Neither had she ever asked Employer 2 what his full name was. After the accident happened a co-workers gave her a card with Employer 2's name on it, identifying Employer 2 as the project manager for Employer 3. However, it had a different phone number and email than the one that Employer 2 had given her or that she had taken off the Facebook page and website. Employer 2 worked with her every day, supervising her work.

D. The Accident:

17. On July 15, 2022 Claimant reported to work at approximately 7:30 a.m. Claimant was working for Employer 2 at [Redacted, hereinafter ET]. She had been on the job for approximately one month when the accident happened. She was four floors up, working on the scaffolding, where the parking lot was. The scaffolding board was sitting on top of another board. She had been putting the gravel in the cinder blocks, filling them in. She had asked her supervisor if the scaffolding was safe because she did not think the scaffolding was secured correctly as there were two boards on the scaffolding instead of just the one that they generally had. She was assured that it was.

18. Claimant was in a hurry, because her boss had to turn in the project. At approximately 10 a.m. on July 15, 2022 Claimant was in the process of reaching to grab a bucket full of gravel while standing on the scaffolding when the overlapped boards of the scaffolding separated, tilting and Claimant fell four stories to the ground, hitting various parts of her body on the scaffolding, including another level of the scaffolding and a couple of the X supports of the scaffolding, ricocheting on the way down. She believed that the fact that she hit so many areas of the scaffolding, slowed her fall down to the concrete ground, saving her from worse injuries. Claimant lost consciousness when she hit the ground. Employer 2 sent her to the hospital and told her that he would pay for her medical costs.

19. When Claimant was taken to the emergency room at Denver Health, another gentleman went to the hospital though he was not Spanish speaking and Claimant could not communicate with him. Employer 2 declined to accompany her to the hospital. She was told that the other man had gone because Employer 2 did not want to go and Employer 2 sent him to the hospital to check on Claimant.

20. In the fall of July 15, 2022, Claimant injured her face, teeth causing a tooth prosthesis to brake, hurt her coccyx, low back, arms, shoulders, neck, hip, left leg, mid back and neck. She also had substantial bruising on the right leg (middle and outer portions including the quadriceps), left foot and ankle as well as her left forearm. She stated that Denver Health released her with a neck brace. They did not give her any treatment for the shoulders, low back and leg. She had not yet seen the dentist to get her missing tooth fixed, despite trying, because it was too costly, approximately $2,000.00, and she could not afford it. She was seen at Denver Health but had not returned there since July 19, 2022 as they told her how much she had to pay before she

could receive more care and she did not have the money to pay. Her bills have since gone to collections.

E. Claimant's Testimony:

21. Claimant stated that she wished to have further medical and dental care to cure or relieve her of the effects of her injuries.

22. Claimant stated that she had not been able to work since the accident due to her continuing symptoms and injuries, which she has yet been able to have addressed by medical providers. When she was released from the emergency room she was released with a walker due to her low back and lower extremity pain. When she returned to Denver Health, they provided her with narcotic medication due to the severe pain she was experiencing after the fall.

23. She continued to have pain, including in the neck, shoulders, left leg and low back, on both sides. She had difficulty with standing, crouching, leaning over, straightening up, sitting due to pain in her coccyx, and moving from side to side. She had neck pain, especially in the dawn hours, which was constant. She had a gash of approximately 5 inches on her left leg but they did not do any stitches. She also continued with symptoms in her left leg, with numbness in her shin area, pain in the left knee and felt a pulsing pins and needles sensation. She had pain in her bilateral shoulders, right greater than left, especially going into the shoulder blades when lifting. She used acetaminophen and an ointment to alleviate some of the pain.

24. Claimant considered going to a chiropractor but was concerned about making her problem worse. She took multiple pictures, including of the all the bruising. They showed, in order, bruising on her right hip and upper right leg to her mid thigh, her neck brace, the cut on her left shin, extensive bruising on her right upper arm, arm pit, elbow and forearm, while in the hospital. There were subsequent pictures of her shin healing, but Claimant stated she had some infection after she was released and it took some time to have the swelling go down and heal. There were also pictures of her arm bruises, that were significantly discolored, as well as all the abrasions, and pictures of the healing bruises on her right upper thigh, left ankle, and left thigh.

25. Claimant took screen shots of Employer 1's website, which showed her supervisor's email address.

26. Claimant recalled seeing Employer 1's Facebook page that had multiple pictures of Employer 2 working, and several job sites, showing work Employer 2 had purportedly completed. Employer 2 also advised Claimant that he was a preacher and had invited Claimant to attend one of his services, but she never accepted and he never gave her an address where he preached.

F. Division Records:

27. The Division's demand letter for the employer to state a position dated May 18, 2023, as well as the letter demanding the employer file their statement admitting or denying the claim dated June 21, 2023, were sent to Insurer, not to any of the employers listed as parties. While this ALJ understands that Insurer had an obligation to provide the

notices to the correct employer, Insurer did not insure neither Employer 1 nor Employer 3.

28. Records from Insurer did indicate that Insurer insured Employer 1 beginning July 25, 2022.

G. Medical Records:

29. On July 15, 2022 Claimant was seen in the emergency room at Denver Health by Gabriel Siegel, MD. Claimant was brought in by ambulance, complaining of back pain and lower extremity joint pain following a fall from 30 feet. Dr. Siegel noted that EMS reported Claimant was witnessed to fall/jump from a 30 foot scaffolding that she was working on, landing on her feet, and then falling to the ground. Claimant had complained of back pain, and knee, hip, and ankle pain. There were no head strikes or loss of consciousness (LOC). She had abrasions to her right arm, and no appreciable deformities. EMS administered Fentanyl *en route*.

30. Dr. Siegel noted that "[P]er chart review: patient transferred with known acute fracture to right base of dens extending into the R side with displacement and fracture fragment in the narrowing of the canal. No intracranial abnormalities."[2] He reported that Claimant complained of severe pain, but no abdominal pain, chest pain, fever or shortness of breath. She was negative for fever, facial swelling, dysuria, seizures or confusion. He noted that she was positive for arthralgias and back pain. He noted bony tenderness of the lumbar spine and sacral midline tenderness, a laceration of the left anterior shin, motor weakness and multiple abrasions. She had a GCS[3] score of 15. There were at least 40 diagnostic or x-ray images taken. He noted that the MRIs of the spine showed no evidence of acute injuries to the cervical, thoracic or lumbar spine, though there were small disc bulges at L1-L2 and L2-L3. X-rays of the forearms, elbows, wrists, chest, left ankle and foot, right foot, knees, pelvis, were all normal. CT of the chest showed a lucency suspicious for small pneumothorax[4] but no additional acute traumatic injury to the chest, abdomen or pelvis or thoracolumbar spine. CT of the head and the cervical spine were normal. Her trauma shock index was normal. Another provider noted that Claimant had sensory weakness present.

31. Dr. Leah S. Warner admitted Claimant for observation. She took a history of "34 y.o. female who presented as trauma activation after fall >30ft." She noted that initial CT scans failed to show acute injuries, and she had stable labs. The patient continued to have neck pain and lower extremity paresthesias and they ordered an MRI. She was transferred to the Clinical Decision Unit (CDU) for imaging, pain control and final recommendations. On exam she noted claimant was positive for tenderness to palpation in the midline lumbar spine, with multiple abrasions. She was neurologically intact. Multiple other providers evaluated Claimant while in the emergency room and the CDU, while awaiting test results, mainly imaging.

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[2] Nowhere else in the records were there mentions of a fracture.

[3] This ALJ infers that GCS stands for Glasgow Coma Scale and that a 15 indicates the highest level of consciousness.

[4] This ALJ infers that pneumothorax of the chest means that air had leaked into the chest cavity between the lungs and the chest wall, which is generally caused by trauma to the chest.

32. She was administered acetaminophen, ibuprofen, Toradol and Ativan. All imaging were normal except for the chest CT. Claimant had lab work performed showing Claimant was negative for any illegal or legal but control substances. She was seen by physical therapy who recommend a four point walker and she was advised to establish care with a primary care provider (PCP). Multiple other instructions were given in Claimant's native language, Spanish. She was discharged home with a front wheel walker, with diagnoses of fall, back pain and left leg pain.

33. Claimant was evaluated at the outpatient Hospital Transition Clinic at Denver Health on July 19, 2022 for acute back and left leg pain. They took a history of Claimant having been seen in the emergency room on July 15, 2022, following a 30 foot fall from a fourth floor, landing on her feet. They noted she had multiple imaging though noting only a pneumothorax on CT of the chest. They noted Claimant had swelling and bruising on her lateral left knee, had been using ice to the area, and continued to have nightmares of the fall. Claimant reported that her employer's insurance would be responsible for the treatment. Nurse Amy J. Witte noted that Claimant had coccyx pain, pain in multiple sites on her body and psychosocial problems. On exam she noted that Claimant had a large laceration to the left shin, no signs or symptoms of infection and swelling/bruising to the left knee and arm. She stated Claimant was having difficulty sleeping at night due to the pain. She recommended Claimant acquire a donut pillow and provided narcotic medication (oxycondone-acetamenophen) and a return to the clinic for further evaluation.

34. A billing statement from Denver Health showed a balance of $894.10 (after adjustments, $2,554.56 prior to adjustments) for specified dates of service from July 15, 2022 to July 19, 2022, including for CT scans, X-Rays, and the Clinic visit as well as an outpatient service. As found, these charges were related to the July 15, 2022 work related injury.

H. Conclusive Findings:

35. As found, Claimant provided sufficient notice to Employer 1, Employer 2 and Employer 3 that she filed a workers' claim for the injuries she sustained during the fall on July 15, 2022 and that a hearing was scheduled to determine whether one or all of the employers listed on the pleadings were liable for workers' compensation benefits in this matter.

36. As found, Claimant's counsel's representation that they contacted Employer 2 multiple times without response are deem reliable. Further, communications from Insurer showed that they did not cover any of the three employers for workers' compensation. They did confirm that they covered Employer 1 as of July 25, 2022. As found, Employer 1, Employer 2 and Employer 3 do not have policies for workers' compensation in the State of Colorado.

37. As found, Employer 2 was Claimant's employer. Employer 2 hired Claimant, trained Claimant and supervised Claimant. Employer 2 was Claimant's only point of contact and he, himself, paid Claimant for the work she performed. As found, Employer 2 was not only Claimant's supervisor or manager, he was Claimant's employer.

38. As found, Claimant established that she was injured in the course and scope of her employment working for Employer 2 on July 15, 2022, while filling blocks with gravel on the fourth floor of a building when the scaffolding failed and she plummeted to the ground, hitting her body on multiple structures of the scaffolding.

39. As found, Claimant has shown that Employer 1 and Employer 3 are one and the same and that Employer 2 was the Project Manager and supervisor for both. Employer 3's card with Employer 2's name supported this conclusion. Further, Employer 1's website also had Employer 2 as their contact person. However, it is uncertain whether Employer 2 owned Employer 1 and Employer 3 or if they were separate entities. As found and concluded, there is insufficient evidence that Claimant was working for either Employer 1 or Employer 3 at the time of the July 15, 2022 accident. The issue of whether Employer 1 or Employer 3 were actually Claimant's employers or were statutory employers is reserved for future determination.

40. As found, Employer 1, Employer 2 and Employer 3 were not insured for workers' compensation in the Colorado. Division sent Insurer a request for a statement to admit or deny the claim. Insurer provided confirmation that they did not insure Employer 1, Employer 2 or Employer 3 on July 15, 2022. In fact, the evidence showed that a policy for insurance commenced as of July 25, 2022 and that there was no coverage as of July 15, 2022. None of the listed employers provided Division with any information regarding insurance.

41. As found, Claimant was attended at Denver Health emergency room on July 15, 2022. Claimant's care was related to the injuries sustained during the fall off the scaffolding. Denver Health provided the emergency care and was authorized as the emergency provider.

42. As found, Claimant continued to have ongoing symptoms and injuries related to the fall of Jul 15, 2022 which have been left untreated at the time of the hearing. Claimant was credible and continued to require medical care. As found, Claimant showed that she was entitled to reasonably necessary and related medical care related to the July 15, 2022 work injury.

43. As found, Denver Health outpatient clinic declined to provide her with further treatment unless she paid for her care. This was deemed a refusal of the provider to treat Claimant for her work related injuries caused by the fall of July 15, 2022.

44. As found, Employer 2 knew or should have known that Claimant fell four floors and was taken to the hospital emergency room for care as Employer 2 was a witness to the fall. As found, Employer 2 should have provided a designated provider list and failed to do so. As found, Claimant was entitled to select her treating provider and Claimant selected Sander Orent, M.D. to be her authorized treating provider (ATP). As found and concluded, Claimant showed by a preponderance of the evidence that Dr. Orent is Claimant's ATP.

45. As found, Claimant's average weekly wage was $720.00 and her temporary total disability benefits rate was $480.00. This was calculated based on an hourly rate of $18.00 per hour multiplied by 40 hours a week. The Claimant's testimony regarding her

overtime hours was not sufficiently persuasive to increase this average weekly wage calculation.

46. As found, Claimant was unable to work following her injury due to her multiple injuries, specifically to her low back and left lower extremity. Claimant showed that she was entitled to temporary total disability since the date of her injury until terminated by law.

47. As found, Respondent Employer 2 failed to admit or deny Claimant's claim. Claimant is entitled to any penalties for Employer 2's failure to admit or deny the claim.

48. As found, Employer 2 failed to carry workers' compensation insurance and is penalized for failure to insure.

49. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See Industrial Commission v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

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

credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. University Park Care Center v. Industrial Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. Cordova v. ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See Burnham v. Grant, 24 Colo. App. 131, 134 P. 254 (1913); see also Heinicke v. ICAO, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. Colorado Springs Motors, Ltd. v. Industrial Commission, 441, P.2d 21 (Colo. 1968).

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

B. Jurisdiction

Claimant established that this ALJ had jurisdiction to hear the matter. Pursuant to Sec. 8-43-103(2) (2) "administrative law judges employed by the office of administrative courts shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided by articles 40 to 47 of this title." *Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430, 437 (Colo. App. 2003) (ALJ may not exercise jurisdiction, exert any powers, perform any duties, or assume any authority unless the right is granted by statute). See also *Lewis v. Scientific Supply Co., Inc.,* 897 P.2d 905, 908 (Colo. App. 1995).

Section 8-43-211(1), states in pertinent part that "[A]t least thirty days before any hearing, the office of administrative courts in the department of personnel shall send written notice to all parties by regular or electronic mail or by facsimile." In this case, OAC sent Respondents a Notice of Hearing dated June 30, 2023 to their agent, as demonstrated by the Claimant's testimony that she was hired by Employer 2 as well as Employer 1's website identification of Employer 2's email address and Employer 3's card showing Employer 2 as their "Project Manager." The NOH showed all three employers as listed in the pleading. Notice was also appropriately provided to Insurer. Lastly, no emails were returned to the Office of Administrative Courts. Therefore, it was determined that this ALJ had proper jurisdiction to address the issues set for hearing.

C. Claimant's Employer on July 15, 2022

Claimant credibly testified that she contacted Employer 2 by responding to a Facebook notice of employment which listed Employer 1 but provided Employer 2's email address. Employer 2 communicated with Claimant by WP[Redacted] for all the work they performed. Employer 2 hired Claimant and agreed to pay her, and actually handed over personally all wages to Claimant. Employer 2 was the one to train her and supervised

her work. Claimant was not made aware of any statutory employers or other companies under which they may have been working. As found, Employer 2 was Claimant's employer of injury on July 15, 2022.

There was persuasive evidence that Employer 2 was associated with Employer 1. This ALJ cannot conclude on the available evidence that Employer 2 was an owner of said company, but he clearly represented to the world through Employer 1's website that he was a representative of that company as Employer 1 listed Employer 2's email address. However, there are no contracts of hire, no social media communications, paychecks, or other documentation in the record available at this time to conclude that Employer 1 was Claimant's employer or a general contractor for Employer 2. The issue of whether Employer 1 was an employer or a statutory employer is specifically reserved for future determination.

There was persuasive evidence in the form of a business card that Employer 2 was associated with Employer 3. This ALJ cannot conclude on the available evidence that Employer 2 was an owner of said company, but he clearly represented to the world through his business card that he was a representative of that company. However, there are no contracts of hire, no WP[Redacted] communications, paychecks or other documentation available at this time to conclude that Employer 3 was Claimant's employer or statutory employer. This issue is specifically reserved for future determination.

D. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

As found, Claimant was in the course and scope of her employment for Employer 2 on July 15, 2022 while filling blocks with gravel on the fourth floor of a structure when she fell off a scaffolding, falling approximately 30 feet, hitting multiple scaffolding structures or braces and falling on the ground on her feet. Claimant was working for Employer 2 under a contract of hire on that day. Claimant injured multiple body parts, including her neck, back, left hip, lower extremities, and bilateral shoulders and arms. The fall also caused nightmares. Claimant proved that it was more likely than not she suffered compensable work related injuries on July 15, 2022 while working for Employer 2 and was entitled to compensation.

E. Medical Benefits, Authorized Provider and Penalties

Employer 2 is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; Sims v. Industrial Claim Appeals Office, 797 P.2d 777 (Colo. App. 1990). A claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106

(Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra,* 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office,* 121 P.3d 328, 330 (Colo.App.2005).

As found, Claimant was attended at Denver Health emergency room on July 15, 2022 and July 19, 2022. Claimant's care was related to the injuries sustained during the fall off the scaffolding. Denver Health provided the emergency care and was authorized as the emergency provider.

As found, Claimant continued to have ongoing symptoms and injuries related to the fall of Jul 15, 2022 which have been left untreated at the time of the hearing. Claimant credibly testified that she continued to require medical care. As found, Claimant showed that she was entitled to reasonably necessary and related medical care related to the July 15, 2022 work injury. As found, Denver Health outpatient clinic declined to provide Claimant with treatment unless she paid for her care. This is deemed a refusal of the provider to treat Claimant for her work related injuries caused by the fall of July 15, 2022.

As found, Employer 2 knew or should have known that Claimant fell four floors and was taken to the hospital emergency room for care as Employer 2 was a witness to the fall. As found, Employer 2 should have provided a designated provider list and failed to do so. As found, Claimant was entitled to select her treating provider and Claimant selected Sander Orent, M.D. to be her authorized treating provider (ATP). As found and concluded, Claimant showed by a preponderance of the evidence that Dr. Orent is Claimant's ATP for her work related fall of July 15, 2022 injuries.

As further found, Employer 2 is financially responsible for the payment of Claimant's medical expenses, including the Denver Health bill in the amount of $894.10 for the outstanding medical benefits to Denver Health.

There was insufficient evidence to establish whether Claimant was due and owing interest for failure to pay medical benefits. This issue is reserved.

F. Average Weekly wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." Claimant was hired by Employer 2 who paid Claimant $18.00 per hour, for 40 hours a week. As found,

Claimant's average weekly wage was $720.00 at the time of the July 15, 2022 work related accident.

G. Temporary Total Disability Benefits and Interest

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric,* 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.,* 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office,* P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

As found, Claimant's credible testimony, the photographic evidence and the medical records from Denver Health show that Claimant had a significant accident and injuries as a result of the July 15, 2022 fall. As further found, Claimant's testimony was persuasive that she had not been able to return to work following the fall of July 15, 2022 and through the date of the hearing. Nothing in the records showed that Claimant had been placed at maximum medical improvement and Claimant credibly testified that she had been unable to access further medical care due to the expense involved. Claimant showed that she was entitled to TTD as a consequence of the work related accident of July 15, 2022 while in the employ of Employer 2, until terminated by law.

Claimant was also due interest on all benefits which were not paid when due pursuant to statute at the rate of 8% per annum. Temporary total disability benefits and interest through the date of the hearing were calculated as follows:

[Redacted, hereinafter calculation chart]

Therefore, Claimant is owed $32,604.74 in past due TTD, including interest, through October 10, 2023. From the day of the hearing forward, Claimant continued to be owed TTD benefits until terminated by law but would only be entitled to interest until benefits were paid and up to date.

H. Insurance, and Penalties for Failure to Admit or Deny Benefits and to Insure under the Act

Section 8-41-404(1)(a), C.R.S. states as follows

> …every person performing construction work on a construction site shall be covered by workers' compensation insurance, and a person who contracts for the performance of construction work on a construction site shall either provide, pursuant to articles 40 to 47 of this title, workers' compensation coverage for, or require proof of workers' compensation coverage from, every person with whom he or she has a direct contract to perform construction work on the construction site.

Sec. 8-41-404(5) states:

> (a) "Construction site" means a location where a structure that is attached or will be attached to real property is constructed, altered, or remodeled.
>
> (b) "Construction work" includes all or any part of the construction, alteration, or remodeling of a structure.
>
> …
>
> (c) "Proof of workers' compensation coverage" includes a certificate or other written confirmation, issued by the insurer or authorized agent of the insurer, of the existence of workers' compensation coverage in force during the period of the performance of construction work on the construction site.

Pursuant to Sec. 8-43-203(1)(a), C.R.S. "The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division … whether liability is admitted or contested."

As found, Claimant's supervisor and Employer 2 knew of the accident as he was a witness to Claimant's fall from the scaffolding and saw Claimant off on the ambulance to the hospital. He also sent a representative to the hospital to check on Claimant. As found, Employer 2 had notice of the accident and failed to file any documents with Division to either admit or deny the claim or provide any insurance information. Neither did Employer 2 contact Claimant to provide insurance information after the accident despite advising her that he would make sure her bills would be paid. As found, Respondents failed to secure insurance coverage for workers' compensation and failed to comply with the Act.

Under Sec. 8-43-203(2)(a), C.R.S. if notice of insurance is not filed with Division, the statute states that:

> …the employer or, if insured, the employer's insurance carrier, as the case may be, may become liable to the claimant, if the claimant is successful on the claim for compensation, for up to one day's compensation for each day's failure to so notify; except that the employer or, if insured, the employer's insurance carrier shall not be liable for more than the aggregate amount of three hundred sixty-five days' compensation for failure to timely admit or deny liability. Fifty percent of any penalty paid pursuant to this subsection (2) shall be paid to the subsequent injury fund, created in section 8-46-101, and fifty percent to the claimant.

As found, Employer 2 was responsible to Claimant for failure to admit or deny and Claimant was entitled to penalties. Claimant was entitled to one day's compensation for their failure to insure. From July 16, 2022 through the date of the hearing of October 11,

2023, there were 453 days. However the statute limits the maximum penalty to 365 days. Claimant was entitled to 365 days' penalty in this matter for failure to admit or deny the claim. Claimant's daily rate was $68.57, which multiplied by 365 was a penalty in the amount of $25,028.05.

Sec. 8-43-408(5), C.R.S. in effect at the time of Claimant's July 15, 2022 injury provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

The penalty for failure to insure only applies to indemnity benefits and does not encompass medical benefits. *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc.*, W.C. No. 4-155-231 (ICAO, Feb. 13, 1998). Statutory interest is not properly considered "compensation or benefits" within the meaning of Sec. 8-43-408(5), C.R.S. Interest is a statutory right intended to secure claimants the present value of benefits to which they were entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

As found, Employer was not insured on Claimant's July 15, 2022 date of injury. Based on the preceding sections' calculation in the present Order, Employer 2 was required to pay Claimant $31,062.86 in TTD benefits. Twenty-five percent of $31,062.86 was $9,015.71. Accordingly, Employer 2 shall pay $9,015.71 in penalties to the Colorado Uninsured Employer Fund created in Sec. 8-67-105, C.R.S.

Pursuant to Sec. 8-43-408(2), C.R.S.

> [I]n all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado.

In this matter, Employer 2 shall pay the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado." Employer 2 may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

As found, this order awards ongoing benefits so the present value calculated in this order does not limit the amount Employer 2 will be required to pay. Claimant was owed $32,604.74 in TTD and interests benefits through October 10, 2023 and penalties of $25,028.05. The CUE Fund was owed $9,015.71 in penalties and Denver Health was owed at least $894.10 for a total of $67,542.60. Employer 2 shall deposit with the trustee of the Division the amount of $67,542.60 plus 4% interest per annum.

ORDER

IT IS THEREFORE ORDERED:

1. Employer 2 was Claimant's employer on July 15, 2022.

2. Claimant sustained compensable injuries to multiple body parts, as stated above, including but not limited to the neck, bilateral shoulders, arms, back, left hip, lower extremities, head and psychological sequelae, on July 15, 2022 during the course and scope of her employment with Employer 2.

3. Employer 2 shall pay Claimant's reasonably necessary and related medical benefits caused by the July 15, 2022 work related accident, including for Denver Health and Dr. Sander Orent, who was found to be an authorized treating provider. Further, if the Colorado Uninsured Employers' Fund designates a new provider pursuant to Rule 4-1, 7 CCR 1106-1[5] Employer 2 shall pay for the medical benefits under the new designated provider as well.

4. Claimant's average weekly wage was $720.00 and her temporary total disability benefits rate was $480.00.

5. Employer 2 shall pay Claimant TTD benefits from July 16, 2022 until terminated by law. Employer 2 shall pay interest on benefits due and owing at the statutory rate of 8% per annum. Benefits due and owing through the day prior to the hearing including October 10, 2023 were $32,604.74. TTD and interests continue to be due from October 11, 2023 until terminated by law and past due benefits are paid.

6. Employer 2 shall pay Claimant penalties for failure to admit or deny the claim in the maximum amount of 365 days for a total of $25,028.05.

7. Employer 2 shall pay $9,015.71 in penalties to the Colorado Uninsured Employer Fund created in Sec. 8-67-105, C.R.S.

8. In lieu of payment of the above compensation and benefits to Claimant and the CUE Fund, Employer 2 shall:

   a. Deposit the sum of $67,542.60, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of

[5] Rules Governing the Colorado Uninsured Employer Fund under the Workers' Compensation Act, Colorado Department of Labor And Employment, Division of Workers' Compensation, 7 CCR 1106-1 Title 8, Article 67.

Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $67,542.60 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

10. Employer shall pay statutory interest at the rate of 8% per annum on benefits not paid when due.

11. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

12. Pursuant to Sec. 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer 2 is solely liable and responsible for the payment of all medical costs related to Claimant's July 15, 2022 work injury.

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

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

after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts** or email the Petition to Review to oac-ptr@state.co.us. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 21st day of November, 2023.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-084-400-007

ISSUES

I. Whether Claimant has overcome the DIME opinion by clear and convincing evidence that he is not at MMI because he sustained a compensable injury to his right shoulder?

II. Whether Claimant has proven by a preponderance of the evidence that he sustained additional disfigurement of the left shoulder?

FINDINGS OF FACT

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

1. On September 23, 2017, while lifting a pipe that was stuck in the ground at work, Claimant was injured. E**x. W:514.** He was treated at Advanced Urgent Care, LLC the next day for off and on left shoulder pain, which was at a 2/10 but rose to a 5 when he moved the left shoulder. **Ex. C:054**. Claimant's neck and back were normal, and there were no right upper extremity or shoulder complaints. **Ex. C:054**.
2. An MRI Arthrogram of the left shoulder on October 25, 2017, requested by Julie Parsons, MD, showed abnormal pathology. **Ex. D:073**.
3. On September 28, 2017 and November 13, 2017, Claimant treated with Julie Parsons, MD, for left shoulder complaints only, and was released to full duty work. **Ex. C:057**.
4. Dr. Parsons referred Claimant to Thomas A. Mann, MD, who first evaluated Claimant on December 7, 2017. Claimant's complaints were regarding the left shoulder, although the right shoulder was mildly stiff at the extremes but had normal rhythm and good strength. **Ex. E:081**. Dr. Mann concluded that Claimant had a "left shoulder injury with acute-on-chronic appearance of significant cuff injury." **Ex. E:083**.
5. Claimant underwent left shoulder surgery by Dr. Mann on December 28, 2017. **Ex. F:162**.
6. On January 16, 2018, Dr. Mann saw Claimant post left shoulder operation, and instructed Claimant to wear his shoulder brace for any type of activity or when he is up and around. **Ex. E:088**. There was no mention of neck or right shoulder complaints.
7. Around seven weeks postop, on February 15, 2018, Claimant followed-up with Dr. Mann. Claimant was doing well, and only noted soreness and no regular pain. **Ex. E:090**. Eleven weeks postop, On March 15, 2018, were similar with approval of fairly limited lifting and pushing. **Ex. E:097**.
8. A physical therapy report dated April 3, 2018, recorded that Claimant "reports right hand got slammed in door 3/29/2018." **Ex. G:204**. Two days later, on April 5, 2018,

a physical therapy note states, “Patient reports that he had a fall in shower and broke right hand Patient reports that he did not hurt left shoulder with fall.” **Ex. G:206**.

9. On April 17, 2018, Dr. Mann reported that Claimant, “unfortunately broke his hand in the shower two weeks ago. He is also complaining of some right shoulder pain because he is using it more.” **Ex. E:098**. That same day, a physical therapy report states, “Patient reports that he is continuing to have more pain since he hurt his R hand (april 2nd) and has started having to use his L Upper extremity more.” **Ex. G:211**. “Patient has been having increase in shoulder pain and soreness at left upper extremity reports since breaking right hand and now using only left upper extremity.” **Ex. G:213**. “Patient having increased pain and difficulty with L upper extremity due to R hand injury. He reports that he has to use L upper extremity to shoulder bc he can not get cast wet.” **Ex. G:226**.

10. Despite what is documented in the medical records by multiple providers, Claimant testified that he did not sustain injuries to his right upper extremity after September 24, 2017. **TR. 40:4-9**. As a result, the ALJ does not find Claimant credible regarding the cause of his right shoulder pain.

11. During a visit on May 15, 2018, Dr. Mann noted that Claimant continued to have significant weakness and pain across the front of his clavicle into his pectoralis. **Ex. E:103**.

12. An MRI of the left shoulder on May 23, 2018, as requested by Dr. Mann, showed abnormal pathology evidencing a re-injury. **Ex. D:075**. On May 31, 2018, Dr. Mann noted that Claimant only had left shoulder pain, and a recurrent cuff tear with retraction and ongoing atrophy. **Ex. E:108**. Dr. Mann recommended another shoulder surgery. **Ex. E:110**.

13. Claimant underwent a second left shoulder surgery on August 15, 2018. **Ex. E:128; F:165**.

14. Claimant later complained of right shoulder and neck pain. **Ex. E.138**. Nevertheless, Dr. Parsons continued to identify the injured body part was the left shoulder. **Ex. C:070**.

15. On September 18, 2018, Claimant saw Dr. Mann because of “severe progression of right shoulder pain. He has been sweeping at work and this particular activity has flared up the shoulder to the point now that it is more severe than its operative side.” **Ex. E:143**. Dr. Mann wrote, “Given his chronic rotator cuff tear that was found in his left shoulder, I am suspicious he may have similar type of pathology in the right…” **Ex. E:147**.

16. Dr. Mann requested an MRI of the right shoulder, which was performed on September 22, 2018. **Ex. D:077**. The MRI showed abnormal pathology. **Ex. D:078**.

17. Mark S. Failinger, MD, saw Claimant on November 15, 2018, for a Respondent-sponsored IME. **Ex. A**. Dr. Failinger concluded that Claimant’s right upper extremity condition was unrelated to the September 23, 2017, industrial accident unless Claimant returned to work after surgery and was performing major lifting duties and tasks with only his right upper extremity. **Ex. A:012**. “It is fallacious reasoning to state

that a patient's opposite limb symptomatology is related to overuse of the opposite limb when favoring the injured limb." **Ex. A:012**.

18. Dr. Failinger also pointed out that there was no mention of any neck pain before the December 2017 visit with Dr. Mann, which was three months following the work accident. Thus, "it would appear that the neck symptoms were transient and likely due to cervical spine pathology rather than due to the work incident on 09-23-2017." **Ex. A:013**.

19. At the hearing, Dr. Failinger testified that sweeping with the right arm would not cause Claimant's preexisting right shoulder pathology to be symptomatic, unless he was sweeping at the shoulder level or above. **TR. 58:18-25**. Dr. Failinger also testified that throwing trash bags into a dumpster would not cause Claimant's preexisting pathology to be symptomatic unless they were extremely heavy bags, and he was throwing overhead all day long. **TR. 59:3-16**.

20. Dr. Failinger also stated that:

> In fact, he fell in the shower just a couple of weeks before the first report of right shoulder symptoms. He fell hard enough that he broke his right hand. And, you know, we can't say for sure that the shoulder was injured at that point, but there was no symptoms until that fall. And that raised a question of whether or not the fall created an acceleration of what was, no doubt, preexisting rotator cuff tearing in the right shoulder, the opposite shoulder, and that's possibly the reason he had developed symptoms after that fall.

TR. 55:9-19.

21. With respect to the right shoulder and neck being aggravated because he was using it more due to the left shoulder injury, Dr. Failinger testified that, "There is no supportable evidence in the medical literature of opposite side developing a pathology based on contralateral or other side injury or so-called favoring of the opposite extremity." **TR. 60:12-20**.

22. Dr. Failinger also testified that there was no relationship between the distal clavicle and the original fall. **TR. 62:17-20**.

23. Dr. Failinger's opinions are well reasoned and supported by the medical records. Thus, the ALJ finds Dr. Failinger's opinions to be credible and highly persuasive in concluding that Claimant's right shoulder condition is unrelated to overuse or to performing work tasks, such as sweeping or taking the trash out, after his 2017 left shoulder injury.

24. On November 27, 2018, Dr. Mann wrote that Claimant's right shoulder pain increased because of relying on the right shoulder now more than the left, contrary to his September 18, 2018, note. **Ex. E:148**. Dr. Mann also recorded Claimant's neck pain complaints, with radicular symptoms and numbness on the ulnar side of the hand. **Ex. E:148**.

25. Despite Dr. Mann indicating that Claimant's right shoulder pain increased because Claimant was relying more on his right side, Dr. Mann's statement seems to be merely

repeating Claimant's assertion, and not a medical opinion that Claimant injured his right shoulder due to overuse and needs medical treatment due to the alleged overuse. Thus, the ALJ does not find Dr. Mann's statement to be persuasive in determining Claimant allegedly overusing his right shoulder caused Claimant's right shoulder complaints and need for treatment.

26. A CT scan of Claimant's left shoulder, as requested by Dr. Mann, was performed on December 14, 2018, and showed mild glenohumeral joint arthrosis and superior migration of the humeral head with volume loss of the supraspinatus and infraspinatus muscles.

27. On December 19, 2018, Dr. Parsons discharged Claimant, stating that the "Injured employee requests treatment for a condition that is unrelated to the work injury: Patient is claiming a neck injury which is not the original injury of the Left shoulder which he did not start complaining of until after his second L shoulder surgery." **Ex. C:070**. Dr. Parsons also wrote, "Patient and his wife consistently request narcotic pain medication which has never been prescribed by me but by the surgeon; it has been explained at every visit that I am not prescribing any narcotics." **Ex. C:70**.

28. Claimant's care was transferred to Marc Steinmetz, MD, following discharge by Dr. Parsons. Dr. Steinmetz reported that it did not appear that Claimant had significant neck complaints or arm numbness or neck stiffness originally back in 2017. **Ex. H:287**. Dr. Steinmetz referred Claimant to a second opinion of pain management with Dr. Lesnak. **Ex. H:287**.

29. Lawrence A. Lesnak, DO, examined Claimant on January 31, 2019, and highlighted that Claimant's right shoulder symptoms started several months after the September, 2017 occupational incident. **Ex. I:313**. Dr. Lesnak also reported that claimant had a high level of somatic pain complaints. **Ex. I:313**.

30. Dr. Lesnak conducted an electrodiagnostic evaluation of Claimant's bilateral upper extremities and cervical spine, which was normal. **Ex. I:325**.

31. On May 21, 2019, Dr. Steinmetz reported his concern that Claimant was not likely to improve and possibly have more problems with further procedures. **Ex. H:295; 297; 300**.

32. Dr. Steinmetz placed Claimant at MMI on June 20, 2019, with impairment for the left shoulder only. **Ex. H:300**.

33. On October 28, 2019, Claimant was awarded $625.00 in disfigurement benefits by ALJ Michelle Jones. **Ex. GG:551**.

34. Richard Gordon, MD, conducted a DIME on November 6, 2019, and opined that Claimant was not at MMI because he should be evaluated for a left shoulder replacement. **Ex. B:031-042**.

35. On December 30, 2019, Dr. Steinmetz reported that Claimant continued to complain of left shoulder, neck, and new leg complaints. **Ex. H:304**.

36. By February 20, 2020, Dr. Lesnak wrote, "it appears that the patient has had a dramatic increase in his diffuse pain behaviors and nonphysiologic findings, which suggests severe psychosocial factors are currently present and affecting his

symptoms, his recovery, as well as his perceived function. His presentation was nearly completely nonphysiologic in nature today." **Ex. I:364**. He concluded that Claimant's right shoulder and neck complaints were unrelated to the September 24, 2017 claim. **Ex. I:368**.

37. Claimant's primary care was transferred to Annu Ramaswamy, MD, on April 29, 2020. **Ex. P:451**.

38. On Dr. Ramaswamy's recommendation, Claimant began treating with Philip Stull, MD, who recommended a performed a left reverse shoulder arthroplasty and distal clavicle excision on September 10, 2020. **Ex. N:436; 438; 445.** Following the left shoulder replacement procedure, Claimant dislocated the prosthesis and underwent a revision of left total shoulder prosthesis on October 2, 2020. **Ex. N:448**.

39. On January 13, 2021, Dr. Ramaswamy noted that Claimant's right shoulder hurt more than the left, and that Claimant was interested in right shoulder treatment. **Ex. N:474**. Claimant attributed the right shoulder pain as a result of compensation for the left shoulder. **Ex. N:476-477**.

40. Claimant was placed at MMI by Dr. Ramaswamy on April 7, 2021. He did not receive impairment for the neck or right shoulder. **Ex. N:483-484**.

41. Dr. Gordon saw Claimant on July 21, 2021, for a follow-up DIME. **Ex. B:043**. He opined that "there is no ratable injury to the right shoulder. There is no ratable injury to the cervical spine." **Ex. B:052**.

42. Claimant returned to Dr. Ramaswamy on January 4, 2023, at the request of his attorney for an evaluation. **Ex. N:492**. Claimant noted chronic pain in both shoulders, and despite a left shoulder replacement that clearly helped him (**Ex. N:480**), he told Dr. Ramaswamy that his left shoulder condition never changed. **Ex. N:492**.

43. For the purpose of disfigurement, Claimant's scar to his left shoulder was observed to be approximately 5 inches long, and approximately ½ inch wide. The scar is different in color than the surrounding skin. In addition, Claimant has some atrophy from his clavicle into his chest. Claimant was previously paid $625.00 in disfigurement benefits.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the

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

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

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Off.,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Med. Ctr.,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000).

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

I. Whether Claimant has overcome the DIME by clear and convincing evidence that he is not at MMI because he sustained a compensable injury to his right shoulder?

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Off.*, 87 P.3d 261, 263 (Colo. App. 2004).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proven by clear and convincing evidence if, considering the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra*. When there are two or more reasonably supported medical opinions, the mere difference of opinion may, or may not, constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

Here, Claimant suffered an injury to his left shoulder in September 2017. Claimant contends that the injury to his left shoulder caused him to overuse his right upper extremity and overusing his right upper extremity caused him to develop a right shoulder condition that requires medical treatment. For example, Claimant testified that performing various work duties after the September 2017 accident, with his right upper extremity - such as sweeping and taking out the trash - caused him to develop right shoulder pain.

However, Dr. Failinger credibly and persuasively testified that Claimant using his right upper extremity to sweep or take out the trash would not cause Claimant to develop a new right shoulder condition, or aggravate his preexisting shoulder pathology, and necessitate the need for medical treatment.

Moreover, in April of 2018, Claimant fell in the shower and broke his right hand. Then, after Claimant fell in the shower and broke his right hand, he started complaining of persistent right shoulder pain. Dr. Failinger also credibly testified that the fall in the shower, with the onset of right shoulder pain after the fall, could be the cause of Claimant's right sided shoulder problems.

In the end, the ALJ finds and concludes that Drs. Failinger, Parsons, Steinmetz, and Dr. Lesnak all credibly concluded that Claimant's work-related injury was to his left shoulder only. The DIME physician agreed, and placed Claimant at MMI with an impairment rating for the left shoulder injury only.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant failed to overcome the DIME physician's opinion by clear and convincing evidence. As a result, the Claimant is at MMI.

II. Whether Claimant has proven by a preponderance of the evidence that he sustained additional disfigurement of the left shoulder?

For the purpose of disfigurement, Claimant's scar to his left shoulder was observed to be approximately 5 inches long, and approximately ½ inch wide. The scar is different in color than the surrounding skin. In addition, Claimant has some atrophy from his clavicle into his chest. Claimant was previously paid $625.00 in disfigurement benefits. Claimant shall be paid an additional $2,250.00 for his disfigurement.

ORDER

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

1. Claimant failed to overcome the opinion of the DIME physician. As result, Claimant is at MMI as of April 7, 2021, and his right shoulder condition is not related to his September 23, 2017, work injury.
2. Claimant shall be paid an additional $2,250.00 in disfigurement benefits.
3. The previously endorsed issues by the parties, are reserved. This includes, but is not limited to, PPD (including conversion), PTD, overpayment, recovery of overpayment, offsets, and credits. As a result, and any all issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: November 28, 2023.

/s/ Glen Goldman

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that recommended medical treatment is reasonable and necessary to maintain Claimant at maximum medical improvement (MMI)? The recommended treatment modalities at issue are:

- left shoulder subacromial bursa injections and arthrocentesis;
- left upper extremity electromyography (EMG) study; and
- bilateral C5-C7 medial branch blocks.

Have Respondents demonstrated, by a preponderance of the evidence, that post-MMI medical treatment should be terminated because it is no longer reasonable, necessary, or related to Claimant's work injury?

FINDINGS OF FACT

1. Claimant suffered a compensable injury on January 2, 2017 when she experienced a slip and fall while at work. On January 6, 2017, Claimant was first seen by her authorized treating physician (ATP) Dr. Vanessa McClellan. In the medical record of that date, Dr. McClellan listed Claimant's symptoms as left shoulder soreness; neck soreness; right arm soreness; left knee tenderness; radiating pain from the left knee up to the left hip; and radiating pain from the left knee down to the left foot. Dr. McClellan diagnosed Claimant with a neck strain and a knee contusion. Dr. McClellan referred Claimant to physical therapy for the left shoulder.

2. After a period of physical therapy, Dr. McClellan ordered magnetic resonance imaging (MRI) of Claimant's left shoulder. In addition, Dr. McClellan referred Claimant for an orthopedic consultation.

3. On April 19, 2017, Claimant began treatment with orthopedist Dr. Peter Scheffel. Dr. Scheffel read the MRI as showing a partial versus full-thickness tear of the supraspinatus tendon with the appearance of upper-border subscapularis tearing and biceps tendon instability with tendinosis. Dr. Scheffel recommended an arthroscopy of the left shoulder to include possible rotator cuff repair, biceps tenotomy, and possible acromioplasty.

4. On May 18, 2017, Dr. Scheffel performed a left shoulder arthroscopic rotator cuff repair, biceps tenotomy, glenohumeral joint debridement, acromioplasty, subacromial decompression, and extensive debridement of the subacromial space. Following the surgery, Claimant underwent physical therapy.

5. Claimant testified that there was a delay in beginning physical therapy after surgery. As a result, Claimant developed adhesive capsulitis ("frozen shoulder"). Claimant further testified that in addition to physical therapy, she underwent injections. However, these treatments did not relieve Claimant's left shoulder symptoms.

6. On October 4, 2017, Claimant returned to Dr. Scheffel and reported ongoing pain and stiffness in her left shoulder. Dr. Scheffel recommended a repeat left shoulder MRI to assess the rotator cuff for possible failure.

7. On October 18, 2017, the MRI was performed and showed post rotator cuff repair with severe tendinopathy of the distal supraspinatus tendon, possible intrasubstance tearing with no full-thickness tear, evidence of post biceps tenotomy, and linear sign in the superior glenoid labrum.

8. On October 24, 2017, Dr. Scheffel reviewed the MRI and noted that the rotator cuff repair was intact and "looks excellent". Dr. Scheffel also noted that Claimant had acromioclavicular joint arthritis that was clinically asymptomatic. Dr. Scheffel diagnosed impingement syndrome of the left shoulder and recommended Claimant undergo a subacromial steroid injection. He also recommended continued physical therapy.

9. On December 20, 2017, Claimant was seen by Dr. Scheffel. At that appointment, Dr. Scheffel told Claimant to "remain confident" and to continue with aggressive physical therapy followed by a gentle strengthening program. Dr. Scheffel also told Claimant that "most rotator cuff repair patients have a sensation of clicking or popping in the shoulder and that is nothing to be concerned about." Dr. Scheffel opined that no further injections, imaging, or surgery was appropriate.

10. On January 10, 2018, Claimant attended an independent medical examination (IME) with Dr. Brian Lambden. In connection with the IME, Dr. Lambden reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Lambden opined that Claimant had reached maximum medical improvement (MMI) as of the date of the IME (January 10, 2018). Dr. Lambden further opined that no maintenance medical treatment was necessary for Claimant's left shoulder. Dr. Lambden assessed a permanent impairment rating of four percent of the left upper extremity.

11. On February 14, 2018, Claimant was seen by Dr. McClellan. At that time, Claimant indicated that she disagreed with Dr. Lambden's determination that she had reached MMI. Dr. McClellan stated her opinion that Claimant was at MMI. Dr. McClellan further opined that additional formal therapy would not be beneficial, but Claimant could

continue with strengthening and range of motion exercises. Dr. McClellan did not perform an impairment rating.

12. On March 12, 2018, Dr. McClellan responded to a letter from Insurer. In her responses, Dr. McClellan indicated her agreement that Claimant reached MMI as of January 10, 2018. Dr. McClellan also indicated that an impairment rating should be performed by another provider, and she recommended Dr. Ellen Price. Finally, Dr. McClellan identified permanent restrictions for Claimant's left arm that included no lifting over five pounds, no overhead reaching, and no pushing or pulling over ten pounds.

13. On March 14, 2018, Claimant attended a second IME with Dr. Lambden. In a letter dated April 19, 2018, Dr. Lambden stated that his opinions were unchanged.

14. On March 21, 2018, Claimant was seen by Dr. Scheffel. Claimant reported that she was "struggling with range of motion and frozen shoulder." Claimant also reported popping in her left shoulder. Claimant described the popping as "suprising", but not significantly painful. Dr. Scheffel noted that Claimant had not received much relief from a subacromial steroid injection. Dr. Scheffel recommended that Claimant could continue with eight to twelve weeks of physical therapy. He also recommended the use of Tylenol for pain control. Dr. Scheffel stated that he had no further treatment recommendations.

15. On May 10, 2018, Claimant was seen by Dr. Price for an impairment rating. In her report of that date, Dr. Price reviewed Claimant's pain diagram and noted that Claimant complained of symptoms in her arms and hands, low back, and left leg. Dr. Price further noted Claimant had a difficult time lifting and performing activities of daily living. Dr. Price stated that Claimant had reached MMI. With regard to an impairment rating, Dr. Price assessed a whole person impairment of 12 percent that included Claimant's left upper extremity and low back. With regard to maintenance medical treatment, Dr. Price recommended acupuncture and a functional capacity evaluation (FCE).

16. On July 26, 2018, Claimant attended a Division independent medical examination (DIME) with Dr. Douglas Scott. In connection with the DIME, Dr. Scott reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his DIME report, Dr. Scott opined that Claimant had reached MMI as of January 10, 2018. Dr. Scott also noted that Claimant's left shoulder was stable. As a result, he opined that Claimant did not require further "diagnostic testing, surgery or active treatment" of her left shoulder. Dr. Scott assessed a permanent impairment rating of eight percent for Claimant's left upper extremity. With regard to maintenance medical treatment, Dr. Scott recommended a home exercise program, hot and cold compresses, and over-the-counter pain medications, (including topical applications).

17. On October 2, 2018, Respondents filed a Final Admission of Liability (FAL) in this case. In that FAL, Respondents admitted for the permanent impairment rating of eight percent for Claimant's left upper extremity and an MMI date of January 10, 2018. Respondents also admitted for reasonable, necessary, and related post-MMI medical treatment. On January 3, 2019, Respondents filed a second FAL to reflect a disfigurement award.

18. On January 17, 2019, Respondents filed another FAL that specifically referenced Dr. Scott's July 26, 2018 DIME report. Respondents and admitted for the permanent impairment rating of eight percent for Claimant's left upper extremity and an MMI date of January 10, 2018. Respondents also admitted for reasonable, necessary, and related post-MMI medical treatment.

19. On March 14, 2019, Claimant was seen by Dr. McClellan as part of her post-MMI treatment. Claimant reported pain and popping in her left shoulder. Claimant also reported that although the popping was not initially painful, it was now "painful after every pop." Dr. McClellan referred Claimant back to Dr. Scheffel for consultation.

20. On April 25, 2019, Claimant was seen by Dr. Scheffel. At that time, Claimant reported two months of worsening left shoulder pain when reaching. Claimant also reported popping in her left shoulder. Dr. Scheffel opined that Claimant had impingement bursitis. At that time, he recommended and administered a subacromial steroid injection.

21. On May 3, 2019, Claimant returned to Dr. McClellan and reported that the injection administered by Dr. Scheffel provided approximately one week of relief. Claimant also reported continued left shoulder pain and popping. Dr. McClellan referred Claimant to Dr. Price.

22. Claimant returned to Dr. Price on June 5, 2019. Dr. Price identified the purpose of this visit was to assess an impairment rating. In her report dated August 22, 2019, Dr. Price assessed a permanent impairment rating of 11 percent for Claimant's left upper extremity. Dr. Price recommended maintenance medical treatment of ongoing care with Ors. Sheffel and McClellan and four to six visits of physical therapy.

23. Claimant did not undergo treatment with any authorized provider between August 22, 2019 and March 12, 2021.

24. On March 12, 2021, Claimant was seen with Dr. McClellan and reported painful popping in her left shoulder. Dr. McClellan referred Claimant back to Dr. Scheffel for evaluation. Dr. McClellan also noted that an updated MRI might be needed.

25. On April 12, 2021, Claimant was seen by Dr. Scheffel. In the medical record of that date, Dr. Scheffel noted that Claimant had developed pain and popping in her left shoulder. Expressing a concern for a possible re-tear of Claimant's left rotator cuff, Dr. Scheffel recommended a new left shoulder MRI.

26. On August 3, 2021, Claimant returned to Dr. Lambden for an IME. As with the January 10, 2018 IME, Dr. Lambden reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Lambden agreed that a new left shoulder MRI would be appropriate. Dr. Lambden suspected that the MRI would show "significant underlying degenerative changes and tendinopathy". Dr. Lambden opined that if there were such MRI findings, they would not be related to Claimant's work injury. Dr. Lambden specifically noted that he would not recommend any further injections. Dr. Lambden also stated that Claimant remained at MMI.

27. On August 17, 2021, Claimant underwent a left shoulder MRI. The results showed supraspinatus tendinosis with a 3mm full thickness tear of the distal supraspinatus tendon; with no definite labral tear.

28. On September 14, 2021, Claimant returned to Dr. Scheffel to discuss the MRI results. Dr. Scheffel noted that Claimant's rotator cuff was intact, but he indicated that it was possible Claimant had subacromial impingement. Dr. Scheffel recommended and administered a subacromial steroid injection. Dr. Scheffel also recommended a home exercise program.

29. On January 12, 20231, Claimant returned to Dr. Scheffel. At that time, Claimant reported that the injection in September 2021 provided one day of 40 percent relief. Dr. Scheffel referred Claimant to Dr. Price for evaluation for fibromyalgia and to discuss trigger point injections.

30. On February 2, 2023, Claimant underwent a left shoulder MRI. The MRI results included findings of a stable postoperative left shoulder.

31. On February 7, 2023, Claimant was seen by Dr. Scheffel to review the MRI results. Dr. Scheffel noted that the MRI showed an intact rotator cuff repair. In that same medical record, Dr. Scheffel noted no symptoms of adhesive capsulitis. He again noted that Claimant was to see Dr. Price regarding fibromyalgia. Dr. Scheffel also wanted to order a neck MRI for evaluation with Dr. Christopherson for possible radiofrequency ablation of the left shoulder. Finally, Dr. Scheffel stated that if Claimant continued to experience left shoulder pain, he would discuss a possible diagnostic arthroscopy.

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[1] Based upon the medical records entered into evidence, it appears that Claimant did not see Dr. Scheffel between September 2021 and January 2023.

32. On February 21, 2023, Claimant returned to Dr. Price's practice and was seen by Dr. Nikos Hollis. Claimant reported her symptoms as pain and popping in her left shoulder, with numbness, tingling, and weakness in her left hand. Dr. Hollis recommended and administered trigger point injections. These injections were made in the left thoracic paraspinal, rhomboids, trapezius, levator scapulae, infraspinatus, supraspinatus, tares minor, anterior deltoid, and splenius capitis. Dr. Hollis opined that it was possible that Claimant had left sided cervical radiculopathy. As a result, he recommended cervical flexion and extension x-rays, a cervical MRI, or EMG testing.

33. On March 7, 2023, Claimant returned to Dr. Hollis. Claimant reported that the trigger point injections initially caused a flare in her symptoms, but then provided approximately two days of relief. Claimant also reported experiencing chronic headaches. Dr. Hollis administered laser treatment to Claimant's upper back and neck. Dr. Hollis also administered bilateral occipital nerve injections. These treatments were intended to address cervical dystonia and occipital neuralgia, respectively.

34. On March 8, 2023, Claimant was seen in Dr. Price's practice by Dr. David Saldivar. At that time, Dr. Saldivar noted that Claimant had "significant neck and low back and lower extremity issues" since her work injury. Dr. Saldivar opined that claimant had facet mediated pain in her cervical and lumbar spines, trochanteric bursitis, and sacroiliitis. He recommended Claimant undergo the following: a left subacromial bursa injection; bilateral C5-C7 medial branch blocks; bilateral L3-L5 medial branch blocks; bilateral sacroiliac (SI) joint injections; and bilateral greater trochanteric bursa injections.

35. As noted above, the recommended treatment modalities currently before the ALJ are: 1) left shoulder subacromial bursa injections and arthrocentesis; 2) a left upper extremity EMG study; and 3) bilateral C5-C7 medial branch blocks.

36. At the request of Respondents, on June 19, 2023, Claimant attended an IME with Dr. F. Mark Paz. In connection with the IME, Dr. Paz reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. At the IME, Claimant reported that her left shoulder symptoms included pain and popping. In his IME report, Dr. Paz opined that Claimant's current left shoulder condition was not related to the January 2, 2017 work injury. Rather, it is Dr. Paz's opinion that the condition of Claimant's left shoulder is caused by deconditioning, coupled with comorbidities including obesity, diabetes mellitus, and a sedentary activity. Dr. Paz agreed with the DIME physician, Dr. Scott, that Claimant reached MMI for her left shoulder as of January 10, 2018. Dr. Paz also noted that Dr. Scott's recommendations for post-MMI treatment for the left shoulder included "topical applications, physical applications, and over-the-counter nonsteroidal anti-inflammatories". It is Dr. Paz's opinion that Claimant's left shoulder remains stable and no further treatment is needed.

37. Dr. Paz further opined that Claimant's cervical symptoms and any treatment of those symptoms are not reasonable, necessary or causally related to the January 2, 2017 work injury. In support of this opinion, Dr. Paz noted that Claimant has a history of chronic neck pain. Dr. Paz also noted that reports from other medical providers (including Drs. Scheffel, Price, and Scott) as well as his findings on examination at the IME are inconsistent with cervical radiculopathy. Dr. Paz noted that such a diagnosis would be secondary to cervical degenerative disease, a diagnosis which is not causally related to the January 2, 2017 incident. Dr. Paz further noted that there is no cervical diagnosis in this claim.

38. Dr. Paz specifically opined regarding the treatment modalities at issue in this case. It is Dr. Paz's opinion that the left shoulder subacromial bursa injections and arthrocentesis; the EMG study of Claimant's left upper extremity; and bilateral C5-C7 medial branch blocks; are not reasonable, necessary, or related to the January 2, 2017 work injury.

39. Dr. Paz's deposition testimony was consistent with his IME report. Dr. Paz reiterated his opinion that the only body part at issue is Claimant's left shoulder, for which she reached MMI on January 10, 2018. Dr. Paz reiterated his assessment that Claimant's deconditioning and lack of compliance with a home exercise program was one of the primary contributors (along with obesity, diabetes, and a sedentary lifestyle) to her current left shoulder symptoms. Dr. Paz testified that the specific treatments recommended for Claimant are not related to the work injury. Dr. Paz also specifically testified that, in his opinion, Claimant is not in need of any additional post-MMI treatment.

40. The ALJ credits the medical records and the opinions of □rs. Paz and Lambden. Generally, the ALJ credits the opinion of Dr. Paz that Claimant is not in need of further post-MMI medical treatment. The ALJ also specifically credits Dr. Lambden's August 3, 2021 opinion that no further injections are necessary to treat Claimant's left shoulder. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended left shoulder subacromial bursa injections and arthrocentesis is reasonable and necessary to maintain Claimant at MMI.

41. With regard to the recommended left upper extremity EMG study, the ALJ credits the medical records and the opinions of Dr. Paz. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended EMG study is reasonable and necessary to maintain Claimant at MMI.

42. The ALJ further credits the medical records, the opinions of Dr. Paz, as well as those of the DIME physician, Dr. Scott. The ALJ specifically credits Dr. Paz's opinion that his findings on physical examination are inconsistent with cervical radiculopathy. The ALJ further credits the DIME report in which Dr. Scott only assessed Claimant's left shoulder, and not her cervical spine. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended bilateral

C5-C7 medial branch blocks are reasonable and necessary to maintain Claimant at MMI.

43. With regard to the issue of whether post-MMI medical treatment should continue, the ALJ credits the medical records and the opinions of Dr. Paz. Specifically, the ALJ credit's Dr. Paz's opinion that Claimant's left shoulder remains stable and no further treatment is needed. The ALJ finds that Respondents have demonstrated that it is more likely than not that post-MMI medical treatment should be terminated because it is no longer reasonable, necessary, or related to Claimant's work injury.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter

an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that left shoulder subacromial bursa injections and arthrocentesis is reasonable and necessary to maintain Claimant at MMI. As found, the medical records and the opinions of Ors. Paz and Lambden are credible on this issue.

6. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that a left upper extremity EMG study is reasonable and necessary to maintain Claimant at MMI. As found, the medical records and the opinions of Dr. Paz are credible and persuasive on this issue.

7. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that bilateral C5-C7 medial branch blocks are reasonable and necessary to maintain Claimant at MMI. As found, the medical records, the opinions of Dr. Paz, and Dr. Scott's DIME report are credible and persuasive on this issue.

8. When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. Section 8-43-201(1), C.R.S.; *Salisbury v. Prowers County School District,* W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District,* W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification."

9. In the present case, Respondents have admitted for reasonable, necessary, and related post-MMI medical treatment. They are now requesting to end all post-MMI medical treatment. Although Claimant bears the burden of proof with regard to the specific treatment modalities addressed above, it is Respondents' burden to prove, by a preponderance of the evidence, that no further post-MMI treatment is necessary.

10. As found, the Respondents have demonstrated, by a preponderance of the evidence, that there is no further medical treatment necessary to maintain Claimant at MMI. As found, the medical records and the opinions of Dr. Paz are credible and persuasive on this issue.

ORDER

It is therefore ordered:

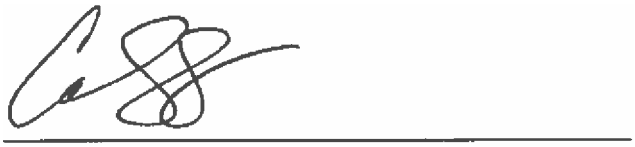
1. Claimant's request for left shoulder subacromial bursa injections and arthrocentesis is denied and dismissed.

2. Claimant's request for a left upper extremity EMG study is denied and dismissed.

3. Claimant's request for bilateral C5-C7 medial branch blocks is denied and dismissed.

4. Respondents' request to terminate maintenance medical treatment is granted.

Dated November 29, 2023.



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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-117-992-005

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as a result of the admitted work related injuries of August 10, 2019.

PROCEDURAL HISTORY

Claimant was placed at MMI by Dr. Zimmerman on October 14, 2021 with a 21% rating. Respondents filed an Application for a Division of Workers' Compensation Independent Medical Examination (DIME). Claimant was evaluated by Dr. Mark Winslow, the DIME physician on March 15, 2022.

Respondents filed a Final Admission of Liability on June 2, 2022 admitting to temporary total disability benefits paid based on an average weekly wage of $859.63 and a TTD rate of $573.09. Respondents also paid permanent partial disability benefits beginning the date of MMI. Respondents admitted to maintenance medical benefits.

Claimant filed an Application for Hearing on December 7, 2022 on multiple issues including permanent total disability benefits. Respondents filed a Response to Application for Hearing dated January 4, 2023. Present during the hearings were [Redacted, hereinafter JG] from [Redacted, hereinafter MO] office, and Claimant's daughter, [Redacted, hereinafter MA], as observers; Claimant, Dr. David Yamamoto and Cynthia Bartman who testified on behalf of Claimant; and Dr. John Raschbacher and Katie Montoya, who testified on behalf of Respondents.

This ALJ issued Findings of Fact, Conclusions of Law and Order on August 18, 2023 and served on the parties on August 21, 2023 determining that Claimant was permanently totally disabled from earning any wages proximately caused by the August 10, 2019 admitted work related accident.

Respondents filed a Petition to Review (PTR) the Order on September 8, 2023. After multiple extensions of time to file briefs in support and in opposition of the PTR, the final brief was filed on November 16, 2023. Issues raised included,

1. Whether the ALJ failed to adhere to the controlling law in Colorado concerning permanent total disability.
2. Whether the ALJ considered evidence that was not part of the record.
3. Whether the ALJ misapplied the applicable law to the findings of fact.

This Supplemental Findings of Fact, Conclusions of Law and Order followed.

FINDINGS OF FACT

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

A. Generally:

1. At the time of the hearings, Claimant was fifty nine years old, lived with his wife and had a ninth grade education in Mexico. Claimant worked as a laborer in construction. While he mainly performed manual labor, he also used machinery including the mixer and a forklift tractor. He had been doing the same kind of work for more than 20 years and would essentially perform the same kinds of tasks each day, so he understood the instructions in English. He would use a coworker to interpret when he was unable to understand his supervisor. He would frequently be lifting the 80 to 90 lbs. of mix when operating the tractor. His job required lifting, walking, standing, climbing scaffolding. After his accident, he performed modified duty for approximately four months sorting materials, washing cars, cleaning floors.

B. The Accident:

2. On August 10, 2019 Claimant had been preparing the mix for the mixer, went up the scaffolding to put the mix in the mixer, when the weight of the bucket of cement mix overbalanced him, it threw him back and he fell to the floor. The mixer had a solid piece of concrete in it which was shaking the scaffolding. He injured his low back and had almost immediate pain going into his right lower extremity all the way to his foot. About three weeks after the accident the pain started getting worse, then about six weeks later, the pain was even worse causing numbness going down his leg. Approximately three months prior to the March 2023 hearing, he developed increasing nerve pain radiating into the groin.

3. Claimant last worked on February 10, 2020. He had surgery on February 12, 2020. He was happy initially with the surgical results. The pain in his low back seemed to get worse after about another month or two, especially in his low back, and his right lower extremity. After the surgery he received medications, injections and physical therapy. Both the physical therapy and the injections helped with the pain. The medications only helped for a while and then the pain and symptoms would return. He continues to take Gabapentin at nighttime and sometimes when he wakes up he may take more of the Gabapentin.

C. Medical and Vocational Records:

4. Claimant was first evaluated by Dr. Carrie Burns of Concentra – Centennial on August 12, 2019. She documented that Claimant was operating a cement mixer when he felt back pain which immediately radiated down his right leg, reporting right leg pain and paresthesias. Dr. Burns noted loss of lordosis, tenderness at the L1-L5 left and right paraspinal, worse on the right, right sided muscle spasms, limited range of motion (ROM) and positive right straight leg raise (SLR). She assessed lumbar strain, right wrist sprain and acute lumbar radiculopathy. She ordered physical therapy, a wrist brace, x-rays of

the right wrist (normal) and spine; and medications. She noted degenerative joint disease of the lumbar spine and suspected some nerve irritation or compression. Dr. Burns ordered restrictions of sedentary duty, no lifting greater than 10 lbs., limited bending and twisting. Claimant started physical therapy at Concentra shortly thereafter.

5. By August 16, 2019 Dr. Burns ordered an MRI of the lumbar spine, diagnosing lumbar radiculopathy, lumbar strain and right wrist strain.

6. The August 16, 2019 MRI read by Dr. Brian Steele of Health Images showed as follows:

> 1. At L4-LS there is a medium-sized broad-based right paracentral/foraminal caudally-directed disc extrusion that causes moderate thecal sac stenosis and impinges on the transiting right L5 nerve root in the lateral recess. The disc also contacts the transiting left L5 nerve root to a lesser degree and contributes to mild bilateral foraminal stenosis.
>
> 2. A caudally-directed central disc extrusion at L5-S1 only slightly narrows the thecal sac but contacts both transiting S1 nerve roots, without nerve root compression or displacement.
>
> 3. At L3-L4 there is a broad-based right paracentral disc protrusion that contributes to mild-moderate thecal sac stenosis and contacts the transiting right L4 nerve root in the lateral recess.
>
> 4. Smaller disc protrusions at L1-L2 and L2-L3 does not cause thecal sac stenosis or specific nerve impingement. No sites of severe degenerative foraminal stenosis are present.

7. On August 19, 2019 Dr. Burns noted that the MRI showed a large disc extrusion with compression of the nerve root on the right at L4-5. Claimant continued to have right sided paraspinal spasms, limited ROM and positive SLR on the right. Claimant complained of increasing pain and numbness. She injected a Ketorolac Tromethamine intramuscular solution, prescribed pain medication and referred Claimant to Dr. Pehler, an orthopedic spine surgeon.

8. Dr. Stephen F. Pehler of Colorado Orthopedic Consultants evaluated Claimant on August 29, 2019 and diagnosed lumbar disc herniation with radiculopathy, spondylosis of the lumbar spine with radiculopathy and low back pain. He documented that Claimant had low back pain with right lower extremity radiculopathy, numbness and tingling, and was not able to work due to the pain and limped when walking. He documented Claimant had increased pain with prolonged sitting and at nighttime. He reviewed the MRI films and noted L4-5 lumbar disc herniation with right neuroforaminal narrowing and nerve root compression, and recommended a right-sided transforaminal epidural steroid injection. He commented that if symptoms did not subside, then Claimant would require a microdiscectomy. He prescribed gabapentin, flexeril and lidocaine patches.

9. Dr. Burns noted on September 6, 2019 that Claimant continued with severe pain in the low back and radiating pain down the right leg. He was having problems sleeping as he would wake up with pain down his leg and would have difficulty going back to sleep. Exam, diagnoses and restrictions remained the same. Dr. Burns administered another Ketorolac injection on September 27, 2019 while awaiting authorization for steroid injection with the specialist.

10. Claimant was attended by Dr. Barry A. Ogin of Colorado Rehabilitation & Occupational Medicine on October 10, 2019 for a right L4 and L5 transforaminal epidural steroid injection (ESI). The 7/10 pre injection pain level was immediately reduced to 0/10 post-injection. He was given a pain dairy and recommended follow up with Dr. Pehler.

11. On October 18, 2019 Dr. Burns reported that Claimant was working but that it was a struggle to make it to the end of the 4 hours and he was in significant pain, even with an extended lunch break. On October 23, 2019 Nurse Hanna Bodkin noted that she was very concerned that Claimant was having problems with getting and understanding proper instructions for follow up, medications, procedures and would benefit from a nurse case manager.

12. Dr. Pehler submitted a request for authorization on November 1, 2019 for the right sided L4-5 microdiscectomy surgery for the large herniated disc as Claimant had failed conservative treatment including therapy and injections.

13. On November 7, 2019 Dr. Burns noted that Claimant was being scheduled for surgery but it had not yet been authorized. Claimant was again out of medications on December 19, 2019 and was still awaiting authorization for surgery. Claimant was getting some weakness down his right leg. His daily pain was a 9/10. Dr. Burns noted that it was clear that Claimant needed surgery as he had a definite disc herniation that was compressing on his nerve. He was weak on the right side and short relief with injections. She discussed consulting with Dr. Pehler to refile the request for authorization since it had been 5 months since his injury.

14. Dr. Burns noted on January 31, 2020 that Claimant's back and right leg were more painful, and had been doubling up on his medications as his employer was working him for longer shifts. Dr. Burns noted that Claimant was moving very slowly, obviously limping when transitioning from sitting to standing and walking.

15. Dr. Pehler performed the surgery on February 12, 2020 at The Medical Center of Aurora with a post-operative diagnosis of lumbar disk herniation with radiculopathy, right sided at L4-L5.

16. On February 24, 2020 Dr. Pehler noted that Claimant had improving back and leg pain though still had ankle tingling. Claimant was taking oxycodone, Robaxin (Methocarbamol) and Tizanadine for pain and spasms, which were helping.

17. Claimant was not doing well three weeks post-op, when Dr. Burns examined him on March 6, 2020, with low back pain radiating down into the right leg, though his leg pain was improving. At that time Claimant was taking 3 Vicodin per day for pain. Dr. Burns noted that Claimant had been having significant difficulties with the physical requirements of his job before surgery.

18. On March 30, 2020 Dr. Pehler continued to assert that Claimant had significant improvement to his right lower extremity radiculopathy, however still noted some right toe and foot numbness. He also documented Claimant had stiffness in his low back as well as spasms. He reported that the oxycodone and Robaxin had been helping. He referred Claimant to physical therapy and provided further medications.

19. By March 27, 2020 Dr. Burns noted that Claimant's pain in the low back had intensified and the pain down his right leg was also worsened, with the right foot going

numb and walking too long causing pain and fatigue. On exam she palpated bilateral muscle spasms of the lumbar spine.

20. Claimant was treated by Devan Ohi, P.T. on March 31, 2020 who noted on exam that Claimant demonstrated high level of pain, reporting 8/10 pain, minimally changed with posture changes, except that pain increased with prolonged sitting or standing. He demonstrate limited LS ROM in all directions, most significantly with extension, which also reproduced right sided great toe numbness. He noted glute atrophy and that Claimant would benefit from physical therapy to address the deficits. Notes continued through May 13, 2020 with further recommendations for PT.

21. Dr. Burns documented on May 1, 2020 that Claimant could not stand for more than 20 minutes before his back started to hurt so bad he had to sit down, and was still having numbness in his right foot and pain behind his right knee. He continued to be on gabapentin, skelaxin and Lidoderm patches, which helped but when off medication he was miserable. She made a referral for a neurosurgery consult with Dr. Rauzzino regarding the post-surgical radiculopathy. Dr. Burns still had Claimant off work at this point

22. On May 12, 2020 Claimant had the evaluation with Dr. Michael Rauzzino, who documented that following the L5 disc extrusion surgery, Claimant had worsening low back and right leg pain, was increasingly frustrated due to failure to improve post-surgery and was unable to work. On examination he noted a well-healed lumbar incision, positive straight leg raise on the right, negative on the left; loss of ROM, subjective weakness of his right EHL. Claimant complained of diminished sensation on the top of his toe and he walked with an antalgic gait secondary to pain. Dr. Rauzzino recommended a follow up MRI.

23. The MRI was performed at Health Images -- Diamond Hill on May 20, 2020, and was interpreted by Dr. Kevin Woolley. It showed evidence of a previous right L4-L5 laminotomy with a broad-based disk bulge, a small right paracentral protrusion with mild degenerative changes, mild right-sided foraminal tension, and mild spinal stenosis. The impression was interval right-sided L4-L5 laminotomy with decreased spinal stenosis and disk extrusion, a small residual disk protrusion was noted with no recurrent disk herniation.

24. On May 28, 2020 Dr. Pehler reviewed the MRI noting that there was improvement at the L4-5 level though some degenerative compression on the descending L5 nerve root and he planned on referring Claimant for an L4-5 transforaminal ESI. Claimant reported low back and leg pain but there was no interpreter present so communication was difficult. He continued to diagnose lumbar radiculopathy.

25. Dr. Burns documented on June 1, 2020 that Claimant was unable to stand up straight, was in a flexed position, had loss of normal lordosis, had mild swelling at the incision, and had tenderness at the L3-L5 level paraspinals with bilateral muscle spasms, limited range of motion and antalgic gait. She provided ibuprofen. In July she added a Medrol pack, stating he was no better and needed a functional capacity evaluation and kept him off work.

26. Dr. Ogin performed a right L4 and L5 transforaminal ESI on June 29, 2020 at Belmar Surgery Center.

27. On August 3, 2020 Dr. Burns provided the first work restrictions of working only 4 hours a day, lifting 5 lbs. occasionally, push/pull 5 lbs. occasionally.

28. Claimant had another transforaminal ESI on November 5, 2020 by Dr. Ogin, who documented pre-injection pain of 8/10 and a post-injection 0/10 pain level.

29. Dr. Burns commented on November 5, 2020 that Claimant had his second injection with Dr. Ogin and was feeling better already, making him hopeful it would help. He was out of medications again and she prescribed Lidocaine patches and Metaxalone.

30. On November 30, 2020 Claimant reported to Dr. Burns that the injection had helped for about 2 weeks, and now he was getting worse again, had a pain level of 8/10 and felt like he was being stabbed in the right foot. On exam she noted that Claimant had loss of normal lordosis, tenderness in the bilateral paraspinals and right sacroiliac joint, right sided muscle spasms, loss of range of motion, increased pain with facet loading on the right and was limping on the right. She noted that Claimant needed to return to his surgeon for further evaluation. She also increased his work restrictions to lifting, pushing and pulling 10 lbs. occasionally but only up to 4 hours a day.

31. Dr. Pehler's PA, Maria Kaplan mentioned on December 30, 2020 that Claimant received approximately two weeks of relief from a third post-surgical ESI. Claimant continued to have significant pain in the low back and right lower extremity radiculopathy, with reduced quality of life and difficulties sitting and walking. She recommended a two level interbody fusion of L3-5 as he had failed continued conservative care.

32. Dr. Burns recorded on January 19, 2021 that Claimant continued to worsen with pain in his low back, with muscle spasms and a sensation of nails driven into his foot from time to time. She noted that Dr. Pehler was recommending a fusion. She sustained that objective findings were consistent with history and work related mechanism of injury, and she decreased restrictions to lifting 20 lbs., with no repetitive bending or stooping.

33. While Claimant awaited the decision for further surgery and an IME result, Claimant's pain in the low back continued to be documented by Dr. Burns, who ordered further medications for pain control.

34. At Respondent's request for an independent medical evaluation, Dr. Brian E. Reiss, an orthopedic spine surgeon, examined Claimant on March 17, 2021. He did an extensive medical record review including the films of both MRIs. He stated that Claimant continued with constant central low back pain of 8/10 with 9/10 at its worst and 6/10 at its best. Claimant also complained of posterior leg pain at the knee and some numbness at the bottom of his right foot. Dr. Reiss wrote that Claimant did not show pain behaviors.

35. On exam Dr. Reiss noted Claimant was able to heel and toe stand, had loss of ROM, had some tenderness centrally, and at the right SI ligament and sciatic notch. SLR was positive on the right, with decreased sensation of the right big toe and some groin pain with a Faber test. Dr. Reiss indicated that the first MRI showed a herniated disc at L4-5 but the second one was done without gadolinium, which was not optimal. He

mentioned that there might be a retained central disc protrusion at the L4-5 which might be touching the right L5. He recommended a new MRI with gadolinium and an EMG to determine nerve root involvement, but stated that there was no indication for a fusion. He diagnosed post-laminectomy syndrome[1], deconditioning, and primarily back pain.

36. Following additional record review, on April 23, 2021 Dr. Reiss opined that a multilevel fusion for the low back in the absence of instability was unlikely to provide any benefit. He specifically noted that the pain generator had not been identified and conservative care had not been completed. He recommended core strengthening, aerobic conditioning and a stretching program.

37. On June 17, 2021 Dr. Burns noted that the surgery had been denied due to failure to reinstate physical therapy after the surgery and Claimant's post-surgical decline. Dr. Burns recorded that Claimant requested a second surgical opinion and that medications were helping with his night pain. She prescribed physical therapy, and changed the lifting restrictions to 25 lbs. with no repetitive bending or stooping.

38. Dr. Rauzzino saw Claimant for a second opinion on July 6, 2021. On examination, he observed Claimant had bilateral negative SLR, limited ROM, was not able to walk on his toes or his heels. Reflexes were 1/4. Dr. Rauzzino recommended updated imaging and flexion and extension x-rays. He stated that it was not clear what was Claimant's pain generator given the diffuse nature of his axial lumbar pain. Claimant continued to take oxycodone for pain but his pain continued getting worse. Dr. Rauzzino also recommended Claimant return to see Dr. Pehler since Claimant had not been evaluated since the fusion surgery was initially recommended in December 2020. He stated that it would be difficult to know that performing a lumbar fusion would actually clinically improve Claimant's symptoms given Claimant's poor response to the microdiskectomy and the fact that he had continued persistent leg pain in the absence of a significant structural lesion.

39. Claimant's MRI of July 25, 2021 showed multilevel degenerative changes in the lumbar spine with associated disc bulging and annular fissuring at the L1-2 and L2-3; circumferential disc bulging indenting the ventral thecal sac resulting in moderate right subarticular recess stenosis at the L4-5 level which might have been impinging on the exiting L5 nerve root; and circumferential bulging at the L5-S1 level with mild foraminal narrowing.

40. On August 3, 2021 Dr. Burns emphasized that Claimant had most pain with standing, walking and driving, though medications helped, and he had pain chiefly in his right lower back which radiated down his right leg. He was unable to squat. She continued to prescribe medications and reduced restrictions to 15 lbs. maximum lifting, limited bending, twisting and stooping.

41. Dr. Pehler attended Claimant on August 5, 2021 noting that Claimant continued to have fairly significant back pain as well as right lower extremity pain, especially worse with standing and extension. Dr. Pehler remarked that the repeat MRI demonstrated some slight worsening at the L3-4 and L5-S1 levels. However, the biggest area of work-related pathology was at the L4-5 level, the site of his previous

[1] Dr. Raschbacher described post-laminectomy syndrome as failed back syndrome

microdiscectomy. He thought it would be reasonable to consider a one level L4-5 oblique lateral interbody fusion with percutaneous fixation to address his most significant level of pathology. In the interim, he sent Claimant for a right-sided transforaminal epidural steroid injection at the L4-5 level. He noted Claimant was still continuing to have worsening pain symptoms that were affecting his quality of life and ability to work.

42. Claimant was referred by Dr. Burns to Dr. Zimmerman for an impairment rating on October 12, 2021 noting that Claimant should have permanent work restrictions in the sedentary category.

43. Dr. Frederic Zimmerman placed Claimant at maximum medical improvement on October 14, 2021. He noted that Claimant failed conservative care and proceeded with surgery in February 2020. He had also had epidural steroid injections, which did not significantly improve his symptoms long term. He recorded that Claimant had constant low back pain across the lumbosacral region that radiated down the right lower extremity with bending activities, paresthesia down the right lower extremity which resolved with position changes, difficulty walking community distances and was forced to sit down after five minutes of walking. He also documented weakness and decreased sensation in the great toe.

44. On exam, Dr. Zimmerman observed that Claimant went from a seated to standing position in a very slow and stiff fashion, ambulated with antalgia/stiffness of the right lower extremity with a very short stride length, had weakness in the right EHL compared to the left with sensation subjectively decreased to light touch in the right great toe, an equivocal SLR test, positive neural tension on the right and valid ROM testing. He diagnosed low back injury status post L4-5 laminotomy and post-laminectomy syndrome with pain and radiculitis down the right lower extremity. He provided a 21% whole person impairment rating. Dr. Zimmerman issued light physical demand category work restrictions with no stooping, bending, crawling, crouching, or ladders, as well as limited to ambulating on level ground and stated he qualified for a disability parking pass.

45. Dr. Burns noted Claimant was at MMI on October 18, 2021, noting that objective findings were consistent with history and work related mechanism of injury. On exam, Dr. Burns noted that Claimant had decreased lordosis of the lumbar spine, tenderness present in right paraspinal muscles from L3-S1, but not the left and loss of range of motion. Dr. Burns diagnosed status post lumbar surgery with lumbar radiculopathy (acute). She provided work restrictions of maximum lifting to 15 lbs., limited bending, twisting, stooping, no ladders or crawling. She made a referral for a health club membership.

46. Dr. Rauzzino issued a letter to Respondents in response to specific inquires on October 26, 2021. He stated that he did not see a new large recurrent disc protrusion at L4-L5; the discs at L3-L4, L4-L5, and L5-S1 showed similar degeneration and disc protrusions. He did not see a clearly definable pain generator that would require surgery, that fusion surgery would likely not treat Claimant's pain or relieve his symptoms; and

more likely would worsen his condition. He was interested in knowing whether Dr. Pehler would consider a one level L4-L5 fusion instead of the two level fusion.[2]

47. Claimant was evaluated by Dr. Mark Winslow, the Division Independent Medical Examination (DIME) physician on March 15, 2022. Claimant reported that subsequent to the surgery, he continued to worse with lower extremity symptoms though was not sure he wanted to move forward with further surgery unless surgery was assured to relieve his symptoms. On exam, he found increased paraspinal muscle tone and pain with range of motion and valid measurements. He found no focal neurologic deficits. He diagnosed acute lumbar radiculopathy, status post lumbar surgery with residual symptoms and stiffness. He opined as follows:

> I reviewed the opinions from the neurosurgeons and their opinions regarding surgery. On review of the medical record, on clinical examination of the patient I must agree with Dr. Rauzzino. It is my opinion based on the patient's past history, current presentation, and the known pathology that the patient would most likely not do well with a subsequent surgery. In addition, it is my opinion that as Dr. Rauzzino stated he might actually be worse. The patient has had a poor outcome to his previous surgery, is a smoker, deconditioned, there is not a significant identifiable pain generator, there is no instability demonstrated on imaging that is available.

48. Dr. Winslow found Claimant to be at MMI as of October 14, 2021 as no further active treatment was likely to change Claimant's symptoms. He provided an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised)*, of a Table 53IIE rating of 10% of the lumbar spine specific disorder and 14% for loss of range of motion for a combined impairment of 23% whole person. Under restrictions he stated "[l]ight physical demand category. No stooping, bending, crawling, crouching or climbing ladders. Level ground work with no stairs. Disabilities parking pass."

49. Claimant returned to see Dr. Pehler on April 1, 2022 who documented Claimant had persistent low back pain with right sided buttock and leg pain. Plain films showed spondylosis with an underlying spinal deformity and has a history of recurrent protrusion as well as progression of spondylosis at L4-5. He recommended a new MRI.

50. Respondents filed a Final Admission of Liability on June 2, 2022 consistent with Dr. Winslow's report, and admitted to maintenance medical care pursuant to Dr. Burns' October 18, 2021 report.

51. Claimant was evaluated by Cynthia Bartmann for an Employability Evaluation, who issued a report dated July 29, 2022. Ms. Bartmann interviewed Claimant and reviewed the medical records, specifically for restrictions. She relied upon the work restrictions provided by ATP Zimmerman and Dr. Winslow, of light physical demand category, no stooping, bending, crawling, crouching or ladders, ambulation on level ground only (no stairs) as well as noting he qualified for a disability parking pass. She also considered ATP Burns' restrictions of 15 lbs. lifting, limited bending, twisting, and stooping with no ladders and no climbing as well as DIME physician Winslow's light duty restrictions with no stooping, bending, crawling, crouching or ladder climbing, walking only on level ground and a disability parking pass. Ms. Bartmann noted that the lifting of 15

[2] Dr. Reiss may not have had Dr. Pehler's August 5, 2021 report that recommended a one level fusion at the L4-L5.

lbs. did not release Claimant to a full range of light work which requires up to 20 lbs. lifting. She noted that a physician's recommendation for a parking pass required limited walking no more than 200 feet without stopping.[3]

52. Claimant reported to Ms. Bartmann that he had typically 5/10 to 6/10 pain on a numeric pain scale, with pain radiating to his right leg to the knee and continuing down to his big toe, with numbness in the big toe, weakness in the right leg and occasional use of a cane. She highlighted that Claimant had a ninth grade education in Spanish and did not attend any English as a second language courses. Claimant reported working in a factory using a forklift and mixing cement to pour into molds, cutting down trees, picking up trash, and construction cement work. At his employer of injury, Claimant would lift 50 lb. bags of mix, standing and walking throughout the day. He was then moved to working modified duty, sorting materials in the shop, washing cars, and sweeping. Though while doing modified duty he required an extended break before he could complete the part time work. Claimant could not read or write English and for the majority of his time he had a bilingual supervisor, though was able to understand simple directions in English.

53. Ms. Bartmann opined that Claimant's entire work history involved working as a laborer in production, mainly unskilled work without transferable skills to other occupations. She opined that, considering Claimant's providers' restrictions, he fit more in the sedentary than light category of work, which comprised mainly of telemarketer, customer service, night auditor, concierge and front desk work, for which Claimant did not have the vocational skills. Ms. Bartmann opined that Claimant was permanently and totally disabled as any employment opportunities in the general labor market did not match Claimant's skills and work restrictions as well as the fact that employers would not be willing to train a 59 year old worker.

54. John Raschbacher, M.D. issued an Independent Medical Evaluation at Respondent's request on September 6, 2022. He took a history, reviewed the records and examined Claimant. Dr. Raschbacher noted no concerning findings on exam except for Claimant's exaggerated behaviors and complaints of pain and limitations, and that Patrick's test on the right produced groin pain. He opined that there was no physiologic or medical reason for him to have loss of range of motion, loss of strength and impairment. He mistakenly noted that Claimant qualified for a Table 53IIB impairment of 8% whole person for the lumbar spine and disagreed with both Dr. Zimmerman and Dr. Winslow regarding their assessments of restrictions and impairment. He provided a 40 lb. work restriction assuming that Claimant had any real symptoms at all, for the lumbar spine, "which he may well not, given his presentation" according to Dr. Raschbacher. ROM testing results were attached to the report August 25, 2022 Rule 8 IME but were not assessed for validity as Dr. Raschbacher did not believe them to be valid.[4] But the pain diagram attached showed a pain pattern consistent with Claimant's treaters' descriptions in the records.

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[3] Claimant only met the eligibility requirement of Colorado disabled parking permit eligibility guidelines for limited walking.

[4] Dr. Raschbacher did not take a second set of ROM numbers during his exam pursuant to the requirements of the *AMA Guides*.

55. Kristine M. Couch, OTR performed a Functional Abilities Evaluation on September 15, 2022. During the testing she noted that Claimant had a consistent and valid performance in 22 of 22 in multiple validity testing parameters. Testing showed Claimant was able to sit for up to 21 minutes, required position changes, and had increased low back with continual sitting. Claimant attempted the 12 minute treadmill test but was only able to complete 6:38 minutes and ambulated with an altered gait, favoring his right leg and leaned heavily on the rails. He reported low back pain radiating into the right groin with walking. Claimant had difficulty and limitations with positional tolerances. He was able to lift 15 lbs. shoulder to overhead, and 20 lbs. knuckle to shoulder but was unable to lift floor to knuckle. He was limited in his ability to lift with the bilateral upper extremities to 15 lbs. for 50 feet with an altered gait but only up to 10 lbs. with either the right or left upper extremity individually. Lifting testing was terminated due to increased pain in the lumbar spine.

56. Ms. Couch noted that Claimant's abilities demonstrated a capacity to lift between sedentary and light work categories as defined by the US Department of Labor. He was unable to demonstrate the ability to tolerate repetitive horizontal reaching and forward bending, the ability to tolerate repetitive supination/pronation of the forearms while stepping side to side, unable to demonstrate the ability to tolerate sustained standing while performing repetitive reaching between chest level and the overhead on an occasional basis, and was limited in his ability to tolerate stair climbing during the evaluation. Claimant was unable to complete any crouching, stooping, kneeling or repetitive bending testing, which was consistent with the restrictions provided by his ATPs. Claimant reported his abilities as less than what testing showed during the FCE. As found, Ms. Couch's findings were consistent with Dr. Burns and Dr. Zimmerman's work restrictions previously provided at MMI.

57. Claimant was evaluated by Dr. David W. Yamamoto of Peak to Peak Family Medicine at Claimant's request for an Independent Medical Evaluation (IME) on October 26, 2022. He interviewed Claimant, took a history, reviewed the medical records and examined Claimant. He was provided a mechanism of injury of being jerked back while mixing concrete using a portable mixer and being thrown back feeling immediate pain. Claimant reported a 7/10 pain with an aching in his lower back, radiating down his right leg and stated his great toe was numb . Claimant reported he had increased pain with standing and could only walk for 10 minutes before he had major pain. He stated that he could stand for only 20 minutes at a time, had difficulty putting his socks on and tying his shoes. He also conveyed he had depression and anxiety as a result of the work injury.

58. On exam, Dr. Yamamoto observed that Claimant appeared uncomfortable with movement, had tenderness over the inguinal area, noted the surgical incision, decreased ROM, antalgic gait favoring the right leg, positive straight leg test on the right, decreased sensation over the medial right foot and decreased EHL strength on the right compared to the left. He diagnosed lumbar radiculopathy, ongoing low back pain post lumbar surgery with residual symptoms and stiffness. He conveyed that Dr. Zimmerman and Dr. Winslow's evaluations, and permanent restrictions were consistent with the FCE performed by Ms. Couch. He averred that Dr. Raschbacher arbitrarily assigned a 40 lb. work restrictions without testing or evidence of ability. Dr. Yamamoto opined Claimant had sustained a lower back injury and was treated appropriately but did not do well with

the L4-5 microdiscectomy. He disagreed with Dr. Raschbacher, noticing his mistaken citation to the *AMA Guides* for specific disorder and failure to properly assess ROM. He agreed with the restrictions that were provided by Dr. Winslow and Dr. Zimmerman. He further opined that Dr. Winslow had provided an accurate report and rating and that Claimant would be unlikely to find any work based on his chronic pain, lack of function and lack of English skills.

59. Ms. Bartmann provided an addendum report dated November 5, 2022. At that time she reviewed additional records including Ms. Couch's FCE, and IMEs from Dr. Raschbacher and Dr. Yamamoto. She noted that, even using Dr. Raschbacher's 40 lb. work restrictions, Claimant would be unable to return to his pre-injury job or any position he had performed in the past. She stated that these restrictions were categorically different and not consistent with the work restrictions of Dr. Zimmerman, Dr. Burns, Dr. Winslow, and Dr. Yamamoto. She stated that restrictions of no bending, crawling, crouching or stair climbing combined with the added work restrictions provided by Ms. Couch in her Functional Capacity Evaluation would eliminate all production and machine operator jobs. She agreed with Dr. Yamamoto's conclusion that Claimant would not be able to find any work based on his chronic pain, his lack of function and his lack of English skills and opined that Claimant was permanently and totally disabled from a vocational standpoint.

60. Katie G. Montoya performed a Vocational Assessment on November 15, 2022, though she interviewed Claimant on September 27, 2022. Claimant reported that he drove to the appointment five to ten minutes, but generally limited his driving as his low back pain would increase and his right foot would get tired. Claimant reported he had no prior injuries. Claimant reported he worked in cement, concrete and masonry work most of his working life, setting forms, making/mixing concrete, setting up scaffolds, taking up materials, stacking materials, and bringing materials where they were needed. Claimant reported that he was never in a supervisory or lead position. Claimant reported to Ms. Montoya that he did not feel he could work, that he had gone to multiple companies, including restaurants, factories, and cement companies, they had seen him and had said no. Ms. Montoya reported Claimant stated he could not work because of the following:

> He explained it is due to the fact that he cannot walk long, cannot stand long, and cannot bend over. [Claimant] believes he can walk about five to 10 minutes. He can stand still approximately 20 to 30 minutes. [Claimant] is able to sit longer but explained that he still must move. He explained that he really does not lift from the floor at all. If he lifts from the table level it is 15 pounds. This is due to back pain. [Claimant] explained that he is able to use his hands at the table level. He does not use a cane but will use a cart when he is at the store. [Claimant] had been up and down during our interview, and he explained that was typical.

61. Ms. Montoya reviewed the medical records in this smatter, including Dr. Zimmerman's MMI report, Dr. Winslow's DIME report, Dr. Raschbacher's Respondent IME report, the FCE performed by Kristine Crouch and Dr. Yamamoto's Claimant IME report. She also reviewed Ms. Bartmann's vocational assessment. Ms. Montoya opined that Claimant's work history showed he was an unskilled worker. She noted that Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto's work restrictions were substantially similar and opined they allowed for light duty work, so long as Claimant was not required to perform bending, crawling, crouching, stooping, ladders and ambulate only on level

ground with no stairs. She stated that Claimant had limited options due to his unskilled Spanish speaking profile but could perform production and packaging work. She opined that, when considering Dr. Burns' 15 lb. restriction, that Claimant's work availability was further limited but included food preparation, packaging, office cleaning, and some forklift operation. She opined that when considering Dr. Raschbacher's decreased limitations, the job opportunities increased.

62. On February 3, 2023 Claimant was evaluated by Nurse Kelly F. as a walk-in patient with complaints of middle back and right foot swelling. Dr. Lesley Pepin ordered an ultrasound of the right lower extremity, which was normal. X-rays of the hip findings were inconclusive and unclear. He was advised to follow up with his primary doctor.

63. Claimant was attended at Platte Valley Medical Center for low back and right leg pain and foot swelling. Claimant reported two weeks' history of increased pain and symptoms. PA Noel Kiley noted a normal exam. Claimant reported no numbness or tingling to his legs, no weakness, no loss of bowel or bladder function and advised Claimant that an MRI of the lumbar spine was not medically indicated at that time and recommended Claimant return to see his surgeon, take Tylenol and Motrin for pain, provided a muscle relaxer, lidocaine patches to help pain control and recommended ice or heat. She diagnosed lumbar spine pain.

D. Claimant's Testimony:

64. In the past Claimant worked as a laborer driving a forklift, trimming trees, and in construction and masonry. Some of his supervisors were only English speaking and Claimant would understand some of their instructions regarding work to be performed. However, if he did not understand his supervisor, while working for Employer, he would request that the supervisor's assistant, someone from the office, the mechanic or one of the truck drivers to interpret for him, but while working modified duty, most of the time it was the mechanic that was in the shop all the time. Occasionally, his supervisor would give him instructions to wash a car or clean the floor and he would understand those instructions in English. Claimant speaks some English, but he does not read or write English.

65. He did have to fill out paperwork when he began employment with Employer, all of which were in English. He had help completing them and only signed them. He also was provided with an employee handbook and a benefits package, both of which were translated by a coworker at the Employer's yard. This ALJ noticed that the completed forms handwriting in Exhibit O and the signature handwriting were distinctly different, with the exception that the Benefit Enrollment and Change form at bate stamp 423 seems that have been completed by the signatory (name and identifying information only).

66. Approximately two months after his surgery in February 2020, Claimant went to where his original supervisor was working and was not offered any further employment. He was instructed to contact the main office to see what his options for employment would be. Claimant contacted Employer's main office and enquired about work. He was informed that there was no space for him. Employer never contacted Claimant after that time.

67. Claimant contacted multiple businesses in search for employment. He provided his phone number but did not fill out any written applications for employment.[5] He did make some specific enquiries about jobs as a laborer and did not provide his restrictions. The prospective employers were for production factories, a thrift store, an electrical business, construction work and framing work. He would go to the job sites and speak with the supervisors who had the ability to hire laborers. Claimant believed he was not hired because they would notice how he was walking but none mentioned his problems with walking.

68. Claimant understood that Dr. Pehler recommended a second surgery, which was not authorized or approve by Insurer.

69. He used to visit his father daily. His father lived approximately five blocks away but Claimant would drive to his house, not walk. His father moved away, and was living with his brother, who was taking care of him, though he later moved to Mexico for most of the time, returning to live with his brother only two to three weeks at a time. In the spring, he would water his plants and flowers every day during the season, but he did not have any grass. He would either stand or sit on a wooden chair, both at his own home and when his father lived near, his father's garden, which was approximately 10 by 10 ft., a little larger than his own. He could stand for approximately 10 minutes then would need to sit down. He did not use other tools other than the hose.

70. Claimant would drive his father to the store, appointments and other errands. He would only drive thirty to forty minutes at a time due to his back pain. At around twenty minutes his back pain increased and by thirty the pain was not tolerable and would go to his lower extremity into his foot. He attempted to get a handicap placard for his vehicle but when he went to the DMV (Department of Motor Vehicle) he was told he needed a medical form. Claimant went to Eastside Family Health Center, his primary care provider, and was told by one of the physicians that he had to be in a wheel chair to qualify for one.

71. Claimant had recently sought medical attention at Denver Health Medical Center due to the increased pain in his low back and right leg, which was hurting and was swollen, changing colors on the sole of the foot. He was also having groin pain and that was the first time he had groin pain. They provided him medication, they ordered x-rays and gave him an injection for the pain. They also did an ultrasound due to the swelling of the leg and groin pain.

72. He attempted to return to Concentra but they personally declined to attend him. He then went to Brighton Platte Valley Hospital. They referred Claimant back to his surgeon, Dr. Pehler, at Concentra. He continues to take medications which include, Cyclobenzaprine 10 mg, three times daily, Morphine but only one tablet at the time of the visit to Platte Valley, prednisone 40 mg, once per day in the mornings, and Gabapentin.[6]

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[5] This ALJ infers that Claimant did not have anyone available to assist him in completing any formal applications for employment.

[6] The Final Admission of Liability dated June 2, 2022 shows that Respondents admitted to maintenance medical benefits. Counsel for Respondents indicated he would contact his client to have Concentra authorize the follow up visits.

73. He had a functional capacity evaluation with Ms. Couch. Claimant stated that they tested his ability to sit, stand, and required change in positions. He was able to walk on the treadmill approximately six minutes before he asked to stop the tests due to back and groin pain. He was also limited in performing the bending test, and other tests with his arms away from the body as it significantly increased his pain. There were also some tests that he declined to perform due to the back and leg pain, like crouching and squatting. He was able to do lifts from chest to shoulder level and other lifts, but not from the floor.

74. Claimant continues to have problems with pain in his low back and right leg since his injury. He is able to walk approximately 10 minutes, then he needs to rest or sit down. He is unable to bend down and lift an item from the floor. He has to lie down during the day for approximately one hour. His wife does the cooking, shopping and cleaning. He only makes the bed in the morning. Sometimes he does go with his wife to do the shopping so that he can walk for a little but goes out to wait in the car when he tires out. He generally proceeds to bed around 9 to 10 p.m. but will wake up in pain around 1 a.m. and stays up until around 5 or 6 a.m. when he returns to lay down. He then gets up again around 10 or 11 a.m. He has to alternate between laying down, standing, walking and sitting during the day. During the night he may watch TV or walk to distract him with the pain. The pain is what limits him. He is unable to bend at the waist, crouch, and squat without pain. When he needs to pick up something from the floor, he has to hold on to the wall or a table. He continues to perform his home exercise program to help with the pain. When he walks greater than ten minutes the pain increases, coming from his low back. He uses a cane to walk every so often.

75. Claimant stated that, but for the leg symptoms, he might be able to work, but the symptoms going down the leg prevent him from being able to work.

76. On multiple occasions Claimant requested to have questions repeated. This ALJ observed and noticed Claimant's confusion and lack of understanding on those occasions.

77. Claimant continues to have problems with his low back as he cannot bend forward and touch the floor. He also has problems with his foot and leg, which limit his movement and function. He stated that, if not for his leg, he might be able to work at a fast food restaurant or at a vegetable factory separating vegetables. Claimant declared his leg symptoms prevent him from working.

78. He can walk approximately 10 minutes before the pain in his back increases and now the pain is worse with groin pain. Claimant's biggest problems continue to be with the low back pain, the right leg pain and the groin pain.

79. At times, during the hearing, Claimant was visibly uncomfortable, moving around in his chair, as well as standing and sitting. This ALJ noted that Claimant took breaks from sitting on more than one occasion and request formal breaks.

Dr. Yamamoto's Testimony:

80. David W. Yamamoto, M.D., an expert in medicine generally, occupational medicine and family medicine as well as a Level II accredited physician by the Division of

Workers' Compensation, testified at hearing on June 23, 2023. Dr. Yamamoto reviewed the medical records, Claimant's restrictions as well as reviewing Respondent's IME physician's report.

81. Dr. Yamamoto agreed with the restrictions imposed by the DIME physician, as they were consistent with his examination of Claimant. He was considered to be in the light duty category, which means occasional lifting to 20 lbs., no bending, no crawling, no crouching or climbing ladders. He specifically opined that Claimant should not perform any job that would require him to bend repetitively. He also agreed that Claimant should have a handicap permit. He reviewed Kristine Couch's Functional Capacity Evaluation and stated she was extremely professional in how she did her work, was well known in the community and provided very dependable reports every time. He opined that Dr. Raschbacher's assignment of a 40 lb. restriction with no other limitations was very arbitrary and subjective. This is based on the fact that Dr. Raschbacher provided no evidence that he had done any testing for lifting limitations. He opined that Dr. Winslow and Dr. Zimmerman provided valid and objective reports in a scientific administration of the test for range of motion.

82. Dr. Yamamoto stated that it was a physician's responsibility to provide physical restrictions which can be used by vocational experts to reach an opinion with regard to the work they may perform. He expressed that Claimant had not recovered the function he had hoped following the microdiskectomy surgery. He mentioned that the MRI of May 20, 2020 showed a right-sided laminotomy with decreased spinal stenosis, a disc protrusion and multi-level degenerative changes but no longer showed the extrusion on the right at L4-L5 and stenosis. Dr. Yamamoto did not find any sign of instability post-operatively. Both he and Dr. Zimmerman observed that there was a decrease in the spinal stenosis post-surgery and no recurrent disc herniation. He noted that, unlike his examination of a positive straight leg test, a subjective finding, Dr. Zimmerman opined that Claimant had a tight hamstring, not nerve pain, which he did not consider a significant point.

83. Dr. Yamamoto opined that Claimant's work injury was the straw the broke the camel's back. In essence, Claimant was able to work a heavy duty job for many years, up to the point that he was injured, which is something that happens with laborers that are his age. He voiced that it was not uncommon to have degenerative changes in addition to what looked like a treatable condition. He specifically pointed out that neither the ATP nor the DIME physicians rated the radicular symptoms. This ALJ infers that the reason for the choice not to rate was not clear from either report. Dr. Yamamoto explained that it is the rater's choice, but under the *AMA Guides for the Evaluation of Permanent Impairment*, Third Edition (*Revised*), under Table 53IIE, Claimant had a surgically treated disc lesion with residual, medically documented pain and rigidity with or without muscle spasm. Dr. Yamamoto agreed with both Dr. Winslow and Dr. Zimmerman that the surgery, while technically successful, did not help Claimant's symptoms, as Claimant continued with radicular symptoms and he did not regain function.

E. Testimony of Cynthia Bartman:

84. Ms. Cynthia Bartman, an expert vocational evaluations, testified at hearing on June 23, 2023. Ms. Bartman interviewed Claimant, reviewed the medical records, and considered Claimant's work restrictions as well as his residual labor market, if any. She noted Claimant had light duty restrictions, no stooping, bending, crouching, crawling and no ladders and the Functional Capacity Evaluation performed by Kristine Crouch. She noted that, she considers whether a patient has a valid profile on the FCE to consider whether a Claimant had an indication of maximal effort and Claimant met 22 of 22 for validity markers. She also considered that Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto all agreed he should have a handicapped parking tag. The last requires limits on walking, which were consistent with the FCE. She stated that if a physician feels a claimant is able to walk over 200 feet, they should not recommend a parking permit.

85. Ms. Bartman opined that, contrary to Ms. Montoya's opinion, there is no work that would match Claimant's vocational skills and his sedentary to light work restrictions, and his limitations. She opined that the majority of the jobs identified by Ms. Montoya were primarily in the medium or heavy work categories and did not match Claimant's work restrictions or the overwhelming medical evidence. Those jobs identified fit only within the restrictions provided by Dr. Raschbacher. Further, in assessing Claimant's skill level based on the jobs and how he performed those jobs, he primarily worked performing unskilled work and laboring manual jobs. Ms. Bartman opined that there were no jobs in the local labor market that he could perform within his skill set in the sedentary to light duty categories. [7] Ms. Bartman stated as follows:

> [Claimant] mainly worked in the unskilled work category, so what I indicated earlier is that there would be very few skills, if any, that would ever transfer into other occupations, so then you have to look at what is his chances of getting other unskilled work. But then you have to factor in his work restrictions. And when I look at his work restrictions, I do not believe there are any jobs in the local labor market that matches his vocational skills and his work restrictions and that would come available in his local labor market. There are no matches when I evaluate each one of those elements.
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> …
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> I do labor market research every single week by calling employers and inquiring on the physical requirements of many different jobs, I feel like I have a firm understanding.

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[7] This ALJ takes judicial notice of the *Dictionary of Occupational Titles (4th Ed., Rev. 1991)* -- Appendix C by the U.S. Department of Labor job category list of physical demands as follows:
A) S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.
B) Light Work - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.
C) Medium Work - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

86. Ms. Bartmann stated that there were certain types of jobs that employers would be willing train workers at Claimant's age (59) such as front desk and customer service if they had prior computer skills. However, considering Claimant's background of no skills and work restrictions, she opined employers were not willing to train. Further, she noted that while packing job may sitting allow, very infrequently, that they would also require horizontal reaching, which Claimant was unable to perform pursuant to the FCE and Dr. Yamamoto's recommendations pursuant to the FCE. Others required the ability to read and write in English, which Claimant could not do. Ms. Bartmann consulted the Dictionary of Occupational Titles (DOT)[8] to determine whether the jobs identified by Ms. Montoya were appropriate for Claimant considering his limitations and restrictions. The jobs, such as packaging, cleaning, food prep, required occasional bending, were inappropriate for Claimant considering his restricted, Ms. Bartmann never found any positions suitable for someone with Claimant restrictions. Ms. Bartmann opined that Claimant was permanently and totally disabled from employment,

F. Testimony of General Superintendent:

87. The general superintendent testified that he supervised Claimant's supervisor, as well as Claimant when he worked in the shop on modified duty after his injury form October 8, 2019 to February 11, 2020. [Redacted, hereinafter MZ] stated that he gave Claimant instructions of the jobs to perform each morning. He stated that he did not give instructions to have his instructions translated but that the workers were continuously speaking in Spanish, which was their native language. He did not recall having Claimant's supervisor or the main office contact him if Claimant went to either of them about a job following his surgery, as neither informed him as was the company policy.

G. Testimony of Katie Montoya:

88. Ms. Montoya testified as an expert vocational rehabilitation and assessment. Ms. Montoya interviewed Claimant on September 27, 2022. She obtained a history including that Claimant had ongoing low back and right leg pain that was constant. He stated that he was not the same person he used to be and could not do what he used to do. Claimant reported physical limitations consistent with his testimony at hearing. Ms. Montoya reviewed the medical records including the work restrictions prescribed by different providers, including the parking pass eligibility and the FCE performed by Ms. Couch. She discussed the jobs Claimant had sought out but that he had filed no formal applications for employment, as he had been turned away.

89. Ms. Montoya performed labor market research in this case after reviewing all available information by looking at local employment posting and sources as well as

[8] The Dictionary of Occupational Titles, Volume I & II (Forth Edition, Revised 1991) U.S. Department of Labor, Employment and Training Administration, U.S. Employment Service, found at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00357017o&view=1up&seq=1 and at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00357018m&view=1up&seq=1 as they are in the public domain and not updated since 1991.

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the DOT for the job classifications and determining any transferable skills. She relied on those restrictions that allowed Claimant to work the full range of light work, identifying jobs that fit that category, and possible job leads in the general metropolitan labor market. Ms. Montoya did not identify any that were within 20 minutes of Claimant's home. She opined that Claimant could earn a wage within the light duty category. She agreed that the DOT classification for forklift operator fell within the medium unless there was a job with cross-classification. She also agreed that hand packager was also in the medium category under the DOT. Further, Ms. Montoya did not consider any walking limitations.

H. Testimony of Dr. Raschbacher:

90. Dr. John Raschbacher testified at the second hearing as an expert in occupational medicine. At the time of his examination on September 6, 2022 Claimant was complaining of low back and leg pain. He noted that the post-surgical MRI of May 2020 showed resolution of the disc extrusion that was supposedly pinching the nerve and that Dr. Rauzzino indicated that Claimant had persistent leg pain in the absence of structural lesion. He also opined that the July 26, 2021 MRI did not show any re-herniation. Dr. Raschbacher went on to state that the surgery was "technically successful" and could not explain why the Claimant continued with symptoms, going so far as to state "that assumes he is, in fact, suffering leg pain. I don't – I doubt that he is. That's just what he's saying." This ALJ infers that Dr. Raschbacher is stating that Claimant is lying when he is reporting that he has leg pain. He also stated that things to look for to determine whether there is some abnormality are normal lumbar lordosis and the presence of lumbar spine spasms, positive SLR or positive tripod sign.

91. Dr. Raschbacher went on to exhaustively articulate the need for an EMG to be ordered by providers, then stated that it would not change the outcome, his complaints, his treatment or the need for further surgery. Dr. Raschbacher noted that he did not belief Claimant was telling the truth and if he were, the surgical outcome would be successful. He disagreed with Dr. Winslow that Claimant had a poor outcome to the surgery.

92. Lastly, he opined that FCEs were rarely indicative of a patient's abilities or restrictions despite the validity criteria being met as patients rarely if ever give a good effort. He recommended a 40 lb. work restriction and stated that Claimant really does not need any restriction at all. Dr. Raschbacher opined that Dr. Winslow and Dr. Zimmerman's opinions that Claimant had a poor outcome of his surgery was incorrect because Claimant was not telling the truth. However, he could not site to any medical records where any other physician found Claimant not credible or not truthful.

93. This ALJ finds Dr. Raschbacher's opinions not credible and contrary to medical records. Nothing in the DIME report, Dr. Zimmerman's, Dr. Burns' or other treater's, or Dr. Yamamoto's reports support the conclusion that Claimant was not truthful to his providers. It is well noted that while surgeries can be "technically successful" because it takes away the source of the original offending tissue, it may leave patients with permanent conditions and ongoing symptomology. While Dr. Raschbacher did not believe this Claimant, this ALJ does not doubt the veracity of the Claimant and his complaints of symptoms that limit his abilities as Claimant has consistently been reporting the same symptoms as shown above for the last four years.

I. Ultimate Findings:

94. As found, Claimant had no significant or relevant medical conditions that limited his ability to perform work as a heavy masonry worker prior to his work injury of August 10, 2019. Claimant is found credible and persuasive.

95. As found, Claimant had ongoing consistent low back pain from the day of the work related accident on August 10, 2019 to the present that limit his function. As found, the work related injury caused the ongoing symptoms despite providers being unable to identify a specific pain generator that would be amenable to surgery. As found, Claimant's work related injury was admitted and was the reason for the surgical treatment that resulted in Claimant's failed back syndrome or post-laminectomy syndrome. As found, simply because there is no identified pathology that can be addressed by surgery does not naturally indicate that there is nothing wrong with Claimant. Claimant clearly responded to steroid injections, improving for a short while, with symptoms returning wthin weeks. Here, throughout most of the medical care, Dr. Burns document that Claimant had ongoing lumbar spine spasms on the right, stiffness and significant loss of range of motion. Multiple other providers, other than the ATPs also highlighted objective findings. Dr. Rauzzino found positive straight leg raise on the right, negative on the left; loss of ROM, subjective weakness of his right EHL. Dr. Reiss wrote that Claimant did not show pain behaviors, had loss of ROM, had tenderness centrally, a positive SLR on the right, decreased sensation of the right big toe and some groin pain with a Faber test. Dr. Winslow found increased paraspinal muscle tone, and loss of range of motion. Dr. Yamamoto found decreased ROM, antalgic gait favoring the right leg, positive straight leg test on the right, decreased sensation over the medial right foot and decreased EHL strength on the right compared to the left. This ALJ is persuaded by the multiple providers that recorded objective findings over the lone physician that did not even believe Claimant had any symptoms. As found, Claimant has significant ongoing chronic pain caused by the work related August 10, 2019 injury.

96. As found, Dr. Winslow's opinion regarding a 'significant identifiable pain generator" was in the context of his opinion against recommending further surgery and not that Claimant was either symptom magnifying or was not truthful as Dr. Raschbacher suggested. It was simply noting that, from a surgical perspective, there was not sufficient identified pathology to operate again, and was not a comment about Claimant's credibility or disability, which are for this ALJ to determine and not a medical opinion. As found, Dr. Winslow, Dr. Zimmerman and Dr. Burns clearly found Claimant trustworthy as they provided ongoing care recommendations, work restrictions and formal significant impairment ratings. The opinions of Drs. Burns, Zimmerman, Winslow and Yamamoto were consistent and more credible than the contrary opinions of Dr. Raschbacher, who is specifically found not credible.

97. As found, Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto all agreed Claimant qualified for a parking permit. As found, when a physician indicates that a patient qualifies for a permit, they are indicating that the patient meets the legal criteria of limited walking up to 200 feet and ranges greater than that only with breaks or assistance.

98. As found, the job of office cleaner would require stooping, bending, crouching, and possibly stairs, which Claimant is unable to perform, which is fully

document in the credible medical records. The job of hand packer and food preparer would require bending forward and horizontal reaching. Claimant was unable to perform these activities during the functional capacity evaluation, which is found credible, valid and consistent with Dr. Yamamoto's credible endorsement of the evaluation. These types of jobs would also require occasional bending to pick items off the ground, which Claimant credibly testified and Dr. Burns documented he was unable to perform. These jobs would also most likely involve standing and sitting for extensive periods of time, which Claimant is unable to do as he requires frequent rests to lay down during the day. As found, Claimant could not perform the job of fork lift driver pursuant to the work restrictions of his ATPs as it would involve climbing on to the machine, and would not be considered to be on level ground. As found, any of the jobs which were potentially identified as possibly available to Claimant do not meet all of the Claimant's functional limitations or work restrictions. As found, even if the work restrictions of the ATPs had fit within the parameters of the proposed jobs identified, Claimant is unable to obtain and retain a job because he is unable to rest a full night without frequently waking up and staying awake for long hours at a time and requires rest breaks laying down during the day due to the unremitting low back and leg pain caused by the August 10, 2019 work injury.

99. As further found, considering Claimant's ongoing consistent complaints of low back pain and radicular symptoms, Claimant's background and experience, his transferable skills or lack thereof, as well as the persuasive vocational evidence Claimant has proven that he is permanently and totally disabled. As found, despite the robust current labor market, Ms. Bartmann's opinions and testimony are found more credible and persuasive that those presented by Ms. Montoya. Not because Ms. Montoya is not credible, but because Ms. Montoya's assessment did not include all of Claimant's credible and persuasive work restrictions and physical limitations caused by the chronic pain that prevent him from performing the full range of light duty jobs identified. In light of Claimant's education, primarily Spanish language skills, limited unskilled laboring experience, the accumulation of work restrictions provided by his ATPs, the DIME physician and Dr. Yamamoto, related to the admitted work injury, and his ongoing functional limitations, from the totality of the credible and persuasive evidence, Claimant is permanently and totally disabled.

100. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

B. Permanent Total Disability Benefits

To prove his claim that he is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Indus. Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 ¶ 26. Claimant must

also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Wallace v. Current USA, Inc.* W.C. No. 4-886-464 (ICAO, Dec. 24, 2014).

The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether Claimant can earn any wages, the ALJ may consider various human factors, including Claimant's physical condition, mental ability, age, employment history, education and availability of work that Claimant could perform. *Weld County Sch. Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter* 2019 COA 53 ¶ 26. The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (ICAO. Apr. 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his particular circumstances. *Weld County Sch. Dist. Re-12 v. Bymer*, *supra*; *Blocker v. Express Pers.* W.C. No. 4-622-069-04 (ICAO, July 1, 2013.). Whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

Because permanent total disability is based upon a claimant's impaired access to the labor market, medical evidence is neither required nor dispositive of permanent total disability. See *Baldwin Construction Inc., v. Industrial Claim Appeals Office*, 937 P.2d 895 (Colo. App. 1997). To the contrary, the claimant's testimony, if credited, may alone be sufficient to support a finding of permanent total disability. Chacon v. I.C.A.O., W.C. No. 54-382-050 (September 26, 2003). However, to the extent medical evidence is presented, the ALJ is the final abiter of conflicts in the evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). It is immaterial if the record contains some medical and vocational evidence which, if credited, might support a contrary determination. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The determination of the weight to be accorded the various pieces of evidence is a matter within the ALJ's province as the fact-finder. *Rockwell International v. Turnbull, supra*.

This ALJ finds and concludes Claimant has proven, by a preponderance of evidence, that due to the restrictions that flow directly from his work injury he is permanently and totally disabled. Most important, the ALJ credits Claimant's testimony as it relates to his development of symptoms and limitations after his August 10, 2019 work injury and his surgery. This includes his limited ability to engage in activities of daily living, and physical activities necessary to obtain and retain employment.

The ALJ also credits the opinions of Dr. Burns, Dr. Zimmerman, and Dr. Winslow, all of whom listed work restrictions that were similar and substantially consistent. Those work restrictions include lifting no more than 15 to 20 lbs. occasionally, no bending, no stooping, no crouching, no crawling, no ladder climbing, as well as limited twisting, ambulating on level ground (no stairs or climbing) and was qualified to obtain a parking permit that includes limited walking up to 200 feet without breaks. These restrictions largely concurred with the findings of the Functional Capacity Evaluation which was later performed by Ms. Crouch. Ms. Crouch's evaluation is found to be persuasive, and markedly consistent with Claimant's acknowledged functional abilities.

This ALJ also credits and finds persuasive the testimony of Claimant's vocational expert, Cynthia Bartmann. Ms. Bartmann credibly explained Claimant's limited education, advanced age, lack of English skills including reading and writing, his limited work experience as an unskilled laborer, the physical restrictions as laid out by his ATPs Dr. Burns and Dr. Zimmerman, which are the human factors considered, all support the conclusion that Claimant is precluded from work due to his work injury of August 10, 2019 and that Claimant is permanently and totally disabled. This ALJ credits Claimant's testimony, the opinions of the authorized treating physicians, Dr. Burns and Dr. Zimmerman as well as the opinions of the DIME physician, and the opinion of Ms. Bartmann to conclude that the claimant is permanently and totally disabled. Further, when these are considered with the opinions of Dr. Winslow and Dr. Yamamoto, and the findings of the FCE by Ms. Crouch, as well as the Claimant's inability to find, secure and retain any jobs that may have become available in the labor market due to his inability to sleep, requiring rest periods during the day and his ongoing chronic pain, are all human factors that, collectively, support the finding that Claimant is unable[9] to earn a wage due to his August 10, 2019 work related injuries, and therefore, is not employable in a competitive job market, despite its current robustness.

While Respondents argue that this ALJ misapplied the facts to the law, this ALJ disagrees. Here, Respondents state that both Dr. Zimmerman and Dr. Winslow identified that Claimant could perform work in the light duty category. This ALJ interprets light duty work as the general ability to stand for up to 8 hours day and lift up to 20 lbs., with frequent lifting up to 10 lbs. Dr. Zimmerman issued light physical demand category work restrictions with no stooping, bending, crawling, crouching, or ladders, as well as limited to ambulating on level ground and stated he qualified for a disability parking pass.

Dr. Burns provided work restrictions of maximum lifting to 15 lbs., limited bending, twisting, stooping, no ladders or crawling, though she did not state she considered this light work, though it may be classified as not the full range of light duty. Both physicians limited the kind of work that Claimant could perform to something less than the full range of light work. In fact, Claimant's functional abilities, as demonstrated by the credible FCE performed by Ms. Couch, were less than this category when considering all of Claimant's limitation caused by the severe back injury and pain Claimant continued to experience following the unsuccessful lumbar surgery. Further, Claimant credibly testified that he could not lift from the floor or more than occasionally lift items or walk for more than 10 minutes without taking a break, and, required multiple breaks to lay down during the day. While Ms. Montoya identified several jobs available in the market, which involved the full range of light duty work. One of the jobs was as a tomato packer. This was a line job and would not be consistent with Dr. Burns' restrictions of 15 lbs. lifting, limited bending, twisting, and stooping, and this ALJ inferred that it would require reaching and standing for extensive periods of time, which Claimant stated he was not able to do. This ALJ did not consider this type of job to be within Claimant's functional abilities, given the credible and persuasive evidence.

[9] The FFCL issued on August 18, 2023 stated "able" instead of unable as appropriate given the context of the order. This was a scrivener's error.

Respondents argue that because Claimant had a recent complaint of groin pain, that the ongoing complaints cannot be linked to the August 10, 2019 work related injury. Claimant was placed at MMI as of October 18, 2021 and established what his physical limitation were at that time. The groin pain did not come about until 2023 and are found not to be a significant factor in the determination of whether Claimant was permanently and totally disabled upon reaching MMI.

Lastly, Respondents argue that Claimant's functional limitations as testified by Claimant cannot be relied upon for a determination of permanent total disability. Yet they cite no specific case law that supports this conclusion. In fact, case law states that an ALJ can make such a determination based on Claimant's testimony alone, if found credible, and need not rely on a specific medical opinion. However, in this case, Claimant's functional limitations is actually documented by providers. For example, Dr. Burns found Claimant to have difficulty standing up straight, had loss of normal lordosis and noted that objective findings were consistent with history and work related mechanism of injury. Dr. Burns noted that Claimant had spasming of the lumbar spine, tenderness present in right paraspinal muscles from L3-S1, and loss of range of motion. Other providers also documented multiple difficulties Claimant had with function that support his testimony. This bolsters Claimant's credibility in the final assessment of the totality of the evidence.

This ALJ concludes that Claimant cannot perform the full range of light duty work, has significant physical factors and functional limitations beyond those provided by his providers, as well as a significant amount of personal and human factors that affect Claimant's ability to return to the work force and cannot earn any wages. This ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that Claimant is permanently and totally disabled.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant is permanently and totally disabled.

2. Respondents shall pay permanent total disability benefits beginning October 14, 2021, which is the date Claimant reached MMI.

3. Based on the admission in the record, Claimant's TTD rate is $573.09. As a result, Claimant's PTD rate is currently $573.09.

4. Respondents may take credit for any temporary disability, permanent partial disability benefits or other allowable offset for benefits paid to Claimant after MMI against any retroactive PTD benefits payable to Claimant.

5. Respondents shall pay Claimant interest at the rate of eight percent (8%) per annum for all compensation benefits which were not paid when due.

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

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

DATED this 29th day of November, 2023.

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-220-689-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer in September 2022.

2. Whether Claimant established by a preponderance of the evidence entitlement to medical benefits.

3. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver beginning July 10, 2022. (Ex. G). Claimant testified he was injured while pulling a dolly up a truck ramp in early September 2022 while making a delivery, although Claimant could not recall the precise date of the alleged injury, or the location where it occurred.

2. On September 3, 2022, Claimant saw Heather Roesly, M.D., at the UCHealth emergency room in Green Valley Ranch, reporting intermittent left leg cramping for several months, which he reported was worse over the previous few days. Claimant reported he had always suffered from cramps, and it was likely due to excessive sweating association with working outside. Dr. Roesly recommended Claimant hydrate appropriately and follow up with his primary care provider. Claimant did not report any work-related injury at this visit. (Ex. D).

3. On September 6, 2022, Claimant saw Kimberly Maiers, PA-C, at the UCHealth emergence department at the Anschutz Medical Campus, reporting left lower calf pain, radiating into his upper thigh and back, and left calf swelling. He reported the pain as severe enough to prevent him from working and doing normal activities of daily living. Claimant reported having intermittent left calf pain for a year. Evaluation for deep vein thrombosis was negative. Ms. Maiers' clinical impression was pain of the lower extremity, with possible neuropathy. She prescribed gabapentin and recommended physical therapy. Claimant did not report any work-related injury at this visit. (Ex. E).

4. On September 9, 2022, Claimant was seen at Swedish Medical Center for a lumbar x-ray. The x-ray was negative for acute abnormality in the lumber spine. (Ex. C). No other record of Claimant being seen at Swedish Medical Center was offered or admitted into evidence. However, other providers reviewed the treatment note and summarized Claimant's evaluation, indicating Claimant reported left leg pain beginning approximately one year earlier. Claimant reported a distant history of motor vehicle

collision in and that he was told he had an L4-L5 disc bulge. Claimant stated his symptoms resolved so he never pursued surgery. (Ex. F).

5. On September 13, 2022, Claimant saw Alvin Padua, D.C., at Aim High Chiropractic, reporting shooting pain in his leg, shooting into his lower back. Claimant reported acute leg pain starting one week earlier, without a known origin, but noted that it started as a cramp "over a year ago." Claimant did not report a work-related injury. (Ex. C).

6. On September 21, 2022, Claimant was seen again at the UCH emergency department for low back and left leg pain. Although Claimant indicated he lifted heavy objects at work, he did not report a specific mechanism of injury, or being injured in the course of his employment. (Ex. A).

7. On October 20, 2022, Claimant reported to Employer that he sustained an injury to his lower back when he slipped on a ramp while loading a truck in a dark alley at a unknown location. Employer completed a First Report of Injury on October 20, 2022, which lists the date of injury as October 20, 2022. (Ex. G).

8. Also on October 20, 2022, Claimant saw Brian Cass, M.D., at UC Health, for complaints of back pain radiating into his left leg after heavy lifting at work 2½ months earlier. (The treatment note for this date was not offered or admitted into evidence). (Ex. A).

9. On November 1, 2022, Claimant was first seen by a workers' compensation provider, when he was evaluated at Workwell by Casey Jones, PA-C. The record from the initial evaluation was not offered or admitted into evidence, but was summarized by various other providers. Claimant reported he was injured while carrying a large load of plates and dishes on a dolly up a ramp. He reported he tried to catch himself, and the dolly fell on him, forcing him into a wall. Claimant reported left calf and lower back pain. Claimant denied prior similar problems, and was diagnosed with a lower back strain. Physical therapy was recommended. (Ex. F & A).

10. Over the following month, Claimant received physical therapy at Workwell, and had follow up appointments with Workwell providers. No records of Workwell visits from November 2022 were offered or admitted into evidence, although the treatment was summarized by others. (Ex. A).

11. On November 3, 2022, Claimant saw Ms. Jones, who noted that Claimant had a motor vehicle accident in 2012 which resulted in an L4-L5 disc bulge, for which Claimant was told surgery may be required. Ms. Jones opined that Claimant's pre-existing L4-L5 disc bulge was asymptomatic prior to his September incident, and that Claimant's current symptoms were work-related. She recommended a lumbar MRI and spine referral. (Ex. A).

12. At Claimant's initial physical therapy evaluation on November 3, 2022, Claimant reported needing to use a cane to ambulate, and that his pain was unrelenting, impacting his ability to sit, bend, walk and sleep. (Ex. A).

13. Claimant saw Lynne Yancey, M.D., at Workwell on November 9, 2022 and November 28, 2022. (Ex. F & A). At the November 28, 2022 visit, Claimant reported he had completed a course of steroids, and was moving better, but had now regressed to his pre-medication baseline. Claimant reported using a cane for ambulation. Dr. Yancey referred Claimant to Stephen Pehler, M.D., for evaluation of his ongoing reported symptoms. (Ex. F & A).

14. On December 2, 2022, Claimant had a lumbar MRI which showed a minimal disc bulge at L4-L5 with mild facet arthropathy and ligamentum flavum hypertrophy, without spinal canal or neuroforaminal stenosis. The MRI also showed a mild disc bulge at L5-S1, with a subarticular disc protrusion resulting in mild to moderate spinal canal stenosis, with compression of the traversing left L5 nerve root. (Ex. A & F).

15. Claimant's next documented medical visit was December 7, 2022 with Dr. Yancey, M.D., at Workwell, for a date of injury of September 1, 2022. Dr. Yancey documented her review of Claimant's records from a September 9, 2022 Swedish Medical Center visit, and noted Claimant had provided a history indicating his symptoms had existed for one year prior to that evaluation. Dr. Yancey also reviewed Claimant's October 20, 2022 and indicated Claimant reported a 2.5-month history of lower back and left leg radiation after "heavy lifting at work." She opined that the timeline would put his injury date in early August 2022, several weeks before his reported injury date. (Ex. F).

16. At the December 7, 2022 visit, Claimant reported his lower leg was worse, and that his pain level was 10/10. He reported his pain was worse with all movements, and that he was unable to tolerate prolonged standing or walking. Dr. Yancey opined that Claimant's reported symptoms corresponded to the disc bulge shown on his MRI, and noted he was scheduled for an evaluation with Samuel Chan, M.D., for an EMG. (Ex. F).

17. On December 8, 2022 and December 12, 2022, Claimant attended physical therapy visits at Workwell. Claimant's physical therapy records document that Claimant reported severe pain with transitions and gait, and that he was using a cane. One of Claimant's functional goals was listed as "To be able to ambulate without quad cane > 100 feet." (Ex. F).

18. On December 14, 2022, Claimant saw Dr. Yancey with no reported significant changes in his condition. (Ex. F).

19. On December 15, 2022, Claimant saw Dr. Pehler. (Dr. Pehler's note from this date was not offered or admitted into evidence, but is summarized by other providers). Claimant reported debilitating pain, difficulty weight bearing, and needing to use a cane. Dr. Pehler performed x-rays and recommended an L5-S1 epidural steroid injection for a large central and left-sided L5-S1 disc herniation with nerve impingement. Dr. Pehler noted that if injections did not improve, a microdiscectomy would be recommended. (Ex. F & A).

20. On December 16, 2022, Claimant saw Samuel Chan, M.D., for a physiatry consultation. (The treatment note for Dr. Chan's December 16, 2022 visit was not offered

or admitted into evidence, but is summarized and referenced in other records). In a June 4, 2023 letter, Dr. Chan indicated Claimant was using a single point cane at his visit, and had significant pain behavior. On December 16, 2022, Dr. Chan performed an EMG study of Claimant's left leg which was within normal limits. He noted that there was no electrophysiologic evidence of left sided lumbar radiculopathy or lumbosacral plexopathy, and no evidence of nerve entrapment or neuropathy of the left leg. (Ex. A & B).

21. On January 12, 2023, Dr. Chan performed a left L5-S1 transforaminal epidural steroid injection (TESI). Eight days later, on January 20, 2023, Claimant returned to Ms. Jones using a cane for ambulation, and reporting 10/10 pain, without obvious signs of discomfort. Ms. Jones indicated the TESI provided no benefit and recommended additional physical therapy. (Ex. A).

22. Claimant's next documented treatment notes is a physical therapy re-evaluation from February 16, 2023. Claimant had attended 13 physical therapy visit, and reported continued severe pain. He reported "increased pain after walking a few steps," and his goals continued to include walking without a cane for greater than 100 feet. It was also noted that Claimant had not responded to conservative therapy. (Ex. F).

23. On February 17, 2023, Claimant saw Jacqueline Denning, M.D., at Workwell. Ms. Denning documented that Claimant sustained a fall injury in September 2022, and that there was a "delay of care [due to] insurance coverage logistics." Claimant reported to Ms. Denning that he woke that morning experiencing the worst pain since his injury, radiating down his left leg, and now had popping in his left knee. On examination, required support to stand on his heels and toes, and reported requiring a cane for ambulation. Dr. Denning diagnosed Claimant with a lower back strain and lumbar radiculopathy. (Ex. F).

24. On February 23, 2023, Claimant saw Dr. Pehler, reporting that buttock and leg pain and requiring a cane for ambulation assistance. Dr. Pehler characterized Claimant as having a very large and significant herniation on the left-hand side at the L5-S1 level. He recommended a left-sided L5-S1 microdiscectomy. (Ex. F).

25. Respondents performed video surveillance of Claimant on eight days between November 8, 2022, and January 5, 2023. The video surveillance footage contained in Exhibit I is approximately 22 minutes in length. The surveillance videos show Claimant walking, jogging a short distance, walking his dog, riding an electric bicycle, carrying various items, loading, and unloading vehicles, getting in and out of a vehicle, working in a garage, ducking under a partially open garage door, going into various buildings, and shopping in a store, all without apparent difficulty. Although Claimant is seen carrying a cane at various points in the video, the majority of footage shows Claimant walking without the use of a cane, and with a normal gait. At some points, Claimant is shown carrying, but not using a cane to walk. When using the cane, Claimant alternately used it in his right or left hand, and did not appear to be placing any weight on the cane, or using it to assist in walking. On November 9, 2022, the day Claimant had two appointments with Workwell, Claimant is shown walking in and out of a building and into a parking lot using a cane or adjustable walking stick. Video from November 11 and 12, 2022, shows Claimant walking, jogging, and working in a garage, without a cane. When considered in

its totality, the video surveillance demonstrates that Claimant symptoms were not as reported to his health care providers, and that he did not require a cane for ambulation. (See Ex. I). Although Claimant testified briefly regarding the video footage, he offered no credible, cogent explanation for his ability to perform these tasks without apparent difficulty, while reporting severe pain and limitations to his physicians.

26. On February 8, 2023, Claimant underwent an independent medical examination (IME), with Carlos Cebrian, M.D., at Respondent's request. Dr. Cebrian reviewed Claimant's medical records and performed an examination. After completion of the evaluation, Dr. Cebrian was provided with video surveillance footage of Claimant. Dr. Cebrian's description of the surveillance footage he reviewed is consistent with the ALJ's interpretation of the video provided for hearing. Dr. Cebrian noted that Claimant presented at the IME with an exaggerated limp of the left leg while using a cane in the right hand. Based on his review of records, examination, and review of video surveillance, Dr. Cebrian opined that Claimant had no work-related diagnoses. He indicated that Claimant's lumbar pain was degenerative changes at L5-S1 due to a disc protrusion compressing the left S1 nerve root, but did not attribute Claimant's condition to any work-related cause. The ALJ finds Dr. Cebrian's opinion credible.

27. On June 4, 2023, Dr. Chan authored a letter to Respondents' counsel after reviewing Dr. Cebrian's report. Dr. Chan noted that Claimant's clinical presentation was significantly different than that described by Dr. Cebrian in his report. For example, Dr. Chan noted that when he saw Claimant he was using a single-point cane, and had significant pain behavior, including alternating sitting and standing during his clinical visit. Dr. Chan opined that Claimant's lumbar pain and left leg complaint "is incidental, independent and unrelated to his work" for Employer. He opined that Claimant required no further treatment modalities, and that any further treatment should be provided outside the workers' compensation system. (Ex. B).

28. At hearing, Claimant testified his work for Employer was labor intensive, and that he worked more hours than other employees. He testified that he was injured when pulling a dolly up a ramp while making a delivery, but he did not recall the specific date or the location where he was injured. Claimant testified that had his condition been preexisting, he would not have been able to perform a labor-intensive job, and that he had no leg or back problems prior to his alleged injury. Claimant testified that he underwent back surgery in June 2023, and now he is better.

29. Claimant's co-worker, [Redacted, hereinafter SY] testified at hearing that he has worked with Claimant for frequently, and does not recall seeing Claimant limp or exhibit signs of an injury before September 2022. He confirmed that Claimant's job is labor intensive, and that Claimant worked a lot of hours.

30. [Redacted, hereinafter BL], Employer's general manager, testified at hearing that Claimant worked full -time from September 2022 through October 2022. BL[Redacted] testified that Claimant reported an injury on October 20, 2022, and Claimant has not worked for Employer since.

31. The admitted evidence is insufficient to permit the ALJ to determine Claimant's average weekly wage.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant

demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has failed to establish that he sustained an injury arising out of the course of his employment with Employer. Claimant testified and reported to various medical providers that he was injured in early September 2022. Claimant's claim that he sustained an injury in the course of his employment with Employer is not credible for multiple reasons. First, although Claimant was evaluated at least four times from September 3, 2022 through September 21, 2022, by physicians at UC Health and by chiropractor Dr. Padua, he did not report a work injury to these providers. Claimant indicated to these providers that he had a history of left leg pain for approximately one year prior to September 2022. The ALJ does not find it credible that Claimant would seek care from multiple providers without reporting to any of them alleged incident which he claims caused his pain. Nor is it credible that four different providers failed to document a report of the alleged incident.

Next, Claimant did not report a work-related injury until October 20, 2022, more than six weeks after it allegedly occurred. When Claimant did report the incident, as described on the First Report of Injury, he did so in vague terms, without identifying the location where the incident allegedly occurred. In testimony, Claimant could not recall the date of the alleged incident. The ALJ does not find it credible that Claimant cannot recall the location of the alleged injury, or the date on which it occurred.

Next, Claimant was able to work full-time for all of September 2022, until reporting an injury to Employer on October 20, 2022. Claimant's assertion that he would not be able to work if his injury was preexisting is inconsistent with his ability to work full-time for approximately six weeks after it allegedly occurred. Moreover, the surveillance videos are inconsistent with his reports to medical providers, and demonstrate that Claimant's condition was not as represented.

The ALJ credits the opinions of Drs. Cebrian and Chan that Claimant's symptoms are not work-related. Although Claimant's treating providers have opined that his condition is work-related, these opinions rely on the Claimant's self-report of the mechanism of injury and the emergence of symptoms. Those reports are inconsistent with his contemporaneous reports to his providers prior to October 20, 2022. Although Claimant had pathology at the L4-L5, and L5-S1 levels, the evidence does not establish that these conditions were caused by or aggravated by his employment with Employer.

At hearing, and in position statements, Claimant appears to contend that Respondents' payment for medical care helps establish that he sustained a work-related

injury. Although Insurer apparently paid for medical treatment Claimant received for his back and left leg, the payment of medical services is not in itself an admission of liability, and such payments do no prevent respondents from challenging the compensability of a claim. *See Ashburn v. La Plata School Dist. 9R*, W.C. No. 3-062-779 (ICAO May 4, 2007); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO Jun. 3, 2020) (Provision of medical care "does not necessarily establish that claimant was injured, it only establishes that the claimant claimed she was injured.")

Based on the totality of the evidence, the ALJ concludes that Claimant has failed to meet his burden to establish that it is more likely than not that he sustained an injury to either his lower back or left leg arising out of the course of his employment with Employer.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to medical benefits.

Temporary Total Disability

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103 (1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to temporary total disability benefits.

Average Weekly Wage

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

Because Claimant has failed to establish that he sustained a compensable injury, determination of Claimant's average weekly wage is moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that he sustained a compensable injury to his back or left leg arising out of the course of his employment with Employer.

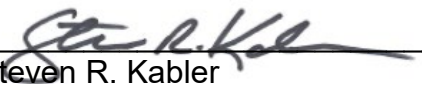
2. Claimant's claim for medical benefits is denied and dismissed.

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

4. Determination of Claimant's average weekly wage is moot.

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

DATED: November 29, 2023



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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that all medical treatment after June 8, 2022 (including all recommendations and referrals made by Dr. Kennan Vance and Dr. Benjamin Sears) constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted September 20, 2021 work injury?

Have Respondents demonstrated, by a preponderance of the evidence, that Claimant experienced an intervening event on June 8, 2022 or June 9, 2022 that was sufficient to sever Respondents' liability?

Has Claimant demonstrated, by a preponderance of the evidence, that on August 30, 2023 she suffered further injury while in the quasi-course of employment?

FINDINGS OF FACT

1. Claimant worked for Employer as a cashier and "self check-out host". On September 20, 2021 Claimant suffered an injury to her right shoulder while lifting a case of beer while working for Employer. Respondents have admitted liability for the September 20, 2021 work injury.

2. Following the September 20, 2021 injury, Claimant was diagnosed with a torn right rotator cuff. On December 22, 2021, Dr. Keenan Vance performed a repair of Claimant's torn rotator cuff. Specifically, the procedure included "diagnostic operative arthroscopy of the right shoulder with extensive intra articular debridement", and "repair of a massive retracted rotator cuff tear and subacromial decompression including acromioplasty".

3. Unfortunately, the initial surgery failed and on May 17, 2022, Dr. Vance performed a right reverse total shoulder arthroplasty. In the operative report, Dr. Vance noted "63-year-old female with osteoporosis that failed her rotator cuff repair. Intraoperatively on the rotator cuff repair we had difficulty with her anchors holding into the bone."

4. At the completion of the May 17, 2022 surgery, x-rays were performed and showed that the hardware from the reverse total shoulder arthroplasty was "intact and well seated".

5. Thereafter in June 2022, Claimant suffered two falls at home. Claimant testified that the first fall occurred on June 8, 2022, when she was exiting her vehicle, and she slipped and fell onto her right side.

6. Claimant further testified that she fell a second time on June 9, 2022. In this instance, Claimant was on her porch and placing a water bowl for her cat. As she returned to standing, she began to feel lightheaded and fell backwards onto her buttocks.

7. In a medical record dated June 22, 2022, Claimant was seen by her primary care provider (PCP) Dr. Daniel Sullivan regarding recent shortness of breath. At that appointment, Claimant reported to Dr. Sullivan that she had fallen twice at home. Dr. Sullivan recorded that the first fall occurred when "she was getting some bags out of the trunk and she landed on her side and knees." Dr Sullivan also noted that with this first fall she thought she had broken ribs on her right side. With regard to the second fall, Dr. Sullivan noted that it was "a porch fall as she began to black out due to not having her oxygen. She landed on her bottom".

8. On July 6, 2022, Claimant returned to Dr. Vance. In the medical record of that date, Dr. Vance noted Claimant's report that she had fallen at home "a couple of weeks ago". Claimant informed Dr. Vance that she "tried everything not to fall on her shoulder but she did break [four] ribs and she fell on her knee." Based upon Claimant's report of a fall, Dr. Vance ordered x-rays.

9. On that same date, x-rays of Claimant's right shoulder revealed a heme fracture of the glenoid with dislodgement of the glenoid component. Dr. Vance listed it as an active problem of an acute periprosthetic fracture around the prosthetic joint.

10. Dr. Vance advised Claimant that due to this fracture, another revision surgery would be necessary. Dr. Vance noted that such a revision surgery would require bone grafting and a new glenoid component. As a result, Dr. Vance referred Claimant to another surgeon with experience with such complex procedures. This referral was made to Dr. Benjamin Sears in Denver, Colorado.

11. On August 3, 2022, Claimant was seen by Dr. Sears. In reciting Claimant's history, Dr. Sears noted that after the reverse total shoulder arthroplasty, Claimant "had another fall about [six] weeks later". Dr. Sears noted that the fall resulted in loosening the surgical hardware that is now "completely dislodged". Dr. Sears recommended a two stage procedure and placement of a custom glenosphere. Prior to scheduling the procedure, Dr. Sears also expressed concern about a possible infection and ordered a CT scan of Claimant's right shoulder. Dr. Sears also ordered nerve conduction studies.

12. On August 30, 2022, Claimant attended an independent medical examination (IME) with Dr. John McBride. In connection with the IME, Dr. McBride reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. McBride opined that Claimant's need for the initial rotator cuff repair and the reverse total arthroplasty were both related to the September 20, 2021 work injury. Dr. McBride also noted that both of those procedures were reasonable and necessary medical treatment. Dr. McBride further opined that Claimant's fall at home resulted in the fracture of Claimant's scapula and caused the glenosphere to become dislodged. Specifically, Dr. McBride noted that it was that fall

that was "the etiology for [Claimant's] need for revision of her reverse total shoulder replacement." Dr. McBride agreed that it would be wise to determine if there is an underlying infection in Claimant's shoulder. However, he further noted that if such testing was negative, then the trauma of the fall would be the cause of Claimant"s periprosthetic fracture, and therefore not related to the work injury.

13. Clamant resides in Grand Junction, Colorado and the IME with Dr. McBride was conducted in Denver. Respondents provided Claimant with air travel to attend the IME. On August 30, 2022, Claimant was at [Redacted, hereinafter DA] to take her flight back to Grand Junction. While at DA[Redacted], Claimant suffered another fall.

14. Claimant testified regarding her fall at DA[Redacted]. Specifically, she testified that the fall occurred while she was on a moving sidewalk. While on that moving sidewalk, she moved to the side and "blacked out". When she was next conscious she discovered she had fallen face first with both of her hands extended in front of her. On cross examination, Claimant confirmed that there was nothing specific about the moving walkway that caused her to fall. With regard to the reason for the loss of consciousness on this occasion, Claimant testified that Dr. Sullivan had diagnosed her with severe anemia.

15. Claimant further testified that emergency services were called and she was transported to the hospital by ambulance. Claimant was transported from DA[Redacted] to the emergency department (ED} at University of Colorado Hospital. Claimant testified that she remained in the hospital for two days.

16. On September 7, 2022, x-rays of Claimant's right humerus showed an acute oblique fracture of the midshaft of the right humerus "at the tip of the humeral component of the reverse total shoulder arthroplasty".

17. On September 22, 2022, Dr. Sears authored a letter to Respondents' counsel. In that letter, Dr. Sears again noted his concern that there may be an underlying infection in Claimant's right shoulder. Dr. Sears also stated his opinion that Claimant's current need for revision surgery is related to her workers' compensation injury. In support of this opinion, Dr. Sears stated that "[t]he complication of a catastrophic base plate failure requiring revision arthroplasty would only occur as a secondary condition to her placement of a reverse shoulder arthroplasty which was due to a [workers' compensation] accident." Dr. Sears also noted that the most recent fall on August 30, 2022 resulted in "a relatively nondisplaced midshaft fracture distal to the stem of the implant." Dr. Sears noted the most recent fracture was being treated nonoperatively.

18. On October 10, 2022, an x-ray of Claimant's right humerus showed a prosthetic fracture of the right humerus.

19. On November 8, 2022, Dr. Sears performed revis1on surgery on Claimant's right shoulder. Specifically, the procedure included resection arthroplasty right reverse shoulder arthroplasty; placement of long intramedullary (IM)nail; placement of allograft at the humeral shaft fracture and at the glenoid; and placement of a cement spacer.

20. On January 13, 2023, Dr. McBride authored an addendum to his September 2022 IME report after reviewing additional medical records. In the addendum Dr. McBride reiterated his opinion that Claimant's falls at home resulted in the periprosthetic fracture. Dr. McBride also addressed Claimant's fall on August 30, 2022 at DA[Redacted]. Dr. McBride opined that Claimant's falls that occurred after the successful reverse total shoulder arthroplasty are unrelated to the work injury.

21. Claimant testified that on April 25, 2023 she underwent the second revision surgery with Dr. Sears. Claimant testified that it is her understanding that in that second procedure Dr. Sears removed the IM nail from the humerus and performed a second replacement operation. Claimant testified she has improved since surgery and is now undergoing treatment with a bone clinic. Claimant testified that she is planning to undergo additional post-surgery physical therapy, as recommended by Dr. Sears.

22. Dr. McBride's testimony was consistent with his written reports. Dr. McBride testified that the procedures performed by Dr. Vance (the initial rotator cuff repair and the reverse total shoulder arthroplasty) were both reasonable, necessary, and related to Claimant's work injury. Dr. McBride noted that immediately following the reverse total shoulder procedure imaging showed that the hardware was intact and well seated. Dr. McBride testified that this indicates that the reverse total shoulder arthroplasty was successful. Dr. McBride further testified that the fall Claimant suffered that resulted in four broken ribs was a significant fall. Dr. McBride testified that he agrees with Dr. Vance that the periprosthetic fracture occurred secondary to that fall. With regard to Dr. Sears's concern related to infection, Dr. McBride testified that was a reasonable concern. Dr. McBride further testified that ultimately infection was ruled out in this case.

23. Prior to the June 8 and June 9, 2022 falts at her home, Claimant has a history of other falls. Medical records entered into evidence show that in October 2018, Claimant underwent x-rays following a "fall into tub back in August". On June 11, 2020, Claimant underwent a number of imaging studies (including x-rays of her right wrist and cervical spine, and a CT scan of her pelvis) after suffering a fall. This June 2020 fall is further addressed by Dr. Sullivan in a July 19, 2020 medical record. At that time, Dr. Sullivan noted that Claimant had suffered a sacral and pubic rami fracture in a fall.

24. The ALJ credits the medical records and the opinions of Drs. Vance and McBride. The ALJ finds that Claimant's fall at home on June 8, 2022 resulted in four broken ribs and the fracture to the reverse total shoulder hardware. That fall was not related to the admitted work injury. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that medical treatment she received after the

June 8, 2022 fall is related to the work injury. The ALJ also finds that Respondents have successfully demonstrated that it is more likely than not that the June 8, 2022 fall at home was an intervening event sufficient to sever Respondents' liability for the September 20, 2021 work injury.

25. With regard to specific medical treatment requested in this case, the ALJ finds that although the two revision surgeries performed by Dr. Sears were reasonable and necessary in treating Claimant's condition, those procedures are not related to Claimant's work injury.

26. Although the ALJ has determined that Respondents' liability in this matter was severed as a result of the June 8, 2022 fall at home, the ALJ must now turn to the August 30, 2022 fall at DA[Redacted]. Specifically, the ALJ must determine whether the quasi-course of employment doctrine is applicable to that fall. Furthermore, if that fall did occur within the quasi-course of employment, the ALJ must consider Claimant's pre-existing condition of anemia and determine if there was any special hazard present at the time of the August 30, 2022 fall.

27. The ALJ finds that it is clear that on August 30, 2022, Claimant was within the quasi-course of employment as she was traveling home after attending the IME with Dr. McBride. However, the ALJ finds that Respondents have successfully demonstrated that Claimant's fall on August 30, 2022 was precipitated by her pre-existing conditions of anemia and syncopal episodes. As noted above, Claimant has a history of falling. The ALJ credits Dr. McBride's opinion that Claimant's falls that occurred after the successful reverse total shoulder arthroplasty are unrelated to the work injury. The ALJ finds that it was Claimant's dizziness and "blacking out" on August 30, 2022 that resulted in the fall on that date. Although the fall occurred at an airport while Claimant was utilizing a moving walkway, the ALJ credits Claimant's testimony that there was nothing specific about the moving walkway that caused her to fall. The ALJ further finds that there was no special hazard present at the time of the fall.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that medical treatment after June 8, 2022 is related to the admitted September 20, 2021 work injury. As found, the medical records and the opinions of Drs. Vance and McBride are credible and persuasive on this issue.

6. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See Post Printing* & *Publishing* Co. *V. Erickson,* 94 Colo. 382, 384, 30 P.2d 327, 328 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. V. Ball,* 172 Colo. 510,474 P.2d 622 (1970).

7. As found, Respondents have demonstrated, by a preponderance of the evidence, that on June 8, 2022, Claimant suffered an intervening event that was sufficient to sever Respondents' liability related to the admitted work injury. As found, the medical records and the opinions of Drs. Vance and McBride are credible and persuasive on this issue.

8. Under the quasi-course of employment doctrine injuries sustained while undergoing or traveling to and from authorized medical treatment are compensable, even though they occur outside the ordinary time and place limitations of normal employment. *Excel Corp. V. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1998); *Schreiber v. Brown* & *Root, Inc.,* 888 P.2d 274 (Colo. App. 1993). The rationale for this principle is that because an employer is required to provide medical treatment, and because the claimant is required to submit to treatment in order to receive benefits, travel to receive authorized treatment is an "implied part of the employment contract." *Turner V. Industrial Claim Appeals Office,* 111 P.3d 534 (Colo. App. 2004).

9. If the precipitating cause of an injury is a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the accident or the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO July 29, 1999); *Stanley Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO Oct. 14, 2014). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Hom,* 781 P.2d 150 (Colo. App. 1989); *Stanley Alexander v. Emergency Courier Services, supra.* In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" generally encountered outside the workplace. *Ramsdell v. Hom, supra; Joan Briggs v. Safeway,* Inc. W.C. No. 4-950-808-01 (I.C.A.O July 8, 2015). Conversely, if the precipitating cause of the injury involves conditions or circumstances of the employment, there is no need to prove a "special hazard" in order for the injury to arise out of the employment. *Cabe/a v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *H&H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

10. As found, the August 30, 2022 fall, while within the quasi-course of employment, occurred due to Claimant's preexisting conditions and no special hazard was present. Therefore, the injuries sustained on August 30, 2022 are not compensable. As found, the medical records, Claimant's testimony, and Dr. McBride's opinions are credible and persuasive on this issue.

ORDER

It is therefore ordered that Claimant's request for medical treatment after June 8, 2022 is denied and dismissed.

Dated November 30, 2023.

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

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

ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-229-784-001

ISSUE

I. Claimant's average weekly wage.

FINDINGS OF FACT

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

1. This case involves an admitted claim.
2. Claimant started working for Employer on or about August 7, 2022.
3. Claimant was injured on January 16, 2023.
4. Claimant earned the following wages:

Pay Period Ending	Gross Earnings
8/14/2022	$1,170.00
8/21/2022	$150.00
8/28/2022	$1,330.00
9/4/2022	$1,076.25
9/11/2022	$630.00
9/18/2022	$1,400.00
9/25/2022	$1,400.00
10/2/2022	$1,120.00
10/9/2022	$1,382.50
10/16/2022	$1,400.00
10/23/2022	$1,400.00
10/30/2022	$1,400.00
11/6/2022	$1,400.00
11/13/2022	$1,400.00
11/20/2022	$1,120.00
11/27/2022	$280.00
12/25/2022	$560.00
1/1/2023	$576.00
1/8/2023	$576.00
1/15/2023	$1,440.00
Total Wages	**$21,210.75**

5. From August 7, 2022, through January 15, 2023, a 23-week period, Claimant earned $21,210.75. Claimant contends that in order to fairly calculate his average weekly wage, his total earnings over the 23-week period should be used. Using Claimant's earnings over the entire 23-week period results in an average weekly wage of $922.21.
6. From October 3, 2022, through January 15, 2023, a 15-week period, Claimant earned $12,934.50. Respondents contend that in order to fairly calculate Claimants' average weekly wage, a period of 15 weeks should be used. Using Claimant's earnings over this 15-week period results in an average weekly wage of $862.30.
7. Both Claimant's and Respondents' calculations consider that Claimant did not work and earn any wages from November 28, 2022, through December 18, 2022. Plus, Claimant earned less than usual from November 21, 2022, through January 1, 2023.
8. There was no testimony provided by either party regarding why Claimant's wages varied during any weekly period. Moreover, there was no testimony that established Claimant had to be available for 40-hours week – if the work was available.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

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

I. Claimant's average weekly wage

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

There was no testimony presented at the hearing regarding why Claimant's wages varied during the 23-week period. The only evidence submitted and admitted into evidence was Claimant's wage records. As found, Claimant worked 23 weeks before he suffered his work injury. During this period, Claimant's weekly earnings varied – and Claimant did not work for an approximate three-week period. The 15-week period urged by Respondents is arbitrary and disproportionately impacts Claimant's average weekly wage, in a negative way, based on the three weeks Claimant did not work during that period.

Thus, based on the fluctuation of Claimant's wages during the 23-week period, the ALJ finds and concludes that the most reasonable calculation to determine Claimant's average weekly wage is to take his total earnings over the 23-week period of $21,210.75 and divide it by 23 weeks. While the ALJ considered using the $1,440 amount Claimant earned the week he was injured, the ALJ ultimately finds and concludes that the most reasonable and fair method to determine Claimant's average weekly wage is the method proposed by Claimant.

Therefore, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that his average weekly wage is $922.21-which is the $21,210.75 amount divided by 23 weeks.

ORDER

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

1. Claimant's average weekly wage is $922.21.
2. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: November 30, 2023.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-174-107-001

ISSUES

1. Whether Respondents proved by a preponderance of the evidence that the September 13, 2021 Final Admission of Liability (FAL) was filed in error, and should be withdrawn based on the Division Independent Medical Examination (DIME) opinion that Claimant did not suffer a compensable injury.

2. Whether Claimant overcame the DIME opinion regarding maximum medical improvement (MMI) and impairment by clear and convincing evidence.

3. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits.

4. If Claimant met her burden regarding TTD benefits, whether Respondents proved by a preponderance of the evidence that Claimant is not entitled to TTD benefits after March 10, 2021 based on termination for cause.

5. Whether PALJ Phillips' Prehearing Order requiring Respondents to pay the fee for the rescheduled DIME violated procedural due process.

STIPULATION

The parties stipulated, via email communications, to the admissibility of communications between Claimant's former counsel and the DIME physician (Ex. N and Ex. O) with the stipulation that the DIME physician cancelled both DIME appointments.[1]

FINDINGS OF FACT

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

1. Claimant is a 66 year-old woman who previously worked for Employer as a custodian.

2. On July 7, 2019, Claimant was walking between buildings when her right knee buckled. She was not pushing, pulling or carrying anything. There was no uneven terrain, and she did not slip. Claimant did not feel a pop or a snap when her right knee buckled. (Ex. M Ex. J.)

[1] Exhibits N and O were admitted during the hearing.

3. Claimant did not immediately report her alleged injury, but reported it to her supervisor sometime between July 9 and July 11, 2019.[2] Claimant's supervisor, [Redacted, hereinafter JR], completed an "Injury & Illness Prevention Plan" form regarding Claimant's injury on July 11, 2019. He specifically noted that it was an "unusual accident" and the "cause [was] not clear." JR[Redacted] offered Claimant treatment through workers' compensation, but Claimant refused, and she signed a document entitled "Medical Treatment Refusal." (Ex. M pp. 274-276). Claimant testified that this was not her signature on the form. Claimant's employment records contain multiple documents that Claimant signed – Employment Application (Ex. M p. 246), Employer Handbook acknowledgement (Ex. M p. 258), and patient information sheet (Ex. M p. 175). Each of the signatures on these documents closely resembles the signature on the form refusing medical treatment. The ALJ finds that Claimant's testimony denying this is her signature on the Medical Treatment Refusal form is not credible.

4. Claimant saw her primary care physician, Mark Unger, M.D., on July 11, 2019. The medical record for this visit was not complete, so there is no indication as to the primary reason for Claimant's visit. Nevertheless, four issues were noted under her assessment and plan: 1) anxiety; 2) chronic left-sided low back pain with left-sided sciatica; 3) osteopenia; and 4) acute pain of right knee. According to the medical record "[t]his past Sunday she was walking from one building to another at work when her right leg buckled on her. She has a remote history of cartilage tear and reports having arthroscopy for meniscus repair many years ago but she had not had any recent problems with her knee giving out on her." (Ex. I). Dr. Unger ordered an x-ray, but also strongly recommended that Claimant follow up with Employer about seeing a workers' compensation doctor for her knee issue.

5. On July 12, 2019, Claimant presented to UC Health for a diagnostic evaluation of her right knee. The x-rays showed moderate to severe tricompartment osteoarthritis. The imaging was compared to a prior right knee x-ray from May 28, 2012 and it was noted there was no joint effusion or fractures. (Ex. L).

6. On July 12, 2019, Employer's First Report of Injury was completed. (Ex M). A few days later, on July 16, 2019, Claimant went to Concentra for an evaluation of her right knee, and she was evaluated by Keith Meier, N.P. Mr. Meier noted that Claimant strained her right knee when she was "[s]imply walking briskly from building to building." Claimant told Mr. Meier she has had problems with her right knee in the past. Mr. Meier concluded that based upon his examination and the information about Claimant's job duties and mechanism of injury, "it does not appear that the presenting complaints arose out of her job duties in the course of the patient performing those duties." Claimant was placed at MMI as of July 16, 2019, and she had no work restrictions. (Ex. H).

7. There is no objective evidence in the record that Respondents were unaware of Mr. Meier's opinion that Claimant's injury was not work-related.

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[2] The Worker's Claim for Compensation form completed by Claimant on November 17, 2020, states that she notified employer of the injury on July 9, 2019. (Ex. D). Claimant's supervisor signed the "Medical Treatment Refusal" form on July 11, 2019. (Ex. M).

8. Claimant continued to see her primary physician, Dr. Unger, for treatment. He diagnosed Claimant with right knee osteoarthritis that was "recently exacerbated by walking for longer distances than usual." (Ex. M).

9. Claimant saw Brian Lancaster, M.D., on December 31, 2019, and reported walking at work when her knee buckled and she fell. She denied feeling a pop or snap. The medical record notes that the case was evaluated by workers compensation and denied, so Claimant wanted to proceed with addressing the issue under private insurance. Dr. Lancaster indicated Claimant had predominant severe osteoarthritis present on imaging with bone-on-bone pathology. Dr. Lancaster recommended an MRI and an injection. (Ex. J).

10. Claimant had an MRI of her right knee taken at UC Health on January 14, 2020. The MRI showed: markedly truncated medial meniscus likely related to prior partial meniscectomy with prominent chondral loss; partial thickness chondral loss of the patellofemoral compartment cartilage; and small-to-moderate sized suprapatellar joint effusion. The indication was primary osteoarthritis of the right knee. (Ex. L).

11. On February 11, 2020, Claimant returned to Concentra for a "recheck of injury," and she was evaluated by Jeffery Baker, M.D. In the medical record, Dr. Baker noted "[p]atient seen on 7/16/19 for knee pain. It was felt to not be a work related issue. She states that WC insurance has decided to pay for everything. She has subsequently been seen by Dr. Lancaster at OCR. She ha[d] an injection on 1/24/20 and states she will get another one in 6 months." Dr. Baker referred Claimant for physical therapy, twice a week for three weeks. He also gave Claimant work restrictions. (Ex. H).

12. Claimant received treatment from Concentra from February 11, 2020 through August 27, 2020 and Respondents paid for the treatment. There is no objective evidence in the record as to why Claimant returned to Concentra in February 2020.

13. After treating her right knee conservatively with injections, Claimant saw C. Dana Clark, M.D., an orthopedic surgeon, on July 28, 2020. Dr. Clark diagnosed Claimant with end-stage arthritis of the right knee. Dr. Clark recommended a total right knee arthroplasty. (Ex. J).

14. On behalf of Respondents, William Ciccone, M.D., conducted a records review and opined that the request for a total right knee replacement should be denied because Claimant did not suffer a work-related injury. He specifically noted, "[i]t is unclear from the records provided why the claimant was seen again by occupational medicine on 2/11/2020 and was being treated as a work injury after it was denied on 7/16/2019. I am in agreement with the opinion given on 7/16/2019 that the claimant's symptoms are related to her preexisting knee arthritis and are unrelated to a work injury."

15. Claimant saw Dr. Baker for a recheck of her knee on August 27, 2020. Claimant told Dr. Baker she was slowly progressing, but was very fatigued due to the pain. Dr. Baker noted that Dr. Ciccone performed an IME on August 10, 2020, and determined she did not suffer a work-related injury. Dr. Baker noted "[t]his was the original determination

and I still do not understand why she was told to return for treatment." Dr. Baker explained to Claimant that he agreed with Dr. Ciccone that she had not suffered a work-related injury. He placed Claimant at MMI as of August 27, 2020, with no impairment rating. Dr. Baker subsequently completed a WC 164 form noting the MMI date of August 27, 2020 and no impairment. (Ex. H).

16. There is no objective evidence in the record that Respondents were unaware that both Dr. Ciccone and Dr. Baker opined that Claimant did not suffer a work-related injury.

17. Over the course of her employment with Employer, Claimant received multiple written warnings. On March 10, 2021, Employer terminated Claimant for the unauthorized use of a family member's login information to access a client's computer system. (Ex. M). The ALJ finds that Employer terminated Claimant for cause on March 10, 2021.

18. On September 13, 2021, Respondents filed a Final Admission of Liability (FAL). In the FAL, Respondents admit to medical benefits only. According to the FAL, medical benefits of $10,194.47 had been paid to date. The FAL specifically notes that future medical benefits and indemnity benefits are denied. The FAL lists the MMI date as August 27, *2021*, and this is based upon Dr. Bakers' August 27, *2020* report.[3]

19. Claimant objected to the FAL and requested a Division Independent Medical Exam (DIME). Alicia Feldman, M.D. was selected as the DIME physician, and the DIME was scheduled for January 25, 2022. Dr. Feldman cancelled the appointment because Respondents failed to timely provide the packet of medical records. The DIME was rescheduled for April 15, 2022. Dr. Feldman cancelled this appointment because an interpreter had been requested, but no interpreter appeared at the scheduled DIME.

20. Respondents' counsel entered his appearance in this matter on February 17, 2022. His office communicated with the DIME unit, and received confirmation that a DIME had not been rescheduled. Respondent's counsel also emailed Claimant's counsel on February 18, 2022 regarding the requested DIME and cancelled appointment. Claimant's counsel did not respond. On February 25, 2022, Respondents' counsel told his office, via email, that "it is Claimant's DIME so let's let them reset." (Ex. N).

21. Unbeknownst to Respondents' counsel, between January 25, 2022 and April 18, 2022, Insurer's adjuster, [Redacted, hereinafter PC], dealt directly with [Redacted, hereinafter RS], a non-attorney representative from Claimant's counsel's office regarding rescheduling the DIME and the request for an interpreter. On or about April 18, 2022, Respondents' counsel received notice from the adjuster that Claimant did not attend the April 15, DIME appointment. He subsequently emailed RS[Redacted], copying Claimant's counsel, and explained, among other things, that his office was not given any notice of the rescheduled DIME. Respondents' counsel further stated he would be seeking a prehearing conference on the following issues: Motion to Compel Releases and

[3] In the section denying maintenance care, Dr. Baker's August 27, *2021* report is noted. The report in evidence from Dr. Baker noting Claimant's MMI date of August 27, 2020, is his August 27, *2020* report.

Disclosures; Motion to Hold DIME in Abeyance; Motion to Compel Claimant to Pay Costs of Rescheduled DIME; and Motion to Show Cause to Terminate Dime.

22. A prehearing conference was held on April 26, 2022 on two issues: Respondents' Motion to Compel releases and essential information and Respondents' Motion to hold DIME in abeyance. PALJ Sandberg compelled Claimant to provide essential information and signed medical releases, and the DIME process was held in abeyance pending a settlement conference, until May 20, 2022. (Ex. B).

23. The parties did not settle this matter, and a prehearing conference was set on Claimant's Motion to Compel Respondents to pay the DIME rescheduling fee; Claimant's Motion to Compel Respondents to provide interpreter for the DIME, and Respondents' Motion to Compel Claimant to provide a sworn affidavit regarding the ability to speak English. PALJ Phillips denied Respondents' Motion to Compel, and granted Claimant's Motions to Compel. She found that "[i]t is undisputed that Claimant requested an interpreter in the notice and proposal for a DIME. This request was provided to the DIME Unit, to Respondents and to the DIME physician." She further found that good cause existed to reschedule the DIME and Respondents were responsible for paying the rescheduling fee. (Ex. C).

24. It is undisputed that Respondents knew a DIME appointment had been scheduled for April 15, 2022, and an interpreter was requested. There is no objective evidence in the record as to why neither Respondents, nor Claimant's counsel, included Respondents' counsel on the emails. Regardless, the ALJ finds that Respondents had proper notice that an interpreter was requested for the April 15, 2022 DIME appointment. The ALJ further finds that PALJ Phillips' Order is correct and does not violate procedural due process.

25. The DIME with Dr. Feldman occurred on September 19, 2022. Dr. Feldman opined Claimant did not sustain a work-related injury on July 7, 2019. Dr. Feldman further noted that she agrees with Dr. Baker's MMI date of *August 10, 2020*.[4] She gave Claimant a 0% impairment rating because of her opinion that Claimant did not sustain a work-related injury. Dr. Feldman specifically noted that she agreed with Dr. Baker and Dr. Ciccone that there was no work-related injury. (Ex. E).

26. F. Mark Paz, M.D., performed a records review on January 10, 2023, including a review of Dr. Feldman's DIME. Dr. Paz opined that the mechanism of injury reported was consistent with an activity of daily living and that, based on a reasonable degree of medical probability, it was not medically probable that the activity aggravated or accelerated Claimant's preexisting right knee osteoarthritis. Dr. Paz opined that the need for further treatment was attributable to the preexisting right knee osteoarthritis and not the July 7, 2019, event. (Ex. F).

27. Claimant presented no objective evidence to overcome Dr. Feldman's DIME opinion. The ALJ finds that Dr. Feldman's DIME opinion is credible and persuasive.

[4] Dr. Baker's MMI date is August 27, 2020.

28. Respondents seek to withdraw the September 13, 2021 FAL based upon the DIME report and Dr. Feldman's opinion that Claimant did not suffer a work-related injury. Specifically, Respondents assert "the conditions reported pursuant to the July 7, 2019 alleged injury were personal to the Claimant and not related to her employment. ***This is supported by the overwhelming majority opinion of the treating and examining physicians throughout the claim.*** The September 13, 2021, FAL was filed in error and should be withdrawn." (Respondent's Proposed FFCL p. 16, ¶ 9) (emphasis added).

29. As found, Mr. Meier of Concentra, placed Claimant at MMI on July 16, 2019, and opined this was not a work-related injury. It is undisputed that despite this opinion, Respondents continued to authorize medical treatment for Claimant. When Dr. Clark recommended a right total knee replacement, Respondents retained Dr. Ciccone to conduct a records review. Dr. Ciccone prepared a report dated August 10, 2020, and opined that Claimant did not suffer a work-related injury. He questioned why Claimant was being seen by occupational medicine, since the opinion on July 16, 2019 was that this was not a work related injury. On August 27, 2020, ATP, Dr. Baker placed Claimant at MMI with no impairment rating. He too noted that it was unclear why Claimant was told to return for treatment.

30. The ALJ finds that Respondents had notice on July 16, 2019, August 10, 2020, and August 27, 2020 that Claimant's treating providers opined she did not suffer a work-related injury. Despite three different ATPs opining Claimant did not suffer a work-related injury, Respondents admitted liability and paid Claimant medical benefits, as evidenced by the September 13, 2021 FAL.

31. Respondents, however, assert that the FAL was filed in error and should be withdrawn. As found, Respondents were on notice since July 16, 2019 that the providers opined this was not a work-related injury. There is no evidence that Respondents were unaware of Mr. Meier's opinion, Dr. Ciccone's opinion, or Dr. Baker's opinion that Claimant did not suffer a work-related injury when they filed the FAL. Dr. Feldman reviewed and relied on these medical opinions in her DIME report, and she reached the same conclusion. There is no objective evidence in the record that Respondents were unaware multiple providers opined Claimant did not suffer a work-related injury, and they only became aware of this from Dr. Feldman's DIME report.

32. The ALJ finds that there is no objective evidence in the record that Respondents filed the FAL in error.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the

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

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

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

Withdrawal of Admission of Liability

If an admission of liability is contested, the matter must be litigated before an ALJ, who may permit or deny withdrawal at her discretion. *Rocky Mountain Cardiology v. ICAO*, 94 P.3d 1182 (Colo. App. 2004); *HLJ Mgmt. Group v. KIM*, 804 P.2d 250 (Colo. App. 1990). A party seeking to modify an issue determined by general or final admission shall bear the burden of proof for any such modification by a preponderance of the evidence. § 8-43-201(1), C.R.S. Respondents assert, however, that "Claimant has the burden to overcome the DIME on MMI and impairment by clear and convincing evidence on causation *before* any threshold compensability is addressed." (Proposed FFCL p. 14). It is unclear to the ALJ what Respondents are specifically arguing. Regardless, Claimant challenged the FAL to overcome the MMI date and impairment rating. Claimant never challenged compensability, and it is illogical to think Claimant would challenge compensability. Respondents' argument is without merit. Respondents filed the Application for Hearing, and Respondents bear the burden to prove by a preponderance of evidence that they filed the FAL in error and should be allowed to withdraw the FAL.

Respondents seek to withdraw the September 13, 2021, FAL on the basis that there was no compensable injury per the opinions of the DIME physician, the ATP Dr. Baker, Dr. Ciccone, Dr. Lancaster, and Dr. Paz. Respondents' position is that there was no compensable injury in the first place and the FAL was filed in error.

If a claimant does not timely object to the final admission in a timely fashion, admitted issues are closed and may only be reopened in accordance with § 8-43-303, C.R.S. In other words, respondents are in no position to challenge their own final admission where claimant has not objected. *Perry Kizer v. Phil Long Ford*, WC 4-391-990 (Nov. 19, 2001); *Weber v. Mesa Cnty. Sheriff's Dept.*, W.C. 3-113-179 (May 28, 1998). Here, Claimant objected to the FAL and requested a DIME to address MMI and impairment. Claimant never objected to the issue of compensability. Regardless, Respondents have failed to prove by a preponderance of the evidence that the FAL was filed in error. Notably, Respondents were aware of the opinions of Mr. Meier, Dr. Baker, and Dr. Ciccone, all of whom opined that Claimant did not suffer a compensable injury, ***before*** Respondents filed the FAL. Dr. Feldman and Dr. Paz did not offer any new opinion regarding compensability. Thus, Respondents have no basis to argue that the FAL was filed in error. As found, Respondents failed to prove by a preponderance of the evidence that the FAL was filed in error and should be withdrawn.

Overcoming DIME Opinion

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colo. Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy,* WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start,* WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café,* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). As found, Claimant presented no objective evidence to challenge Dr. Feldman's DIME opinion regarding MMI and impairment. Claimant failed to overcome Dr. Feldman's DIME opinion by clear and convincing evidence.

Temporary Total Disability (TTD) Benefits

To qualify for temporary disability benefits, an injured worker must establish three things: 1) the work injury caused the disability; 2) claimant left work as a result of the injury or has reduced wages as the result of the injury; and 3) temporary disability is total and lasts for more than three working days. *Colo. Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Employer properly accommodated all of Claimant's restrictions. Claimant remained working modified duty under restrictions throughout the duration of her remaining employment with Employer. There is no objective evidence in the record that Claimant lost time after the injury on July 9, 2019. Thus, Claimant has failed to prove by a preponderance of the evidence that she is entitled to TTD benefits.[5]

Appeal of June 24, 2022 Prehearing Order

Interlocutory prehearing orders are reviewable by an ALJ. *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998). PALJ Phillips granted Claimant's motion and compelled Respondents to pay the cost of rescheduling a DIME appointment and providing an interpreter. It is undisputed that a representative from Claimant's attorney's office, coordinated the DIME with the adjuster without advising Respondents' counsel. W.C.R.P. 11-4(A)(8) states, in pertinent part: "[t]he requesting party shall immediately notify the DIME Unit and the opposing party in writing of the date and time of the examination." W.C.R.P. 1-4(A) states: "[w]henever a document is filed with the Division, a copy of the document shall be mailed to each party to the claim and attorney(s) of record, if any."

The Colorado Supreme Court has held that, where a party is represented by counsel, due process requires that the attorney of record be provided with notices since a party is entitled to rely on his attorney. *Mountain States Tel. & Tel. v. Dep't of Labor & Employment*, 520 P.2d 586 (Colo. 1974). The court stated:

> "It follows that when a client has employed an attorney to present his defense to claims in litigation, and notice of this representation by entry of appearance has been given to the opposing party and the court, or other adjudicatory body, all notices required to be given in relation to the matters in controversy, including notice of the decision and entry thereof, should be given to the attorney of record. This basic requirement flows from the attorney-client relationship by which the management, discretion and control of all procedural matters connected with the litigation is invested in the attorney. By virtue of such delegation of authority, the client is bound by the actions of his attorney. (citations omitted). If the attorney through no fault of his own is denied notice of the critical determination in the case, and by reason thereof fails to take procedural steps necessary to preserve his client's rights, fundamental unfairness results. Procedural due process cannot be satisfied when counsel, upon whom a client is entitled to rely, is not notified of decisions affecting his client's interests."

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[5] As found, Claimant was terminated for cause on March 10, 2021.

Where a party denies receipt of notice, the issue becomes one of fact for determination by the ALJ. *Chacon v. R&L Carriers Shared Servs*, W.C. No. 5-178-236 (July 25, 2022). If the issue turns on credibility determinations, then the ALJ is obliged to hold a hearing to resolve the matter. *See Trujillo v. Indus. Comm'n*, 735 P.2d 211, (Colo. App. 1987). Respondents assert that defense counsel was never given notice of the DIME appointment and therefore could not schedule an interpreter on Respondents' behalf. While the ALJ does not take lightly that Claimant's previous counsel and RS[Redacted] did not respond to Respondents' counsel's emails, this is not a sufficient basis to find that due process was violated. As found Respondents had notice the DIME had been rescheduled and that an interpreter was requested, and one was not provided. Respondents could have also notified ***their*** counsel of the communications, just as Respondents notified counsel that there were issues with the April 15, 2022 DIME appointment. PALJ Phillips' Order does not violate procedural due process.

ORDER

It is therefore ordered that:

1. Respondents failed to prove by a preponderance of the evidence that the admission of liability should be withdrawn.

2. Claimant failed to overcome the DIME opinion by clear and convincing evidence.

3. Respondents proved by a preponderance of the evidence that Claimant was terminated for cause.

4. Claimant failed to prove by a preponderance of the evidence that she is entitled to TTD benefits, and her claim for TTD benefits is denied.

5. Respondents' appeal of the June 24, 2022 Prehearing Order is denied.

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

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

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

DATED: October 3, 2023

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

ISSUES

1. Whether Claimants proved by a preponderance of the evidence that each sustained an injury arising out of and in the course of their employment on June 29, 2021.

2. Whether Claimants proved by a preponderance of the evidence that the treatment that each received at Sky Ridge Medical Center on June 29, 2021, was reasonably necessary to cure and relieve them of the effects of the June 29, 2021 motor vehicle accident.

FINDINGS OF FACT

1. Claimants [Redacted, hereinafter MC] and [Redacted, herainfter JC] are married and reside together in Arvada, Colorado. Both worked for Respondent-Employer and were injured in a motor vehicle accident on June 29, 2021.

2. At the time of the accident, Claimants were commuting from home to work in a vehicle provided by Respondent-Employer. JC[Redacted] was driving, and MC[Redacted] was riding as a passenger. Claimants would regularly commute to work together in the company vehicle.

3. MC's[Redacted] position with the Employer was as a pavement marking technician III. His responsibilities included working as a foreman, commercial driving, managing timecards, and submitting job reports. JC[Redacted] was also a pavement marking technician III, and her responsibilities included driving company equipment and trucks, generating reports, performing inspections and maintenance, implementing traffic striping, and mentoring and training employees.

The Employer's Safety Handbook

4. The Employer's Safety Handbook provided regarding "Vehicle Use" that:

> The use of a company vehicle is intended for official company business only. Company vehicles shall not be used for personal purposes except when commuting between home and business for those co-workers specifically assigned a vehicle for that purpose. Incidental stops, such as at a convenience store, restaurant, financial institution, or gas station are not considered to be violations of this policy. Drivers must abide by the Federal DOT hours of service regulations. Drivers must comply with applicable state and local laws regarding cell phone usage while driving.

5. The Safety Handbook also prohibited transportation of non-coworkers in company vehicles, including non-coworker family members, and prohibits drivers from making "incidental stops at locations the public might perceive as inappropriate." The Safety Handbook also indicated that fuel cards were issued for each vehicle, implying that Respondent-Employer paid for the gasoline for the vehicle.

MC's[Redacted] testimony

6. At hearing, MC[Redacted] testified on his own behalf, as well as in support of JC's[Redacted] case. His testimony can be summarized in pertinent part as follows.

7. MC[Redacted] is a supervisor and pavement marking technician for Respondents. He is paid hourly. His responsibilities include supervising the crew, completing timecards, and recording truck numbers to submit to his boss. His primary responsibility is to make sure his crew returns home safe at the end of their shift. MC[Redacted] would supervise eight people.

8. MC[Redacted] and JC[Redacted] would typically get to the workplace by 4:00 P.M. by commuting to work in a company pickup truck. Their crewmembers would show up at the workplace by 6:00 P.M. The reason they would show up to work early was to prepare for the shift.

9. The truck in which MC[Redacted] and JC[Redacted] would commute to work was a specific truck assigned by Respondent-Employer. MC[Redacted] was instructed that he was not to use the truck for personal purposes.

10. Every morning, during their commute in the company truck, MC[Redacted] would have a pre-safety meeting with his wife, JC[Redacted]. JC[Redacted] was a supervisor on MC's[Redacted] crew. JC[Redacted] would assist MC[Redacted] with anything MC[Redacted] could not complete on his own. Additionally, she would deal directly with employees. During the commute from home to the shop, MC[Redacted] and JC[Redacted] would discuss the plan for the day, what they would need to do to be productive and safe, and the performance of their crewmembers. MC[Redacted] testified that he and his wife could wait until they arrived at the shop before having that conversation, but that it would put them behind by an hour. If the jobsite for the day was within the Denver metro area, MC[Redacted] and JC[Redacted] would first clock in at the Englewood facility and then drive out to the worksite in a different vehicle to perform the work. If, however, the jobsite for the day was outside of the Denver metro area, MC[Redacted] and JC[Redacted] would clock in as they left their home and would drive directly to the jobsite.

11. On the date of injury, MC[Redacted] and JC[Redacted] were driving from their home in Arvada to the Employer's Englewood facility at Peoria and I-470. They

were discussing work on the entire commute, including the job performance of their employees and some prior projects. The only personal item they discussed was the fact that they were working on their anniversary. MC[Redacted] and JC[Redacted] were not paid for the time they spent commuting, even though they were discussing work during their commute, nor were they required by the Employer to have pre-shift meetings in the vehicle on the way to work. They were to arrive at the Englewood facility by 4:00 P.M. However, at 3:40 P.M., their vehicle was involved in a motor vehicle accident, and both MC[Redacted] and JC[Redacted] were injured.

12. On the date of injury, both MC[Redacted] and JC[Redacted] departed their home in the company pickup truck. JC[Redacted] was driving. MC[Redacted] was in the passenger seat writing down the employees' hours and truck assignments.

13. The Claimants and their team were to stripe a highway that day. Among the tools MC[Redacted] had with him were his backpack with the employer's emblem on it, tape measures, headlamps, a laser light, a flashlight, and paperwork for "tank charts." MC[Redacted] would carry those tools with him at all times no matter where he was just in case he would need them. He would carry a second backpack with paperwork, his work phone, and his iPad.

14. MC[Redacted] testified that he went to the emergency room at Sky Ridge Medical Center for treatment immediately after the accident. He had internal bleeding and a portion of his intestines were resected at the hospital. The Court finds these injuries to be urgent in nature and the treatment at Sky Ridge Medical Center to be therefore reasonably necessary and related.

15. The Court finds MC's[Redacted] testimony credible.

JC's[Redacted] testimony

16. JC[Redacted] testified on her own behalf and in support of MC's[Redacted] case. Her testimony was largely consistently with MC's[Redacted]. Her testimony is summarized in pertinent part as follows.

17. JC[Redacted] testified that her job was primarily administrative work, including communicating with employees regarding personnel issues.

18. JC[Redacted] added that she was typically the one who would drive the truck in the morning while MC[Redacted] would ride in the passenger seat and work on his phone.[1] Both MC[Redacted] and JC[Redacted] would field text messages and phone calls from their crewmembers during the commute. On the morning commute, the two typically did not talk for the first forty-five minutes of the trip so that MC[Redacted] could perform work on his phone. During the drive, JC[Redacted] prepared a checklist of tasks to perform that day. MC[Redacted]

[1] MC[Redacted] would typically drive the truck on the way home after the shift.

and JC[Redacted] had to do the planning on the way to work because once they reach the Englewood facility they would be saturated with other work. JC[Redacted] acknowledged that she was not required by her employer to conduct a meeting with MC[Redacted] during her morning commute.

19. On the morning of the accident, JC[Redacted] performed a pre-trip inspection of the truck, including checking the fluids, as was required by the Employer each time the truck was driven. She testified that prior to driving the truck, including for the morning commute, she would have to log into the employer's electronic fleet monitoring system. JC[Redacted] explained that the system would monitor driving behaviors. Despite being engaged in work during the morning commute, JC[Redacted] testified that she was not permitted to clock in until reaching the employer's facility, since that day's jobsite would be in the Denver metro area.

20. JC[Redacted] testified that she would have clocked in around 3:45 P.M. were it not for the motor vehicle accident.

21. JC[Redacted] was treated at Sky Ridge Medical Center following the accident for multiple injuries, including ruptured prosthetics. The Court finds these injuries to be urgent in nature and the treatment at Sky Ridge Medical Center to be therefore reasonably necessary and related.

22. The Court finds JC's[Redacted] testimony to be credible.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the

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

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

Compensability

An injury must arise out of, and in the course of, the Claimant's employment to be compensable. § 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 2 (Colo. 1967). One exception, however, to the coming and going exclusion is when "special circumstances" create a causal relationship between the employment and the travel beyond the employee's arrival at work. *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1992); *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989). Where Claimant is injured while on travel status, under certain circumstances that injury is compensable. *SkyWest Airlines, Inc. v. Indus. Claim Appeals Office*, 487 P.3d 1267 (Colo. App. 2020).

The *Madden* Court identified several factors to be evaluated to determine whether special circumstances exist. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. 977 P.2d at 865. The question of whether Claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Elec.*, W.C. 4-939-901-03 (ICAO February 22, 2016). The *Madden* Court reasoned that "the going to and from work rule is such a fact-specific analysis that it cannot be limited to a predetermined list of acceptable facts and circumstances. . . . the proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act." 977 P.2d at 864.

In *Industrial Commission v. Lavach*, 439 P.2d 359, 165 Colo. 433 (Colo. 1968), an employee was injured during his commute home in his employer's vehicle. The employer in that case provided the employee with a pickup truck, all expenses paid, for delivering packaging materials to customers and preparing estimates for local moving jobs. The employee was permitted to commute between his home and work in the truck, and the claimant would occasionally deliver material for the employer while commuting home from work, though he was not making any such deliveries on the evening of the accident. The Colorado Supreme Court, citing the facts that the employee was provided the truck at the employers expense and that the employee would sometimes make deliveries during his commute home, concluded that the scope of the employee's employment had enlarged to include the employee's transportation to and from work.

In *Varsity Contractors and Home Ins. Co. v. Baca*, 709 P.2d 55 (Colo.App.1985), an employee was injured during his commute home. The employee had stopped at a bar to have drinks with a friend on his way home. The employee had planned to go home, shower, change clothes, and await a call from his employer to return to work. However, he was involved in a motor vehicle accident after leaving the bar. The Colorado Court of Appeals agreed that the nexus between the accident and the employee's employment was insufficient to establish compensability.

The Court of Appeals reached a different outcome in *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo.App.1989). In *Burak*, the employee died in a motor vehicle accident while commuting from his home in Fort Collins to his office in Laramie in a vehicle provided by his employer. In addition to providing the vehicle, the employer also provided a credit card with which the employee could purchase fuel for the vehicle. The employee would frequently work from home and during his commute. At the time of the accident, he was dictating into a recording device. The Court of Appeals found the case distinguishable from *Varsity Contractors* in that the employee's home car had become part of the workplace, thus bringing the accident within the scope of the employment. *Id.* at 690.

The Court finds the facts in the present case most analogous to those in *Burak*. The Claimants, like the employee in Burak, were provided with a company vehicle and fuel card for commuting between home and work. Also, like the employee in *Burak*, the Claimants were in fact working at the time of the accident, as they were conducting their pre-shift meeting in the vehicle. Although Respondents argue that there was no dictating device or other documentary evidence of the Claimants' pre-shift meeting, the Court does not find the distinction meaningful, as both Claimants credibly testified that they routinely conducted pre-shift meetings during the morning commute and were in fact conducting such a meeting on the day of the accident.

Furthermore, the fact that Respondent-Employer required Claimants to log into the electronic fleet monitoring system prior the commute, prohibited them from using the vehicle for personal errands, required them to conduct a pre-trip inspection even prior to the commute, and required them to be mindful of their driving hours during the commute so as not to violate the federal DOT hours of service regulations, all suggest that the

employer maintained some level of control over the manner in which the Claimants commuted to work.

Based on the totality of the facts, the Court finds and concludes that the Claimants' pre-shift commute on June 29, 2021, was more probably within the scope of the Claimants' employment with Respondent-Employer. The Court therefore finds and concludes that the Claimants' motor vehicle accident and resulting injuries on June 29, 2021, arose out of and in the course of their employment with Respondent-Employer.

Medical Treatment

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S.

Although respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

As found above, both Claimants credibly testified that they sustained serious injuries following the accident, including MC[Redacted] sustaining internal bleeding and JC[Redacted] sustaining ruptured prosthetics. The Court also finds these injuries to be most likely urgent in nature and the treatment at Sky Ridge Medical Center to be therefore reasonably necessary and related.

ORDER

It is therefore ordered that:

1. Both Claimants sustained compensable injuries in the motor vehicle accident on June 29, 2021.

2. Claimants' treatment at Sky Ridge Medical Center on June 29, 2021, was reasonably necessary and related to the injuries Claimants sustained on the same date. Respondents shall pay for the treatment Claimants' received at Sky Ridge Medical Center on June 29, 2021.

3. Respondents shall pay for all other medical treatment reasonably necessary to cure and relieve Claimants of their June 29, 2021 injuries.

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

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

DATED: October 4, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether the issue endorsed on Claimant's April 19, 2023 Application for Hearing is within the OAC's limited jurisdiction to determine following settlement of the claim on a full and final basis.

II. If so, whether Claimant established, by a preponderance of the evidence, that Respondents were required to file a Petition to Modify, Suspend or Terminate Compensation to stop his temporary disability benefits.

Because the undersigned ALJ concludes that the OAC no longer has jurisdiction over this claim and Claimant failed to establish that Respondents were obligated to file a Petition to Modify, Terminate or Suspend Compensation, if it had jurisdiction, this order does not address Respondents' contention that Claimant is barred by the doctrine of *res judicata* from litigating issue number II above.

FINDINGS OF FACT

1. This case has a lengthy and complex history. There have been multiple hearings and several post-hearing requests for review, including an appeal to the Colorado Court Appeals and a Petition for Writ of Certiorari to the Colorado Supreme Court. The ALJ was assisted in understanding the history of this claim by reference to the Chronological History of the file maintained by the Division of Workers Compensation and the materials contained in the OAC files. In order to address the jurisdictional issue raised by Respondents, it is necessary to provide a detailed statement regarding Claimant's injury and the complete procedural history of the claim.

2. Claimant, as the finance manager for Employer, suffered admitted injuries on March 31, 2009, when he was hit on the head by a retractable garage door. Claimant, was attempting to secure a repair estimate when he entered a repair shop through a manual garage door. As Claimant lifted the door and stepped into the shop, the door came back down and hit him on the head. (Resp. Ex. E, p. 3). As referenced, liability for Claimant's injuries was admitted and he proceeded through a protracted course of care to treat reported headaches, neck pain and a constellation of cognitive complaints.[1]

3. On April 11, 2011, ALJ Bruce Friend presided over a hearing to determine whether Respondents were liable for a neck surgery performed by Dr. William Choi on November 16, 2010. (Clmt's. Ex. 1). Judge Friend issued an Order containing Findings of Fact and Conclusions of Law on May 25, 2011. (Clmt's. Ex. 1, p. 50). ALJ Friend

[1] The ALJ adopts and incorporates by reference, the Factual Findings of ALJ Spencer regarding the nature and extent of Claimant's medical, psychological and cognitive treatment as set out in his December 31, 2020 Order. (Resp. Ex. E).

credited the opinions of Dr. Douglas Scott and Dr. John Douthit to find and conclude that the cervical spine surgery performed by Dr. Choi was not reasonably necessary or related to Claimant being struck on the head by the falling garage door. *Id.*

4. Claimant filed a Petition to Review Judge Friend's Order and the matter was taken up by the Industrial Claim Appeals Office (ICAO). The ICAO affirmed ALJ Friend's Order on November 7, 2011. The ICAO Panel found no error in Judge Friend's credibility determination and held his findings and conclusions were supported by substantial evidence. Claimant did not appeal further and ALJ Friend's Order became final. (Resp. Ex. F, p. 2).

5. According to medical reports authored by Drs. Jill Castro and Howard Entin, Claimant reached maximum medical improvement (MMI) for the sequela related to his neck and head injury on April 18, 2011.[2] (Resp. Ex. K). Based upon the MMI reports of Drs. Castro and Entin, Respondents filed a Final Admission of Liability on April 11, 2012. *Id.* In addition to reflecting liability for various periods of temporary partial disability, the FAL reflected that Respondents admitted liability for temporary total disability (TTD) benefits beginning January 4, 2010 and running through April 17, 2011. *Id.* Because Claimant had reached MMI for all components related to his industrial injuries per the opinions of Drs. Castro and Entin on April 18, 2011, Claimant's TTD benefits were terminated as of 4/17/2011 pursuant to statute and rule of procedure. *Id.* The FAL also admitted liability for whole person impairment. *Id.* The FAL computed the value of the impairment ratings as $35,849.35 (10% physical) and $17,924.68 (5% psychiatric). However, the FAL also noted benefits were capped at $75,000 pursuant to § 8-42-107.5, and Claimant had already been paid $107,139.96 in TTD and TPD (temporary partial disability). The FAL claimed an overpayment of $38,775.87 which "will be applied towards any future benefits." A copy of the FAL was mailed to Claimant at his address of record of: [Redacted, hereinafter CA]. *Id.* By this date, Claimant was represented by Attorney, [Redacted, hereinafter GY].[3] Accordingly, the Division of Workers Compensation mailed the FAL to GY[Redacted] at: [Redacted, hereinafter AS]. *Id.*

6. Claimant objected to the 4/11/2012 FAL and GY[Redacted], filed an Application for Hearing on April 17, 2012. (Resp. Ex. L).[4] He also requested a Division Independent Medical Examination (DIME). (Resp. Ex. F, p. 2). Based upon the statement that Claimant would seek to continue any hearing as a DIME on PPD/MMI was pending,

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[2] Per the report of Dr. Entin dated 4/2/2012, Claimant had reached psychiatric MMI on 6/14/2010, however, per the 1/10/2012 report of Dr. Castro, Claimant did not reach MMI for the physical components of his injury until 4/18/2011.

[3] GY[Redacted] also represented Claimant in a third-party personal injury suit against the property owner of auto repair shop. Respondents intervened in the third-party litigation to advance and protect its subrogation interest. [Redacted, hereinafter CS] represented Respondents in the third-party case. The third-party case went to mediation before Judge Sandy Brooke on January 28, 2012. GY[Redacted] represented Claimant. The suit settled for $110,000. Insurer's lien at that time was $200,000, but it agreed to compromise its subrogation claim for $20,000. (Resp. Ex. E, pp. 6-7, FOF ¶¶ 26-27).

[4] Contrary to Respondents' assertion, as reflected in their post-hearing position statement, Claimant did endorse TTD from April 17, 2011 and ongoing as an issue for determination in his April 17, 2012 Application for Hearing.

the ALJ infers that the hearing on Claimant's April 17, 2012 Application was continued and ultimately abandoned. (Resp. Ex. L, p. 1). Claimant would also abandon the DIME process and apply for a hearing claiming entitlement to permanent total disability (PTD) benefits on May 29, 2012. (Resp. Ex. F, p. 2). In preparation for his PTD hearing, Claimant saw Dr. Lynn Parry for an independent medical examination (IME) on July 4, 2012. Dr. Parry documented a lengthy history of Claimant's treatment and cataloged numerous ongoing problems she believed were related to the accident. Dr. Parry noted "two major residual problems secondary to his industrial accident that have not been adequately addressed. Primarily his nausea and vestibular dysfunction." Dr. Parry ultimately opined that Claimant was not at MMI. She recommended that he return to vestibular therapy. (Resp. Ex. E, p. 9, FOF ¶ 41).

7. Dr. Henry Roth performed an IME for Respondents on March 4, 2013. Dr. Roth had previously issued several Rule 16 reports on the claim. Claimant completed a lengthy questionnaire before the evaluation. Dr. Roth spent one hour and 43 minutes with Claimant conducting the interview and examination. Dr. Roth also reviewed hundreds of pages of medical records and subsequently issued a 94-page report. Claimant's chief complaints were headaches, facial pain, neck pain, problems thinking, changed behavior, depression, sleep disturbance, nausea, and vision problems. Claimant complained "bitterly" about headaches and his vision. Dr. Roth opined none of Claimant's ongoing complaints were related to the accident. He opined the injury mechanism was minor and insufficient to injure Claimant's visual system, auditory system, vestibular system, or cause cognitive impairment. (Resp. Ex. E, p. 9, FOF ¶ 42).

8. Dr. Victor Chang also issued a supplemental IME report on March 18, 2013. He opined Claimant suffered a concussion in the accident, "but his ongoing symptoms should not be considered as a manifestation of the concussion itself." He noted Claimant's presentation was "atypical for MTBI," and concluded, "[Claimant's] symptoms are not related to the concussion. It is more probable than not that his ongoing symptoms are related to mental/behavioral and/or motivational factors." He also opined Administrative issues commonly seen in litigation" were also likely contributing to Claimant's presentation. He did not think Claimant had any permanent impairment related to a concussion but agreed with Dr. Entin's decision to provide a 5% rating for "a mental/behavioral condition related to the work injury." He opined that any residual symptoms of the MTBI had resolved and no further treatment was expected to improve Claimant's condition. Dr. Chang disagreed with a previously expressed opinion issued by Dr. David Zierk that Claimant could not work in any capacity. He also commented,

> [Claimant] has previously submitted 2 large binders that detailed his treatment since his injury. At first, I thought these binders were prepared by an attorney's office, as the contents were very organized and had numerous cross-references. I later discovered that these binders had been prepared by [Claimant] himself, which I found to be quite impressive for any person. The ability for a layperson to obtain, organize, cross-reference, draw conclusions, and rebut opinions made by medical providers and legal experts was, in my

> professional opinion, something that would be difficult for any non-legal professional to complete. This compilation of work submitted by [Claimant] demonstrated a high degree of cognitive functioning, including attention to detail, organizational skills, and complex deductive reasoning. These abilities would indicate readiness to perform in a competitive workplace.

(Resp. Ex. E, pp. 9-10, FOF ¶ 43).

9. On March 26, 2013, Claimant and his Attorney, GY[Redacted] along with Respondents Counsel, [Redacted, hereinafter EA] agreed to settle the claim on a full and final basis for a lump sum payment of $182,500.00 plus a contingent Medicare Set-Aside (MSA) agreement. The parties further agreed to leave the medical portion of the claim open pending a response from the Centers for Medicare and Medicaid Services (CMS) regarding the proposed MSA. Respondents retained the right to fund an MSA per CMS requirements or leave Claimant's medical benefits open indefinitely. (Resp. Ex. E, p. 10, FOF 44; Resp. Ex. F, p. 4, Resp. Ex. M, p. 9, ¶ 9(A).

10. The settlement documents contained the following language:

> Claimant sustained or alleges injuries or occupational disease as arising out of and in the course of employment with the employer on or about March 31, 2009 including, but not limited to, head, neck, shoulder, back, knee, psychological, cognitive, and G.I. System. *Other disabilities, impairments and conditions that may be the result of these injuries or diseases but that are not listed here are, nevertheless, intended by all parties to be included in and resolved FOREVER by this settlement.* (emphasis added).

(Resp. Ex. E, p. 10, FOF 45); Resp. Ex. F, p. 4).

11. In consideration for the $182, 500.00, Claimant was paid under the terms of the settlement, he acknowledged that he was rejecting, waiving, and forever giving up the right to claim all compensation to which he might be entitled for each injury or occupational disease he claimed, including: Temporary total and temporary partial disability benefits to compensate Claimant for time he missed from work. (Resp. Ex. M, p. 8).

12. The settlement documents also provided that in keeping with the requirements of the WC Act, the settlement could only be reopened on the grounds of "fraud or mutual mistake of material fact". (Resp. Ex. M, p. 9; Resp. Ex. E, p. 10, FOF ¶ 45; Resp. Ex. F, p. 4). Finally, the agreement stated, "Claimant has reviewed and discussed the terms of the settlement with claimant's attorney, has been fully advised, and understands the rights that are being given up in this settlement." (Resp. Ex. M, p. 10) *Id.* Claimant executed the agreement on April 26, 2013, and it was approved by the Division on May 9, 2013. (Resp. Ex. M, pp. 10, 12). Upon approval by the Division of

Workers' Compensation, Respondents forwarded the lump sum check of $182,500.00 to Claimant's Counsel on June 12, 2013. (Resp. Ex. M, pp. 6-7).

13. An MSA proposal in the amount of $32,178.00 was submitted to CMS for approval. CMS rejected the proposed payment as insufficient, noting instead that a total of $102,126.00 would need to be set-aside to fully protect Medicare's interests. Insurer exercised its rights under the settlement to not fund the MSA at that time. Ultimately, Respondents agreed to fund a self-administered structured MSA under the terms required by CMS. The MSA was funded with a lump sum payment $8,881, plus $4,238 per year for 22 years, if Claimant is living. Claimant reviewed and agreed to the terms of the structured settlement regarding his medical benefits as evidenced by his May 21, 2015 signature. (Resp. Ex. M, p. 3). The parties' then filed a Joint Motion to Amend the Settlement Documents on April 29, 2015 and the Division approved the amended agreement on May 21, 2015. (Resp. Ex. E, p. 11, FOF ¶ 48; Resp. Ex. F, p.5). The claim then closed as all benefits, compensation, penalties and interest to which Claimant might be entitled as a result of his injuries, including medical and other health care benefits had settled on a full and final basis.

14. On May 7, 2020, Claimant, proceeding *pro se*, filed a Petition to Reopen and an Application for Hearing requesting that the settlement be set-aside on the grounds of fraud and mutual mistake of material fact. The Petition and Application for Hearing were received in the Colorado Springs Office of Administrative Courts on May 11, 2020 and a hearing on Claimant's Petition to Reopen was held before ALJ Patrick Spencer over four nonconsecutive days on September 16, October 27, November 9 and November 13, 2020. The hearings were conducted remotely via video/teleconference due to the COVID-19 pandemic. (See generally, Resp. Ex. E).

15. At hearing Claimant asserted multiple instances of "fraud, misrepresentation, or concealment," including:

- "Someone had to cut and paste Claimant's name" onto another patient's medical record and gave it to Dr. Douthit for his IME.

- Respondents "manufactured" evidence, including a prescription made by a physician who never treated Claimant, "with the intent Dr. Roth would act upon false information and produce opinions and reports."

- Judge Friend's May 25, 2011 FFCLO was "altered and falsified by a second author." This allegedly falsified Order was then allegedly used to influence and limit benefits that might otherwise have been available to Claimant.

- Respondents' counsel "recklessly" misrepresented to Dr. Castro that Judge Friend found "the neck is not a compensable component" of his claim.

- Respondents did not regularly send copies of Claimant's medical records to Dr. Castro or Dr. Entin.

- Respondents intentionally presented "incomplete" medical files to ATPs and IMEs to induce them to act to Claimant's detriment.

- Respondents concealed medical records from Claimant's attorney.

- Dr. Roth produced reports for Respondents without having "all medical records."

- Respondents violated *Samms* by corresponding with Claimant's ATPs.

(Resp. Ex. E and F).

16. Following hearing, ALJ Spencer concluded that Claimant had been represented by counsel through much of his claim, including from April 2012 (when the FAL was filed) through the date of the settlement. Claimant neither argued nor suggested he was not adequately informed of the progress of his case. In fact, the record documents several instances of communication between Claimant and his counsel. Accordingly, ALJ Spencer concluded that the persuasive evidence demonstrated that Claimant was "aware of and participated in the tactical and strategic decisions regarding his case through the time of settlement". (Resp. Ex. E, pp. 11-12, FOF 55). Based upon the evidence presented, ALJ Spencer found no persuasive evidence to support any intent on Respondents part to "deceive, misrepresent or conceal material information" relating to the settlement. Thus, ALJ Spencer concluded that Claimant had failed to establish any fraud which would justify reopening the settlement.[5] Likewise, ALJ Spencer concluded that the evidence presented failed to prove that there were any mutual mistakes of material fact to support reopening the settlement. (Resp. Ex. E and F). Accordingly, ALJ

[5] In concluding that Claimant had failed to establish fraud as required by statute to set the settlement aside and reopen the claim, ALJ Spencer specifically considered Claimant's contention that ALJ Friend's May 25, 2011 order had been "altered and falsified" because there were multiple versions of the order containing a signature of ALJ Friend. In addressing this as part of his December 31, 2020 order, ALJ Spencer, notes: "Claimant refers to multiple "versions" of Judge Friend's May 25, 2011 Order. Claimant believes the version at Ex. 18-1 to 18-4 is the "real" Order. The ALJ disagrees. The version referenced by Claimant is incomplete and contains no findings pertinent to the issue being decided, *i.e.*, Respondents' liability for the surgery recommended by Dr. Choi. Judge Friend's true order is located at multiple places in the exhibits and pleadings, including at 18-5 through 18-15. It is then reproduced twice at 18-16 through 18-40, with slightly different formatting. At the time of Judge Friend's FFCLO, the OAC served its orders electronically in Word format. The small formatting differences in the multiple copies of the Order were probably the result of the document being opened and printed on a computer with a different version of Word, or different installed fonts. There is no persuasive evidence anyone "altered" or "falsified" Judge Friend's Order. In this case, Claimant reviews his assertion that ALJ Friend's order was altered and he includes the various copies of the May 25, 2011 order in his hearing exhibits. After careful review of Claimant's Exhibit 1, this ALJ concurs with ALJ Spencer to find and conclude that the likely explanation for there being several copies of ALJ Friends order in slightly different formats with different fonts is that the order was opened and copied from a different computer with different software versions. Like ALJ Spencer, this ALJ is not convinced that the true and accurate version of ALJ Friend's May 25, 2011 Order is contained at Ex. 1, pp. 1-5, because this version of the order is devoid of important findings of fact regarding the issues litigated and contains nothing in the way of a Finding of Fact at paragraph 4 and 5. (Clmt's. Ex. 1, pp. 1-5).

Spencer denied and dismissed Claimant's request to reopen the approved settlement in this claim. *Id.*

17. Claimant timely appealed to the ICAO. On April 26, 2021 a panel from the ICAO affirmed ALJ Spencer's determinations prompting Claimant to seek review of the final order of the ICAO by the Colorado Court of Appeals. The Court of Appeals considered 14 separate arguments advanced by Claimant in support of his request to reverse the ICAO's order. (Resp. Ex. G, pp. 13-16). These enumerated arguments along with several others were rejected by the Court in affirming the Panel's order in an unpublished opinion announced February 3, 2022. It is noted that the Court, to the extent that Claimant raised a challenge to the 2011 order of the ICAO affirming ALJ Friend's order, concluded it did not have jurisdiction to consider such a challenge "[b]ecause [Claimant] didn't timely appeal that order". Citing, *Cornstubble v. Indus. Comm'n.*, 722 P.2d. 448, 450 (Colo. App. 1986) (concluding that the Court of Appeals was deprived of jurisdiction to consider the appeal because the claimant failed to seek review within the statutory period contained in former section 8-53-111(8), which is substantially similar to section 8-43-301(10)).

18. Claimant appealed to the Colorado Supreme Court; however, the Petition for Writ of Certiorari was denied by Order of the Court on May 16, 2022. (Resp. Ex. H, p. 1).

19. On June 30, 2022, Claimant submitted a blank copy of a Petition to Modify, Terminate, or Suspend Compensation Form along with a completed Objection to the Petition to the Division of Workers' Compensation. (Resp. Ex. A). In his objection, Claimant noted: "Claimant is requesting this Petition [be] completed (meaning the blank Form accompanying his objection). Claimant never received this Petition as Required by Statute and Rule. Claimant is requesting this so as to make an informed decision whether to object". *Id*. at p. 1.

20. On September 22, 2022, Claimant filed an Application for Hearing endorsing a single issue for determination. (Resp. Ex. B). Claimant framed the issue as a question of whether Respondents were required to present a Petition to Modify, Terminate of Suspend Compensation. *Id*. at p. 2. A response to Claimant's Application for Hearing, endorsing multiple defenses, including jurisdiction and r*es judicata* (claim preclusion) was filed by Respondents on October 7, 2022 and a virtual hearing was scheduled for January 11, 2023 at 1:00 p.m. before ALJ Spencer. (Resp. Ex. C).

21. Claimant failed to appear for his scheduled hearing. Accordingly, ALJ Spencer issued a Show Cause Order on January 12. 2023, affording Claimant 30 days to demonstrate good cause for his failure to appear. (Resp. Ex. O, p. 1). The show cause order also required Claimant to "show cause why the September 12, 2022 Application for Hearing should not be dismissed for lack of jurisdiction" as the claim was "previously closed by full and final settlement" and a prior "petition to reopen the settlement based on fraud or mutual mistake of material fact was denied and dismissed in a final order dated December 31, 2020, for which all appeals had been exhausted. *Id*. at pp. 1-2.

22. Claimant responded the January 12, 2023, Show Cause Order on January 13th and 17th, 2023. He asserted that he did not receive the electronic invitation to the virtual hearing. He did not otherwise respond to the jurisdictional issue raised by ALJ Spencer. In a February 14, 2023 Order, ALJ Spencer dismissed Claimant's September 12, 2023 Application for Hearing with prejudice noting that the OAC lacked jurisdiction to adjudicate the issues endorsed in Claimant's September 12, 2022 Application for Hearing because the claim was closed by a full and final settlement and a petition to reopen based upon fraud or mutual mistake of material fact had been dismissed and the appeals concerning that determination had been exhausted. Indeed, ALJ Spencer noted: "Absent a reopening for fraud or mutual mistake of material fact, a full and final settlement divests the OAC of jurisdiction over all but a tiny handful of issues. (Resp. Ex. O, pp. 5-9) (citations omitted).

23. No appeals were taken from ALJ Spencer's February 14, 2023 Order dismissing Claimant's September 12, 2022 Application for Hearing. Rather, Claimant simply filed a new Application for Hearing on April 19, 2023. In this application, Claimant endorsed the same issue he outlined in his September 12, 2022 Application for Hearing, namely whether Respondents can terminate benefits without petitioning the Court. As noted above, the hearing concerning Claimant's endorsed issues proceeded on July 20, 2023 and August 24, 2023.[6]

CONCLUSIONS OF LAW

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

Generally

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

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item

[6] While the issue endorsed for hearing, i.e. "Can Respondents terminate benefits without Petitioning the Court? could arguably be characterized as a request for an advisory opinion, the ALJ is persuaded, based upon the statements of the parties during a prehearing/status conference held May 22 and August 18, 2023, in addition to the hearing convened July 20, 2023, that Claimant contends that he is entitled to additional TTD and other benefits because Respondents improperly terminated his TTD benefits because they failed to file a Petition to Modify, Terminate or Suspend Compensation. Accordingly, the ALJ elected to adjudicate the matter upon established facts.

contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Claim Closure and Jurisdiction

C. The Workers' Compensation Act permits injured workers to settle all or part of their claim. Section 8-43-204(1), C.R.S. (20022). Accepting the full and final settlement in this claim effectively closed all issues relating to the claim. Indeed, paragraph 7 of the Settlement Agreement in this case provides: "Claimant understands that this is a final settlement and that approval of this settlement by the Division of Workers' Compensation or by an administrative law judge form the Office of Administrative Courts dismisses this matter with prejudice and FOREVER closes all issues relating to this matter." (Resp. Ex. M, p. 9). Accordingly, Claimant waived and forever gave up the right to claim any additional TTD/TPD he might have been entitled to (See ¶ 3, Resp. Ex. M, p. 8) and all matters concerning Claimant's entitlement to such disability benefits closed upon approval of the settlement agreement by the Division of Workers' Compensation on May 9, 2013. Nonetheless, all final settlements are subject to reopening, *at any time* "on the ground of fraud or mutual mistake of material fact."[7] The party seeking to reopen a settlement bears the burden of proof by a preponderance of the evidence. Section 8-43-303(4), C.R.S.

D. In this case, Claimant failed in his effort to reopen his claim on the basis or fraud or mutual mistake of material fact at hearing before ALJ Spencer and the order denying his petition to reopen was affirmed by the ICAO and the Colorado Court of Appeals. Moreover, a Petition for Writ of Certiorari was denied by the Colorado Supreme Court on May 16, 2022. Accordingly the claim remains closed. In the present action, Claimant did not file a subsequent petition to reopen or allege fraud. Indeed, he did not endorse reopening at all. Rather, he simply sought a determination as to whether the Respondents could terminate his compensation (TTD/TPD) without petitioning the Court to do so. As noted above, the ALJ considers Claimant's endorsement as a demand for additional indemnity benefits based upon his assertion that his TTD/TPD benefits were improperly terminated because Respondents failed to file a Petition to Modify, Terminate or Suspend Compensation. Regardless, because the claim is closed and Claimant waived all rights to additional TTD/TPD and reopen any prior awards, except on the

[7] Compare C.R.S. § 8-43-204(1), providing that settlements shall not be "subject to being reopened under any provisions of articles 40-47 of [the Act] other than on the ground pf fraud or mutual mistake of material fact with C.R.S. § 8-43-303(1) which provides that "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all rights to reopen an award; but a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact." Also, § 8-43-303(2)(a), C.R.S., allows an administrative law judge to reopen a claim on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition "at any time within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable…." Similarly, § 8-43-303(2)(b), C.R.S., allows an administrative law judge to reopen a claim for medical benefits only on the grounds of error, mistake or change in condition "at any time within two years after the date the last medical benefits become due and payable…."

grounds of fraud or mutual mistake of material fact, which he did not endorse for hearing[8], this ALJ agrees with ALJ Spencer that absent reopening of the claim, Claimant's acceptance of the full and final settlement divests the OAC of jurisdiction over the issue endorsed for hearing. Even if the ALJ had jurisdiction to determine the issue Claimant endorsed for hearing, the evidence presented fails to establish that Respondents were required to file a Petition to Modify, Terminate or Suspend Compensation when they terminated Claimant's TTD on April 11, 2012.

Respondents Obligation to File a Petition to Modify, Terminate or Suspend Compensation

E. As found, Claimant's TTD benefits were terminated after he was determined by Dr. Castro and Entin to have reached MMI. (Resp. Ex. K). Per C.R.S. § 8-42-105(3), TTD benefits shall continue until the first occurrence of any one of the following:

(a) The employee reaches maximum medical improvement;

(b) The employee returns to regular or modified employment;

(c) The attending physician gives the employee a written release to return to regular employment; or

(d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

F. In this case, the evidence persuades the ALJ that Respondents were within their rights to terminate Claimant's TTD benefits, without a hearing, by filing the FAL contained at Respondents' Exhibit K because he had reached MMI. The evidence presented also supports a conclusion that Respondents complied with WCRP 6-1 when filing their FAL, because the medical reports from Claimant's authorized treating physicians stating he had reached maximum medical improvement were attached to the FAL and the FAL clearly took a position on permanent disability benefits. Nonetheless, Claimant argues that Respondents were required to file a Petition to Modify, Terminate or Suspend Compensation before terminating his lost wage benefits after April 17, 2011.

G. A Petition to Modify, Suspend or Terminate Compensation provides prospective relief to an Insurer when a claimant is receiving indemnity benefits and there is a basis to change (modify), terminate or suspend those benefits. (WCRP 6-4-6-8). It does not address medical benefits. Claimant did not present any statutory reason for such a Petition to have been filed when the claim was open, and it is undisputed that Insurer was

[8] To the extent that Claimant argues that Respondents defrauded him by actively concealing the Petition to Modify, Terminate of Suspend Compensation form and this caused him harm and otherwise constitutes fraud, the ALJ refuses to determine the merits of those allegations as the issue of fraud, no matter the theory, was not plead or tried by consent of Respondents. Nonetheless, as presented the evidence fails to support Claimant's assertions.

not liable for benefits at the time he filed his objection to Respondents April 11, 2012 FAL. This issue cannot be decided retroactively, and claimant is not entitled to retroactive relief. WCRP 6-4 addresses suspension, modification or termination of temporary disability benefits by petition. This rule provides in pertinent part:

> (A) When an insurer seeks to suspend, modify or *terminate temporary disability benefits pursuant to a provision of the Act, and Rules 6-1, 6-2, 6-3, 6-5, 6-6, 6-7 or 6-9 are not applicable*, the insurer *may*[9] file a petition to suspend, modify or terminate temporary disability benefits on a form prescribed by the Division. All documentation upon which the petition is based shall be attached to the petition. The petition shall indicate the type, amount and time period of compensation for which the petition has been filed and shall set forth the facts and law upon which the petitioner relies. (emphasis added).

H. In this case, Respondents terminated Claimant's TTD benefits based upon C.R.S. § 8-42-105(3) (a). The evidence presented supports a conclusion that they did not seek/move to terminate, modify or suspend Claimant's compensation for any other reason for which a Petition would be required. (See WCRP 6-4(B), 6-5, 6-6 or 6-7). Because the only basis used to terminate TTD was MMI and the evidence presented supports a conclusion that Respondents followed WCRP 6-1 when filing their FAL, the ALJ agrees with Respondents that Insurer was not under a duty file a Petition to Modify, Terminate or Suspend Compensation prior to terminating Claimant's TTD.

ORDER

It is therefore ordered that:

1. The claim is closed.

2. Claimant's request for additional TTD and that Respondents file a Petition to Termination, Modify or Suspend Compensation is denied and dismissed.

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

[9] Rather than file a Petition, an insurer could simply choose to continue to pay indemnity benefits as established; however, if they wish to modify, terminate or suspend the benefit prospectively, they must file the petition and following the process set out in WCRP 6-4(A)-(G).

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

DATED: October 5, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-228-929-001

ISSUES

- Did Claimant prove she suffered a compensable injury on January 27, 2023 arising out of and in the course of her employment?
- If Claimant proved a compensable injury, did she prove Dr. Miguel Castrejon is the ATP because the right of selection passed to Claimant?
- What is Claimant's average weekly wage?
- Did Claimant prove entitlement to TTD benefits commencing January 28, 2023?

FINDINGS OF FACT

1. Claimant works for Employer as a personal care provider. Her duties include household tasks such as housekeeping, meal preparation, personal hygiene, grocery shopping, and running errands. Another core function of her job is providing "companionship," including but not limited to, social interaction, emotional support, reading, writing, and other "mind-stimulating activities."

2. On January 27, 2023, Claimant was working at the home of one of Employer's clients. The client's care plan covered basic ADLs like personal hygiene, toileting, bathing, and transfers. It also included to "homemaking" activities such as housecleaning, laundry, meal preparation, and "shopping errands."

3. On January 27, Claimant was covering the shift of a co-worker from 12:00 PM to 4:00 PM. She left the client's home before the end of her shift to go to the [Redacted, hereinafter DT] and [Redacted, hereinafter KS] stores nearby. Claimant intended to purchase craft supplies and butterscotch candies for the client from the DT[Redacted] store. The craft supplies were for a project Claimant and the client would be working on the next day. The client was distressed about the health of her dog, and they decided to make a "paw print" memento. After obtaining the supplies at the DT[Redacted], Claimant planned to stop at KS[Redacted] to purchase beverages for the client. Claimant was trying to complete these errands before the end of her shift.

4. Claimant was involved in a motor vehicle accident shortly after leaving the client's home. The front of her vehicle was struck by a large Ford F-250 pickup that had turned into her lane. Claimant's vehicle suffered significant damage.

5. Claimant texted Employer shortly after the accident with photos of her vehicle. She also spoke with [Redacted, hereinafter ST] and [Redacted, hereinafter PM] by telephone while still at the scene. Claimant had contacted Employer immediately because, "I was still on the clock, so I wasn't really sure what to do because I've never been in a car accident while I was at work."

6. Most of Employer's clients are Medicaid beneficiaries, including the client with whom Claimant was working on January 27, 2023. Medicaid generally covers two 60-minute shopping trips per week for each client. Medicaid pays for time but does not pay mileage. Because there is no reimbursement for vehicle expenses beyond the caregiver's hourly wage, the caregivers are encouraged to "try to limit the number of shopping errands so it is not as cost exorbitant on the . . . caregiver who is performing the errands."

7. Claimant routinely ran errands at the request of clients or Employer. The errands were not always related to grocery or medication needs. Examples include buying a storage tote from [Redacted, hereinafter WT], going to the pet hospital, and picking up fast food. Claimant also picked up vape pens for a client on at least one occasion.

8. Claimant typically asked her supervisor, ST[Redacted], for permission before running errands other than the two 60-minute shopping trips each week. However, the record contains at least one documented instance when Claimant forgot to contact ST[Redacted] before running the errand. When Claimant mentioned it to ST[Redacted] a few days later, ST[Redacted] responded "that's all okay."

9. On January 27, Claimant neglected to advise ST[Redacted] before leaving the client's home that she was running errands. However, based on the evidence presented, there is no persuasive reason to infer ST[Redacted] would have prohibited her from doing so.

10. Claimant occasionally ran errands at the start of her shift, on the way to a client's home. On those occasions, she was advised to "clock in" and begin her shift when she arrived at the store. The ALJ infers that Claimant would follow the inverse procedure and clock out after leaving the store if she ran an errand at the end of her shift.

11. Claimant initially felt no symptoms after the accident and told ST[Redacted] and PM[Redacted] that she felt "fine." However, she started to experience pain in her back, left shoulder, and neck, and had "a major headache" a few hours after the accident.

12. Claimant went to the UCHealth Urgent Care in Fountain, Colorado the evening of January 27, 2023. She reported pain from her shoulder down to her low back, a headache, and minor chest pain from the seatbelt. CT scans of her head and pelvis were negative and she was discharged home.

13. Claimant spoke with ST[Redacted] and PM[Redacted] before going to the urgent care, and again thereafter. ST[Redacted] and PM[Redacted] conceded they knew within a day of the accident that Claimant had sought treatment for injury-related symptoms.

14. Claimant returned to the UCHealth Urgent Care facility on January 31, 2023, because of worsening injury-related symptoms, including "blacking out." Her decision to go to urgent care was motivated in part by a text from ST[Redacted] suggesting she go to the emergency room and been seen "immediately" if the blackout spells continued. Claimant texted ST[Redacted] after leaving urgent care and stated,

“they said the blacking out is most likely from swelling/inflammation from whiplash and concussion even though I didn’t hit my head.”Employer did not give Claimant a list of designated providers at any time after the accident. A provider list was included in the new-employee paperwork when Claimant was hired in April 2021, but there is no persuasive evidence she recalled the list or any of the named providers after the January 27, 2023 MVA.

16. Claimant had multiple text exchanges with ST[Redacted] in the week after the accident stating she was still symptomatic and did not feel ready to return to work.

17. Claimant was evaluated by Dr. Miguel Castrejon on February 13, 2023. She reported pain, stiffness, and muscle spasms in her neck and low back, numbness and tingling in her hands, and headaches. Claimant described a pre-injury history of headaches, for which she had been prescribed Topamax by Dr. Bower, a neurologist. She stated the headaches had become more intense and frequent since the MVA and now seemed to originate from the base of her neck. She also reported “absence episodes” that were new since the accident. Physical examination showed tenderness and muscle spasm of the cervical and lumbar musculature. Dr. Castrejon diagnosed cervical and lumbar strains with myofascial pain, left SI joint dysfunction, a probable mild concussion, post-traumatic aggravation of pre-existing headaches, and occipital neuralgia contributing to the headaches. He prescribed muscle relaxers, massage therapy, and chiropractic treatment. He was unsure what was causing the absence episodes, so he referred Claimant to Dr. Bowser for further evaluation. Dr. Castrejon restricted Claimant from until her next appointment.

18. Claimant followed up with Dr. Castrejon on March 27, 2023. The corresponding report is not in evidence, but Dr. Castrejon described the encounter during his hearing testimony. Claimant’s neck pain and headaches had improved significantly in the interim. Her low back was improved too, but not to the same extent as her neck. Dr. Castrejon maintained Claimant’s work restrictions, including the limitation on driving because he had not received information from Dr. Bowser whether it was safe for Claimant to drive.

19. Dr. Fall performed an IME for Respondents on May 10, 2023. Claimant’s symptoms had improved since the accident, but she was still having low back pain. Dr. Fall concluded the accident caused a left cervicothoracic myofascial strain and mild lumbopelvic dysfunction. She opined a course of PT would be reasonable.

20. At hearing, Dr. Castrejon opined the work accident aggravated Claimant’s pre-existing headaches and caused new symptoms in her neck and low back. Dr. Castrejon could not offer definitive opinions about Claimant’s current condition because he had not seen her since March 2023. Based on Claimant’s testimony and Dr. Fall’s IME, Dr. Castrejon stated Claimant is probably at or close to “baseline” regarding the headaches and neck pain, but requires additional conservative treatment for her low back. However, he declined to put Claimant at MMI or release her to regular duty during the hearing.

21. Dr. Fall testified via deposition on July 10, 2023. In her deposition, Dr. Fall questioned the reliability of Claimant's subjective complaints and suggested they may be influenced by psychological factors.

22. Dr. Castrejon's opinions and conclusions are credible and more persuasive than any contrary opinions offered by Dr. Fall.

23. Wage records show Claimant earned $7,805.05 in the 12 weeks before the injury. This equates to an average weekly wage (AWW) of $650.42, with a corresponding TTD rate of $433.61.

24. Claimant has been off work since the work accident, at least in part because of limitations and restrictions related to the work accident. As of the hearing, she had not been put at MMI by an ATP, released to regular duty, or returned to work in any capacity.

25. Claimant's testimony is credible.

26. Claimant proved the January 27, 2023 MVA arose out of and occurred in the course of her employment.

27. The treatment Claimant received from UCHealth Urgent Care on January 27 and January 31, 2023 was reasonably necessary emergency treatment for to the work injury.

28. Claimant proved the right to select the treating physician passed to her because Employer did not timely provide a list of designated providers.

29. Claimant selected Dr. Castrejon as the ATP.

30. Claimant proved entitlement to TTD benefits commencing January 28, 2023 and continuing until terminated by law.

CONCLUSIONS OF LAW

A. Compensability

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of employment." Section 8-41-301(1)(b). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The injurious activity need not be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). "Many job functions involve discretionary or optional activities on the part of the employee, devoid of any duty

component and unrelated to any specific benefit to the employer, but nonetheless are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). There is no presumption that an injury occurring at work or during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant proved the January 27, 2023 MVA arose out of and occurred in the course of her employment. Multiple factors support this conclusion. The accident occurred during Claimant's shift while she was still "on the clock." Shopping and running errands are a routine part of Claimant's job. Although most shopping trips are related to groceries or medications, she occasionally shops for other personal items, with Employer's approval. The limitations Employer placed on shopping trips were largely intended to protect the employee from incurring unreimbursed travel expenses, rather than limiting the scope of employment. The items Claimant intended to purchase on the day of the accident related entirely to the client's needs. There is no persuasive evidence to suggest any personal aspect of the journey. Obtaining craft supplies for a project related to the client's aging pet was directly ancillary to Claimant's core job duties of providing companionship and emotional support. As such, the shopping trip was sufficiently incidental to Claimant's job to support a determination that it arose out of and occurred in the course of her employment.

B. Authorized treating providers

The respondents are liable for medical treatment from authorized providers reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). As found, Claimant's treatment at UCHealth Urgent Care on January 27 and January 31, 2021 was reasonably necessary emergency treatment for her injuries. The initial onset of symptoms occurred after regular business hours, making urgent care the only reasonably available option. The January 31 visit was instigated in part by her supervisor's suggestion that she go to the emergency room to be evaluated "immediately."

Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith" upon receiving notice of the injury, or the right of selection passes to the claimant. *Rogers v.*

Industrial Claim Appeals Office, 746 P.2d 565 (Colo. App. 1987). An employer's attempt to "pre-designate" a provider with posted notices or printed forms is not a sufficient tender of treatment if the injured worker does not recall the notice at the time of injury. *E.g*., *Park v. Phil Long Ford d/b/a Academy Ford*, W.C. No. 4-373-188 (December 14, 1999); *Broadmoor Hotel v. Industrial Claim Appeals Office*, (Colo. App. No. 92CA1635, May 27, 1993) (NSOP).

Employer did not timely refer Claimant to a provider after receiving notice of her injuries, and there is no persuasive evidence Claimant recalled the designated provider list she was given in April 2021, nearly two years before the work accident. Claimant had multiple text and phone conversations with ST[Redacted] and PM[Redacted] in the week after the accident in which she indicated a need for treatment related to the MVA. Employer had ample opportunity to give Claimant a provider list but failed to do so. The right of selection passed to Claimant, and she selected Dr. Castrejon. Treatment provided by, and on referral from, Dr. Castrejon is authorized.

C. Average weekly wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly compute" the employee's AWW in any manner that seems most appropriate under the circumstances.

As found, Claimant's AWW is $650.42, with a corresponding TTD rate of $433.61. This determination is based on the 12 weeks immediately preceding the injury, which provides a fair approximation of Claimant's earnings capacity "at the time of the injury.

D. TTD commencing January 28, 2023

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions or limitations that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). A claimant need not prove that the work-related injury was the sole cause of the wage loss to establish entitlement to TTD benefits. Rather, eligibility for TTD requires only that the work-related injury contributes "to some degree" to a temporary wage loss. *PDM Molding, supra*. Once commenced, TTD benefits continue until the occurrence of one of the events listed in § 8-42-105(3)(a)-(d).

As found, Claimant proved entitlement to TTD benefits commencing January 28, 2023. Claimant's job is physically demanding and requires the ability to help infirm clients with transfers, toileting, and other bodily functions, as well as housekeeping activities such as cooking, cleaning, and laundry. The compensable injury impaired Claimant's ability to perform these functions. Additionally, the absence episodes raised concern for the safety of Employer's clients and Claimant's ability to perform work-related driving.

As of the hearing date, no terminating event listed in § 8-42-105(3)(a)-(d) has occurred. Accordingly, Claimant's entitlement to TTD benefits is ongoing at present.

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable.

2. Dr. Miguel Castrejon is Claimant's authorized treating provider.

3. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of her compensable injury, including but not limited to the charges Dr. Castrejon and UCHealth Urgent care.

4. Claimant's average weekly wage is $650.42, with a TTD rate of $433.61.

5. Insurer shall pay Claimant TTD benefits at the weekly rate of $433.61 commencing January 28, 2023 and continuing until terminated according to law.

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

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

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

DATED: October 6, 2023

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

ISSUES

1. Whether or not Respondents have shown by a preponderance of the evidence that Claimant did not sustain a compensable work-related injury (and therefore are permitted to withdraw the admissions of liability).

2. Whether Respondents are entitled to reimbursement for medical and temporary total disability benefits issued on this claim due to fraud (and the amount of that reimbursement Claimant must pay back per month).

FINDINGS OF FACT

Notice

1. Respondents' counsel's paralegal, [Redacted, hereinafter SE], credibly testified that she sent all pleadings related to this hearing, including the hearing confirmation and the notice of hearing, to Claimant at the address [Redacted, hereinafter PO]. The claims adjuster, [Redacted, hereinafter HD], credibly testified that the address was obtained directly from Claimant.

2. The Court finds that Claimant had notice of the September 26, 2023 hearing and the issues to be addressed. The Court also finds that Claimant had an opportunity to present his case.

Personal and Employment Information

3. Claimant is a 50-year-old former technician with the Employer.

Alleged Work Injury – August 25, 2022

4. Claimant alleged that he injured his left shoulder when he lifted a thirty-pound fire extinguisher with the Employer on August 25, 2022. Resp. Ex. W.

5. The First Report of Injury confirms that the Claimant did not report the injury until the day following the alleged work injury. As a result, there were no witnesses to the alleged work injury.

6. Respondents accepted the claim based on Claimant's representation that the injury was legitimate. Respondents also accepted the claim not knowing that Claimant was running his own company or had a prior shoulder condition.

7. Respondents also began paying claimant TTD benefits and for all the medical treatment related to Claimant's left shoulder injury. Respondents paid these benefits based on Claimant's representations that he suffered a legitimate injury and was disabled from working due to the alleged work injury.

Surveillance Demonstrates that Claimant Runs His Own Company

8. Respondents obtained surveillance on Claimant. Resp. Ex. J and Ex. M. Surveillance efforts revealed that Claimant runs his own company, [Redacted, hereinafter BF]. The surveillance also demonstrated that Clamant was working at his company while collecting temporary total disability benefits. Resp. Ex. J, p. 180 and Resp. Ex. L, p., 190, p. 196.

9. Surveillance showed Claimant carrying heavy materials and operating vehicles for his own company while he was also collecting TTD benefits from respondents. Resp. Ex. M.

10. Contemporaneous medical records indicated that Claimant had been placed on medical restrictions that included no lifting, pushing, pulling, carrying with the left arm, repetitive lifting, and no climbing ladders. Resp. Ex. B, p. 7. These restrictions were completely inconsistent with Claimant's work with his company as demonstrated on the surveillance.

11. Claimant's own business, BF[Redacted], performs the same type of work as the Employer.[1]

Claimant has Prior Left Shoulder Injury and Evidence that Rotator Cuff Tear was Pre-Existing

12. Medical records indicate that Claimant previously suffered a left shoulder separation before the alleged work injury with the Employer. Resp. Ex. A, p. 4.

13. The MRI Scan taken of the Claimant's left shoulder demonstrated a supraspinatus full thickness tear and advanced acromioclavicular joint degenerative changes. More importantly, the supraspinatus tear was noted to have "delamination of the retracted fibers." Resp. Ex. F, p. 46. As a result, there is evidence suggesting that the rotator cuff tear in the left shoulder was pre-existing.

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[1] Adverse inference made consistent with Respondents' Exhibit L, p. 190. ("Subject listed as a current fire suppression systems contractor. A business was located for the subject BF[Redacted].") Adverse inference is appropriate where Claimant has failed to participate in his claim and Respondents' investigation of his pertinent medical history and treatment and potential concurrent employment. C.R.C.P. 37.

14. Based on Claimant's misrepresentations involving his ability to perform work and his pre-existing shoulder problems, respondents contended that no work injury occurred with the Employer. Respondents began a further investigation into the claim and attempted to withdraw the admissions of liability filed on the case.

Termination of TTD Benefits

15. HD[Redacted] was the claims representative at [Redacted, hereinafter BE] who formerly handled the file. She credibly testified that upon discovery of Claimant's concurrent employment and surveillance showing him working outside of his restrictions, Respondents sought to terminate TTD benefits.

16. On February 8, 2023, Respondents filed a Petition to Terminate Compensation pursuant to C.R.S. § 8-42-105(3)(b) on the basis that Claimant was working for his own company while simultaneously collecting TTD benefits. Resp. Ex. R.

17. The Division granted the Petition on March 15, 2023, thereby allowing Respondents to terminate benefits as of February 8, 2023. Resp. Ex. S.

Claimant Failed to Provide Discovery Responses and Violated Multiple Prehearing Conference Orders

18. On April 21, 2023, Prehearing ALJ Mueller issued a Prehearing Conference Order compelling production of medical releases and healthcare provider list pursuant to W.R.C.P. 5-4(C). Releases and the provider list were due within fourteen days of the date of the order. Resp. Ex. N, p. 207.

19. On June 14, 2023, Prehearing ALJ Phillips issued a Prehearing Conference Order that compelled Claimant to provide discovery responses pursuant to W.C.R.P. 9-1 by June 24, 2023. Resp. Ex. O, p. 211.

20. Claimant did not respond to either Order. Therefore, on July 20, 2023, Prehearing ALJ Mueller entered a Prehearing Conference Order imposing sanctions on Claimant. Sanctions prohibited Claimant from presenting any documentary evidence or witnesses at the hearing. Prehearing ALJ Mueller stated that the Court had discretion to draw adverse inferences from Claimant's failure to answer Respondents' discovery requests. Resp. Ex. P., p., 217-218.

21. Claimant never attempted to cure his failure to provide discovery. Instead, he refused to participate in this claim or to allow Respondents to investigate his medical history or whether a work injury actually took place.

Fraud Referral

22. Respondents filed a Uniform Suspected Insurance Fraud Referral Form on the basis that Claimant may have exaggerated his condition and was working while receiving benefits in violation of Colorado law. Resp. Ex. K, p. 185. Claimant never notified Respondents of any written objection to receiving TTD benefits. *Id.*

Respondents Paid Substantial Medical and Indemnity Benefits to the Claimant

23. Respondents paid $31,811.92 in temporary total disability benefits as outlined in the table below. *See also* Resp. Ex. W.

Indemnity Ledger		
Starting Date	**End Date**	**Amount**
08/29/2022	09/04/2022	$1,228.99
08/26/2022	08/28/2022	$526.71
10/12/2022	10/25/2022	$2,457.98
11/9/2022	11/22/2022	$2,457.98
11/23/2022	12/06/2022	$2,457.98
12/07/2022	12/20/2022	$2,457.98
12/21/2022	01/03/2023	$2,457.98
01/04/2023	01/17/2023	$2,457.98
01/18/2023	01/31/2023	$2,457.98
01/11/2023	01/20/2023	$33.75
02/01/2023	02/14/2023	$2,457.98
02/15/2023	02/28/2023	$2,457.98
03/01/2023	03/14/2023	$2,457.98

24. Respondents also paid $30,444.11 in medical benefits pursuant to the Table below. *See also* Resp. Ex. W and Ex. X.

Medical Ledger	
Payment Date(s)	**Amount**
3/30/2023	$130.56
3/24/2023	$130.56
4/25/2023	$143.91
2/17/2023	$130.56
3/17/2023	$134.40
3/27/2023	$130.56
1/18/2023	$130.56
3/16/2023	$130.56
3/22/2023	$130.56
2/21/2023	$143.91
1/16/2023	$130.56
3/15/2023	$130.56
1/27/2023	$130.56

3/9/2023	$130.56
3/14/2023	$22.40
1/13/2023	$130.56
3/7/2023	$130.56
3/1/2023	$130.56
2/24/2023	$130.56
2/27/2023	$130.56
11/30/2022	$119.68
12/26/2022	$119.68
2/13/2023	$130.56
11/14/2022	$119.68
12/1/2022	$119.68
12/6/2022	$119.68
2/15/2023	$130.56
2/21/2023	$1,187.60
2/24/2023	$271.50
2/8/2023	$353.36
2/8/2023	$130.56
2/7/2023	$130.56
1/31/2023	$44.80
2/2/2023	$130.56
1/30/2023	$130.56
11/7/2022	$119.68
1/25/2023	$130.56
1/23/2023	$130.56
1/10/2023	$130.56
1/10/2023	$12.71
1/20/2023	$130.56
1/18/2023	$430.00
12/30/2022	$394.38
1/11/2023	$57.00
1/11/2023	$130.56
1/9/2023	$130.56
1/6/2023	$130.56
1/4/2023	$130.56
12/30/2022	$119.68
1/2/2023	$130.56
12/28/2022	$119.68
12/29/2022	$237.20
10/28/2022	$112.00
12/23/2022	$119.68
12/16/2022	$30.75
12/21/2022	$119.68
12/16/2022	$119.68
12/19/2022	$119.68

12/12/2022	$119.68
12/14/2022	$119.68
12/7/2022	$792.15
12/9/2022	$119.68
12/7/2022	$119.68
12/5/2022	$22.40
11/23/2022	$355.00
11/25/2022	$119.68
11/28/2022	$119.68
11/23/2022	$119.68
11/18/2022	$119.68
11/21/2022	$119.68
11/10/2022	$57.75
10/30/2022	$226.25
9/1/2022	$737.00
10/12/2022	$7.72
11/16/2022	$119.68
10/12/2022	$8.75
11/11/2022	$119.68
11/9/2022	$119.68
10/12/2022	$16.23
10/25/2022	$139.40
10/12/2022	$8.75
11/4/2022	$119.68
10/12/2022	$9,585.37
10/12/2022	$83.92
10/12/2022	$3,259.82
11/1/2022	$211.98
10/12/2022	$556.67
10/12/2022	$189.04
10/26/2022	$112.00
10/21/2022	$208.00
9/7/2022	$391.22
9/12/2022	$203.42
9/8/2022	$106.11
9/1/2022	$395.39
2/8/2023 - 2/21/2023	$353.36
12/30/2022 - 1/10/2023	$394.38
12/16/2022 - 12/28/2022	$30.75
11/23/2022 - 12/1/2022	$355.00
11/10/2022 - 11/21/2022	$57.75
10/30/2022 - 11/10/2022	$226.25
9/1/2022 - 10/28/2022	$737.00

25. Respondents have collectively paid $62,256.03 in indemnity and medical benefits on this claim.

Respondents Have Proven that Claimant Did Not Suffer a Work Injury with the Employer

26. The evidence has demonstrated that Claimant did not suffer a work injury with the Employer. Instead, the Claimant's shoulder condition was pre-existing or resulted from an injury to his shoulder while working for his own company (BF[Redacted]). Respondents have proven that the Claimant did not suffer a work injury to his left shoulder with the Employer.[2]

27. The evidence demonstrates that Claimant intentionally mispresented that an injury occurred with the Employer and also whether he was earning money or disabled from work to improperly obtain workers' compensation benefits from the respondents.[3]

Respondents Have Proven that the Admissions on this Case Can be Withdrawn and are Void <u>Ab Initio</u> and Claimant Must Repay Respondents the $62,256.03 for the Indemnity and Medical Benefits Paid on this Case

28. Respondents have proven that the Claimant engaged in fraud both in alleging that a work injury occurred with the Employer and to obtain ongoing indemnity and medical benefits. Respondents are entitled to withdraw their admissions *ab initio* and collect back all the money paid to Claimant for medical and indemnity benefits.[4]

29. Claimant's admitted average weekly wage was $2,274.48, which corresponds with $9,856.08 monthly. The Court finds this was most likely what Claimant was earning at the time of his alleged injury. There is no direct evidence as to what Claimant's current earnings are. However, the Court infers, based on Claimant's prior earnings, and the fact that he is now performing the same type of work but for his own company, that Claimant is earning roughly the same amount as he was before.

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[2] Adverse inference made because Claimant failed to respond to discovery to allow Respondents adequate ability to investigate a potential pre-existing or intervening injury in addition to investigating Claimant's concurrent employment. See C.R.C.P. 37; *Sheid v. Hewlett Packard, supra.*

[3] Adverse inference made because Claimant failed to respond to discovery to allow Respondents adequate ability to investigate a potential pre-existing or intervening injury in addition to investigating Claimant's concurrent employment. See C.R.C.P. 37; *Sheid v. Hewlett Packard, supra.*

[4] Adverse inference made because Claimant failed to respond to discovery to allow Respondents adequate ability to investigate a potential pre-existing or intervening injury in addition to investigating Claimant's concurrent employment. See C.R.C.P. 37; *Sheid v. Hewlett Packard, supra.*

30. Because Claimant is currently earning roughly $9,856.08 monthly, the Court finds that a repayment plan of $500.00 per month would not cause Claimant undue hardship.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability – Withdrawal of Admissions

The beneficial intent of the Act is predicated on claimant's providing accurate information. Therefore, when a claimant supplies materially false information upon which his employer and its insurer relied in filing an admission of liability, the court is justified in declaring the admission void *ab initio*. *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981); *Kraus v. Artcraft Sign Co.*, 710 P.2d 480 (Colo. 1985); *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995); *West v. Lab Corp. of America*, W.C. No. 4-684-982 (ICAO February 27, 2009). *Vargo* and *Lewis* stand for the proposition that the authority of an ALJ to remedy fraud is limited to the express provisions of the statute, except where the fraud occurs prior to entry of a final admission or closure of the claim by way of an order. In circumstances where no final adjudication has occurred, "Retroactive Withdrawal" is a permissible remedy. *Cf. Johnson v. Industrial Commission*, 761 P2d 1140 (Colo. App. 1988).

In this case, Respondents filed admissions of liability and paid medical and temporary total disability benefits based on fraudulent information provided by Claimant.[5]

The Court credits the testimony of HD[Redacted] and the exhibits submitted in the claim.

Based on the above, Respondents have proven that it is more likely than not that Claimant did not suffer a work injury with the Employer. Instead, he sustained an injury, or an aggravation thereof, to his shoulder at a prior time or while on the job for his own company. [6] Specifically, Respondents have proven by a preponderance of the evidence that Claimant did not suffer a work injury,[7] and that Claimant fraudulently induced Respondents to admit the compensability of the claim.

As found, Respondents have proven by a preponderance of the evidence that Claimant's medical condition and subsequent medical treatment were not work-related. Accordingly, Respondents may withdraw all admissions of liability filed on this claim.

Fraud and Repayment

To prove fraud, a party must generally show the following: (a) a party made a false representation of a material fact; (b) the party knew that the representation was false; (c) that the person to whom the representation was made was ignorant of the falsity; (d) that

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[5] Adverse inference made due to Claimant's failure to comply with providing releases pursuant to W.C.R.P. 5-4(c) thereby preventing Respondents an opportunity to thoroughly investigate the claim. Adverse inference also made due to Claimant's failure to respond to discovery or comply with the April, 2023 and June, 2023 prehearing conference orders compelling the same. See Respondents' Exhibits N-P.

[6] Adverse inference made Adverse inference made based on Claimant's failure to provide requisite releases, cooperate with discovery as required by W.C.R.P. 5-4(c) and W.C.R.P. 9-1, and comply with the prehearing conference Orders. *See* Resp. Ex. N, Ex. O, Ex. P. Additionally, adverse inference made consistent with the surveillance and social media investigations. See Resp. Ex. J, Ex. L, Ex. M.

[7] Adverse inference made based on Claimant's failure to provide requisite releases, cooperate with discovery as required by W.C.R.P. 5-4(c) and W.C.R.P. 9-1, and comply with the prehearing conference Orders. *See* Resp. Ex. N, Ex. O, Ex. P.

the representation was made with the intention that it be acted upon; and (e) that the reliance resulted in damages to the plaintiff. *See Nelson v. Gas Research Institute*, 121 P.3d 340, 343 (Colo. App. 2005).

"The existence of these elements is generally a question of fact for determination by the ALJ. *See Vargo v. Industrial Commission, supra*. Because proof of fraud is a factual issue, the ALJ may base his decision on inferences drawn from circumstantial evidence, as well as direct evidence. *See Electric Mutual Liability Insurance Co. v. Industrial Commission*, 391 P.2d 677 (1964). Insofar as the ALJ's inferences are supported by substantial evidence in the record they must be upheld on review. *May D & F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo.App.1988); *Essien v. Metro Cab, Inc.*, W.C. No. 3-853-693 (I.C.A.O. Aug. 22, 1991).

As found, Claimant was performing substantially similar work for his own company, BF[Redacted] and was doing so while collecting TTD from Respondents. Claimant failed to provide medical releases, engage in discovery, or timely respond to the prehearing conference orders. Failure to cooperate in his claim has prevented Respondents a meaningful opportunity to investigate Claimant's medical history and ascertain if the left shoulder condition was related to or aggravated by the August 25, 2022 incident with the Employer or if related to a naturally progressing preexisting condition and/or related to a work incident at BF[Redacted]. Therefore, this ALJ makes an adverse inference that it is more likely than not that the left shoulder condition is unrelated to the August 25, 2022 incident at [Redacted, hereinafter SP]. *See* C.R.S. § 8-43-207(1)(3) (stating that the administrative law judge may improve the sanction provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery); *See C.R.C.P. 37(b); see also Sheid v. Hewlett Packard*, 826 P.3d 396 (Colo. App. 1991).

Because Respondents were induced to make the workers' compensation payments based on Claimant's material misrepresentations, the appropriate remedy is for the admissions of liability filed to be declared void *ab initio* and to order the Claimant to repay the $62,256.03 in benefits administered on this claim. The Colorado Court of Appeals has held that ALJs have discretion to fashion such a remedy with regard to overpayments. *See Turner v. Chipotle Mexican Grill*, W.C. No. 4-893-631-07 (Feb. 8, 2018), *citing Simpson v. Industrial Claim Appeals Offi*ce, 219 P.3d 354 (Colo.App.2009); *see also Arenas v. Industrial Claims Appeals Office*, 8 P.3d 558 (Colo.App.2000); *see Louisiana Pacific Corp v. Smith*, 881 P.2d 456 (Colo.App.1994).

As found above, Claimant's earnings of $9,856.08 monthly are sufficient that a payment of $500.00 per month would not cause undue hardship to Claimant. Payment of $500.00 per month from Claimant until the fraudulently paid out benefits are fully repaid is appropriate.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant did not sustain a work-related injury with the Employer. Therefore, Respondents are permitted to withdraw the admissions of liability previously filed on this claim and they are deemed void ab initio.

2. Because the evidence shows that Respondents were induced to administer benefits due to Claimant's misrepresentations, it is appropriate for the Claimant to repay $62,256.03 in benefits that he obtained through fraud.

3. Claimant is ordered to pay back this amount at a rate of $500.00 a month until the entire amount has been reimbursed.

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

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

DATED: October 27, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-219-282-002

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that on August 16, 2022, she suffered a right shoulder injury arising out of and in the course and scope of her employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of her right shoulder including reverse total shoulder arthroplasty performed on February 7, 2023 by Dr. Jared Lee constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability {TTD) benefits beginning November 15, 2022 and ongoing until terminated by law?

STIPULATIONS

1. At the hearing, the parties stipulated that if the claim is found compensable, Basalt After Hours Care Clinic is an authorized treating provider (ATP).

2. In their position statements, the parties stipulated that if the claim is found compensable, Claimant's average weekly wage (AWW) is $1,500.00.

FINDINGS OF FACT

1. Claimant began working for Employer in January 2011. In 2022, Claimant worked as a server in private dining. Claimant testified that she earned between $1,200.00 and $2,000.00 per week.

2. Claimant testified regarding an incident that occurred at work on August 16, 2022. Claimant testified that it was very busy in her department on that day. At one point during her shift, Claimant noted that a large tray had been left on the floor. Claimant estimates that the tray and its contents weighed approximately 20 pounds. Claimant bent at the waist to lift this tray. Claimant testified that as she began to lift the tray, she immediately felt pain in her right shoulder. Claimant did not report this incident at that time because she had other work to do and she completed her shift.

3. When she reported for her next scheduled shift, Claimant reported the August 16, 2022 incident regarding her right shoulder. Claimant was provided with a list of designated medical providers. Subsequently, Claimant was seen at the Basalt After Hours Care Clinic on August 24, 2022.

Right shoulder treatment prior to August 16, 2022

4. Claimant testified that she has had prior right shoulder issues. She further testified that approximately 10 years ago Dr. Liotta recommended that she undergo rotator cuff repair. Claimant testified that she chose not to undergo the recommended surgery at that time.

5. On April 8, 2014, Claimant was seen by Dr. Donald Corenman at The Steadman Clinic. The purpose of that evaluation was to discuss symptoms of low back pain. However, in that medical record, Dr. Corenman noted Claimant's report that Dr. Liotta had recommended right shoulder surgery.

6. On September 28, 2021, Claimant was seen by Dr. Tomas Pevny for treatment of her right shoulder. In the medical record of that date, Dr. Pevny referenced magnetic resonance imaging (MRI) from 2014 that showed a full thickness rotator cuff tear. Dr. Pevny recommended and administered a right shoulder injection. Dr. Pevny also recommended an updated MRI. Claimant declined to pursue an MRI at that time.

Right shoulder treatment after August 16, 2022

7. As noted above, Claimant underwent treatment of her right shoulder on August 24, 2022 at the Basalt After Hours Care Clinic. At that time, Claimant was seen by Kelly Hill, FNP-C. Claimant reported that she already had an appointment scheduled with Steadman Clinic on October 3, 2022 to address her right shoulder. Nurse Practitioner Hill ordered x-rays of Claimant's right shoulder and diagnosed a chronic rotator cuff tear. Nurse Practitioner Hill assessed work restrictions of no lifting over five pounds. In addition, she referred Claimant for an orthopedic consultation.

8. As previously scheduled, on October 3, 2022, Claimant was seen at The Steadman Clinic by Dr. Dustin Anderson for an orthopedic consultation. On that date, Claimant reported a number of issues including pain in her right shoulder, neck, left low back and hip[1]. Dr. Anderson documented Claimant "has had pain in both her right shoulder and neck since roughly 2015 both have recently worsened over the course of the last 3 months." With regard to her right shoulder, Claimant reported that she had a rotator cuff tear in 2015, which she treated non-surgically. Claimant further reported that she reinjured her right shoulder by "lifting heavy objects at work". On examination, Dr. Anderson noted "significant atrophy of her supraspinatus muscle" and recommended a right shoulder MRI.

9. On October 28, 2022, an MRI of Claimant's right shoulder was performed. In the MRI report, radiologist, Dr. Elizabeth Kulwiec indicated a comparison to an MRI performed on May 13, 2014. Dr. Kulwiec noted a full thickness tear of the distal supraspinatus tendon that had extended since the 2014 MRI. The MRI also showed a new partial thickness bursal surface tear of the subscapularis tendon, with new mild

[1] As the only body part at issue at this time is Claimant's right shoulder, further discussion of symptoms and related treatment of any other body parts is not addressed here.

atrophy of the subscapularis muscle. Dr. Kulweic also noted, *inter alia,* new mild infraspinatus tendinosis; moderate osteoarthritis of the acromioclavicular joint, a new complete tear at the origin of the long head biceps tendon; moderate joint effusion; a new superior labrum anterior and posterior (SLAP) tear; and a new humeral avulsion glenohumeral (HAGL) lesion.

10. On November 2, 2022, Claimant returned to Dr. Anderson to discuss the MRI results. At that time, Dr. Anderson referred Claimant to Dr. Jared Lee to discuss surgical options.

11. On November 7, 2022, Dr. Anderson completed an order for the referral to Dr. Lee. That same document states that Claimant was unable to return to work.

12. Claimant testified that November 15, 2022, was the date that employees were to return to work to begin the season. However, because Dr. Anderson had taken her off of all work, Claimant was unable to return to work on November 15, 2022. As of the date of the hearing, Claimant has not returned to work for Employer.

13. On December 1, 2022, Claimant was seen by Dr. Lee. In the medical record of that date, Dr. Lee noted his independent review of the October 2022 right shoulder MRI. Dr. Lee identified the condition of Claimant's right shoulder as "acute on chronic". Claimant reported to Dr. Lee that her job was physical and recently her shoulder pain had increased. Dr. Lee documented "no know[n] specific injury or trauma but patient does endorse that symptoms have noticeably increased more recently especially with movement." Dr. Lee discussed several treatment options, including a reverse total shoulder replacement, three other surgical procedures, or a steroid injection. At that time, Claimant wished to continue with conservative treatment.

14. On January 5, 2023, Claimant returned to Dr. Lee and reported that her symptoms had persisted, but had not worsened. Dr. Lee again recommended a right reverse total shoulder arthroplasty. Claimant agreed to proceed with the surgery and on February 7, 2023, Dr. Lee performed a right reverse total shoulder arthroplasty with biceps tenodesis.

15. At the request of Respondents, on February 22, 2023, Claimant attended an independent medical examination (IME) with Dr. F. Mark Paz. In connection with the IME, Dr. Paz reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In an IME report dated February 22, 2023, Dr. Paz opined that Claimant's rotator cuff tear was not caused by the activity of lifting the tray on August 16, 2022. Dr. Paz also opined that the pre-existing rotator cuff tear in Claimant's right shoulder was not aggravated or accelerated by her work activities on August 16, 2022. In support of these opinions, Dr. Paz noted that Claimant has a history of chronic right shoulder complaints. Dr. Paz points to the 2021 medical record in which Dr. Corenman noted that in 2014 Dr. Liotta recommended right shoulder surgery. Dr. Paz further noted that the 2022 MRI results are consistent with a chronic rotator cuff tear and related degenerative changes.

16. Dr. Paz's testimony was consistent with his IME report. Dr. Paz testified that Claimant's need for reverse total shoulder arthroplasty is not related to her work activities on August 16, 2022. Dr. Paz further testified that Claimant had pre-existing degenerative changes in her right shoulder that were documented as early as 2014. Dr. Paz explained that the term "new" as used in the October 28, 2022 MRI report does not mean "acute". Rather, since the radiologist was comparing the MRI taken in October 2022 to the MRI taken in May 2014, the term "new" describes a chronic change in the anatomy from that which existed in May 2014. Dr. Paz explained that the degenerative changes noted in the 2022 MRI is typical degeneration that occurs from instability caused by a rotator cuff tear.

17. The ALJ does not find Claimant's testimony regarding the nature and onset of her right shoulder symptoms to be credible or persuasive. The ALJ credits the medical records and finds that Claimant had ongoing right shoulder symptoms prior to the alleged August 16, 2022 incident. The ALJ credits the opinions of Dr. Paz and finds that Claimant's right shoulder was not injured on August 16, 2022. The ALJ further credits Dr. Paz's opinions and finds that Claimant's work activities on August 16, 2022 did not aggravate, accelerate, or combine with the pre-existing degenerative condition of Claimant's right shoulder to necessitate surgery.

CONCLUSIONS OF LAW

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

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

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

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

6. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that on August 16, 2022, she suffered a right shoulder injury arising out of and in the course and scope of her employment with Employer. As found, the medical records and the opinions of Dr. Paz are credible and persuasive.

ORDER

It is therefore ordered that Claimant's claim related to an alleged August 16, 2022 right shoulder injury is denied and dismissed.

Dated October 9, 2023.

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

Jf you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be finat. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-177-827-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that his scheduled eye impairment should be converted to a whole-person impairment.

2. Whether Respondents are liable for penalties for filing the final admission of liability beyond the period set forth in § 8-42-107.2(4)(c), C.R.S.

3. Whether Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his right eye on July 8, 2021, while he was re-treading a tire. A strap broke and struck his safety goggles, causing the safety goggles to strike his right eye.

2. Claimant was taken to the emergency department at Denver Health that same day and underwent eye surgery, consisting of a peritomy and globe exploration of the right eye.

3. On October 11, 2021, Claimant underwent a second right eye surgery with Dr. Jesse Smith. The procedure was a "[c]omplex [p]hacoemulsification and cataract extraction with intraocular lens implantation, CTR, no kenalog."

4. On October 19, 2021, Claimant saw his authorized treating physician, Dr. Jay Reinsma at Concentra. Dr. Reinsma noted that Claimant had one more follow-up scheduled with a retinal specialist, at which point he anticipated Claimant would be released from care and returned to work at full duty. Dr. Reinsma referred Claimant for an impairment evaluation in anticipation of maximum medical improvement (MMI).

5. Claimant underwent an impairment rating evaluation[1] with Dr. Chester Roe on January 25, 2022. Dr. Roe opined that Claimant had reached MMI with a 99% impairment to his right eye based on Table 2, page 163 of the *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, which given the absence of impairment of the left eye, resulted in a total visual system impairment of 25%. Dr. Roe noted that "one entirely blind eye with no visual field can only at

[1] The record is ambiguous as to whether this evaluation was at the referral of Dr. Reinsma or whether it was an independent medical examination sponsored by Respondents pursuant to 8-43-404(3), C.R.S. The distinction does not affect the Court's analysis in this case, and so the Court does not make any findings in this regard.

worst be a 25% visual system impairment, if the other eye is normal, according to the Guides."

6. Dr. Roe later testified at hearing that Claimant would be legally blind if both eyes were as bad as his right eye. Regarding depth perception, Dr. Roe testified that stereo vision—or vision with two eyes—provides better depth perception than one eye alone. Regarding the impairment, Dr. Roe testified that the visual system chapter of the AMA Guides, the calculations were 99% vision impairment in the right eye, which is a 25% visual system impairment, or 24% whole-person impairment. He clarified that he chose not to assign a whole person impairment for cosmetic disfigurement because he could not perceive much of a pupil abnormality from several feet away. The Court finds Dr. Roe's testimony credible and persuasive.

7. Claimant obtained a Division independent medical examination (DIME) with Dr. James McLaughlin on August 2, 2022, a level II accredited physician under the Workers' Compensation Act.[2] Dr. McLaughlin examined Claimant and noted that Claimant was able to drive his seven-minute commute to work. However, Dr. McLaughlin noted that Claimant had difficulty getting in and out of the vehicle because he has to feel around for the handle, would have to hold onto the railing while ascending or descending stairs, and would sometimes miss his mouth while eating. The Court infers that these difficulties are related to his loss of depth perception resulting from his loss of vision in his right eye.

8. Dr. McLaughlin agreed that Claimant was at MMI, and he determined that date to be January 25, 2022. He assigned a 98% impairment to Claimant's right eye, and therefore a 25% visual impairment. Dr. McLaughlin clarified that this would convert to a whole-person impairment of 24%. Regarding permanent work restrictions, Dr. McLaughlin recommended Claimant not work at exposed heights and not operate heavy equipment, power tools, or sharp tools due to loss of depth perception and decreased stereo acuity.

9. The Court finds Dr. McLaughlin's opinion regarding permanent impairment to equate to total loss of use of the eye.

10. Claimant testified at hearing that he cannot see movement in his right eye and that he sees lots of rays of different colors. Claimant also reported left eye fatigue and headaches. In his testimony, Claimant also recounted his difficulties with depth perception, including difficulty putting paste on his dentures in the morning, difficulty preparing food, and difficulty driving.

11. The Court finds Claimant's testimony credible. The Court also finds that Claimant's left eye fatigue and headaches are the result of overuse of his left eye to

[2] Rule 11-1, W.C.R.P. (2022), requires that a DIME physician be level II accredited, have sufficient recency of experience treating patients, and be board-certified in Colorado. Because Dr. McLaughlin performed the DIME, the Court infers that he met these criteria.

compensate for his right eye's loss of vision. Therefore, those symptoms lead the Court to find that Claimant's right eye impairment is beyond that which is set forth on the schedule of injuries at § 8-42-107(2), C.R.S.

12. The Court finds, based on Dr. McLaughlin's DIME report, Dr. Roe's testimony, and Claimant's testimony, that Claimant's loss of vision in his right eye for which he received an impairment rating from DIME Dr. McLaughlin constitutes a total loss of use of his right eye.

13. Dr. McLaughlin sent a copy of his DIME report to the Division as well as to counsel for the parties at some point in time between August 2 and September 7, 2022. Claimant and Respondents had a copy of the report for review by September 7, 2022 at the latest.

14. On September 7, 2022, The Division of Workers' Compensation issued a notice to the parties that the DIME process had concluded. The notice was sent by e-mail, and a copy was sent to Respondents' counsel. Respondents had actual notice as of September 7, 2022, that the DIME process had concluded.

15. On October 4, 2022, the Division issued a notice to Respondent-Insurer that "[t]he period for filing an application for hearing [pursuant to § 8-42-107.2(4)(c), C.R.S.] has expired and a final admission of liability is required." The Court finds that Respondent-Insurer received a copy of this letter.[3]

16. That same day, [Redacted, hereinafter RO], a representative of Claimant's counsel's office, e-mailed Respondents' counsel advising that the DIME process had concluded on September 7, 2022, and asking whether Respondents would be filing a FAL.

17. Respondents' counsel contacted Claimant's counsel via e-mail on October 10, 2022, regarding the possibility of settlement. Claimant's counsel responded on October 14, stating:

    a. *I have discussed the possibility with the client, and there is a possibility of settlement. However, I would like to receive the FA before evaluating this with the Client. If I'm not mistaken, this was due by September 27, and remains outstanding. Please advise on its status*.

18. On Wednesday, October 19, 2022, [Redacted, hereinafter BS], claims management supervisor for the Division, sent an e-mail to [Redacted, hereinafter JH][4] of Respondent-Insurer indicating that a "DIME conclusion notice" was sent to Respondent-Insurer on September 7, and that a FAL was due on September 27,

[3] Respondents' counsel, however, did not receive a copy of the letter until October 19, 2022, after learning about the existence of the letter and requesting a copy from the Division.

[4] JH[Redacted] role with Respondent-Insurer is not entirely clear, but the Court infers based on the circumstances that JH[Redacted] is a claims supervisor for Respondent-Insurer.

2022. BS[Redacted] also made reference to the October 4, 2022 letter sent by [Redacted, hereinafter DC]. BS[Redacted] requested that a FAL be filed by that Friday.

19. Respondents filed a FAL on November 7, 2022, admitting for a 25% scheduled impairment rating of the eye based on DIME Dr. McLaughlin's report and corresponding PPD benefits in the amount of $9,456.20. Respondents reserved the right to credit an overpayment of $715.35 toward PPD. The FAL was filed 61 days after the notice of conclusion of the DIME process, and 41 days after the FAL was due pursuant to § 8-42-107.2(4)(c), C.R.S. Based on the multiple notices Respondents received regarding the need to file an FAL, there is clear and convincing evidence that Respondents should have known that an FAL was due by no later than September 27, 2022, and that they were in continuing violation of the Workers' Compensation Act. The Court finds that Respondents' delay in filing the FAL was unreasonable and was the result of negligence. The Court also finds that with each successive notice, the delay in filing of the FAL became more unreasonable.

20. Four days prior to filing the FAL, Respondents had voluntarily issued a lump sum PPD payment to Claimant without discount in the amount of $8,740.85, the value of the admitted PPD minus an asserted overpayment of $715.35. The Court finds this to be a mitigating factor with regard to the issue of penalties. Though, the Court does also observe that Claimant would have been entitled to the same lump sum upon request pursuant to Rule 5-10, W.C.R.P., and § 8-43-203(2)(b)(II).

21. On December 7, 2022, exactly thirty days after the FAL was filed, Claimant filed an Application for Hearing (AFH) to challenge the FAL on the issues of average weekly wage, disfigurement, temporary disability benefits, permanent disability benefits, and penalties. December 7, 2022, was the latest date Claimant could file an AFH challenging the FAL pursuant to § 8-43-203(2)(b)(II), C.R.S.

22. The Court finds that Claimant's choice to wait thirty days from the date of the FAL before filing an AFH, notwithstanding having a copy of the DIME report since at least September 7, 2022, is evidence that Claimant perceived minimal ongoing harm resulting from delay of resolution of the issues endorsed in Claimant's AFH. The Court finds that the harm Claimant sustained as a result of Respondents' late filing of the FAL consisted of a delay in receipt of PPD benefits and a delay in resolution of the hearing issues. The former was somewhat mitigated by Respondents' voluntary payment of a lump sum PPD award without discount. The latter was of little harm, as evidenced by Claimant's own lack of urgency in seeking to challenge the FAL.

23. The harm resulting from the late filing of the FAL was slightly greater than *de minimus*, and the delay resulted from the negligence of Respondents. However, with each successive notice that Respondents received regarding their late FAL, the degree of culpability increased. Therefore, the Court finds that the following

daily penalties during the 41-day delay in filing of the FAL would be fairest and within Respondents' ability to pay:

a. From September 27 through October 4, 2022, daily penalties of $8 per day;
b. From October 5 through October 10, 2022, daily penalties of $10 per day;
c. From October 11 through October 19, 2022, daily penalties of $15 per day; and
d. From October 20 through November 6, 2022, daily penalties of $20 per day.

24. At the time of hearing, Claimant allowed the Court to observe his right eye for a disfigurement award. The Court observed that Claimant's right eye was slightly more dilated than the left and slightly redder. The Court finds that the disparities in pupil dilation and eye redness are related to Claimant's July 8, 2021 injury, and that Claimant has proved by a preponderance of the evidence that he has been seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view, as described, so as to entitle him to a disfigurement award. While the disfigurements are not particularly stark, their location in Claimant's right eye contributes to their prominence. The Court finds that a $700 disfigurement award is appropriate.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Whole-Person Conversion

The ALJ is the finder of fact on the question of whether the Claimant sustained a "loss of an arm" within the meaning of schedule of disabilities in § 8-42-107(2)(a), C.R.S., or a whole person rating under § 8-42-107(8)(c), C.R.S. *Strauch v. PSL Swedish Healthcare System,* 917 P. 2d 366, 369 (Colo.App.1996). In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883, 884 (Colo.App.1996)*; Strauch* at 368-369.

Injury is the manifestation in part or parts of the body which been impaired or disabled as a result of the industrial accident. *Mountain City Meat v. ICAO,* 904 P.2d 1333 (Colo. App. 1995). The part of the body that sustains the ultimate loss is not necessarily the particular part of the body where the injury occurred. *McKinley v. Bronco Billy's,* 903 P.2d 1239, 1242 (Colo.App.1995). When evaluating functional impairment the ALJ shall look at the alteration of the claimant's functional abilities by medical means and by non-medical means, as well as the claimant's capacity to meet personal, social, and occupational demands. *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333, 1337 (Colo. 1996).

Section 8-42-107(1), C.R.S., provides that a claimant is limited to a scheduled disability award if the claimant suffers an "injury or injuries" described in subsection (2) of that provision. *Strauch*, 917 P.2d 366. The schedule of impairments includes "[t]otal blindness of one eye." § 8-42-107(2)(gg), C.R.S. However, the Act also provides that "[w]hen an injury results in the total loss or total loss of use of . . . an eye . . . the benefits for such loss shall be determined pursuant to this subsection (8),[5] except as provided in subsection (7)(b)(IV)[6] of this subsection." § 8-42-107(8)(c.5), C.R.S.

The only distinction between these two provisions appears to be between total blindness and total loss of use of an eye. Although the distinction is not obvious at first glance, the Colorado Court of Appeals clarified the distinction in *McKinley v. Bronco*

[5] Whole-person.
[6] Where it provides that you must admit for the scheduled rating if it results in greater compensation.

Billy's, 903 P.2d 1239 (Colo.App.1995). The court in *McKinley v. Bronco Billy's* held that "[i]f the loss of use was partial, then . . . the amount of compensation was to be the proportionate share of the amount stated in the schedule for the total loss of a member." However, if the loss was total, then the permanent partial disability award was to be calculated based on the scheme for whole-person impairments set forth at § 8-42-107(8), C.R.S.

Claimant points to the case of *Parra v. Spectrum Retirement Communities*, W.C. No. 5-052-120-005 (May 6, 2021), as a case analogous to the present one. The panel in *Parra* upheld the ALJ's finding that the claimant's impairment of the eye was not limited to the schedule. The claimant in *Parra* suffered a full-thickness corneal laceration. As a result, he did not have a cornea or lens in his right eye and experienced headaches. Nevertheless, he was able to distinguish between lightness and darkness with his injured eye, as well as perceive motion if within several inches of his eye. The DIME physician declined to assign the claimant a whole-person impairment rating because the claimant still had some vision and still had his eyeball. The ALJ concluded that the claimant sustained a total loss of use of the eye and converted the scheduled rating to a whole-person rating.

The respondents in *Parra* appealed, arguing in part that the ALJ's finding that the claimant had "total loss of use" of his affected eye was not supported by the evidence, and that the loss of use was only partial because the claimant could still distinguish between lightness and darkness and perceive some motion. The ICAO panel, however, upheld the ALJ's finding, citing *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 199 P. 482 (1921), for the proposition that an award for total blindness is correct where the vision remaining is of no value for working. The panel further upheld the finding that the impairment was not contained on the schedule in light of the facts that the claimant's "entire life has been altered by this injury" and the claimant experienced "continual headaches."

Here, just as in *Parra*, Claimant has not sustained enucleation of his right eye. Claimant retains some vision, just like the claimant in *Parra*, but the vision is of no value for Claimant's work. He cannot see movement in his right eye, but can see rays of different colors. Claimant's loss of vision has also caused Claimant continual headaches and altered Claimant's activities of daily living in substantial ways.

Parra is sufficiently analogous to the facts in this case such that the Court concludes, based on *Parra*, that it has the discretion to convert the scheduled eye impairment rating if the Court finds that Claimant sustained a total loss of use of his eye for all practical purposes. *See Mut. Ins. Co.*, 199 P. 482.

As found above, Claimant's loss of vision in his right eye for which he received an impairment rating from DIME Dr. McLaughlin constitutes a total loss of use of his right eye. Additionally, given Claimant's decreased ability to meet his personal needs in his activities of daily living, the strain placed on his contralateral eye, and his recurring

headaches, the Court concludes that Claimant's impairment is beyond that which is set forth on the schedule at § 8-42-107(2), C.R.S.

Therefore, Claimant has proved by a preponderance of the evidence that he is entitled to a conversion of his right eye impairment to a whole-person impairment of 24%.

Penalties

Section 8-43-304(1), C.R.S., provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S., is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005).

Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital*, 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Section 8-42-107.2, C.R.S., provides that Respondents shall, within twenty days after the date of mailing of the Division's notice that hit has received the DIME report, either file a FAL or request a hearing to contest the DIME's findings. As found above, the Division issued its notice on September 7, 2022. Respondents had until September 27, 2022, to either file a FAL or request a hearing challenging the DIME. Respondents did neither. Respondents were therefore in violation of the Act.

The Court also considers whether Respondents' violation of § 8-42-107.2, C.R.S., was reasonable. As found above, it was not. Respondents had notice that they were to file a FAL or request a hearing by no later than September 27, 2022, yet did not.

Section 8-43-304(4), C.R.S. permits an alleged violator twenty days to cure the violation. If the violator cures the violation within the twenty-day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003). Section 8-43-304(4), C.R.S., modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo.App.1997); *see Tadlock v. Gold Mine Casino*, W.C. No. 4-200-716 (May 16, 2007).

Respondents came into compliance with the Act upon filing the November 7, 2022 FAL. However, in so doing, Respondents did not cure the daily violations of the Act already accrued for the period between September 27 and November 6, 2022. Even had it done so, as found above, Claimant has proved by clear and convincing evidence that Respondents should have known they were in violation of the Act. Therefore, penalties are appropriate.

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hosp.*, W.C. No. 4-619-954 (May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005); *Espinoza v. Baker Concrete Construction*, W.C. No. 5-066-313 (Jan. 31, 2020).

When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc.*, W.C. 4-981-806 (July 1, 2019).

As found above, the harm resulting from the late filing of the FAL was slightly greater than *de minimus*. Respondents took measures to mitigate the late filing of the FAL by promptly issuing a lump sum payment without discount of all PPD admitted. The mitigation is partial, as Claimant would have been entitled to the same lump sum upon request pursuant to Rule 5-10, W.C.R.P., and § 8-43-203(2)(b)(II).

As found above, the harm Claimant sustained as a result of Respondents' late filing of the FAL consisted of a delay in receipt of PPD benefits and a delay in resolution of the hearing issues. The former was somewhat mitigated by Respondents' voluntary payment of a lump sum PPD award without discount. The latter was of little harm, as evidenced by Claimant's own lack of urgency in seeking to challenge the FAL.

As for reprehensibility, as found above, Respondents' violation is the result of negligence. Nevertheless, the degree of culpability increased with each successive notice Respondents received that their FAL was untimely. Therefore, the Court concludes that daily penalties should be imposed proportional to the unreasonableness of Respondents' failure to file the FAL during each period during which Respondents had additional notice. Penalties should be imposed as follows:

- From September 27 through October 4, 2022, daily penalties of $8 per day;
- From October 5 through October 10, 2022, daily penalties of $10 per day;
- From October 11 through October 19, 2022, daily penalties of $15 per day; and
- From October 20 through November 6, 2022, daily penalties of $20 per day.

Based on the above findings, the penalties payments should be apportioned equally between Claimant and the Colorado Uninsured Employer Fund.

Disfigurement

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

Based on Claimant's testimony and the records submitted at hearing, Claimant's injury caused a visible disfigurement to his body consisting of slight redness in the right eye and slightly more pupil dilation in the right eye than the left. Claimant has proved entitlement to a disfigurement award. As found above, and as the Court here concludes, a disfigurement award of $700.00 is most appropriate for a disfigurement that is not salient in appearance but located in the prominent location of Claimant's eye.

ORDER

It is therefore ordered that:

1. Respondents shall file an amended FAL admitting for a 24% whole-person impairment.

2. Respondents shall pay daily penalties as follow:

   a. From September 27 through October 4, 2022, daily penalties of $8 per day;
   b. From October 5 through October 10, 2022, daily penalties of $10 per day;
   c. From October 11 through October 19, 2022, daily penalties of $15 per day; and
   d. From October 20 through November 6, 2022, daily penalties of $20 per day.

   The penalties shall be paid 50% to Claimant and 50% to the Colorado Uninsured Employer Fund.

3. Respondents shall pay Claimant a disfigurement award of $700.00.

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

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

DATED: October 10, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-110-218-003

ISSUES

1. Whether temporary total disability (TTD) benefits Respondents paid to Claimant before Claimant reached MMI which exceed the statutory cap constitute an overpayment.

2. Whether Respondents may recover TTD benefits Claimant received in excess of the statutory cap prior to MMI, as either a credit against future benefits or in some other form.

FINDINGS OF FACT

1. On June 20, 2019, Claimant sustained an admitted injury arising out of the course of her employment with Employer. (Ex. 1). As a result of his injury, Respondents paid Claimant temporary total disability (TTD) benefits in the amount of $179,786.88 from June 21, 2019 through December 14, 2022. (Ex. 1).

2. Claimant was placed at maximum medical improvement (MMI) effective January 18, 2023, and assigned a whole-person impairment rating of 21%. (Ex. 1).

3. On February 22, 2023, Respondents filed a Final Admission of Liability (FAL) admitting for the whole person impairment of 21%, and for TTD benefits. Respondents asserted an overpayment in the amount of $88,660.04. Respondents' asserted overpayment is based on the difference between the applicable statutory cap on combined TTD and PPD benefits of $91,126,84, and the amount paid for TTD benefits (*i.e.*, $179,786.88 - $91,126.84 = $88,660.04). (Ex. 1). (For the purposes of this order the $88,660.04 in TTD benefits will be referred to as the "Excess TTD Payments").

4. On May 9, 2023, Claimant filed an Application for Hearing challenging the asserted overpayment.

CONCLUSIONS OF LAW

Generally

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

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

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

Overpayment

Ripeness

At hearing, the parties agreed the issue of whether the Excess TTD Payments constituted an overpayment was appropriate for determination. In position statements, Respondents now contend otherwise. An issue is "ripe" when it is real, immediate, and fit for adjudication. *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). An issue is "fit for adjudication" where the issue is disputed and there is no legal impediment to immediate adjudication. *Meacham v. American Blue Ribbon Holdings*, W.C. No. 4-885-416-02 (ICAO July 18, 2014). Where an issue is addressed in a final admission of liability, and the legal prerequisites to adjudication of the issue have been satisfied, the issue is ripe for hearing. *Chavez v. Cargill, Inc.*, W.C. No. 4-421-748 (Nov. 1, 2002).

With respect to the issue of overpayment, these criteria have been met. Respondents identified an alleged overpayment in the February 22, 2023 FAL, and calculated the alleged overpayment based on the TTD benefits paid. The legal prerequisites to determination also have been satisfied. Specifically, Claimant's right to TTD benefits ended pursuant to § 8-42-105 (3)(a), C.R.S., when Claimant reached MMI on January 18, 2023. Respondents filed an FAL, and Claimant did not challenge the FAL with respect to MMI or permanent impairment. That Respondent has not yet sought repayment of the alleged overpayment "[does] not render the issue premature for resolution at a hearing or otherwise not ripe." *Tully v. Southwest Health Systems, Inc.*, W.C. No. 5-062-753-001 (ICAO Feb. 9, 2021). The ALJ finds the issue of whether the Excess TTD Payments constitute an overpayment to be a real, immediate dispute, that is fit for adjudication.

Classification of Excess TTD Payments

Respondents contend the Excess TTD Payments constitute either an "overpayment," or a "credit." The Act defines an "overpayment" as:

> "[M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce death or disability benefits payable under said articles."

§ 8-40-201 (15.5), C.R.S. (2020).[1] Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek an order for repayment of overpayments, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207(1)(q), C.R.S. Respondents bear the burden of proof to establish by a preponderance of the evidence that a claimant received an overpayment, and that respondents are entitled to repayment or recovery. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002). Respondents may also retroactively recover an overpayment of benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

The present scenario was addressed in *United Airlines v. Indus. Claim Appeals Office*, 312 P.3d 235 (Colo. App. 2013), where the issue was whether TTD benefits a claimant received in excess of the statutory cap in § 8-42-107.5, C.R.S., constituted an overpayment subject to recovery by respondents. The claimant received TTD benefits before any condition for termination of TTD benefits under § 8-42-105 (3), C.R.S., had been satisfied. The Court held these were benefits to which the claimant was entitled, and did not constitute an "overpayment." The Court further held that the statutory cap applies to "combined" temporary and permanent disability benefits, and is not applicable where a claimant receives only temporary benefits to which they are entitled. Because the claimant's TTD benefits exceeded the cap before an award of permanent benefits was made, claimant never received combined permanent and temporary benefits. Thus, the statutory cap is not applicable to TTD benefits properly paid, even if they exceed the cap. The Court of Appeals further held that the respondents were not entitled to recovery of TTD benefits that exceeded the statutory cap.

The present case is not factually distinguishable from *United Airlines*. The Excess TTD Payments Claimant received were to compensate him for lost wages before any of the conditions for termination of TTD benefits under § 8-42-105 (3), C.R.S. occurred. Thus, the Excess TTD Payments were benefits to which Claimant was entitled and did not constitute an "overpayment" as that term was defined prior to January 1, 2022. Because the Excess TTD Payments are not an "overpayment," Respondents are not entitled to repayment or recovery of those benefits.

Respondents contention that the Excess TTD Payments may be defined as a "credit," rather than an "overpayment," is without basis. While the Act defines "overpayment," it contains no provision classifying any payments as a "credit." Instead, in appropriate circumstances, respondents may be permitted to "offset" or "credit" overpayments against other benefits. In other words, a "credit" or "offset" is a vehicle for the recovery of an "overpayment," but is not a separate entity itself.

[1] Section 8-40-201 (15.5), C.R.S., amended the definition of "overpayment" effective January 1, 2022. However, the statute does not apply to injuries or causes of action occurring before January 1, 2022, and this is not applicable to Claimant's claim. *See Barnes v. City and Cty. of Denver, W.C*. No. 5-063-493 (ICAO Mar. 27, 2023)

Application of Excess TTD Payments To Future Benefits.

Ripeness

The second issue relates to the application of the Excess TTD Payments toward potential future indemnity benefits. Respondents contend even if the Excess TTD Payments are not an "overpayment," they are entitled to apply the Excess TTD Payments toward future indemnity benefits should they be owed, and that the Excess TTD Payments should not be "expunged." Although the parties agreed this issue should be determined, the ALJ finds the issue to be a hypothetical question not appropriate for adjudication at this time.

As noted above, an issue is ripe when the dispute is real, immediate and there are no legal impediments to adjudication. *Olivas-Soto, supra; Meacham, supra.* "[A]djudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur." *Tully, supra*. "No court can appropriately adjudicate a matter … 'in the absence of a showing that a judgment, if entered, would afford [the parties] present relief.'" *Cacioppo v. Eagle Cty. School Dist.*, 92 P.3d 453 (Colo. 2004) *citing Farmers Ins. Exch. v. Dist. Court*, 62 P.2d 944, 947 (Colo. 1993). "Above all, there must be a present and actual legal controversy and 'not a mere possibility of a future legal dispute over some issue.'" *Id*.

Respondents raise several hypothetical scenarios in which the Excess TTD Payments could potentially be applied as a credit or offset against future benefits, but do not establish more than a possibility of future disputes based on currently-non-existent facts. These scenarios include Claimant reopening his claim and receiving new permanent impairment rating greater than 25%; Claimant's condition worsening to the point he is no longer at MMI, and becoming entitled to additional TTD benefits; or scenarios which could result in duplicate benefits. Respondents argue if these scenarios were to occur, future indemnity benefits, if any, should be reduced by the Excess TTD Payments. No evidence was presented, however, that any of these potential scenarios has occurred, or that a real, present controversy exists.

The ALJ concludes that determination of the issue Respondents' ability to recover, offset, or credit the Excess TTD Benefits against some as-yet-determined future indemnity benefits involves uncertain, contingent future matters which may never occur. Accordingly, the issue is not a real or immediate dispute, and is not fit for adjudication at this time.

ORDER

It is therefore ordered that:

1. The Excess TTD Payments Claimant received do not constitute an "overpayment" under the Workers Compensation Act.

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

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

DATED: October 10, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-231-678-001

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the left shoulder surgery requested by Authorized Treating Physician (ATP) Nathan Faulkner M.D. is reasonable, necessary and causally related to his January 5, 2023 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Field Technician. His job duties involved assisting with and repairing cabinet installations. While exiting his car at a jobsite on January 5, 2023 Claimant suffered admitted industrial injuries during the course and scope of his employment. He specifically slipped on ice and fell on his left side.

2. Claimant initially received medical treatment for his January 5, 2023 injuries from Authorized Treating Provider (ATP) Concentra Medical Centers on January 6, 2023. He reported to Barry Nelson, D.O. that he had slipped on ice and fallen on his left side. Claimant specifically landed on his left shoulder and elbow. He also twisted his left ankle. Claimant noted that he was scheduled to undergo total reverse left shoulder surgery on January 17, 2023 through private medical provider Kaiser Permanente. Dr. Nelson diagnosed Claimant with a left ankle sprain as well as contusions of the left shoulder and elbow.

3. Claimant testified that he had been receiving treatment for his left shoulder from Kaiser prior to January 5, 2023. Notably, medical records reveal Claimant had a pre-existing history of left shoulder problems. On September 10, 2018 Claimant visited Kaiser and presented with continued left shoulder pain and difficulties with movement for just over one week. Claimant reported he initially injured his left shoulder when he fell while hunting approximately two weeks earlier.

4. On September 20, 2022 Claimant visited Seth R. Olson, D.O. at Kaiser. Claimant reported his chief concern was left shoulder pain. He commented that left shoulder pain had been a chronic issue but worsened over the past few days. Claimant specified he has suffered pain in his left arm for three years and reported that "lately arm feels weak" and he kept dropping things. Claimant explicitly denied any recent left shoulder injuries, but noted that it hurt to merely lift his arm a quarter of the way up and move his steering wheel when driving. He acknowledged that left shoulder surgery had previously been recommended, but he never underwent the procedure. Dr. Olson assessed acute and chronic left shoulder pain and recommended an MRI.

5. Claimant testified that on September 28, 2022 he suffered an injury to his left shoulder while working on a drawer at a private residence for Employer. While adjusting the front face of the drawer by pushing it from the bottom with his hands, he felt increased left shoulder pain. Claimant visited David J. Mackey, PA at Kaiser Urgent Care for treatment. PA Mackey noted a recent September 23, 2022 MRI revealed a massive left shoulder rotator cuff tear. Claimant exhibited debilitating pain and was unable to move his left arm. PA Mackey

remarked that Claimant had "extremely limited range of motion." He determined that, based on the mechanism of injury, he did not "suspect any new severe pathology except for possibly new rotator aspect." PA Mackey placed an urgent referral for an orthopedic consultation.

6. On September 30, 2022 Claimant again visited Kaiser and received treatment from Andrew J. Morris, M.D. Dr. Morris remarked that Claimant had a well-established chronic history of a left massive rotator cuff tear. However, Claimant reported he re-injured his left shoulder at work and was unable to use his arm because of pain. Dr. Morris commented that Claimant had suffered pain in his left shoulder that worsened with overhead activities for many years. He recommended a reverse total shoulder arthroplasty once Claimant quit smoking.

7. Employer's Field Manager [Redacted, hereinafter JJ] testified at the hearing in this matter. He explained that Claimant never reported a work-related incident on September 28, 2022 as reflected in a text message he received from Claimant. Instead, Claimant advised JJ[Redacted] that he was experiencing a re-aggravation of a previous injury. The September 28, 2022 text message only specified that Claimant "had some lifting restrictions until I meet with orthopedic surgeon." Employer thus did not complete an Accident/Injury Incident Report.

8. On January 19, 2023 Claimant returned to Kaiser and visited Dr. Morris for an examination. Claimant reported left shoulder pain that had been occurring "for many years" and worsened with overhead activities. Dr. Morris discussed surgical options including a reverse total shoulder arthroplasty because Claimant had not smoked for three months.

9. On February 21, 2023 Claimant returned to Concentra and visited Dr. Nelson for an evaluation. Dr. Nelson recorded that Claimant's left shoulder symptoms were the result of an "old work comp injury from August" where Claimant sustained a rotator cuff tear. He remarked that Claimant had "plans for a reverse total shoulder" based on the recommendations of his Kaiser physicians. Dr. Nelson referred Claimant for an orthopedic evaluation with Nathan Faulkner, M.D. at Orthopedic Centers of Colorado.

10. On March 15, 2023 Claimant visited Dr. Faulkner for an examination. Claimant reported that he initially injured his left shoulder "in August when he was hitting a drawer up while installing a cabinet and developed immediate left shoulder pain." Dr. Faulkner summarized that Claimant had suffered two separate injuries to his shoulder that occurred at work. In addition to the August, 2022 injury Claimant again injured his left shoulder in January, 2023 when he slipped on ice and fell.

11. On March 20, 2023 Claimant underwent an MRI of his left shoulder. The MRI revealed a "massive full-thickness rotator cuff tear." Therefore, on March 24, 2023 Dr. Faulkner sought authorization for a reverse total shoulder arthroplasty. Dr. Faulkner mentioned Claimant's intermittent pain prior to the work injury but explained that he now experienced significant weakness and limited range of motion.

12. On May 3, 2023 Claimant underwent an Independent Medical Examination (IME) with William Ciccone II, M.D. Dr. Ciccone reviewed Claimant's medical records and performed a physical examination. He recounted that Claimant had reported a work injury to his left shoulder in September 2022 when he pushed up on a drawer that weighed about seven

pounds. Claimant stated that he again injured his left shoulder at work on January 5, 2023 when he slipped on ice and landed on his left side. Dr. Ciccone concluded that Claimant's need for a reverse left shoulder arthroplasty was not causally related to either of the preceding work events.

13. Initially, Dr. Ciccone explained that the minor event of simply pushing up on a drawer in September 2022 was unlikely to cause any significant injury to Claimant's shoulder. Moreover, a left shoulder MRI from September 23, 2022 at Kaiser had revealed a massive chronic retracted rotator cuff tear. Kaiser discussed the possibility of a shoulder replacement if Claimant ceased smoking.

14. Dr. Ciccone also determined that the January 5, 2023 slip and fall at work did not aggravate Claimant's pre-existing rotator cuff tear. Notably, Dr. Ciccone compared Claimant's left shoulder MRI from September 23, 2022 with the more recent left shoulder MRI from March 20, 2023. The imaging did not reveal any differences. Both scans reflected a "massive, retracted rotator cuff tear with atrophy." Dr. Ciccone remarked that there have been no differences in the suggested treatment for Claimant's shoulder following his work accident. He emphasized that Claimant has chronic, pre-existing cuff tear arthropathy in the shoulder that was not changed by the fall on January 5, 2023. Dr. Ciccone thus concluded that the reverse shoulder replacement surgery requested by Dr. Faulkner is not causally related to Claimant's work activities. Claimant's need for shoulder surgery preceded any work events.

15. On June 13, 2023 Claimant underwent an IME with Sander Orent, M.D. Dr. Orent reasoned that Claimant's "initial shoulder injury was work related and should have been managed inside the Workers' Compensation system." He remarked that Claimant exacerbated his left shoulder when he slipped and fell on ice on January 5, 2023. Although Dr. Orent recognized that Claimant had planned left shoulder surgery before the fall, the event exacerbated his symptomology. He concluded that Claimant's request for a left shoulder reverse arthroplasty should be covered under Workers' Compensation.

16. On August 23, 2023 the parties conducted the post-hearing evidentiary deposition of Dr. Ciccone. Dr. Ciccone maintained that Claimant's request for reverse left shoulder arthroplasty is not causally related to either the September 28, 2022 or January 5, 2023 work events. He reiterated that both the September 23, 2022 and March 20, 2023 left shoulder MRIs revealed that Claimant had a "massive rotator cuff tear" that was chronic in nature. Notably, the September 28, 2022 work incident in which Claimant was pushing a seven-pound drawer would not have changed his left shoulder condition. Claimant was not trying to reach or lift the drawer. Dr. Ciccone reasoned that the mechanism was unlikely to cause a significant shoulder injury. Furthermore, Claimant's January 5, 2023 slip and fall did not cause the need for a reverse left shoulder arthroplasty. Instead, the necessity of a left shoulder arthroplasty was the pain and dysfunction from a chronic rotator cuff tear that existed prior to the January 5, 2023 accident. Furthermore, the fall on January 5, 2023 did not aggravate Claimant's pre-existing rotator cuff tear arthropathy because the MRIs from September of 2022 and March of 2023 both revealed chronic, complete, full thickness rotator cuff tears. Accordingly, Claimant's request for left rotator cuff surgery was not causally related to an industrial event.

17. Claimant has failed to demonstrate it is more probably true than not that the left shoulder surgery requested by ATP Dr. Faulkner is reasonable, necessary and causally related to his January 5, 2023 industrial injury. Initially, Claimant explained that he slipped on ice, landed on his left side and injured his shoulder while at a jobsite on January 5, 2023. However, the record is replete with evidence that Claimant had significant left shoulder symptoms prior to his accident at work. On September 20, 2022 Claimant visited Dr. Olson at private medical provider Kaiser and reported that he had suffered chronic left shoulder pain that had worsened over the past few days. Claimant specified he had experienced pain in his left arm for three years and reported that "lately arm feels weak" and he kept dropping things. He acknowledged that left shoulder surgery had previously been recommended, but he never underwent the procedure.

18. Claimant testified that on September 28, 2022 he suffered an injury to his left shoulder while repairing a drawer at a private residence for Employer. He visited Kaiser Urgent Care for treatment. PA Mackey noted a September 23, 2022 MRI had revealed a massive left shoulder rotator cuff tear. On September 30, 2022 Claimant again visited Kaiser and Dr. Morris remarked that he had a well-established chronic history of a left massive rotator cuff tear. The preceding Kaiser records reveal that Claimant had chronic, long-standing left shoulder problems, including a massive rotator cuff tear, that warranted surgery even before any alleged industrial injuries.

19. After Claimant's January 5, 2023 work accident in which he slipped and fell on ice, he obtained medical treatment from ATP Concentra. On January 6, 2023 he reported to Dr. Nelson that he was already scheduled to undergo total reverse left shoulder surgery on January 17, 2023 through Kaiser. On a February 21, 2023 visit to Concentra, Dr. Nelson recorded that Claimant's left shoulder condition was the result of an "old work comp injury from August" where Claimant sustained a rotator cuff tear. He remarked that Claimant had "plans for a reverse total shoulder" based on the recommendations of his Kaiser physicians. On March 20, 2023 Claimant underwent an MRI of his left shoulder that revealed a "massive full-thickness rotator cuff tear." Dr. Faulkner at Concentra thus requested a reverse left shoulder arthroplasty.

20. Dr. Ciccone conducted an IME and testified through a post-hearing evidentiary deposition in this matter. He persuasively determined that Claimant's need for a reverse left shoulder arthroplasty was not causally related to either the September, 2022 or January 5, 2023 work events. Dr. Ciccone explained that the minor event of simply pushing up on a drawer in September 2022 was an unlikely mechanism to cause a significant shoulder injury. Furthermore, Claimant's January 5, 2023 slip and fall did not cause the need for a reverse left shoulder arthroplasty. Instead, the cause of Claimant's need for a left shoulder arthroplasty was the pain and dysfunction from the massive, chronic rotator cuff tear visible on the September 23, 2022 MRI at Kaiser. Furthermore, the fall on January 5, 2023 did not aggravate Claimant's pre-existing left shoulder condition because the MRIs from September of 2022 and March of 2023 both revealed chronic, complete, full thickness rotator cuff tears. Dr. Ciccone also remarked that there have been no differences in the suggested treatment for Claimant's shoulder following his work accident. He emphasized that Claimant simply has chronic, pre-existing cuff tear arthropathy in the left shoulder that was not changed by the fall on January 5, 2023. Dr. Ciccone thus persuasively concluded that Dr. Faulkner's requested reverse shoulder replacement surgery is not causally related to Claimant's work activities.

21. In contrast, Dr. Orent remarked that Claimant's September 28, 2022 left shoulder injury was related to his work activities and he exacerbated his symptoms when he fell on ice on January 5, 2023. Although Dr. Orent recognized that Claimant had planned left shoulder surgery before the fall, the event nevertheless aggravated his condition. He concluded that Claimant's request for a left shoulder reverse arthroplasty was related to his work activities and should be authorized. However, although Dr. Orent was correct that Claimant's left shoulder surgery had been planned before the January 5, 2023 fall, the records reveal that he was incorrect in assuming the initial injury was related to Claimant's employment. Extensive medical records from Kaiser clearly show that Claimant had reported left shoulder problems eight days before the September 28, 2022 alleged incident. Notably, a September 23, 2022 MRI showed a "massive rotator cuff tear'" that was the cause of Claimant's need for surgery. Therefore, based on the medical records and persuasive testimony of Dr. Ciccone, Claimant's request for left shoulder surgery is not likely causally related to his work activities for Employer. Accordingly, Claimant's request for a reverse left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the left shoulder surgery requested by ATP Dr. Faulkner is reasonable, necessary and causally related to his January 5, 2023 industrial injury. Initially, Claimant explained that he slipped on ice, landed on his left side and injured his shoulder while at a jobsite on January 5, 2023. However, the record is replete with evidence that Claimant had significant left shoulder symptoms prior to his accident at work. On September 20, 2022 Claimant visited Dr. Olson at private medical provider Kaiser and reported that he had suffered chronic left shoulder pain that had worsened over the past few days. Claimant specified he had experienced pain in his left arm for three years and reported that "lately arm feels weak" and he kept dropping things. He acknowledged that left shoulder surgery had previously been recommended, but he never underwent the procedure.

7. As found, Claimant testified that on September 28, 2022 he suffered an injury to his left shoulder while repairing a drawer at a private residence for Employer. He visited Kaiser Urgent Care for treatment. PA Mackey noted a September 23, 2022 MRI had revealed a massive left shoulder rotator cuff tear. On September 30, 2022 Claimant again visited Kaiser and Dr. Morris remarked that he had a well-established chronic history of a left massive rotator cuff tear. The preceding Kaiser records reveal that Claimant had chronic, long-standing left shoulder problems, including a massive rotator cuff tear, that warranted surgery even before any alleged industrial injuries.

8. As found, after Claimant's January 5, 2023 work accident in which he slipped and fell on ice, he obtained medical treatment from ATP Concentra. On January 6, 2023 he reported to Dr. Nelson that he was already scheduled to undergo total reverse left shoulder surgery on January 17, 2023 through Kaiser. On a February 21, 2023 visit to Concentra, Dr. Nelson recorded that Claimant's left shoulder condition was the result of an "old work comp injury from August" where Claimant sustained a rotator cuff tear. He remarked that Claimant had "plans for a reverse total shoulder" based on the recommendations of his Kaiser physicians. On March 20, 2023 Claimant underwent an MRI of his left shoulder that revealed a "massive full-thickness rotator cuff tear." Dr. Faulkner at Concentra thus requested a reverse left shoulder arthroplasty.

9. As found, Dr. Ciccone conducted an IME and testified through a post-hearing evidentiary deposition in this matter. He persuasively determined that Claimant's need for a

reverse left shoulder arthroplasty was not causally related to either the September, 2022 or January 5, 2023 work events. Dr. Ciccone explained that the minor event of simply pushing up on a drawer in September 2022 was an unlikely mechanism to cause a significant shoulder injury. Furthermore, Claimant's January 5, 2023 slip and fall did not cause the need for a reverse left shoulder arthroplasty. Instead, the cause of Claimant's need for a left shoulder arthroplasty was the pain and dysfunction from the massive, chronic rotator cuff tear visible on the September 23, 2022 MRI at Kaiser. Furthermore, the fall on January 5, 2023 did not aggravate Claimant's pre-existing left shoulder condition because the MRIs from September of 2022 and March of 2023 both revealed chronic, complete, full thickness rotator cuff tears. Dr. Ciccone also remarked that there have been no differences in the suggested treatment for Claimant's shoulder following his work accident. He emphasized that Claimant simply has chronic, pre-existing cuff tear arthropathy in the left shoulder that was not changed by the fall on January 5, 2023. Dr. Ciccone thus persuasively concluded that Dr. Faulkner's requested reverse shoulder replacement surgery is not causally related to Claimant's work activities.

10. As found, in contrast, Dr. Orent remarked that Claimant's September 28, 2022 left shoulder injury was related to his work activities and he exacerbated his symptoms when he fell on ice on January 5, 2023. Although Dr. Orent recognized that Claimant had planned left shoulder surgery before the fall, the event nevertheless aggravated his condition. He concluded that Claimant's request for a left shoulder reverse arthroplasty was related to his work activities and should be authorized. However, although Dr. Orent was correct that Claimant's left shoulder surgery had been planned before the January 5, 2023 fall, the records reveal that he was incorrect in assuming the initial injury was related to Claimant's employment. Extensive medical records from Kaiser clearly show that Claimant had reported left shoulder problems eight days before the September 28, 2022 alleged incident. Notably, a September 23, 2022 MRI showed a "massive rotator cuff tear'" that was the cause of Claimant's need for surgery. Therefore, based on the medical records and persuasive testimony of Dr. Ciccone, Claimant's request for left shoulder surgery is not likely causally related to his work activities for Employer. Accordingly, Claimant's request for a reverse left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

ORDER

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

1. Claimant's request for a reverse left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

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

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

DATED: October 11, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-196-637-002

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that trigger point injections are reasonable, necessary, and related to her admitted industrial injury.

2. Whether Claimant proved by a preponderance of the evidence that prescriptions for Oxycodone and Tizanidine are reasonable, necessary, and related to her admitted industrial injury.

FINDINGS OF FACT

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

1. Claimant worked in Employer's warehouse. On October 28, 2021, Claimant sustained admitted injuries to the right side of her neck and right shoulder while cleaning a machine with her right arm overhead.

2. Claimant first saw her authorized treating physician (ATP) Annu Ramaswamy, M.D., on November 11, 2021. Claimant reported pain in her right shoulder and neck that had not resolved. Based on his examination and history, Dr. Ramaswamy diagnosed Claimant with shoulder impingement and secondary myofascial pain in the neck and rhomboid regions. Dr. Ramaswamy referred Claimant for physical therapy and massage therapy. He also noted that if Claimant did not improve in time, he would perform trigger point injections. (Ex. 4, pp. 9-11).

3. At Claimant's November 17, 2021 appointment, Dr. Ramaswamy noted on the exam that Claimant had moderate trigger point activity involving the right trapezius and levator musculature with tenderness. He gave Claimant trigger point injections in the right trapezius/levator, and noted that a twitch response was obtained. (Ex. 4 p. 14).

4. On November 30, 2021, Dr. Ramaswamy examined and treated Claimant. He noted mild to moderate trigger point activity involving the right trapezius and levator musculature with tenderness. Claimant received three trigger point injections (one to the right praspinous region and two to the right trapezius and levator regions). Dr. Ramaswamy noted that a local twitch response was obtained. Claimant reported some relief from the trigger point injections. (Ex. 4 p. 21).

5. Claimant saw Dr. Ramaswamy for a follow up appointment on December 21, 2021. Dr. Ramaswamy found that Claimant had very localized trigger point activity in the right trapezius/levator musculature with tenderness. Claimant reported that the trigger point injections "helped quite a bit." (Ex. 4 p. 25).

6. Dr. Ramaswamy referred Claimant to Levi Miller, M.D., of Colorado Rehabilitation & Occupational Medicine. Claimant saw Dr. Miller on January 28, 2022, and reported the nature of her injury and detailed her persistent right shoulder pain, popping, and clicking. Claimant reported increased symptoms with reaching and overhead activities. She reported pain with cervical range of motion and some radiating pain into her arms. Claimant also reported some left shoulder pain and other issues from overcompensating on her right shoulder. On physical exam, Dr. Miller noted decreased cervical range of motion, tenderness in her bilateral mid and lower paraspinals, trapezius, and levator scapula. Dr. Miller diagnosed Claimant with a right shoulder sprain and cervical sprain. He recommended an EMG, chiropractic care, and medications. Dr. Miller also discussed possible shoulder injections. (Ex. 5, pp. 110-113).

7. On February 10, 2022, Claimant treated with Dr. Ramaswamy and upon examination, he recorded that significant trigger point activity was present involving the trapezius and levator musculature with tenderness. The following day, February 11, 2022, Claimant saw Dr. Ramaswamy for trigger point injections. She had trigger point injections in her left trapezius/levator, and a local twitch response was obtained. Claimant gained range of motion following the injections. (Ex. 4, pp. 32-37).

8. On February 26, 2022, Respondents filed a General Admission of Liability, and Claimant started receiving temporary total disability benefits on February 14, 2022. (Ex. 1).

9. Claimant continued to be treated by Dr. Ramaswamy. On March 1, 2022, he noted Claimant had moderate trigger point activity involving the right trapezius and levator musculature with tenderness. On April 12, 2022, Claimant also presented with moderate trigger point activity involving the right trapezius and levator musculature with tenderness, and mild trigger point activity involving the left trapezius/levator complex. Dr. Ramaswamy performed trigger point injections to both the trapezius and levator regions. (Ex. 4 pp. 39-49).

10. On June 9, 2022, Claimant told Dr. Ramaswamy that the trigger point injections helped quite a bit, even if the relief was temporary. On exam, Claimant had moderate trigger point activity involving the right trapezius and levator musculature with tenderness. Dr. Ramaswamy recommended trigger point injections every three weeks. He noted the trigger point injections and chiropractic dry needling were treating the secondary issues to maintain the patient. (Ex. 4, pp. 57-58).

11. Claimant returned to Dr. Ramaswamy on June 14, 2022, for treatment. According to the medical record, he noted moderate trigger point activity involving the right trapezius and levator musculature and mild trigger point activity involving the left trapezius and levator musculature. He administered trigger point injections in the left and right trapezius/levator junctions. Dr. Ramaswamy noted Claimant would undergo chiropractic care and trigger point injections every two weeks. (Ex. 4, pp. 60-62).

12. At her June 29, 2022 appointment with Dr. Ramaswamy, Claimant reported that the trigger point injections helped her for about four to five days, but this was the only

thing giving her relief. On examination, Dr. Ramaswamy noted moderate trigger point activity involving the right trapezius and levator musculature with tenderness and mild trigger point activity involving the left trapezius and levator musculature. Dr. Ramaswamy performed trigger point injections, and a twitch response was noted 50% of the time. (Ex. 4 pp. 64-65).

13. On July 14, 2022, Dr. Ramaswamy performed trigger point injections on Claimant. She again noted that the injections gave her temporary relief of four to five days. (Ex. 4, p. 69). At Claimant's August 11, 2022 appointment, Dr. Ramaswamy noted on examination that Claimant had moderate trigger point activity involving the bilateral trapezius and levator regions. He administered three trigger point injections. (Ex. 4 p. 75).

14. Dr. Ramaswamy treated Claimant on August 25, 2023. On examination he noted moderate trigger point activity involving the left trapezius and levator musculature, and mild trigger activity on the right side. He administered trigger point injections. He noted twitch responses on the left side, but not on the right side. (Ex. 4, p 78). On September 8, 2022, Dr. Ramaswamy noted Claimant had trigger point activity in both the trapezius and levator regions, much more on the right side. He gave Claimant two trigger point injections. (Ex. 4, p. 81).

15. At Claimant's October 10, 2022 appointment, on examination, Claimant had moderate trigger point activity involving her right trapezius and levator musculature, and mild trigger point activity on the left side. Claimant underwent trigger point injections and twitch responses were noted on the right side. (Ex. 4, p. 88).

16. Dr. Ramaswamy treated Claimant on November 7, 2022. On examination he noted Claimant presented with moderate trigger point activity in the right trapezius, levator regions and the right parascapular region. He added steroid to the trigger point injection mixture in an effort to obtain a more long-lasting response. Dr. Ramaswamy also discussed Claimant's use of Percocet. He reviewed the PDMP and there were no issues, but his plan was to conduct a urine drug screen at the next visit, and have Claimant sign another narcotic contract. (Ex. 4, p. 95).

17. A hearing was held on November 18, 2022 because Claimant was seeking authorization for cervical medial branch blocks as recommended by her ATPs. On January 9, 2023, ALJ Kabler granted Claimant's request for authorization of cervical medial branch blocks. (Ex. 11).

18. At Claimant's November 21, 2022 follow-up appointment with Dr. Ramaswamy, Claimant expressed her frustration that she continued to suffer from chronic pain. Claimant stated that the last trigger point injections were quite helpful, and she wanted another steroid trigger point injection. On examination, Claimant had moderate trigger point activity involving the right trapezius/levator region, and mild trigger point activity involving the right rhomboid region. (Ex. 4, p. 99).

19. Dr. Ramaswamy had previously referred Claimant to Michael Hewitt, M.D. at Orthopedic Centers of Colorado, and Dr. Hewitt recommended proceeding with non-surgical management, including a PRP injection. On January 11, 2023, Claimant treated with Dr. Hewitt, who performed a PRP injection. (Ex. 6).

20. Claimant had a telemedicine appointment with Dr. Ramaswamy on February 1, 2023. He noted her PRP injections with Dr. Hewitt three weeks prior, and stated he would contact Dr. Miller's office to get the medial branch blocks scheduled. (Ex. 4., p. 105).

21. On February 23, 2023, Claimant had another telemedicine appointment with Dr. Ramaswamy. Claimant told him she noticed improvement following the PRP injection and had a diagnostic response to the C4-C6 medial branch blocks. Dr. Ramaswamy refilled her prescriptions for Percocet and Tizanidine. He noted Claimant took the Percocet very rarely. Dr. Ramaswamy also noted his clinic was closing as of March 5, 2023. (Ex. 4, pp. 107-109).

22. On February 24, 2023, Claimant presented to Dr. Miller. He discussed with Claimant her diagnostic response to the medial branch blocks and requested a follow-up visit to perform trigger point injections. Dr. Miller specifically noted that according to Claimant, Dr. Ramaswamy requested the trigger point injections be performed through his clinic. (Ex. 5, p. 130). The ALJ infers that Dr. Ramaswamy made this request because his clinic was closing.

23. On March 13, 2023, William Barreto, M.D. completed a peer review report regarding Dr. Miller's request for additional trigger point injections. Dr. Barreto opined that the trigger point injections were not medically necessary because there was "no documentation of well circumscribed trigger points demonstrating a local twitch response to support this treatment." He also stated it was unclear how the injections improved Claimant's condition. Dr. Barreto reviewed limited medical records from Claimant's ATP, Dr. Ramaswamy. He reviewed the records from her appointments on February 1, 2023 and February 23, 2023. Both of these appointments were virtual, so Dr. Ramaswamy did not administer trigger point injections, and his examination was limited. Dr. Baretto also reviewed records from Claimant's January 11, 2023 appointment with Dr. Hewitt and her February 24, 2023 appointment with Dr. Miller. But neither of these appointments involved the administration of trigger point injections, or an examination related to trigger point injections. (Ex. V).

24. Dr. Barreto's opinion is neither credible, nor persuasive. Dr. Barreto did not examine Claimant, nor did he review the medical records from the multiple visits, between November 17, 2021 and November 21, 2022, where Dr. Ramaswamy administered trigger point injections, and recorded his examination of Claimant prior to the injections and any twitch response from the injection.

25. Claimant credibly testified she has been experiencing knots in her trapezius area and muscle spasms. Previous trigger point injections have provided her pain relief and increased mobility in her neck. She credibly testified that the reduction in pain and

increase in mobility following a trigger point injection allows her to better perform other recommended treatment. (Tr. 12:20-13:11, 15:18-16:10, and 26:4-7).

26. Claimant's testimony and her medical records demonstrate the trigger point injections provide Claimant with pain/symptom relief and increased range of motion and increased function. Based on the totality of the evidence, the ALJ finds that the requested trigger point injections recommended by Dr. Ramaswamy and Dr. Miller are reasonable, necessary, and related to Claimant's admitted industrial injury.

27. Dr. Ramaswamy prescribed Percocet for Claimant to take as needed when her pain was intolerable. He first prescribed the opioids on November 11, 2021. (Ex. 4, p. 11). Claimant periodically received refills of the Percocet while being treated by Dr. Ramaswamy. As found, Dr. Ramaswamy checked the PDMP and instituted other safeguards to ensure Claimant was not abusing the opioid. Claimant refilled the prescription only sparingly. Claimant credibly testified she only takes the medication as needed. (Tr. 18:3-20:10). Claimant takes the Tizanidine at night so she can sleep. Claimant testified the Tizanidine controls her pain and muscle spasms. (Tr. 20:15-21:16).

28. On March 3, 2023, Respondents denied the Percocet prescription based on a utilization review report from Eddie Sassoon, M.D. Dr. Sassoon recommended denying the prescription for a lack of documentation of the opioid's efficacy at decreasing Claimant's pain and improving function. (Ex. U). The ALJ does not find this opinion to be persuasive.

29. Respondents argue in their position statement that Claimant takes the Tizanidine daily and "muscle relaxers have a potential for addiction and prolonged use can lead to a physical dependence." There is no objective evidence in the record as to why Respondents denied the Tizanidine.

30. Based on the totality of the evidence, the ALJ finds the prescriptions of both Percocet and Tizanidine are reasonable and necessary to help cure and relieve Claimant from the effects of her industrial injury.

31. The ALJ finds Claimant proved by a preponderance of the evidence that the trigger point injections and Percocet and Tizanidine prescriptions are reasonable, necessary, and related to her admitted industrial injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find

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

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

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

MEDICAL BENEFITS

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293, 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 474 P.2d 622 (1970). As found, Claimant proved by a preponderance of the evidence that the trigger point injections and Percocet and Tizanidine prescriptions recommended by Drs. Miller and Ramaswamy are reasonable, necessary, and related to her admitted industrial injury.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence that the trigger point injections recommended by her ATP are reasonable, necessary and related to her admitted industrial injury. Respondents shall pay for the injections subject to the Division of Workers' Compensation Medical Fee Schedule.

2. Claimant proved by a preponderance of the evidence that the prescriptions for Percocet and Tizanidine, recommended by her ATP are reasonable, necessary and related to her admitted industrial injury. Respondents shall pay for the prescriptions subject to the Division of Workers' Compensation Medical Fee Schedule.

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

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

DATED: October 11, 2023

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

ISSUES

The issues determined by this decision are:

I. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment thereby precluding his entitlement to TTD pursuant to C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a).

II. If Respondents failed to demonstrate that Claimant was responsible for his resulting wage loss, whether Claimant established, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits commencing April 16, 2023 and ongoing.[1]

FINDINGS OF FACT

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

General Findings

1. Claimant was working as a mason for Respondent-Employer when he suffered admitted burn injuries to his face, left upper extremity, chest and abdomen on November 14, 2022. On the day of his injury, Claimant and a co-worker were using a demolition saw to cut rebar. The co-worker had filled the saw with gas but unbeknownst to Claimant, had not tightened the gas cap sufficiently causing gas to slosh out of the tank while Claimant was operating the saw. The spilled gasoline ignited, burning Claimant's abdomen/chest[2], left hand/forearm and face. Claimant was taken to the hospital and subsequently transported by ambulance to the UC Health Burn Clinic where he was hospitalized for 17 days. While in the burn unit, Claimant underwent extensive grafting from donor skin harvested from his right thigh. (Exhibit 2, Page 25; Exhibit 4, page. 40).

2. Claimant was unable to work and was paid Temporary Total Disability (TTD) benefits from November 15, 2022 through February 9, 2023, as he recovered from his injuries. (Exhibit F, page 26). However, on February 2, 2023, senior claims representative, [Redacted, hereinafter LP], sent correspondence to Dr. Annu Ramaswamy, Claimant's authorized treating provider, outlining a modified job offer Respondents intended to extend to Claimant in order to return him to work within his physical restrictions. The offer acknowledged that Claimant was under restrictions of no

[1] Although Claimant also sought to litigate his entitlement to Temporary Partial Disability (TPD), the ALJ sustained Respondents objection to hearing this issue as it was not endorsed for hearing.
[2] Claimant's Hearing Testimony, Tr2, page 8, ll. 19-23.

lifting more than 20 pounds, no use of the left hand and limits on carrying, pushing, pulling and climbing ladders. (Exhibit 2, page 28; Exhibit I, page 32).

3. Dr. Ramaswamy approved the modified job offer and Claimant returned to modified duty, in a supervisory capacity at full wages with Employer on February 10, 2023. (Exhibit 2, page 28; Exhibit F, page 26; Claimant's Hearing Testimony, Tr2, page 15, ll. 20-24). At the time, Respondent-Employer was the masonry subcontractor to [Redacted, hereinafter EC]., a general contractor assigned to build a [Redacted, hereinafter DT] location in Peyton, Colorado. (Testimony of [Redacted, hereinafter MS], Tr2, page 22, ll. 4-25).

4. Prior to his return to work on February 10, 2023, Claimant and all other employees of [Redacted, hereinafter MC] signed and acknowledged receipt of Employer's Employee Handbook on February 8, 2023. (Exhibit A, page 19; Claimant's Hearing Testimony, Tr2, page 13, ll. 2-13; Testimony of EA[Redacted], Tr2, page 47, ll. 12-21). Included in the Acknowledgement of Receipt that Claimant signed on February 8, 2023 were the statements: "I understand that I am responsible for familiarizing myself with the policies in this handbook and agree to comply with all rules applicable to me" and "I have received the Company Employee Handbook. I have read (or will read) and agree to abide by the policies and procedures contained in the Employee Handbook." (See Exhibit A, page 19).

5. Claimant testified that his proficiency with English is limited and that the handbook was written in English. Nonetheless, he testified that he tried to read the handbook on his own. (Claimant's Hearing Testimony, Tr2, page 15, ll. 12-19). Regardless, of his English capabilities, Claimant never requested a copy of the handbook in Spanish, nor did he ever indicate that he was unable to understand its contents prior to or following his signing the acknowledgement form. Tr2 at page 47, ll. 22-25; Tr2 at page 48, ll. 1-8). Moreover, Claimant testified that he understood that engaging in certain conduct, including insubordination and failure to comply with Employer's rules could result in discipline up to termination. *Id*. at page 14, ll. 22-25 through page 15, ll. 1-4.

6. The handbook Claimant received and acknowledged on February 8, 2023 contains Employer's "Drug and Alcohol Policy", which included a zero-tolerance policy for drug and alcohol use during working hours and on any sites. (Exhibit A, Section 2.11, page 8). The policy further provides that anyone caught using any substance would be automatically terminated and that Respondent-Employer had the "right to drug test anyone at any time without notice." *Id*. Finally the policy states that "[i]f a drug test is found positive to any drugs or alcohol, [the] employee will automatically be terminated". *Id.* Respondent-Employer reserved the right to pick up the employee or employees suspected of using drugs and/or alcohol during work hours or on jobsites and transport them to a drug testing facility. *Id.*

7. Also contained in the Employee Handbook are policies relating to "Discipline and Standards of Conduct." (Exhibit A, Section 4.3, page 19). This section of the handbook states explicitly that engaging in any conduct the Employer deems

inappropriate may result in disciplinary action up to and including termination. *Id.* "Insubordination, failure to perform assigned duties or failure to comply with the Company's health, safety or other rules" are examples of conduct that is deemed to be inappropriate. *Id*. at Section 4.3(f), page 12.

8. Claimant was given his final paycheck and his employment was terminated on April 17, 2023 for insubordination and failing to submit to drug testing as requested by Employer. (Testimony of [Redacted, hereinafter EA], Tr2, page 70, ll. 1-24). EA's[Redacted] request that Claimant take a drug test has its roots in Claimant's conduct/actions as observed by MS[Redacted] on April 10 and April 14, 2023.

The Testimony of MS[Redacted]

9. MS[Redacted], testified as the construction site superintendent for the general contractor, EC[Redacted]. As noted, Employer had been selected as the masonry subcontractor for EC[Redacted] for the DT[Redacted] build in Peyton, Colorado and Claimant worked for Employer as a foreman on that job. MS[Redacted] testified that as site superintendent, he had numerous interactions with Claimant leading up to his termination in April 2023. (Testimony of MS[Redacted], Tr2, pages 22-23).

10. MS[Redacted] testified that he would call EA[Redacted], as the owner/operator of MC[Redacted] every day, at least once per day, to discuss work on the job site and any issues with the performance of Employer's crew on the DT[Redacted] job site. (Testimony of MS[Redacted], Tr2, page 23, ll. 13-25; Tr2, page 47, l. 5).

11. According to MS[Redacted], he came out of his office on the job site around 3:00 p.m.[3] on April 10, 2023, to observe Claimant's pickup truck parked near, i.e. approximately 20 from the front of his office with the windows rolled down. (Testimony of MS[Redacted], Tr2, pages 24-25). MS[Redacted] testified that he could smell a strong order of marijuana, so he approached Claimant's truck. *Id*. at page 24, ll. 18-19. MS[Redacted] testified that as he advanced towards the truck the order became stronger and he could see lingering smoke. *Id.* at ll. 19-20. MS[Redacted] testified that he advised Claimant that smoking marijuana was not acceptable on the jobsite and that he would need to remove him from the job. Id. at page 25, ll. 22-23. All parties then left for the day. *Id.* at l. 24. As MS[Redacted] was getting fuel, he called EA[Redacted] and explained what he had observed and that he (EA[Redacted]) would need to remove Claimant from the job based upon EC[Redacted] policy. *Id.* at page 25, l. 1; page 26, ll. 7-8.[4]

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[3] According to MS[Redacted], as foreman of others who were still on site, Claimant was on the clock when he was observed smoking in his truck. (Testimony of MS[Redacted], Tr2, page, 34, ll. 1-6).

[4] EA[Redacted] confirmed this conversation took place, noting that MS[Redacted] called him late in the day on April 10th and reported that he (MS[Redacted]) suspected that employees were getting high on the job. (Testimony of EA[Redacted], Tr2, page 50, ll. 20-25; Tr2, page 51, ll.3-12).v

12. Although MS[Redacted] intended to have Claimant removed from the job site following the April 10, 2023 incident, he permitted Claimant's return to work on April 11, 2023. (Testimony of MS[Redacted], Tr2, page 26, ll. 7-14).

13. On April 14, 2023, the entire crew, i.e. both EC[Redacted] and MC[Redacted]. employees working at the DT[Redacted] job site were scheduled to work a half day. According to MS[Redacted], both he and EA[Redacted] were on the job site on this date, during which MS[Redacted] had a conversation with Claimant. MS[Redacted] testified that Claimant was asking incomplete and incoherent questions and that his eyes were bloodshot. (Testimony of MS[Redacted], Tr2, page 27, ll. 1-21). MS[Redacted] suspected Claimant was under the influence of something, either marijuana or pills. *Id*. at ll. 4-5. Accordingly, MS[Redacted] testified that sometime between 11:00 a.m. and 12:00 noon, he discussed his suspicions that Claimant was intoxicated with EA[Redacted]. During this conversation, MS[Redacted] informed EA[Redacted] he wanted Claimant removed from the job site. (Testimony of MS[Redacted], Tr2, page 27, ll. 17-25; Tr2, page 41, ll. 12-19).

14. MS[Redacted] testified that after discussing the situation with EA[Redacted], he believed that Claimant was going to be asked to take a drug test. As the end of the work day was approaching, and everyone was preparing to leave for the day, MS[Redacted] testified that Claimant was not removed from the job site immediately. (Testimony of MS[Redacted], Tr2, page 42, ll. 7-25).

The Testimony of EA[Redacted]

15. EA[Redacted] testified that because he was not present during the April 10, 2023 incident when MS[Redacted] alleged Claimant was smoking marijuana and because MS[Redacted] did not actually see Claimant smoking, he elected to warn his work crew rather than remove Claimant from the job site. (Testimony of EA[Redacted], Tr2, page 51, ll. 2-22). EA[Redacted] gave a verbal warning to the entire crew in Spanish on April 11, 2023 advising all employees that drug use on the job was unacceptable. *Id.* at pages 51, ll. 13-23 and 52, ll. 3-9. Despite this verbal warning, MS[Redacted] suspected Claimant of being intoxicated while working on the DT[Redacted[job site on April 14, 2023.

16. EA[Redacted] testified that MS[Redacted] called him on April 14, 2023, alleging that Claimant was intoxicated on the job site. (Testimony of EA[Redacted], Tr2, page 53, ll. 19-25). This contradicts MS's[Redacted] testimony that he and EA[Redacted] spoke in person about Claimant's alleged intoxication. EA[Redacted] testified that he told MS[Redacted] that he intended to have Claimant drug tested before making any drastic moves, i.e. removing him from the job. (Testimony of EA[Redacted], Tr2, page 53, ll. 9-25). According to EA[Redacted], at approximately 12:15 p.m. on April 14, 2023, he called Claimant and instructed him and another employee to remain on the clock and proceed to Concentra and submit to drug testing. *Id.* at page 54, ll. 1-9; page 58, ll. 11-24; page 62, ll. 1-9.

17. As evidenced by the [Redacted, hereinafter TS] data Claimant was probably still on the clock at 12:15 p.m. when he was instructed to proceed to Concentra to take a drug test. Indeed, the TS[Redacted] data supports a finding that Claimant probably did not clock out on April 14, 2023 until 12:45 p.m. (Exhibit C, page 22; see also, Tr2, page 55, ll. 1-19; page 58, ll. 11-24; page 62, ll. 1-4).

18. While Claimant acknowledges that EA[Redacted] instructed him to take a drug test, he claims that he was already clocked out for the day and was on his way home in preparation for attending an "important appointment" when he received EA's[Redacted] call to proceed to Concentra.[5] (Claimant's Hearing Testimony, Tr2, page 99-100, ll. 1-10). Claimant maintains that because he is paid by the hour and had clocked out for the day, the request for drug testing was outside his work hours. *Id.* Accordingly, Claimant informed EA[Redacted] that he could ask for such testing during work hours but not after he had clocked out and was on the way home from work. *Id.*

19. Claimant's opposition to proceed with drug testing prompted a lengthy text message string between himself and EA[Redacted]. (Exhibit 5). The text message exchange can be summarized from Claimant's perspective primarily as his assertion that the request for testing came after he had clocked out of work for the day and that his personal time was equally important as the testing request.[6] Conversely, EA[Redacted] text messages convey his assertion that he could request and send Claimant for drug testing at any time, that Claimant clocked out in contravention of Employer's express direction to remain on the clock and proceed to Concentra for testing and that submitting to testing was important because failure to take the test would be taken as a failure to pass it. (See, Tr2, pages 101-117).

20. Regarding the text message exchange, EA[Redacted]testified that he offered to get a cup of coffee with Claimant to discuss the issues and try to find a solution, but Claimant instead insisted he was off the clock and did not want to be bothered. Testimony of EA[Redacted], Tr2, page 59, ll. 6-25; Tr2, page 61, ll. 3-21; Tr2, page 64, ll. 3-19; Exhibit B, page 20). EA[Redacted] also testified that he told Claimant to "get back on the clock and do it" in referring to the drug testing requested on April 14, 2023, however Claimant refused to submit to the same. *Id*. at page 76, ll. 2-13; page 87-88.

21. During cross examination, Claimant admitted that EA[Redacted] asked him to take a drug test. Nonetheless, he reiterated his position that the request came after he had clocked out for the day and he didn't submit to testing because he was on

[5] No corroborating evidence regarding this appointment was presented at hearing.

[6] Despite his limited English capabilities, the evidence presented supports a finding that Claimant was able to respond to text messages written in English by EA[Redacted]. (See Exhibit B). Moreover, EA[Redacted] testified that Claimant was selected to be a foreman for Employer in part because of his ability to communicate in English and Spanish. (Testimony of EA[Redacted], Tr2, page 52, ll. 22-25; Tr2 page 53, ll. 1-11).

his personal time when the request was received.[7] (Testimony of Claimant, Tr2, page 118-119, ll. 1-21). Claimant also admitted that it was his decision to clock out and that he knew he could be terminated if his test was positive.[8] *Id*.

22. EA[Redacted] testified that after Claimant refused to submit to testing on Friday, April 14, 2023, he returned to work on Monday, April 17, 2023. According to EA[Redacted] Claimant was promptly terminated upon his arrival at work due to his failure to submit to drug testing as requested and for insubordination resulting from his failure to comply with Employer's directives/policy. (Testimony of EA[Redacted], Tr2, page 70, ll. 1-24).

CONCLUSIONS OF LAW

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

Generally

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

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

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

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[7] Concentra Medical Center confirmed, that Claimant and his co-worker never presented for the drug screening on April 14, 2023 despite Employer's request for the same. (Exhibit D, Testimony of EA[Redacted], Tr2, page 64, ll. 23-25).

[8] Claimant testified that despite not submitting to testing, his test would probably have been positive for marijuana because he uses marijuana outside work due to anxiety caused by his accident. (Testimony of Claimant, Tr2, page 94, ll. 16-25; page 95 - 96, ll. 1-6). He also admitted to taking Gabapentin for the residual effects of his injury, which he reported caused dizziness and blurred vision. Id. at page 96, ll. 9-17.

App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). In this case, the ALJ credits the testimony of MS[Redacted] and EA[Redacted] to conclude that Claimant performed a volitional act which he would reasonably expect to cause the loss of his employment, namely failure to submit to drug testing and refusing the reasonable directives of his Employer. See *Patchek v. Dept. of Public Safety*, W.C. No. 4-432-201 (ICAO, Sept. 27, 2001).

Responsibility for Termination

D. Because Claimant's injury in this case was after July 1, 1999, C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a), collectively referred to as the "termination statutes", apply to assertions that Claimant is responsible for his wage loss. These provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Under the termination statutes, a claimant who is responsible for the termination of modified or regular employment is not entitled to temporary disability benefits absent a worsening of condition, which reestablishes the causal connection between the injury and the wage loss. See *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004); see also *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002); *Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). As a result, the claimant loses the right to temporary benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo.App. 1994).

E. Since the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant is responsible for his termination and subsequent wage loss. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office,* 20 P.3d 1209 (Colo.App. 2000). Claimant's suggestion that Respondents' failure to follow its own progressive disciplinary policy precludes a determination of whether he was responsible for his termination is unpersuasive. See generally, *Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo.App. 1993) (employer's failure to follow its established discipline procedures did not prohibit a determination that an employee was responsible for termination). To the contrary, as noted in *Keil*, the dispositive issue is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in discharge. Moreover, Respondents do not have to prove Claimant knew or should have known that his conduct would result in his termination. *Gonzales v. Industrial Commission*, 740 P.2d. 999 (Colo. 1987). Rather, it is necessary only that Respondents establish that Claimant

is “responsible” for his/her termination and subsequent wage loss through a volitional act or the exercise of some control over the circumstances surrounding the termination.

F. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. See, *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control of the circumstances surrounding the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994). “Fault” does not require “willful intent” on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008). In other words, an employee is "responsible" for their termination if the employee precipitated the employment termination through a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety, supra.* A volitional act does not mean moral or ethical culpability. It simply means that the claimant performed an act, which led to his/her termination. *Gleason v. Southland Corp*., W.C. No. 4-149-631 (ICAO, June 13, 1994). Thus, as noted above, the fault determination depends upon whether a claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo.App. 1995). In this case, Respondents assert that Claimant is responsible for his termination and subsequent wage loss after April 14, 2023 because he refused to comply with Employer’s request that he take a drug test.

G. Despite legalization of marijuana in Colorado, the Colorado courts have reiterated that an employer may terminate an employee for drug use. *See, e.g., Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015); *Bolerjack v. Water Edge Pond Service*, W.C. 4-905-434 (ICAO 2014). In the seminal case of *Coats*, the Colorado Supreme Court considered a wrongful termination action where an employee was terminated after a random drug test came back positive for marijuana. In that case, the employer terminated the employee under their zero-tolerance policy. The employee argued that he was licensed by Colorado to use medical marijuana and that his use was off-premises. The Colorado Supreme Court found the termination was lawful because even state-licensed marijuana use was not lawful activity as it related to the employment. *Bolerjack*, an Industrial Claims Appeals Office (ICAO) case, on the other hand, applies this exact reasoning to the termination of TTD post-termination of employment in the workers’ compensation context. As found here, Employer’s handbook, as acknowledged by Claimant, clearly states that Employer had a zero-tolerance policy for drug and alcohol use on any work site and Employer had the right to drug test “anyone at any time without notice.” (Exhibit A, page 8). The Employer’s Handbook also included rules, which Claimant acknowledged, indicating that engaging in certain conduct, such as insubordination or failing to comply with Employer’s rules/policies could result in discipline up to termination. (Exhibit A, page 12; Tr2, page 14, ll. 22-25; Tr2, page 15, l. 4). In this case, Claimant through his testimony, as well as his text message responses to Employer, demonstrated his ability to comprehend the terms of the aforementioned policies. In fact, Claimant was selected to be a foreman for

Employer upon his return to modified duty in part due to his ability to communicate in both English and Spanish. As such, any assertion that Claimant was unable to understand the express terms of the handbook or the policies in question is unpersuasive and without merit.

H. While the evidence presented fails to convince the ALJ that Claimant was using marijuana on the job site on April 10, 2023, the ALJ is persuaded that EA[Redacted] had a reasonable basis to request that Claimant submit to drug testing based upon the observations of MS[Redacted] on April 14, 2023. The totality of the evidence presented persuades the ALJ that EA[Redacted] probably contacted Claimant around 12:15 p.m. on April 14, 2023 and told him to remain on the clock and proceed to Concentra to take a drug test. Instead of following this directive, Claimant elected to clock out and leave the job site.

I. As noted, a finding of fault for termination requires a volitional act or Claimant's exercise of a degree of control over the circumstances leading to his termination. *Gillmore v. Indus. Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008). Here, the evidence presented supports a conclusion that Claimant exercised a degree of control over the circumstances leading to his termination, notably by refusing to submit to the drug screening by 4:30 PM as requested by Employer on April 14, 2023, by arguing with his Employer that he was off the clock on his personal time and as such could not be tested. Claimant's attempts to justify his refusal to submit to testing are contradictory to the handbook policy allowing drug testing to occur at "any time", but also contrary to the facts of this claim. Claimant was advised numerous times by Employer, both before and after he elected to clock out and left the job site, that he was to remain on the clock and submit for drug testing. Not only did Claimant's failure to comply with Employer's reasonable requests violate Employer's drug testing policy, but also Employer's policies surrounding the Standards of Conduct guiding employee behavior. Indeed, the evidence presented persuades the ALJ that Claimant's disobedience and volitional refusal to follow reasonable orders amounts to the type of impermissive insubordination outlined in Section 4.3(f) of Employer's Employee Handbook. Based upon the degree of defiance and contempt Claimant directed towards his employer in this case, it is not surprising that he was terminated. Indeed, the ALJ concludes that any employee acting in a similar fashion would reasonably expect such behavior to result in the loss of employment. Claimant is found to be responsible for the termination of his employment pursuant to C.R.S. §8-42-105(4) (a), and the resulting wage loss from such volitional conduct is not attributable to his November 14, 2022 work injury.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment. Accordingly, his claim for TTD benefits after April 17, 2023 is hereby denied and dismissed.

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

Dated: October 12, 2023

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

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

ISSUES

I. Whether Respondents have shown by a preponderance of the evidence that Claimant's maintenance medical benefits regime is no longer reasonably necessary, in the form of medications of Ambien, Percocet, Flexeril and Lyrica.

PROCEDURAL ISSUE

The parties advised that ALJ Kimberly B. Turnbow issued an order dated February 14, 2018 relating to overcoming a DIME physicians' opinion regarding medical impairment by clear and convincing evidence and finding that Claimant only had a temporary aggravation of his preexisting condition of his lumbar spine when considering permanent impairment. It did not address maintenance medical benefits. This order was not entered as evidence.

The parties also advised that ALJ Edwin L. Felter issued a subsequent decision on September 11, 2018 finding Claimant permanently totally disabled and ordering reasonably necessary post maximum medical improvement maintenance medical benefits. This order was part of the evidence submitted in Claimant's packet.

The parties both indicated that Claimant had been receiving, as part of his maintenance regime, four maintenance medications which included Ambien (zolpidem) 10 mg once a day, Percocet (oxycodone) Acetaminophen 5mg/325mg once a day, Flexeril (cyclobenzaprine) 10 mg once a day, and Lyrica (pregabalin) 50 mg twice a day.

A Final Admission of Liability dated June 20, 2019 was filed admitting to permanent total disability benefits and medical maintenance benefits pursuant to the ALJ's order.

FINDINGS OF FACT

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

A. Generally:

1. On January 20, 2015, Claimant sustained an admitted industrial injury while employed for the mining company, held by Employer, located in Leadville, Colorado, where Claimant has continued to reside and has lived all his life.

2. The Claimant hurt himself when he, and three other coworkers, carried a magnetic belt weighing an estimated 400-450 pounds. One of the workers lost his grip on the belt jolting the Claimant forward and causing him to fall to his knees.

3. The Claimant immediately felt severe pain in his lower back. Dr. Zwerdlinger, the Claimant's primary care physician, saw him on the same day as his injury. Dr. Zwerdlinger took Claimant off work. Since his date of injury, Claimant has not worked.

4. Dr. Zwerdlinger was Claimant's provider prior to this injury and had seen Claimant regarding some back pain before it happened. However, she indicated that Claimant had significantly improved after treatment with a chiropractor.

5. Claimant testified that prior to his injury he had an ankle and foot injury and surgery, which left him with a shorter leg. What he was really having problems with before his injury was his hip, not his back, which was what the chiropractor had worked on successfully. Claimant was able to continue working his heavy duty job without significant problems until this January 20, 2015 work injury happened.

B. Medical Records:

6. Claimant had an MRI on March 16, 2015 showing a central L3-4 disc herniation with annular fissure measuring 4.5 mm in maximum AP dimension and indented thecal sac which in combination with mild bilateral facet arthrosis produced mild-to-moderate central stenosis. There was an L4-5 broad-based disc bulge asymmetrical left with an annular fissure in combination with bilateral facet arthrosis producing mild-to-moderate central stenosis.

7. Dr. Corenman, Claimant's authorized treating provider (ATP), found a central L3-L4 disc herniation with mild to moderate central stenosis. He also found an L4-L5 disc bulge and left lateral recess stenosis.

8. Dr. Barry Ogin performed an Independent Medical Examination at Respondent's request on December 16, 2016 and a medical record review. At that time Claimant was having back and bilateral leg pain, problems sleeping due to the numbness in his legs, though no shortness of breath or abdominal complaints. He noted Claimant was significant for multiple pain behaviors and had pain that, with a seated straight leg test reproduced back and buttock pain, numbness along his thighs extending down into his lower legs as well, including his dorsal and plantar feet, Patrick maneuver produced inguinal region pain, and limited range of motion though no valid tests were produced. Dr. Ogin's impressions included possible lumbar strain following work injury of January 20, 2015 and somatoform pain disorder. He believed Claimant was at maximum medical improvement and remarked that Claimant's medication regime was Lyrica 150 mg b.i.d., cyclobenzaprine 10 mg twice per day, Percocet 5/325 one per day, metformin, glipizide, Ambien, and atorvastatin. The report provides no further credible assistance regarding Claimant ongoing medication needs in this report.

9. Dr. Ogin performed a second IME on May 31, 2017. He noted Claimant was maintained on Percocet 5/325 four times per day, Ambien and Lyrica 150 mg b.i.d. as well as cyclobenzaprine only once per day. Claimant confirmed that injections had offered relief for a few weeks or a month but not a sustained period of time. He mentions an MRI performed on April 26, 2017 which showed L4-5 has a superimposed central to left posterolateral disc extrusion that contributed to moderate to severe left lateral recess narrowing compressing the descending left L5 nerve root. There was also mild to

moderate facet joint arthritis and small facet joint effusions. There was mild to moderate central spinal stenosis. It stated that the extruded component was new compared to the prior examination. There were also modic endplate changes. The spondylosis had progressed since the prior study of May 6, 2015. The L3-4 disc protrusion was unchanged at 5 mm. The spondylosis at L4-5 had mildly progressed. He opined that the new herniated disc, which was caused by an event in April 2017, was not related to the work related injury of January 20, 2015 and should be addressed outside of the workers compensation system. He provided no further insight with regard to continuing medication management.

10. On February 15, 2018 Dr. Ogin performed a third IME on Respondents' behalf, including reviewing additional medical records. In this report Dr. Ogin agreed that Claimant was a candidate for surgical intervention for the low back but did not agree that it was related to the January 20, 2015 claim.

11. The fourth IME report issued by Dr. Ogin on June 27, 2018 included consideration of further medical and vocational assessments, examination and addressed Claimant's ability to work as well as his work restrictions, and agreed with his ATP, Dr. Corenman's work restrictions assigned when he reached MMI on March 17, 2016, of no lifting more than 20 pounds, no pushing or pulling more than 40 pounds, no squatting, pivoting, crawling, or kneeling, limited stooping, bending, twisting, and limited overhead work. Dr. Ogin opined that Claimant did not require any maintenance medical for the work related conditions.

12. In the last report dated August 2, 2018 Dr. Ogin revised his opinion with regard to the work restrictions not being related to the January 20, 2015 work incident. This is specifically not found credible.

13. Dr. Ernest Braxton of Vail-Summit Orthopaedics & Neurosurgery evaluated Claimant on July 23, 2018. He noted that Claimant had undergone multiple transforaminal epidural steroid injections, facet blocks, rhizotomies and SI joint blocks with diagnostic relief. He noted that EMG nerve conduction studies showed radiculopathies and little evidence of peripheral neuropathy. He noted that the most recent MRI showed degenerative changes at L3-4 and L4-5 with Modic changes in the L5 body, along with a large central disc herniation causing central stenosis. He also noted contributing bilateral facet arthropathy at the L4-5 level with bilateral proximal leg pain as well as leg pain that descended below the knees. He remarked that Claimant had a recommendation of a 2 level fusion and was seeing Dr. Braxton for a third opinion. He noted that Claimant was on Lyrica, Cyclobenzaprine HCI, Zolpidem Tartrate and Percocet 5-325 mg as needed for pain.

14. On exam he noted that Claimant was walking with an antalgic gait, abnormal tandem and Romberg tests, decreased sensation of the left lower extremity and decreased strength, positive straight leg test and increased low back pain with external rotation of the hips bilaterally. Dr. Braxton noted that given Claimant's radiculopathy findings that stabilization and decompression were indicated. He diagnosed lumbar degenerative disc disease, radiculopathy (lumbar region) and lumbar stenosis with neurogenic claudication and recommended an anterior lumbar interbody fusion with L4-

5 posterior pedicle screws and rods. Dr. Braxton performed the surgery on September 11, 2018.

15. On August 11, 2018 Dr. Lisa Zwerdlinger noted that Claimant was being seen for maintenance medication with a 30% pain relief and no side effects. She noted that the MRI of March 2015 showed hepatic steatosis with no suspicious lesions seen. She continued the Ambien, Lyrica and Percocet. She recommended that Claimant taper off of narcotics after his surgery.

16. Claimant was attended by Dr. Braxton's PA Holley Spears in post-surgical follow up on October 2, 2018. Claimant reported interval improvement of his right lower extremity pain symptoms which extend below the knee. He also had improvement in his walking tolerance since surgery. He continued to experience some low back pain and some right lower extremity radiating pain into his anterolateral thigh with some burning and tingling as well as some intermittent left groin pain which was positional. He denied any new areas of pain. There were some additional pain medications that were added to Claimant's regime including Medrol, Methocarbamol and Ultram.

17. On October 17, 2018 Claimant reported he had had improvement of the low back pain symptoms. He continued to have some right lower extremity paresthesia and numbness in his anterior thigh. He also had some intermittent medial thigh pain in the right leg. Dr. Braxton noted that "Patient has new 2 view x-rays of the lumbar spine done in clinic today. The imaging shows that the instrumentation is intact and appropriately placed without signs of loosening or subsidence. Patient's lumbar spinal alignment is within normal limits."

18. Following the surgery, Dr. Braxton recommended he increase the pregabalin from 150 mg to 300 mg BID. Dr. Zwerdlinger refilled the pregabalin at 150 mg twice a day on October 18, 2018.

19. On April 13, 2020 Dr. Zwerdlinger completed a Physician's Report of Workers' Compensation refilling Claimant's four medications, Percocet, Ambien, Flexeril and Lyrica.

20. Amanda King, P.A.-C noted on May 13, 2021 that maintenance medications control Claimant's pain and made it tolerable.

21. On June 14, 2021 PA King examined Claimant noting that he was a healthy appearing, well-nourished and well developed 51 year old male. She prescribed oxycodone-acetaminophen 5mg/325 mg 30 tablets, cyclobenzaprine 10 mg 30 tablets, pregabalin 50 mg 90 capsules, and zolpidem 10 mg 30 tablets. She diagnosed chronic pain syndrome, degenerative lumbar intervertebral disc disease and lumbar radiculopathy. She remarked that he was there for follow up regarding his chronic pain management. She documented that he was seeing the orthopedic specialist who was trying to determine if some of his pain in the leg was coming from his hip, not his back. She observed that the last provider he had seen believed that pain, tingling and weakness was coming from his back and needed to go back to a neurosurgeon. She found that he had a small tear in his right labrum but that Claimant's symptoms were not consistent with the labrum being the issue. She noted that Claimant had the following:

> Patient reports no fever, no night sweats, **no significant weight loss**, no exercise intolerance, and **no fatigue**. He reports no vision change and no irritation. He reports no difficulty hearing and no ear pain. He reports no sinus problems. He reports no sore throat, no dry mouth, no oral ulcers, and no teeth problems. He reports **no chest pain**, no palpitations, and no known heart murmur. He reports no cough, no wheezing, **no shortness of breath**, and no coughing up blood. He reports **no abdominal pain**, no nausea, no vomiting, no constipation, normal appetite, no diarrhea, no GERO, and no dyspepsia. He reports no penile lesions, no erectile dysfunction, no incontinence, no difficulty urinating, no hematuria, and no increased frequency. He reports no changing skin lesions, **no jaundice**, no rashes, and no laceration. He reports no loss of consciousness, no seizures, no dizziness, no headaches, and no tremor.

22. PA King noted on July 14, 2021 that Claimant followed up regarding his workers compensation case, with generally no changes, except that on the top of his left foot he felt like it was on fire but was relieved by taking 100 mg of Lyrica and after 20 minutes he felt better.

23. An MRI was performed on November 15, 2021 which showed post-surgical changes and was compared to a July 2019 MRI without any significant interval changes. Dr. Chelsea Jeranko noted that the interbody fusion and posterior stabilization remained patent and adjacent segment disc degeneration stable. There was mild paraspinal muscle atrophy associated with the surgical levels and was chronic and symmetric.

24. Dr. Matthew Gnirke of Vail-Summit Orthopaedics evaluated Claimant on November 29, 2021. He reported that Claimant continued to have bilateral low back pain with radicular pain, weakness, numbness, and tingling in the bilateral lower extremities. He rated his pain as a 4 out of 10 on the VAS pain scale and noted that it was constant, and had problems with sleep. He was taking Lyrica, cyclobenzaprine, and Percocet for pain management and was ambulating with the assistance of a cane. This is the first time fatty liver showed in the past medical history at Vail-Summit Orthopaedics.

25. On February 14, 2022 Dr. Gnirke noted Claimant continued to have bilateral anterior hip pain as well as bilateral low back pain with radicular pain down both lower extremities and into the bilateral groins. He also complained of weakness in bilateral lower extremities. He rated his pain to be 5 out of 10 on the VAS pain scale, described as burning, shooting and electric in nature. This pain was constant and woke him up from sleep. He was taking Percocet, Lyrica and cyclobenzaprine for pain management. Dr. Gnirke performed a bilateral L3 transforaminal epidural steroid injection on February 18, 2022.

26. Claimant followed up with PA King on March 10, 2022 PA King reporting some abdominal pain, difficulty urinating and increased frequency. He denied any swelling in his lower extremities, no weight loss, no fatigue, no shortness of breath, no jaundice, among other denials. Due to the complaints, PA King did a full abdominal exam. Lisa Zwerdlinger, M.D. performed an ultrasound and Ms. King, by using a catheter removed urine, after which the bladder normally collapsed. They suspected diverticulitis based on the physical exam. They ordered multiple labs and a CT.

27. Upon Claimant's return to see PA King on April 7, 2022, Claimant was no longer reporting abdominal pain or urinary problems. He reported no weight loss, no fatigue, no shortness of breath, no abdominal pain, no jaundice. He did report leg spasms

and shooting pain in the left leg but no swelling. PA King continued to prescribe the same four medications.

28. On April 28, 2022 Claimant had an MRI of the sacrum that showed unremarkable SI joints, no evidence of fracture and moderate to severe bilateral L5-S1 facet arthropathy with small facet joint effusion.

29. Dr. Gnirke performed a bilateral L5-S1 intra-articular facet corticosteroid injection on June 10, 2022.

30. On October 4, 2022 PA King noted no swelling in the extremities, no weight loss, no fatigue, no shortness of breath, no abdominal pain, and no jaundice among other things. She remarked that Claimant's medications were necessary for quality of life and that she discussed the risks of continued medications. There were no change in his four medications related to his workers compensation case.

31. Claimant underwent an EMG nerve conduction study on October 10, 2022 with Dr. Gnirke which showed evidence of a remote right L5/S1 lumbar radiculopathy, which was consistent with Claimant's prior EMG from 2015, no active denervation noted in the right lower extremity, no evidence of a left or right peroneal neuropathy across the fibular head and no evidence of a large fiber peripheral neuropathy affecting the lower extremities. Dr. Gnirke performed an L3-L4 interlaminar epidural steroid injection on October 28, 2022.

32. On December 12, 2022 Dr. Gnirke's PA Haley Zipperer referred Claimant to UCH Neurology clinic for a second opinion EMG/nerve conduction study and again on January 19, 2023.

33. Claimant returned to see PA King on January 5, 2023 in follow up for medication maintenance. She remarked that Claimant had a failed back surgery due to "delay in WC company approving his surgery." She observed that Claimant subsequently continued with persistent numbness/tingling/weakness in the lower extremities and had to walk with a cane. She documented that Claimant reported muscle aches and back pain but no weight loss, fatigue, shortness of breath, abdominal pain, urinary problems or jaundice. She remarked that she would prefer Claimant not have such sedating medication but that they were required for Claimant's quality of life. She prescribed the same medications, zolpidem 10 mg 30 tablets, oxycodone-acetaminophen 5mg/325 mg 30 tablets, cyclobenzaprine 10 mg 30 tablets, and pregabalin 50 mg 90 capsules, making arrangements for a mail order delivery system.

34. Linda Manna, Pharm.D,[1] on January 9, 2023 issued a Pharmacist Report pursuant to Insurer's request. Dr. Manna stated that:

> While long-term opioid therapy may benefit some patients with severe suffering that has been refractory to other medical and psychological treatments, it is not generally effective in achieving the original goals of complete pain relief and functional restoration.

She stated that adverse effects from the chronic use of opioids included multiple conditions, none of which were identified by any provider in this matter as happening to

[1] As found, Dr. Manna is not an "M.D." as stated by Respondents, but is licensed in Michigan (MI) and Maryland (MD).

Claimant. Dr. Manna also stated that neuroendocrine problems included hypogonadism and erectile dysfunction, both of which Claimant had at the time of the hearing. However, Claimant was not seeking "complete pain relief" nor complete functional restoration, simply to be able to function in his daily life considering his conditions.

35. Dr. Manna stated that pregabalin has been known to augment the euphoric effect of opiates, particularly when used long-term and at high doses, putting the injured worker at risk for physiological/physical dependence. Claimant, however, is not using the opioid at a high dose and there is no evidence that he is experiencing a euphoric effect from his limited opioid use.

36. She opined that the addition of cyclobenzaprine was not recommended as adjunct with other medications and not to be used for longer that two to three weeks. She noted that long-term use of zolpidem (Ambien) can impair function, memory, and cause decreased high-level cognitive functioning. None of which were identified by his providers nor the IME physician.

37. To an inquiry to the treating provider, Ms. King, she responded that

> The medication help the patient to maintain function with symptomatic relief. This combination of medication and MED of 8 mg/day is the lowest baseline that the patient can tolerate. If there is improvement in the future, then there can be plans to wean. The patient has no aberrant signs of behavior and is counseled on the signs of respiratory depression.

38. PA King responded to Dr. Manna that she did not agree to wean Claimant off his four medications.

39. On February 2, 2023 Claimant was evaluated by Nicholas Olsen, D.O. of Rehabilitation Associates of Colorado at Respondents' request for an independent medical examination. Dr. Olsen took a history consistent with Claimant's testimony at hearing, reviewed the records and examined Claimant. Claimant rated his pain as 4/10. He reported he believed the surgery helped him. He noted, prior to the surgery, his pain as 7 to 8/10 and felt that he did get some relief from the spine surgery. He also noted his back was now straight up and down. He reported aggravating factors as walking greater than 20 minutes, standing, increased activities, bending, twisting, sitting on hard surfaces. He reported relief with lying flat or reclining, heat, ice and holding onto a supportive device, with injections and pain medications.

40. On exam Claimant was pleasant; oriented to time, place and person; appropriate; nonantalgic, but had difficulty ambulating; with neutral mechanics, limited range of motion and pain with terminal flexion; and an equivocal straight leg raise on the right but negative on the left. He had decreased pinprick on the right L5 dermatome. He stated that Claimant was status post a work injury on January 20, 2015 and an MRI of March 16, 2015 that showed a herniated disc at L3-4 with annular fissure measuring 4.5 mm, an indented thecal sac and facet arthrosis producing mild to moderate central canal stenosis. There was a broad disc bulge on the left at the L4-5 level with an annular fissure and bilateral facet arthrosis producing central canal stenosis. There was no disc herniation at L5-S1. He reported that Dr. Brian Shea placed Claimant at MMI on March 17, 2016 and provided a rating of 18% whole person.

41. Dr. Olsen opined that after the review of the records and a scathing critic of PA King's documentation and records, he opined that within a reasonable degree of

medical probability, that Claimant should be weaned off of all four medications. He opined that none of these medications were indicated by the fact that he has a nonalcoholic fatty liver disease, none of these have demonstrated a significant increase in functional benefit to Claimant, that he has only taken these habitually and was not trialed on alternate medications.

42. PA King evaluated Claimant on February 9, 2023 at St. Vincent General Hospital. She noted that the patient seemed hydrated, was non-toxic appearing, with no findings of acute occlusion in his bilateral lower extremities though pulses were diminished. She noted that Claimant had a long standing diagnosis of Type II diabetes without complications, with numbness, tingling and weakness in the lower extremities and had a chronic failed back surgery which was complicating his lower extremity symptoms. She ordered a CT scan/angiogram with contrast of the abdomen with runoff.

43. A CT angiogram of the abdomen, pelvis and runoff vessels from February 24, 2023 noted that the "visualized solid organs and hollow viscera in the abdomen and pelvis are within normal limits." This ALJ infers from this report that Claimant's organs were within normal limits including his liver.

44. On March 9, 2023 Dr. Dianna Quan of UCHealth neurosciences performed an EMG nerve conduction study which showed chronic right L5-S1 radiculopathies and no electrophysiologic evidence of superimposed generalized polyneuropathies affecting the lower limbs. This ALJ finds that this is in opposite to the suggestions made by Dr. Olsen that Claimant's diabetes may be causing lower extremity neuropathy that could explain the Claimant's lower extremity symptoms. As found, Claimant does not have diabetic neuropathy and has had symptoms into his legs from his initial complaints on January 20, 2015, including by Dr. Ogin.

45. PA King documented that Claimant had steatosis of liver or fatty liver disease with an onset of October 3, 2015. She notes her observations at each visit. For example, on April 13. 2023 she documented that Claimant has

> no arthralgias/joint pain and **no swelling in the extremities**. He reports weakness and numbness but reports no loss of consciousness, no seizures, no dizziness. no headaches, no tremor, and no muscle weakness. He reports no fever, no night sweats, **no significant weight loss,** no exercise intolerance, and **no fatigue**. He reports no vision change and no Irritation. He reports no difficulty hearing and no ear pain. He reports no sinus problems. He reports no sore throat, no dry mouth, no oral ulcers and no teeth problems. He reports no chest pain, no palpitations, and no known heart murmur. He reports no cough, no wheezing, **no shortness of breath**, and no coughing up blood. He reports **no abdominal pain**, no nausea, no vomiting, no constipation, normal appetite, no diarrhea, no GERD, and no dyspepsia. He reports no incontinence, no difficulty urinating, no hematuria, and no increased frequency. He reports **no jaundice**, no rashes, no laceration, and no changing skin lesions. He reports no swollen glands, no bruising, and no excessive bleeding. [**Emphasis added.**]

46. PA King continued to prescribe oxycodone-acetaminophen 5mg/325 mg 30 tablets, cyclobenzaprine 10 mg 30 tablets, pregabalin 50 mg 90 capsules, and zolpidem 10 mg 30 tablets. This is the same dosage as two years prior. She documented that Claimant was there for a "WC f/u. Is here for his monthly visit for meds he needs to maintain his quality of life. Today pain is worse but this happens-pain will ebb and flow. No recent Injury. Right leg has been painful and spasming. Is seeing Dr. [Gnirke] later

this month." She continued to diagnose degenerative lumbar intervertebral disc, chronic pain and insomnia. She remarked that

> … meds are required for quality of life. Will cont to rx. Pt aware of risks of medications. During his 7 years of treatment with me, we have tried numerous medications. Some didn't work and others had side effects. My preference would be that he didn't need as much of this sedating medication but this is what is required for quality of life. Pt has never exhibited any worrisome behavior for misuse or abuse.

47. Dr. Gnirke evaluated Claimant on April 23, 2023 following up on his lumbar spine complaints. He noted that

> …he rates his pain to be 3 out of 10 on the VAS pain scale describes it as stabbing, aching, throbbing, shooting, and sharp in nature. This pain is constant and does occasionally wake him up from sleep. His pain is located in his low back and radiates down the lateral aspect of the right lower extremity. He takes cyclobenzaprine, Lyrica, and Percocet for pain management. He engages in a home exercise program with an emphasis on core strengthening and aquatic therapy. He had an L3-4 interlaminar epidural steroid injection performed on October 28, 2022 which gave him a few weeks of pain relief. Of note, he has a history of an L4-5 ALIF performed in 2018. He recently had an EMG performed at UC health…

48. On exam he noted that claimant had radicular pain greater on the right than the left lower extremity in a patchy L3-L5 distribution, diminished gross sensation to light tough over the right lower extremity in the L4-5 distribution grossly, antalgic gait using a cane. He diagnosed a failed back surgical syndrome, which had a diagnosis code of M96.1 and was primary; lumbar radiculopathy; history of lumbar fusion; and right knee pain. They discussed the fact that Dr. Quan's EMG nerve conduction study as being similar in results to the one he performed. The nerve conduction study showed the exact same findings that he found on previous EMG with a chronic right LS/S1 lumbar radiculopathy without active denervation and no evidence of superimposed peripheral neuropathy or other compressive peripheral neuropathies. Considering the chronic nature of the L5 radiculopathy, he referred Claimant for a new MRI of the lumbar spine. The request for authorization was sent to the Insurer's adjuster on April 26, 2023.

49. Dr. Olsen performed a second IME on behalf of Respondents on May 18, 2023. Dr. Olsen conducted a phone interview of Claimant and reviewed additional records. He was asked to assess whether the Claimant's current right knee conditions were related to the work injury of January 20, 2015. Dr. Olsen assessed Claimant as status post a lumbar spine injury on January 20, 2015, status post L4-5 ALIF on September 11, 2018, steatosis of liver with onset of October 3, 2015, nonalcoholic fatty liver disease with onset of June 14, 2021, male hypogonadism, Type II diabetes mellitus, hyperlipidemia and status post right knee arthroscopy in 1989. Dr. Olsen opined that Claimant did not suffer from a knee injury related to the January 20, 2015 work injury and would be preexisting and related to his prior injury of 1989, though he did recommend Claimant continue to use his straight cane for support related to his altered gait dysfunction.

50. The June 8, 2023 MRI was read by Dr. Mark Murray and was compared to the prior MRI of November 21, 2021. It showed no significant interval changes, no stenosis at the fusion level, adjacent segment facet arthrosis without stenosis at the L5-S1 level and an annular tearing and disc protrusion at the L2-3 level with questionable contact of the exiting left L2 nerve root.

C. Dr. Olsen's Testimony:

51. Nicholas K. Olsen, D.O. testified at hearing as a board certified physician in physical medicine and rehabilitation as well as a Level II accredited physician with 30 years' experience treating musculoskeletal conditions with physical therapy, medications and referrals to surgery as well as electrodiagnostic testing and interventional medicine performing spinal injections under fluoroscopy. Dr. Olsen evaluated Claimant on February 2, 2023 and May 18, 2023 at Respondent's request. Dr. Olsen was asked to determine if ongoing prescription medications, including those for pain and sleep, were reasonably necessary.

52. Dr. Olsen stated that Claimant had been receiving maintenance medications prescribed by Amy King, PA-C. He was not able to determine from the records who was Ms. King's supervising physician. He noted that Claimant was on cyclobenzaprine (Flexeril), oxycodone, pregabalin (Lyrica), zolpidem (Ambien). He explained that Flexeril was a muscle relaxant that worked at the level of the brain, similarly to an antidepressant when used long term, to calm the central nervous system and relieve muscle spasms. Oxycodone was an opioid that affect the brain in the opioid receptors to reduce the expression of pain to provide pain relief. He questioned its effectiveness when using it chronically. He expounded that Lyrica affected the GABA receptors in the brain helping to control the peripheral nerve system. Ambien was a hypnotic which induced somnolence and helps people fall asleep, typically used acutely, not chronically.

53. Dr. Olsen discussed the report issued Dr. Manna. Dr. Olson stated that he agreed with Dr. Manna's statement that opioid treatment failed to achieve complete pain relief and functional restoration because there were multiple studies that demonstrated that there was a buildup of tolerance to opioids over time and proved less effective. He stated that the study showed that those weaned off of the opioids showed no difference than those on opioids, as over time they became less effective. However, this ALJ concludes that Claimant is not attempting to obtain complete pain relief or functional restoration but simply maintaining MMI status. Dr. Olsen agreed that there were neuroendocrine problems with the chronic use of opioids, including psychomotor/cognitive impairment, daytime sedation, and respiratory depression when used with Flexeril, Ambien and Lyrica because they work on similar pathways in the brain. Also, all three medications needed to be cleared through the liver.

54. Dr. Olsen agreed with Dr. Manna regarding the combined increased euphoric effect of using opioids and pregabalin because both opioids and GABA receptors are co-expressed by neurons in the brain, meaning one neuron can be affected by either opioid or GABA, and you get a combination of effect because they are GABA analogues. He noted that the addition of cyclobenzaprine was not recommended as an adjunct to other medications because of the risk of respiratory depression.

55. Dr. Olsen disagreed that Claimant had a failed lumbar surgery because Claimant had a good response the first four months following the surgery. He stated that Ms. King failed to properly document how medications enhanced Claimant's function or symptom relief. He also opined that Ambien was to be used as a short term, usually two to six weeks, for treatment of insomnia. He stated that it was rare from him to have a patient on long term Ambien. He stated that articles alluded that long term use can impair

function, memory and decreased higher level cognitive function because the patient only gets restorative sleep and does not go through the process of deep sleep, REM sleep and regular sleep. He explained that multiple of the medications, in addition to having these side effects, they are cleared through the liver, with the exception of Lyrica, and when a patient is having liver issues, like Claimant's nonalcoholic fatty liver disease (NAFLD), the risks need to be weighed against the benefits of continuing the medication. Dr. Olsen opined that continued use of narcotics, Ambien and cyclobenzaprine were probably going to affect his liver function.

56. Dr. Olsen stated that Claimant had been diagnosed with diabetes and that Claimant may have peripheral neuropathy instead of failed back syndrome. However, multiple EMG nerve conductions studies including the one by Dr. Gnirke and Dr. Quan showed the contrary, that there was no peripheral neuropathy.

57. Dr. Olsen stated that Claimant also had hyperlipidemia, which is high cholesterol, and the current medications being metabolized through the nonalcoholic fatty liver was challenging his liver because the liver also helps manage cholesterol. Dr. Olsen opined that Claimant had to be weaned off of these medications that were challenging his liver until the medications are discontinued completely within six months on an outpatient basis.

58. Dr. Olsen agreed that Claimant was being prescribed narcotics to treat his ongoing chronic low back pain. He was uncertain why the other medications were being prescribed but assumed that the Ambien was being prescribed as a sleep aid. He agreed that the prescriptions of Percocet (Oxycodone), Ambien, Lyrica and Flexeril were not prescribed before his workers' compensation injuries to his low back and that they were prescribed by his workers' compensation providers while treating his work related injuries.

59. Dr. Olsen was concerned that PA King failed to document Claimant's other medical concerns in conjunction with any side effects of the medications but is providing the maintenance medications. Dr. Olsen agreed that he did not seen any reports of side effects in any of the medical records he reviewed.

60. Dr. Olsen testified that the Type 2 diabetes caused the fatty liver disease, which in turn caused the hyperlipidemia or high cholesterol. The three diagnosis worked together, one creating the other. He noted that Claimant could not have normal labs considering these diagnosis, but they may be stable for Claimant.

D. Claimant's Testimony:

61. Claimant was initially prescribed Tramadol by Dr. Zwerdlinger but it was not sufficient to help him with the pain. In fact, Tylenol helped more than the Tramadol. That is when she changed the prescription to low dose Percocet about two months after his injury.

62. Claimant had not taken this kind of medications prior to his injury of January 2015 nor did he have any problems with his back prior to his admitted work injury. Claimant had excruciating lower back pain and could barely walk at the time because it was affecting both of his legs. He was even on crutches for a time before his surgery.

63. Claimant had taken other medications than the ones he was on at the time of the hearing, including gabapentin, Methocarbamol, Tramadol, Effexor and Cymbalta

under the direction of Dr. Zwerdlinger and Ms. King, her PA as well as her nurse practitioner, Ms. Laura Hoffman. At the time he was being seen by Dr. Evans at Steadman Hawkins, for injections, who also knew about the medications he was being prescribed.

64. Claimant testified that he took Zolpidem (Ambien) as a sleep agent, because he has back pain, and numbness and pain in his right leg that prevent him from sleeping, noting that he was unable to sleep without the medication. When he does not take the Zolpidem, he would remain awake most of the night, and then would have to increase his intake of Lyrical for the nerve pain going from his back down his leg. He even sleeps with pillows between his legs due to symptoms.

65. Claimant testified that he had suffered severe pain for approximately three years until a physician was willing to perform his back surgery. He had been prescribed Dexamethasone for the back pain flare ups, which was a five day steroid. He had pain going into his groin.

66. After the surgery, he continued to have groin pain, numbness in the thigh and has back pain. He stated he believed he had a failed back fusion because he had continued back pain.

67. Claimant continues to take pregabalin (Lyrica) for the nerve pain in the right leg that comes from permanent damage to the spine. If he is unable to take the Lyrica, the pain in his right leg becomes severe and cause a flare up. He generally takes 100 mg of pregabalin a day but is allowed up to 300 mg per day for flare ups. Prior to that he had taken 300 mg pills and it would cause brain fog. When he reported the symptoms, his prescription was changed to 50 mg pills and he takes them as needed.

68. Claimant takes cyclobenzaprine (Flexeril) only when he has back or leg spasms and he may use one when he feels the spasms come on. He limits how much he takes and only takes one at a time. The Flexeril generally takes 20 to 30 minutes to take effect and start calming the muscle spasms. This normally happens on a daily basis.

69. Claimant takes a low dose oxycodone acetamitaphen 5 mg/325 mg (Percocet) for pain. He generally only takes one a day. He only takes two a day when that pain in his back and hip are not well controlled. He has a hard time functioning when he is unable to take the low dose medication. He stated that the Flexeril and low dose Percocet is the combination of pain relief that has been most effective for him. He stated that he has his labs on a regular basis to test him. He also has his fatty liver disease checked on a frequent basis too, with the last one approximately six months prior to the hearing at St. Vincent Health where he sees either Dr. Stewart or PA Amy King, as Dr. Zwerdlinger left the system. He reported that his kidney function is good without any issues.

70. Claimant testified that the medications keep him functioning, able to do small chores around his house. If he was unable to take them, he would not be able to function and his quality of life would go downhill. He had used a cane since approximately 2019 in order to walk because his right leg gives out. He is able to drive.

71. He has attended a water core strengthening class weekly upon the recommendation of Dr. Evans since August 2022. This is in order for his muscles not to atrophy. The exercise help his right leg and low back.

72. Claimant testified that he has had no side effects related to taking the four medications.

73. From both Claimant's testimony and the records, it is determined that PA King worked under Dr. Zwerdlinger at St. Vincent's Health, until Dr. Zwerdlinger left the practice and PA King continued to provide Claimant's maintenance care.

74. Claimant stated that he was not taking any narcotic medications at the time of the January 20, 2015 accident because he was afraid of being drug tested and being fired. Neither did he recall taking any pain medications at that time.

E. Other Evidence:

75. The Medical Treatment Guidelines propounded by the Division of Workers' Compensation, Rule 17, Exhibit 9 state that the CDC recommends limiting opioid dose to 90 MME per day to avoid increased risk of overdose and that there was strong evidence that any dose above 50 MME per day was associated with a higher risk of dead. Claimant is taking Oxycodone 5 mg, which, when multiplied by the opioid factor of 1.5 is an MME equivalent to 7.5 mg, well below the recommended maximum dosage.

76. Under Opioid Medication Management of the Guides, it states that in selective cases, opioids may prove to be the most cost effective means of ensuring the highest function and quality of life.

77. In this case, Claimant has been on a stable dose of 5 mg of oxycodone since after his 2018 surgery and has maintained a stable medication regime. PA King has documented that she has considered other alternatives and ruled them out as well as assessing that Claimant is not at risk for abusing his narcotic medication. Ms. King sees Claimant every month to assess continuing need for opioids, risks, and signs of abuse. Claimant credibly stated that he has his labs drawn and had done so recently before the hearing. PA King is found credible and persuasive. While the records do not show significant details of each question Ms. King asked of Claimant, she documents what is most important. Specifically that Claimant has no swelling in the extremities, no weight loss, no fatigue, no shortness of breath, no abdominal pain, and no jaundice, all of which might indicate poor liver function. As found, Claimant has used his medications to remain and maintain function for many years without significant worsening or requiring more aggressive treatment.

ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order on September 11, 2018. ALJ Felter found Claimant permanently totally disabled and ordered reasonably necessary post maximum medical improvement maintenance medical benefits. This order was part of the evidence submitted in Claimant's packet. ALJ Felter considered ALJ Turnbow's opinion, noting that she had only issued a decision regarding permanent partial impairment, not regarding permanent total disability or maintenance medical benefits and that the determination of the DIME physician as to which body parts and resulting work restrictions were related to the work injury could be considered, but they

were not entitled to additional weight by the statute. *Cole v. Dish Network,* W.C. No. 4-918-651-02 [Indus. Claim Appeals Office (ICAO), January 15, 2016] *(aff'd sub nom. Dish Network v. Indus. Claim Appeals Office,* 2016 WL 7404847 (Colo. App., December 22, 2016). ALJ Felter did note that ALJ Turnbow's determination regarding MMI as of March 17, 2016 was binding.

78. Facts that may be pertinent to this decision are that ALJ Felter found Dr. Ogin was of the opinion that Claimant's permanent restrictions were causally related to the admitted injury, and was inconsistent with his insistence that Claimant had only a "temporary aggravation." He found that Lisa Zwerdlinger, M.D., the Claimant's primary care physician, saw him on the same day of his injury of January 20, 2015. She took the Claimant off work. Since his date of injury, the Claimant had not worked nor had he been released to return to his pre-injury job by an authorized treating physician. The Claimant had seen Dr. Zwerdlinger prior to his injury. Although Dr. Zwerdlinger's reports indicated that the Claimant had back pain prior to January 4, 2015 she noted that the Claimant's back pain had "significantly improved" after visits with chiropractor. At the hearing of August 23, 2018, the Claimant stated that the pain prior to his injury was related to his hip. Notwithstanding the Claimant's prior symptoms, the Claimant testified that he had no problems performing the duties related to his heavy duty job for the Employer until his admitted injury occurred on January 20, 2015. ALJ Felter found that the MRI on March 16 2015, as interpreted by Donald S. Corenman, M.D., the Claimant's primary authorized treating provider, showed Claimant had a central L3-L4 disc herniation with mild to moderate central stenosis and an L4-L5 disc bulge with left lateral recess stenosis. Dr. Corenman stated that the Claimant was unable to work. He further added, "I do not expect [Claimant] will ever be able to do heavy lifting." On May 6, 2015, Kelly Lindauer, M.D., performed an MRI which showed a disc protrusion at both Claimant's L3-4 and L4-5. Two years later, in April of 2017, Dr. Lindauer performed an additional MRI on the Claimant. She compared her findings to the prior imagining from May of 2015. She agreed that the findings were similar to the prior imaging done on the Claimant's lumbar spine in 2015 with some progression of pathology since the earlier imaging noting a "left posterolateral disc extrusion." He found Dr. Kuklo credible in his opinion that a "450-pound load can literally hit 1500 pounds of force across the disk *(sic),* which tears the annulus or the outer rim resulting in a disk (sic) bulge, back pain, [or] strain" and had worsened Claimant's condition since his industrial injury. ALJ Felter found Dr. Kuklo's, Dr. Zwerdlinger's and Corenman's opinions highly persuasive and credible over the opinions of Dr. Ogin and Dr. Reiss, stating that Dr. Kuklo's opinions were not available to ALJ Turnbow before her decision of February 14, 2018. Ultimately, ALJ Felter found that Claimant was entitled to maintenance medical care, which was reasonably necessary to address the injury and ordered Respondents to pay the costs of authorized, causally related and reasonably necessary post maximum medical maintenance care, including care by Dr. Corenman, and by Dr. Zwerdlinger.

79. This decision was appealed and the ICAO affirmed the decision in *In re Claim of Bertolas v. Climax Molybdenum,* WC 4-972-988-001, I.C.A.O. (May 3, 20219). The panel noted that there was no issue preclusion due to the distinct issues addressed in each case. ALJ Turnbow's determination was regarding overcoming the DIME physician's opinion and ALJ Felter addressed permanent total disability

and maintenance medical benefits. The panel determined that ALJ Turnbow's findings were not binding with regard to the issues addressed by ALJ Felter. This ALJ failed to find any further appeals and the panel's decision was final.

F. Conclusive Findings:

80. After consideration of both prior orders issued by ALJ Turnbow and ALJ Felter, this ALJ determines that the orders in those matters have little bearing on the single issue before this ALJ regarding the reasonableness and necessity of the ongoing maintenance medications, specifically Ambien, Oxycondone-Acetamenophen, Flexeril and Lyrica, in light of the evidence presented at this hearing. While it is clear from ALJ Felter's order that he considered ALJ Turnbow's findings overcoming the DIME physician's medical impairment, he found that the standard of proof was different in both cases and Judge Turnbow's decision only related to a finding regarding MMI and permanent partial disability benefits. Issue preclusion did not apply. This is true for this case as well.

81. As found, fatty liver is caused by buildup of excess fat in the liver when blood from the digestive system filters through the liver. Symptoms include fatigue, weight loss and abdominal pain, though there can be other more severe signs such as jaundice, swollen lower extremities, and shortness of breath.

82. As found, it is confusing to this ALJ how Dr. Olsen simply relies on other providers notes and Claimant's report of fatty liver disease and that he has failed to review any lab work reports. In fact, no lab work-up was provided by either party to this ALJ for consideration.

83. As found, Dr. Manna stated that use of opioids included hypogonadism and erectile dysfunction but did not identify whether she considered Claimant's ongoing need for pain management and what the options were. Only that all four medications should be discontinued. Further, PA King, who has managed Claimant's ongoing problems, has stated that she would prefer that Claimant not be on narcotics but, in light of the fact that Claimant had been tried on multiple other medications which caused side effects or were not effective, Claimant's current medication regime was necessary to keep Claimant functional. PA King is found to be credible and persuasive in this matter. This opinion was determined to be shared by other providers like Dr. Zwerdlinger, Dr. Corenman and Dr. Gnirke, as all noted Claimant's continued use and need for medication management after he was found to be at MMI on March 17, 2016.

84. Further, Claimant was credible in the fact that he testified that he tries to take as little medication as possible, frequently less than the prescribed amount, but requires it in times when the muscle spasm, intractable pain and problems sleeping increases in order to maintain some level of activity. If he does not have access to the maintenance medications, Claimant persuasively stated that he would not functioning well, could not walk around, do his core strengthening or the limited chores or simple daily living activities as needed. Further, he credibly stated that he has been stable due to the medication management. Claimant was credible and persuasive.

85. As found, Respondents have failed to prove by a preponderance of the evidence that the Claimant's Ambien, Percocet, Flexeril and Lyrica (or their generic counterparts) were no longer reasonably necessary or related to his ongoing needs for maintenance care related to Claimant's admitted January 20, 2015 work injury.

86. As found, Claimant has proven by a preponderance of the evidence that he continues to require maintenance medical care, as found by ALJ Felter, that is reasonably necessary and related to the January 20, 2015 admitted work related accident.

87. Testimony and evidence inconsistent with the above findings is not credible, persuasive or relevant to the issue determined herein.

CONCLUSIONS OF LAW

A. Generally

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial*

Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

B. Continuing Post MMI Medical Benefits

Section 8-42-101(1)(a), C.R.S. provides that respondents are liable for authorized medical treatment which is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). This includes maintenance medical treatment recommended after MMI. W.C.R.P. Rule 5-5(A)(1). The question of whether a particular treatment modality is reasonable and necessary is one of fact for resolution by the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995); *Young v. Bobby Brown Bail Bonds, Inc.,* W.C. No. 4-632-376, I.C.A.O. (April 7, 2010)(the question of whether the continued use of narcotic medications is reasonable and necessary is one of fact for determination by the ALJ); *Deane v. Regis Corp*., W.C. No. 4-664-891, I.C.A.O. (August 7, 2023)

A claimant is entitled to post-MMI maintenance medical benefits if future medical treatment will be "reasonably necessary to relieve the claimant from the effects of the industrial injury or occupational disease even though such treatment will not be received until sometime subsequent to the award of permanent disability". *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1998). In deciding whether maintenance care is necessary there must be evidence which establishes "but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that [s]he will suffer a greater disability than [s]he has thus far." *Stollmeyer v. Industrial Claim Appeals Office of State of Colo.*¸916 P.2d 609, 610 (Colo. App. 1995). Where the claimant's entitlement to continuing benefits is disputed, the claimant has the burden to prove the reasonableness and causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office, supra.*

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability,

reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). When respondents seek to terminate post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn,* W.C. No. 4- 754-838 (ICAO, Oct. 1, 2013). Specifically, respondents are not liable for future maintenance benefits when they no longer reasonable and necessary, or relate back to the industrial injury. See *In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

In *Deane,supra,* the ALJ credited the opinions of Dr. Olsen and Dr. Patel that the claimant needed to be weaned from her opioid medications. There was no evidence suggesting that the claimant's opioids should be immediately discontinued. Consequently, the ALJ determined that the claimant had established that ongoing opioid medications and Ketamine were reasonable, necessary, and related through the weaning process. *George v. Industrial Commission,* 720 P.2d 624 (Colo. App. 1986). The panel in *Deane* determined that an ALJ was unable to direct a medical professional to administer a treatment the professional did not believe was appropriate because it was not a matter arising under articles 40 to 47 of title 8 for which the ALJ is provided authority by Sec. 8-43-201(1), C.R.S. and Sec. 8-43-503(3), C.R.S. (employers, insurer. claimant or their representative shall not dictate to any physician the type or duration of treatment...). The panel emphasized that, should the respondents dispute the reasonableness and necessity of the opioids during the weaning process, the respondents remained free to file another application for hearing pursuant to Sec. 8-43-207, C.R.S., *Snyder v. Industrial Claim Appeals Office*, supra, or to possibly request a utilization review under Sec. 8-43-501(2), C.R.S. See Deane v. Regis Corp., *supra; Torres v. City & County of Denver,* W.C. No. 4-937-329-03, I.C.A.O. (May 15, 2018) and *Short v. Property Management of Telluride,* W.C. No. 3-100-726, I.C.A.O. (May 4, 1995).

The Medical Treatment Guidelines (MTGs), contained in Workers' Compensation Rule of Procedure 17, 7 CCR 1101-3, provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. Sec. 8-42-101(3)(b), C.R.S. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005). The ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the

deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (Jan. 25, 2011). The Guidelines, however, do not constitute evidentiary rules, and an expert's compliance with them does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the Guidelines may affect the weight given by the ALJ to any particular medical opinion. *Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (February 23, 2009); *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009; *In re Claim of Foust*, 102120 W.C. No. 5-113-596, I.C.A.O. (October 21, 2020). Neither are the Guidelines definitive. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150, I.C.A.O. (May 5, 2006), affirmed *Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (NSOP); *In re Claim of Reyes*, W.C. No. 4-968-907-04, I.C.A.O. (December 4, 2017)

Respondents' major arguments are that the four medications being prescribed by ATPs are no longer reasonably necessary for Claimant to continue due to the diagnosis of NAFLD and other risks as well as PA Kings lack of documentation as indicated in the Medical Treatment Guidelines and that they are not related to the January 20, 2015 work related injury.

Respondents' arguments that Claimant's continuing maintenance is related to the preexisting spinal degeneration and not the admitted January 2015 work related injury is not persuasive. Prior to Claimant's injury, Claimant was clearly able to work a very heavy duty job and, in fact, was moving a very large and heavy 450 lb. belt, which required four men to move, when he was injured. Claimant persuasively testified that he was not having significant problems with his lower back that prevented him from performing his heavy work and was not taking narcotic or pain medications at the time of his January 20, 2015 injury. While the records do show some indications that Claimant had either lower back pain or hip pain prior to his injury, they did not affect his ability to work. Claimant persuasively showed that it was more likely than not that his injury, and subsequent progression of disability and need for medications was as a consequence of the aggravation and acceleration of Claimant's spinal degeneration, was caused by the admitted work injury of January 20, 2015. Claimant's accident and injury of January 20, 2015 was the tipping point that led to a significant and progressive acceleration of his preexisting condition, causing his continued need for a medical maintenance regime of medications provided by Dr. Zwerdlinger and PA King, and other treatments such as the injections provided by Dr. Gnirke, in order to maintain Claimant's condition stable and prevent any further worsening.

This ALJ is not persuaded by Dr. Olsen's opinions with regard to either the NAFLD or the risks assessed by Dr. Manna. PA King, and Dr. Zwerdlinger before she left the St. Vincent Health practice, persuasively and frequently addressed all the risks involved, including examining Claimant with symptoms associated with NAFLD, such as fatigue, weight loss, abdominal pain, jaundice, swollen lower extremities, and shortness of breath. PA King has been assessing risk with regard to abuse and finding none. This is supported by the stability of Claimant's continued medications at the lowest level dosages possible, while still being effective in controlling his symptoms and maintaining Claimant at MMI without any further worsening other than occasional flares in symptoms. PA King, Dr. Gnirke and Dr. Zwerdlinger are more credible and persuasive than the contrary opinions

of Dr. Ogin and Dr. Olsen. Respondents have failed to show that it is more likely than not that the Ambien, Oxycodone, Flexeril and Lyrical are no longer reasonably necessary and related to the January 20, 2015 admitted work related injury.

Both parties failed to submit any lab work results or imaging showing what Claimant's liver condition is at this time. This might have been support for an argument that Claimant's medications are no longer reasonably necessary because his NAFLD has worsened over time, such as an increasing decline in liver function. Claimant has purportedly had this diagnosis of NAFLD, or steatosis, for many years, maybe even before the work related injury of 2015. Yet multiple ATPs have been prescribing Claimant narcotics, and other medications, which are metabolized by his liver, since his work related injury in 2015.

Respondents argue that the four medications, Ambien, Oxycodone, Flexeril, and Lyrica are no longer reasonably necessary due to Claimant's diagnosis of steatosis because the medications are potentially hazardous to Claimant's liver. This ALJ concludes that it is not because the medications are not reasonably necessary, but that they may be unwise for Claimant to continue the medications in light of the steatosis diagnosis without further confirmation that the NAFLD is being affected or that Claimant's liver function is declining due to the continued use of medications that are metabolized by the liver. In fact, while this ALJ has no authority or jurisdiction to direct Claimant's ATP to either continue or terminate medical treatment that is reasonably necessary, this ALJ encourages Claimant to consult with this ATP to wean the narcotics or other medications, even if for a short time, to determine if Claimant's function remains the same or declines, and assess whether continuing on the prescription medications is affecting his steatosis. Further, this ALJ encourages Claimant to confer with his ATP if the ATP has an opioid contract in effect, that regular lab tests are taking place, that Claimant have regular urine drug screens and that the ATP is monitor the PDMP.

Respondents also argue that PA King has failed to comply with the Medical Treatment Guidelines by not laying out every one of her assessments and findings regarding the benefits of medications and Claimant's functional performance which is assisted by the medications. This ALJ is not persuaded by this argument either. While providers are required to use the MTGs, this ALJ determines and finds that Claimant's ATPs are documenting Claimant's benefits from his continuing medications regime, though maybe not in the manner that Dr. Olsen is stating is required by documenting every specific activity that shows Claimant has benefited from the use of medications. This ALJ finds that, in fact, PA King is substantially complying with the rules and documenting that Claimant is benefiting from the medication, is not abusing them and understands the risks of continuing to use them. Respondents have failed to show that Claimant's continued use of the four medication is no longer reasonably necessary and related to the January 20, 2015 admitted work injury.

Claimant has proven by a preponderance of the evidence that Ambien, Oxycodone, Flexeril and Lyrical continue to be reasonably necessary. Claimant credibly and persuasively explained the medications he has taken for the last multiple years have helped him remain as functional as possible, including with activities of daily living, driving, core strengthening, aquatic exercises and chores around his home, considering his

ongoing continued and persistent lumbar spine pain, lower extremity radicular pain and muscle spasms, and difficulties with sleeping.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall continue to pay for Claimant's reasonably necessary and related medical care, including the Ambien, Oxycodone, Flexeril and Lyrical as long as they are prescribed by his authorized treating providers. Medical benefits are subject to the Colorado Workers' Compensation Fee Schedule. Respondents retain the right to challenge any treatment recommendation of the grounds that it is not reasonable, necessary or related to Claimant's 2015 injury.

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

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

DATED this 13th day of October, 2023.

DIGITAL SIGNATURE

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-217-011-002

ISSUES

The hearing in this matter was set on the endorsed issue of Respondents overcoming the Division IME with respect to rating and Claimant's temporary partial disability. The following stipulations were offered and accepted:

- The Claimant's Average Weekly Wage is $580.00.
- TPD is owed from September 7, 2022 to September 29, 2022, when Claimant was initially placed at MMI.
- Dr. Johnson initially placed claimant at Maximum Medical Improvement (MMI) on September 29, 2022.
- Respondents stipulate that the date of MMI is December 29, 2022, as opined by the DIME doctor, Dr. Higginbotham.

The issues remaining for determination are:

- Did Respondents overcome the DIME's cervical spine rating by clear and convincing evidence?
- Did Claimant prove by a preponderance of the evidence that she is entitled to TPD beginning September 30, 2022 through December 28, 2022?

FINDINGS OF FACT

1. Claimant was employed as a cook for the employer and sustained an admitted injury on September 7, 2022 when she fell backward, tripping over a co-employees foot as she was carrying a container of chicken wings on her way to the fryer. When she fell backwards, she sustained a whiplash type injury.

2. Claimant treated at Concentra beginning on September 10, 2022. Claimant received conservative care from Dr. Johnson until he placed Claimant at MMI on September 29, 2022 with no impairment.

3. Respondent filed a Final Admission of Liability (FAL) on November 7, 2022 based on Dr. Johnson's report dated September 29, 2022. Claimant timely objected to the FAL and requested a DIME.

4. Claimant returned to Concentra on November 5, 2022 for worsening pain in her neck. She saw Dr. Baron. Claimant told her that she was discharged when she still had significant pain. Claimant was referred for Chiropractic treatment for a total of six visits.

Claimant saw Dr. Lance Weidner for chiropractic treatment beginning on December 6, 2022. Dr. Weidner diagnosed neck strain, segmental and somatic dysfunction of the cervical region and muscle spasms of the neck. He performed massage and spinal manipulation. The exhibits show the Claimant treated four more times according to the notes, with one more visit scheduled, but not documented in the hearing exhibits.

5. Dr. Thomas Higginbotham performed the DIME on January 23, 2023. He noted that Claimant's clinical pain picture diagram identified pain and discomfort about the suboccipital, cervical paraspinal, CT junction and superior scapulothoracic areas and both heels. He opined that the Claimant reached maximum medical improvement on December 29, 2022 and had a 12% whole person impairment rating for her cervical spine.[1]

6. [Redacted, hereinafter LE] testified by telephone on behalf of the Respondents. He is the Vice President of Operations for the Employer. He described the physical demands of the claimant's job which did not involve lifting more than two pounds. He stated pulling a basket of chicken out of the fryer is about two pounds. The "bone-in" chicken would weigh more than the boneless check or chicken tenders. It was his testimony that Claimant's decrease in wages during the disputed time period was due to construction of the road in front of the business, causing decreased sales in general as opposed to Claimant's physical limitations.

7. Dr. Thurston performed an IME on behalf of Respondents on April 6, 2023. He agreed with the determination of Dr. Higginbotham that Claimant reached MMI on December 29, 2022. However, he disagreed with the rating of Dr. Higginbotham. The basis for the disagreement was that Table 53(II)(B) requires an "intervertebral disc or other soft tissue lesions: unoperated, with medically documented injury and a minimum of 6 months of medically documented pain and rigidity with or without muscle spasm, associated with none to minimal degenerative changes on structural tests". Exhibit F, p. 5. He reasoned that since the Claimant was placed at MMI less than 6 months from the date of injury, this requirement was not met so the Claimant would not be eligible for permanent impairment under this section.

8. During his testimony, Dr. Thurston was asked a series of questions regarding whether imaging was required in order meet the "structural test" requirement under the Table 53(II)(B). The following testimony was taken

> "Q. Would you agree that, based on the phrasing of that that you can qualify for a Table 53 rating with no findings on imaging?
>
> A. Some -- some examiners would rate that.
>
> Q. All right. Is that practically any different than having no imaging at all?

[1] Doctor Higginbotham notes that the original MMI date is the last visit the Claimant had with the chiropractor, but the note was unavailable for his review. Similarly, neither party included this note in their hearing exhibits so it is unclear as to the chiropractor's opinion on MMI or the need for further treatment.

A. Can you restate that? I'm not sure I quite understand.

Q. Yeah. So if a doctor get a Table 53 rating and there are no findings on imaging, is it equivalent of a doctor giving a rating where no imaging exists, effectively or practically the same?

A. Probably effectively the same. It -- it -- in my opinion it doesn't bear the same weight, but yeah, you'd have some overlap." (Transcript p. 40).

9. Claimant underwent an IME with Dr. Miguel Castrejon on April 24, 2023 at the request of her counsel. Exhibit 8. He took a history from Claimant, he performed a physical examination of Claimant, and he reviewed the medical records, including the DIME report. Claimant reported to Dr. Castrejon that the chiropractic treatment she received did substantially help her neck pain. *Id.* at 134. Exactly as reported to Dr. Thurston weeks prior, Claimant stated she was in a level 1 out of 10 pain at that time; however, the pain increases more with activity, particularly her work activity. *Id.* Claimant reported a dull neck pain at the base of her neck and her trapezius muscles. *Id.* The noticeable differences come in the form of physical examination. Dr. Castrejon did note some decreased cervical range of motion with pain in reported end ranges, "especially with extension." He also found mild muscle hypertonicity with several trigger points elicited with deep palpation. *Id.* at 135.

CONCLUSIONS OF LAW

A. Burdens and standards of proof

Respondent must overcome the DIME's cervical rating by clear and convincing evidence. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Claimant must prove by a preponderance of the evidence entitlement to temporary partial disability benefits.

B. Respondent did not overcome the cervical rating

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

Respondent failed to overcome the DIME's cervical rating by clear and convincing evidence. Respondents rely upon Dr. Thurston's opinion that it is improper to provide a Table 53(II)(B) rating when there has not been 6 months of medically documented pain and rigidity at the time of MMI. Since the Claimant was placed at MMI less than 6 months after the injury, Dr. Thurston reasons that there should be no table 53 rating greater than 0% since Table 53(2)(A) would apply. Based on this analysis, Dr. Thurston further opines there can be no impairment for loss of range of motion based on the Division of Workers' Compensation Impairment Rating Tips.

Contrary to Dr. Thurston's opinions, there is established case law that arrives at a different conclusion. In *Lopez v. Redi Services*, 5-118-981, 5-135-641 (ICAO October 27, 2021), *citing McLane Western, Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263(Colo. App. 1999), the Panel in *Lopez* quoted from *McLane* "Once a disability has become permanent, the resulting physical impairment must be determined in accordance with the AMA Guides. See §8-42-101(3.7). But, contrary to employer's contention, the AMA Guides do not require that the documented pain occur prior to MMI. As the Panel observed, an injury could produce some determinable and stable medical impairment at a certain point, yet remain unratable under the AMA Guides because insufficient time had passed. . . We therefore reject employer's contention that, as a matter of law, permanent impairment must be determined at the time of MMI, and cannot be assessed under Table 53 unless claimant shows that six months of documented pain occurred prior to MMI." (Citation omitted). Since the Claimant had continued documented pain at the time of the IME with Dr. Castrejon, which was more than 6 months after the date of injury, she is entitled to an impairment rating based on Table 53(II)(B). Having reached that conclusion, the next issue is whether the fact that the DIME occurred less than 6 months after the date of injury makes a difference. Taking the next step from the McLane case, I conclude that it does not make a difference that the DIME occurred less than six months after the date of injury since there is documented pain by Dr. Castrejon more than six months after the date of injury.

The final step of the analysis is the lack of x-rays or other imaging at any time. Since the table 53 requirement includes the word "none" it would appear that there is no requirement of actual imaging to obtain an impairment rating. I rely on the testimony of Dr. Thurston that in response to questions that no imaging is essentially the equivalent of no findings on imaging. As such, this does not pose an impediment to a rating under Table 53(II)(B).

Based on this analysis, I conclude that the Respondents have failed to overcome the rating of the Division IME by clear and convincing evidence.

C. Claimant failed to sustain her burden of proof of entitlement to Temporary Partial Disability from September 30, 2022 to December 28, 2022.

Claimant's wage loss after originally being placed at MMI is not due to a disability. TPD was properly terminated when was originally placed at MMI and assigned a full duty release. LE[Redacted] is credible in his testimony as to the non-injury related factors which resulted in claimant's wage loss. When these factors were not present, claimant's hours increased.

The wage loss after September 29, 2022 is not attributed to a disability or the industrial injury and not owed.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME's 12% whole person cervical rating is denied and dismissed.

2. Claimant's request for TPD from September 29, 2022 to December 29, 2022 is denied and dismissed.

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

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

DATED: October 13, 2023

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

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that on August 29, 2022, he suffered a work injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of his right knee, including surgery performed on February 15, 2023 by Dr. Thomas Dwyer, constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits?

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

FINDINGS OF FACT

1. Claimant began working for Employer on February 17, 2017. At all times relevant to the current matter, Claimant was employed as a Patrol Corporal. Claimant's job duties include all aspects of a law enforcement patrol officer. In addition, Claimant is a member of the [Redacted, hereinafter ST] team.

2. Claimant asserts that he suffered an injury to his right knee while performing his job duties on August 29, 2022.

3. Claimant testified that when he was 17 or 18 years old he undeiwent arthroscopic surgery to his right knee. Claimant further testified that between his recovery from that prior surgery and August 29, 2022, he had no right knee issues.

4. On August 29, 2022, officers from both the [Redacted, hereinafter MS] and the [Redacted, hereinafter MD] responded to a domestic incident. The incident escalated and an armed individual barricaded himself in a local automotive business and threatened suicide. Claimant was tasked with maintaining sight of the individual. This involved kneeling to view the individual through a window that was close to the ground. Claimant knelt in this position for approximately 30 to 40 minutes.

5. Claimant testified that while he was kneeling in this manner there came a moment when the individual neared the window where Claimant was located. As a result, Claimant turned and twisted on his right knee to avoid being seen. Claimant immediately felt a "crunch" and pain in his right knee. However, due to the emergent and volatile nature of the situation unfolding inside the building, Claimant continued to kneel to maintain sight of the individual.

6. Officer [Redacted, hereinafter JL] is an officer with the MD[Redacted]. JL[Redacted] was also involved with the August 29, 2022 barricaded individual. JL[Redacted] testified that he observed Claimant kneeling to be able to look in the low window. At one point, Claimant asked JL[Redacted] to change positions with him because Claimant's knee was beginning to hurt. While JL[Redacted] took the kneeling position for a brief period of time, Claimant was able to walk around to try to loosen up his right knee. Claimant then returned to kneeling before the window and remained there.

7. Claimant's direct supervisor, [Redacted, hereinafter MB] was also present at the August 29, 2022 incident. After the incident was resolved, Claimant interacted with MB[Redacted]. In addition to the the normal debriefing discussions and completion of paperwork, Claimant told MB[Redacted] that his knee was sore from kneeling at the scene. MB[Redacted] offered Claimant medical treatment, and Claimant declined. Claimant testified that although his right knee was painful on August 29, 2022, he believed he was just sore and could treat his symptoms with rest and ice.

8. Claimant's right knee pain did not resolve and continued to bother him in the coming days and weeks. Claimant attempted to continue to perform all of his job duties, despite his ongoing right knee pain. On October 11, 2022, Claimant was involved in training with ST[Redacted] Claimant disclosed to the ST[Redacted] supervisor that his right knee was painful, and he was unable to fully perform the functions of the ST[Redacted] training.

9. At his next shift on October 13, 2022, Claimant reported his right knee concerns to MB[Redacted] and requested medical treatment. At that time, Claimant completed an Employee's Written Notice of Injury to Employer. In his description of the incident, Claimant wrote "After kneeling on the ground for some time I noticed my right knee hurt. I assumed it was nothing major. It has only gotten worse to the point I can not perform my duties." Claimant testified that he did not include language about turning and twisting his knee because he believed his description was sufficient, and the form lacked additional space for more details.

10. On October 13, 2022, an Employer's First Report of Injury was completed by [Redacted, hereinafter CC], Safety and Risk Coordinator. The written statement from Claimant was included in that form.

11. On October 14, 2022, Claimant was seen by his authorized treating physician (ATP) Dr. Stephen Adams with Peak Professionals. Dr. Adams noted Claimant's development of right knee symptoms while kneeling for a prolonged length of time. Claimant's symptoms were noted to include right knee pain, stiffness, mild

swelling, catching, and locking. Dr. Adams ordered magnetic resonance imaging (MRI) of Claimant's right knee and placed Claimant on light duty.

12. On October 25, 2022, a right knee MRI was performed and showed surgical changes to the medial meniscus; an extrusion of the body segment; a meniscus flap in the meniscotibial recess at the medial joint line; mild medial compartment chondral degeneration; and mucoid degeneration of the anterior cruciate ligament (ACL).

13. On October 31, 2022, Claimant returned to Dr. Adams. Dr. Adams listed Claimant's mechanism of injury as "kneeling down for half hour by a window I turned my upper body so no one would see me and knee felt funny after". Based upon Claimant's ongoing symptoms and the MRI findings, Dr. Adams referred Claimant for an orthopedic consultation.

14. On December 8, 2022, Claimant was seen by Dr. Thomas Dwyer. At that time, Claimant described his August 29, 2022, mechanism of injury as kneeling down and then twisting quickly so that the individual would not see him. He further reported feeling immediate pain that has not improved. Claimant also reported right knee symptoms of swelling, popping, and catching. After an examination and review of the MRI results, Dr. Dwyer opined that Claimant would not likely benefit from an injection. Dr. Dwyer recommended an arthroscopic surgery with partial meniscectomy. A request for authorization for this procedure was sent to Insurer on that same date.

15. At the request of Respondents, Dr. Timothy O'Brien reviewed Claimant's medical records. In a report dated December 20, 2022, Dr. O'Brien opined that Claimant did not suffer a right knee injury at work on August 29, 2022. Dr. O'Brien further opined that Claimant's right symptoms are "a manifestation of [Claimant's] personal health". In support of his opinions, Dr. O'Brien noted that Claimant has pre-existing arthritis in his right knee and the MRI did not show an acute injury. Dr. O'Brien further stated that kneeling would not cause damage to soft tissue or aggravate the pre-existing condition in Claimant's right knee. Dr. O'Brien also opined that Claimant did not behave as if he was injured. It is also Dr. O'Brien's opinion that Claimant is not a candidate for surgery. In support of this opinion, Dr. O'Brien noted that the recommended surgery would likely increase Claimant's pain symptoms.

16. Based upon Dr. O'Brien's opinions, Respondents denied authorization for the recommended right knee surgery.

17. Claimant responded to Dr. O'Brien's December 20, 2022 report in an undated letter in which he explained his various disagreements with Dr. O'Brien. On January 10, 2023, Dr. O'Brien authored a second report in response to Claimant's letter and reiterated the opinions he outlined in his initial report.

18. On January 24, 2023, Dr. O'Brien further supplemented his reports. This was done in response to a letter Claimant sent to Insurer regarding his August 29, 2022 body cam footage. Reviews of the body cam footage did not change Dr. O'Brien's opinions.

19. On February 15, 2023, Dr. Dwyer performed the recommended right knee surgery. The procedure included arthroscopy with partial medial meniscectomy and chondral shaving of the medial femoral condyle and trochlea.

20. The cost of the surgery was paid for by Claimant and his private medical insurance. Claimant testified that since undergoing the right knee surgery in February 2023, he has far less pain. In addition, Dr. Dwyer has released Claimant to full duty.

21. On July 7, 2023, Dr. Dwyer authored a letter regarding his treatment of Claimant. Dr. Dwyer opined that the February 15, 2023 surgery, was reasonable and necessary to treat the condition of Claimant's right knee. Dr. Dwyer further opined that the kneeling incident on August 29, 2022 caused Claimant's right knee symptoms and the related need for surgery. Dr. Dwyer also noted that the surgery improved Claimant's symptoms. Dr. Dwyer opined that Claimant's mechanism of injury was consistent with objective findings. Dr. Dwyer further stated "[i]t is very common to sustain a meniscus tear on a flexed knee with a twisting motion."

22. Dr. O'Brien's deposition testimony is consistent with his written reports. Dr. O'Brien testified that the October 25, 2022 MRI showed degenerative findings and no new pathology. Therefore, it is his opinion that there was no acute work injury on August 29, 2022. Dr. O'Brien further testified that substantial energy would be necessary to tear a meniscus, and such energy does not exist when one is kneeling. It is Dr. O'Brien's opinion that Claimant would have had to engage in a twisting motion, while standing, to produce such a tear. Dr. O'Brien testified that the meniscectomy performed when Claimant was a teen, accelerated the wear and tear of Claimant's right knee. Dr. O'Brien also stated that chondral defects are often degenerative, but can be produced during athletic pursuits. Dr. O'Brien also noted that such a defect could have been created by Dr. Dwyer during surgery.

23. Pay records demonstrate that in the 12 week period[1] prior to the August 29, 2022 injury, Claimant had total earnings of $16,544.93. When this total is divided by 12, it results in an average weekly wage (AWW) of $1,378.74.

24. After he was placed on work restrictions by Dr. Adams, there were weeks in which Claimant earned less than his AWW. Claimant testified that due to his work restrictions, he was unable to accept overtime hours.

[1] Although Claimant was paid on August 30, 2022, the day after the incident, the ALJ notes that payment was for the pay period ending August 20, 2022.

25. The ALJ credits Claimant's testimony regarding his activities on August 29, 2022, and specifically the nature and onset of his right knee symptoms. The ALJ further credits the medical records and the opinions of Dr. Dwyer over the contrary opinions of Dr. O'Brien. Claimant has successfully demonstrated that it is more likely than not that on August 29, 2022 he suffered a right knee injury arising out of and in the course and scope of his employment with Employer. The ALJ finds that the kneeling and twisting incident on August 29, 2022, aggravated, accelerated, and combined with Claimant's pre-existing right knee condition. This resulted in Claimant's right knee symptomology and the need for medical treatment.

26. The ALJ further credits the medical records and the opinions of Dr. Dwyer over the contrary opinions of Dr. O'Brien and finds that Claimant has demonstrated that it is more likely than not that treatment of Claimant's right knee is reasonable, necessary, and related to the work injury. The ALJ specifically finds that the surgery performed by Dr. Dwyer on February 15, 2023 was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

27. The ALJ credits the payroll records and Claimant's testimony and finds that Claimant has demonstrated that it is more likely than not that he suffered periodic wage loss after being placed on work restrictions. Therefore, the ALJ finds that after Claimant was placed on light duty by Dr. Adams on October 14, 2022, there were weeks in which he earned less than his AWW. Therefore, Claimant was entitled to payment of temporary partial disability (TPD) benefits for those weeks.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has demonstrated, by a preponderance of the evidence, that he suffered a work injury arising out of and in the course and scope of his employment with Employer on August 29, 2022. As found, the kneeling and twisting incident on August 29, 2022, aggravated, accelerated, and combined with Claimant's pre-existing right knee condition, resulting in the need for treatment. As found, Claimant's testimony, the medical records, and the opinions of Dr. Dwyer are credible and persuasive.

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

7. As found, Claimant has demonstrated, by a preponderance of the evidence, that treatment of his right knee, including the surgery performed on February 15, 2023 by Dr. Thomas Dwyer, constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the August 29, 2022 work injury. As found, the medical records and the opinions of Dr. Dwyer are credible and persuasive.

8. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to

establish a temporary disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair a claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 P.2d 595 (Colo. App. 1998).

9. As found, Claimant has demonstrated, by a preponderance of the evidence, that he suffered periodic wage loss after being placed on work restrictions. Therefore, the ALJ finds that after Claimant was placed on light duty by Dr. Adams on October 14, 2022, there were weeks in which he earned less than his AWW. As found, Claimant was entitled to payment of TPD benefits for those weeks. As found, the payroll records and Claimant's testimony are credible and persuasive on this issue.

10. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food* & *Commercial Workers Local No.* 7, W.C. No. 4-240-475 (ICAO, May 7, 2007).

11. As found, Claimant's average weekly wage (AWW) is $1,378.74. The payroll records are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable injury to his right knee on August 29, 2022.

2. Respondents shall pay for reasonable, necessary, and related medical treatment of Claimant's right knee.

3. Respondents shall pay for the right knee surgery performed by Dr. Dwyer on February 15, 2023.

4. Respondents shall pay temporary partial disability (TPD) benefits to Claimant for any week after October 14, 2022, in which he earned less than his AWW.

5. Claimant's average weekly wage (AWW) is $1,378.74.

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

Dated October 17, 2023.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ•s order will be final. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Claimant prove she suffered a compensable injury on March 10, 2023?
- If the claim is compensable, did Claimant prove she is entitled to medical benefits?

FINDINGS OF FACT

1. Claimant worked at the office of the employer on March 10, 2023. While seated at her desk, she experienced a sudden loss of consciousness and fell from her chair.

2. An ambulance from AMR, Colorado was called. Colorado Springs Fire Department also responded to the call. In the report prepared by the EMS personnel, it was reported that Claimant had seizure like activity. Claimant had no history of seizures. When she fell, she sustained a contusion to her head when the hair clip she was wearing hit the ground.

3. Claimant was transported to Penrose Hospital Emergency Room in Colorado Springs. Claimant was treated by Dr. Jason Younga. He ordered that Claimant undergo a CT scan of the head to determine if there were any intracranial injuries suffered from the seizure. The CT findings were "Small left parietal contusion without images and calvarium fracture. No acute intracranial injury".

4. Dr. Younga also ordered that an EKG for Claimant. The findings of the EKG were "Normal sinus rhythm. Possible left atrial enlargement. Nonspecific T Wave abnormality". After all of the tests were conducted, Dr. Younga opined that "Is potentially patient's Wellbutrin is the etiology of the seizure-like activity today". (Exhibit B, p. 17). He also provided a differential diagnoses including medication reaction, hyponatremia, hypoglycemia, and grand mal seizure.

5. On March 13, 2023 Claimant attended an appointment at Concentra with Physician's Assistant Kimberly Shenuk. She conducted a physical exam of Claimant as well as exams centered on the pulmonary and neurologic symptoms of the body. She stated "Patient understands that the syncope episode is not by WC, but the symptoms related to hitting her head may be covered". Exhibit D, p. 35.

6. Dr. Burris performed a record review at the request of Respondents and issued a report of August 12, 2023. Subsequent to his report, he reviewed the records of Claimant's primary care physician. It was his opinion that the cause of the seizure was the medication Wellbutrin that she was taking for depression. This medication lowers the seizure threshold for an individual. This was the inciting cause of the seizure.

7. Claimant understood that the cost of the medical investigation as to the cause and nature of the syncope episode would be paid by the Carrier. This was based on the assumption that since [Redacted, hereinafter SY] paid for some of the medical treatment, it was obligated to pay for the rest of the initial costs to determine what was causing her symptoms.

8. SY[Redacted] voluntarily paid for some of the initial medical evaluations but not all. On June 26, 2023, the adjuster from Sentry sent an email to Claimant that SY[Redacted] provided coverage for the medical bills to date.

9. Claimant failed to prove she suffered a compensable injury on March 10, 2023. It is more probable that the seizure-like symptoms she experience resulted as a side effects from the Wellbutrin she was taking.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The mere fact an employee experiences symptoms at or after work does not automatically establish a compensable injury. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008); *Garamella v. Paul's Creekside Grill, Inc*., W.C. No. 4-519-141 (March 6, 2002). The claimant must prove entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is evidence that leads the ALJ to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). Put another way, the standard is met when the existence of a contested fact is "more probable than its nonexistence." *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant failed to prove she suffered a compensable injury on March 10, 2023. As found previously, Dr. Burris' testimony and written opinions, which are credible, supports this conclusion.

Although Claimant had no prior history of seizures, I conclude that the seizure like activity was personal to Claimant as the result of the Welbutrin that she was taking for depression.

I am also not persuaded that the adjuster/carrier committed to paying all medical expenses while the medical personnel tried to sort out the cause of Claimant's seizure-like episode. Although that may be Claimant's perception, the credible, admissible evidence does not support that conclusion. Further, it has generally been held that payment of medical services is not in itself an admission of liability. "This is based on the sound public policy that carriers should be allowed to make voluntary payments without running the risk of been held to have made an irrevocable admission of liability (Citation omitted) In addition, the Colorado Rules of Evidence generally govern workers' compensation proceedings. Section 8-43-210, CRS 2008. C.R.E. 409 provides that evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury. *Zarate v. Silver Peaks*, (ICAO 4-740-886, October 23, 2008). This analysis applies to this case and, as such, Respondents are not liable for the cost of medical services beyond the voluntary payments made.

ORDER

It is therefore ordered that:

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

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

DATED: October 18, 2023

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

ISSUES

I. Did Respondents prove by a preponderance of the evidence that the statute of limitations under Section 8-43-103(2), C.R.S., precluded Claimant from bringing this claim?

II. Did Claimant prove by a preponderance of the evidence that she sustained a compensable mental-mental injury arising out of and occurring within the course and scope of her employment?

III. Did Claimant prove by a preponderance of the evidence that she was entitled to medical benefits related to her mental-mental claim?

IV. Did Claimant prove by a preponderance of the evidence that Claimant was entitled to temporary total disability (TTD) benefits after March 10, 2021?

V. If Claimant met her burden regarding TTD benefits, did Respondents prove by a preponderance of the evidence that Claimant was terminated for cause unrelated to the alleged injury?

VI. If Claimant met her burden regarding TTD benefits, did Respondents prove by a preponderance of the evidence that Claimant was subject to a penalty for late report of injury per Section 8-43-102(1), C.R.S., between May 13, 2020 and February 21, 2023?

FINDINGS OF FACT

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

A. Generally

1. Claimant was 67 years old at the time of the hearing. She was hired as a custodian for Employer beginning September 16, 2017. Claimant acknowledged receipt of the Policies and Procedures for Employer on September 11, 2017.

2. Employer was contracted by another corporation, hereinafter "Contractor," to do custodial work in the contractor's facility, which was comprised of multiple buildings. Claimant worked at the contractor's location under the supervision of a site manager who worked for Employer as well as under her supervisors and Team Leads for Employer.

3. Claimant provided a letter from her counsel's office that a claim had not been reported to the Division as of October 12, 2020. They requested Claimant complete the form and return it to them for filing. While the letter does not specify which claim, it is presumed that Claimant submitted this exhibit regarding her May 8, 2020 claim.

4. Claimant completed a Workers' Claim for Compensation (WCC) on April 15, 2022 alleging she suffered a psychological injury ("mental-mental") on May 8, 2020 from ongoing harassment, being accused of wrongdoing, ignored disability and physical restrictions, and wrongful discharge. It further stated that Claimant's last day of employment with Employer was March 5, 2021 but that Employer notified her of the termination on March 31, 2020.[1] The WCC was not filed with Division until February 21, 2023.

5. In addition to this claim, Claimant previously filed four other workers' compensation claims:

a. A right knee injury claim with an alleged date of injury of July 7, 2019, which was the subject of W.C. 5-174-107;

b. A claim for September 20, 2019 for multiple body parts, which was the subject of W.C. 5-155-262;

c. An alleged left ankle injury for October 31, 2019, which was the subject of W.C. 5-155-269; and

d. An alleged left knee injury with a June 3, 2020 date of injury, which was the subject of W.C. 5-155-271).

6. Claimant also filed an EEOC claim for alleged discrimination in 2021. Claimant submitted Employers' statement to the EEOC noting that no less than eight employees made complaints against Claimant of unprofessional behavior in the workplace. They encompassed all races, ages and disability statuses. The complaints included refusing to perform certain job tasks, arguing with supervisors and coworkers, threatening to sue supervisors when they complained about her poor attitude, telling other employees to "shut up," and advising coworkers that she had falsely made claims against her employer. The EEOC dismissed the charges on September 21, 2022 stating that based on the EEOC investigation they were unable to conclude that the information obtained established any statutory violations.

7. The allegations surrounding this claimed injury of May 8, 2020 are documented in a letter issued by Claimant, addressed to Human Resources, on June 16, 2020.

a. Claimant alleged that, on May 8, 2020, the Team Lead of Building 1 (B1), approached Claimant to "pull out all 6 [sanitation] boxes but leave the 6 boxes by the back grind." Claimant claims that the Team Lead had notified the site manager, about the changes and that both the Contractor and Employer supervisors agreed to pull out all the boxes. Claimant saw her regular Team Lead, passing by her station and both she and Team Lead of B1 gave her permission to bag the boxes. According to Claimant, the changes in B1 created a lot of confusions and problems and she felt that, due to misunderstandings and miscommunication, she was not properly informed of the changes by her leads. Claimant believed her leads accused her of gossiping. When Claimant went to go out on break, Claimant was

[1] Claimant lists the date the Employer notified Claimant of the termination as March 31, 2020 but this ALJ infers that was intended to be March 31, 2021.

told by her Team Leads she had to go home due to her conduct. Claimant claimed she felt insulted.

b. On May 13, 2020, Claimant claims that a coworker went to B1 to check Claimant's work. She took pictures of the dirty overflow and put back all of the dirty boxes Claimant had taken out of B1. Claimant claimed it was done without consulting her, which confused her, and that this same thing occurred again the following day. Claimant felt that she should have been consulted if there was a problem with her work.

c. On May 22, 2020, Claimant attended a training meeting and again alleged she was accused of gossiping by management. Claimant claimed that one of her leads did not like Claimant speaking both Tagalog and English to another lead. Claimant claimed she was given the option of completing her job or going home. Claimant also claimed her supervisor spoke with her before the meeting about what was going on with a co-worker and this made her feel uncomfortable. Claimant claimed her managers told her she was the oldest person they will ever hire and accused her Team Lead of yelling at her and to stop using "that tone of voice" in front of the managers.

d. Claimant asserted that she felt bullied, intimidated, and suffered from dysfunctional behaviors from her leads. Claimant asserted that she had no proper communication or direction to succeed or do her best. Claimant further claimed that she felt harassed due to her disability and change of duties that was approved by her manager.

8. As found, nowhere in the June 16, 2020 document did Claimant make a claim that she had a mental impairment or required medical care.

9. Claimant signed a Visitor Confidential Information and Internet Policy Terms on September 15, 2020, which stated that any information Claimant had access to or viewed was not to be disclosed and that, if Claimant was logged into the Contractor's guest internet system, she was subject to Contractor's rules of use and requirements.

10. Claimant signed a second copy of the Visitor Confidential Information and Internet Policy Terms on December 20, 2020, which was exactly the same as the first one. As found, contrary to Claimant's allegation that this form granted her access to Contractor's computer system, this ALJ determines this is a simple form granting access to guest Wi-Fi only, and does not give permission to use their computers or log into their system.

11. Claimant was provided access to a phone application and given instructions regarding how to access the "App" and log in with the designated "ID" and password. There was a follow up email from the "app" system administrator confirming Claimant logged into that system on December 20, 2020.

12. On February 23, 2023 Division of Workers' Compensation (Division) sent a letter advising insurer that Claimant had filed a Workers' Claim for Compensation (WCC) and had twenty days to state a position.

13. Respondents filed a First Report of Injury (FROI) on April 11, 2023, after having been notified about the alleged injury.

14. Respondents subsequently filed a Notice of Contest (NOC) on April 24, 2023, for further investigation regarding compensability.

15. On June 7, 2023, Employer's Site Manager submitted a sworn affidavit stating she did not have any recollection of Claimant reporting an injury on or around May 8, 2020. She also stated she reviewed emails from around that time, as well as voice messages and messages on her cell phone, and did not receive any correspondence or messages concerning a May 8, 2020 alleged mental injury. The Site Manager stated that, if she had received such report, she would have advised Claimant to complete a company injury packet to document the injury. The Site Manager affirmed during testimony that the representations in her affidavit were true and correct.

16. Respondents filed a Motion for Summary Judgment at OAC on June 13, 2023, seeking summary judgment on the basis that the statute of limitations had run and also that Claimant failed to meet the statutory criteria for a mental injury. On July 6, 2023, ALJ Glen Goldman denied the Motion, finding there were disputed issues of material fact as to whether the statute of limitations barred the claim (specifically as to when Claimant would have known of the probable compensable nature of her claim), and that the court must also make a finding as to whether any disciplinary actions and the termination were made in good faith.

B. Disciplinary History and Termination

17. Claimant had a documented history of disciplinary actions leading up to the June 16, 2020 letter outlining complaints of harassment.

18. On February 27, 2018, Claimant was given an Employee Warning Report by the cleanroom manager for unwillingness to perform routine cleaning duties despite numerous trainings and verbal coaching. It was noted that "even [Contractor's] staff have all commented on [Claimant's] lack of performance in her assigned duties."

19. On February 19, 2019 the cleanroom manager issued Claimant another Employee Warning Report for "bad-mouthing" and making derogatory remarks to her co-workers. It was noted in this report that this behavior had been occurring for some time. They noted that any further policy violation identified by the Contractor would be the third one, and would be the subject of further consideration by Employer's Human Resources office.

20. Claimant admitted that she had been reprimanded by her Team Leads, on May 8, 2020, for gossiping about other employees, which Claimant denied doing.

21. On May 26, 2020, Claimant was again cited with an Employee Warning Report, authored by Employer's Site Manager, noting violations of workplace policy for disobedience and work quality. Claimant was cited for talking about not participating in her job duties after a training exercised and was requested to refrain from slander and gossip.

22. On March 4, 2021 Contractor's HR Business Partner issued an email to Employer's Site Manager that "per our earlier discussion, we would like for you to end the assignment of [Claimant] at [Contractor's location].

23. On or around March 10, 2021, Claimant was terminated by the Employer at the express request of Contractor due to security policy violations. The Notice to Employee as to Change in Relationship cited to "security policy violations, [Contractor] has asked [Employer] to end our employment of [Claimant]."

24. Earlier in March 2021, one of the team leads observed Claimant using one of Contractor's computers and took a picture, then related her observations to the Site Manager and gave her the picture. The Team Lead communicated that Claimant was using a family member's login to access the Contractor's system. This observation was discussed directly with the Contractor by the Employer management and the Contractor requested that Employer end the Claimant's assignment at the Contractor's location. Suspension protocol was carried out by the Site Manager and Claimant's supervisor.

C. Medical Records

25. On November 11, 2019 Dr. Christopher Stockburger documented that Claimant had a past history of depression and anxiety. The records also mentioned that Claimant's psychological history included chronic fatigue, anxiety, panic attacks and depression. On October 24, 2019 there was documentation of a past history of anxiety disorder.

26. On February 10, 2020 Dr. Brian G. Lancaster had Claimant on limited stooping and lifting more than 20 lbs. until further evaluation.

27. Claimant was provided restrictions for her right knee given on May 1, 2020 by Stephen Toth, PA-C immediately prior to the alleged mental injury.

28. Claimant was released to full duty effective July 14, 2020 by Bryan Copas at Banner Occupational Health Clinic for her left knee injury.

29. On July 30, 2020 PA Toth provided restrictions under the July 7, 20219 claim, including sitting 50% of the time, use of a cane, weightbearing as tolerated, and may not walk on uneven surfaces.

30. Claimant was placed at MMI and discharged without restrictions for her right knee injury, on August 29, 2020.

31. On November 9, 2020 Dr. Mark Unger of Associates in Family Medicine issued work restrictions of sitting at least 50% of the time, limited walking to 100 yards, use of a cane, weightbearing as tolerated, and no walking on uneven surfaces.

32. Claimant was first evaluated by Erin Morgan, LPC, at LIV Health on June 10, 2021. The note indicated that Claimant was referred by her primary care physician for symptoms of anxiety and depression. Claimant reported that she was terminated from her job in March and the termination caused "increased hopelessness, sadness, feelings of worthlessness, anxiety, ruminating thoughts, tearfulness, stress and stated she feels like she has lost herself." Claimant conveyed that she had siblings who worked with the Employer and she could not see them as much, and that she had been staying in bed and watching TV since she was terminated. Claimant reported that she had experienced "ongoing harassment at work that has been causing her significant distress." Claimant was diagnosed with adjustment disorder with mixed anxiety and depressed mood, which

LPC Morgan attributed to the recent stressor of being terminated from her job, which had significantly impacted her functioning.

33. Claimant continued treating at LIV Health on a frequent basis, from June 14, 2021 until at least January 4, 2023. The visits were conducted through telehealth with the intention of stabilizing Claimant's anxiety and depression while increasing her ability to function, keeping in mind difficulties with mobility, chronic pain and medical limitations, exploring her symptoms that continued to impact her life, identifying unhelpful and inflexible cognitive messages that were impacting her quality of life and emotional wellbeing, and providing cognitive behavioral therapy, exploration of emotions and coping skills.

34. On June 28, 2021 LPC Morgan noted that she engaged Claimant in discussions about her thoughts, feelings and ongoing reactions to being terminated from work. They discussed how Claimant was handling the impact of the termination on Claimant personally, as well as regard to her functioning. She emphasized the need to build rapport with the patient and build on the therapeutic relationship.

35. UCHealth records for Discharge from the Orthopedics Clinic at Poudre Valley Hospital on August 9, 2021 is the first instance in the exhibits where there is mention of Claimant falling in the bathroom in April 2021, following the alleged May 8, 2020 psychological injury claim and following her March 31, 2021 termination, listing a diagnosis of anxiety, depression and a concussion.

36. Beginning on December 9, 2021, the records reflect that Claimant maintained treatment with LPC Morgan but under the supervision of Natasha Trujillo, Ph.D. Throughout the records, it was referenced that Claimant's termination was the source of her depression, stating that "her previous job being a significant part of her identity and whether her life as it is now is worth living."

37. On September 29, 2022 Claimant was evaluated by a Division of Workers' Compensation Independent Medical Examining physician, Dr. Alicia Feldman, in regard to a July 7, 2019 claim for the lumbar spine, and right foot, ankle, knee and hip. Dr. Feldman determined that Claimant suffered no injury on this date and that Claimant's continuing complaints were preexisting.

38. The claimant reported to Dr. Feldman having seen a psychologist but had no records to review. However, based on her presentation during her examination, Claimant appeared to have significant amount of psychological distress, likely had poor coping mechanisms related to her pain and agreed with Dr. O'Toole's February 18, 2020 assessment that Claimant's subjective complaints were not consistent with the lack of objective findings and probably denoted significant psychosocial overlay. Her consistent complaints regarding how she was treated by her supervisors and co-workers suggested that job satisfaction was a significant component to her complaints. Dr. Feldman noted that multiple other providers observed significant psychosocial issues and her past medical records revealed Claimant had significant psychosocial issues before her alleged July 7, 2019 work-related injury that required treatment with therapy and medications.

39. On January 4, 2023 LPC Morgan noted that Claimant had been dealing with anxiety and depression for approximately one and one half year and Claimant's

symptoms were somewhat worse at that time due to some legal developments, which were not specifically identified. Ms. Morgan provided empathetic validation and listening of issues that had brought the resurgence of difficulties, and presented multiple insights regarding management of feelings and challenges Claimant faced, in order to move forward with her life despite roadblocks. She continued to diagnose adjustment disorder with mixed anxiety and depressed mood pursuant to the DSM V, noting Claimant continued to have moderate difficulty and impairment, including problems with mobility and engaging physically with the world, including her family, community and obligations. Claimant was yet discharged as of January 2023.

40. On April 4, 2023 Dr. Mark Unger stated Claimant should continue to follow her previously prescribed work restrictions until further treatment was completed through her orthopedist, including sitting at least 50% of the time, use of a cane, weightbearing as tolerated, and no walking on uneven surfaces. As found, there were no specifically identified restrictions that related to Claimant's mental health conditions.

D. Testimony of Employer's Site Manager

41. Employer's Site Manager testified by deposition on April 28, 2023 that she became both the Site Manager and Claimant's supervisor in April 2020. She stated that Claimant was a very difficult and stubborn employee and was very intimidating. While Claimant did require a lot of assistance, she would also refuse to perform certain tasks associated with her job. She noted that Claimant had had multiple verbal admonitions due to conflicts with co-workers and supervisors, which she tried to handle quickly without having to do written warnings. Because a lot of Claimant's family members worked for the Contractor directly she was having to defend the staff of what were really small grievances. At one point, even though she would finish her work around 4:30 p.m. and was not around, she would keep in touch with the supervisors and leads. On one occasion she authorized the Team Leads to send Claimant home for insubordination.

42. She explained that Claimant was performing minimal cleaning when she became Claimant's supervisor, working in Building 1, mainly doing wipe down of surfaces, bagging items for transfer (she did not do the transfers), pre-cleaning containers that would go into the washing machine and would be sitting most of her shift. She was not required to do any heavy lifting.

43. Employer's Site Manager testified credibly at hearing. She reiterated that she was Claimant's supervisor and the site manager at Contractor's location. She stated that Claimant's work restrictions from her existing injury allegations from other workers' compensation claims were always accommodated by Employer, and that these restrictions were communicated to Claimant's other supervisors. This included the restrictions for both left and right knee injuries.

44. She testified that she believed Claimant was playing psychological games with her coworkers and supervisors. She testified as follows:

> And yes, it was -- it was my opinion, up to that point, that I felt -- I felt like, sometimes, [Claimant] would hit (sic.)[2] people against each other, or say one thing and then do another

[2] This ALJ determined that the testimony was the word "pit" not "hit."

> thing. And you know, based on all of the written and verbal complaints I had compiled and statements that I had received from employees, I felt like there was mounting evidence that, you know, that she would befriend somebody, get close with them, and then if there were any issues, she would immediately turn on that person, and there would be a conflict, a blowup, that would happen. So I -- I began to see a pattern, and that's -- that's something I noticed.
>
> I also felt personally uncomfortable talking to [Claimant] because, you know, there were many comments made about suing people and -- companies, people, whatever it may be. I know she had some pending cases that she talked to me, personally, about. So I felt uncomfortable whenever we were in conversation, just disclosing anything.

45. The Site Manager accurately recalled at hearing Claimant's restrictions for her right knee given on May 1, 2020 by PA Toth, immediately prior to the alleged mental injury. The Site Manager also accurately recalled Claimant being released to full duty effective July 14, 2020 by Bryan Copas at Banner Occupational Health Clinic for her left knee injury. She testified that she continued to accommodate Claimant after she was placed at MMI and discharged without restrictions for her right knee injury, on August 29, 2020. The accommodations were continued for Claimant's comfort despite her workers' compensation providers releasing her to full duty.

46. Site Manager testified that Claimant was reprimanded per the prior Employee Warning Reports in accordance with the Employer policy, outlined in Employer's Handbook, for refusal to follow her supervisor's instructions.

47. Contractor's policy forbade unauthorized access of Contractor's computers using someone else's login information and Contractor themselves requested that Employer terminate Claimant from that location.

48. It is in Employer's code of ethics and Employer's handbook that employees should not use any company property, including computers. Claimant would have signed the policy when she was hired as the handbook was given to all employees.

49. The Site Manager testified that Claimant would have been aware of the policy. She testified that Claimant was observed using Contractor's computers to page and had logged in using a family member's login, as communicated by Claimant's Team Lead. The Team Lead is the one that caught Claimant and took the picture of Claimant in the clean room using the computer. Site Manager concluded that the only way that Claimant could access Contractor's computers was to have an ID and password, which Employer's employees were not provided including Claimant, though as the site manager, she did have access to Contractor's system.

50. The Site Manager testified that Contractor discussed the issue with the Employer and that Claimant was terminated from access to the property after discussion with Contractor. Both she and the day shift supervisor were involved in informing Claimant of her termination from Contractor's job site and suspended until Employer could fully investigate.

51. She testified that the computer incident was not the only factor in the decision to terminate Claimant. Employer's HR managers conducted an investigation after the March 5, 2021 suspension, and made the decision to terminate based on the unauthorized computer access as well as her history of written warnings and also the history of complaints and conflict with coworkers and supervisors/team leads.

52. Claimant was officially terminated by Employer on March 31, 2021 for misconduct and violation of company policies.

E. Testimony of Claimant

53. Claimant testified at hearing on her own behalf. She explained that she felt ignored when she would complain of issues. She denied using the internet other than to use the "app" to call for help and she was mostly ignored. She stated that she was not very familiar with the iPhone or how to use a cell phone, so she just used the icon to page her coworkers. She stated that she still had a landline at home because she did not know how to use a cell phone.

54. Claimant recalled that, after she had been out for some time, she returned to work approximately February 4, 2020 and was informed by one of the Team Leads for B1 that there were a lot of changes to how things had to be done and that the work was not being done correctly.

55. When there was meeting, she asked about all the changes and then spoke to her lead about another worker. Because of that conversation, Claimant stated that her Team Lead sent her home and that she felt insulted because she did not believe she was spreading gossip. She asked for a meeting to discuss what was happening because she felt mentally stressed, especially with all her physical problems but no meeting took place. That is when she wrote the letter of June 16, 2020.

56. She stated that she had been to Harmony in Fort Collins for treatment related to the May 8, 2020 claim. She insisted that Claimant reported the incident to her supervisor. She complained that because of the all the emails and mailings, and her insistence that she had not done anything wrong, she fell unconscious in her bathroom on April 5, 2021. Her husband took her to Urgent Care.[3] They returned her to her family doctor who prescribed Alprazolam for panic attacks and Bupropion and Trazadone for her stress (depression). She was also interviewed by Social Services who recommended that she see a psychologist for therapy, which happened around June 10, 2021. Claimant stated that the process was that Dr. Unger had to make the referral, it had to be authorized and only then did the provider contact her for an appointment. Claimant stated that it was not until she had therapy and discussed her issues with her second prior attorney that they filled out the claim because initially she did not understand if it would be a claim for workers' compensation or for discrimination (EEOC-related).

57. Claimant testified about her perception of what happened when she was terminated by Contractor from the premises on March 4, 2021. She was advised that she was not terminated by Employer but could not return to Contractor's property. Claimant was confused because if she could not return to the premises, she did not know where she would be working and was not told where she would be working. She was provided with a copy of Contractor's HR Business Partner letter to Employer requesting her termination. She was also advised to await Employer's HR representative's decision.

58. She complained about Contractor's employees thinking that she had been terminated and that there was no confidentiality. She explained that it was not until 2023

[3] These records were not in evidence.

when she received her file from her prior lawyer that she understood everything that had happened, including the write-ups and the termination. She fell back to actions that happened in 2018 and 2019. She denied that she had "bad-mouth[ed]" anyone, especially her supervisor. Claimant complained that the Site Manager is the one that mismanaged the investigation, despite the manager's denial that it was not her responsibility to complete the investigation and that it would be conducted by Employer's HR personnel. Claimant also denied that she received any of the paperwork before. As found, this is not credible as each of the warnings was signed by Claimant and there were statements by Employer employees submitted by Claimant in evidence to support the warnings.

59. Claimant testified that she believed her termination was really related to her having so many work restrictions and her employer not being able to accommodate them, not the incident with the Contractor, not about the slander and gossiping, or the difficulties with her supervisors. She believed that she had not been able to work for the last two years because of all the pain she had suffered and the depression. She continued to be worried about all the medical bills related to her multiple surgeries.

60. Claimant specifically stated that she didn't "mind losing a job, every -- every second, every minute, every hour, people lose their job. It's about how I lost my job that's a (sic.) mentally, physically affected me."

61. As found, this ALJ determines that, while Claimant may be credible with regard to her personal perceptions, she is not credible with regard to the facts of her termination. As found, Claimant was terminated for good cause for failure to comply with company policy and for using Contractor's computer without authorization.

F. Conclusory Findings

62. As found, while Claimant made a claim for May 8, 2020, she likely did not understand the extent of her mental disability until she was referred by her primary care provider for psychological care. Claimant was terminated on March 31, 2021. Shortly thereafter, Claimant experienced significant depression and anxiety and was placed on antidepressant and antianxiety medications. Therefore, Claimant knew or should have known she had a potential claim for mental impairment closely following the March 31, 2021 termination date. As found, this ALJ has jurisdiction to determine if this claim is compensable and there is no statutory prohibition for failure to file the claim within two years of her alleged date of injury on May 8, 2020. Claimant filed her claim with Division of Workers' Compensation on February 21, 2023, within two years of March 31, 2021. Respondents failed to show that Claimant was precluded from bringing a claim pursuant to the statute of limitations.

63. As found, Claimant has failed to show that she suffered a psychological injury caused by harassment, or other mental stressors from the working environment. As found, Claimant failed to introduce necessary evidence from a mental health professional, either a physician or a psychologist, establishing that Claimant suffered a recognized disability arising from a psychologically traumatic event which occurred in the workplace. Because such evidence is necessary to establish a claim for mental distress arising out of a nonphysical or purely mental event or injury, Claimant failed to meet her

burden of demonstrating entitlement to benefits for her "mental-mental" claim. As found, Claimant's mental impairment, if she has any, is related to her termination of employment and her personal revisionist view of acts and facts which happened during her employment with Employer including interactions with co-workers and supervisors as well as normal disciplinary actions. The May 8, 2020 claim arose from a disciplinary action of her supervisor sending her home due to insubordination. Subsequent to this, Claimant acted in a manner that was in violation of company policies, including utilizing the Contractor's computer and another individual's "ID" and password. Employer terminated Claimant in good faith for good cause.

64. As found, it is clear from multiple employee statements that Claimant was belligerent towards her supervisors, she declined to perform assigned activities and did not get along with her co-workers. Further, the Site Manager's testimony was credible and persuasive that, over the contrary testimony from Claimant, Claimant was allowed to work within her medical restrictions and personal abilities. As found, Claimant violated both the Contractor's and the Employer's policies by accessing and using Contractor's computer with another employee's ID and password. As found, Claimant did not have permission to do so from Contractor. As found, Claimant was terminated in good faith by Employer for good cause due to violation of company policies.

65. Even if this claim was compensable, which it is not, Claimant would not be entitled to temporary disability benefits. First, because no provider established that Claimant was unable to work due to her mental impairment and Employer had accommodated all of Claimants work restrictions, which remained substantially the same prior to and after her termination from employment. Secondly, because Claimant was terminated for cause, since she had a hand in her own termination and any benefits she may have been entitled to would have been forfeit and terminated. Respondents have shown that Claimant was terminated for a cause unrelated to the alleged May 8, 2020 mental-mental injury.

66. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See Industrial Commission v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Jurisdiction

Section 8-43-103(2), C.R.S., provides that the right to workers' compensation is barred unless a formal claim is filed within two years of the injury, or three years if a reasonable excuse exists. The statute of limitations begins when the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). The statute of limitations is tolled, however, where the employer fails to report the injury to the Division as required by Section 8-43-101(1), C.R.S. See *City of Englewood v. Industrial Claim Appeals Office*, 954 P.2d 640 (Colo. App. 1998).

Section 8-43-103(1) provides that "any notice required to be filed by the injured employee 'shall be in writing and upon forms prescribed by the division for that purpose

and served upon the division." The Division's Workers' Compensation Rules of Procedure, 7 CCR 1101-3, Rule 5-1(D) and (E), refers to this notice and requires the claimant to file a WCC form (form WC15) to achieve compliance with this statutory direction." *Galagar* v. *E2 Optics, LLC*, W.C. No. 5-016-677-01 (March 6, 2018.)

As found, Claimant was not aware of the probable compensable character of her alleged injury, the nature of her alleged injury or the seriousness of her claimed injury until after she was terminated from her employment and she broke down, requiring medical care, medications and counselling pursuant to Dr. Unger and LPC Morgan. Claimant filed her claim with the Division on February 21, 2023, less than two years from her date of termination. Therefore, this ALJ has jurisdiction to address the issue of compensability in this matter.

C. Compensability of Mental-Mental Claim

Section 8-41-301(2) (a), C.R.S. states as follows:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim must have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

To receive benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence, that he or she has sustained a compensable injury proximately caused by his or her employment. Sec. 8–41–301(1)(c), C.R.S. (2023). Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant's alleged injury falls within the scope of "mental-mental" injuries, in which "mental impairment follows solely an emotional stimulus." *Oberle v. Indus. Claim Appeals Office,* 919 P.2d 918, 920 (Colo. App.1996). An injury that is "the product of purely an emotional stimulus that results in mental impairment," requires a "heightened standard of proof." *Davison v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004).* The legislature juxtaposed "recognized, permanent disability" with the requirement that a claimant provide "evidence supported by the testimony of a licensed physician or psychologist" to reduce the incidence of fraudulent claims. *Davison, supra*, at 1029. As noted by the supreme court in *Davison,* the legislature adopted this heightened burden "in mental impairment claims in order to help prevent frivolous or improper claims." *Kieckhafer v. Indus. Claim Appeals Office of State, 2012 COA 124, 284 P.3d 202 (Colo. App. 2012).*

Under the express terms of the statute, "the testimony of a licensed physician or psychologist" is required to establish a claim for mental impairment. Sec. 8–41–301(2)(a). The Colorado Supreme Court has interpreted this phrase broadly to include "the work product of a licensed physician or psychologist," which "may include letters, reports, affidavits, depositions, documents, and/or oral testimony." *Colo. Dep't of Labor & Employment v. Esser,* 30 P.3d 189, 196 (Colo.2001).

Expert testimony is necessary to prove that the event was psychologically traumatic, but the other elements can be proved by lay and/or expert evidence. *Davison, supra*, at 1033; see also *City of Loveland Police Dep't v. Indus. Claim Appeals Office,* 141 P.3d 943, 951 (Colo. App. 2006). In addition, an expert need not use the precise statutory language to opine on a claimant's condition. "What is required is the presentation of sufficient facts such that the ALJ can find there existed a psychologically traumatic event or events." *City of Loveland, supra*, at 951.

Whether a claimant has met his or her burden of establishing a compensable mental impairment is a question of fact for determination by the ALJ. *See Pub. Serv. v. Indus. Claim Appeals Office,* 68 P.3d 583, 585 (Colo.App.2003) ("The causes of a claimant's mental impairment and the commonality of those causes are questions of fact to be resolved by the ALJ.").

Sec. 8-41-301(2)(d), C.R.S. provides that, in addition to satisfying the heightened burden for establishing compensability of a mental impairment claim under section (2)(a), a claimant must also show that the mental impairment itself is "sufficient [either] to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment." *Kieckhafer v. Indus. Claim Appeals Office of State*, *supra,* at 207. Nothing in that language negates the requirement in subsection (2)(a) that, as a threshold for compensability, a claimant must prove a recognized, permanent psychological disability by evidence supported by a licensed physician or psychologist. *Kieckhafer v. Indus. Claim Appeals Office of State*, *supra,* at 207.

Claimant failed to introduce credible and persuasive evidence needed from a mental health professional—a physician or a psychologist—establishing that "claimant suffered a recognized disability arising from a psychologically traumatic event." Because such evidence was necessary to establish a claim for mental distress arising out of a nonphysical or purely mental event or injury, it is found that Claimant failed to meet her burden of demonstrating entitlement to benefits for her "mental-mental" claim for either May 8, 2020 or March 31, 2021.

Further, Claimant failed to identify any specific event or events that lead to her psychological breakdown other than the disciplinary actions taken by Employer and her supervisors, and ultimately her termination for good cause. The instances Claimant identified were not outside the usual experience of an employee nor did Claimant identify why these reprimands and disciplinary actions would evoke significant distress in a reasonable worker. Claimant failed to identify any particular event which would be considered outside of the normal course of her job. In fact, this ALJ finds more credible the Site Manager's testimony that Claimant was the instigator that cause the need for reprimands and discipline, including failure to follow instructions by supervisors, insubordination, slandering other coworkers, and encouraging other employees not to participate in particular job duties. As found, the Site Manager credibly and persuasively explained that Claimant acted in a manner that was in violation of the company policies. As found, Claimant was terminated in accordance with the company policies in good faith.

Lastly, Claimant did not understand the nature of her disability until after her March 31, 2021 termination, and LPC Morgan's records establish that Claimant sought care as

a consequence of the effect her termination had on her psychologically. The Act specifically precludes any claim being based on disciplinary actions or termination for good cause and in good faith. The good faith actions of Employer in this case are supported by the Site Manager's credible and persuasive testimony. Despite Claimant's continuous claims that Employer failed to accommodate her restrictions and that failure was the underlying reason for her termination, Claimant's testimony was not persuasive. The Site Manager credibly and persuasively testified that Claimant's restrictions and perceived limitations were being accommodated and that she had been provided with a very easy job, including accommodating her sitting requirements, even after her workers' compensation providers had released her to full duty without restrictions. Claimant failed to present persuasive evidence that she suffered any impairment from a psychologically traumatic event outside of her usual course of work that another, reasonable employee would have likewise suffered. Claimant's allegations of being harassed at work and wrongfully discharged was not credible and does not constitute the basis for a mental-mental injury for either a date of disability of May 8, 2020 or March 31, 2021.

D. Medical Benefits

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Here, Claimant failed to show a causal link between her need for medical care and a compensable claim. No medical benefits are due in this matter.

E. Temporary Disability and Termination in Good Faith

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, which she left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), C.R.S. (2023) and 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. (2023) requires the claimant to establish a causal connection between a work-related injury and

a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Here, Claimant's claim is not deemed compensable so the issue of TTD is moot. However, even if the claim was compensable, Claimant failed to show that she had any work restrictions or that there was a causal connection between her wage loss and her medical disability as she was responsible for her own termination from employment in good faith. As found, Claimant's wage loss was not caused by any medical impairment or disability related to her mental or psychological conditions, but to her termination for good cause.

F. Penalty for Late Reporting

Section 8-43-102(1), C.R.S., states that every employee who sustains an injury from an accident shall notify the employer, in writing, of the injury within four days of the injury. The time begins to run for filing a notice claiming compensation when the claimant, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). A "compensable" injury is one which is disabling, and entitles the claimant to compensation in the form of disability benefits. *City of Boulder v. Payne, supra*; *see also Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). To recognize the probable compensable character of an injury, the claimant must appreciate a causal relationship between the employment and the condition. *Taylor v. Summit County*, W.C. No. 4-897-476 (March 18, 2014).

Respondents argue that Claimant knew or should have known that she had an injury on May 8, 2020 and they would be entitled to a penalty of one day's compensation for every day between May 13, 2020 and February 21, 2023, when Claimant filed her formal claim with the Division. Here, the claim has been found to not be compensable. However, even if the claim were compensable, Claimant did not recognize the nature, seriousness and probable compensable character of her injury until after she was terminated on March 31, 2021 and had a breakdown which required medical attention from her PCP, Dr. Unger for treatment with medications and the subsequent referral and treatment with a counselor, LPC Morgan. Therefore, Respondents failed to show a penalty is appropriate in this matter.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant failed to show she had a compensable claim either on May 8, 2020 or March 31, 2021 for a mental-mental disability related to her employment pursuant to Sec. 8-41-301(2)(a), C.R.S. Claimant's claim is *denied* and *dismissed*.

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

DATED this 19th day of October, 2023.

DIGITAL SIGNATURE

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-570-001

STIPULATIONS

- Respondents agreed to file a general admission of liability in Colorado.
- The Claimant's Average Weekly Wage is $1,460.84.

ISSUES

- Did Claimant prove that the right hip surgery recommended by Dr. Adams reasonable, necessary and related to her work injury of July 31, 2022?

FINDINGS OF FACT

1. Claimant worked for the Employer driving a semi-truck and delivering goods to [Redacted, hereinafter WT]. She picks up the loads in Wyoming and delivers them to the WT[Redacted] in Denver, Colorado Springs, Pueblo and Cañon City.

2. On the date of the injury, July 31, 2022, Claimant was delivering to the WT[Redacted] in Woodland Park. When she arrived, she initially could not find anyone to unload the pallets. She finally found someone, a young lady, to unload the pallets. The WT[Redacted] employee used an electric pallet jack and was having difficulty because two of the pallets were stuck together due to the plastic wrap surrounding the merchandise. The pallet began to fall over on to the Claimant and she turned to brace herself against the wall of the trailer. The goods on the pallet hit the right side of her body.

3. Claimant went to Concentra for treatment on August 1, 2022. Dr. Johnson saw the Claimant at this visit. He took a history that Claimant was there "for R side of the body injury after a heavy palette fell on her R side of the her body while she was trying to help a co-worker. Pt states she has some neck pain on the right side. R hip and R low back pain". Exhibit B, p. 12. His assessment included injury of back, injury of right hip and strain of neck muscle. He deferred taking an x-ray since no tech was available to take the imaging.

4. Claimant returned to Concentra on August 3, 2022 for follow up. Dr. Johnson performed a physical examination. With respect to the right hip, he noted "Appearance normal. No deformity. No tenderness. Full range of motion. Strength normal". Exhibit B, p. 15.

5. Claimant continued to receive conservative care at Concentra, consistently showing full range of motion without any objective findings related to her right hip. Prior to November 9, 2022, the focus of treatment was involving her lower back and her neck. However, on November 9, 2022, Claimant presented with limited range of motion in her

right hip. Specifically, Dr. Johnson noted “Appearance is normal. Tenderness in iliac crest. Palpation normal. Limited range of motion in all planes. Forward flexion: AROM 60 degrees with pain. Extension: AROM 10 degrees with pain. Abduction: AROM 20 degrees with pain.” Dr. Johnson then ordered an MRI of the right hip”. Exhibit B, p.111.

6. On December 2, 2022, Dr. Johnson noted that the MRI of the right hip showed a labral tear. He referred the Claimant to Dr. Adams for a surgical evaluation of the right hip. Exhibit B, p. 124.

7. Dr. Adams saw Claimant on January 11, 2023. He reviewed the MRI and noted the following findings: “Chondral thinning and loss involving the acetabulum and femoral head. Mild reactive bone marrow edema. Degenerative tearing of the anterior and superior labrum. No evidence of AVN or femoral neck stress fracture”. Exhibit D, p.199. Dr. Adams recommended arthroscopic surgery to repair the torn labrum. Exhibit D, p. 203. Dr. Adams was sent a questionnaire from Claimant’s counsel on April 3, 2023. In response to one of the questions, he stated “[Redacted, hereinafter MN] injury resulted in a right hip labral tear, hip bursitis and chondromalacia”. However, Dr. Adams did not provide any causation analysis to support this opinion.

8. Claimant underwent an IME with Dr. Rook at the request of her attorney. The IME occurred on March 23, 2023. After taking a history, a review of the records and physical examination, Dr. Rook opined that hip injury and the need for hip surgery was related to Claimant’s work injury on July 31, 2022. Although Dr. Rook does a cursory causation analysis, he failed to address the lack of symptoms or treatment for the hip until November 9, 2022 when Dr. Johnson documented loss of range of motion and pain which was previously undocumented. While it is true that she did complain of hip pain on her first visit with Dr. Johnson, the pain apparently resolved shortly after the initial incident. Similarly, the Claimant is noted to have full range of motion in right hip until a marked decrease in range of motion on November 9, 2022.

9. Claimant also underwent an IME with Dr. Lesnak on April 3, 2023 at the request of Respondent’s counsel. Dr. Lesnak also reviewed the medical records, took a history and examined the Claimant. With respect to her right hip, Dr. Lesnak opined that “(b)ased on all the information that I currently have available to me and to a reasonable degree of medical probability, there is no medical evidence to support that the reported mechanism that involved MN[Redacted] during work hours on 07/31/2022, in any way caused or aggravated any reported MRI pathology involving her right hip whatsoever. Being struck on the lateral aspect of one’s buttock/proximal thigh is not a mechanism that would cause or aggravate any type of intraarticular right hip joint pathology, including any type of symptomatic labral pathology whatsoever. Therefore, there is absolutely no medical evidence to support that the requested right hip arthroscopy procedure by Dr. Adams would in any way appear to be related whatsoever to the reported occupational incident claim of 07/31/2022”. He also questioned whether the procedure recommended by Dr. Adams was reasonable and necessary. Exhibit F, p. 238.

CONCLUSIONS OF LAW

Medical Treatment

The Respondent is liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondent admits liability, it retains the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment to the same body part was proximately caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondent disputes the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not prove an injury objectively caused any structural anatomical change to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact a claimant experiences symptoms after an accident at work does not necessarily mean the employment aggravated or accelerated a preexisting condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Ultimately, the ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Claimant failed to prove the arthroscopic surgery to her right hip is reasonable, necessary and causally related to her industrial injury. I am persuaded by the opinions of Dr. Lesnak, whom I find to be credible, that the Claimant's request for surgery is not reasonable and necessary or related to the incident on July 31, 2022. I am not persuaded by the opinions of Dr. Adams and Dr. Rook to the contrary.

ORDER

It is therefore ordered that:

1. Claimant's request for arthroscopic surgery to repair Claimant's torn labrum in her right shoulder is denied and dismissed.

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

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

DATED: October 19, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-097-379-005

ISSUES

- Did Claimant prove by a preponderance of the evidence that lumbar epidural steroid injections are reasonably needed and causally related to his admitted injury?

- Although the evidence suggests Claimant may have paid for certain medications out of pocket, Claimant agreed that prescription reimbursement is not an issue for the hearing.

FINDINGS OF FACT

1. Claimant worked for Employer as a power plant engineer. He suffered admitted injuries on January 5, 2019 when he slipped and fell on a wet floor.

2. Claimant was transported to the Parkview Hospital emergency department. He reported landing on his right thoracic back and ribs and striking the back of his head on the floor. X-rays showed multiple rib fractures.

3. Claimant was referred to Dr. Terrence Lakin at the Southern Colorado Clinic. Medical records in the first several months after the accident document complaints of and treatment for thoracic spine pain, rib pain, and tinnitus. There is no mention of any injury-related lumbar pain.

4. Dr. Lakin put Claimant at MMI on March 12, 2019, with no impairment.

5. A thoracic MRI on May 2, 2019 showed compression fractures at T3, T4, and T9, and transverse process fractures at T5 and T6.

6. Claimant saw Dr. Velma Campbell for a DIME on July 10, 2019. Dr. Campbell diagnosed multiple rib fractures, a thoracic spine contusion with possible compression fractures (she did not have access to imaging of the thoracic spine during the DIME), an occipital contusion, and tinnitus possibly related to the accident. No injury-related symptoms or diagnoses relating to the lumbar spine were noted. Dr. Campbell determined Claimant was not MMI.

7. Claimant returned to Dr. Lakin on August 22, 2019 for additional treatment. He completed a pain diagram on which he drew a circle from the mid thoracic area to the upper lumbar area. Dr. Lakin opined the new lumbar complaints were "normal age-related aches/pains of normal life," and not related to the work accident.

8. On September 19, 2019, Dr. Jack Chapman performed a T9 kyphoplasty and thoracic spine injections.

9. Dr. Chapman administered two sets of bilateral medial branch blocks at T9-10 and T10-11 in December 2019. Claimant later underwent rhizotomies to his thoracic spine.

10. Dr. Chapman performed intra-articular facet injections at T10-11, T11-12, T12-L1, and L1-L2 on January 17, 2020. The record contains no persuasive causation analysis regarding the lumbar levels that were included in the injections.

11. Claimant followed up with Dr. Lakin on January 29, 2020. He reported some improvement in his thoracic pain, "but now pain in the lower back that radiates to the legs. . . . Not sure if this occurred at work or not." Dr. Lakin added diagnoses of lumbosacral pain and radiculopathy to Claimant's chart, but dated the "onset" of low back pain to January 29, 2020, more than a year after the industrial accident. Dr. Lakin opined Claimant was at MMI and needed a follow-up DIME.

12. Claimant had a lumbar MRI through his primary care provider on February 18, 2020. It showed lumbar spondylosis and bilateral foraminal stenosis at L5-S1 encroaching on the existing nerve roots without evidence of nerve root compression. There is no persuasive indication the findings were acute, and instead were most likely degenerative in nature.

13. Dr. William Watson performed the follow-up DIME on August 18, 2020. Dr. Watson determined Claimant suffered multiple rib fractures and a thoracic compression fracture from the work accident. Dr. Watson did not ascribe Claimant's complaints of low back pain to the industrial injury. He agreed Claimant was at MMI on January 29, 2020, and assigned a 7% whole person impairment for the thoracic spine.

14. Respondent filed a Final Admission of Liability based on Dr. Watson's DIME report, and Claimant requested a hearing to challenge the DIME regarding impairment.

15. Claimant saw Dr. Gary Zuehlsdorff for an IME at the request of his counsel on February 17, 2021. Dr. Zuehlsdorff disagreed with Dr. Watson's rating in several respects. However, he expressed no disagreement over the omission of a rating for the lumbar spine. Dr. Zuehlsdorff noted that Claimant's low back "has not ever been part of the claim. The patient notes that it did start a while after the injury, at least a couple of months. ***He understands and accepts that the lumbar spine is not part of the claim***." (Emphasis added).

16. Dr. Zuehlsdorff assigned a substantially higher rating than Dr. Watson for the thoracic spine, hearing loss/tinnitus, and psychiatric impairment. Consistent with Claimant's agreement that the low back was "not part of the claim," Dr. Zuehlsdorff provide no injury-related diagnosis or impairment for the lumbar spine.

17. A hearing was held on April 8, 2021 before Administrative Law Judge Richard Lamphere to consider Claimant's challenge to the DIME. Judge Lamphere found that Claimant overcame the DIME and adopted Dr. Zuehlsdorff's rating. Judge Lamphere also found Claimant proved entitlement to a general award of medical benefits after MMI. Judge Lamphere awarded no benefits specifically related to the lumbar spine.

18. Claimant was involved in a serious motor vehicle accident on September 22, 2021. He was stopped at a red light when he was struck by a [Redacted, hereinafter FX] truck traveling approximately 35 miles per hour. Claimant suffered injuries and was transported to the emergency department by ambulance. He reported pain in multiple areas, including his low back, and was diagnosed with acute on chronic lumbar pain.

19. Claimant returned to the emergency department on October 1, 2021 with complaints of "ongoing low back pain."

20. Claimant eventually settled a personal injury lawsuit related to the MVA for $375,000.

21. A second lumbar MRI was completed on June 3, 2022. The radiologist appreciated "age-related lumbar disc degeneration" at L4-5, "without significant interval progression" since the previous MRI in February 2020.

22. Dr. Tashof Bernton performed an IME for Respondent on June 28, 2023. Dr. Bernton opined Claimant's low back symptoms are not causally related to the January 2019 work accident.

23. Dr. Bernton's opinions and conclusions regarding Claimant's low back symptoms are credible and persuasive.

24. Shaileen Johnson, NP testified at hearing regarding the reasonable necessity of treatment for Claimant's low back. However, she offered no persuasive analysis or conclusions regarding causation.

25. Claimant failed to prove his low back symptoms are causally related to the January 5, 2019 admitted injury.

CONCLUSIONS OF LAW

Claimant's claim remains open for medical benefits after MMI pursuant to Judge Lamphere's Order. Respondent is liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of Claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, Respondent retains the right to question the reasonable necessity and causal relationship of any specific treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent treatment was caused by the industrial injury. *Fairchild v. GCR Tire Center*, W.C. No. 4-632-507 (February 2, 2006). Similarly, payment of medical benefits related to a body part or condition is not in itself an admission of liability, and the respondents may still dispute causation even if they have paid for treatment. *Ashburn v. La Plata School District 9R*, W.C. No. 3-062-779 (May 4, 2007). Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical

benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The fact that Claimant was not awarded PPD benefits for a lumbar spine rating does not preclude him from trying to establish a causal relationship in the context of a request for medical benefits after MMI. *Cf. Yeutter v. CBW Automation, Inc.*, W.C. No. 4-895-940-03 (February 26, 2018). But Claimant failed to carry his burden of proof here. By Claimant's own admission, his low back symptoms did not start until many months after the admitted injury. The imaging studies show only degenerative conditions, with no acute pathology that could reasonably be ascribed to the work accident. Claimant has been thoroughly evaluated by multiple Level II accredited physicians, none of whom have attributed his low back complaints to the industrial injury. Nor did Judge Lamphere note any injury-related low back issues in his detailed Findings of Fact, Conclusions of Law, and Order. The persuasive evidence presented at hearing fails to prove that Claimant's low back symptoms and associated limitations were proximately caused by the admitted work injury.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits related to his low back is denied and dismissed.

2. All issues pertaining to Claimant's general award of medical benefits after MMI not decided herein are reserved for future determination.

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

DATED: October 19, 2023

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

ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome the maximum medical improvement (MMI) determination of Dr. Michael Maher.

II. If Claimant is found to be at MMI, whether Respondents established, by clear and convincing evidence, that Dr. Maher erred in assigning 15% whole person impairment for mental health disorders.

III. If Claimant is found to be at MMI, whether Respondents established, by a preponderance of the evidence, that Dr. Maher erred in assigning a 30% scheduled impairment rating for Claimant's left knee condition.

IV. If Claimant is determined to have reached MMI, whether she established, by a preponderance of the evidence, that she is entitled to maintenance care for the injuries associated with her July 27, 2021 work-related trip and fall.

V. If is found that Claimant is not at MMI, whether she has established, by a preponderance of the evidence, that she is entitled to Temporary Partial Disability (TPD) benefits beginning May 26, 2022 through July 23, 2022, and Temporary Total Disability (TTD) benefits beginning July 24, 2022 and ongoing.

VI. Whether Claimant established, by a preponderance of the evidence, that she is entitled to disfigurement benefits and if so, the amount of such award.

Because the undersigned ALJ concludes that Claimant is not at MMI for all conditions related to her July 27, 2021 industrial injury, this order does not address issues II, III, and IV outlined above.

FINDINGS OF FACT

Based upon the evidence presented, including the testimony of Dr. Fall, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted injury to her left knee when she tripped and fell while training a new employee for Employer on July 27, 2021. (RHE C). Claimant received treatment for her left knee injury from Concentra Medical Centers (Concentra). (RHE K, 77-187). Her care was overseen primarily by Nurse Practitioner (NP) Brendan Madrid, who ultimately referred her to Dr. David Walden. For an orthopedic evaluation. *Id.* at 89.

2. An MRI of the left knee was obtained on September 22, 2021 to help determine the extent of Claimant's injuries and the source of her pain complaints. (RHE M, pp. 221-23). The MRI revealed multiple findings, including complex tearing of the lateral meniscus, a bony contusion injury to the lateral tibial plateau and a high-grade injury to the fibular collateral component of the lateral collateral ligament (LCL) complex. Joint effusion was also noted on the radiologist's report. *Id.* at 222.

3. Dr. Walden recommended continued conservative care after reviewing the MRI and in conjunction with his examination and discussion with Claimant. (RHE L, p. 193). Although Dr. Walden agreed the MRI showing the meniscal tear was consistent with her pain complaints, he wanted to exhaust conservative treatment methods first. *Id.* On October 28, 2021, Claimant returned to Dr. Walden. *Id.* at 198. She reported no relief from an intraarticular injection at her last visit along with failure to improve with physical therapy (PT). Indeed, she discontinued PT due to severe pain in her knee when performing squatting motions. *Id.* Dr. Walden recommended arthroscopic surgery to address her condition. *Id.*

4. Surgery was performed on November 17, 2021. (RHE L, p. 212). Dr. Walden performed three procedures directed to the left knee: an arthroscopic partial lateral meniscectomy, an arthroscopic chondroplasty of the femoral trochlea and lateral tibial plateau, and an excision of synovitis. *Id.*

5. Claimant continued her post-operative care through Concentra. (RHE K, pp. 77-179). Claimant was evaluated by Dr. Leah Johansen on January 26, 2022. (RHE K, p. 152). Dr. Johansen imposed physical restrictions on Claimant's ability to work including no squatting, no kneeling, and lifting no more than 30 pounds. *Id.* at 155-56. These restrictions would remain in place until Claimant saw Dr. Johansen for a final visit on April 23, 2022. (RHE K, pp. 174-79). During this appointment, Dr. Johansen opined that Claimant was at MMI. *Id.* at 174, 175. Dr. Johansen raised Claimant's lifting capacity to 40 pounds, but left the restrictions of no kneeling and no squatting unchanged. *Id.* at 174. She also indicated that Claimant would have "permanent restrictions moving forward." *Id.* at 175.

6. Following her appointment with Dr. Johansen, Claimant was seen by Dr. Daniel Peterson on May 25, 2022. (RHE K, p. 181). The sole reason for the visit was to complete an impairment rating. *Id.* After reviewing Claimant's restrictions and Functional Capacity Evaluation report, Dr. Peterson assigned a scheduled impairment rating of 30% (22% for range of motion loss, and an additional 10% for ratings under Table 40 of the AMA Guides: 5% for #2 for the disorder of the meniscus, and 5% for #5 for "arthritis due to any cause….") *Id.* at 186. He also released Claimant to full duty work without restrictions, and opined that Claimant required no maintenance care.

7. Claimant requested a Division Independent Medical Examination (DIME) after Respondents filed their Final Admission of Liability (FAL) on June 28, 2022,

pursuant to Dr. Peterson's report.[1] (RHE C, p. 9). Dr. Michael Maher was selected to perform the examination and did so per his February 6, 2023 report. (CHE 10).[2] The body parts/conditions checked for Dr. Maher to examine were both Claimant's knees and her mental health. *Id.* at 192.

8. Claimant has a history of major depression.[3] (CHE 11). According to Claimant's testimony, she has been treated for depression by Dr. John Hardy for a number of years. (See also, CHE 11). Her psychiatric treatment has included the use of a number of different prescriptions for mood stabilization. *Id.*

9. Claimant contends that her workers' compensation injury precipitated a worsening of her depression and that her authorized providers ignored her repeated complaints that she was deteriorating emotionally. Indeed, when asked if she told her providers about her mental health decline since the work injury, Claimant testified, "Yes. Like, every time I went in there. They asked me how I'm doing. I'm like, 'Well, my mental health isn't good,' but they would never say anything else." (Tr., 41:9-14). She further testified she expressed all of this to Dr. Maher during his examination of her. (Tr., 41:19-24).

10. Careful review of Dr. Hardy's records indicate that four days prior to her work-related trip and fall, Claimant saw Dr. Hardy. She was taking her medications and reported that "somedays she 'over thinks" things and that can make her feel a bit depressed but no real plummets of her mood." (CHE 11, p. 241). She was scheduled for a follow-up visit in 6 months. *Id*. at p. 242.

11. Claimant returned for her follow-up visit on December 21, 2021. (CHE 11, p. 243). During this visit she reported significant personal stressors including the fact that her brother-in-law (BIL) died of COVID before Thanksgiving and that her mother had been hospitalized with COVID the week prior to her visit but had since been released and was home with her. *Id*. at p. 243. Claimant also reported that she had injured her knee and had surgery as part of the claim at issue. Claimant was drinking alcohol compulsively and was unmotivated. *Id.* She was not involved in therapy and rated her mood as a 4/10. *Id.* Medication management suggestions were made as was the recommendation to secure a therapist. *Id.* No specific cause for Claimant's mental/emotional deterioration was documented.

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[1] As part of their June 28, 2022 FAL, Respondents admitted to TPD benefits from August 2, 2021, through November 14, 2021; TTD benefits from November 15, 2021, through November 30, 2021; TPD benefits from December 1, 2021, through May 24, 2022; and permanent partial disability (PPD) benefits pursuant to the 30% scheduled impairment rating. (RHE C, p. 9).

[2] There are two versions of Dr. Maher's DIME report contained at CHE 10. There are subtle differences between the reports and the copy beginning at page 205 appears more complete than the copy beginning at page 192. Accordingly, citations to the DIME report include references to the DIME report contained at pages 205-215 of CHE 10. The second report was generated because Dr. Maher did not include a provisional mental health rating in his initial report, thus prompting the issuance of his addendum report, though not clearly marked as such. *See* CHE 10, p. 212 ¶ H (stating he conducted the mental impairment rating worksheet in order to "satisfy the requests of the DIME")

[3] Just prior to her July 27, 2021 work injury, Claimant's ICD 10 diagnosis was documented as "Major depressive disorder, recurrent, mild." (CHE 11, p 242).

12. Claimant was re-evaluated approximately one month later on January 25, 2022. During this encounter, Claimant reported feeling "[a] lot better". (CHE 11, p. 245). She was no longer at "[r]ock bottom", noting that she was able to talk things out with herself and this had helped. *Id.* No mention of Claimant's work-related injury is referenced in Dr. Hardy's note from this date of visit.

13. On March 31, 2022, Claimant returned to Dr. Hardy's office for a reassessment. She was noted to be smiling during this appointment and reported that her mood was, "OK, but she lack[ed] motivation." (CHE 11, p. 247). The only mention of Claimant's work-related injury in the note from this visit is documented as: "She is waiting for final rating from workman's comp on her knee so she can get settlement and then resume work." *Id.*

14. Claimant saw Dr. Hardy in follow-up on June 20, 2022. (CHE 11, p. 249). Dr. Hardy noted that Claimant was back to work but was "still waiting for final workman's comp." *Id*. Claimant reported that she felt "unstable" emotionally and that she was "easily triggered and quick to tearfulness" although no cause for her increased emotionality was cited. *Id.* Additional medication adjustments were suggested to improve Claimant's mood. *Id*. at p. 250

15. On August 16, 2022, Dr. Hardy noted that Claimant had tested positive for COVID and that she had stopped her Wellbutrin which made no difference in her mood, which she described as "pretty good". (CHE 11, p. 251).

16. On November 22, 2022, Dr. Hardy noted that Claimant "has workman's comp for her left knee" and that she had to "decide by Monday if she will quit or return to [Redacted, hereinafter OG]." (CHE 11, p. 253). It was also noted that Claimant was "ambivalent" and was "mostly a shut in [because] she finds people upsetting." *Id*. Again, no cause was cited for Claimant's emotional state.

17. On February 7, 2023, Dr. Hardy noted that Claimant was no longer working for Employer and had decided to take some time off. (CHE 11, p. 256). Claimant reported "[f]eeling much better because 'I am not expecting myself to be something that I am not.'" *Id.*

18. During a follow-up appointment with Dr. Hardy on May 3, 2023, Claimant reported that she was "doing well" and that her mood was "good." (CHE 11, p. 259). No mention was made regarding her knee or her current employment. *Id.*

19. Dr. Maher agreed with Dr. Peterson's May 25, 2022 MMI date regarding Claimant's left knee injury. (CHE 10, p. 213). While he agreed with the date of MMI for the left knee, Dr. Maher indicated that Claimant was not at MMI for the psychological aspect of the claim. *Id.* Based upon a careful review of the DIME report, this ALJ finds that Dr. Maher elected not to place Claimant at psychological MMI because Claimant's prior psychological records had not been supplied to him. *Id.* For similar reasons, Dr. Maher noted that he could not give an impairment rating for any claim related psychological condition. *Id.* Indeed, Dr. Maher indicated: "I was asked to evaluate the

patient for a potential impairment rating for her psychological status. As stated above in section A, I do not have any psychiatric or psychological records to review. The patient was seeing a psychiatrist before, during and after the injury and continues to do so." *Id*. at ¶ H, p. 212. Because he did not think Claimant was at psychological MMI (because he did not have records to review), Dr. Maher indicated that he would not be "giving [Claimant] a mental impairment' at the time of the DIME. *Id*. at ¶¶ H, K, pp. 212-213). Instead, Dr. Maher "strongly" recommended that Claimant be evaluated by a psychiatrist through the Workers' Compensation system to evaluate her for "exacerbation of pre-existing conditions as a result of this injury." *Id*. at ¶ K, p. 212.

20. While he elected not to place Claimant at MMI, Dr. Maher asked Claimant about her psychological condition. (CHE 10, p. 206). Claimant reported to Dr. Maher that her providers at Concentra ignored her reports of worsening mental health. She specifically reported that her social anxiety had "greatly worsened" since the work injury. *Id.* In fact, she felt her mental health was a larger impediment to returning to work than her knee condition. *Id.* Based upon Claimant's subjective history and to "satisfy" the DIME requirements, Dr. Maher provided a provisional mental health impairment rating equal to 39% whole person, which he subsequently reduced to a 15% whole person impairment. Id. at ¶ H, p.212. While he provided a provision psychological rating, Dr. Maher made it clear that he was not assigning impairment because he needed Claimant's mental health records. *Id.*

21. As noted, Dr. Maher found Claimant to be at MMI for her left knee condition. He assigned a 30% scheduled extremity rating for the knee based on range of motion loss, along with Table 40 diagnoses #2 and #5, as also provided by Peterson, though to a different extent. (CHE 10, ¶ G, pp. 211-212; ¶ K, p. 213). Dr. Maher provided 8% for range of motion loss after normalization, along with 10% per Table 40 #2 and 15% for Table 40 #5. *Id.* at 213, 216. Dr. Maher also felt Claimant should have permanent work restrictions in line with those recommended by the FCE. *Id.* at 214.

22. Dr. Fall performed an independent medical examination (IME) at Respondents request on July 19, 2023. (RHE J). As part of her IME, Dr. Fall obtained a medical history from Claimant. She also reviewed Claimant's medical records and completed a physical examination. *Id*. Following her examination and records review, Dr. Fall made the following pertinent observations:

- Dr. Peterson assigned 22% impairment for range of motion of the left knee along with an additional 10% scheduled impairment per Table 40, for a total left knee extremity impairment rating for 30%. (RHE J, p. 72). Because the surgical report from Dr. Walden indicated that Claimant underwent a "*partial* lateral meniscectomy", Dr. Fall opined that utilizing 10% per Table 40 for meniscectomy was not appropriate because that would indicate that the entire meniscus was resected, which did not occur during Claimant's November 17, 2021 surgery. *Id.*

- Dr. Maher assigned 8% scheduled impairment for left knee range of motion loss after using the right knee for normalization. Consistent

with Dr. Peterson, Dr. Maher assigned 10% scheduled impairment from Table 40 for the meniscus surgery. Finally, Dr. Maher assigned 15% scheduled impairment for arthritis due to any cause including chondromalacia. (RHE J, p. 73). According to Dr. Fall, Dr. Maher made the same error that Dr. Peterson did in assigning 10% impairment from Table 40, because Claimant did not have a complete meniscectomy as would be required to assign the full 10% from Table 40.[4] Dr. Maher erred further when he added the 10% impairment from Table 40 to the 15% impairment for arthritis due to any cause for 25% scheduled impairment. Per Dr. Fall, Dr. Maher should have combined the 10% and the 15% pursuant to the Combined Values Table in the AMA Guidelines which would yield 24% lower extremity impairment not 25%. *Id.* Dr. Fall observed that Dr. Maher would later correct this addition error in a subsequent worksheet he completed as part of the second DIME report referenced above. *Id*. at p. 74

- Claimant has been involved in psychiatric treatment for an extended period of time (probably since a teenager) and has taken medication for anxiety and depression over the years. (RHE J, p. 70). According to Dr. Fall, Dr. Maher erred in concluding that Claimant's psychological symptoms were causally related to her July 27, 2021 trip and fall. Indeed, Dr. Fall noted: "There had been no diagnosis of a mental condition or an impairment as related to the work-related injury." Moreover, "[Claimant] did not request to be evaluated and treated for a work-related mental issue." *Id.* at p. 73. Accordingly, Dr. Fall opined that Dr. Maher erred in refusing to place Claimant at psychiatric MMI, even if Claimant's non work-related psychiatric condition/symptoms were exacerbated (temporarily worsened) by the July 27, 2021 trip and fall. Indeed, Dr. Fall suggested that not having Dr. Hardy's records were immaterial to the issue of whether Claimant reached MMI. *Id.*

- Dr. Maher erred further when he stated that Claimant was not at psychological MMI but failed to indicate what treatment would be necessary for Claimant to attain MMI. (RHE J, p. 74).

- Dr. Maher's psychological impairment worksheet was completed without a DSM diagnosis and included impairment based upon physical rather than mental health deficits leading directly to a rating that was grossly out of proportion to the medical record documentation. (RHE J, p. 74). While she acknowledged that Claimant was subjected to "bullying" issues at work, Dr. Fall opined that there was no record evidence that this, or other mental health issues delayed Claimant's

[4] Dr. Fall would amend this opinion during her testimony, noting that Dr. Peterson correctly assigned 5% impairment per Table 40 for the partial meniscectomy and another 5% for aggravation of underlying arthritis for a total of 10% rather than assigning 10% for the partial meniscectomy alone. (Tr., 31:19-25-32:1-4) (See also, RHE K, p. 186).

recovery or interfered with her function. *Id.* Instead, Dr. Fall characterized this "bullying" as a "worksite stress issue." *Id.*

23. Dr. Fall summarized her opinions in the "Discussion" section of her report. (RHE J, pp. 75-76). In summarizing her opinions regarding Dr. Maher's conclusion that Claimant was not at psychological MMI, Dr. Fall wrote:

> [Claimant] has long standing psychiatric issues. There is no expectation that addressing psychiatric issues through Workers' Compensation would lead to any improvement in her function. Besides the prior errors I noted in [Dr. Maher's] report, it is not appropriate to set out different areas when assessing MMI status. In other words, when one is at MMI, they are either at MMI for the date of injury or not at MMI for the date of injury. I disagree with separating out a psychological part because there was no psychological part such as a mental health diagnosis related to the work-related injury. [Dr. Maher] did not provide any treatment she required for the psychological/psychiatric issues to get [Claimant] to MMI. I disagree with his causation analysis. Furthermore, [Dr. Maher's] own report is inconsistent in that he used the word exacerbation but recommended treatment and discussed permanent impairment. He also made an error in his mental impairment by assigning impairment to areas that were affected by her musculoskeletal condition and not a mental health condition.

24. According to Dr. Fall, there are many errors in Dr. Maher's DIME report and prompting her to adopt Dr. Peterson's report of MMI/Impairment as more accurate. (RHE J, p. 76).

25. Dr. Fall testified as board certified, Level II accredited expert in physical medicine and rehabilitation (PM&R). (Tr., 16:1-16). Dr. Fall testified consistently with her report. She reiterated that Dr. Maher erred when he did not "address how the psychological issues were caused by the work-related injury or account for the lack of documentation in the medical records." (Tr., 18:1-5). While she acknowledged that Dr. Maher did not have Claimant's prior psychiatric records when he concluded that Claimant was not at MMI, Dr. Fall testified that there was no work-related psychiatric diagnosis in the medical records and Dr. Maher did not recommend any treatment for Claimant to reach MMI. (Tr., 18:5-6; 20:6-16). Rather, he simply opined that Claimant was not at MMI, which conclusion, Dr. Fall testified, was erroneous because a finding of "not at MMI . . . means that . . . the provider, is indicating that there is some additional active treatment that needs to occur . . . to achieve maximum medical improvement", which Dr. Maher failed to outline in his DIME report. (Tr., 18:7-11). She also recapped her opinion that Claimant's psychological condition was not work-related because there was no temporal relationship between the manifestation of psychiatric symptoms and Claimant's industrial injury and no such connection was noted by Dr. Maher in his DIME

report. (Tr., 22:17-25-23:1-20). Finally, Dr. Fall restated her belief that Dr. Maher erred in completing the psychiatric impairment worksheet because, he assigned very high mental impairment scores for limitations caused by Claimant's physical condition rather than her mental disorder. (Tr., 19:3-16).

26. Dr. Fall also repeated her opinion that Dr. Maher improperly used the full 10% impairment available under Table 40 for the partial meniscectomy, which she testified is reserved for complete meniscus resections. (Tr., 18:15-24; 33:2-15). Nonetheless, Dr. Fall agreed on cross-examination that Table 40 of the AMA Guides provides for a range of impairment from zero to ten percent for one meniscus. (Tr., 29:2-6). While Table 40 provides for a 0-10% range, Dr. Fall testified that 10% impairment would be reserved for a "full meniscectomy of one meniscus." (Tr., 29:8-9).

27. Claimant is seeking a disfigurement award for the surgical scarring associated with her left knee meniscus repair surgery. Visual Inspection of the left knee reveals two approximately ⅜ inch in diameter, semi-circular arthroscopic surgical scars, one on each side of the left patella. These scars are smooth and pink in color, when compared pigment and contour of the surrounding skin.

CONCLUSIONS OF LAW

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

Generally

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

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

Overcoming Dr. Maher's DIME Regarding MMI

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo.App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (October 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998). Careful review of the written DIME report of Dr. Maher and the reports/opinions of Drs. Peterson and Fall persuades the ALJ that Claimant is not at MMI for all conditions Dr. Maher has concluded are related to Claimant's July 27, 2021 industrial injury. Here, the evidence supports a conclusion that Dr. Maher believes that Claimant's pre-existing depressive and anxiety disorders were exacerbated by her July 27, 2021 industrial injury and subsequent recovery. Nonetheless, he did not have Claimant's prior psychiatric records upon which to verify her reported history and confirm a date of MMI or degree of impairment. Without such records, the ALJ concludes that Dr. Maher could not determine whether Claimant would need additional psychiatric treatment to achieve MMI or if at MMI, her degree of permanent impairment. Consequently, the ALJ concludes that the "not at MMI" determination is consistent with the overall purpose of the DIME process in permitting an injured worker to seek a second opinion based upon a complete review of the medical records regarding all physical and mental conditions felt to be related to the work injury, either directly or as a compensable consequence thereof.

E. After considering the totality of the evidence presented, including Dr. Fall's various claims or error, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that Dr. Maher's determination regarding MMI is highly probably incorrect. As determined above, the persuasive medical evidence establishes that Dr. Maher believes that Claimant likely suffered a compensable aggravation of her pre-existing depressive and anxiety disorders. While Dr. Fall maintains contrary opinions and "disagrees" with Dr. Maher's conclusion regarding causality, a professional difference of opinion between medical experts does not rise to the level of clear and convincing evidence that is required to overcome Dr. Maher's

opinions concerning causality and MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set the MMI determination aside. Until such time that Dr. Maher has reviewed Claimant's prior psychiatric records the ALJ agrees it would be inappropriate to place her at MMI and/or rate her mental impairment. In this case, the ALJ concludes, as was demonstrated by Dr. Maher's attempt to rate Claimant's impairment without reviewing Dr. Hardy's records to satisfy the DIME requirement, that placing Claimant at MMI with/without impairment is likely to result in a highly probably incorrect conclusion. Based upon the evidence presented, the ALJ concludes that Claimant's is not at psychological MMI. Because Claimant is not at MMI for all compensable conditions (including the exacerbation of her pre-existing mental health disorders) related to her industrial injury, this order does not address whether Respondents established, by a preponderance of the evidence, that Dr. Maher erred in assigning a 30% scheduled impairment rating for Claimant's left knee condition.

F. Claimant has the burden to prove by a preponderance of the evidence that she is entitled to further TPD and TTD benefits. C.R.S. § 8-42-101. When the attending physician provides a written release to work, unless the record contains conflicting opinions from attending physicians regarding the release to work, an ALJ is not at liberty to disregard the attending physician's opinion that a claimant is released to return to employment. *See Burns v. Robinson Dairy, Inc.*, 911 P.2d 661, 662 (Colo. App. 1995).

G. Claimant has failed to prove that she is entitled to further TPD benefits from May 25, 2022, through July 23, 2022, and TTD benefits from July 24, 2022, through ongoing. Here, the evidence presented supports a conclusion that Dr. Peterson placed the claimant at MMI with a release to *full-duty* employment on May 25, 2022. There is no dispute that Dr. Peterson is the attending physician. The claimant relies on the functional capacity evaluation conducted by Elizabeth Smith, DPT to argue that she needed work restrictions contrary to Dr. Peterson's assessment. Dr. Smith placed the claimant in the medium work category. As Dr. Peterson noted in his MMI report and Dr. Fall testified, the medium work category is acceptable for the type of restaurant work performed by the claimant. The claimant did not present any evidence into the record showing conflicting opinions from attending physicians regarding the claimant's release to work. In the absence of any such evidence, the claimant's testimony regarding her ability to perform her job is irrelevant and should be disregarded. *See Burns*, 911 P.2d at 662-663. Because the claimant's release to work by Dr. Peterson is controlling, the Claimant has failed to establish that she is entitled to further TPD or TTD benefits.

H. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As noted above, the ALJ conducted a disfigurement viewing in this case. As part of that viewing, the ALJ observed two smooth and pink in color arthroscopic scars, one on the front of the left lower extremity in close proximity to the knee and the other located on the lateral aspect of the left lower extremity in close proximity to the knee joint. The ALJ also observed

that Claimant ambulates with a perceptive limp favoring the left leg. Based upon the in-court observations, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles her to additional compensation. Section 8-42-108 (1), C.R.S. Accordingly, the ALJ orders that Insurer pay Claimant $1,500.00 for the above-described disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Respondents request to set aside the MMI determination of Dr. Maher is denied and dismissed. Dr. Hardy's medical records shall be directed to Dr. Maher and Claimant shall be scheduled for a follow-up DIME with Dr. Maher to further determine MMI and Claimant's degree of permanent physical and mental impairment.

2. Claimant's request for additional TPD and TTD benefits is denied and dismissed.

3. Insurer shall pay Claimant $1,500.00 for her serious permanent disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

DATED: October 19, 2023

/s/ Richard M. Lamphere

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-228-169-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right shoulder arising out of and in the course of his employment on December 31, 2022.

2. Whether Claimant proved that the treatment he has received for his right shoulder since the date of injury is reasonably necessary to cure and relieve him of the effects of the December 31, 2022 injury.

3. What amount most fairly represents Claimant's average weekly wage for purposes of his December 31, 2022 injury.

4. Whether Claimant sustained a wage loss resulting in temporary disability arising from his December 31, 2022 injury.

FINDINGS OF FACT

1. Claimant began working as a security guard for Respondent-Employer in August of 2022. He worked at St. Joseph's Hospital to ensure the safety of medical doctors, nurses, and staff. On December 31, 2022, as a part of his security duties, Claimant physically assisted in restraining a violent visitor to secure him for arrest, along with two other police officers and security guards.

2. Claimant later testified that he "plowed so much pressure on [the detainee's] . . . back to try and get his arm bent and everything. And once I got this part bent, that's when I grabbed it and then we could get the cuffs on him. It was like – I mean, it was tough." Claimant testified that he was using both his arms to pull the individual off the police officers; his right arm was pushing forward and down.

3. After the altercation, Claimant did not have immediate pain, so he finished his shift and then went home. Later that evening, Claimant presented to the emergency room at Lutheran Hospital complaining of a work injury to his right shoulder. He reported shoulder pain that was "constant, dull/aching, nonradiating, moderate severity, worse with palpation and improved with rest." An x-ray performed that evening was "not significant for any acute findings." Given the pain complaints, it was noted that an MRI could be considered, but there was no emergent reason for it to be performed at the ER.

4. Claimant had a significant prior history of right shoulder symptoms and treatment.

5. On June 2, 2021, Claimant saw Barbara Wright, PA-C, at Panorama Orthopedics and Spine Center. Claimant complained that he had two-to-three years' history of right shoulder pain after trying to start his lawnmower. He rated the pain at 7 out of 10. He had tried over-the-counter medications, physical therapy exercises, and anti-inflammatory medications with no improvement in symptoms. PA Wright recommended an MRI to evaluate the condition of Claimant's rotator cuff.

6. In the Fall of 2022, Claimant noticed that his arms were tired while he was doing photography and driving. He was having more problems with his left shoulder, but was also having some problems with his right arm in the biceps and triceps areas.

7. He went to Rocky Mountain Primary Care for these issues, who noted that that Claimant had chronic left shoulder pain and "pain in right upper arm," primarily in the "R proximal bicep tendon." The physician's assistant referred Claimant to physical therapy for "chronic left shoulder pain and R upper arm pain." Claimant attended PT to improve his strength back in both arms.

8. On November 7, 2022, at Claimant's first PT appointment, Claimant documented upper arm pain ("muscles right") with the image of the body showing pain in the middle of the right upper arm.

9. On December 19, 2022, the physical therapist documented that "[Claimant] reports this R shoulder is feeling pretty good today." They noted that Claimant "[t]olerated treatment well. Noted no pain with PROM or exercises but some fatigue." However, they also recommended an MRI because testing revealed potential rotator cuff pathology, labral pathology, and impingement. Claimant's health insurance did not authorize any MRIs in the absence of more physical therapy. However, X-rays performed on December 22, 2023, on both Claimant's left and right shoulder showed on the right no lesions, no advanced degenerative changes, and a "normal shoulder radiograph."

10. On December 29, 2022, two days before the injury, Claimant reported significant right shoulder pain with any movement and at rest. He reported experiencing a sharp burst of pain with simple activities such as reaching to shake someone's hand or lifting a plate off the table. He reported being unable to bear weight with the right arm. The right shoulder physical examination performed on that date showed decreased range of motion, pain with flexion/abduction and external range of motion, and positive provocative testing. Claimant had decreased strength scores for flexion, abduction, internal rotation, and external rotation. Claimant testified that prior to the alleged work injury, he discussed a potential right rotator cuff surgery with his physical therapist.

11. Claimant completed a questionnaire that same day in which he reported severe difficulty opening a jar and doing household chores and moderate difficulty

washing his back, sleeping, and carrying a shopping bag. He reported moderate tingling. He also noted he was unable to perform recreational activities that used the arm and that he was moderately limited in his work or other daily activities.

12. Claimant's physical therapist documented the following on December 29, 2022: limited range of motion, limited strength (with pain on flexion, abduction, and external rotation) and positive impingement, labrum, and rotator cuff provocative testing.

13. Following Claimant's December 31, 2022 injury and hospitalization, Claimant first presented to Injury Care Associates on January 3, 2023, where he was evaluated by PA Sophie Schmitz. He reported moderate to severe pain in his shoulder and severe difficulty functioning in his activities of daily living. He reported he had a preexisting "history of bilateral shoulder weakness over the past couple of months when lifting his photography equipment, therefore patient has started physical therapy roughly 3 weeks ago through his private care insurance for strengthening of bilateral upper extremities." PA Schmitz felt that the objective findings were consistent with a work-related injury. She also gave Claimant work restrictions, a prescription for PT, more lidocaine patches, and referred him for an MRI of his right shoulder.

14. Claimant returned to Injury Care Associates the next day, January 4, 2023, where he was attended by Dr. Eric Tentori. Claimant reported that he woke up at 1:00 A.M. from "major pain" and was now experiencing pain of 10 out of 10 in his right shoulder. He reported that he was unable to perform a number of activities of daily living. Dr. Tentori noted in his report, "Patient denies any previous injuries or surgeries to the right upper extremity," and that Claimant had "a history of bilateral shoulder weakness over the past couple of months when lifting his photography equipment, therefore patient started physical therapy roughly 3 weeks ago through his private care insurance for strengthening of bilateral upper extremities." Dr. Tentori's final assessment was "Acute pain of right shoulder," and he prescribed Claimant Norco and further increased his restrictions.

15. Claimant underwent an MRI on January 13, 2023, which showed two tendinous tears and a supraspinatus rupture. On January 20, 2023, Dr. Tentori noted that he reviewed the results with orthopedist Dr. Lucas Schnell. Per Dr. Tentori's note, Dr. Schnell's assessment was as follows: "After review of this MRI report I would have to agree that this appears more chronic. The retraction and moderate atrophy of the supraspinatus tear leads me to believe this. It is hard to know if partial tears are acute or chronic but there is no mention of edema of the muscles to suggest an acute tear." Dr. Tentori added that the MRI findings "do not appear to be acute and makes reference to moderate atrophy. . . . I believe it to be more medically probable that the MRI findings . . . predate this work-related events/injury."

16. On January 16, 2023, Dr. Tentori documented that he received the physical therapy records from prior to the injury and that he reviewed them with Claimant.

Per Dr. Tentori, "patient reports that prior to this work-related injury on 12/31/22 he was only experiencing minimal pain of the right shoulder but due to this injury his pain has increased and caused functional limitations."

17. Claimant returned to Dr. Tentori on January 19, 2023. Claimant reported that the work injury had "escalated his shoulder symptoms significantly." Dr. Tentori opined that Claimant had suffered acute pain of the right shoulder and strain of the right shoulder resulting from the work injury. However, he felt that Claimant's current right shoulder symptoms were consistent with Claimant's pre-injury baseline. Dr. Tentori placed Claimant at maximum medical improvement with no impairment and no restrictions on that date. He advised Claimant to pursue further treatment with his private healthcare provider.

18. Claimant went to see his personal physician that same day for his right shoulder treatment through his personal insurance. Dr. Martha Ives stated in her impression section of the report: "Suspect this is an acute on-the-job injury, that Workmen's Comp. is not planning to cover. Patient may need urgent surgery for a tendon repair to improve his long-term range of motion and ability to hold this job. Refer to cornerstone orthopedics right away."

19. Respondents issued a notice of contest (NOC) on the claim on January 20, 2023.

20. On February 2, 2023, Claimant saw orthopedic surgeon Dr. Thomas Mann. Dr. Mann reported that Claimant's symptoms since December 31, 2022, were "incapacitating and worsening." Dr. Mann documented that the MRI, which he personally reviewed, demonstrated a full-thickness supraspinatus tear with moderate partial thickness infraspinatus tear and secondary findings consistent with internal impingement. Additionally, he noted a moderate grade partial-thickness subscapularis tendon tear with some medial subluxation and partial-thickness of the proximal biceps. In discussing possibilities for treatment, Dr. Mann wrote, "given [Claimant] has had issues with his shoulder and been doing physical therapy and then had an aggravating episode with progression surgical intervention for his dominant shoulder would be recommended."

21. On February 24, 2023, Claimant underwent surgery performed by Dr. Mann to repair a right rotator cuff tear, impingement syndrome of right shoulder, and biceps tendinopathy.

22. Dr. Mann stated in his indications for surgery section of his surgical report:

> "The patient is a 61-year-old gentleman who suffered an aggravating injury from a scuffle while working as a security guard. The patient had some preexisting shoulder issues, but this was an acute change from the incidents. Subsequent MRI demonstrated significant rotator cuff tear, as well as some underlying impingement anatomy, arthritis, and biceps

tendinopathy. Operative intervention to address this acute shoulder injury with notable pain and loss of function is indicated."

23. Dr. Mann noted that the rotator cuff exhibited mobility consistent with an acute injury.

24. Claimant conceded on examination at hearing that he did not bring his 2022 physical therapy records or his 2021 Panorama records for Dr. Mann to review. He conceded he did not tell Dr. Mann that he had previously gone to an orthopedic facility. The Court finds that Dr. Mann did not know of Claimant's pre-injury medical history.

25. Respondents hired Dr. Timothy O'Brien, an orthopedic surgeon, to perform a record review, which Dr. O'Brien completed on August 2, 2023. Dr. O'Brien opined that the physical therapy records from both before and after the date of injury documented essentially the same levels of pain and function, which Dr. O'Brien felt supported the absence of a new injury or aggravating/accelerating event. Dr. O'Brien also opined that the right shoulder MRI demonstrated no evidence of an acute injury. Specifically, he noted the atrophy of the rotator cuff, the retraction of the rotator cuff tendon units, and absence of accumulation of joint fluid that would be expected after an acute tear. Ultimately, Dr. Obrien felt that a rotator cuff repair surgery would be reasonably necessary, but his opinion was that it was due to Claimant's pre-existing right shoulder pathologies rather than the December 31, 2022 injury.

26. Dr. O'Brien testified by deposition as an expert in orthopedic surgery on August 15, 2023. He testified largely consistently with his record review reports. He observed that Claimant's historical accounts and physical therapy records showed similar symptoms before and after the accident, and these symptoms were not consistent with a significant acute injury. He also opined that the mechanism of injury described by Claimant was not consistent with a rotator cuff tear, as injuries resulting in rotator cuff tears typically involve overhead movements or shoulder dislocations.

27. Regarding the mobility of Claimant's rotator cuff, Dr. O'Brien felt that it was not telling regarding the age of the rotator cuff tear. Rather, he felt that the level of atrophy was more informative.

28. Dr. O'Brien also pointed out during his testimony that the physical therapy records from prior to the date of injury documented testing that appeared to be focused on determining the presence or absence of inflammation and dysfunction in Claimant's right shoulder intraarticular structures, including the rotator cuff, the labrum, the acromioclavicular joint, and the glenoid humeral joint. He noted that the tests were consistent with inflammation in those areas.

29. The Court finds Dr. O'Brien's and Dr. Tentori's opinions more credible more credible than those of Dr. Mann insofar as they address the question of whether Claimant's rotator cuff tears were related to the December 31, 2022 injury. However, the Court does not find Dr. O'Brien's testimony credible as to whether Claimant sustained an injury at all on December 31, 2022.

30. Claimant testified at hearing on his own behalf. He testified that he had been working as a security officer for Respondent-Employer for approximately one year. In that role, Claimant testified that he was responsible for ensuring the safety of hospital staff, doctors, nurses, and patients in the building. His duties included performing various tasks that included screening people entering the building and dealing with potentially violent situations.

31. Claimant was asked about his symptoms prior to his injury. He testified that he had a prior surgical repair on his left shoulder between thirteen and fifteen years ago. He experienced issues with both shoulders, which he attributed to his work as a motocross racing photographer. He had been concerned about potential rotator cuff surgery for his left shoulder, but not for his right. However, Claimant later testified that he discussed the possibility of right shoulder surgery with his physical therapist prior to the injury. He also testified that he would have severe pain prior to the date of injury even while reaching to shake somebody's hand.

32. Claimant described the work injury itself, including his involvement in restraining the combative individual. Claimant testified that he used his right arm to assist with restraining the visitor, pushing the visitor forward and down. He initially did not experience pain. However, later that night, he had an onset of severe pain and sought treatment at the emergency room.

33. Regarding the initial post-injury period, Claimant testified that it was marked by severe pain. Though, he clarified that treatment helped to alleviate the pain to some extent.

34. On cross examination, Claimant testified that he did not fall to the ground during the December 31, 2022 incident, nor did he experience direct trauma to his right shoulder. Claimant also testified that he had not received treatment for his right shoulder prior to the December 31, 2022 incident. However, Claimant testified that prior to the December 31, 2022 injury, Claimant had discussed with his physical therapist the possibility of a right rotator cuff surgery.

35. Except insofar as Claimant testified that he had not received treatment for his right shoulder prior to the date of injury, the Court finds Claimant's testimony credible.

36. The Court finds that Claimant has proven by a preponderance of the evidence that he did sustain an injury to his right shoulder on December 31, 2022, and that the injury resulted in a need for treatment. Specifically, Claimant's injury was the proximate cause of Claimant's onset of severe pain that night. Claimant's severe

pain caused Claimant's need to seek emergency medical treatment, which he would not have otherwise needed but for the December 31, 2022 injury.

37. However, the Court also finds that Claimant's December 31, 2022 injury did not aggravate or accelerate Claimant's right shoulder condition so as to cause the need for the right shoulder surgery. Claimant had a significant prior history of right shoulder symptoms resulting from what Claimant's medical providers suspected to be a rotator cuff tear. Indeed, just two days before the injury itself, Claimant exhibited significant symptoms and lack of function in his right shoulder, and Claimant discussed with his providers the need for right shoulder surgery. The Court finds that Claimant, prior to the injury, was in need of a right rotator cuff repair surgery and that Claimant's need for surgery did not arise from the December 31, 2022 injury.

38. Claimant earned during the sixteen weeks leading up to the date of injury an average of $1,284.61 per week. The Court finds that this figure most fairly represents Claimant's average weekly wage for purposes of this claim.

39. The Court finds that Claimant did not sustain any wage loss until undergoing rotator cuff surgery of his right shoulder. However, because the Court finds that the need for the right shoulder surgery was not related to Claimant's December 31, 2022 injury, the Court finds that the resulting wage loss did not arise from Claimant's December 31, 2022 injury either. Therefore, the Court concludes that Claimant has not proven that he is entitled to temporary total disability in this matter.

CONCLUSIONS OF LAW

Generally

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

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

draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

Compensability

An injury must “arise out of and occur in the course of” employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S. *See also Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). An injury “arises out of” the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. Popovich, 811 P.2d at 383.

The existence of a preexisting condition will not prevent an injury from "arising out of" the employment. *Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 124 Colo. 217, 220, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). Generally, an injury will be found compensable if the employment aggravated, activated, caused, or accelerated a medical disability or need for medical treatment. *Id*.

An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Barba v. RE 1J School District*, W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company*, W.C. No. 3-850-024 (December 14, 1989). Rather, a claimant must establish to a reasonable degree of probability that the need for additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing

condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo.1949); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) *cf. Valdez v. United Parcel Service*, 728 P.2d 340 (Colo. App. 1986).

As found above, Claimant's December 31, 2022 injury aggravated his right shoulder symptoms such that he needed to obtain emergency medical treatment later that night. Because the aggravation caused a need for medical treatment which he would not have otherwise needed, Claimant sustained a compensable injury on December 31, 2022.

Medical Treatment

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S.

Although respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. Sny*der v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997).

"It is sufficient if the injury is a 'significant' cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment." *Burbank v. PepsiCo Inc*, W.C. No. 5-127-122 (April 17, 2023). Thus, if the industrial injury aggravates or accelerates a preexisting condition so as to cause a need for treatment, the treatment is compensable. *Id*.

As found above, Claimant's need for right shoulder rotator cuff surgery did not arise from the December 31, 2022 injury. Therefore, Claimant's injury was not the but-for cause of Claimant's need for right shoulder rotator cuff surgery, and Claimant has failed to prove by a preponderance of the evidence that right shoulder rotator cuff surgery is reasonably necessary to cure and relieve him of the effects of the December 31, 2022 injury.

Average Weekly Wage

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corporation*, 867 P.2d 77, 82 (Colo. App. 1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d

548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

Where the prescribed methods will not result in a fair calculation of a claimant's AWW in the particular circumstances, section C.R.S. § 8-42-102(3) grants an ALJ discretion to determine AWW "in such other manner and by such other method as will, in the opinion of the director *based upon the facts presented*, fairly determine such employee's average weekly wage." Section 8-42-102(3), C.R.S. (emphasis added).

As found above, Claimant's earnings during the sixteen weeks preceding his date of injury, which averaged $1,284.61 per week, most fairly represent Claimant's wage earning capacity as of the date of injury. Therefore, the Court concludes that $1,284.61 is the average weekly wage for this matter.

Temporary Total Disability

Temporary total disability (TTD) benefits are designed to compensate an injured worker for wage loss while employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson*, 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo.App.1997).

As found above, Claimant did not sustain a wage loss after his injury until undergoing right shoulder surgery on February 24, 2023. However, because the Court finds that the February 24, 2023 surgery was not reasonably necessary to cure and relieve Claimant of the effects of his December 31, 2022 injury, the Court concludes that Claimant has not proved by a preponderance of the evidence that his December 31, 2022 industrial injury caused his disability. Therefore, the Court concludes that Claimant is not entitled to TTD benefits in this matter.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable right shoulder injury on December 31, 2022.

2. The February 24, 2022 surgery was not reasonably necessary to cure and relieve Claimant of the effects of his December

31, 2022 injury, and Respondents are not liable for the cost of the surgery.

3. Claimant's average weekly wage is $1,284.61.

4. Claimant is not entitled to temporary total disability benefits for his December 31, 2022 injury.

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

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

DATED: October 19, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-188-909-002

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the left shoulder surgery performed by Alex Romero, M.D. on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Registered Nurse. On November 2, 2021 Claimant suffered an admitted left shoulder injury during the course and scope of her employment with Employer. Specifically, a patient grabbed Claimant's arm and struck her in the chest, shoulder, neck and chin.

2. On November 4, 2021 Claimant visited Jonathan Claassen. M.D. at Authorized Treating Provider (ATP) Concentra Medical Centers. He noted a prior work incident where Claimant was attacked by a patient in December 2019. Claimant subsequently underwent left shoulder surgeries in October 2020 and October 2021 with Landon Fine, M.D. consisting of repairs of the rotator cuff and labrum.

3. On November 11, 2021 Claimant underwent a left shoulder MRI. The imaging revealed a possible partial tear of the anterior infraspinatus tendon with retraction but no other abnormalities.

4. On November 15, 2021 Claimant visited Dr. Fine at Concentra for an evaluation. Dr. Fine determined the MRI revealed a left infraspinatus tear and a rotator cuff strain. He administered a subacromial injection. The injection did not provide any significant improvement. On December 8, 2021 Dr. Fine commented there was nothing "severe enough [to] warrant surgical intervention" and recommended against surgery because it was too "risky."

5. On January 24, 2022 Claimant was evaluated by ATP Alex Romero, M.D. at Centura Orthopedics. Dr. Romero noted that Claimant exhibited "inconsistent shoulder findings," but did not identify a pain generator by conducting diagnostic testing. Nevertheless, on February 18, 2022 Dr. Romero performed an additional left shoulder surgery.

6. Claimant continued to report high levels of left shoulder pain. After undergoing an arthrogram MRI and a repeat EMG Claimant returned to Dr. Romero on August 9, 2022. Dr. Romero noted that Claimant was not making any improvement despite unremarkable EMGs and MRIs consistent with postoperative changes. He recommended a second opinion with Adam Seidl, M.D. to address the causes of her lack of improvement and "significant regression." Notably, in the fall and winter of 2022 Dr. Romero was scheduled for deployment to [Redacted, hereinafter IA] with the [Redacted, hereinafter AR].

7. On August 17, 2022 Claimant visited Adam Seidl, M.D. at the Steadman Hawkins

Clinic for an evaluation. Claimant reported significant limitations in her left shoulder function with accompanying pain. She specifically noted stiffness, locking, catching, grinding, popping, swelling, numbness and tingling. In reviewing the MRI, Dr. Seidl remarked that the rotator cuff was intact and the shoulder looked "quite good." He thus did not recommend additional surgical intervention.

8. In September, 2022 Dr. Seidl administered a steroid injection to Claimant's left shoulder. However, Claimant failed to receive any benefit from the injection. Dr. Seidl recommended continued physical therapy because additional surgery would not provide any benefit. After a repeat EMG, Claimant returned to Dr. Seidl on September 21, 2022. He reiterated that the MRI revealed an intact rotator cuff repair. Dr. Seidl recommended against additional surgery and endorsed conservative treatment.

9. Prior to Dr. Romero's return from deployment, Claimant visited Dr. Fine for an evaluation. Dr. Fine recommended an additional left shoulder MRI that was performed on November 25, 2022. The MRI revealed small areas of bursal fluid with partial thinning and tearing in the supraspinatus and anterior infraspinatus. In December, 2022 Dr. Fine noted the MRI findings "shouldn't be what is causing you to not move your arm."

10. By January 4, 2023 Dr. Romero had returned and Claimant visited him for an examination. Claimant was still experiencing intense pain and had made little or no progress during his absence. Dr. Romero noted the November 25, 2022 left shoulder MRI revealed a small defect in the anterior supraspinatus at the repair level. The defect could have been "simple postoperative changes" or represented a failure of healing in the area. He commented that he could passively forward flex the left shoulder to 120 degrees before pain, however "active range of motion again [was] minimal with essentially pseudoparalysis of the shoulder."

11. Dr. Romero testified that Claimant initially made good progress after her surgery on February 18, 2022 but then experienced significant, unexplainable regression. He remarked that diagnostic testing did not reveal the pathology for Claimant's continuing pain. Dr. Romero commented that the "gold standard" for ascertaining Claimant's pathology was to perform a diagnostic arthroscopy to actually examine the tissue. He reasoned that it had been a little over ten months since her last surgery and conservative treatment had not provided relief. Claimant's options were to continue with therapy and pain management or perform an arthroscopy. Because the radiologist believed the November 25, 2022 MRI potentially reflected a re-tear of the rotator cuff and Claimant was still suffering significant shoulder pain, Dr. Romero recommended an arthroscopy. He submitted a pre-authorization request for the procedure.

12. On January 16, 2023 Mark S. Failinger, M.D. conducted a records review of Dr. Romero's surgical request. Dr. Failinger remarked that the records review was notable not only for the numerous treatment measures that had failed to improve Claimant's condition, but also that all treating physicians had been puzzled as to the source of her pain. He commented that, despite the confusion regarding the source of Claimant's pain and the inability to identify why Claimant's pain was dramatically out of proportion to her pathology, Dr. Romero nevertheless proposed another surgery. Dr. Failinger reasoned that, in the absence of a clear pain source, another surgery was not reasonable. He determined that Claimant is at high risk of either not improving or developing worsening shoulder symptoms if she undergoes another surgery. Dr.

Failinger summarized that it was far from medically probable that a repeat surgery would improve Claimant's function and decrease her pain levels. He remarked that non-organic sources for Claimant's subjective complaints should be considered.

13. On February 8, 2023 Dr. Failinger conducted an Independent Medical Examination (IME) of Claimant. After reviewing Claimant's medical records and conducting a physical examination, Dr. Failinger maintained that Dr. Romero's surgical request was not reasonable. He explained there was no rotator cuff pathology identified in the MRIs that would cause severe active range of motion deficits and no neurologic explanation for her loss of active motion. Dr. Failinger commented that loss of active motion was very likely due to Claimant's volitional actions. Nonorganic factors were likely the primary reason for Claimant's ongoing pain and significant dysfunction. He remarked that, despite multiple surgeries, Claimant's pain source has never been identified. Furthermore, multiple clinicians have raised concerns about the inconsistencies between the objective imaging and Claimant's subjective, high pain levels. Dr. Failinger concluded that it is not medically probable another surgery to repair any thinning of Claimant's rotator cuff will result in a successful outcome by improving Claimant's function and decreasing her pain. Respondents thus denied Dr. Romero's surgical request.

14. Contrary to numerous physicians, Dr. Romero proceeded with the diagnostic arthroscopy on March 21, 2023 "to evaluate the supraspinatus defect as to whether it is a failure of healing versus postsurgical changes." He remarked that Claimant's pre-operative diagnosis was a "left rotator cuff tear." When Dr. Romero performed the surgery on March 21, 2023, he found Claimant's rotator cuff to be intact, the prior graft was incorporated well and the abnormalities on the MRIs were normal post-surgical changes. Dr. Romero detailed that Claimant had developed scar tissue or adhesions above the rotator cuff and deltoid. He characterized the amount of scar tissue as "severe." Dr. Romero explained that any time Claimant moved her left shoulder the rotator cuff and the deltoid pulled against each other and generated pain. He thus used an arthroscopic shaver and radiofrequency ablation device to remove scar tissue.

15. Claimant subsequently received medical treatment from Concentra with Scott Richardson, M.D. The medical records reveal that by June 27, 2023 Claimant's left shoulder was still grinding and popping. She had good range of motion except for abduction of only about 70 degrees. Claimant was also only lifting two pounds in physical therapy. By August 3, 2023 Claimant remarked that her left shoulder was improving. She specifically had less pain and better range of motion. Claimant believed that massage therapy and acupuncture were helping.

16. After reviewing additional medical records, Dr. Failinger authored an IME addendum on August 21, 2023. He maintained that the diagnostic arthroscopy on March 21, 2023 was not reasonable. Dr. Failinger explained that no rotator cuff tearing was discovered during the surgery. He specified that, aside from some subacromial adhesions, Dr. Romero did not find any significant pathology during the procedure. However, adhesions would be expected in many cases following multiple rotator cuff surgeries and a manipulation. After the surgery Claimant underwent postoperative physical therapy with improvement in forward flexion but still had fairly significant limited abduction. Dr. Failinger summarized that, based on the recent MRI findings and the lack of any significant pathophysiology found by Dr. Romero during the March 21, 2023 surgery, there was "no pathophysiologic explanation, nor an anatomic structural

explanation" for Claimant's dramatic loss of range of motion and high pain levels. He reasoned that Dr. Romero recommended the surgery despite noting that Claimant had essentially a "pseudoparalysis" of the shoulder. Dr. Failinger commented that a pseudoparalysis generally means there was no ability to use the shoulder. Based on the absence of identifiable pathology on the MRI or during surgery to explain the pseudoparalysis, he remarked that nonorganic and/or psychological issues would be the most reasonable explanation for Claimant's shoulder limitations.

17. Claimant testified at the hearing in this matter. She explained that, after her surgery on February 18, 2022, she suffered increasing pain and loss of range of motion. Claimant specifically had a strong stabbing pain in her shoulder down into her arm that made it difficult to do anything. However, after the March 21, 2023 surgery and subsequent physical therapy, Claimant made huge improvements. She remarked that, "[m]y pain has decreased a ton. I'm able to fully lift my arm now, which I couldn't do before. I'm lifting things. I'm able to basically use my arm again, which is nice." Claimant commented that, throughout her treatment since her November 2, 2021 work injury, she has given complete effort in all of her physical therapy.

18. Claimant has failed to establish it is more probably true than not that the left shoulder surgery performed by Dr. Romero on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 industrial injury. Initially, the record reveals that Claimant previously underwent left shoulder surgeries in October 2020 and October 2021 with Dr. Fine consisting of repairs of the rotator cuff and labrum. On November 2, 2021 Claimant suffered an admitted left shoulder injury. A November 11, 2021 MRI revealed a left infraspinatus tear and a rotator cuff strain. On December 8, 2021 Dr. Fine commented there was nothing "severe enough [to] warrant surgical intervention" and recommended against additional surgery. Nevertheless, on February 18, 2022 Dr. Romero performed another surgery to repair Claimant's left shoulder.

19. On August 17, 2022 Claimant visited Dr. Seidl and reported significant limitations in her left shoulder function with accompanying pain. In reviewing the November 11, 2021 MRI, Dr. Seidl remarked that the rotator cuff was intact and the shoulder looked "quite good." He thus did not recommend additional surgical intervention. In September, 2022 Dr. Seidl administered a steroid injection to Claimant's left shoulder that failed to provide relief. He recommended continued physical therapy because additional surgery would not provide any benefit. On September 21, 2022 Dr. Seidl again recommended against additional surgery and endorsed conservative treatment. A November 25, 2022 MRI revealed small areas of bursal fluid with partial thinning and tearing in the supraspinatus and anterior infraspinatus. Dr. Fine subsequently noted the MRI findings "shouldn't be what is causing [Claimant] to not move [her] arm."

20. By January 4, 2023 Dr. Romero had returned from his deployment and Claimant visited him for an examination. Claimant was still experiencing intense pain and had made little or no progress during his absence. Dr. Romero noted the November 25, 2022 left shoulder MRI revealed a small defect in the anterior supraspinatus at the repair level. He commented that the "gold standard" for determining Claimant's pathology was to perform a diagnostic arthroscopy to actually examine the tissue. Dr. Romero thus recommended an arthroscopy and submitted a pre-authorization request. However, Dr. Failinger determined that Dr. Romero's surgical request was not reasonable. He explained there was no rotator cuff pathology identified in the MRIs that

would cause severe active range of motion deficits and no neurologic explanation for Claimant's loss of active motion. Dr. Failinger remarked that, despite multiple surgeries, Claimant's pain source has never been identified. Furthermore, multiple clinicians have raised concerns about the inconsistencies between objective imaging and Claimant's subjective, high pain levels. Dr. Failinger thus concluded it was not medically probable that another surgery to repair any thinning of Claimant's rotator cuff would result in a successful outcome by improving Claimant's function and decreasing her pain. Respondents thus denied Dr. Romero's surgical request.

21. Contrary to numerous physicians, Dr. Romero proceeded with the diagnostic arthroscopy on March 21, 2023. He found Claimant's rotator cuff to be intact, the prior graft was incorporated well and the abnormalities on the MRIs constituted normal post-surgical changes. Dr. Romero detailed that the source of Claimant's pain was scar tissue or adhesions above the rotator cuff and deltoid. However, Dr. Failinger authored an IME addendum and maintained that the diagnostic arthroscopy on March 21, 2023 was not reasonable. He specified that, aside from some subacromial adhesions, Dr. Romero did not find any significant pathology during the procedure. Dr. Failinger summarized that, based on recent MRI findings and lack of any significant pathophysiology found by Dr. Romero during the March 21, 2023 surgery, there was no pathophysiologic or anatomic structural explanation for Claimant's dramatic loss of range of motion and high pain levels. Moreover, despite Claimant's testimony that she had significant improvement after the March 2023 surgery, medical records reflect just a two-pound change in work restrictions months after the exploratory arthroscopy. Dr. Romero also acknowledged that the adhesions he removed during the March 21, 2023 surgery were a "normal part of the healing process" and could be reduced through non-surgical measures such as physical therapy that Claimant attended after March 2023.

22. Drs. Seidl and Failinger did not identify any basis for proceeding with additional surgery because the imaging was unremarkable despite numerous EMGs and MRIs. However, with no identifiable pain generator or explanation for Claimant's loss of range of motion, Dr. Romero nonetheless elected to proceed with surgery. With an intact rotator cuff and graft, the alleged supraspinatus defect that was to be investigated by Dr. Romero's diagnostic arthroscopy did not exist. The lack of a supraspinatus defect was suggested by numerous physicians and imaging studies prior to the March 21, 2023 procedure. The pathophysiological cause of Claimant's subjective complaints was not even ascertainable prior to the arthroscopy. Contrary to the MTGs, physicians were unable to determine a "specific diagnosis with positive identification of pathologic conditions." Notably, Dr. Romero justified his basis for performing the March 21, 2023 surgery not because of specific pathology or an identifiable pain generator, but only after he discovered adhesions while conducting the exploratory procedure. Although he found the adhesions during surgery, there was no reasonable basis for performing the surgery at the outset. As Dr. Failinger summarized, there was no pathophysiologic or anatomic structural explanation for Claimant's dramatic loss of range of motion and high levels of pain. Claimant has thus failed to demonstrate that the left shoulder surgery performed by Dr. Romero on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 industrial injury. Accordingly, Claimant's request for Respondents' to cover the cost of the surgery is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

6. The Colorado Division of Workers' Compensation Medical Treatment Guidelines (MTGs) were propounded by the Director pursuant to an express grant of statutory authority.

See §8-42-101(3.5)(a)(II), C.R.S. It is appropriate for an ALJ to consider the MTGs in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); *see Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the MTGs are a reasonable source for identifying diagnostic criteria). The MTGs are regarded as accepted professional standards of care under the Workers' Compensation Act. *See Rook v. Indus. Claim Appeals Off.*, 111 P.3d 549 (Colo. App. 2005); *Hall v. Indus. Claim Appeals Off.*, 74 P.3d 459 (Colo. App. 2003).

7. While the MTGs may carry substantial weight and provide significant guidance, the ALJ is not bound by the MTGs in deciding individual cases. Notably, §8-43-201(3), C.R.S. specifically provides:

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

8. Rule 17, Exhibit 4(B)(9) of the MTGs addresses surgical intervention of the shoulder and specifies:

> SURGICAL INTERVENTIONS should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. All operative interventions must be based upon positive correlation of clinical findings, clinical course, and diagnostic tests. *A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic conditions*.

(emphasis added).

9. As found, Claimant has failed to establish by a preponderance of the evidence that the left shoulder surgery performed by Dr. Romero on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 industrial injury. Initially, the record reveals that Claimant previously underwent left shoulder surgeries in October 2020 and October 2021 with Dr. Fine consisting of repairs of the rotator cuff and labrum. On November 2, 2021 Claimant suffered an admitted left shoulder injury. A November 11, 2021 MRI revealed a left infraspinatus tear and a rotator cuff strain. On December 8, 2021 Dr. Fine commented there was nothing "severe enough [to] warrant surgical intervention" and recommended against additional surgery. Nevertheless, on February 18, 2022 Dr. Romero performed another surgery to repair Claimant's left shoulder.

10. As found, on August 17, 2022 Claimant visited Dr. Seidl and reported significant limitations in her left shoulder function with accompanying pain. In reviewing the November 11, 2021 MRI, Dr. Seidl remarked that the rotator cuff was intact and the shoulder looked "quite good." He thus did not recommend additional surgical intervention. In September, 2022 Dr.

Seidl administered a steroid injection to Claimant's left shoulder that failed to provide relief. He recommended continued physical therapy because additional surgery would not provide any benefit. On September 21, 2022 Dr. Seidl again recommended against additional surgery and endorsed conservative treatment. A November 25, 2022 MRI revealed small areas of bursal fluid with partial thinning and tearing in the supraspinatus and anterior infraspinatus. Dr. Fine subsequently noted the MRI findings "shouldn't be what is causing [Claimant] to not move [her] arm."

11. As found, by January 4, 2023 Dr. Romero had returned from his deployment and Claimant visited him for an examination. Claimant was still experiencing intense pain and had made little or no progress during his absence. Dr. Romero noted the November 25, 2022 left shoulder MRI revealed a small defect in the anterior supraspinatus at the repair level. He commented that the "gold standard" for determining Claimant's pathology was to perform a diagnostic arthroscopy to actually examine the tissue. Dr. Romero thus recommended an arthroscopy and submitted a pre-authorization request. However, Dr. Failinger determined that Dr. Romero's surgical request was not reasonable. He explained there was no rotator cuff pathology identified in the MRIs that would cause severe active range of motion deficits and no neurologic explanation for Claimant's loss of active motion. Dr. Failinger remarked that, despite multiple surgeries, Claimant's pain source has never been identified. Furthermore, multiple clinicians have raised concerns about the inconsistencies between objective imaging and Claimant's subjective, high pain levels. Dr. Failinger thus concluded it was not medically probable that another surgery to repair any thinning of Claimant's rotator cuff would result in a successful outcome by improving Claimant's function and decreasing her pain. Respondents thus denied Dr. Romero's surgical request.

12. As found, contrary to numerous physicians, Dr. Romero proceeded with the diagnostic arthroscopy on March 21, 2023. He found Claimant's rotator cuff to be intact, the prior graft was incorporated well and the abnormalities on the MRIs constituted normal post-surgical changes. Dr. Romero detailed that the source of Claimant's pain was scar tissue or adhesions above the rotator cuff and deltoid. However, Dr. Failinger authored an IME addendum and maintained that the diagnostic arthroscopy on March 21, 2023 was not reasonable. He specified that, aside from some subacromial adhesions, Dr. Romero did not find any significant pathology during the procedure. Dr. Failinger summarized that, based on recent MRI findings and lack of any significant pathophysiology found by Dr. Romero during the March 21, 2023 surgery, there was no pathophysiologic or anatomic structural explanation for Claimant's dramatic loss of range of motion and high pain levels. Moreover, despite Claimant's testimony that she had significant improvement after the March 2023 surgery, medical records reflect just a two-pound change in work restrictions months after the exploratory arthroscopy. Dr. Romero also acknowledged that the adhesions he removed during the March 21, 2023 surgery were a "normal part of the healing process" and could be reduced through non-surgical measures such as physical therapy that Claimant attended after March 2023.

13. As found, Drs. Seidl and Failinger did not identify any basis for proceeding with additional surgery because the imaging was unremarkable despite numerous EMGs and MRIs. However, with no identifiable pain generator or explanation for Claimant's loss of range of motion, Dr. Romero nonetheless elected to proceed with surgery. With an intact rotator cuff and

graft, the alleged supraspinatus defect that was to be investigated by Dr. Romero's diagnostic arthroscopy did not exist. The lack of a supraspinatus defect was suggested by numerous physicians and imaging studies prior to the March 21, 2023 procedure. The pathophysiological cause of Claimant's subjective complaints was not even ascertainable prior to the arthroscopy. Contrary to the MTGs, physicians were unable to determine a "specific diagnosis with positive identification of pathologic conditions." Notably, Dr. Romero justified his basis for performing the March 21, 2023 surgery not because of specific pathology or an identifiable pain generator, but only after he discovered adhesions while conducting the exploratory procedure. Although he found the adhesions during surgery, there was no reasonable basis for performing the surgery at the outset. As Dr. Failinger summarized, there was no pathophysiologic or anatomic structural explanation for Claimant's dramatic loss of range of motion and high levels of pain. Claimant has thus failed to demonstrate that the left shoulder surgery performed by Dr. Romero on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 industrial injury. Accordingly, Claimant's request for Respondents' to cover the cost of the surgery is denied and dismissed.

ORDER

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

1. Claimant's request for Respondents' to cover the cost of the March 21, 2023 surgery performed by Dr. Romero is denied and dismissed.

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

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

DATED: October 23, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-224-953-001

ISSUES

1. Whether Dependent has demonstrated by a preponderance of the evidence that she is a proper and sole recipient of death benefits related to Decedent's industrial fatality.

STIPULATIONS OF THE PARTIES

1. By stipulation of the parties, Decedent was fatally injured on December 17, 2022, while in the course and scope of his employment with Employer, thereby establishing the compensable nature of Decedent's industrial fatality.

2. By stipulation of the parties, Decedent's weekly death benefit rate is $446.78, with a corresponding pre-death average weekly wage of $670.17.

FINDINGS OF FACT

1. Decedent died on December 17, 2022, while in the course and scope of his employment.

2. Claimant and Decedent were married on February 11, 2019. Prior to his death, Decedent and Claimant cohabitated as husband and wife at [Redacted, hereinafter AT]. Decedent was the sole financial provider of the household. Claimant was financially depended on Decedent prior to his death.

3. Claimant credibly testified that Decedent had two biological children, but neither of them were under the age of 21 and Decedent was not financially supporting either of his adult children prior to his death.

4. Claimant credibly testified that Decedent was not allegedly or in fact married to any other individual prior to his death.

CONCLUSIONS OF LAW

1. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

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

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

4. A widow is presumed to have been wholly dependent on a decedent unless she was either "voluntarily separated and living apart from the spouse at the time of the . . . death or was not dependent in whole or in part on the deceased for support." §8-41501(1)(a), C.R.S.

Dependency

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

2. A widow is presumed to be wholly dependent on a decedent unless she was either "voluntarily separated and living apart from the spouse at the time of the . . . death or was not dependent in whole or in part on the deceased for support." §8-41-501(1)(a), C.R.S.

3. As found, Claimant has demonstrated by a preponderance of the evidence that she was married to Decedent at the time of his industrial fatality. Furthermore, Claimant has demonstrated that she and Decedent were living together at the time of Decedent's death and that she was financially dependent on Decedent prior to his death.

4. As found, Claimant is the only individual that has filed a claim for death benefits and has established herself as a whole dependent under §8-41-501, C.R.S., she is the sole recipient of said benefits.

ORDER

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

1. Claimant is the sole wholly dependent of Decedent and is hereby awarded death benefits at a weekly rate $446.78.

2. Respondents shall pay death benefits dating back to Decedent's death plus interest at a rate of 8% per annum.

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

DATED: October 25, 2023.

Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-211-550-001

ISSUES

- Did Claimant prove she suffered a compensable occupational disease involving her left arm?
- If Claimant proved a compensable injury, the following issues will be addressed:
- Did Claimant prove entitlement to TTD benefits commencing July 26, 2022?
- What is Claimant's average weekly wage (AWW)?
- The parties stipulated that if the claim is compensable, Claimant is entitled to a general award of reasonably necessary and related treatment from authorized providers, including mileage reimbursement. The parties agreed to reserve any specific medical benefit issues for future determination if they cannot resolve those issues by mutual agreement depending on the outcome of the hearing.

FINDINGS OF FACT

1. Claimant worked for Employer as a lettuce harvester. She commenced work on July 19, 2022. Claimant had not previously performed this type of work.

2. Harvesting lettuce required Claimant to cut heads of lettuce with her right hand and place them into bags using her left hand. At hearing, Claimant demonstrated grasping a head of lettuce with her left hand in a pronated position (palm-down), cutting the lettuce stalk with her right hand, supinating her left wrist and forearm to hold the lettuce in a palm-up position, and placing the lettuce into plastic bags carried around her waist.

3. By the end of the first day, Claimant noticed pain in her left wrist. She mentioned the pain to a supervisor but continued working. She noticed some swelling in her left wrist the next day. The remainder of the week, she primarily cut lettuce, but occasionally switched to making boxes or packing lettuce, for approximately 30-60 minutes at a time. Claimant performed a similar pronation-to-supination motion with her left arm while packing heads of lettuce. Her arm also bothered her while making boxes, because the cardboard was stiff and required her to exert what she perceived as significant force with her hands.

4. [Redacted, hereinafter AC] is the daughter of Employer's owners. She handles bookkeeping, payroll, and other financial matters for Employer. Claimant texted AC[Redacted] on July 25, 2022, that she needed to see a doctor because her wrist was hurting, and she could no longer tolerate the pain. Claimant said the pain started on July 19 and became progressively worse during the week. Claimant had also reported the pain to AC's[Redacted] father, "and they tried moving her around, but she still couldn't keep up because her wrist was hurting." AC[Redacted] told Claimant she could go the clinic in

Center, CO but Claimant replied that she wanted to finish the day and then go to the hospital after work.

5. On July 25, 2022, Claimant was evaluated by Vanessa Zwegers, NP at the San Luis Valley Health Regional Medical Center emergency department for complaints of left arm pain. Claimant said she had recently started work as a lettuce harvester cutting and packaging lettuce. Ms. Zwegers documented, "early in this week, she started to have discomfort, especially when rotating her hand." She had tried ibuprofen, icing, and elevation without relief. Physical examination showed an area of soft tissue swelling with mild warmth in the radial aspect of the left forearm. The area was tender to palpation. Finklestein's test was positive. The examination was otherwise normal. Ms. Zwegers opined, "this is a tendinitis from repetitive movement related to her job." She gave Claimant a spica splint and restricted her from work until she could follow up with an occupational medicine physician. If the symptoms did not resolve with splinting, NSAIDs and rest, she could consider a steroid injection.

6. Employer referred Claimant to its designated provider at the SLV Occupational Medicine clinic. Claimant saw Dr. Tasha Alexis at her initial appointment on August 3, 2022. Dr. Alexis documented the history as, "she was cutting lettuce and she had to twist the lettuce and had to twist her hand as well in a weird way and she noticed her wrist was swollen the next day and they kept her working." Claimant felt her symptoms were related to "overuse" of her left arm and "a specific twisting position." Her arm remained symptomatic despite rest, bracing, and taking NSAIDs. The examination showed pain in the dorsal aspect of the left wrist, reduced grip strength, and limited wrist range of motion. Dr. Alexis diagnosed soft tissue strains of the left wrist and hand. She opined the objective findings were consistent the history and a work-related mechanism of injury. She referred Claimant to occupational therapy and imposed work restrictions of no lifting more than 10 pounds and no work involving cutting.

7. Employer could not accommodate the restrictions, so Claimant remained off work.

8. Claimant followed up with Dr. Alexis on August 17, 2022. She was still having 4-5/10 pain in the left arm. Claimant had received an email from the claims adjuster stating Insurer would not pay temporary disability until Dr. Alexis reviewed and commented on a job demands analysis (JDA). Because she was not receiving any income, Claimant asked Dr. Alexis to remove her restrictions be lifted. Dr. Alexis stated, "I have no choice but to remove this patient's restrictions even though I feel it is appropriate for her to have those restrictions."

9. Claimant returned to work on August 18, 2022. However, the work aggravated her left arm pain and she resigned.

10. Claimant texted AC[Redacted] on August 19, 2022 and stated she could not continue working because "it was too painful and her hand was still hurting."

11. Claimant started occupational therapy on August 26, 2022. She explained she "started working on the 19th of July, and by the 20th, I was already in pain. I kept working with the pain." Claimant stated the pain started while she was gripping and manipulating lettuce with her left hand. Claimant reported increased pain with grabbing lettuce, moving suddenly, and twisting with her wrist. The pain radiated from the wrist, up the forearm, to the inside of her shoulder. She stated, "I don't know if [the shoulder pain] has to do with the hand, but it started since then." Claimant had moved back to Las Cruces, NM, after she stopped working, and was driving up to Colorado for therapy.

12. Claimant saw Dr. Alexis again on August 31, 2022. Claimant explained she had quit the job and was having to drive from Las Cruces for treatment. She was wondering if her care could be transferred to New Mexico. Dr. Alexis advised Claimant about a telephone conversation with the therapist on August 26. The therapist had expressed concern that Claimant may be "faking" her physical exam and pain. The therapist stated Claimant reported 9/10 pain "and with provocative testing that is not where she really was with her pain level."[1] The therapist was also "concerned" because "she is trying to get the shoulder into the claim." Dr. Alexis indicated she was going to order an EMG to rule out radiculopathy because Claimant was reporting radiating pain from the wrist up to the shoulder. Dr. Alexis left Claimant's work restrictions in place because she was no longer working.

13. Dr. David Orgel performed multiple record reviews for Insurer. In a report dated August 16, 2022, Dr. Orgel opined a JDA was needed to determine if Claimant's condition was work-related. In the meantime, he agreed ongoing conservative care was "certainly reasonable."

14. Sara Nowotny performed a JDA at Insurer's request on August 31, 2022. Ms. Nowotny interviewed Claimant by telephone, but observed other employees performing work tasks because Claimant was no longer working for Employer. Ms. Nowotny concluded the job involved no primary or secondary risk factors identified in the Cumulative Trauma Disorder Medical Treatment Guidelines (CTD MTGs).

15. Dr. Orgel issued his final report on September 15, 2022 after reviewing the JDA. He concluded the condition was not work-related based on the causation criteria delineated in the CTD MTGs.

16. Dr. Orgel testified at hearing consistent with his report. Dr. Orgel reiterated that Claimant's job involved no primary or secondary risk factors outlined in the MTGs. He opined that the absence of risk factors means the condition is not work-related, irrespective of Claimant's perception that the symptoms were associated with her work activities. He opined that Claimant may have developed "soreness" from performing work tasks to which she was previously unaccustomed, but opined that is not a work-related "injury." According to Dr. Orgel, the fact that Claimant experienced pain while performing work activities is insufficient to establish causation because "pain doesn't count" under

[1] This statement by the therapist is puzzling, because the August 26, 2022 OT report indicates that Claimant reported "7/10" pain at "worst," and "3/10" pain "current[ly]."

the MTGs. Dr. Orgel opined that repetitive tendonitis cannot be a work-related condition under the MTGs without the presence of primary or secondary risk factors.

17. Claimant's testimony is credible.

18. The causation opinions of Ms. Zwegers and Dr. Alexis are credible and more persuasive than the contrary opinions offered by Dr. Orgel.

19. Claimant proved she suffered a compensable injury to her left arm on July 25, 2022.

20. Claimant proved she suffered an injury-related wage loss from July 26, 2022 through August 17, 2022. Her entitlement to TTD terminated on August 18, 2022, because she returned to work.

21. Claimant proved she left work again because of the work injury on August 18, 2022. She has not subsequently been put at MMI by an ATP, released to regular duty, or returned to work.

22. AC[Redacted] testified Claimant was paid a piece rate or minimum wage, "whichever is greater." She was guaranteed at least minimum wage but could earn more depending on how much lettuce she picked during a shift. The harvesters worked 10-hour shifts Monday through Friday, and 5 hours on Saturday. This corresponds to 55 hours per week.

23. No documents or other persuasive evidence was presented to show Claimant's actual wages from July 19 to July 25, 2022. Therefore, the minimum wage provides the most appropriate metric to estimate her wages. The Colorado minimum wage was $12.56 in July 2022.[2] This equates to an average weekly wage of $690.80 ($12.56 x 55 = $690.80).

24. AC's[Redacted] testimony is credible and persuasive.

25. Claimant's average weekly wage is $690.80, with a corresponding TTD rate of $460.53.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no

[2] Overtime rules did not apply to agricultural workers before November 1, 2022. *See* 7 CCR 1103-1 § 2.3.2(A).

presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

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

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The Division has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). The MTGs are primarily intended to facilitate quick determinations by insurers regarding requests for pre-authorization. They are not binding rules, and not intended to supplant a case-by-case evaluation of individual circumstances. *See* § 8-43-201(3).

As found, Claimant proved she suffered a compensable occupational disease affecting her left arm. Claimant's testimony is credible. Claimant has provided consistent accounts of the onset and progression of symptoms to AC[Redacted], other representatives of Respondents, and multiple medical providers. Claimant perceived that the left arm symptoms were directly associated with specific work tasks. Although Claimant is not a medical expert, she is in the best position to say how her body responded to particular activity. Claimant worked 10-hour shifts, which further concentrated her exposure to the injurious activities. Ms. Zwegers observed swelling over the radial aspect of Claimant's left wrist on July 25, 2022, which correlated with the reported symptoms and provides objective evidence of a soft tissue injury. There is no

persuasive evidence Claimant had any problems with her left arm before starting the job with Employer or has any nonwork-related medical condition that would explain her symptoms. There is no persuasive evidence that Claimant is equally exposed to potentially injurious activities outside of work. The causation determinations of Ms. Zwegers and Dr. Alexis are more persuasive than the contrary opinions offered by Dr. Orgel. Dr. Orgel did not personally examine or interview Claimant, and his conclusions are based strictly on the records of others. Dr. Orgel's opinions are too heavily focused on the causation algorithm in the MTGs, with insufficient consideration of the other persuasive factors supporting a determination of compensability.

B. Average weekly wage

Section 8-42-102(2) provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $690.80 based on AC's[Redacted] credible testimony and the applicable minimum wage on the date of injury. Although Claimant testified she earned more than minimum wage, she presented no persuasive evidence to establish a specific AWW based on a piecework rate or using any method other than minimum wage.

C. TTD benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). A work injury need not be the sole cause of a wage loss; a disabled claimant is entitled to TTD benefits if the injury contributed "to some degree" to their wage loss. *PDM Molding, Inc. v. Stanberg, supra*.

As found, Claimant proved entitlement to TTD benefits commencing July 26, 2022. She was taken off work by Ms. Zwegers on July 25, and subsequently given work restrictions that precluded a return to her pre-injury job. Employer had no modified duty available, and Claimant remained off work through August 17, 2022.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). Claimant returned to work on August 18, 2022, which terminated TTD benefits under § 8-42-105(3)(b).

However, Claimant proved she left work again on August 18, 2022 because of the injury and is entitled to reinstatement of TTD benefits effective August 19, 2022. There is no persuasive evidence Claimant has subsequently been put at MMI by an ATP, released to regular duty, or returned to work. Therefore, TTD benefits remain ongoing at present.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

3. Claimant's average weekly wage is $690.80, with a corresponding TTD rate of $460.53.

4. Insurer shall pay Claimant TTD benefits at the rate of $460.53 per week, from July 26, 2022 through August 17, 2022, and from August 19, 2022 until terminated by law.

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

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

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

DATED: October 25, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-219-381-002

STIPULATIONS

1. The parties stipulated on the record to an average weekly wage of $2,917.13.

2. The parties further stipulated that a general award of medical benefits would be appropriate if the claim were found compensable.

ISSUES

1. Whether Claimant sustained a compensable injury on August 24, 2022, arising out of and in the course of his employment with Respondent-Employer.

2. Whether the right of first selection of the authorized treating physician passed to Claimant, and, if so, whom Claimant selected.

FINDINGS OF FACT

1. Claimant was a CEO for [Redacted, hereinafter NB], a subsidiary of Respondent-Employer, who on August 24, 2022, around 7:00 A.M., sustained a low back injury, while removing a bicycle from the back of his vehicle. Claimant was at the [Redacted, hereinafter BS] in Fort Collins and was planning to take the bicycle for a test ride prior to going into the office. The bicycle was a prototype of NB's[Redacted] research and development department, which Claimant oversaw.

2. Claimant's low back pain gradually worsened over the next day. Claimant reported his injury to [Redacted, hereinafter JP], from the human resources department, and [Redacted, hereinafter MK], his supervisor. Claimant's employer did not provide Claimant with a designated provider list as required by Rule 8-2(A)(1), W.C.R.P. and § 8-43-404(5), C.R.S. (2022).

3. The day after the injury, Claimant sought treatment with his primary care provider at Associates in Family Medicine in Fort Collins where he was attended by Melissa Jones, FNP. Claimant reported that he had pulled a muscle in his back while pulling his bicycle out of his car. He was assessed with a lumbar strain and prescribed a muscle relaxer.

4. Claimant followed up with his provider on January 10, 2023, reporting that his pain had improved overall, though he still had intermittent flare-ups in back pain. Claimant's provider did not recommend imaging at that time, but instead recommended that Claimant continue with stretching, ice, and massage. NP Jones indicated that she would refill his muscle relaxer prescription as needed.

5. Claimant filed a Worker's Claim for Compensation (WC15) on October 19, 2022. On that form, Claimant described the injury as: "Attempting to test ride company bicycle. Strained and heard popping sound from lower back. Immediate intense pain in lower back. When attempting to pull Electric Bike from vehicle." Claimant indicated that there were no witnesses to the accident and that he had reported the injury to JP[Redacted] and MK[Redacted].

6. Respondents denied the claim for further investigation.

7. Claimant underwent an independent medical examination (IME) with Dr. John Raschbacher on May 23, 2023. Claimant recounted the facts of the injury in a way consistent as found herein. At the time of the IME, Claimant reported that he was experiencing only minimal back pain. He reported that he had experienced persistent pain for a month or two after the injury, but that the pain slowly abated with ibuprofen and exercises he learned on the internet. Dr. Raschbacher also reviewed Claimant's prior medical history.

8. Dr. Raschbacher opined that Claimant sustained a lumbar strain or sprain on the August 24, 2022, while attempting to lift the bicycle out of his vehicle. Dr. Raschbacher recommended lumbar X-rays and an MRI to determine if there is any lumbar annular ligament tears that might be pain generators. Dr. Raschbacher also recommended a course of physical therapy.

9. Claimant testified at hearing on his own behalf as follows.

10. Claimant testified that he had been employed by [Redacted, hereinafter HY] since August 24, 2018. He had a long history with the company, starting his own business, NB[Redacted], in 2005 before it was acquired by HY[Redacted] in 2018. Under HY's[Redacted] ownership, he held the position of president or CEO of the NB's[Redacted] Division, with responsibilities including overseeing research and development, design, sales, and marketing. Claimant also played a pivotal role in testing and developing new products, making him the final decision-maker in product development.

11. He frequently commuted to work on bicycles and actively tested different iterations of bicycles, as well as accessories. His team comprised ten to fourteen individuals, with their main focus on research and development. While some responsibilities shifted to HY[Redacted] after the acquisition, Claimant continued to have a significant role in testing and maintaining the quality of new products.

12. Claimant's responsibilities included test-riding the bicycles himself, given his lifelong experience with biking. This testing was crucial to product development, and he believed that NB[Redacted], a product from his division, had benefited from his insights, winning numerous awards. Claimant was a salaried employee and had flexible working hours, typically working 40 to 55 hours a week.

13. On August 22, 2022, at 7:00 A.M., he went out to the BS[Redacted] Trailhead to test a prototype bicycle for the market. He noted that the BS[Redacted] Trailhead was conveniently located near his office and provided a variety of terrain, making it a common testing location. During an attempt to remove the bicycle from his SUV, he injured his back. This injury prevented him from completing the test ride. He explained that testing in this mountainous terrain was necessary since it provided a more rigorous environment compared to the flatter Ohio location where HY[Redacted] was based.

14. After the incident, he returned to work and initially self-treated with Aspirin, but the pain worsened over the next day. He reported the injury to JP[Redacted] and MK[Redacted], although they did not offer immediate medical care as it had occurred outside of office hours. JP[Redacted] indicated that he could file a claim but expected it to be denied due to the belief that he was riding outside of work hours.

15. Claimant emphasized that even when riding for leisure, he constantly assessed the bicycle's qualities, believing that the company would benefit from his observations. Claimant regularly shared notes with MK[Redacted] about their bicycle observations, which were pertinent to his performance reviews and goals for the year. Claimant clarified that MK[Redacted] also would test ride prototypes.

16. During cross-examination, Claimant stated that his new job duties after NB's[Redacted] acquisition included working as a board member for HY[Redacted]. He also clarified that while he had no obligation to report or document his test rides, he did produce data, including "shock analysis," for some rides. However, written reports were only required for specific back-to-back tests, and his injury incident was not part of such testing.

17. In the redirect examination, Claimant reiterated that he had never seen or recognized Respondents' Exhibit E, his job description which described his duties as, among other things, "Oversees all research and development efforts to ensure brand sustainability and the organization's financial health." The job description did not specifically address whether Claimant was to personally test the products rather than leave the testing to his research and development team. Nevertheless, Claimant emphasized that test rides were routinely discussed within the team. Additionally, he confirmed that he had never been asked to submit written ride reports to HY[Redacted] management.

18. The Court finds Claimant's testimony credible.

19. Respondents called JP[Redacted] to testify at hearing as well. Her testimony was as follows.

20. JP[Redacted] is the Manager of People and Culture for [Redacted, hereinafter UW] and HY[Redacted], which she described as being the head of the human resources department. She was the Talent and Recruitment specialist at the time of Claimant's injury.

21. Claimant notified JP[Redacted] on the day of the accident, though it might have been the next day. Claimant reported that he had gone out for a ride before work because he had not ridden his bicycle in some time, and he wanted to get some practice in before meeting with some vendors that afternoon. JP[Redacted] testified that it was not within the normal work hours of 8 to 5.

22. Claimant was an employee of HY[Redacted]. JP[Redacted] met with Claimant in March of 2020 in her first week in the company. Her understanding of Claimant's duties and responsibilities was that Claimant was the strategic leader for the brand NB[Redacted]. JP[Redacted] felt that Ex E was consistent with Claimant's duties and responsibilities at NB[Redacted].

23. JP[Redacted] testified that Claimant oversaw the research and development team for NB[Redacted]. The research and development team was obligated to ride bicycles as part of their employment, as testing the bicycles on trails was necessary for their work. She clarified that it was common practice of the NB's[Redacted] team to test their bicycles themselves, though they would sometimes use outside testers or influencers.

24. Despite Claimant being in charge of the research and development team, JP[Redacted] testified that she was not aware of any obligations for Claimant to test or ride bicycles himself, nor did she believe anybody directed Claimant to go on a bicycle ride that morning. She also testified that she was not aware of any reports that Claimant was required to produce that morning of the ride nor that Claimant was subject to any safety protocols. However, she acknowledged that nobody at NB's[Redacted] would ever seek permission from her before testing bicycles and that she was unaware if there was a way for the company to verify whether Claimant would be testing a bicycles. JP[Redacted] admitted that she was working in Miamisburgh, Ohio, and did not have access to the day-to-day work at NB[Redacted] at the time of the injury other than HR matters.

25. JP's[Redacted] testified that Claimant told her he had not ridden a bicycle in some time and that he needed to practice before riding with some vendors that afternoon. She testified that Claimant did not mention to her that he was test-riding a bicycle nor did he mention the type of bicycle or parts he was using. Though, Claimant did report the injury to JP[Redacted] as being work-related.

26. The Court finds JP's[Redacted] testimony credible, except insofar as she testified that Claimant told her that the purpose of his morning ride was to practice before riding with vendors that afternoon.

27. The Court finds based on the totality of the circumstances that Claimant's August 24, 2022 low back injury arose out of and in the course of his employment with Respondent-Employer.

28. As CEO of the NB[Redacted] brand, Claimant had broad discretion to execute his duties as he saw fit. Although his job description did not specifically identify test-riding bicycles as the means by which he would achieve any of his other duties, the job description was in fact not specific as to the means by which Claimant was to execute any of his duties. One of his duties was to "oversee[] all research and development efforts to ensure brand sustainability and the organization's financial health." The Court infers that the means by which he was to execute that duty was within his discretion. Claimant credibly testified that he, along with the rest of his research and development team, regularly tested prototypes, and that he would conduct those tests outside of normal working hours.

29. The Court also finds that Respondents did not provide Claimant with a designated provider list and that Claimant, by choosing to treat with Associates in Family Medicine, selected that provider as his authorized treating physician.

CONCLUSIONS OF LAW

Generally

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

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

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

Compensability

An injury must "arise out of and occur in the course of" employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S. *See also Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). An injury "arises out of" the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Popovich*, 811 P.2d at 383.

The Workers' Compensation Act excludes from the definition of "employment" an employee's "participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Section 8-40-102(8), C.R.S. (2022).

The fact that an activity is recreational in nature does not preclude an injury arising from that activity from being compensable. When presented with a situation where, as here, the employer's principal business is recreation, the following test should be applied to determine whether the injured employee was in the course of employment: (1) the extent to which the employer derives substantial benefit from the policy—beyond the intangible value of improvement of employee morale; (2) the extent to which the recreational activity represents compensation for employment; (3) the extent to which the obligations of employment create the special danger which precipitates the injury; (4) whether the use of the recreational activity was an inducement for employment; (5) whether the use of the recreational facility was originally contemplated by the parties at the time of employment. *Dorsch v. Industrial Commission*, 523 P.2d 458, (Colo. 1974).

In this case, the Court concludes the first and third factors are most informative as to whether Claimant's injury arose out of and in the course of his employment. The first factor weighs in favor of a finding that Claimant's injury arose out of and in the course of his employment. As found above, Claimant oversaw the product testing performed by the research and development team. Claimant was in fact engaged in product testing at the time of the injury, and Respondent-Employer certainly benefited from the product testing performed by the research and development team.

The third *Dorsch* factor also weighs in favor of a finding that Claimant's injury arose out of and in the course of his employment. Within his role as CEO of NB[Redacted] and as the manager of the research and development team, Claimant exercised his executive discretion to personally partake in the product testing. He had an obligation to oversee research and development, and he executed that obligation by personally testing some of the products. Handling bicycles created a special danger that precipitated the injury in this case.

Therefore, as found above, Claimant's low back injury on August 24, 2022, arose out of and in the course of his employment.

Authorized Provider

Claimant seeks determination of his authorized provider.

Pursuant to Section 8-43-404(5), C.R.S. (2022), Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, a claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Indus. Claim Appeals Office*, 931 P.2d 570 (Colo.App.1996).

A copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven business days following the date the employer has notice of the injury. Rule 8-2(A)(1), W.C.R.P. A physician or corporate medical provider is presumed willing to treat injured workers unless the employer is specifically informed by the physician or corporate medical provider to the contrary. Rule 8-2(D), W.C.R.P. If the employer fails to supply the required designated provider list in accordance with the W.C.R.P., the injured worker may select an authorized treating physician or chiropractor of their choosing. Rule 8-2(E), W.C.R.P.

In situations where the claimant has signified "by words or conduct that he has chosen a physician to treat the industrial injury," they have made a physician "selection". *Murphy-Tafoya v. Safeway, Inc.*, WC No. 5-153-600-001 (Sept. 1, 2021).

As found above, Claimant selected Associates in Family Medicine as his authorized treating physician through his conduct, namely choosing to treat with Associates in Family Medicine.

Average Weekly Wage

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corporation*, 867 P.2d 77, 82 (Colo. App. 1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d 548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

As documented herein, the parties, on the record, stipulated to an AWW of $2,917.13. The Court approves this stipulation and adopts the stipulated AWW as its own finding.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable low back injury on August 24, 2022.

2. Claimant's authorized treating provider is Associates in Family Medicine in Fort Collins.

3. Respondents shall pay for all medical treatment reasonably necessary to cure and relieve Claimant of the effects of his August 24, 2022 injury.

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

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

DATED: October 25, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-200-463-003

ISSUES

- Did Claimant prove she sustained a compensable injury?
- If so, Did Respondents prove Claimant was responsible for termination of her employment?
- Entitlement to medical benefits.
- Temporary disability.
- Average Weekly Wage.

FINDINGS OF FACT

1. Claimant was employed as a well site mechanic by [Redacted, hereinafter OS] on March 10, 2022. She alleges that on that date she sustained a work injury when her work vehicle was involved in a one vehicle accident.

2. Claimant testified that on the date of the incident, she went to a site to perform mechanic work on a well site motor. It was snowing on that day. She was not able to complete the work on the unit before the weather became worse. Due to the weather, she packed up her equipment early. Since everything was covered in snow when she came out of the sound walls surrounding the unit she was working on, she put on her snow chains. After she put on her snow chains, she began driving down little [Redacted, hereinafter BM], a switch back mountain road. On her way down the steep mountain, she was unable to brake the vehicle and lost control of the truck. She testified that the truck hit the side of the mountain and she hit a rock and the truck became airborne and its back wheels hit first and the truck ended up in a ditch. She testified that she had a complete loss of brakes. She testified that the brake pedal went all the way to the floor.

3. During the incident, Claimant testified that she experienced whiplash and pain in her back. She did not lose consciousness but experienced shock.

4. After the incident, Claimant used her CB radio to tell the employer that she was in an accident and needed help. She was told that they were sending two people to help her. The two people who came to help her were [Redacted, hereinafter JB] and [Redacted, hereinafter KR]. They looked at the truck. There were no dents on the truck but there were scratches on the truck. Claimant was not sure if the scratches were new or old. She observed brake fluid in a puddle under the driver side front tire coming from the brake caliper. She did not see any breaks in the brake lines. The snow chains were still intact.

5. In her testimony, Claimant described what happened after the accident. She rode back to the shop with KR[Redacted] in KR's[Redacted] truck. When she got to the shop, she spoke with [Redacted, hereinafter DB] and she told him that she hurt her back. DB[Redacted] was Claimant's supervisor. He did not acknowledge her claim that she hurt her back. He accused her of putting the snow chains on wrong. When the tire was removed she saw the brake fluid coming from the banjo bolt. She claimed in her testimony that the banjo bolt was purposefully loosened. She testified that [Redacted, hereinafter CA] intentionally tried to kill her. (July 25, 2023 transcript, p. 53).

6. KR[Redacted] testified at the hearing on behalf of Claimant. He testified that the Claimant's truck had no brakes when they picked her up. However, it was not KR[Redacted] that drove the Claimant's truck down the last half mile of BM[Redacted], JB[Redacted] drove it down the rest of the way, so KR[Redacted] would not be best position to determine if the brakes were completely gone as opposed to partially working as testified to by DB[Redacted]. KR's[Redacted] credibility is also called into question since he was terminated for a positive drug test. He denies that the test was accurate. However, the test administered by a third-party, [Redacted, hereinafter MH], was independently done without any interference with the Employer.

7. Claimant testified that she hit her head initially on the steering wheel and then on the dashboard. She did not recall if she had any bruising on her head.

8. Claimant testified that did not seek immediate medical care. Claimant sought treatment for her back after she obtained Medicaid since she did not have health insurance. She initially treated with a chiropractor at McGowan Chiropractic on March 17, 2022. Claimant thinks she scheduled an appointment with the chiropractor on the day of the injury but could not get in to see him until March 17, 2022. After the initial treatment with the chiropractor, she was referred to Eileen Romero at Sunrise Clinic.

9. DB[Redacted] testified at hearing. He is the operations manager and Claimant's supervisor. He was aware of the incident with the truck and he discussed the incident with the Claimant. He did ask her if she was ok. According to DB[Redacted], although the Claimant looked "shook up" after the incident, she did not request medical treatment or complain of any physical injuries.

10. When the truck arrived in the shop, JB[Redacted] said the brakes were working. However, when [Redacted, hereinafter SB], JB[Redacted] and [Redacted, hereinafter CB] examined the brakes more thoroughly they discovered that the banjo bolt had loosened and had a brake fluid leak. Something had hit the bolt. They further discovered that the tire chain link hit the bolt and caused damage to the chains. The chain link was "smashed". The tire chain had been installed improperly. Specifically, the link that hooks the chain and locks the chain. This allowed the chain to move toward the inside of the tire so that the chain hit the caliper and the banjo bolt.

11. CA[Redacted], the shop mechanic also evaluated the brakes on Claimant's truck. He determined that the snow chains were put on backwards which caused the banjo bolt to loosen and cause the brake fluid to leak out. CB[Redacted] denied ever

intentionally loosen the banjo bolt in contrast to Claimant's testimony that she suspected him of doing that.

12. There was no structural damage to the truck involved in the incident. No repairs were required for the body of the truck. The banjo bolt was replaced and Claimant drove the truck the day after the incident.

13. Claimant worked full duty from the date of the incident, March 10, 2022 through the date of termination on March 16, 2022. During that same time period, she alleges that another co-worker, [Redacted, hereinafter FK], purposefully tried to hit her truck with his truck and that he was drunk when this occurred. Other than Claimant's testimony, she offered no other evidence that FK[Redacted] was drunk.

TERMINATION[1]

14. Prior to the alleged incident, on March 8, 2022 Claimant had been reprimanded for yelling at CA[Redacted], a co-employee, demanding that he change her truck tire immediately. SB[Redacted] investigated the incident and interviewed co-employees who witnessed the interaction and issued a final notice to Claimant that she would be terminated if she engaged in similar behavior in the future. Exhibit I, p. 127.

15. A couple of days after the incident, the Claimant was again involved in loud verbal conflict with a co-employee. Claimant was terminated due to the combination of the incident on March 8, 2022 and the verbal conflict with [Redacted, hereinafter AM] on March 16, 2022. The conflict stemmed from AM[Redacted] working with another co-employee when that co-employee was assigned to work with Claimant. Claimant was terminated on that day since she had previously been warned on March 8, 2022 that she would be terminated for the next incident involving rudeness to co-employees or customers.

16. Claimant testified that the Employer set her up to be terminated based on the fact that the Employer did not report the work injury and would be in trouble for that failure. She also claims that the employer would provoke her into conflicts with co-workers.

17. I find that, contrary to Claimant's testimony, it was only after the termination that Claimant complained of injuries. On March 17, 2022, the day after her termination, she sought treatment with McGowan Chiropractic.

18. I do not find the Claimant to be credible with respect to how the accident occurred, including her testimony that the left side of her truck hit the side of the mountain, and the that the testimony that truck became airborne and forcefully landed first on the truck's back wheels and then on the front tires resulting in injuries to her neck and back. The lack of physical damage to the vehicle is inconsistent with the Claimant's description

[1] Although the issue of termination for cause was identified as an issue, the determination that the claim is not compensable renders this issue moot. The findings related to this issue are included since they provide insight regarding a determination of Claimant's credibility.

of the incident. I am also not persuaded that she was terminated because the employer was “out to get her”.

MEDICAL EVIDENCE

19. Dr. Burris testified that he performed an IME on February 7, 2023. He issued a report on that day which was in evidence. Of note is the Claimant’s subjective pain of 10 out of 10 in her entire posterior torso. In his review of the medical records, he mentions that a thoracic and a lumbar MRI were taken. Both showed no significant abnormality.

20. Dr. Burris’ assessment was “Diffuse back pain with nonphysiologic presentation”. He also indicated in the discussion portion of the report “that the only diagnoses that can be causally related to the 3/10/2022 workplace event are relatively minor spinal soft tissue strains and contusions with possible mild concussion”. Exhibit A, p. 13.

21. Dr. Rook also performed a record review and issued a report dated June 29, 2023. He also testified at hearing. It was Dr. Rook’s opinion that based on the history given to the medical providers that Claimant had muscular pain in her neck and back along with facet mediated pain caused by the accident when the Claimant’s truck was airborne and then landed with the rear wheels first then the front wheels.

22. Despite Dr. Burris’ initial diagnoses, he changed his opinion after hearing the testimony of the lay witnesses at hearing. Specifically, he would have expected some damage to the vehicle if the Claimant’s truck had hit the side of the mountain as she claimed. The other thing was that the Claimant said that she experienced immediate pain after the accident. This is contrary to the testimony of the witnesses that she continued to work after the incident and continued to drive the work truck. Finally, the Claimant’s had non-physiologic reported pain which called into question whether she sustained any injury as the result of the truck incident.

CONCLUSIONS OF LAW

A. Generally

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

respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In assessing credibility in this case, I have considered the testimony of the Claimant and the testimony of the other witness presented by both parties. I conclude that Claimant is not credible based on her description of the work incident, the facts leading up to her termination and the fact that Claimant did not seek medical care until she was terminated. Although she claims that she could not afford medical care immediately after the accident, she nonetheless did see the Chiropractor the day after her termination and paid the for treatment, despite the fact that the Chiropractor did not accept Medicaid.

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

B. Compensability

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

Claimant has failed to sustain her burden of proof that she sustained an injury in the incident that occurred on March 10, 2023. If the accident occurred in the manner that Claimant testified, including hitting the side of the mountain with the left side of her vehicle, there would have been some damage to the vehicle. However, there was no damage to the truck other than scratches of an undetermined age. Additionally, although the Claimant was observed to be "shook up" following the incident, she did not seek medical treatment until after her termination. I do not find her testimony credible that she was told not to make a claim since it would result in her termination. I find that Dr. Burris' testimony that Claimant did not sustain any injuries based on his review of the records, physical examination, and listening to the testimony of the witnesses at hearing to be credible. I find that Dr. Rook's opinions to the contrary not to be credible since it is based on the inaccurate history of the Claimant given to Dr. Burris as to the mechanism of the unwitnessed automobile accident. He assumed that the history given to Dr. Burris to be

"accurate". I conclude that the history given is inaccurate and therefore his opinions based on that history are inaccurate.

ORDER

It is therefore ordered that:

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

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

DATED: October 26, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-236-859-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a right knee injury during the course and scope of his employment with Employer on April 4, 2023.

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

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

FINDINGS OF FACT

1. Claimant is a 54-year-old Fire Prevention Officer who has worked for Employer since 2013. On April 4, 2023 Claimant was sitting in a chair at his work desk. When he stood up, he felt sharp pain in his right knee. Claimant's knee buckled, but he did not fall to the ground. Claimant testified that he had not previously received medical treatment for his right knee. He reported his injury to Employer and was referred to Concentra Medical Centers for treatment.

2. On April 4, 2023 Claimant visited Jonathan Claassen, D.O. at Concentra. He reported right knee pain and loss or range of motion after standing up from his desk chair. Claimant specifically felt his knee pop and then "lock." Dr. Claassen referred Claimant for an MRI and to Thomas Noonan, M.D. for an orthopedic evaluation.

3. The MRI revealed a tear that was superimposed on the "free edge fraying and intrasubstance mucid degeneration. The anterior and posterior root insertions [were] frayed but intact." There was also soft tissue edema and a small joint diffusion.

4. On April 13, 2023 Claimant underwent a surgical consultation with Dr. Noonan. Dr. Noonan recounted that Claimant had suffered extreme right knee pain since getting up from his chair at work about 1.5 weeks earlier. In reviewing the right knee MRI he noted a free edge radial tear in the medial meniscus body segment, moderate patellofemoral compartment osteoarthritis and a small joint effusion. Dr. Noonan thus diagnosed Claimant with right knee pain, a medial meniscus tear with likely flap component, patellofemoral arthritis and grade 2 chondral changes to the medial compartment. After a long discussion about treatment options, Claimant elected to proceed with arthroscopic intervention. Dr. Noonan agreed surgery was the best option.

5. On April 18, 2023 Claimant returned to Dr. Claassen to review his MRI results. Dr. Claassen determined there was a greater than 51% probability that Claimant's right knee injury was work-related. He reasoned that, due to the degenerative nature of

Claimant's knee, it was likely that standing up from the chair caused his meniscus to tear. Dr. Claassen explained that Claimant exhibited high grade cartilage loss in the medial compartment of the knee. The finding meant there was increased force on the meniscus with weight bearing and knee motion. Therefore, standing from a chair could have created the force required to tear Claimant's meniscus. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he arose from his chair "corresponded to the event of the meniscus tearing."

6. Claimant testified he was able to work modified duty following his injury but was unable to work "on call." He explained that the inability to work "on call" or overtime reduced his Average Weekly Wage (AWW). Claimant's wage records revealed an AWW of $2,030 plus "on call" wages of $721.61 for a total AWW of $2,751.61.

7. Following his right knee injury, Claimant worked modified duty until he underwent knee surgery with Dr. Noonan on June 5, 2023. The surgery involved repair of Claimant's right knee medial meniscus tear. The surgical notes reflected "complex tearing of the meniscus" that was debrided with a basket punch and shaver. Approximately 60% of the posterior horn and 50% of the body remained intact. Claimant explained that the surgery relieved his right knee symptoms and permitted him to return to full duty work on September 1, 2023.

8. Claimant's supervisor [Redacted, hereinafter BC] testified at the hearing in this matter. He explained that on the date of Claimant's alleged injury there had been a discussion about a picture of a vehicle on the whiteboard in Claimant's office area. After BC[Redacted] left the room, he heard a "thud" and returned to the office area. He noticed Claimant reaching for his knee. Claimant told BC[Redacted] that when he stood up from his chair, he felt a pop and pain in his right knee.

9. BC[Redacted] testified that he took pictures of the work area in which Claimant was allegedly injured. The photos showed various work stations with computers and rolling desk chairs. There was nothing about the work environment that was uneven or otherwise would have caused a risk of injury. The pictures were not taken on the day of Claimant's injury, but BC[Redacted] testified the pictures accurately reflected the circumstances and condition of the room on the date of the incident.

10. Respondents retained Timothy S. O'Brien, M.D. to perform a records review, provide an opinion on the cause of Claimant's knee symptoms and evaluate Dr. Noonan's surgical request. Dr. O'Brien concluded that Claimant's right knee symptoms were the result of his degenerative condition. The mechanism of simply standing up from a chair would not have aggravated or accelerated his underlying condition. He explained that Claimant's MRI findings were not acute, but instead reflected degeneration of the knee joint. He summarized that Claimant had an advanced arthritic knee and the mechanism of injury would not have created sufficient force to injure a healthy knee. Dr. O'Brien determined that Claimant's pre-existing osteoarthritis was the cause of his right knee problems and the surgery performed by Dr. Noonan was neither reasonable nor necessary.

11. Claimant has established it is more probably true than not that he suffered a right knee injury during the course and scope of his employment with Employer on April 4, 2023. Initially, on April 4, 2023 Claimant arose from a desk chair at work and felt a sharp pain in his right knee. After undergoing a right knee MRI, he was diagnosed with a torn meniscus. Claimant credibly testified that he had not previously received medical treatment for his right knee.

12. On April 18, 2023 Dr. Claassen determined there was a greater than 51% probability that Claimant's right knee injury was work-related. He reasoned that, due to the degenerative nature of Claimant's knee, it was likely that standing up from the chair caused his meniscus tear. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he stood up from the chair "corresponded to the event of the meniscus tearing." The record reveals that Claimant was engaging in an employment function by arising from his chair at Employer's facility when the injury occurred. But for his employment, Claimant would not have been at work and stood up from his office chair.

13. In contrast, Dr. O'Brien determined that Claimant's work activities did not cause his right knee injury. He explained that Claimant's MRI revealed degenerative fraying of the meniscus and mucoid degeneration. Dr. O'Brien remarked that the findings were not "acute," but instead reflected degeneration of the knee joint. He summarized that Claimant had an advanced arthritic knee and the mechanism of injury would not have created sufficient force to injure a healthy knee. However, Dr. O'Brien acknowledged that the medical records did not reveal any prior radiographic evidence of fraying in Claimant's meniscus, work restrictions, or modified duty because of his right knee condition. Claimant's employment causally contributed to his right knee injury because it obligated him to engage in employment-related functions, errands, or duties at the time of his symptoms. His employment obligations placed him in the particular place at the specific time when he injured his right knee when arising from his chair.

14. The record reflects a direct causal connection or nexus between the conditions and obligations of Claimant's employment and his injuries. Because Claimant was performing a service arising out of and in the course of his employment when he developed symptoms, his injuries were proximately caused by his work activities for Employer. Accordingly, Claimant's work activities on April 4, 2023 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

15. Claimant has demonstrated it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for his right knee injury. On April 4, 2023 Claimant was arising from his chair at work and developed significant right knee pain. He immediately obtained medical treatment with Dr. Claassen. An MRI revealed that Claimant had suffered a torn meniscus. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he stood, "corresponded to the event of the meniscus tearing." After reviewing the MRI Dr. Noonan diagnosed Claimant with right knee pain, a medial

meniscus tear with likely flap component, patellofemoral arthritis and grade 2 chondral changes to the medial compartment. Dr. Noonan determined surgical repair of Claimant's right knee medial meniscus tear was the best option and completed the procedure on June 5, 2023. The surgical notes established "complex tearing of the meniscus" that was debrided with a basket punch and shaver. Claimant explained that the surgery relieved his right knee symptoms and permitted him to return to full duty work on September 1, 2023. All of the preceding treatment was designed to address Claimant's right knee symptoms as a result of his April 4, 2023 work injury. Accordingly, Claimant's treatment constituted reasonable, necessary and causally related medical benefits for his industrial injury.

16. Claimant credibly testified that his base weekly salary is $2,030.00. He also receives overtime benefits of $721.61 per week. However, Claimant explained that his inability to work overtime or "on call" while on modified duty after his injury reduced his AWW. Claimant's wage records corroborated his testimony and revealed an AWW of $2,030 plus "on call" wages of $721.61, for a total AWW of $2,751.61. Accordingly, an AWW of $2,751.61 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

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

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

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

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

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

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

7. In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Colorado Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of the Workers' Compensation Act and is thus compensable. Specifically, in *City of Brighton* the claimant was walking to her basement office when she suffered an unexplained fall. The supreme court rejected the employer's argument that the claimant could not show a sufficient legal causal connection between her work activities and her injury because she could not provide the precise mechanism for her fall. The supreme court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The second category of personal risks includes those referred to as idiopathic injuries. The preceding are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the

simple fact of being at work would have caused any employee to be injured. *Id.* at 504-05.

8. The supreme court in *City of Brighton* declared that "some form of the "but-for" test appears to be the approach taken by the majority of states that have addressed unexplained falls." *Id.* at 505. The supreme court did not require an employee to rule out idiopathic causes for an injury, absent a known idiopathic event such as a stroke or seizure, and reasoned:

> Importantly, however, injuries stemming from neutral risks, whether such risks be an employer's dry and unobstructed stairs or stray bullets, "arise out of" employment because they would not have occurred but for employment. That is, the employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of injury.

Id. at 504.

9. In *King Soopers v. Indus. Claim Appeals Off.*, 2023COA73 (Colo. App. Aug. 3, 2023), the Colorado Court of Appeals relied on the "but-for" test applied in *City of Brighton*. In *King Soopers*, the respondents argued that the claimant had not sustained a compensable injury because the injury was "unexplained." In rejecting the respondents' argument, the court of appeals found that the claimant's unexplained injury fell within the "neutral risk" category. The court of appeals also approved the "positional risk" analysis of an injury occurring within the course and scope of employment. Thus, an injury is compensable under the Act if it is triggered by a neutral source that is not specifically targeted to a particular employee and would have occurred to any person who happened to be in a position of the injured employee at the time and place in question. *Id.* at ¶ 32-33. The court of appeals rejected the employer's argument that an unexplained injury can never be compensable due to the fact that an injured worker has the burden of proving an injury was caused by work activities. *Id.* at ¶ 39. The court of appeals reasoned that the employee was required to engage in employment related functions, errands, or duties that gave rise to the injury. *Id.* at ¶ 42.

10. As found, Claimant has established by a preponderance of the evidence that he suffered a right knee injury during the course and scope of his employment with Employer on April 4, 2023. Initially, on April 4, 2023 Claimant arose from a desk chair at work and felt a sharp pain in his right knee. After undergoing a right knee MRI, he was diagnosed with a torn meniscus. Claimant credibly testified that he had not previously received medical treatment for his right knee.

11. As found, on April 18, 2023 Dr. Claassen determined there was a greater than 51% probability that Claimant's right knee injury was work-related. He reasoned that, due to the degenerative nature of Claimant's knee, it was likely that standing up from the chair caused his meniscus tear. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he stood up from the chair "corresponded to the event of the meniscus tearing." The record reveals that Claimant

was engaging in an employment function by arising from his chair at Employer's facility when the injury occurred. But for his employment, Claimant would not have been at work and stood up from his office chair.

12. As found, in contrast, Dr. O'Brien determined that Claimant's work activities did not cause his right knee injury. He explained that Claimant's MRI revealed degenerative fraying of the meniscus and mucoid degeneration. Dr. O'Brien remarked that the findings were not "acute," but instead reflected degeneration of the knee joint. He summarized that Claimant had an advanced arthritic knee and the mechanism of injury would not have created sufficient force to injure a healthy knee. However, Dr. O'Brien acknowledged that the medical records did not reveal any prior radiographic evidence of fraying in Claimant's meniscus, work restrictions, or modified duty because of his right knee condition. Claimant's employment causally contributed to his right knee injury because it obligated him to engage in employment-related functions, errands, or duties at the time of his symptoms. His employment obligations placed him in the particular place at the specific time when he injured his right knee when arising from his chair.

13. As found, the record reflects a direct causal connection or nexus between the conditions and obligations of Claimant's employment and his injuries. Because Claimant was performing a service arising out of and in the course of his employment when he developed symptoms, his injuries were proximately caused by his work activities for Employer. Accordingly, Claimant's work activities on April 4, 2023 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

Medical Benefits

14. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

15. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his right knee injury. On April 4, 2023 Claimant was arising from his chair at work and developed significant right knee pain. He immediately obtained medical treatment with Dr. Claassen. An MRI revealed that Claimant had suffered a torn meniscus. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he stood, "corresponded to the event of the meniscus tearing." After

reviewing the MRI Dr. Noonan diagnosed Claimant with right knee pain, a medial meniscus tear with likely flap component, patellofemoral arthritis and grade 2 chondral changes to the medial compartment. Dr. Noonan determined surgical repair of Claimant's right knee medial meniscus tear was the best option and completed the procedure on June 5, 2023. The surgical notes established "complex tearing of the meniscus" that was debrided with a basket punch and shaver. Claimant explained that the surgery relieved his right knee symptoms and permitted him to return to full duty work on September 1, 2023. All of the preceding treatment was designed to address Claimant's right knee symptoms as a result of his April 4, 2023 work injury. Accordingly, Claimant's treatment constituted reasonable, necessary and causally related medical benefits for his industrial injury.

Average Weekly Wage

16. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury, the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of injury. *Id.*

17. As found, Claimant credibly testified that his base weekly salary is $2,030.00. He also receives overtime benefits of $721.61 per week. However, Claimant explained that his inability to work overtime or "on call" while on modified duty after his injury reduced his AWW. Claimant's wage records corroborated his testimony and revealed an AWW of $2,030 plus "on call" wages of $721.61, for a total AWW of $2,751.61. Accordingly, an AWW of $2,751.61 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. Claimant suffered a compensable right knee injury while working for Employer on April 4, 2023.

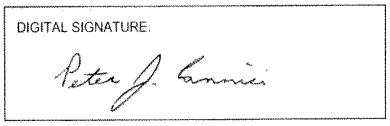
2. The medical treatment performed at Concentra and its referrals, including the MRI of April 5, 2023 and the surgery performed by Dr. Noonan on June 5, 2023, was reasonable, necessary and causally related to Claimant's April 4, 2023 right knee injury.

3. Claimant earned an AWW of $2,751.61.

4. Any issues not resolved in this Order are reserved for future determination.

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

DATED: October 27, 2023.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-232-076-001

ISSUES

- Did Claimant prove that a right elbow surgery recommended by Dr. Chance Henderson is reasonably needed and causally related to the admitted December 14, 2022 work injury?

FINDINGS OF FACT

1. Claimant works for Employer as a Code Enforcement Officer. She suffered an admitted injury to her right elbow on December 14, 2022, while apprehending a stray dog. Claimant tripped and fell to the ground while attempting to load the dog into the back of her vehicle. Claimant fell on the asphalt and landed on her right elbow, left knee and left hand. Her right elbow was bleeding from an abrasion.

2. Claimant went to the Arkansas Valley Regional Medical Center emergency department after the accident. She reported pain in her right elbow, left wrist, and left knee. Examination of the right elbow showed abrasions, swelling, and pain with extension. X-rays of the elbow showed severe arthritic changes but no acute fracture or dislocation. She was prescribed NSAIDs and advised to follow up with a workers' compensation provider.

3. Claimant saw PA-C Brandon Madrid at Concentra on December 29, 2022. She reported ongoing right elbow pain and tingling down to the right hand. Her left knee was better. The elbow was tender at the olecranon and around the ulnar nerve area, with reduced range of motion. Mr. Madrid referred Claimant to PT.

4. On January 24, 2023, PA-C Tara Guy documented continued elbow pain, cracking/popping, and weakness. She referred Claimant to Dr. Chance Henderson for an orthopedic evaluation.

5. A right elbow MRI was completed on January 30, 2023. It showed severe osteoarthritis with cartilage erosion and osteophytes, multiple loose bodies, a large joint effusion, triceps tendonitis, ulnar neuritis, and a lateral collateral ligament tear.

6. Claimant saw Dr. Henderson on February 13, 2023. Her primary complaints were ongoing elbow pain and loss of extension. X-rays obtained that day showed severe degenerative arthritis with large osteophytes and malunion of a previous radial head fracture. Dr. Henderson administered a cortisone injection and ordered a CT scan.

7. Claimant returned to Dr. Henderson on February 20, 2023. The injection had provided no sustained benefit. The CT scan showed severe right osteoarthritis with multiple intra-articular loose bodies. Dr. Henderson noted Claimant had end-stage osteoarthritis, but she was "still very active." Therefore, he did not believe she was a good

candidate for total elbow arthroplasty. Instead, he recommended ulnohumeral arthroplasty with anterior capsular release and ulnar nerve decompression.

8. Dr. Timothy O'Brien performed a Rule 16 record review for Respondent on March 1, 2023. Dr. O'Brien concluded Claimant suffered a minor contusion from the work accident that "healed uneventfully and expeditiously and without sequela." He opined Claimant's ongoing elbow symptoms were solely related to severe, pre-existing osteoarthritis. He opined that all pathology shown on the MRI—including the loose bodies and ligament tear—was pre-existing. He agreed the proposed surgery was reasonable, but opined it is not causally related to the injury.

9. Claimant saw Dr. Craig Davis for an IME at Respondent's request on June 8, 2023. Claimant denied any prior injuries or problems involving her right elbow. Dr. Davis reviewed the imaging, which showed severe degenerative arthritis with multiple intra-articular loose bodies and significant deformity of the articular surfaces. He opined Claimant sustained a strain and/or contusion of her right elbow from the December 14, 2022 accident. He also believed the injury aggravated her pre-existing degenerative arthritis, necessitating a period of rest, activity modification, anti-inflammatory medications, and physical therapy for approximately 8 weeks. However, he opined the proposed surgery is unrelated to the work accident. He noted that sometimes an aggravation of arthritis can result in an increase in symptoms ultimately necessitating in more aggressive treatment such as surgery, which he believed was what happened in this case. However, he stated Claimant clearly had severe pre-existing degenerative arthritis, and he believed she eventually would have needed the surgery with or without the injury on December 14, 2022. He explained that continued daily use of her arm would have resulted in gradual deterioration of function and increasing pain and the eventual need for the proposed surgery.

10. After the IME, Respondent obtained medical records showing that Claimant had not accurately described her pre-injury history. Specifically, there is a report of right elbow pain in April 2016, and additional complaints of elbow pain in 2021 after a fall. There is no persuasive evidence Claimant received any specific treatment for the elbow in 2016. She underwent elbow x-rays after the 2021 fall, which showed a joint effusion, consistent with an occult radial head fracture.

11. Claimant conceded at hearing she neglected to mention the elbow symptoms in 2016 and 2021. She credibly testified she had forgotten the prior episodes because she had no ongoing symptoms and required no specific treatment. Records from Claimant's PCP corroborate her testimony in this regard, as there is no persuasive indication of elbow problems aside from the isolated instances in 2016 and 2021.

12. At hearing, Dr. Davis maintained that the proposed surgery is reasonably needed but not causally related to the December 22 work accident. He emphasized the significant morphological changes shown on imaging as illustrating the severity of the pre-existing condition. He thought it unlikely Claimant's elbow would have been asymptomatic before the accident, given the extensive arthritis. Regardless, he sees "no question" Claimant's range of motion was limited before the injury because of the bone deformity.

Dr. Davis reiterated that Claimant suffered an elbow contusion or strain from the accident, and the treatment she received was reasonable to treat the work-related condition. But he believes the surgery is solely to treat pre-existing arthritis.

13. Claimant's testimony is credible.

14. Claimant proved the surgery recommended by Dr. Henderson is reasonably needed to cure and relieve the effects of her compensable injury. Respondent's experts agree the surgery is reasonable, and the primary disagreement relates to causation. Dr. Davis's opinions are well-reasoned and credible in many respects. But the ALJ is not persuaded by his ultimate conclusion that the surgery is solely related to Claimant's pre-existing condition. Although Claimant had severe osteoarthritis before the work accident, it was minimally symptomatic and caused no significant limitations on her ability to work or perform other activities. Claimant's elbow has been continuously painful since the accident, with no significant break in symptomology to support the argument that the injury "resolved." Dr. Davis may be correct that Claimant "inevitably" would have required surgery for her elbow at some point, but it is speculative whether that would have been next month, next year, ten years from now, or ever. Claimant had no reason to pursue treatment for her elbow immediately before the accident, and there is no persuasive basis to conclude she probably would have needed surgery now absent the injury. The preponderance of persuasive evidence shows the injury combined with the pre-existing condition and accelerated the need for surgery.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

As found, Claimant proved the surgery recommended by Dr. Henderson is reasonably needed to cure and relieve the effects of her compensable injury. Respondent's experts agree the surgery is reasonable, and the primary disagreement relates to causation. Dr. Davis's opinions are well-reasoned and credible in many respects. But the ALJ is not persuaded by his ultimate conclusion that the surgery is solely related to Claimant's pre-existing condition. Although Claimant had severe osteoarthritis before the work accident, it was minimally symptomatic and caused no significant limitations on her ability to work or perform other activities. Claimant's elbow has been continuously painful since the accident, with no significant break in symptomology to support the argument that the injury "resolved." Dr. Davis may be correct that Claimant "inevitably" would have required surgery for her elbow at some point, but it is speculative whether that would have been next month, next year, ten years from now, or ever. Claimant had no reason to pursue treatment for her elbow immediately before the accident, and there is no persuasive basis to conclude she probably would have needed surgery now absent the injury. The preponderance of persuasive evidence shows the injury combined with the pre-existing condition and accelerated the need for surgery.

ORDER

It is therefore ordered that:

1. Respondent shall cover the right elbow surgery recommended by Dr. Chance Henderson.

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

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

DATED: September 1, 2023

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

RELEVANT PROCEDURAL HISTORY

On October 16, 2020, a hearing was held before ALJ Kabler on Respondents' attempt to overcome the DIME opinions of Dr. Ranee Shenoi on permanent impairment, as well as Claimant's attempt to overcome the DIME opinions of Dr. Shenoi on causation, MMI and permanent impairment, Claimant's request for temporary total disability benefits, Claimant's request for permanent total disability benefits, and Claimant's request for medical benefits, including maintenance care. (Resp. Ex. F)

On December 8, 2020, ALJ Kabler issued Full Findings of Fact, Conclusions of Law, and Order, concluding Respondents overcame Dr. Shenoi's opinions with respect to cervical spine impairment and mental impairment, and finding Claimant sustained no such permanent impairment. (*Id*., bn 178) ALJ Kabler determined Claimant failed to overcome Dr. Shenoi's opinions with respect to causation, MMI and permanent impairment for the thoracic and/or lumbar spine. (*Id*., bns 178-179) ALJ Kabler also determined Claimant failed to prove entitlement to additional TTD benefits, Claimant failed to prove he was permanently and totally disabled, and Claimant failed to prove entitlement to additional medical benefits, including Grover medical care/maintenance care. (Id., bn 179)

Claimant appealed ALJ Kabler's Order to the Industrial Claim Appeals Office ("ICAO"), and on June 4, 2021, ICAO affirmed ALJ Kabler's Order. (Resp. Ex. H) Claimant then appealed ICAO's Order to the Colorado Court of Appeals, and on June 30, 2022, the Colorado Court of Appeals affirmed ICAO's Order. (Resp. Ex. I) Finally, Claimant filed a Petition for Writ of Certiorari to the Colorado Court of Appeals, and on February 21, 2023, the Colorado Supreme Court denied Claimant's Petition for Writ of Certiorari. (Resp. Ex. J) As a result, the issues determined by ALJ Kabler in his December 8, 2020 Order, as subsequently admitted to by Respondents in their January 12, 2021 Final Admission of Liability (Resp. Ex. G), closed by operation of law.

After losing his appeal, on March 15, 2023, Claimant applied for hearing on issues that included medical benefits, average weekly wage, disfigurement, temporary total and partial disability benefits, permanent partial disability benefits, permanent total disability benefits, penalties, and "other issues". (Resp. Ex. K) The penalties identified are that he did not get a hearing transcript, he was not permitted to submit his medical records at hearing, he continues to have pain in his head, neck, chest and back, and he is not able to think due to memory issues because the workers' compensation doctors did not provide treatment. (*Id*., bn 282) Under "other issues" section, Claimant identified MMI, termination of benefits, permanent total disability benefits, relatedness, loss of cervical range of motion, mental impairment, total disability, and lost income. (Id.)

On April 4, 2023, Respondents' filed a motion to strike Claimant's hearing application due to the issues being closed as a matter of law, or in case of average weekly wage and disfigurement, moot. (Resp. Ex. N) On April 11, 2023, ALJ Lovato issued an order granting Respondents' motion to strike hearing application, in part. (Resp. Ex. M)

ALJ Lovato struck compensability, temporary partial and total disability benefits, permanent partial disability benefits, permanent total disability benefits, medical benefits (including Grover medical benefits), and average weekly wage. (*Id*. at bn 414) This left only disfigurement, penalties, and "other" as issues remaining for hearing. (*Id*.)

During the hearing held on July 18, 2023, this ALJ reviewed Claimant's hearing application, including Claimant's identification of hearing issues under the "penalties" and "other issues" sections. The ALJ found that Claimant failed to identify with any specificity any penalty against Respondents for which a penalty can be assessed under the Act. The ALJ further found that there are no issues identified by Claimant under the "other issues" section that are open and ripe for litigation. Thus, the only remaining issue for hearing is disfigurement.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained disfigurement as a result of his March 3, 2019 work injury and, if so, a determination of his disfigurement award.

FINDINGS OF FACT

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

1. The ALJ incorporates by reference the "Relevant Procedural History" stated above.
2. On March 3, 2019, Claimant was involved in a motor vehicle accident ("MVA") while working for Respondent Employer. (Resp. Exs. A - C) This MVA resulted in this admitted to claim. (Resp. Ex. G) According to the State of Colorado Traffic Accident Report, the other driver's speed was 15 mph, and Claimant's speed was documented as "unknown." (Resp. Ex. A)
3. Claimant was seen at Rose Medical Center after his accident on the day of his accident. (Resp. Ex. B) His accident was identified as a low speed MVA. (*Id*., bn. 005) There is no indication from the Rose Medical Center records that Claimant sustained any external injuries as a consequence of the MVA, including lacerations or cuts. (*Id*.)
4. In a report dated June 3, 2020, Dr. Kathleen D'Angelo summarized Claimant's medical history after reviewing his medical records, including records from the date of Claimant's MVA through April 30, 2020. (Resp. Ex. E) Dr. D'Angelo did not identify any records documenting that Claimant suffered external trauma or disfigurement as a result of his low speed MVA. (Id.) Dr. D'Angelo also did not identify that Claimant had undergone surgery following his work accident, due to his work accident (*Id*.)

5. At hearing, Claimant acknowledged that he did not sustain any lacerations or cuts or external trauma causing external disfigurement as a result of his MVA, and he further admitted that he had not undergone surgery as a result of his accident.
6. The ALJ has reviewed Claimant's medical records. The records do not provide credible or persuasive evidence that supports a disfigurement award due to his work accident.
7. The ALJ observed Claimant at the hearing and could not see that Claimant suffered from any disfigurement due to his work accident. Claimant did state that he has to wear glasses due to his work injury, however, the ALJ does not find that assertion to be credible.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence that he sustained disfigurement as a result of his March 3, 2019 work injury and, if so, a determination of his disfigurement award.

CRS §8-42-108(1) indicates that if an employee is seriously, permanently disfigured about the head, face or parts of the body "normally exposed to public view", in addition to all other benefits provided in this article and except as provided in subsection (2) of this section, the Director may allow compensation not to exceed $4,000 to the employee who suffers the disfigurement.

As found, the ALJ visually saw Claimant and could not discern any disfigurement. Plus, the Claimant was not wearing glasses. Moreover, the ALJ reviewed Claimant's medical records to determine whether the records contained credible evidence that Claimant sustained any disfigurement from the MVA. The ALJ did not find any credible evidence of a disfigurement in the medical records.

Claimant identified numerous symptoms and complaints he relates to his work injury, but none of which qualify as a serious, permanent disfigurement to an area about the head, face or body normally exposed to public view.

Based on the plain language of the statute, disfigurement is intended to compensate a worker for serious, permanent disfigurements about the head, face or parts of the body exposed to public view.

The ALJ finds and concludes that Claimant failed to prove by a preponderance of the evidence any such disfigurement related to this claim. As a result, Claimant's request for disfigurement benefits is denied and dismissed.

ORDER

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

1. Claimant's request for disfigurement benefits is denied and dismissed.

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

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

DATED: September 5, 2023

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-185-285-001 & 5-202-084-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to maintenance medical care after maximum medical improvement (MMI) to cure and relieve the effects of his ongoing work related injuries of July 22, 2020 for WC No. 5-202-084-001.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to maintenance medical care after maximum medical improvement (MMI) to cure and relieve the effects of his ongoing work related injuries of May 2, 2021 for WC No. 5-185-285-001.

III. If Claimant is entitled to maintenance care, whether the treatment and MRI recommended by the authorized treating physician (ATP), Dr. John Sacha is reasonably necessary and related to which injury.

PROCEDURAL HISTORY

Claimant sustained an admitted work related injury to his low back and right knee on July 22, 2020, which is the subject of WC No. 5-202-084.

Claimant sustained a second admitted work related injury to his low back and right knee on May 2, 2021, which is the subject of WC No. 5-185-285.

On March 9, 2022 Respondent filed a Final Admission in the May 2, 2021 claim admitting for maintenance care after MMI pursuant to Dr. Amanda Cava's February 22, 2022 medical report, including follow-up care with Dr. John Sacha.

On May 16, 2022, Respondents filed a Final Admission of Liability for date of injury July 22, 2020 admitting for maintenance care pursuant to Dr. Amanda Cava's medical opinion of January 18, 2021.[1]

Claimant requested a Division of Workers' Compensation Independent Medical Evaluation (DIME) in both matters. In the July 22, 2020 claim, Dr. Anjmun Sharma was selected as the DIME physician. In the May 2, 2021 claim, Dr. John Tyler was selected as the DIME physician.

Respondents filed Final Admissions of Liability consistent with both Dr. Sharma and Dr. Tyler's opinions, denying maintenance medical care in both claims pursuant to their respective reports. The FALs were both dated February 13, 2023.

Claimant filed Applications for Hearing in both matters. The sole issue to be determined was whether claimant was entitled to medical maintenance care. As both

[1] This claim was a medical benefits only claim and no admission was required as Claimant had not missed greater than three scheduled workdays.

claim involved the same body parts and similar issues in dispute, the parties indicated the claims were consolidated for purposes of the hearing.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if it was determined that Claimant was entitled to maintenance medical benefits in either claim, Respondent will authorize the diagnostic MRI being recommended by Claimant's treating provider, Dr. John Sacha.

FINDINGS OF FACT

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

A. Generally:

1. Claimant was and continues to be a Deputy Sheriff Sargent working for Employer. Claimant was 55 years old at the time of the hearing. Claimant has worked in several of Employer's facilities and has been working for Employer for approximately 32 years.

2. Claimant sustained two separate admitted work related injuries.

3. The first occurred on July 22, 2020 and is the subject of W.C. No. 5-202-084. Claimant was in the officer's mess when he went to grab some paper towels and tripped over a partial wall. Claimant fell onto his right knee, and twisted his low back causing low back and right knee injuries.

4. The second incident occurred on May 2, 2021 and is the subject of W.C. No. 5-185-285. Claimant was responding to an inmate who attempted suicide. The inmate had covered herself and her cell with slippery personal hygiene products and, during a difficult attempt to restrain the inmate, claimant aggravated his low back and right lower extremity.

B. Medical Records for July 22, 2020 Injuries

5. Claimant was initially seen at Concentra on July 24, 2020 by authorized treating provider, Jonathan Joslyn, PA who took a history of stumbling on a small wall but did not fall all the way to the ground. Claimant reported immediate right knee pain with a popcorn sound in the right knee and back pain that radiated into the left gluteus. Claimant denied prior right knee injuries. PA Joslyn diagnosed claimant with low back strain, lumbar strain, and right knee strain. He referred claimant for physical therapy and designated a 10 pound lifting restriction.

6. Claimant was released back to full duty on July 28, 2020 despite Claimant's assertions that he was not ready for full duty work.

7. By September 8, 2020, claimant's symptoms had worsened. Dr. Jeffrey Peterson of Concentra noted that Claimant's symptoms had worsened including continued right knee soreness and low back pain that radiated both to the buttock and leg. Dr. Peterson ordered x-rays of the right knee and spine, and an MRI of the lumbar spine due to intervertebral disc disorder. He also reinstated work restrictions to up to 15 lbs. with push/pull up to 30 lbs., squatting and kneeling occasionally, and no walking on uneven terrain or climbing ladders.

8. The MRI of the lumbar spine taken on September 17, 2020 showed mild disc narrowing at the L4-5 level with a small disc bulge mildly indenting the dural sac and an associated annular fissure. Dr. Eduardo Seda read the imaging as degenerative disc changes with mild dural sac indentation without root sleeve deformity.

9. On September 23, 2020 Dr. Peterson referred Claimant for a physiatry consultation and continued Claimant's restrictions. By October 1, 2020 Dr. Peterson reported that Claimant's pain was worse, he administered a Ketorolac Tromethamine (Toradol) intramuscular injection and prescribed a methylPREDNISolone (Medrol) dose pack. Restrictions again remained the same.

10. Claimant was initially evaluated by John Sacha, M.D. on October 12, 2020 who documented that Claimant was stepping over a wall when he tripped, falling sideways and backwards, and landing on his bilateral low back. He had acute onset of bilateral low back pain, bilateral buttocks pain, and right peripatellar knee pain. Claimant complained of constant pain localized on the left greater than the right low back and left greater than right buttocks with pain worse when sitting. On exam, Dr. Sacha noted lumbar paraspinal spasm pain with straight leg raise and neural tension testing bilaterally but minimal pain with extension-rotation on the left. He diagnosed lumbosacral radiculopathy. He recommended a bilateral L5 transforaminal injection for both diagnoses and treatment purposes. He also prescribed Lyrica for neuropathic pain and insomnia.

11. Dr. Amanda Cava of Concentra took over Claimant's care on October 19, 2020, and reported that the dose pack and the intramuscular injection helped with symptoms. She noted that Claimant was awaiting authorization for the transforaminal injection. She continued work restrictions, though increased them to 30 lbs. On November 10, 2020, Dr. Cava noted that symptoms had returned and recommended he continued physical therapy and chiropractic care with Dr. Jason Gridley.

12. Dr. Sacha performed a bilateral L5 transforaminal epidural steroid injection (ESI) and nerve block on November 19, 2020. He reported that preprocedure Claimant reported pain on a visual analog scale (VAS) of 6/10 with a 7/10 with provocative maneuvers, and a 0/10 post procedure, which was an excellent result.

13. On December 28, 2020 Dr. Sacha wrote to Dr. Cava reported that Claimant had "done great" since the ESI and had an excellent lasting relief with an 80-90% response. On exam, he observed only mild residual paraspinal spasm in the lumbar spine. He also mentioned that Claimant had benefited from the chiropractic treatment provided by Dr. Gridley. Dr. Sacha cleared him for full duty and returned him to Dr. Cava, but recommended maintenance care.

14. By January 18, 2021 Dr. Cava placed Claimant at MMI with no impairment and no permanent restrictions. She recorded that now, Claimant's symptoms occurred only rarely but continued with occasional tightness in the lumbar spine with prolonged bending and had benefited from the chiropractic care and ESI. Dr. Cava did recommend chiropractic care as maintenance.

15. At MMI, because claimant had not lost more than 3 days from work due to the July 22, 2020 incident, the matter was being handled as a medical-only claim, and no Final Admission of Liability was filed. From February through April 2021, claimant underwent chiropractic care for his lumbar spine with Jason Gridley, DC.

16. Claimant underwent a DIME evaluation with Dr. Anjmun Sharma on September 30, 2022. Dr. Sharma took a history, reviewed the medical records and examined Claimant.[2] Dr. Sharma noted Claimant still reported pain in his lumbar spine with prolonged lifting, pushing and pulling at work as well as pain in his right knee. Dr. Sharma emphasized that Claimant continued to have some functional loss in range of motion of the right knee and the lumbar spine. He diagnosed lumbago, lumbar spine strain, right knee pain, and right knee strain. Dr. Sharma placed Claimant at MMI as of February 22, 2022 and provided a 12% impairment of the lumbar spine and a 3% impairment for the right knee. He did not make any recommendations with regard to maintenance care.

C. Medical Records for May 2, 2021 Injuries

17. Following the incident on May 2, 2021, while restraining an inmate who was attempting do self-harm, Claimant was evaluated by Yue Dai, M.D at Concentra. On May 3, 2021, Dr. Dai took a history consistent with Claimant's testimony. He noted that Claimant had been seen on the date of the injury at Presbyterian St. Luke's emergency room where they took lumbar spine x-rays, which were reportedly negative. Claimant complained of symptoms into his low back with tingling into the bottom of his feet. He assessed Claimant with a low back strain. Claimant was referred to physical therapy for the low back, wrist, hand, finger and right knee[3] and prescribed multiple medications. Dr. Dai also opined that Claimant's work-related mechanism of injury was consistent with objective findings and provided work restrictions of 20 lbs.

18. Claimant returned to Concentra on May 8, 2021 and was seen by Kara Marcinek, NP, who conveyed that Claimant still had some sharp shooting pains and discomfort in the low back, with night pain. She continued physical therapy and modified work.

19. On June 22, 2021 Claimant was evaluated by Dr. Amanda Cava on a virtual platform. She indicated Claimant complained of persistent central low back pain shooting down the buttocks to the calves. Claimant's pain was worse with twisting. He also reported his knee pain was still bothering him. Claimant was continued on modified duty (30 lbs.) and referred to start treatment with Dr. Gridley, the chiropractor, as well as to

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[2] Dr. Sharma reviewed records for both the July 2020 and the May 2021 admitted injuries.

[3] The main report itself nor the physical exam documented any issues with wrist, hand, finger and right knee, only the referral to physical therapy.

continue PT and medications.

20. Claimant returned to see Dr. Cava on July 9, 2021, who noted continued complaints of persistent central low back pain shooting down the buttocks to the calves, worse with twisting and bending, but there was some improvement in the right knee pain symptoms with physical therapy. Dr. Cava noted that objective findings were consistent with history and work-related mechanism of injury.

21. Dr. Cava conducted another virtual appointment on August 12, 2021, indicating Claimant continued to complain of persistent central low back pain shooting down the buttocks to the calves with difficulty when performing quick twisting motions. She documented that Claimant continued to have benefit with chiropractic care, physical therapy and medications, and continued the modified duty restrictions.

22. On August 27, 2021, during a virtual appointment with Dr. Cava, Claimant reported left and midline lower back pain that radiated to left buttock, left thigh, and left calf, and across the top of the foot to the middle toe, to the ball of the foot. Symptoms occurred intermittently but the pain was sharp, burning and shooting in nature and associated with stiffness and exacerbated by twisting. Relieving factors included physical therapy, manipulation and treatment with Dr. Gridley. She reported that Claimant was taking medications as prescribed. She diagnosed low back strain with left lumbar radiculopathy and continued Claimant on modified duty. Dr. Cava referred Claimant back to Dr. Sasha, the physiatrist.

23. Dr. Sacha evaluated claimant on September 13, 2021 for the first time regarding claimant's May 2, 2021 work injury. Dr. Sacha acknowledged Claimant's prior work related back injury in 2020 and that he had been placed at MMI and discharged. He documented that Claimant had been doing a takedown on an inmate in their jail cell, that after wrestling with and holding her down for 15 minutes, Claimant had a flare in his low back pain including radiation to the left leg with numbness and tingling in the foot. On exam, he detected lumbar paraspinal muscle spasms, pain with straight leg raise and neural tension on the left side, positive bowstring tests on the left, mild pain with extension and decreased sensation in the left L5 distribution. Dr. Sacha's impression was lumbar radiculopathy. Dr. Sacha ordered a new MRI to compare to the previous MRI and prescribed oral steroids as well as a muscle relaxant, Tizanidine.

24. Dr. Cava followed up with Claimant on September 14, 2021 by telemedicine. She noted Claimant felt like he had plateaued in recovery. She recommended continued physical therapy and chiropractic care, recommended a repeat MRI, and referred claimant back to Dr. Sacha.

25. The lumbar spine MRI of September 27, 2021 showed a transitional lumbosacral anatomy with transitional segment labeled L5, a trace retrolisthesis at the L4-L5 level, bilateral facet arthrosis with degenerative disc disease and desiccation, posterior annular fissuring, diffuse disc bulge, mild right foraminal narrowing, mild lower lumbar spondylosis, slightly greater at the L4-L5 level, although there was no significant spinal canal or neural foraminal stenosis. The imaging was read by Dr. Craig Stewart.

26. Claimant returned to Dr. Sacha on October 11, 2021, but since Dr. Sacha noted the oral steroids were helping, they held off on the lumbar epidural injection.

27. Dr. Sacha took a telemedicine visit on November 1, 2021 due to COVID-19 concerns. Claimant reported an increase in low back and left leg pain with increased numbness and tingling in the foot since the last visit, as the oral steroid relief did not last. He diagnosed intervertebral disorder with radiculopathy of the lumbar spine and strain of the muscles, fascia and tendons of the lumbar spine. Dr. Sacha ordered a left L5 and S1 transforaminal epidural/spinal nerve injections.

28. The transforaminal left L5 and S1 injections were performed on December 9, 2021 at Mile High Surgery Center. Dr. Sacha noted that the Claimant's VAS score preprocedure was 7/10 at rest, 8/10 with provocative maneuvers. At 30 minutes postprocedure, Claimant had a VAS score of 1/10 at rest and 2/10 with provocative maneuvers. He documented it as an 80% relief of his pain, which was a diagnostic response to the procedure. Further, Dr. Sacha noted that Claimant had reproduction of symptoms with placement of injectate into both neural foramina, indicating radiculopathy affecting both the L5 and S1 spinal nerves.

29. 41. On January 3, 2022, Dr. Sacha confirmed claimant had improvement after the last L5 and S1 transforaminal injection with 70% to 80% improvement, having less low back and leg pain. Claimant was still working light duty. Dr. Sacha recommended a brief trial of physical therapy with work strengthening and full duty before moving forward with case closure.

30. Claimant returned to see Dr. Cava on January 11, 2022. Dr. Cava verified Claimant was doing better since his last visit. However, she confirmed that he had a motor vehicle accident (MVA) a week after the ESI and was having neck/upper back problems for which he was seeing his primary care provider (PCP). She diagnosed left lumbar radiculopathy and ordered medications and PT for strengthening but continued the modified duty.

31. Dr. Sacha documented on January 31, 2022 that Claimant had been doing well but after a physical therapy visit he started having some left buttock pain which was still present at the time of his appointment. Dr. Sacha suggested proceeding with a one time left piriformis injection and trigger point injection.

32. When Claimant returned to see Dr. Sacha on February 7, 2022, he reported increased left low back pain and buttock pain down the left posterior thigh. Claimant advised Dr. Sacha he did want to do the trial of piriformis and sciatic nerve blocks, as well the trigger point injections (TPI). Dr. Sacha performed the injections in the office.

33. Dr. Cava reported on February 14, 2022 that since his recent flare he was improving post TPI and nerve blocks with Dr. Sacha. She released Claimant to full duty work.

34. On February 22, 2022 Dr. Cava had a telephone visit with Clamant and noted Claimant continued to have soreness and muscle pain from his lumbar strain but had been working full duty. Dr. Cava placed claimant at MMI with no impairment but ordered maintenance care under Dr. Sacha.

35. Claimant proceeded with a DIME in this case with Dr. John Tyler. On

December 16, 2022,[4] Dr. Tyler took a history, reviewed the medical records and conducted a physical examination. Dr. Tyler opined that Claimant's ongoing symptoms regarding the right knee were related to the July 22, 2020 work-related injury. Dr. Tyler assessed Claimant's ongoing low back problems, took measurements and apportioned the impairment in a report dated January 22, 2023 giving an additional 6 % whole person impairment for the lumbar spine. He did not make any recommendations for maintenance care.

D. Post MMI Care

36. Dr. Sacha attended to Claimant on November 21, 2022 following a worsening of symptoms. Dr. Sacha expressed that this was a chronic problem with a significant exacerbation. Claimant reported bilateral low back pain radiating to the bilateral legs with numbness down the feet with lumbar paraspinal spasm and pain with straight leg raise and neural tension tests bilaterally. He also had an absent deep tendon reflex. Dr. Sacha opined that the flare of symptoms was related to the May 2, 2021 claim and prescribed an oral steroid. He stated that if Claimant did not improve he would proceed with a repeat lumbar epidural injection at the L5 and S1 levels.

37. Claimant returned to Dr. Sacha on December 1, 2022. Dr. Sacha communicated that the oral steroids only gave Claimant temporary relief and then the pain returned. He reported Claimant continued with ongoing low back and posterior thigh pain, affecting both legs. Dr. Sacha recommended a repeat bilateral L5 and S1 transforaminal ESIs.

38. On December 29, 2022, Dr. Sacha further evaluated Claimant in maintenance follow-up. He noted he had not received authorization for bilateral L5-S1 transforaminal injection yet. He commented that this case should not be a new date of injury. Dr. Sacha opined that Claimant met the Medical Treatment Guidelines criteria for a TESI. On exam he again noted increase symptoms positive for lumbar paraspinal muscle spasm (left greater than right), pain with straight leg raise and neural tension testing on the left side; positive bowstring test on the left, and decreased sensation in the left L5 versus the S1 distribution. He diagnosed lumbar radiculopathy and lumbar disc displacement. He continued to recommend TESIs. He did trigger point injections at that visit while awaiting authorization for the bilateral L5-S1 TESIs. Dr. Sacha renewed claimant's trazodone and Baclofen prescriptions.

39. Claimant had bilateral L5 and S1 transforaminal steroid injections on January 26, 2023.

40. On March 9, 2023 Claimant saw Dr. Sacha for a maintenance visit. Dr. Sacha voiced that Claimant had ESIs in January that were diagnostic but that they had not provided lasting relief (only 6 weeks). On exam he continued to test positive for lumbar paraspinal muscle spasm pain with straight leg raise, and neural tension, left sided pain with extension and extension rotation with loss of sensation in a patchy distribution of the left foot. He recommended a repeat MRI to compare to prior films. Claimant was

[4] Claimant was supposed to be evaluated by Dr. Tyler on July 8, 2022 but on route was involved in a motor vehicle accident.

working full duty. Dr. Sacha also recommended an additional 8 physical therapy visits as maintenance for lumbar spine.

41. Dr. Sacha responded to correspondence from Claimant's counsel on May 24, 2023 stating that Claimant required maintenance care, including a repeat MRI. He stated that further care depends on the MRI findings.

E. Motor Vehicle Accidents

42. Claimant was in an MVA on December 17, 2021. This accident was unrelated to claimant's employment. A December 22, 2021 report from Dr. Thompson at Kaiser noted, claimant "is seen and examined for non-work-related motor vehicle collision initial encounter, strain of his neck muscle initial encounter lumbar spine as well." The records from Kaiser show a pattern of treatment for the cervical spine, including chiropractic treatment, not for the low back.

43. On July 8, 2022, Claimant presented to the emergency room at Penrose Hospital after a minor MVA. It is noted claimant was nearly stopped when he was rear-ended. Claimant had immediate onset of neck pain. The records states claimant has known chronic back pain that is slightly worse after the accident. The final findings only involved the cervical spine injury.

F. Claimant's Testimony

44. Claimant testified at hearing that the treatment that he received over both admitted claims had helped his condition and injuries significantly. Specifically, claimant testified that the ongoing physical therapy and injections helped his overall condition and provided relief of his symptoms.

45. Claimant testified at hearing that the post injury motor vehicle accident that occurred on December 17, 2021 involved injuries to his neck, left hand, left knee, and left ankle. Claimant testified that he treated at Kaiser for the accident and that he did not receive treatment for his low back or right knee.

46. Claimant testified that he was in another post injury motor vehicle accident on July 8, 2022. Claimant testified that in this accident he injured his neck and his left hand, and that his existing nerve pain increased. Claimant treated at Kaiser for the July 8, 2022 motor vehicle accident but not for the lumbar spine.

47. Claimant testified at hearing that he wanted to proceed with the treatment recommended by Dr. Sacha, including the diagnostic MRI.

48. However, at the time of the hearing, he was no longer treating with either Dr. Cava or Dr. Sasha as no further maintenance care was being authorized.

49. Claimant stated that he continued to have low back pain that is constant and that the pain gets worse without the injections.

G. Conclusive Findings of Fact

50. As found, Claimant has shown that it is more likely than not that he requires further maintenance care regarding his July 22, 2020 claim to relieve the effects of his injury. He was placed at MMI, without impairment, by his authorized treating physician, Dr. Cava, who recommended maintenance care, including chiropractic care for the lumbar spine. Claimant continued to have symptoms. Maintenance care was not admitted by Respondents until May 16, 2022. Claimant then proceeded with a DIME evaluation. The DIME physician, Dr. Sharma, found that Claimant continued to report pain in his lumbar spine with prolonged lifting, pushing and pulling as well as pain in his right knee. He did not recommend any maintenance care. As found, Dr. Cava's opinions were more persuasive than the opinion of the DIME physician. As found, despite significant resolution of symptoms with the treatment Claimant received from authorized treating providers, Claimant continued with need maintenance care after MMI to maintain him at MMI and relieve him of the symptoms of the July 22, 2020 work related injuries.

51. As found, Claimant has shown that it is more likely than not that he requires further maintenance care regarding his May 2, 2021 claim to relieve the effects of his injuries. He was placed at MMI, without impairment, by his authorized treating physician, Dr. Cava, who recommended maintenance care for the lumbar spine under Dr. Sacha, Claimant's pain specialist. As found, Claimant had a history of aggravating his prior injury to the lumbar spine, with increasing lumbar spine pain and radicular symptoms into the lower extremities. Claimant continued to have symptoms that would improve with transforaminal injections, which were beneficial and provided Claimant with significant relief of symptoms. Maintenance care was originally admitted by Respondents on March 9, 2022. Claimant then proceeded with a DIME evaluation. The DIME physician, Dr. Tyler, found that Claimant continued to report pain in his lumbar spine with radicular symptoms and provided an additional impairment. He did not recommend any maintenance care. As found, Dr. Sacha's opinions are more persuasive than the opinion of the DIME physician. As found, despite significant resolution of symptoms with the treatment Claimant received from authorized treating providers, Claimant continued to need maintenance care after MMI to maintain him at MMI and relieve him of the symptoms of the May 2, 2021 work injury to the lumbar spine, including medications, physical therapy, and treatment under Dr. Sacha for injections.

52. As found, Claimant has shown by a preponderance of the evidence that he is entitled to reasonably necessary and related maintenance care that includes but is not limited to the treatment recommended by Dr. Sacha. Dr. Sacha recommended medications, physical therapy, injections and an MRI of the lumbar spine in order to compare the progression of Claimant's work related injuries and determine Claimant's ongoing needs for medical care. The diagnostic test is specifically determined to be causally related to the May 2, 2021 claim.

53. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See Industrial Commission v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Maintenance Medical Benefits

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc., supra*. When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009). The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office, supra.* To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n., supra*; *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, *supra.* Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, *supra*; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. See *Hanna v. Print Expediters Inc*., *supra,* (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra; Hobirk v. Colorado Springs School District #11, supra*; *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003).

The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); *See also*, *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide that "All health care providers shall use the Guidelines adopted by the Division". *Hall v. Industrial Claims Appeals Office,* 74 P.3d 459 (Colo.App. 2003). "Accordingly, compliance with the Guidelines is mandatory for medical providers." *Chrysler v. Dish Network*, W.C. No. 4- 951-475-002 (ICAO, July 15, 2020). In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. Section 8-43-201(3)(C.R.S. 2020). Indeed, Rule 17-4 (A) acknowledges that "reasonable medical care may include deviations from the Guidelines in individual cases." *Chrysler v. Dish Network*, *supra.* Nonetheless, the Guidelines carry substantial weight and should be adhered to unless there is evidence justifying a deviation. *See Hall v. Industrial Claim Appeals Office, supra*; *See Logiudice v. Siemans Westinghouse*, W.C. No. 4- 665-873 (ICAO, January 25, 2011).

As found, Claimant has shown that, after being placed at MMI for both the July 22, 2020 work injuries and the May 2, 2021 work related injuries, Claimant's ATP, Dr. Cava, clearly opined that maintenance care was reasonably necessary and related to Claimant's injuries. The DIME physician opinions only carry the weight of clear and convincing proof in matters related to causation, MMI and impairment. Further, neither DIME physician even bothered to make any comments regarding maintenance care other than "[n]o maintenance care is required" and [n]one". Neither of them explained their comments regarding maintenance medical care. There was no analysis or explanation for arriving at these conclusions and their opinions regarding maintenance care were not persuasive.

As found, Dr. Sacha was very persuasive that Claimant clearly required ongoing maintenance care and provided such including prescribing prescription medications such as of steroids, muscle relaxants including trazodone and Baclofen prescriptions, and transforaminal steroid injections with the benefits of reduced symptoms and Claimant's increased functionality with the care that was carried out post MMI. Dr. Sacha was credible and persuasive in stating that Claimant had ongoing symptoms which were improved with the ESIs but required a repeat MRI in order to further delineate the Claimant's maintenance program. He recommended maintenance physical therapy as well. All of these treatments are addressed as part of reasonable maintenance care for chronic pain cases and Dr. Sacha credibly opined that they were reasonably necessary and related to Claimant's ongoing maintenance needs related to his July 22, 2020 and May 2, 2021 work injuries. Lastly, but not least, Claimant persuasively testified that he required and continued to need maintenance care in order to remain functional gains and continue working full duty, full time.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for reasonably necessary maintenance care with regard to Claimant's July 22, 2020 claim, including but not limited to maintenance chiropractic care in order to relieve Claimant of the effects of the work related injuries to his lumbar spine and lower extremity.

2. Respondents shall pay for reasonably necessary maintenance care with regard to Claimant's May 2, 2021 claim, including but not limited to maintenance follow up care with Dr. Sacha, prescribed medications related to the injuries, physical therapy, and a follow up MRI for purposes of determining Claimant's ongoing maintenance care needs in order to relieve Claimant of the effects of the work related injuries to his lumbar spine and the radicular symptoms to his lower extremities.

3. All maintenance care shall be in accordance with the Colorado Fee Schedule.

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

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

DATED this 7th day of September, 2023.

Digital Signature

By: _____

Elsa Martinez Tenreiro
Administrative Law Judge
525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues set for determination included:

- Is Claimant entitled to medical benefits after maximum medical improvement (*Grovers*)?

- Whether the treatment provided at the emergency room at UC Health on August 31, 2022 reasonable and necessary as emergent care?

- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for Employer, a fast food restaurant, on July 21, 2021 as a cashier. On that date, she was working the drive-thru and touched a metal table and suffered an electrical shock type injury.

2. Claimant received medical treatment from Concentra beginning on July 23, 2021.

3. Nurse Practitioner Jennifer Livingston at Concentra diagnosed Claimant with left upper extremity injury and situational mixed anxiety and depressive disorder. Claimant Exhibit 7, p. 137. She made a referral for psychiatric treatment on September 9, 2021. However, Claimant never received psychiatric evaluation or treatment before being placed at MMI.

4. After the claim was denied, Claimant was placed at MMI on September 23, 2021 by Dr. Bradley with no impairment and no maintenance care.

5. Dr. Burris performed an IME at the request of Respondents. In his first IME report dated December 14, 2021, he stated "During her care at the WC clinic, a psychological referral was made for "situational mixed anxiety and depressive disorder", which was not pursued. Given the overall clinical picture, it is likely that any psychological issues are the cause of continued symptoms and not the result of the workplace event or continued symptoms. However, given the close interplay between psychological and physical issues in delayed recovery (as identified by the Colorado DOWC), it is reasonable to pursue a short course of claim-directed psychological treatment. Given the lack of physical pathology, this treatment does not need to interfere with MMI and can be provided through the maintenance process." (Exhibit G, p. 163).

6. Claimant requested a hearing on compensability. It was then determined to be compensable after a hearing before ALJ Lamphere. The order of Judge Lamphere was dated April 7, 2022.

7. After the order of compensability, a final admission of liability was filed on May 17, 2022.

8. Claimant objected to the Final Admission of Liability and requested a Division IME. That DIME was performed by Dr. Sharma. Dr. Sharma determined that Claimant had 12% impairment and did not make a recommendation for any post MMI treatment.

9. Claimant displayed her left arm at the hearing which showed splotchy darker redness when compared to the right arm. This appeared on the Claimant's bicep and triceps.

10. Dr. Burris opined in his deposition that there is nothing to support the conclusion that Claimant would develop redness or blotchiness as a result of this injury. (Deposition p. 14, l. 11 – 15).

11. Dr. Burris also opined in his deposition that psychological factors may be playing a part in how the Claimant experiences pain. (Deposition p. 38). He also commented that if psychological treatment were offered, that could be considered maintenance treatment.

12. Claimant sought treatment at the emergency room at UC Health on August 31, 2022. With respect to her visit to the ER, Dr. Geiger states "Discussed with patient that the emergency department is really intended to work-up emergent, life-threatening condition and is limited in the evaluation and management of her chronic arm pain."

Conclusions of Law

General

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

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

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

Grover Medical Benefits

§ 8-42-101(1), C.R.S. requires Employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When Respondents challenge Claimant's request for specific medical treatment Claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012).

Once Claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to

contest compensability, reasonableness, or necessity". *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

The ALJ concludes Claimant met her burden to show she is entitled to Grover medical benefits. Based upon the totality of medical evidence in the record, as well as Claimant's testimony, the ALJ concludes that Claimant requires maintenance medical treatment.

EMERGENCY ROOM TREATMENT

Dr. Geiger's chart note for Claimants visit to the ER on August 31, 2022, implies that her visit was not truly an emergency treatment situation. I conclude that based on Dr. Geiger's comments that her treatment was not a bona fide emergency and there for not covered as a benefit. *See, Sims v. ICAO*, 797. P.2D 777 (Colo. App. 1990).

DISFIGUREMENT

The question of whether the claimant carried his/her burden to establish a right to disfigurement benefits is one of fact for the ALJ. See Metro Moving & Storage Co. v. Gussert, 914 P.2d 411 (Colo.App. 1995)." In re Claim of Deleon, 121313 COWC, 4-902-368-01 (Colorado Workers' Compensation Decisions, 2013). I conclude that the Claimant has failed to prove that the blotchiness on her left upper extremity was due to her work injury. I am persuaded by Dr. Burris' testimony that there is no causal relationship between that the blotchy redness on left arm and the industrial injury.

ORDER

It is therefore ordered:

1. Claimant met her burden and established she is entitled to maintenance medical benefits.

2. Respondents shall pay for *Grover* medical benefits.

3. The request for payment of the UC Health emergency room bill is denied and dismissed.

4. The request for disfigurement is denied and dismissed.

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

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

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

DATED: September 7, 2023

STATE OF COLORADO

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-139-409-002

ISSUE

Whether Claimant has presented substantial evidence to support a determination that medical maintenance benefits after Maximum Medical Improvement (MMI) will be reasonably necessary to relieve the effects of her November 18, 2019 admitted industrial injury or prevent further deterioration of her condition.

FINDINGS OF FACT

1. Claimant worked for Employer as a Police Officer Recruit. On November 18, 2019 Claimant suffered an admitted right elbow injury while performing triceps dips.

2. Claimant experienced shooting pain from her elbow into her fingertips. The symptoms progressed into constant numbness and tingling. Claimant also noticed coldness in her fingers as well as spasms in her arm and hand.

3. Claimant was initially diagnosed with right elbow epicondylitis. An MRI found borderline increased signal within the ulnar nerve at and distal to the cubital tunnel without overt enlargement of the ulnar nerve. An EMG also revealed mild to moderate ulnar neuropathy at the elbow.

4. After failed conservative care through Authorized Treating Provider (ATP) Concentra Medical Centers, Claimant underwent an ulnar nerve transposition on June 1, 2020 with Craig Davis, M.D. Claimant was able to return to modified duty shortly after the procedure and underwent a normal course of postoperative care.

5. On August 14, 2020 ATP Amanda Cava, M.D. placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment. Dr. Cava recommended maintenance treatment of physical therapy one time per week for four weeks to continue strengthening.

6. On August 21, 2020 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Cava's MMI and impairment determinations. Claimant did not object to the FAL and the claim closed by operation of law. Claimant continued in her regular course of employment.

7. Claimant returned to Dr. Cava on June 18, 2021 or almost one year after originally reaching MMI. Dr. Cava noted right upper extremity symptoms had returned in November or December 2020 and progressed to where Claimant felt she could not safely perform her job duties. Claimant was subsequently referred back to Dr. Davis and received work restrictions.

8. On June 29, 2021 Dr. Davis re-evaluated Claimant and diagnosed recurrent ulnar neuropathy. He ordered repeat nerve study testing. On June 30, 2021 Respondent voluntarily reopened the claim.

9. On September 29, 2021 Dr. Davis performed revision neurolysis and subcutaneous transposition of the right ulnar nerve. Postoperative medical treatment consisting of chiropractic care, acupuncture, physical therapy and neuropathic medications were not helpful in decreasing Claimant's pain or improving her function.

10. Claimant remained symptomatic following the surgery and began receiving treatment from John Aschberger, M.D. Electrodiagnostic testing was negative. Dr. Aschberger recommended a cervical MRI to rule out cervical radiculopathy. The MRI revealed degenerative changes without encroachment. Dr. Aschberger diagnosed Claimant with upper back and proximal myofascial pain with restrictions. He also noted thoracic restrictions with recurrent findings in the upper ribs. Dr. Aschberger referred Claimant to a physical therapist who specializes in rib mobilization and to Dr. Stephen J. Annest, M.D. for a thoracic outlet evaluation.

11. On July 18, 2022 Dr. Annest evaluated Claimant. He recommended pectoralis minor and scalene muscle blocks. Dr. Annest performed the blocks on August 30, 2022.

12. After the injections Claimant had a 40% decrease in pain, significant range of motion improvement, and a return of grip strength to almost pre-injury levels. Dr. Annest summarized that Claimant had a "20% improvement in symptoms after pec block. Overall, she had a 40% improvement in symptoms after the combination of both pec and scalene block. Improved were grip shoulder ROM, pec stretch and ULTT [upper limb tension test]."

13. On September 21, 2022 Claimant underwent an Independent Medical Examination (IME) with Lawrence A. Lesnak, D.O. Dr. Lesnak addressed the potential Thoracic Outlet Syndrome (TOS) diagnoses as well as treatment recommendations for body parts beyond the elbow. He concluded Claimant had sustained a right elbow sprain, may have developed some medial epicondylitis and possibly had some ulnar neuritis as a result of her admitted work injury. Dr. Lesnak further determined that the revision surgery performed by Dr. Davis may not have been warranted, and it was unsurprising that the procedure did not improve Claimant's condition. Regarding Claimant's current symptoms, Dr. Lesnak noted there was no documentation of any reproducible objective findings to explain her condition. He specifically referenced a relatively benign cervical MRI and multiple normal EMG studies. Dr. Lesnak concluded Claimant did not have TOS and required no further medical care for her work injury. He commented that Claimant reached MMI on March 24, 2022.

14. On November 10, 2022 Alexander Feldman, M.D. performed another EMG of Claimant's right upper extremity. The testing did not reveal any evidence of cervical radiculopathy, brachial plexopathy, ulnar neuropathy, median neuropathy, peripheral neuropathy or myopathy.

15. On November 17, 2022 Dr. Aschberger diagnosed Claimant with TOS. He stated that Claimant "has had objective findings consistent with the symptomology. She has had consistent examination without exaggerated pain behaviors. There is nothing that suggests a psychosomatic disorder based on her presentation."

16. Claimant returned to Dr. Aschberger on December 1, 2022 and January 4, 2023. At the evaluations, Dr. Aschberger assessed Claimant with right TOS, status post ulnar nerve surgery at the elbow, upper back/trapezial myofascial pain, cervical myofascial irritation, and clavicle dysfunction. He recommended Botox injections for Claimant's thoracic irritations. Dr. Aschberger made no treatment recommendations for Claimant's elbow. He instead focused treatment on cervical issues, brachial plexus irritation and TOS.

17. On February 6, 2023 Claimant visited Eric Chau, M.D. at Concentra. Dr. Chau had taken over as Claimant's ATP from Dr. Cava. Like Dr. Aschberger, Dr. Chau focused on differential diagnoses including TOS, first rib dysfunction and radiating symptoms. Dr. Chau discussed surgical intervention and other treatment options, but made no recommendations for Claimant's right elbow.

18. On March 16, 2023 Ranee Shenoi, M.D. performed a 24-month Division Independent Medical Examination (DIME) on Claimant. She issued a report dated April 5, 2023. Although she had access to the reports of Drs. Aschberger and Annest, Dr. Shenoi limited her findings regarding Claimant's work-related conditions to right ulnar neuritis/neuropathy and status repeat post ulnar nerve transpositions. Dr. Shenoi agreed with Dr. Lesnak that Claimant reached MMI on March 24, 2022.

19. Relying on the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Shenoi assigned a total 13% upper extremity impairment rating. She reasoned that Claimant warranted a 1% impairment for right elbow range of motion deficits. Based on "neurological symptoms of ulnar nerve irritation and ulnar weakness in the right hand," Dr. Shenoi assigned a 12% upper extremity rating. Combining the ratings yields a 13% total right upper extremity impairment.

20. In addressing medical maintenance care Dr. Shenoi recommended the following:

> daily stretching exercises, proper body mechanics for lifting, and to maintain good posture. I discussed with [Claimant] that Botox injections in the neck and shoulder have significant risks given surrounding vital structures and are not recommended in my opinion. Independent home exercise is safer. Further, [Claimant] mentioned she has been offered the option of thoracic outlet surgery with rib resection, which is not to be taken lightly.

21. On April 10, 2023 Respondent filed an FAL consistent with Dr. Shenoi's DIME report. Respondent denied medical maintenance care. Claimant has not challenged Dr. Shenoi's findings regarding MMI, relatedness or impairment. Consequently, Claimant's work-related conditions based on DIME Dr. Shenoi's findings include only right ulnar neuritis and right ulnar nerve transposition surgeries. Dr. Aschberger's additional findings of TOS, upper back/trapezial myofascial pain, cervical myofascial irritation, and clavicle dysfunction are unrelated to her November 18, 2019 work injury.

22. Claimant last visited Dr. Chau at Concentra on April 17, 2023. At the evaluation, Dr. Chau reiterated his adoption of Dr. Aschberger's findings from earlier in the year regarding TOS and other conditions related to the cervical spine and upper back. Dr. Chau had no treatment recommendations. He instead determined that Claimant would be approaching MMI and receive an impairment rating.

23. Claimant testified at the hearing regarding her condition and continuing symptoms. She sought ongoing medical care to address her symptoms and improve her function. Regarding her right elbow, Claimant commented that she last underwent related physical therapy in November 2022. Gripping, pushing, and pulling have gotten more difficult. Claimant commented that she has gotten weaker since she stopped receiving physical therapy.

24. Dr. Lesnak also testified at the hearing in this matter. He explained that Claimant's work-related condition is limited to her right elbow and does not extend into the potential diagnoses of Drs. Aschberger and Annest. Dr. Lesnak remarked that, based on the limited nature of Claimant's work-related conditions, she does not require further medical care. He explained that Claimant's work-related right elbow condition has long resolved and is stable. Furthermore, no additional care would help maintain her condition. Dr. Lesnak explained that Claimant's treatment had, for almost a year after MMI, focused on unrelated body parts. Although Claimant had not received elbow treatment since at least November 2022, her condition remained stable without intervention.

CONCLUSIONS OF LAW

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

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

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

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

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Off.,* 992 P.2d 701,704 (Colo. App. 1999); *Stollmeyer v. Indus. Claim Appeals Off.,* 916 P.2d 609 (Colo. App. 1995). Nonetheless, the claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Cob. App. 1992). The care becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate so that he or she will suffer a greater disability. *Id.;* see *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna,* 77 P.3d at 866. Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center,* 992 P.2d at 704.

5. As found, Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment after MMI will be reasonably necessary to relieve the effects of her November 18, 2019 admitted industrial injury or prevent further deterioration of her condition. Initially, on November 18, 2019 Claimant suffered an admitted right elbow injury and was diagnosed with right elbow epicondylitis. After conservative treatment failed, Claimant underwent an ulnar nerve transposition. On

August 14, 2020 ATP Dr. Cava placed Claimant at MMI with no permanent impairment. Her claim subsequently closed by operation of law. However, because Claimant continued to suffer right upper extremity symptoms, she returned to Dr. Cava on June 18, 2021. Respondent voluntarily reopened the claim. Claimant then underwent revision neurolysis and subcutaneous transposition of the right ulnar nerve. Because Claimant remained symptomatic after the surgery, she received additional medical treatment from Dr. Aschberger. He eventually assessed Claimant with right TOS, status post ulnar nerve surgery at the elbow, upper back/trapezial myofascial pain, cervical myofascial irritation, and clavicle dysfunction. Dr. Aschberger focused medical care on cervical issues, brachial plexus irritation, and TOS. He did not make any treatment recommendations for the right elbow.

6. As found, on March 16, 2023 Claimant underwent a 24-month DIME with Dr. Shenoi. Dr. Shenoi limited her findings of Claimant's work-related conditions to right ulnar neuritis/neuropathy and status repeat post ulnar nerve transpositions. She determined that Claimant reached MMI on March 24, 2022. Relying on the *AMA Guides*, Dr. Shenoi reasoned that Claimant warranted a 1% impairment for right elbow range of motion deficits. Based on "neurological symptoms of ulnar nerve irritation and ulnar weakness in the right hand," Dr. Shenoi also assigned a 12% upper extremity rating. Combining the ratings yields a 13% total right upper extremity impairment.

7. As found, Dr. Shenoi recommended general self-care, but did not state Claimant would require medical maintenance benefits for her right elbow. Specifically, Dr. Shenoi merely recommended independent home exercises in the form of daily stretching, proper body mechanics for lifting, and maintaining good posture. She cautioned against possible Botox injections and thoracic outlet surgery with rib resection. Dr. Shenoi's recommendations on maintenance medical care are supported by the written report and testimony of Dr. Lesnak.

8. As found, after conducting an IME, Dr. Lesnak concluded that Claimant reached MMI on March 24, 2022. He persuasively explained that Claimant's work-related condition was limited to her right elbow and did not extend into the potential diagnoses of Drs. Aschberger and Annest. Dr. Lesnak remarked that, based on the limited nature of Claimant's work-related diagnoses, she does not require further medical care. He explained that Claimant's treatment had, for almost a year after MMI, focused on unrelated body parts. Although Claimant had not received right elbow treatment since at least November 2022, her condition remained stable without intervention.

9. As found, the opinions of Claimant's treating physicians reflect that she may require additional medical care for her right upper extremity, neck, thoracic spine, clavicle, and upper back. However, for her work-related conditions of right ulnar neuritis/neuropathy and status repeat post ulnar nerve transpositions, Claimant has failed to present evidence that additional medical care is necessary to maintain her condition at MMI. From the date of MMI through hearing, Claimant's treatment has focused on unrelated body parts, specifically potential TOS and upper back/trapezial myofascial pain, cervical myofascial irritation, and clavicle dysfunction. Drs. Aschberger and Annest provided treatment recommendations for the unrelated conditions, but made no

recommendations for her work-related right elbow condition. Furthermore, recent medical records from both Drs. Aschberger and Chau reflect no change or worsening of the elbow despite months without any treatment.

10. As found, the persuasive medical opinions of Drs. Shenoi and Lesnak demonstrate that Claimant's work-related conditions are limited to her right elbow. Claimant has not challenged DIME Dr. Shenoi's findings regarding MMI, relatedness or impairment. Consequently, Claimant's work-related conditions include only right ulnar neuritis and status post ulnar nerve transpositions. For the preceding conditions, Claimant has failed to show any further treatment is required. Claimant has not undergone treatment for her right elbow since at least November 2022 and provided no credible evidence that her condition has changed or worsened without treatment. For her work-related conditions of right ulnar neuritis/neuropathy and status repeat post ulnar nerve transpositions, Claimant has failed to present evidence that additional medical care is necessary to maintain her condition at MMI. Specifically, she has failed to produce medical record evidence demonstrating the reasonable necessity for future medical treatment. Accordingly, Claimant's request for medical maintenance benefits is denied and dismissed.

ORDER

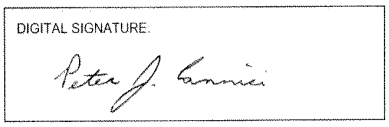
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for medical maintenance benefits is denied and dismissed.

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

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

DATED: September 7, 2023.



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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the surgical treatment she received from Dr. Evans on March 2 and May 10, 2023, was reasonably necessary to cure and relieve Claimant of the effects of her November 2, 2022 injury.

FINDINGS OF FACT

1. Claimant was working as a meat and seafood clerk for Respondent on November 5, 2022, when she was struck in the face by an elevator door. Claimant later testified at hearing that the door struck her "almost dead on the nose, but kind of . . . slightly off center to the right." Claimant testified that the incident occurred "at the end of [her] shift."

2. Claimant was able to stop the bleeding from her lip, provided service to another customer, and then obtained assistance from the head cashier. The head cashier took a photo of Claimant's lip and mouth. It showed bruising on the inside of Claimant's upper lip corresponding with the location of tooth number eight. The Court observed no other visible evidence of injuries in the photo.

3. Claimant completed a signed voluntary statement around the time of her injury. The statement was witnessed by the head cashier. In her statement, Claimant described the injury: "Approx. 5pm Elevator door closed while I was pushing carts out and turned for the last cart; it hit my lip and R incisor. Caused headache bruised lip (swollen/sore tooth/gums)."

4. Claimant also completed an Employee's Report of Injury on November 22, 2022. In that form, Claimant stated, "elevator door hit my face."

5. Claimant's supervisor also completed a report of injury that same date. The report read, "EE turned to get cart out of elevator at the time the door was closing. Door struck EE in upper lip causing pain to front teeth."

6. On November 26, 2022, Claimant's supervisor completed a statement on a "QUESTIONABLE CLAIM FORM" in which the supervisor stated, "[Redacted, hereinafter SA] admitted she has a previous injury to her jaw from a car accident. She initially reported the injury to her front teeth but now claims impact hurt her jaw."

7. Claimant first saw her authorized treating physician, Dr. Kathryn Bird, D.O., on December 1, 2022. Dr. Bird documented Claimant's subjective account of her history as follows: "Patient reports that she was working as a meat clerk for

[Redacted, hereinafter KS] when she was in an elevator, turned her head and her upper lip hit the elevator door as it was closing. She reports getting a blood blister on the upper inner lip which has resolved. However, she has pain in a few teeth and some pain in a muscle on the right cheek." Dr. Bird's handwritten notes document the mechanism of injury as "hit top lip chip top R tooth loose." Upon examination, Dr. Bird observed no chips or irregularities in teeth numbers eight and twenty-eight. Dr. Bird referred Claimant to Old Town Dental.

8. On December 9, 2022, Claimant saw Dr. Christopher Evans, D.D.S, at Old Town Dental, at Dr. Bird's referral. Dr. Evans documented the injury as facial trauma at work involving Claimant's jaw being slammed up into her other teeth. He recounted that Claimant's front tooth took the brunt of the force. He observed that tooth number thirty was fractured and infected, requiring a non-surgical root canal and filling. He also noted that tooth number eight was mobile and had irreversible pulpitis, requiring a root canal and crown.

9. Claimant returned to Dr. Bird on December 20, 2022, who documented that "Tooth 8 is intact. It is not loose." Under "Discussion/Summary", Dr. Bird stated "Awaiting authorization for dental treatment. If plan in place, consider releasing at next visit with maintenance for dental care."

10. Dr. Bird's report dated February 2, 2023, again opined that "Tooth 8 appears normal. Good occlusion." On that date, she placed Claimant at maximum medical improvement with no impairment. As for maintenance medical care, Dr. Bird provided that Claimant "[m]ay have care related to 11/5/22 injury at Old Town Dental as needed."

11. Claimant returned to Dr. Evans on March 2, 2023, for the root canal treatment he previously recommended to tooth number thirty due to the fractured and infected filling. Dr. Evans's notes indicates that after starting the root canal, upon access to the chamber of tooth number thirty, "it was noted that tooth was cracked [mesially to distally] completely and tooth was unrestorable", so after consultation with Claimant he extracted tooth number thirty, grafted the bone, and prepared for an implant to replace tooth number thirty.

12. Claimant returned to Dr. Evans on May 10, 2023, for the non-surgical root canal he previously recommended to tooth number eight for irreversible pulpitis. Dr. Evans's notes indicate that he started the root canal but it "was discover[ed] a mid root fracture had occurred." Dr. Evans documented that he completed the root canal to the level of the fracture and then stopped the root canal and that tooth number eight would need extraction, bone graft, and implant.

13. Dr. James Berwick, D.D.S, performed an IME of Claimant at Respondents' request on June 5, 2023, and issued a report on June 23.

14. Dr. Berwick noted that none of Claimant's teeth appeared to have sustained incisal or occlusal fractures. Dr. Berwick also noted that Claimant did not note complaints regarding her teeth or jaws after the accident until she reduced her medication, which she had been taking for other musculoskeletal complaints following the accident.

15. Dr. Berwick also reviewed Claimant's medical history, which included a history of temporomandibular disorder in the 1980s and 1990s arising from clenching and stress. Dr. Berwick's examination observed wear on Claimant's incisors consistent with bruxism (teeth grinding). Claimant's prior records from January 2017 documented enamel fractures observed on teeth numbers eight, nine, and thirty. Records from March 2017 also documented pain resulting from a suspected cracked tooth number eighteen, and clinical photos from April 2021 showed possible fracture lines in tooth number thirty.

16. Dr. Berwick concluded that Claimant's present dental issues, specifically the fractures in teeth numbers eight and thirty, were not the result of the November 5, 2022 accident. He felt that Claimant did not likely sustain trauma from a traumatic occlusion at the time of the accident. He also observed that bruxism can cause fracture to teeth over longer periods of time, which he felt was consistent with Claimants' pre-injury dental history. In his opinion, Claimant's fractures pre-dated her injury and she likely began to notice symptoms only because she reduced her pain medications.

17. Dr. Evans, in what appears to be a response to Dr. Berwick's report, authored an open letter dated July 7, 2023, which opined on causation:

> *While I was not present at the accident that took place so I cannot say definitively that that was what caused the fractured teeth, in my opinion fractures such as this only occur due to trauma. I have never seen a mid-root fracture like the one that was present on #8 which caused the tooth to be extracted from anything other than trauma of some sort. It seems reasonable that the accident SA[Redacted] experienced at work could be the trauma that resulted in these dental injuries.*

18. At hearing, Claimant testified that she works as a cashier at the KS[Redacted] grocery store at University and Hampden. She started her job in March 2022 and was initially a meat and seafood clerk.

19. During her testimony, Claimant explained that on November 5, 2022, near the end of her shift, she took the elevator to retrieve carts from the mezzanine. While coming out of the elevator with a cart, she noticed a customer who needed help with fish. As she turned to assist the customer, the elevator door suddenly closed and struck her face. Claimant described the impact as hitting her "almost dead on the nose" but slightly off center to the right.

20. Claimant testified that the impact caused immediate and severe pain, and she experienced symptoms such as eyes watering, crying, trembling, fear, extreme pain, and a headache. She bled and had a bruised and swollen lip. She informed a customer about her injury and asked for help, but the customer refused. Claimant attended to the bleeding, packed her lip with ice and pressure, and then sought assistance from the head cashier. Claimant testified that she experienced pain in her lip and right incisor.

21. On direct examination, Claimant testified about the contents of her November 22, 2022 employee report of injury in which Claimant indicated that the body parts involved included, "Face, head, teeth, bone, muscle spasm." Claimant explained that by "bone," she "meant like the mandible, the jaw. Teeth are a kind of bone."

22. Claimant was asked about her written and signed voluntary statement, which indicated that the elevator door struck her lip and right incisor, but did not explicitly mention her jaw. When asked if she had specific memories of the door hitting her jaw, she responded that her jaw is part of her face.

23. She later clarified on redirect examination that the elevator impacted the protruding parts of her face, and that it went on to impact her whole face. When asked by her attorney whether it struck the lower part of her jaw, Claimant testified, "High probability, yes." When pushed further on the question as to whether she specifically recalled being struck in the jaw by the elevator door, Claimant responded, "I have a recollection from a door hitting my face. My jaw is part of my face."

24. Claimant's initial statements regarding how she struck her face appear inconsistent with Claimant impacting her jaw in the accident. Claimant's testimony appears to reconcile those earlier statements with her current position that she injured tooth number thirty in the accident by suggesting that by "face" Claimant meant she impacted her jaw in the accident. However, the Court finds that Claimant, in her testimony, to have adopted a broad explanation of her prior written statement, an explanation which was tailored so as to merely insinuate an injury to the jaw. Yet, when pressed to commit beyond insinuation, Claimant's testimony was calculatingly evasive and vague. The Court to finds Claimant's testimony to be improbable in light of the totality of the evidence, including the early medical records, the photo of the injury, and Claimant's own written statements, and the Court finds Claimant to not be a reliable witness and does not credit her testimony.

25. Dr. Berwick testified at hearing as an expert in general dentistry and oral/maxillofacial surgery.

26. Dr. Berwick expressed his opinion that Claimant's dental issues, particularly regarding tooth number thirty, were not a result of the November 5, 2022 injury. He based this opinion on several factors, including the location and nature of the

impact, the absence of direct trauma to the affected area, and Claimant's occlusion (the way her teeth come together). He pointed out that the force from the incident would not have likely caused the type of dental injury observed. Additionally, he noted that Claimant had a history of clenching and grinding her teeth, which could explain the dental problems.

27. Addressing Claimant's dental records, Dr. Berwick discussed X-rays taken before and during the root canal procedure performed by Dr. Evans. He highlighted that the X-rays did not provide evidence of a fracture as described by Dr. Evans and that the tooth's condition appeared more consistent with pre-existing issues rather than trauma. Dr. Berwick also examined Dr. Evans's July 7, 2023 open letter. Regarding Dr. Evans's observation that the mid-root fracture of tooth number eight was likely due to trauma, Dr. Berwick testified that root fractures can be caused by grinding one's teeth or clenching one's jaw, which Claimant's prior dental records document for the past thirty-five years.

28. Dr. Berwick noted that tooth number eight was in the vicinity where the door might have struck Claimant's face. However, he testified that the lips had absorbed most of the impact, and there was no apparent direct injury to the teeth in the provided photo, and there was no evidence of bleeding, cracking, or injury to the surrounding gums.

29. Dr. Berwick testified that had a mid-root fracture been present since November 5, 2022, the tooth had not shown more severe symptoms, such as increased mobility or discomfort. Dr. Berwick testified that the fact that Claimant's tooth mobility on tooth number eight was identical to that of tooth number nine on examination suggests that the irreversible pulpitis was not limited to tooth number eight and was likely due to Claimant's longstanding periodontal disease.

30. Dr. Berwick also explained irreversible pulpitis. He explained that anything that causes inflammation or swelling within the tooth can produce irreversible pulpitis. Because the living tissue in teeth is confined to the hard structure of the tooth, there is no room for expansion. The increasing pressure prevents blood from entering the tooth at normal blood pressure, and the tooth dies.

31. During cross-examination, Dr. Berwick was questioned about his assertion that tooth number thirty did not have a traumatic occlusion. Dr. Berwick explained that where a person has a normal occlusion, all teeth on the top of the mouth meet those on the jaw at the same time, and a traumatic occlusion is unlikely. Dr. Berwick pointed out that Claimant had a relatively normal occlusion and that he believed the mechanism of injury would not have caused any closing force other than Claimant's own voluntary closure of her mouth.

32. Regarding Dr. Evans's December 9, 2022 note finding that Claimant had an abscess in tooth number thirty, Dr. Berwick felt that the abscess predated the date of injury. Specifically, he opined that an abscess takes time to develop and

would not have developed within the past month. In his opinion, Claimant likely did not notice symptoms from the abscess until after the injury due to Claimant's having stopped taking pain medications around that time.

33. The Court finds Dr. Berwick's observations, as set forth in his IME report and testimony, to be credible. The Court also finds Dr. Berwick's opinions as to tooth number 30 persuasive. However, the Court does not find Dr. Berwick's opinions as to whether Claimant sustained a mid-root fracture to tooth number eight on the date of injury to be persuasive.

34. Dr. Berwick, in his IME report and testimony, pointed out several inconsistencies that cast doubt on Claimant having sustained a mid-root fracture of tooth number eight on the date of injury. The photo from immediately after the injury did not show evidence of bleeding of the gums, which Dr. Berwick testified would be inconsistent with a fractured tooth. Dr. Bird noted "no irregularity" in tooth number eight on December 1, 2022, that tooth number eight was intact and not loose as of December 20, 2022, and that tooth number eight appeared normal as of February 2, 2023. Claimant's history of bruxism involving tooth number eight, which had previously resulted in an enamel fracture, provides an alternate explanation as to the mechanism by which Claimant's tooth number eight sustained a mid-root fracture.

35. Dr. Berwick also felt that Claimant's pulpitis of tooth number eight was not due to the work injury, as the same tooth mobility was observed in tooth number nine, suggesting that the pulpitis was not limited to tooth number eight and was more likely due to Claimant's pre-existing periodontal disease.

36. On the other hand, the early records, including Claimant's written statement, the photo of Claimant's upper lip, and the supervisor's report of injury, clearly establish that Claimant did impact the elevator door at her upper lip in the location of tooth number eight. There is no evidence that Claimant was experiencing pain or mobility in tooth number eight immediately prior to the injury. Yet, Claimant's pursuit of treatment after the injury—albeit a somewhat delayed pursuit of treatment—convinces the Court that Claimant did have a new onset of pain in tooth number eight following the accident.

37. Based on the totality of the evidence, the Court finds it more likely that Claimant's mid-root fracture and irreversible pulpitis of tooth number eight were either the result of the November 2, 2022 injury or at least aggravated by the injury so as to necessitate surgical intervention. Therefore, the surgical treatment Claimant underwent with Dr. Evans for tooth number eight on May 10, 2023, was reasonably necessary to cure and relieve Claimant of the effects of her November 2, 2022 injury.

38. As for tooth number thirty, the Court finds that the mechanism of injury was not consistent with any injury to that tooth. Claimant's initial accounts of her injury

described striking the front of her face against the elevator door. Her voluntary written statement included the right incisor (tooth number eight) but made no mention of any injury to any molars or the jaw. Although Claimant later testified that she included "face" on her November 22, 2022 statement, and that "face" includes the jaw, the Court found that post-hoc explanation to lack credibility. Similarly, the photo of the injury site did not include any photos of Claimant's molars, leading the Court to infer that Claimant did not believe she had injured tooth number thirty at the time the photo was taken.

39. Additionally, Claimant's history of bruxism, and history of fractures of several other teeth, including tooth number eighteen, which is the tooth contralateral to tooth number thirty, provides a more likely explanation for Claimant's fracture of tooth number thirty. The abscess noted to be present only thirty-four days after the date of injury also appears to predate the injury itself given its apparent age based on Dr. Berwick's IME report and testimony.

40. The Court therefore finds that Claimant's need for treatment for tooth number thirty to be wholly unrelated to the November 2, 2022 injury. Therefore, the surgical treatment Claimant received with Dr. Evans for tooth number thirty on March 2, 2023, was not reasonably necessary to cure and relieve Claimant of the effects of her November 2, 2022 injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo.App.2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the

motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo.App.2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Commission,* 441 P.2d 21 (1968).

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

Medical Benefits

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S.

Although respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

As found above, Claimant's need for surgery for tooth number eight was reasonably necessary and related to the November 2, 2022 injury. The need for surgery for tooth number thirty, however, did not arise from the November 2, 2022 injury. Therefore, the Respondents are responsible for the cost of the surgical treatment Claimant received for tooth number eight on May 10, 2023, but not for the surgery for tooth number thirty on March 2, 2023.

ORDER

1. Claimant's request for an order compelling Respondent to pay for the surgical treatment Claimant received with Dr. Evans on March 2, 2023, is denied.

2. Claimant's request for an order compelling Respondent to pay for the surgical treatment Claimant received with Dr. Evans on May 10, 2023, is

granted. Respondents shall pay all medical expenses for the May 10, 2023 surgery.

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

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

DATED: September 7, 2023.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-043-919-004

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening his case for a "mistake" pursuant to section 8-43-303, C.R.S.

FINDINGS OF FACT

1. Claimant is a 58-year-old man who was employed by employer as a welder. On April 11, 2017, Claimant sustained admitted injuries when he fell approximately 12 feet from a ladder. Claimant sustained a severe head injury and shoulder injury arising out of the course of his employment with Employer. Claimant required a decompressive craniectomy, and a left frontal ventriculostomy to address brain hemorrhages. As a result of his injuries, Claimant has continued difficulty with some cognitive functions, impairment of his ability to use his shoulder, and a loss of his sense of smell (*i.e.*, anosmia).

2. After his initial care, Claimant was admitted to Craig Hospital for more than two months from May 1, 2017 until discharge on July 20, 2017. At discharge from Craig, Claimant's diagnoses included traumatic encephalopathy, cognitive and memory impairments, and attention impairments. Following discharge from his inpatient admission, Claimant received additional therapy from Craig on an outpatient basis through August 29, 2017. (Ex. 7).

3. After discharge from Craig, Claimant attended psychological therapy at Behavioral Medicine Center through February 5, 2019. (Ex. 9). He underwent a neuropsychological evaluation, at BMC in late October and early November 2017. The neuropsychological testing indicated Claimant has neuropsychological deficits as a result of his head injury, including significant deficits in bilateral visual, auditory and tactile stimulation, attention deficits, and impairment with manual dexterity for his left hand. He was also determined to have bilateral anosmia (loss of smell). (Ex. 9). A second neuropsychological evaluation at BMC in October 2018 demonstrated that two-thirds of Claimant's previously areas of impairment had normalized. Although Claimant continued to have impairment with left-sided inattention when presented with bilateral visual stimulation, anosmia, sustained auditory attention deficits, and visuospatial deficits. The provider indicated that these areas were not likely to improve further with the passage of time. (Ex. 9). At his visit with BMC on November 6, 2018, Claimant expressed concerns about returning to work, and was encouraged to "continue working with the [Redacted, hereinafter CR] in this regard." (Ex. N).

4. Claimant also underwent occupational therapy and speech/language/cognitive therapy at O.T. Plus through August 2018. (Ex. L and 12). On September 12, 2018, Claimant's treating therapists at O.T. Plus authored a letter indicating Claimant "may not be a candidate for gainful employment due to [his] lack of insight (especially for safety considerations) and his inability to follow through with tasks of priority without significant

oversight, cueing, and assistance." It was noted that Claimant as referred to the CR[Redacted] and ha an appointment for the end of September 2018 to begin the process of changing vocations, if possible. (Ex. 12).

5. On May 9, 2018, Claimant underwent a functional capacity evaluation (FCE) with Vickie Mallon, OTR at Colorado Occupational Medical Partners. The FCE demonstrated that Claimant had no functional limitations sitting or standing, and no significant pain with the evaluation. Claimant was able to occasionally lift 80 pounds and frequently (*i.e*., 1 left every 5 minutes) 35 pounds, and he had normal manipulative ability with both hands, (although he had diminished left hand grip strength which was likely attributable to a prior left thumb injury). Ms. Mallon determined Claimant was able perform the physical demand requirements of the "heavy work" category. The FCE did not assess Claimant's cognitive abilities. (Ex. F).

6. On June 1, 2018, Claimant was evaluated by treating psychiatrist, Stephen Moe, M.D. Dr. Moe indicated that due to the effects of his brain injury, Claimant "may struggle in very important settings, especially the workplace. Such challenges returning to the workforce may be aggravated by his relatively older age, which by itself can be an impediment in a competitive work environment that favors younger workers." (Ex. H).

7. On June 21, 2018, Claimant's authorized treating physician (ATP), Hiep Ritzer, M.D., placed Claimant at maximum medical improvement (MMI). Dr. Ritzer also recommended permanent work restrictions which included limitations of 80 pounds occasional lifting and carrying; 35 pounds repetitive lifting and overhead lifting; and 210 pounds pushing/pulling. She indicated that Claimant is not able to safely operate heavy equipment, use ladders, work on roofs, or have safety sensitive duties. Dr. Ritzer's recommended physical work restrictions are consistent with the May 9, 2018 functional capacity evaluation. (Ex. F).

8. Dr. Ritzer referred Claimant to Yusuke Wakeshima, M.D., to perform a permanent impairment rating. On July 6, 2018, Dr. Wakeshima assigned Claimant a 15% whole person impairment, and a 4% right upper extremity impairment for his shoulder injury. The two impairment ratings correspond to an 18% whole person impairment. (Ex. K). Dr. Wakeshima indicated in his report: "At his juncture I do not foresee patient be able to return to work back to his former line of work, as a welder/iron workers, base[d] on his work restrictions as delineated by Dr. Ritzer. He may be able to find an alternative line [of] work through vocational rehab [through] the state." (Ex. K).

9. On July 26, 2018, Respondents filed a Final Admission of Liability, admitting for a 15% whole person impairment and 6% upper extremity impairment. (Ex.).

10. Claimant then underwent a Division-sponsored independent medical examination (DIME) with Bennett Machanic, M.D. on December 17, 2018. Dr. Machanic agreed with the June 21, 2018 MMI date, and assigned a 20% impairment for cognitive issues and a 9% impairment for Claimant's left shoulder. (Ex. 11). In his December 17, 2018 report, Dr. Machanic indicated that he was concerned about Claimant's future employment productivity, given his significant permanent impairment issues. (Ex. 11).

11. Subsequently, the parties agreed to a stipulation regarding the impairment rating and requiring Respondents to file a revised FAL, which was approved on March 27, 2019. (Ex. 5). Respondents filed a revised FAL on March 29, 2019, admitting to the impairment assigned by Dr. Machanic. (Ex. 5). Pursuant to the stipulation, Claimant did not challenge the revised FAL, and Claimant's claim closed, subject to reopening as permitted by law.

12. On March 2, 2023, Claimant underwent a neuropsychological assessment with Susanne Kenneally, Psy.D., at respondent's request. Based on her testing, Dr. Kenneally opined that Claimant had made a substantial recovery from his brain injury, and had improved over time when compared to his prior neuropsychological testing. She opined that Claimant had no cognitive impediments preventing him from returning to competitive employment. (Ex. B).

Claimant's Work History

13. Before his injury, Claimant was employed as a union welder, and was steadily employed for many years. Claimant had completed core safety classes, and obtained welding certifications necessary to work as a welder and to be a "lead man" on welding jobs. Claimant credibly testified that prior to his injuries, his work required a significant amount of physical work, that he did not have difficulty performing.

14. Claimant testified that after he was placed at MMI, he applied for retraining with the CR[Redacted], but he could not be retrained to perform a job that he thought would sustain his family financially. He testified that CR[Redacted] could not find a job for him, so he re-took welding certification tests three or four times, but was unable to pass and was not able to obtain his prior certifications.

15. In May 2019, Claimant was able to return to employment. Claimant first worked as a millwright for [Redacted, hereainfter RI] (a mechanical company), from May 30, 2019 through July 22, 2019. Claimant testified that the position included performing service and installation of mechanical equipment, which he testified he was not qualified to perform. He testified he was unable to keep up with the work assigned because he was not qualified to perform the job. Claimant was terminated due to a "reduction in force," and was not eligible for rehire. He earned $8,564.32 working for RI[Redacted]. (Ex. 15). No credible evidence was admitted indicating that Claimant was terminated from RI[Redacted] due to the effects of his industrial injury.

16. From August 26, 2019 through September 4, 2019, Claimant worked as a handyman for a homeowner. Claimant performed work such as repairing a fence, trimming trees, general house maintenance, and cleaning. (Ex. 17). He testified that he worked until completion of the project. Claimant earned $627.00 for his work during this time. (Ex. 15).

17. From September 30, 2019 through October 18, 2019, Claimant worked as a handyman for a different homeowner. He worked 20-25 hours per week, performing landscaping, painting, and trash removal. He worked until the completion of the work, and earned $920.00. (Ex. 17 and 15).

18. On October 24, 2019, Claimant began working for [Redacted, hereinafter TB]. Claimant worked 25 hours per week, performing fence work, drywall repair, and painting with a crew. (Ex. 17). Claimant testified that he worked until completion of the project. During this job, Claimant lost his grip on a hammer while working, and the hammer struck a co-worker in the head. He indicated he was "let go" because a younger co-worker in charge of the job, and Claimant felt he could not keep up with the pace of work. He testified that prior to his work injury, he did not have difficulty "keeping up" with work.

19. Claimant has not worked since the TB[Redacted] position ended in November 2019. In 2019, Claimant applied for other positions in the construction industry, and was not hired. No credible evidence was admitted indicating Claimant was not hired as a result of his industrial injury.

20. Claimant has not applied for other employment since 2019. Although, Claimant testified that he attempted to apply for a customer service position at [Redacted, hereinafter HD], but did not complete the online application process.

Claimant's Abilities and Limitations

21. As a result of his work injuries, Claimant has permanent limitations that did not exist previously. As a result of these limitations, Claimant is not able to return to his prior profession as a welder and iron worker. While Claimant does have some physical limitations, such as lifting restrictions, these restrictions do not prevent Claimant from obtaining employment. The primary area of concern relates to Claimant's cognitive function.

22. Claimant's wife of twenty years, [Redacted, hereinafter AL], testified at hearing. Claimant and AL[Redacted] have two teenage sons. AL[Redacted] testified that prior to his industrial injury, Claimant was a hard worker, involved with his family, and enjoyed outside activities such as biking and fishing. She testified that since his injury, Claimant is more forgetful, sleeps less, has difficulty with crowds, is irritable, less communicative, and no longer has interest in outside activities.

23. AL[Redacted] testified that presently Claimant wakes up early every day, walks the dog, makes himself breakfast, drives their sons to and from school, and helps their sons with homework in the evening. She testified that Claimant handles the family finances, including going to the bank and paying the family bills. Although she maintains some degree of control over the family's bank accounts. She testified that Claimant helps with cleaning around the house, but uses too much cleaning product because he cannot smell. Claimant is able to drive a car, although he attempts to avoid heavy traffic areas. Claimant's wife testified that he "always drives," although he becomes angry in certain situations. Claimant testified that he does household chores such as vacuuming, and shoveling snow in the winter.

24. She testified that in her opinion, Claimant cannot accept that he has limitations. She testified that Claimant attempted to return to work, and that he wanted to return to his previous line of work, but could not do so. She testified that Claimant has not applied for non-construction jobs because his experience is in construction-related fields.

25. Claimant and his wife testified that he does unpaid volunteer work for his church, including going door-to-door evangelizing, counseling members via Zoom, providing teaching services, and performing computer research for the church. Claimant is bilingual in English and Spanish, and uses this skill in his volunteer work. During the Covid pandemic, Claimant assisted the church delivering food. Claimant testified he spends approximately one hour, two times per week going door-to-door with his church, and that he attends two 2-hour meetings with the church per week. Claimant reported to Respondents' vocational rehabilitation consultant, Roger Ryan, that he spends approximately 17 hours per week with church-related activities. (Ex. C).

26. Claimant testified that since his injury, he is not as aware of his surroundings, which would make industrial jobs difficult because these jobs require situational awareness. He testified he needs to take breaks to focus, and he gets tired easily. Claimant also testified he has anxiety when dealing with crowds and noisy situations. He testified he sometimes uses ear plugs to help him concentrate. He recognized that his loss of smell would create a safety issue with some areas of employment, such as working in a kitchen.

27. Claimant testified that his ideal situation is to work for himself doing ornamental welding, but he does not have the financial ability to purchase the equipment necessary to start a business.

28. The evidence demonstrates that Claimant has limited insight into the limitations placed upon him by his brain injury. However, Claimant is not unaware of his limitations. Claimant's testimony demonstrates that he understands that he has difficulty concentrating, a lack of awareness of his surroundings, tires easily, needs to take breaks to refocus, and has difficulty communicating. Claimant is also aware of his difficulties in noisy, crowded, and stressful situations, and also in situations that would require a sense of smell. Claimant testified that his physicians told him prior to being placed at MMI that he possibly could not return to construction work.

29. Claimant demonstrated this awareness in his testimony regarding jobs he believes he may be able to perform. For example, Claimant testified he believes he could work as a cashier in a non-stressful situation. He testified that he has not looked for work such as cashier jobs because he is looking for something more substantial and consistent with his experience. He testified that he could not work as a collection agent because it is too confrontational, and that he could not work as a telephone solicitor because of the potential conflict. He testified that he could not work in fast food, because of his loss of smell, and that he could not work as a security guard because he is not comfortable with weapons.

30. Claimant testified that he wants to work and in his opinion he could potentially work in a number of jobs. These include assembly job, as a storage facility or rental clerk, a courier, a parking lot attendant, house or office cleaner, restaurant host, cafeteria attendant, hotel/motel desk worker, or shipping/ receiving clerk. He agreed that he could possibly work in a library, or book store, or could be a greeter at a store. Claimant testified that he could perform the job of delivering food, as long as he did not have to deal with payment, and that he could work for a rental car agency moving and cleaning vehicles.

Vocational Assessments

31. In November 2020, Claimant underwent a vocational assessment with Doris Shriver, OT/L. Ms. Shriver did not testify at hearing, as a result, no explanation of her recommendations and opinions was offered. Claimant reported to Ms. Shriver experiencing difficulty focusing, short-term memory issues, confusion with over-stimulation, a limited verbal filter, slower more methodical thinking, and mental and physical fatigue, and that these symptoms are worse in a busy and distracting environment. Ms. Shriver's testing demonstrated that Claimant is able to read, sentence comprehension and spell at a 12th grade level, and that his math skills are at an 8th to 9th grade level. She determined that Claimant has impairment of his auditory memory, and deficits in fine and gross motor coordination. However, the majority of her testing of Claimant's physical abilities fell within normal limits. Based on her testing, Ms. Shriver opined that Claimant was in the 11th percentile of workers nationwide (although no cogent explanation of what that metric represents was provided), and that he did not meet the necessary criteria for accommodated work options and that he is not a candidate for vocational rehabilitation. (Ex. 17). Implicit in Ms. Shriver's opinion is the idea that Claimant is only able to work in an accommodated work position without vocational retraining, however no cogent explanation for this opinion was offered. Her opinions are not persuasive, nor are they consistent with Claimant's testimony, his other medical providers, or his post-injury work history.

32. At Respondents' request, Claimant underwent a vocational rehabilitation assessment with vocational consultant Roger Ryan, M.S. Mr. Ryan issued multiple reports between February 17, 2022 and May 13, 2023. Based on his assessment, Mr. Ryan identified twenty-five areas of employment available to Claimant and within his physical work restrictions. These included cashier, driving vehicles for repair shops, a courier, information clerk, check cashier, collection clerk, telephone solicitor, night auditor, sales clerk, unarmed security guard, presser, assembler, fast food worker, storage facility rental clerk, office cleaner, parking lot attendant, appointment clerk, restaurant host, management trainee, cafeteria attendant, pastoral assistant, janitor, shipping and receiving clerk, dining room attendant, and kitchen helper. (Ex. C). In May 2023, Mr. Ryan issued a report in which he indicated that positions within Claimant's work restrictions as an office cleaner, unarmed security guard, and night auditor were available in the Denver market. (Ex. C).

CONCLUSIONS OF LAW

Generally

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

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

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

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

Claimant's Petition To Reopen

Claimant seeks to re-open his claim for an alleged mistake, pursuant to § 8-43-303, C.R.S. Claimant has failed to establish by a preponderance of the evidence sufficient grounds to justify reopening his claim.

Once a case has been closed, the issues resolved by a Final Admission of Liability are not subject to litigation unless they are reopened pursuant to § 8-43-303, C.R.S. § 8-43-203 (2)(d), C.R.S.; *see also Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005); *Webster v. Czarnowski Display Serv., Inc*., W.C. No. 5-009-761-03 (ICAO, Feb. 4, 2019). Section 8-43-303(1) C.R.S., allows an ALJ to reopen any award within six years of the date of injury on a several grounds, including error, fraud, or mistake. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). Reopening of a closed claim may be granted based on any mistake of fact that calls into question the propriety of a prior award. § 8-43-303(1), C.R.S.; *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). When determining whether a mistake justifies reopening the ALJ

may consider whether it could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Indus. Comm'n v. Cutshall*, 433 P.2d 765 (Colo. 1967); *Klosterman v. Indus. Comm'n*, 694 P.2d 873 (Colo. App. 1984).

The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

Claimant has failed to establish grounds for reopening his claim due to a "mistake." As found, pursuant to the parties' March 27, 2019 Stipulation, Claimant's claim closed with the filing of the revised FAL on March 29, 2019, subject to reopening as permitted by law. Claimant asserts he mistakenly "believed that he was going to be able to return back to work because of the loss of 'insight' as to his difficulties caused by his brain injury," and that but for this mistake, Claimant would have pursued a claim for permanent total disability benefits. (Claimant's Position Statement, p. 4).

Claimant has failed to establish that his belief that he could return to work constituted a "mistake." While the evidence demonstrates that Claimant has impairments and restrictions on his ability to work, it does not demonstrate that he is unable to work. Claimant was employed briefly in 2019, and earned an income. He did not remain in those jobs, but the credible evidence does not establish his employment was terminated due to his industrial injury. Claimant testified his employment with RI[Redacted] ended due to a reduction in force, and he was not qualified to perform mechanical work. The two handyman jobs Claimant performed ended after he completed the projects for which he was hired. Although Claimant was, more likely than not, terminated from his employment with HD[Redacted] due to the effects of his industrial injury, the inability to perform the requirements of that position do not establish a complete inability to work. Claimant's lack of employment since 2019 is explained by the fact that he has not applied for employment since 2019, rather than an inability to work. The ALJ credits the opinions of Mr. Ryan that work is available for Claimant within the Denver area that can accommodate his work restrictions and experience.

Claimant's ability to work in some capacity is demonstrated by current activities and supported by his testimony. As found, Claimant performs volunteer work for his church, which has the hallmarks of employment, Claimant is able to go door-to-door to speak with people, he counsels church members over the phone and through Zoom in both English and Spanish, and he performs research on a computer. Claimant is able to drive, maintain household finances, perform work around the home, including cooking, cleaning, and yard work. His past employment as a handyman also demonstrates that Claimant is able to perform some level of light construction work.

Although Claimant may not have complete understanding of his physical and cognitive limitations, he is not unaware of them. Claimant testified concerning some of his limitations, including his avoidance of crowded locations, his difficulty focusing, his need to take breaks, and his situational awareness. Despite these limitations, Claimant testified

that he could perform many of the jobs identified by Mr. Ryan, but has not attempted or applied for any. Claimant's testimony that he could not perform certain jobs due to the effects of his injuries also demonstrates his awareness of his circumstances. Based on the totality of the evidence, the ALJ finds that Claimant has failed to establish that his belief that he could return to work was a mistake.

Notwithstanding his ability to work, information regarding Claimant's limitations and impairment were known prior to his claim closure. Claimant's physical and cognitive condition has not significantly changed since his case closed on March 29, 2019. Prior to March 29, 2019, Claimant was subject to work restrictions, and multiple providers expressed concerns regarding his ability to return to work, particularly in his prior career. Despite the existence of this information, Claimant entered into the Stipulation closing his claim, and elected not to pursue a permanent total disability claim. Claimant's decision to resolve his claim without pursuing a permanent total disability claim does not constitute a "mistake" justifying reopening.

Because Claimant has failed to establish that he is unable to work in any capacity, he has failed to establish that his belief that he could return to work was "mistaken." Claimant's request to reopen his claim based on a mistake is denied.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim pursuant to §8-43-303, C.R.S., for a "mistake" is denied and dismissed.

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

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

DATED: September 7, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-121-045-004

ISSUES

- What is the appropriate repayment rate for the $5,349 overpayment previously determined by ALJ Perales in a final order dated March 20, 2023?

FINDINGS OF FACT

1. Claimant suffered an admitted injury on October 12, 2019. She received temporary benefits in the aggregate amount of $101,706.01.

2. Claimant reached MMI on March 11, 2022.

3. A hearing was held before ALJ Michael Perales on February 7, 2023, on Claimant's attempt to overcome the DIME regarding MMI, PPD benefits, and Respondents' asserted overpayment of $5,349.

4. Judge Perales found that Claimant failed to overcome the DIME regarding MMI. He further determined that Claimant suffered a 6% whole person impairment to her right shoulder and 21% scheduled impairment to her left hip. Judge Perales also found Claimant was overpaid $5,349 in TTD benefits. The terms of repayment were reserved for future determination.

5. The overpayment occurred because Claimant received TTD benefits in excess of the statutory benefit "cap." There is no persuasive evidence Claimant contributed to the creation of the overpayment.

6. Claimant is ineligible for PPD benefits because her combined impairment rating is less than 26%. As a result, Respondents cannot recoup the overpayment from other indemnity benefits owed on this claim.

7. Claimant's household consists of Claimant and three minor children.

8. Claimant receives no direct child support payments. The father of one of the children pays expenses such as school supplies and clothing for the child.

9. Claimant recently started working as an account representative with an insurance agency. She works 40 hours per week. Claimant is receiving the minimum wage of $13.65 per hour while studying to obtain various insurance licenses. She expects to receive a property and casualty license by the end of August 2023, at which point she will receive a $2 per hour pay raise. After receiving her property and casualty license, Claimant intends to pursue a life and health insurance license, which would result in an additional $2 per hour raise. There is no established or anticipated timeline for obtaining the life and health license.

10. At the time of the hearing, Claimant's gross wages were approximately $546 per week, or $2,365.82 per month ($13.65 x 40 = $546 x 4.333 = $2,365.82). When she receives the $2 per hour pay raise based on the property and casualty license, her gross wages will increase to $626 per week, or $2,712.46 per month ($15.65 x 40 = $626 x 4.333 = $2,712.46).

11. Claimant credibly testified to recurring household expenses of at least $2,885 per month:

Monthly Expense	Amount
Rent	$1,250.00
Utilities	$267.00
Phone	$261.00
Car payment	$372.00
Auto insurance	$185.00
Groceries	$550.00
Total:	**$2,885.00**

12. Claimant's recurring expenses exceed her monthly earned income.

13. Claimant was recently approved for SNAP benefits of $397 per month. When the SNAP benefits are included, Claimant's household will have $224.46 remaining each month for discretionary spending ($2,712.46 + $397 – $2,885 = $224.46).

14. Claimant anticipates the SNAP benefits will be reduced or terminated soon because of her income.

15. Two of Claimant's children receive Social Security survivors benefits in an unknown amount on the earnings record of their recently-deceased father. Claimant receives no survivor benefits.

16. Thirty-five dollars ($35) per month is an appropriate repayment rate considering Claimant's financial circumstances and lack of culpability in contributing to the overpayment.

CONCLUSIONS OF LAW

Judge Perales previously determined Claimant received an overpayment of $5,349 in a final order dated March 20, 2023. Where, as here, an overpayment cannot be collected from ongoing benefits, the respondents may seek an order of repayment. Section 8-42-113.5(1)(c). The statute prescribes no specific recovery rate or period, and repayment terms are left to the ALJ's discretion. *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994).

As found, $35 per month is an appropriate repayment rate in this case. Claimant is the sole wage-earner in a household that includes three minor children. Claimant's recurring monthly expenses exceed her monthly earned income. If the SNAP benefits are

included, Claimant's household has $224.46 each month for discretionary spending ($2,712.46 + $397 – $2,885 = $224.46). However, it appears the SNAP benefits will be reduced or terminated shortly. The amount of the children's Social Security survivors benefits is unknown, but the household qualified for public assistance despite the benefits. A monthly payment greater than $35 would create an undue hardship for Claimant and her children. The ALJ also considers it significant that Claimant did not contribute to creation of the overpayment.

ORDER

It is therefore ordered that:

1. Claimant shall repay $5,349 to Respondent, in monthly installments of $35. The first payment shall be due thirty (30) days after this Order becomes final, with payments continuing thereafter on a monthly basis until the overpayment is repaid in full.

2. Any issues not decided herein are reserved for future determination.

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

DATED: September 8, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-218-979-003

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she suffered a compensable injury on November 8, 2021, and is entitled to medical benefits.

2. Whether penalties should be assessed against Respondents for not initiating a worker's compensation claim prior to receiving a demand letter from counsel.

FINDINGS OF FACT

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

1. Claimant is a 51 year-old woman who worked for Employer. Claimant was hired to work for Employer[1] through a partnership with [Redacted, hereinafter MD] on November 1, 2021. The partnership provided MD[Redacted] clients with employment opportunities. Individuals were hired to perform regular janitorial services for the MD[Redacted] buildings and facilities in the Denver Metro area Monday through Friday, from 5:00 pm to 9:00 pm. Daily shifts originated at a MD[Redacted] facility where the employees, including Claimant, met, and then would separate into their assigned crews. Employer provided passenger vans for transportation to the facilities and buildings to be cleaned.

2. [Redacted, hereinafter TW] is the Owner and President of Employer. He credibly testified that [Redacted, hereinafter DE] was the supervisor of the MD[Redacted] crews. TW[Redacted] also credibly testified that all employees, including Claimant, were give an employee handbook. The employee handbook explains that employees are to notify their supervisor within 24 hours of any injuries at work.

3. Claimant credibly testified that she knew she should tell her supervisor if she sustained any injuries at work.

4. On November 8, 2021, Claimant was working with a crew that included [Redacted, herainfter TS], [Redacted, hereinafter DT], and [Redacted, hereinafter PN]. TS[Redacted] was the crew leader, and he drove the team to each assignment in a van. The van had two bucket seats in front, and two rows of seats in back. TS[Redacted] was driving, Claimant was in the front passenger seat, DT[Redacted] was in the middle row sitting behind the driver, and PN[Redacted] was in the far back row sitting on the passenger side. TS[Redacted] made a left turn at a yellow light when a small car traveling through

[1] [Redacted, hereinafter LM] is the parent company of [Redacted, hereinafter MO], and [Redacted, hereinafter SS].

the intersection hit the tail end of the van on the passenger side. The impact did not cause the air bags in the van to deploy.

5. Claimant was wearing her seatbelt when the accident occurred. She testified on direct examination that when the car hit the van, it lightly rocked the van from side to side. This is consistent with the testimony of DT[Redacted] and PN[Redacted]. DT[Redacted] testified that it felt like a small bump, like the van ran into the curb. PN[Redacted], who was seated in the back where the car struck the van, testified that the car barely nicked the van and it felt like the van had driven over a speed bump.

6. Claimant, DT[Redacted], and PN[Redacted] all credibly testified that the damage to the van was minimal. The photograph of the van supports this testimony. The paint on the van was scratched and there was small dent. (Ex. B).

7. The ALJ finds that the accident on November 8, 2023 was a minor accident, and resulted in minimal damage to the van.

8. DT[Redacted] and PN[Redacted] both credibly testified that they were not injured in the accident. They also testified that TS[Redacted] asked them if they were okay, and they confirmed that they were. The ALJ infers that TS[Redacted] also asked Claimant if she was injured.

9. TS[Redacted] called the police, and he contacted DE[Redacted], to inform him of the accident. According to Claimant, DE[Redacted] was already on his way to their location because he was bringing the team additional cleaning supplies. DE[Redacted] arrived on scene while all the crew members were still waiting for the police to arrive.

10. PN[Redacted] credibly testified that when DE[Redacted] arrived at the scene, he asked PN[Redacted] if he was okay, and PN[Redacted] confirmed he was not injured.

11. On direct examination, Claimant testified she hurt her neck and hit her head in the accident, but did not tell anyone that she needed medical treatment. On cross-examination, Claimant testified she hurt her neck and back in the accident. Claimant further testified she told TS[Redacted] she hurt her neck and back and that she was going to the hospital the next day.

12. On direct examination, Claimant testified she told both TS[Redacted] and DE[Redacted] that she was injured in the accident. On cross-examination, Claimant testified that even though DE[Redacted] arrived at the accident scene, she did not tell him anything that night because she assumed TS[Redacted] would relay that she had allegedly been injured. Neither TS[Redacted] nor DE[Redacted] testified at the hearing.

13. Claimant credibly testified that she believed TS[Redacted] was her supervisor. DT[Redacted] also credibly testified he believed TS[Redacted] was his supervisor. PN[Redacted] testified that he now understands DE[Redacted] was their supervisor, and not TS[Redacted]. The ALJ finds that the crew members reasonably assumed TS[Redacted] was their supervisor.

14. TW[Redacted] testified that DE[Redacted] called him the evening of November 8, 2021, to tell him about the accident. DE[Redacted] confirmed to TW[Redacted] that none of the crew members, including Claimant, had been injured. The ALJ infers that DE[Redacted] checked on all of the crew members, including Claimant, and confirmed that none of them were injured.

15. Based on the totality of the evidence, the ALJ finds that Claimant did not tell TS[Redacted] or DE[Redacted] that she was allegedly injured in the accident.

16. DT[Redacted] and PN[Redacted] both testified that Claimant did not appear to have been injured in the accident, and she did not tell either of them she had had been injured.

17. After waiting approximately 30-60 minutes for the police to arrive, the crew, including Claimant, proceeded across the street to the next building to be cleaned. Claimant went to the building and continued her work without difficulty. Claimant testified she performed all of her tasks without problem and even assisted with vacuuming, which was not her job.

18. DT[Redacted] credibly testified that Claimant performed her janitorial duties efficiently and without any apparent pain following the accident. Claimant completed his task of vacuuming the floors while he continued to mop. Likewise, PN[Redacted] testified Claimant completed her work without any issues or apparent pain, that she seemed find and did not seem to be hurt in any way.

19. Based on the totality of the evidence, the ALJ finds that Claimant did not tell anyone on November 8, 2021, that she had allegedly been injured in the motor vehicle accident. The ALJ also finds that following the accident, Claimant was able to continue working without any issues.

20. On November 9, 2021, the day following the motor vehicle accident, Claimant presented to the emergency room at Presbyterian/St. Lukes. According to the medical record, Claimant reported being involved in a motor vehicle accident the previous day. Claimant initially felt okay, just a bit stiff. She reported developing “worsening left low back pain stiffness mild to moderate severity worse with movement.” Claimant was diagnosed with a lumbar strain, and was excused “from sport” for one day. The medical record specifically notes that Claimant had “[n]o numbness [or] weakness in extremities” and no neck pain. Claimant was not given any work restrictions. (Exs. C, 6 and 7).

21. There is no objective evidence in the record that Claimant notified Employer that she went to the emergency room the day after the motor vehicle accident because of low back pain.

22. Claimant testified she subsequently went to her chiropractor, Steve Visentin, D.C. Claimant saw Dr. Visentin on November 12, 2021. Claimant testified she saw Dr. Visentin every day for three to four months. Claimant further testified she stopped seeking medical treatment because there was no one to pay for it.

23. There is no objective evidence in the record that Claimant notified Employer she was receiving chiropractic care, allegedly related to the November 8, 2021 accident.

24. In a February 7, 2022, "special report," Dr. Visentin notes Claimant saw him on November 12, 2021 seeking treatment related to a motor vehicle accident where the "car was totaled." Under subjective complaints, Dr. Visentin noted Claimant reported experiencing sharp lower and midback pain and she suffered paresthesia in both of her legs. Claimant also told Dr. Visentin she had to "quit [her] job because [she] was unable to stand 8 hours." Claimant rated her back pain as a 9 out of 10. (Ex. 5).

25. As found, the motor vehicle accident was minor and resulted in minimal damage to the van. The van was not totaled. Further, the November 9, 2021 emergency room records specifically note Claimant had no numbness or weakness in her extremities.

26. Claimant testified she continued to work every day following the accident, without any difficulty. This is in stark contrast to what she reported to Dr. Visentin on November 12, 2021. Further, there is no objective evidence in the record that Claimant ever had difficulty standing, or that she quit her job because of her inability to stand.

27. PN[Redacted] credibly testified that a few days after the accident Claimant told him she was suing the company because they were in a company car when the accident occurred. She wanted PN[Redacted] to join her and sue the company, but he declined. PN's[Redacted] testimony was unclear as to whether Claimant told him she had been injured. But PN[Redacted] credibly testified that he continued to work with Claimant and there was no indication she was injured in any way.

28. Claimant continued to work her regular shift and duties without difficulty and/or accommodation until she voluntarily resigned her position in late November/early December 2021 due the requirement by MD[Redacted] that she obtain a Covid vaccination, which she chose not to obtain.

29. Claimant was subsequently hired by Employer a few days later to work at [Redacted, hereinafter SY] performing janitorial services. She left that job after the school determined she was not a good fit. Employer offered her employment at two other schools. Claimant testified that she checked out the schools and did not care to work at either. She voluntarily resigned her employment. Employer hired Claimant a third time in August 2022 to work as a day porter at the [Redacted, hereinafter EW]. Claimant worked there until she was terminated for cause on January 13, 2023. Claimant's supervisor when she worked as a day porter was [Redacted, hereinafter JH].

30. At no time during any of claimant's subsequent employment with Employer did she ever inform any supervisor or TW[Redacted] that she had sustained a work related injury in the November 8, 2021 accident.

31. TW[Redacted] credibly testified that the first time he ever learned that Claimant alleged sustaining a work injury in the accident on November 8, 2021, was when he received a demand letter from Claimant's attorney dated October 5, 2022. He credibly

testified that he was very surprised because Claimant had never reported any injury from the November 8, 2021 accident.

32. After receipt of the demand letter, TW[Redacted] and JH[Redacted] met with Claimant at the company's main office on October 12, 2022. At the meeting, they asked Claimant to explain what happened and to describe the injuries she sustained. As both TW[Redacted] and JH[Redacted] credibly testified, Claimant described at length her personal health history, and treatment with medical providers, including chiropractors, for many years for back and neck issues, and scoliosis. TW[Redacted] credibly testified that Claimant never gave them an answer regarding the alleged injury on November 8, 2021.

33. On October 12, 2022, TW[Redacted] completed a Workers' Compensation First Report of Injury. (Ex. A). The ALJ finds that Employer did not know of Claimant's alleged work injury until October 2022, nearly a year after the motor vehicle accident occurred. The ALJ further finds that Employer timely reported Claimant's alleged injury.

34. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that she suffered a compensable work injury on November 8, 2021.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

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

Argument

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A claimant is required to prove by a preponderance of the evidence that at the time of the alleged injury she was performing service arising out of and in the course of employment and the alleged injury or occupational disease was proximately caused by the performance of such service. §8-41-301(1)(b)&(c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." §8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *Boulder v. Payne*, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO, Aug. 25, 2014).

It is undisputed that the motor vehicle accident that occurred on November 8, 2021, occurred in the course of Claimant's employment with Employer. As found, this was a minor accident. PN[Redacted] and DT[Redacted] both credibly testified that Claimant never said she was injured, nor was there any indication in her behavior for either of them to believe she had been injured. TW[Redacted] credibly testified that he was informed of the accident and he asked about each of the crew members to see if anyone had been injured. DE[Redacted] assured him that all of the crew member were safe and were not injured. As found there is no objective evidence in the record that Claimant told anyone she had been injured in the accident.

Claimant continued working after the accident without any issue. She continued with her janitorial/cleaning tasks that same evening and was even able to assist other crew members with their cleaning tasks. Moreover, Claimant continued to work her regular shift without interruption and without any complaint, apparent difficulty or need for accommodation, for the next several weeks until she voluntarily resigned her job when she was required to obtain a Covid vaccination to which she objected.

While Claimant went to the emergency room the day after the accident, and then to the chiropractor, this is not sufficient to prove by a preponderance of the evidence that

she suffered a compensable work injury. As found, the subjective report Claimant gave to Dr. Visentin was in sharp contrast to the events that occurred, and her report to the emergency department. The van had not been totaled, and in fact only suffered minor damage. Additionally, there is no objective evidence that Claimant ever had a time where she was unable to stand for eight hours. While Claimant voluntarily quit her job on multiple occasions, there is no objective evidence in the record that she quit because she not stand for eight hours. Through Claimant's own statements to TW[Redacted] and JH[Redacted], and by her own testimony, Claimant admitted that she has suffered from scoliosis and calcium deficiency, for which she has regularly sought medical treatment.

The Act requires that "[e]very employee who sustains an injury … shall notify the employee's employer in writing of the injury within ten day days after the occurrence of the injury." § 8-43-102(1), C.R.S. It is uncontroverted that Claimant failed to submit any written notice to her Employer of an alleged injury. Similarly, Claimant failed to provide her employer with any medical treatment records. As found, the first notice Employer ever received of an alleged injury was the demand letter dated October 5, 2022, sent by Claimant's counsel, nearly a year after the accident.

Based on a totality of the evidence, Claimant failed to prove by a preponderance of the evidence that she sustained a compensable work injury in the November 8, 2021 motor vehicle accident. Accordingly, Claimant is not entitled to medical benefits.

Penalties

Claimant endorsed a claim for penalties in her application for hearing. Claimant asserted that Respondents violated the Act because Insurer denied/contested the injury as not work related and because a workers' compensation claim was not opened until October 2022. An Employer is required to report an injury that results in active medical treatment for a period of more than 180 calendar days after the date the injury was first reported to the employer within 10 days to the Division. § 8-43-101(1), C.R.S. As found, Claimant failed to timely report her injury and Employer had no knowledge of the alleged injury until the receipt of the October 5, 2022, demand letter. Upon receipt of the demand letter, Employer notified insurer and a claim was opened. The claim was subsequently denied as not work related. The denial of the claim as not work related is not a violation of the Act.

Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that she is entitled to penalties.

ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence that she sustained a compensable work injury.

2. Claimant is not entitled to medical benefits.

3. Respondents did not violate the Workers' Compensation Act and therefore are not subject to any penalties asserted by Claimant.

4. Claimant's claim is denied and dismissed with prejudice.

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

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

DATED: September 11, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-109-153-004

ISSUES

1. Whether Claimant established by a preponderance of the evidence that physical therapy and a gym membership, as recommended by authorized treating provider Theodore Villavicencio, M.D., are reasonable and necessary to relieve the effects or prevent further deterioration of Claimant's industrial injury pursuant to *Grover v. Indus. Comm'n*, 795 P.2d 705 (Colo. App. 1988).

2. Whether Respondents established by a preponderance of the evidence grounds for withdrawal of its admission for maintenance medical benefits.

FINDINGS OF FACT

1. Claimant was employed by Employer as a youth specialist working at a juvenile detention facility. On April 26, 2019, Claimant sustained an admitted lower back injury arising out of the course of his employment while restraining a juvenile who had attacked a staff member.

2. Claimant has a history of back issues dating to a 2016 injury. In May 2016, Claimant underwent lumbar surgery including decompressive bilateral laminotomies at L3, L4, and L5, medial facetectomies and foraminotomies at L3-4 and L4-5, right sided hemilaminotomy at L5-S1, microdiscectomy at L5-S1, and excision of an extruded disc at L4-5. Claimant's last documented lower back treatment prior to April 26, 2019 was on September 26, 2017, when he saw James Nelson, PA-C, at Spine Colorado, and reported recurrent low back pain and bilateral lower extremity radiculopathy. (Ex. K)

3. As a result of his April 26, 2019 industrial injury, Claimant received treatment through his authorized treating physician (ATP), Theodore Villavicencio, M.D., for diagnoses of lumbar radiculopathy and adjustment disorder. Over the course of his care, Dr. Villavicencio referred Claimant for physical therapy, injections, medial branch blocks, and nerve root ablation. Claimant also consulted with a physical medicine and rehabilitation physician (Samuel Chan, M.D.), an orthopedic surgeon (Andrew Castro, M.D.), and a psychiatrist (William Boyd, Ph.D.).

4. On December 30, 2019 and January 3, 2019, Claimant underwent independent medical examinations (IME) with Gary Zuehlsdorff, M.D., and Kathleen D'Angelo, M.D., respectively. Both IME physicians diagnosed Claimant with a new injury at the L2-3 level, and opined that Claimant's April 26, 2019 injury was a new, separate, and distinct injury from his pre-existing lower back conditions. (Ex. 1, Ex. A). Both IME physicians agree Claimant sustained a disc herniation at the L2-3 level as a result of his work injury. (See Ex. 1, and D'Angelo Depo., p. 19, l. 19-21).

5. Claimant had lumbar MRIs on April 27, 2019, July 30, 2020, and September 9, 2020 to evaluate his lumbar spine. Each of the MRIs showed pathology at multiple levels of Claimant's lumbar spine, including disc bulges at L2-3, L3-4, L4-5, and L5-S1. The September 9, 2020 MRI was compared to the April 27, 2019 MRI, and showed evidence of a "new extruded disc fragment at the L4-5 level", and evidence of "new severe L5-S1 lateral recess stenosis" (Ex. J).

6. On September 29, 2020, Dr. Villavicencio placed Claimant at maximum medical improvement (MMI) and assigned a 14% whole person impairment for his lumbar spine. Claimant reported lumbar axial area pain rating 0-1/10; and mid thoracic pain wrapping around the bilateral chest area, which had decreased from its prior levels. On examination, Dr. Villavicencio noted limited range of motion in the lumbar and sacral spine, but an otherwise normal examination. Dr. Villavicencio recommended maintenance care including a 12-month gym membership, and six physical therapy visits over the following six months. Dr. Villavicencio indicated that physical therapy was "medically necessary to address objective impairment/functional loss and to expediate return to full activity." (Ex. F). Respondents' payment ledger indicates Claimant did not begin physical therapy until December 9, 2021, and attended a total of 44 sessions through March 1, 2023. (See Ex. M). Claimant testified that he did use the gym membership to perform physical therapy exercises.

7. After being placed at MMI, Claimant continued to see Dr. Villavicencio, Dr. Chan, and Dr. Castro. Each of these physicians, at various times, recommended that Claimant receive physical therapy and participate in a home exercise program.

8. On January 11, 2021, Claimant saw Dr. Chan reporting a lumbar spine axially, without radiation, numbness, or tingling. On examination, Dr. Chan noted diffuse tenderness over the lumbosacral muscles with hypertonicity, and limited range of motion. He opined that Claimant's clinical symptoms were most consistent with facetogenic pain, and that Claimant remained at MMI. He recommended an additional medial branch block, which, if positive, would make Claimant a candidate for a medial branch radiofrequency rhizotomy ("RFA") On March 24, 2021, Claimant had bilateral RFAs, which Claimant reported as effective. (Ex. D).

9. On April 8, 2021, Claimant returned to Dr. Chan. Claimant reported being seen at UC Health[1] outside the workers' compensation system for his back symptoms. Claimant reported that a repeat MRI performed on April 7, 2021, demonstrated new discogenic issues. Dr. Chan indicated that the new findings were no longer related to Claimant's April 2019 industrial injury, and that treatment for those issues should be pursued outside the workers compensation system. He also recommended that Claimant continue with an active exercise program, with emphasis on flexibility, isometric strengthening, and cardiovascular strengthening, given the chronicity of his symptoms. (Ex. D).

10. Claimant saw Dr. Castro on October 1, 2021, and November 10, 2021. Dr. Castro noted that Claimant was responding favorably to physical therapy. He recommended

[1] No records from UC Health were offered or admitted into evidence.

physical therapy strengthening, stretching and range of motion continue “on his own” and referred Claimant for additional physical therapy. (Ex. C).

11. Dr. Chan evaluated Claimant again on December 6, 2021, noting that Claimant had undergone bilateral RFAs and that he had medial branch blocks on December 1, 2021. Claimant reported no sustained relief from the medial branch blocks. Dr. Chan characterized the medial branch blocks as non-diagnostic, and that no further injection therapy should be scheduled. He opined that Claimant should follow through with physical therapy and a core stabilization exercise program, and develop a cardiovascular strength and exercise program. (Ex. D).

12. On March 11, 2022, Claimant saw Dr. Castro. Dr. Castro indicated that Claimant did not have any clear indications for surgery, and recommended physical therapy in conjunction with a home exercise program for core and pelvic strength to support the lumbar spine. He indicated that exercise was the best treatment option for long term relief and prevention of symptom progression. (Ex. C).

13. On July 13, 2022, Claimant saw Brian Altman, M.D. at SCL Health for complaints of lower back pain, extending into the thighs with standing and walking. Dr. Altman’s record includes a lumbar MRI report which shows moderate spinal canal stenosis and a disc-protrusion at the L2-3 level (the date of the MRI is not clear from the record). Dr. Altman indicated he suspected L2-3 as the pain generator, he referred Claimant for an epidural steroid injection at L2-3, and recommended an EMG to confirm L2-3 as the source of Claimant’s pain. (The record is unclear whether Claimant received the ESI or EMG recommended by Dr. Altman). Claimant reported he had been in physical therapy for three years, under workers compensation, and that Dr. Chan had performed more than 14 different injections. Claimant was encouraged to continue physical therapy and a home exercise program. Dr. Altman prescribed gabapentin for Claimant’s pain. (Ex. G)

14. On September 7, 2022, Claimant returned to Dr. Altman reporting that his pain had decreased with gabapentin. Claimant also reported noticing a “new flare of his bilateral leg burning radiations.” Dr. Altman opined that the symptoms were likely due to an L5-S1 disc herniation likely irritating his bilateral L5 nerve roots. No credible evidence was admitted indicating that Claimant’s L5-S1 pathology is causally related to his April 2019 work injury. He recommended that Claimant continue physical therapy. Claimant also reported seeing a gastroenterologist for “significant GI issues” and requested an x-ray to determine if his GI issues could be related to pathology in his coccyx. X-rays were performed, and showed no bony or soft tissue issues, but did identify significant degenerative change at the lumbosacral junction. (Ex. G). No additional records from Dr. Altman were offered or admitted into evidence.

15. On October 6, 2022, Claimant saw Dr. Chan. Claimant reported his low back pain was minimal at that time, but he had been experiencing abdominal pain, and asked for Dr. Chan’s opinion as to whether the abdominal pain was related to his work injury. Dr. Chan indicated that Claimant’s abdominal pain was unrelated to his lower back injury. He further opined that no further diagnostic or therapeutic intervention was necessary for Claimant’s work injury, and that Claimant’s work injury had completely resolved. (Ex. D).

16. On April 19, 2023, Claimant returned to his ATP, Dr. Villavicencio. Dr. Villavicencio's medical record from that date is 18 pages in length, and summarizes approximately 15 previous visits with Claimant. Throughout the record, Dr. Villavicencio notes that Claimant improved with a home exercise program, which increased Claimant's ability to walk and function. Dr. Villavicencio recommended six additional physical therapy sessions for Claimant and a 12-month gym membership to continue his home exercise program. Dr. Villavicencio indicated that physical therapy "is medically necessary to address objective impairment/functional loss and to expediate return to full activity," but offered no other cogent explanation for formal physical therapy. (Ex. 2).

17. Dr. D'Angelo was admitted as an expert in internal medicine and her testimony was presented through a post-hearing deposition. Dr. D'Angelo performed an IME at Respondents' request in January 2020, in which she opined that although Claimant had pre-existing spinal injuries, and prior surgery, he sustained a new injury at the L3 level which was separate from his prior condition. She did not re-examine Claimant again after the January 2020 IME, but did review additional medical records in preparation for her deposition. Dr. D'Angelo agreed with Claimant's MMI date of September 29, 2020. She opined that Claimant's work-related issues were isolated at the L2-L3 levels, and that Claimant no longer has any symptoms relating to his L2-L3 level. She opined that Claimant's ongoing issues were more likely related to underlying spinal disease, than the April 2019 injury. Dr. D'Angelo does not agree with Dr. Villavicencio's recommendation for physical therapy and a 12-month gym membership. Dr. D'Angelo testified that the nature of a home exercise program is that they do not require a gym membership. However, Dr. D'Angelo offered no evidence that she was aware of the exercises Claimant had been recommended to perform, or whether his particular home exercise program requires gym equipment. Her testimony on this issue was too general to be persuasive. She testified that she does not believe Claimant's current condition is related to his April 2019 work injury.

18. Claimant testified that he has been doing weekly physical therapy and that it helps with his mobility, and to maintain strength. He testified that if he does not do physical therapy, his body "seizes up," and that he cannot do physical therapy at home because he does not have the exercise equipment necessary to perform he exercises. He testified that a gym membership is necessary for him to perform his home exercise program, because the gym offers equipment he does not have at home. Specifically, Claimant testified that at the gym he uses tables on which he can stretch and do abdominal exercises, and uses leg abduction and adduction machines, and machines with cables. Although Claimant indicated he is able to perform the exercises requiring cables at home using bands provided by his physical therapist, he credibly testified that it is not as effective as using equipment at a gym.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to

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

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

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

Medical Maintenance Benefits

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

to the respondent's subsequent right to challenge particular treatment." *Trujillo v. State of Colorado*, W.C. 4-668-613-03 (ICAO Aug. 21, 2021).

There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

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

Physical Therapy

Claimant has failed to establish that additional physical therapy is reasonably necessary to relieve the effects of or prevent further deterioration of his April 26, 2019 work injury. Claimant seeks authorization of six additional sessions of physical therapy, based on the April 19, 2023 referral of his ATP, Dr. Villavicencio. Claimant was placed at MMI in September 2020, and had 44 physical therapy visits after that time. The stated rationale for physical therapy in Dr. Villavicencio's April 19, 2023 record appears to be boilerplate and is identical to the rationale from September 29, 2020. The April 19, 2023 record does not offer any cogent explanation of the need for six additional physical therapy after the completion of 44 therapy visits, or how the recommended therapy is causally related to Claimant's injury from four years earlier. Claimant's testimony that he cannot do physical therapy at home because he does not have the proper equipment does not establish that he requires additional sessions of formal physical therapy, but only access to equipment to perform the exercises, which may be addressed through a gym membership.

Gym Membership

Claimant has established that a 12-month gym membership is reasonably necessary to relieve or prevent further deterioration of Claimant's industrial injury. Claimant's health care providers have routinely and consistently recommended that he

participate in a home exercise program. Claimant testified that performing exercises increases his mobility and allows him to function better. The ALJ finds credible Claimant's testimony that using gym equipment, as opposed to home equipment is more effective for him. The ALJ finds persuasive Dr. Castro's statement that exercise is "the best treatment option for long term relief and prevention of symptom progression," which indicates that a home exercise program will, more likely than not, prevent deterioration of Claimant's condition. Although the evidence demonstrates that Claimant's current lower back condition is not limited to his work injury, the ALJ finds that some portion of Claimant's current condition is likely attributable to his work injury. This is demonstrated by Dr. Altman's opinion from July 2022 that Claimant's L2-3 area was strongly suspected to be a pain generator, and the fact that Claimant's symptoms have continued. The ALJ does not find persuasive the opinions of Dr. Chan and Dr. D'Angelo that Claimant's work injury has completely resolved, or that he has no ongoing effects from that injury.

Withdrawal Of Admission To Maintenance Medical Benefits

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

Respondents have failed to establish by a preponderance of the evidence that no future medical treatment will be reasonably necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. As found, Claimant credibly established that a gym membership is reasonable and necessary to relieve the effects of or prevent deterioration of his work-related condition. Accordingly, Respondents' have failed to establish a basis for termination of Claimant's maintenance medical benefits.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of six additional sessions of physical therapy is denied and dismissed.

2. Claimant's request for authorization of a 12-month gym membership is granted.

3. Respondents' request to withdraw their admission for medical maintenance benefits is denied and dismissed.

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

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

DATED: September 12, 2023

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

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on September 8, 2022, primarily on the issue of overcoming the Division of Workers' Compensation Independent Medical Examination (DIME) physician's determination that Claimant had not reached maximum medical improvement (MMI). Other issues included medical benefits that are reasonably necessary and permanent partial disability benefits. Respondents clarified at hearing that waiver, overpayment and credit offsets were no longer issues for hearing, as Claimant's benefits were terminated as of July 8, 2022 when the authorized treating physician (ATP) placed Claimant at MMI and that the issues were listed because Respondents were concerned that Claimant may have been receiving benefits on another worker's compensation claim for her right upper extremity with a date of injury of August 25, 2019. He noted that Claimant's benefits on the prior claim had stopped prior to Claimant's date of injury in this matter. Counsel also mentioned that there were delays in obtaining both a DIME in the prior claim and the DIME with Dr. Orent for this injury. The DIME in this matter was requested by Respondents, took place on August 8, 2022 and a report was issued on August 29, 2022. No Final Admissions of Liability have been lodged in this claim.

Claimant filed a Response to Application for Hearing on October 7, 2022 on issues that included medical benefits that are reasonably necessary, average weekly wage, temporary disability benefits and, if Claimant was found to be at MMI, then permanent partial disability benefits and *Grover* medical benefits.

Claimant and Dr. Sander Orent, M.D. testified on behalf of Claimant, and John Aschberger, M.D. and Douglas Scott, M.D. testified on behalf of Respondents.

Claimant's exhibits 1 through 10 were admitted into evidence. Respondents' exhibits A through L, N, and P were admitted into evidence. Exhibits M, O and Q were not admitted.

Also submitted, post-hearing, was Respondent Addendum Report from Dr. Aschberger dated January 16, 2023 (Integrated Medical Evaluation report dated January 18, 2023). This exhibit was designated as Respondents' Exhibit R. During the hearing and following the DIME physician's testimony, Respondents made an offer of proof regarding Dr. Aschberger's potential rebuttal testimony. Respondents' moved for leave to submit this report, in lieu of a continued hearing, as further evidence for review, which was granted over Claimant's objection. Exhibit R was admitted.

Also discussed was the outstanding Motion to Withdraw as Counsel by [Redacted, hereinafter BR], Claimant's prior counsel. The parties agreed that an order would be appropriate considering his passing and an order was issued on January 12, 2023.

A status conference was held on January 24, 2023 regarding evidentiary matters. The parties agreed to a submission deadline of February 8, 2023 for position statements

or proposed orders. Claimant withdrew his motion to submit as supplemental exhibit the IME recording of Claimant's appointment with Dr. Kleinman. Respondents withdrew their request for submission of Respondents' Supplemental Exhibits 1 through 5. Those exhibits were stricken from the record by order of this ALJ dated January 24, 2023. There was no further discussion with regard to Dr. Aschberger's addendum report dated January 16, 2023.

This ALJ issued Findings of Fact, Conclusions of Law and Order on February 17, 2023. Respondents filed a Petition to Review on March 8, 2023 and the transcript was filed with the OAC on July 18, 2023. The Notice of Briefing was issued on July 28, 2023. Respondents filed their Brief in Support of Petition to Review on August 17, 2023 and Claimant filed a Brief in Opposition of the PTR on September 8, 2023. This Supplemental Order is filed in response.

STIPULATIONS OF THE PARTIES

The parties stipulated that Claimant is entitled to *Grover* maintenance medical care if Respondents meet their burden of proving by clear and convincing evidence that the DIME was overcome on the issue of MMI.

The parties further stipulated to an average weekly wage of $333.00 and that, if Claimant was found not at MMI in accordance to with the DIME physician's opinion, and that Claimant was entitled to continued temporary total disability benefits, the period of benefits should be from July 20, 2021 to present. The parties further agreed that the calculation of TTD would be agreed upon by the parties and this ALJ need not address the exact amount.

The stipulations of the parties were accepted and approved by this ALJ and are incorporated in this order.

ISSUES

I. Whether Respondents proved by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician, Dr. Sander Orent, was incorrect in his determinations of maximum medical improvement (MMI).

II. If Respondents proved that Claimant is at MMI, whether Respondents proved by a preponderance of the evidence that the date of MMI was July 20, 2021.

III. Whether Respondents proved by a preponderance of the evidence that there was a non-work related intervening event that ended Respondents' liability towards Claimant.

IV. If Respondents failed to prove that Claimant was at MMI, whether Claimant is entitled to temporary total disability (TTD) benefits and interest from July 20, 2021 to the present and continued until terminated by law.

FINDINGS OF FACT

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

A. Generally

1. Claimant was 56 years old at the time of the hearing. She was employed as a housekeeper for Employer as of approximately May 2019. Her duties involved cleaning hotel rooms, including kitchenettes with microwaves and refrigerators. This ALJ noted that Claimant was short in stature and the medical records noted that she was four foot, eight inches tall[1] and has no formal education. Claimant had difficulty reaching the tops of the microwaves as they exceeded her height.

2. Claimant sustained an admitted work related injury of August 25, 2019 related to her right upper extremity. She was placed on modified duty that included working up to three hours a day, lift, push and pull up to 10 lbs. constantly, and no reaching above shoulder with the right upper extremity, could not grip, squeeze or pinch with the right upper extremity, should wear a splint or brace on the right upper extremity constantly, could do no sweeping, mopping or vacuuming with the right hand and no overhead work with the right arm.[2] The medical records suggest that Claimant was required to exceed her restrictions.

3. On February 15, 2020 Claimant was in the process of cleaning a microwave. She could not reach the top in order to clean, it due to her height. She stepped onto a chair with the left foot. She was cleaning with the left hand since she was restricted from using her right hand overhead due to her 2019 injury. She was in the process of lifting her right leg onto the chair when her right leg slipped, then the chair slipped out from under her, causing her to lose her balance. She twisted her back and lower extremities then Claimant fell onto her left side, landing on her back, left hip and knee, injuring her right ankle, knees, lower back and hip. The medical records suggest that the chair landed on her.

B. Medical Records

4. Claimant was seen the same day at Concentra Fort Collins by Sheree Montoya, NP. She documented Claimant's mechanism of injury as follows:

> Left side posterior hip pain Pt states when she went to stand on a chair to clean the top of a refrigerator the chair fell on top of her causing her to fall down landing on her left side twisting her back and landing on her *left lateral knee* She has not treated with anything as it happened just prior to arrival. *[Emphasis added]*

5. Nurse Montoya noted that Claimant had burning pain radiating to the left buttocks, causing decreased lateral bending, decreased spine range of motion (ROM), and decreased rotation. The symptoms were exacerbated by twisting, climbing stairs, and walking. On exam she noted that Claimant had joint stiffness, back pain, with tenderness in the left lumbar paraspinals and left sacroiliac joint. She also noted that

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[1] Claimant reported to Psychologist Brady on August 3, 2020 that she was four foot six inches.

[2] Respondents' Exhibit D, Bates 295 through 298, PA Toth, January 18, 2020.

claimant had abnormal thoracolumbar spine range of motion and a positive FABER test[3] on the left, but otherwise within normal limits. She diagnosed sacroiliac strain and prescribed ice, medications, physical therapy, and provided modified work restrictions. She noted that history and mechanism of injury were obtained directly from the patient and appeared to be consistent with presenting symptoms and physical exam.

5. Claimant presented to Jeffrey Baker, MD, on February 17, 2020, with *complaints of left hip, left le*g, and lower back pain *with radiating pain to the knee*. The pain was worse when going up the stairs as she *gets a "pulling" sensation, lifting her leg*, and had difficulty sleeping through the night due to the pain. Claimant reported that she was under restrictions due to her prior workers' compensation claim and that Employer was having her work in excess of her restrictions, which is why she fell. On exam, Claimant had tenderness in the left sacroiliac joint and loss of range of motion, but had a negative exam otherwise. An *injection of dexamethasone sodium phosphate* was administered[4*] and Claimant was diagnosed with sacroiliac strain. She was returned to modified work, including restrictions of 10 lbs. lifting occasionally, push/pull up to 20 lbs. occasionally, bend or twist occasionally and no climbing ladders.

6. Claimant was also seen by Nicholas Wright, DPT, in physical therapy on February 17, 2020. PT Wright noted Claimant was tender to palpation in the left quadrant of the paraspinals and the gluteus maximus, and had abnormal range of motion (ROM) in extension, bilateral thoracolumbar side bending, pain in the left low back and gluteus with resisted motion, pain in the low back with hamstring, gluteal and hip stretching. She had symptoms consistent with left lumbosacral contusion and experienced notable benefit from manipulation. Claimant retuned for therapy with Mr. Wright on February 18, 2020 and reported that her back pain was improving but that she continued to have pain in the lateral knee but had no symptoms distal to the knee. *He put a patch with dexamethasone on the left lateral knee*, noting that Claimant had a lateral collateral ligament (LCL) sprain. On February 19, 2020 Mr. Wright stated that Claimant reported decreased lateral knee and gluteal region pain but that the pain persists in the left low back.

5. On February 24, 2020, Claimant reported that she was still having notable pain to the left low posterior ribcage but the gluteal and lateral knee pain were both improving. Mr. Wright noted Claimant had *a "popping" sound occurring bilaterally in her knees and the left knee was painful*. Claimant continued with physical therapy complaining of both low back/SI joint as well as left knee pain.

6. Dr. Baker attended Claimant on February 25, 2020. Claimant complained of *sharp left lateral knee* pain with intermittent and variable degrees of intensity and dullness. Claimant informed Dr. Baker that the *injection in her left knee* did not make much difference.[5] *Associated symptoms included clicking, tenderness, and painful walking*. *Exacerbating factors included knee extension, direct pressure*, using stairs and walking. On exam Dr. Baker noted that there was *tenderness over and in the lateral tibial*

[3] Test to identify pathology within the hip, lumbar spine or sacroiliac region.

[5] This ALJ infers that the injection of dexamethasone sodium phosphate administered on February 17, 2020 was for the left knee. See [4*] above.

plateau of the left knee with a slight flexion limitation, but was otherwise unremarkable. He also noted that Claimant continued to have tenderness in the left sacroiliac joint with limited range of motion. Dr. Baker diagnosed contusion of the left knee and referred Claimant to physical therapy. He also diagnosed sacroiliac strain. Claimant reported that physical therapy and the patches of lidocaine were helping. Claimant described her low back pain as burning and constant though did wax and wane.

5. Mr. Wright attended Claimant on March 17, 2020 and noted that Claimant's low back was painful to the point that it caused difficulty breathing. Claimant had pain to "left low back/glute" with resisted glute in prone, pain to left low back with hamstring, gluteal and hip external and internal rotation (ER/IR) with passive range of motion and stretching.[6] Mr. Wright noted that progress was slower than expected.

6. On March 24, 2020, Dr. Baker's diagnoses were sacroiliac strain and thoracic myofascial strain. He specifically noted as follows:

> [Claimant] is returning for a recheck of injury(s): Left thoracolumbar strain that occurred on 2/15/2020. This is her 2nd WC claim, she is being treated for her right wrist, shoulder and neck also. She reports that her boss makes her do activities that are outside her WC and that is why she fell. She was put on naproxen and *lidocaine patches but the patches were not approved.* She has done 12 PT visits and is progressing slower than expected. The pain is a left thoracolumbar area. She is applying the bengay and that is helping. Pain is sharp and worse with stairs, sleeping and *lifting her leg*. She has had 12 visits with PT and feels that it s (sic.) improving. She feels that she is about 70%. *Her Adjustor did call and stated that the knee would not be covered. (Emphasis added).*
>
> *…*
>
> There is left mid back pain. There is left lower back pain. The pain does not radiate. The symptoms occur intermittently. She describes her pain as sharp in nature. The severity of the pain is variable (constantly present but the level of intensity waxes and wanes). Associated symptoms decreased lateral bending, decreased rotation, decreased flexion, … Exacerbating factors include twisting, lifting and bending, but not sitting and not standing. Relieving factors include heat, rest, nonsteroidal anti-inflammatory drugs, physical therapy and muscle rub.

Claimant restrictions were changed to 20 lbs. lifting frequently, push/pull up to 40 lbs. frequently, bend and twist frequently, but was to perform no ladder climbing. He referred Claimant to chiropractic care for the lumbar spine.

7. On April 2, 2020 Claimant returned to manual therapy with Mr. Wright to address ongoing left hip mobility as it reduced the complaints of lumbar spine pain, stating that Claimant's *left hip dysfunction* almost certainly limited her lumbar spine recovery.

8. On April 7, 2020 Dr. Baker noted that "Her Adjustor did call and stated that the knee would not be covered." He also noted that Claimant was not currently working due to COVID-19. He noted Claimant had muscle pain, back pain, *muscle weakness*, night pain, and limited ROM.

9. On April 22, 2020, Claimant *complained of left knee and right leg pain* with walking. The pain was also in the left thoracolumbar area. She was applying the muscle

[6] This ALJ infers that IR is internal rotation, ER is external rotation and PROM is passive range of motion.

rub and that was helping. Pain was sharp and worse with stairs, sleeping and lifting her leg. She was doing PT and felt that it was improving her function. Stephen Toth, PA, noted that Claimant was referred to a Chiropractor and that was currently on hold per DORA due to COVID-19. PA Toth also noted that Claimant's Adjustor called and stated that the knee would not be covered. She was not currently working also due to COVID-19. This ALJ noted that from this date forward, Claimant's providers did not mention either examining Claimant's knee or taking Claimant's complaints of knee pain. In fact, the knee was left blank in some of the records.

> Physical Exam
> Constitutional: well appearing and well nourished.
> Head/Face: Normocephalic and atraumatic.
> Eyes: conjunctiva and lids with no swelling, erythema or discharge. Extraoccular movement intact.
> ENT: No erythema or edema of the external ears or nose. Hearing is grossly normal.
> Neck: trachea midline, no JVD.
> Pulmonary: no increased work of breathing or signs of respiratory distress.
> Knee:
> Lumbosacral Spine: Appears normal. Tenderness present in left sacroiliac joint, but

10. Claimant continued with physical therapy for her lumbar spine and SI joint. On May 8, 2020 Claimant reported that she had low back pain upon standing from a prolonged sitting position. She was also *worried about dragging her left toes* when trying to walk quickly. Mr. Wright noted in the assessment that:

> Therapy Assessment:
> Overall Progress Slower than expected Today is the first time that I can remember [Claimant] reporting a concern with L toe dragging The complaint is with fast walking/running. As she hasn t (sic.) had any sign of DF weakness from radicular compression, I assume this complaint comes from altered mechanics, potentially due to lumbar stiffness I have provided her with a heel walking exercise to address this issue, but remain focused on the low back

11. Scott Parker, D.C., evaluated Claimant on May 13, 2020. He took a history of the mechanism of the injuries consistent with Claimant's hearing testimony. Claimant was complaining of left-sided thoracolumbar pain which she rated at 7/10, *left lateral knee pain* which aggravated her back, *numbness* traveling from the left gluteus musculature laterally *in the lower extremity to the left great toe and second toe* which was constant since this fall. He noted on exam that restrictions were palpated at left SI joint, L5 slightly to the left, T6-T7 anterior, the left T7 rib, T12 LP in the left, and L1 slightly to the left. He noted that Claimant had moderate muscle spasm palpated in the thoracic and lumbar regions, trigger points noted in the bilateral thoracic and lumbar regions and adhesions palpated throughout bilateral thoracolumbar fascia.

12. On May 27, 2020, Claimant reported to PA Toth that her back pain was worse with pain radiating down her left side radiating down her left glute. She noted that she had been tripping as a result of her *left foot giving way while walking*.

13. Claimant had multiple chiropractic visits focused on her lumbar, sacroiliac dysfunction and thoracolumbar pain. On June 3, 2020 Dr. Parker noted that Claimant continued with low back pain, that it was especially so when she would put on her pants or shoes. He documented that her pain was a 6/10. She complained that she continued to have *lower extremity numbness* though it was somewhat improved. Claimant was

also complaining of *continuing knee pain* that was concerning to her. While Dr. Parker states Claimant had full range of motion of the lumbar spine, they were not documented as being with an inclinometer or whether it was passive or active range of motion, and Claimant complained of discomfort. Dr. Parker clearly examined the lower extremities because he stated that Claimant gave a "suboptimal effort." He also noted that there were adhesions palpated in the bilateral thoracolumbar fascia, trigger points in the bilateral thoracolumbar muscles and mild muscle spasm palpated.

14. PA Toth evaluated Claimant on July 8, 2020 and continued to diagnose thoracic myofascial strain, sacroiliac strain and radicular low back pain. He ordered lumbar and sacroiliac MRIs at this time. He noted that, while Claimant did have improvement in her range of motion, she was still stiff, having lower left back and hip pain and *numbness radiating down the left leg*. He ordered continued chiropractic care, and her HEP[7], noting that she declined dry needling due to concerns of risks, as noted in prior records. On July 17, 2020 PT Wright noted Claimant was tolerating the dry needling treatment.

15. Claimant continued with chiropractic care, due to continued low back pain, adhesions and muscle spasms in the lumbar spine, including when he released her from his care on July 29, 2020. What is apparent from reading Dr. Parker's records and the records from other providers at Concentra is that significant portions of the reports are likely copy and pasted information from prior records and this ALJ is disinclined to rely on every notation in Dr. Parker's reports stating that there was full range of motion despite "moderate muscle spasms," trigger points, and adhesions.

16. Claimant was evaluated by Molly M. Brady, Psy.D. on August 3, 2020 pursuant to a referral from Mr. Toth to evaluate whether any mental or emotional factors could complicate the treatment of Claimant's medical condition, and to make recommendations with regard to treatment. The Behavioral Health assessment was initially recommended in January 2020 by Jon Erickson, M.D., who had completed an IME at Respondents' request regarding the 2019 claim. BHI 2 testing was valid though potentially indicated that psychological factors may have been contributing to Claimant's perception of pain and disability. Results also were indicative of the presence of an optimistic outlook, emotional control, or an unusual degree of acceptance with a likely support system. Dr. Brady wrote that "[G]iven that validity indicators do not suggest that [Claimant] is magnifying her sense of distress by responding in a biased manner, this may be an accurate report of her internal perception of emotional distress." Dr. Brady diagnosed Claimant with pain disorder and adjustment disorder with mixed anxiety and depressed mood. She noted that "the onset of the injury to [Claimant]'s right arm, a significant stressor, functioned to exacerbate that pre-existing anxiety and dysphoria to a significant extent." She opined that the majority of the symptoms of psychological adjustment developed related to her workplace injury.[8] Dr. Brady recommended interventions including relaxation training, mindfulness-based stress reduction training, biofeedback training, coping skill development to decrease psychological distress, stress management techniques, behavioral activation, and education on the interaction

[7] Home exercise program.

[8] Specifically relating to the August 25, 2019 work related injury. Dr. Brady was engaged to treat Claimant under that claim.

between psychological distress and physiological pain experiences. Claimant continued with psychologic treatment through April 12, 2021 and Dr. Brady recommended an additional 5 visits given Claimant's progress with treatment.[9]

17. Claimant had an MRI of the lumbar spine without contrast on August 14, 2020. Dr. Eric Nyberg read the results as follows:

> Disc Spaces:
> Lower thoracic spine: Mild disc bulges without significant spinal canal or foraminal stenosis.
> L1-2: Mild disc degeneration without spinal canal or foraminal stenosis.
> L2-3: Mild disc degeneration without spinal canal or foraminal stenosis.
> L3-4: Mild disc degeneration with broad disc bulge resulting in mild bilateral foraminal stenosis.
> L4-5: Mild disc degeneration with minimal disc bulge resulting in mild bilateral foraminal stenosis.
> L5-S1: Mild disc degeneration and bilateral facet arthrosis resulting in mild to moderate right and mild left foraminal stenosis.

18. Also on August 14, 2020 Claimant had a MRI of the pelvis. Dr. Andrew Mills noted that there was no acute or aggressive osseous abnormality, chronic degenerative changes of the lumbar spine at L3-S1 and patent appearance of the SI joint which showed minimal degenerative changes.

19. On August 18, 2020 Nurse Elva Saint advised Claimant to return to physical therapy for more PT as the left low back pain persisted. The *main concern at that point is was the left lower extremity (L LE) heaviness and quickness to fatigue as well as the left knee complaints.* Claimant gave good effort and tolerated the PT sessions, treatment and exercises well. Claimant completed her course of PT without much improvement. In fact the records show that Claimant slowly continued to deteriorate.

20. Claimant was seen on September 9, 2020 by PA Toth who documented that Claimant complained of back pain, *difficulty bearing weight on the left foot, and some numbness in the left leg*. She also *complained of bilateral knee pain* and *was limping since seeing the chiropractor and states that is the reason for not going anymore*. Claimant denied "outside causation of injury including sports, hobbies, accidents or external employment." On system review, PA Toth documented *back pain and limping*, but found nothing abnormal during exam. PA Toth referred Claimant to a physiatrist for further evaluation.

21. On October 5, 2020, Claimant presented to Gregory Reichhardt, MD for evaluation of her low back injury and knee pain. Dr. Reichhardt reviewed the mechanism of injury, which was consistent with Claimant's testimony. He mentioned that Claimant was referred to Dr. Brady who diagnosed pain disorder and adjustment disorder with mixed anxiety and depressed mood. Upon exam, Claimant complained of low back pain across the L4-L5 level, diffuse *left gluteal pain*, lateral hip and *lateral thigh symptoms going down to the foot, with leg weakness and left knee pain*. Dr. Reichhardt's work-

[9] No other records were provided as exhibits after April, 2021. Exhibit D was the DIME packet provided under the 2019 claim and Dr. Lindenbaum (DIME) conducted his evaluation on May 27, 2022. This ALJ infers that no further treatment with Dr. Brady took place as Claimant was found to be at MMI as of December 4, 2020 in the 2019 claim.

related impressions and diagnosis were low back pain, probably discogenic, with possible component of radicular involvement, causing left lower extremity pain and weakness, left knee pain with a February 15, 2020 mechanism of injury, pain disorder and adjustment disorder with mixed anxiety and depressed mood, and *right ankle pain*. *Dr. Reichhardt deferred to Concentra providers regarding the causation of any right lower extremity complaints*. Dr. Reichhardt recommended trigger point injections for the lumbar spine, an *MRI of the left knee* and that she continue treating with Dr. Brady for the pain disorder and adjustment disorder. On the M-164 he also recommended an *EMG/NCV[10] study of the left lower extremity*.

22. Dr. Reichhardt noted on October 28, 2020 that Claimant had a normal left lower extremity electrodiagnostic evaluation. The study was negative for left-sided axons loss lumbosacral radiculopathy, lumbosacral plexopathy, peroneal or tibial mononeuropathy and for peripheral polyneuropathy. Dr. Reichhardt did not have a good explanation for the *lower extremity weakness* and recommended she see her PCP. Claimant requested the trial of trigger point injections. He also stated that future considerations would also be for a hip MRI arthrogram.

23. Dr. Baker followed up with Claimant on October 19, 2020 and noted on physical exam that Claimant had *left knee tenderness in the lateral femoral condyle*, in the *lateral hamstrings*, diffusely *over the lateral knee* and in the *lateral tibial plateau*, a positive lateral McMurray test and positive medial McMurray test.[11] He diagnosed sacroiliac strain, radicular low back pain and *strain of the left knee*. He *ordered the MRI of the left knee* and noted that the EMG/NCV was already scheduled. He also documented that he did not anticipate MMI until at least January 31, 2021.

24. Claimant proceeded with trigger point injections on November 18, 2020 over the bilateral L5 paraspinals, left gluteus maximus and left tensor fascial latae. His diagnosis did not change.

25. Claimant was evaluated by Dr. Reichhardt for an impairment evaluation with regard to her August 25, 2019 claim on December 4, 2020. He placed her at MMI for that claim and provided an impairment rating. He noted that Claimant had completed a Functional Capacity Evaluation on October 27, 2020 during which Claimant functioned at a "sub-sedentary level."[12] Claimant demonstrated the ability to lift 5 pounds floor to waist, 5 pounds waist to shoulder, and 20 pounds pushing, 15 pounds forced pulling.

26. On December 8, 2020 Claimant had an MRI of the left knee. Dr. Jamie Colonnello noted that the left knee medial and cruciate ligaments were intact, there was medial and patellofemoral compartment predominant chondrosis/osteoarthritis of the left knee, cartilage loss most pronounced at the medial compartment involving weight-bearing surfaces of the medial femoral condyle as well as joint effusion. This ALJ infers that the joint effusion is a sign of joint inflammation or aggravation of underlying joint osteoarthritis.

27. Claimant returned to see Dr. Reichhardt on December 11, 2020 and noted

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[10] Electromyography (EMG) and Nerve Conduction Velocity (NCV).

[11] McMurrays test is a test to assess knee injuries, including meniscal tears.

[12] The functional capacity evaluation (FCE) report is not contained in the exhibits in evidence and the records indicate it may have been ordered in regard to the 2019 claim.

that she was having *weakness in the right leg* which she thought was *related to dry needling.* Claimant complained that they hit a nerve and one day after her second dry needling treatment, she had difficulty coordinating her right leg then got worse after her last chiropractic treatment and had paresthesias over the lateral aspect of the left lower leg. She was having *pain down the posterolateral aspect of both thighs*. Moderate pain behavior was noted. He observed Claimant to be somewhat angry, but he was not sure if this was just her communication style. He noted giveaway weakness but overall normal strength with encouragement. His impression was probable discogenic pain, and he felt that there was a pain disorder with adjustment disorder and mixed mood and anxiety. The doctor was unclear why her legs were weak and the loss of coordination, and he recommended possibly a repeat MRI. She indicated that she was upset because she had not met the orthopedic doctor. Dr. Reichhardt recommended an evaluation with an orthopedist with regard to Claimant's left knee complaints. Multiple other evaluations occurred following this exam, he documented Claimant's distress at the failure to identify the causes of her pain and discomfort, provided a knee neoprene brace as well as topical medications for the knee, while awaiting the results of an IME as the orthopedic evaluation was not authorized. Claimant was insistent that her right lower extremity symptoms of weakness were related to dry needling, chiropractic care and the EMG testing.

28. An Independent Medical Evaluation (IME) took place on January 6, 2021 with Dr. Jon M. Erickson. He noted that he had previously evaluated Claimant regarding her 2019 upper extremity injuries, and those findings are not relevant in this matter.

29. Dr. Reichhardt attended her on January 28, 2021, rating her pain as 9 out of 10 with weakness in both legs and inability to walk. He felt that her leg weakness was related to the pain. The patient still wanted to see an orthopedist at that point.

30. On February 11, 2021 Dr. Reichhardt noted Claimant had a mild gait alteration and discussed Claimant's left knee pain with PA Toth who advised Dr. Reichhardt that Claimant did not have immediate pain in her left knee following the accident and had not reported it until after 10 days of the injury. Relying of the accuracy of this information Dr. Reichhardt noted that the left knee condition was probably not related to her injury. As found, this is not accurate or credible, as Nurse Montoya documented on February 15, 2020 that Claimant landed on her left lateral knee and Dr. Baker documented on February 17, 2020, two days later, that Claimant complained of left hip, left leg, and lower back pain with radiating pain to the knee, with pain worse when going up the stairs as she had a "pulling" sensation, lifting her leg. He further injected that knee with medication.

31. Claimant underwent an IME with Dr. Douglass Scott on February 23, 2021. He noted that claimant had a lower back injury, and that Claimant informed him she had left knee pain as well as issues with the right leg. On exam, the left knee appeared normal, with no tenderness and had full range of motion and strength. He reviewed the medical records and drew multiple conclusions based on this analysis of the records that are not persuasive to this ALJ. He conducted a physical examination and noted no swelling in the left knee and no crepitus and no deformity or tenderness to the left knee. He noted in his diagnosis that the right knee was unrelated to the original injury. The pain disorder was noted and he suspected there were psychological or somatoform disorders

present. He noted that the changes on the MRI of the left knee of chondrosis/ osteoarthritis probably pre-existed the injury. He reviewed the mechanism of injury, and opined that it occurred without significant force or velocity as her right foot was on the floor and her given height of 4'8. He diagnosed her with a lumbosacral strain as he noted that the EMG was normal, without neurological impairment and did not appreciate an injury to either lower extremity. He stated that, based on Claimant's initial response to treatment for the low back, he opined Claimant had reached MMI on June 3, 2020 without impairment and required no further medical care after that date.

32. On April 8, 2021 Dr. Reichhardt recommend evaluation with Dr. Quickert for an SI joint injection as provocative maneuvers qualified her for the treatment, including tender to palpation, pain in the low back, pain over both sacroiliac areas, negative straight leg test, positive Patrick's maneuver, positive gapping and positive iliac compression tests. He also referred Claimant for x-ray of the lumbar spine to rule out a foreign body (dry needling needle). There were multiple subsequent records documenting symptoms of the left knee as sharp pain, worse with cold, constantly present, with symptoms of clicking, "popping" sound at the time of her injury, tenderness and painful walking. Documentation of joint pain, muscle pain, back pain, joint stiffness, muscle weakness, limping and night pain. Exams of the left knee showing tenderness diffusely over the anterior knee, diffusely over the anterolateral aspect, diffusely over the anteromedial aspect, in the lateral femoral condyle, in the lateral hamstrings, diffusely over the lateral knee and in the lateral tibial plateau.

33. Dr. Scott issued a Rule 16 UMR on April 23, 2021 noting that, based on Dr. Reichhardt's exam, it may be reasonable to perform an SI joint injection. However, based on his prior opinion, that Claimant was at MMI as of June 3, 202 and required no further care, it was not related to the February 15, 2020 work related injury.

34. Claimant had the x-ray performed at Banner Imaging on May 7, 2021, which was read by Dr. Gregory Reuter. It showed mild L5-S1 degenerative changes but no foreign body.

35. On June 24, 2021 Dr. Reichhardt recommended a trial of massage therapy. Claimant returned to Concentra on June 30, 2021 and Dr. Baker made a referral for massage therapy, which took place at Medical Massage of the Rockies from July 9 through August 3, 2021.

36. Claimant was evaluated by Julie Quickert, APRN[13] on June 25, 2021. She noted tenderness with light palpation of the lumbar spine and left SI joint, paraspinal tenderness and muscle tightness noted with light palpation, generally reduced ROM of L- spine, increased pain reported with forward flexion greater than extension, or bilateral flexion. Strength to the bilateral lower extremities was normal and equal, straight leg raise test was negative, FABER test was positive on the left and thigh thrust and iliac compression test were positive. She recommended proceeding with the SI joint injection but, as Claimant requested a guarantee that there would be no further complications, she did not proceed.

37. On June 28, 2021 Dr. Douglas Scott issued a report in response to a Rule

[13] Advanced Practice Registered Nurse.

16 request for authorization from Dr. Timo Quickert/Nurse Quickert for the SI joint injection. He opined that the SI joint injection was not reasonably necessary or related to the February 15, 2020 work related injury as Claimant had reached MMI as of June 3, 2020.

38. On July 20, 2021, Dr. Reichhardt examined Claimant finding tenderness to palpation in the lumbar spine with mild lumbar paraspinal muscle spasm and decreased lumbar range of motion. Examination of the left knee also showed tenderness to palpation though no effusion or instability. Dr. Reichhardt's final impressions were that Claimant had a low back and left lower extremity pain and weakness. He related the lumbar spine and left knee pain mechanism of injury as related to the February 15, 2020 work related fall and injury. He opined that Claimant should be allowed to have an SI joint injection under maintenance care as well as physical therapy to review her home exercise program (HEP), medications, laboratory tests, and follow ups with an advanced practice provider.

39. Dr. Reichhardt placed Claimant at MMI as of July 20, 2021 and assigned permanent lifting, pushing and pulling restrictions of 20 pounds and limit bending and twisting at the waist to an occasional basis.

40. He assigned a 14% lower extremity rating based on range of motion limitations of the left lower extremity, and a 5% rating for arthritis for a total of 18% for the lower extremity. Claimant's lower extremity rating converted to a 7% whole person rating. He assigned Claimant a 5% whole person impairment for specific disorder and a 12% for loss of range of motion of the lumbar spine, which combined to a 16% whole person impairment. Dr. Reichhardt also issued a mental impairment rating of 1% whole person impairment. Claimant's combined impairments were 23% whole person related to the February 15, 2020 work related injuries.[14]

41. On July 30, 2021 Dr. Baker ordered the maintenance physical therapy to review a HEP, which took place with Brian Busey, MPT beginning as of August 5, 2021, through September 13, 2021, and February 15, 2022 through March 31, 2022. Mr. Busey noted Claimant had moderate antalgia, with abnormal range of motion. She was using a cane in the left hand due to her right "wrist injury." He noted that the overall response was that Claimant was not progressing.

42. Dr. Baker's final diagnosis as of August 20, 2021 were strain of the left knee, radicular low back pain, and adjustment disorder. He stated that the objective findings were consistent with the history and work related mechanism of injury. His final work related restrictions were to limit lifting, pushing, pulling and carrying to 20 lbs., and limit bending and twisting at the waist to an occasional basis. These restrictions were consistent with Dr. Reichhardt's final restrictions given on July 20, 2021. Dr. Baker also recommended maintenance care, concurring with Dr. Reichhardt in this regard, including 6 follow up visits with a provider, 4 follow up visits with a PT, coverage of medications, and any lab tests to monitor for side effects, if needed over each for the next 2 years

[14] While Dr. Reichhardt's narrative report notes that Claimant's mental impairment is "zero" the final combined impairment rating includes the 1% mental impairment. The 16% lumbar spine rating combined with 7% whole person for the left lower extremity is 22%. The 22% combined with the 1% is 23% whole person impairment in accordance with the *AMA Guides* Combined Values Chart at p. 254.

Availability of an SI injection and an Orthopedic consult for the left knee.

43. Respondents requested a DIME and Sander Orent, MD was selected to conduct the examination. Dr. Orent documented on August 10, 2022 that Claimant reported she had constant low back pain when walking, bending, sitting, and sleeping. The pain started at waist level and radiated down both legs. Dr. Orent noted marked weakness in the right leg and trouble raising her left leg. Claimant had pain and swelling noted in both knees and her right ankle.

44. Dr. Orent's diagnoses were (1) Lumbar strain secondary to fall with symptoms of lumbar radiculopathy and some symptom magnification noted, but clear evidence of injury. (2) Bilateral knee contusions. The left occurring at the time of injury with swelling and notably an effusion in the joint on imaging and the right apparently manipulated by a chiropractor causing her ongoing pain and discomfort. This happened in the course and scope of her injury. He noted it was strange that a chiropractor would be manipulating her knee. The diagnoses of the knees were bilateral knee strains, possible meniscal injuries and on the left exacerbation of preexisting osteoarthritis as the result of the fall with ongoing symptomology requiring further care. (3) A diagnosis of right ankle sprain. The swelling was obvious over the right lateral malleolus. His opinion was that the mechanism of injury was certainly consistent, there had been no intervening events, there was swelling over the joint and he believed the patient's history.

45. Dr. Orent found Claimant was clearly not at MMI as she required a repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs were so weak, consideration of hyaluronic or other viscosupplementation into the left knee and an MRI of the right knee and the right ankle. Further care would be dictated based on the findings of those studies. Regarding her lumbar spine, it was clear and obvious she had ongoing pain, and recommended repeat imaging. He also stated that injection into the SI joint was reasonable and should proceed given the changes noted on her imaging. In addition, she had a facet syndrome and possible discogenic pain in the lumbar spine which should be further sorted by a repeat MRI with further treatment as necessitated.

46. Dr. Orent assigned a provisional impairment rating to Claimant. He rated the lumbar spine, bilateral knees, and right ankle for a combined 50% whole person impairment without basis for apportionment. He specifically found that Claimant's range of motion of the lumbar spine was valid.[15] Claimant was also unable to work as she was barely able to ambulate or get out of a seated chair at the time of his examination.

47. Following the initial report, on August 18, 2022 Dr. Orent issued a supplemental report correcting an error regarding the impairment for the right lower extremity, but concluded the error was minor and, with the corrected rating, the final whole person impairment did not change.

48. Claimant was evaluated on November 11, 2022 by Dr. John Aschberger, for an IME requested by Respondents. Dr. Aschberger opined that Claimant had an upper motor neuron neurological problems, likely above the cervical spine. Dr. Aschberger opined that there had been progressive involvement affecting both lower extremities that

[15] See Figure 83, Exhibit E, bate18

may be explained by further workup. He further stated that Claimant's presentation showed deterioration probably affecting her presentation at the time of the DIME, affecting the impairment rating issued by Dr. Orent, and that it may not reflect the actual residual from the work injury alone. He further opined that Dr. Reichhardt's impairment would be the best estimate for the correct impairment.

49. Dr. Reichhardt did examine Claimant on November 14, 2022, following his conversation with Dr. Aschberger. He confirmed Claimant had lower extremity clonus and a positive right sided upper extremity Hoffman's, which had been negative previously. He noted that the clonus was likely caused by cervical spine impingement and stenosis at the cervical spine level. He recommended Claimant be seen immediately by Salud Clinic. He did not relate any cervical spine issue with her February 15, 2020 fall.

50. On December 14, 2022 Dr. Scott issued a supplemental report at Respondents' request. He reviewed further records and noted that his opinions had not changed with regard to the February 15, 2020 work related injury, opining that Claimant reached MMI as of June 3, 2020, and that any impairment provided by Dr. Orent was questionable, in light of Dr. Parker's findings on that date.

C. Claimant's Testimony

51. Claimant stated that she recalled her treatment at Concentra with multiple providers. She also recalled her care under Dr. Reichhardt, and that he took measurements of her movement. She recalled seeing Dr. Quickert and that injections were recommended. She denied having declined to go through them only that the injections were not authorized by Insurer, so she was unable to have the injection. She continued to be open to having the injections. She recalled seeing an IME physician but did not recall his name. She recalled being released by Dr. Reichhardt but continued with physical therapy after that date for several months. Her condition with the weakness in her lower extremities continued to deteriorate and she started using a cane over a year before the hearing in this matter.[16] She stated that she had recently returned to see Dr. Reichhardt due to her continued deterioration including her right ankle. She informed Dr. Reichhardt that she has had many falls due to the weakness in her lower extremities.

52. Claimant recalled when they tried to perform dry needling in her lumbar spine, they pinched a nerve and there was a lot of blood. The next day she could not move her right foot properly. Somehow, it affected her right leg. Since that time she has had greater weakness in both legs and has had many falls.

53. Claimant testified that prior to her work related injuries of August 25, 2019 and February 15, 2020 she was healthy and did not have any limitations or restrictions. However, she now has limitations caused by her injury and could not work at this time. Even when she was working, prior to being laid off due to COVID-19, her employer would violate her restrictions and make her perform activities outside of her restrictions.

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[16] This ALJ notes that the Hearing was conducted in January 2023. One year before the hearing would have been approximately January 2022. She was placed at MMI in July 2021. She went to Mexico for a month, after she was released from physical therapy in September 2021, in September or October, 2021.

54. In November 2022 she was called in for an evaluation with Dr. Reichhardt, who asked her questions related to the weakness in her lower extremities and for the name of her personal care provider (PCP). She noted that Dr. Reichhardt attempted to contact her PCP but could not reach her. He recommended that she schedule an appointment. Claimant scheduled the appointment and was evaluated by Katie at Salud Family Health in Fort Collins.

55. Claimant acknowledge that she had travelled due to an emergency to Mexico but was only there for approximately one month after she was released and no longer going to therapy. After she returned, she restarted therapy in the spring of 2022. She testified that she started using a cane approximately a year before because the weakness in her legs caused her to be unstable and caused multiple falls.

D. Testimony of Dr. Douglas Scott

56. Dr. Douglas Scott testified at hearing on behalf of Respondents, as a Board Certified Occupational Medicine expert as well as a Level II accredited physician. He explained his examination of Claimant when he conducted the IME as well as review of the records. He opined that, based on the mechanism of injury and his consideration of the chiropractor's finding on June 3, 2020, Claimant reached MMI without impairment at that time. He stated that he disagreed with Dr. Orent's findings, especially with regard to the lower extremities, as they were not part of the initial injury in his opinion. Further, he question Dr. Orent's range of motion numbers.

57. He was of the opinion that Claimant was disqualified from receiving further care under the workers' compensation system because her current problems were not related to her work related injury. However, he did concede that a degenerative or chronic conditions did not disqualify Claimant from receiving benefit under the WC system. He further opined that Claimant should have been released to work without restrictions as of June 3, 2020 as she had a normal exam including the ability to perform a squat despite the pain. He opined that pain alone does not equate to injury or impairment.

E. Testimony of Dr. John Aschberger

58. Respondents also called Dr. John Aschberger to testify in this matter as a Board Certified expert in Physical Medicine and Rehabilitation as well as a Level II accredited physician. He noted he had reviewed the records and examined Claimant. He specified that at the time of the exam, Claimant was having difficulty walking and standing, and was assisted by her husband. He could not perform ROM measurements because she was not stable on her feet. He stated he found clonus of the left knee and bilateral ankles representing a possible upper motor neuron neurological finding. She had an abnormal gait.

59. Dr. Aschberger recalled that Claimant reported having worsening of condition following her treatment with the chiropractor, though there was some mention in the records that following a walk with a friend she had problems with walking. He further opined that the records did not support a left knee or left lower extremity injury. He opined that Claimant reported multiple falls and that they may constitute an

aggravation or new injury. He agreed with Dr. Reichhardt's determination of MMI and impairment. He stated that the SI joint injection could provide some relief and could be done as maintenance medical care. He did not change his opinions relayed in his IME report.

F. Testimony of Dr. Sander Orent, DIME physician

60. Dr. Orent, a Board Certified Occupational Medicine and Internal Medicine expert, as well as a Level II accredited physician, was called by Claimant as the Division selected DIME physician. He stated that there were no upper motor neuron findings when he examined Claimant in August 2022. He did identify severe lumbar dysfunction as well as bilateral lower extremity injuries. He noted that he considered the medical records as well as Claimant's reports of the injuries when he made the determination to relate the right lower extremity and ankle injuries to the February 15, 2020 work related injury. He chose to believe Claimant's reports despite the lack of a specific report in the medical documentation that Claimant had been hurt either by the dry needling or the chiropractor's records, especially considering his examination and findings of swelling in the knees and the right ankle. He opined that something was going on in Claimant's spine that needed to be addressed as well as her lower extremities, especially considering that the weakness of her lower extremities has resulted in multiple falls. He opined that Claimant's ongoing deterioration required further investigation and that providers should not rely on 2 year old exams.

61. Dr. Orent stated that simply because a Claimant had an asymptomatic condition did not mean that the condition could not be aggravated, causing the asymptomatic condition to flare and become symptomatic. He opined that this is what happened when the chiropractor manipulated Claimant's knees. He failed to understand why the chiropractor, who was in charge of addressing lumbar spine issues, was addressing anything with regard to Claimant's knees. Now Claimant has effusion in both knees as well as an antalgic gait, which he related to the February 15, 2020 work injury.

62. Dr. Orent further considered the Claimant's adequate mechanism of injury and the sequelae caused by the ongoing injuries and treatment when making his causation analysis. He continued to opine that Claimant was not at MMI and required further diagnostic testing and medical care as stated in his report. This included viscosupplementation in the knees, SI joint injection and even repeat MRI of the lumbar spine and repeat EMG, related to her February 15, 2020 admitted work injury as laid out in his DIME report. He stated that Dr. Scott and Dr. Aschberger simply disagreed with his opinions and that physicians frequently disagree with each other.

63. Dr. Orent testified persuasively that he took valid measurements of Claimant's lumbar spine at the time of his examination. He confirmed that the measurements were in fact the numbers he took during the examination and disputed Dr. Scott's opinion that it was not possible to obtain the numbers Dr. Orent actually obtained. Dr. Orent continued to opine that Claimant injured her lumbar spine and bilateral lower extremities, including her right and left knees and her right ankle. He appropriately provided a provisional rating as required by the Division in accordance with the requirements for a DIME physician. He considered the medical records, Claimant's

testimony and the responses Claimant provided to him at the time of her examination, as well as the mechanism of injury and the sequelae treatment she received to arrive at his opinions as laid out in his DIME report. He continued to opine that Claimant was not at MMI and required further diagnostic evaluation and treatment as he had previously laid out. His opinion did not change from that reflected in his DIME report despite the testimony of Drs. Scott and Dr. Aschberger. He stated that they simply have a different opinion.

64. Dr. Orent stated that, even if Claimant was found to be at MMI, that she continued to require medical care related to her work injury.

G. Ultimate Findings of Fact

65. As found, Respondents have failed to overcome by clear and convincing evidence the opinions of Dr. Sander Orent, the DIME physician in this matter. Dr. Orent considered the evidence, the facts as described by Claimant, the medical records, the mechanism of injury and examined Claimant in order to arrive at his opinions in this matter. Dr. Orent is credible and his opinions more persuasive than the contrary opinions provided by Dr. Aschberger and Dr. Scott. Claimant explained to Dr. Orent how her injury occurred, Dr. Orent reviewed the records and examined Claimant in order to perform a causality analysis and reach the determination that Claimant injured her low back, left lower extremity, her bilateral knees and her right ankle, all as a consequence of the February 15, 2020 work related injury. This includes further injury to her lower extremities caused by treatment while under the care of her workers' compensation authorized treating providers.

66. As found, Dr. Orent credibly concluded that, due to the progression of Claimant's symptomology, she required further medical care, including but not limited to repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs are so weak, consideration of hyaluronic or other viscosupplementation into the left knee, SI joint injections and MRIs of the right knee and the right ankle. He credibly opined that this diagnostic care and treatment are essential to cure and relieve Claimant from the effects of her February 15, 2020 admitted work related injury.

67. Drs. Aschberger and Scott did not disagree that Claimant needed further evaluations. In fact, they recommended Claimant seek further evaluation outside of the workers' compensation system with her PCP. However, neither were able to identify what exactly was happening to Claimant other than that she continuing to have complaints of pain in her low back, lower extremities including weakness that may be related to clonus. Those physicians simply concluded that since the treatment provided did not resolve her complaints that they were probably unrelated to the work injury. Dr. Orent credibly opined that Claimant continue to suffer from the work related injuries and required further care and diagnostic treatment and that Drs. Aschberger's and Dr. Scott's opinions were simply a difference of opinions.

68. Dr. Scott is simply not credible in his opinion that, based on his understanding of the mechanism of injury, Claimant should have reached MMI as of June 3, 2020 when the chiropractor identified Claimant was able to perform a squat, despite Claimant's continuing symptoms. He relied heavily on Dr. Parker's notations. However,

Dr. Parker's notes are suspect. From the initial exams on May 13, 2020 he stated that Claimant "transitions from a seated to a standing position without difficulty, pain complaints or pain behaviors." The phraseology of "transitioned from a seated to a standing position without difficulty, pain complaints, or pain behaviors" is commonly added in most of Dr. Parker's reports despite complaints of pain and symptoms. Dr. Parker clearly documents that Claimant was having significant pain with ratings at 6/10 and 7/10, with left lateral knee pain and numbness traveling from her gluteus musculature laterally in the left lower extremity to the left great toe and second toe. He noted significant loss of range of motion, positive Patrick's, Hibb's, Yeoman's, and hyperextension, and while he may not have provided significant chiropractic care to the lower extremity, his exam notes that he clearly examined the lower extremity, manipulating them. On June 3, 2020 Dr. Parker documented that Claimant continued to have a 6/10 pain with activity and noted that she had palpable adhesions, trigger points and muscle spasms. Therefore, Dr. Scott's reliance of Dr. Parker's normal findings make his opinions not credible.

69. Claimant was under medical restrictions issued by her ATPs, including Dr. Reichhardt who stated as of July 20, 2021 that Claimant was limited in her ability to work including a 20 lbs. lifting, pushing and pulling limitation as well as limited bending and twisting. These restrictions are similar to Claimant's restrictions when she was laid off from her employment due to COVID-19. Further, both Dr. Aschberger and Dr. Reichhardt noted in their more recent reports that Claimant was not able to engage in employment at that time. This is consistent with Dr. Orent's opinion as well. Claimant has shown the she has been unable to return to her employment with Employer of injury or any other employment due to her work restrictions.

70. As found, Claimant's loss of employment was caused by a combination of her physical limitations, her restrictions and due to the COVID-19 pandemic. As found, from the totality of the evidence, including Claimant's credible testimony and the medical records, Claimant has proven that it was more likely than not that that she left work as a result of the disability related to this claim and has incurred an actual wage loss. This has caused a disability lasting more than three work shifts. Claimant has proven that it was more likely than not that there was a causal connection between a work-related injury which caused her subsequent wage loss. As found, Claimant continues to have work restrictions that limit her ability to return to her prior employment or any other employment.

71. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

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

B. Whether Respondents overcame the DIME physician's opinion by clear and convincing evidence, that Claimant is not at MMI.

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S.

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Sec. 8-42-107(8)(b)(III), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. E.g., *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523- 097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). A finding that the claimant needs additional medical treatment (including diagnostic evaluations) to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). That means that a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Cordova v. Industrial Claim Appeals Office, supra.* Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. See Cordova v. Industrial Claim Appeals Office, *supra.*

If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*,

(if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine the DIME physician's true opinion). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. ICAO*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO*, 984 P.2d 656, 659 (Colo. App. 1998); *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]; *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005); In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*. Lastly, Respondents bear the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339, ICAO, (June 17, 2005); *Gurule v. Western Forge*, W. C. No. 4-351-883, ICAO, (December 26, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. ICAO, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. ICAO, supra.*

In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination [and true opinion] is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., *supra*; *Shultz v. Anheuser Busch, Inc*., *supra.*

In the case at bench, Respondents' had the burden of proof to overcome Dr. Orent's opinions on MMI and causation. Respondents relied on the opinions of Drs. Scott and Aschberger, as well as other medical reports, to support their contentions. The ALJ found Drs. Scott and Aschberger were unpersuasive in their opinions with regard to causation and MMI, especially their diverging opinions. Dr. Aschberger put great emphasis on his findings that there was a clonus sign at the low extremities but more importantly at the right upper extremity. It is clear from the record that Claimant has continuously complained of right upper extremity problems related to the admitted August 25, 2019 work related injury. Dr. Aschberger's report makes little mention of his review of records from the 2019 claim or Claimant's symptoms in that case, which are extensive in this ALJ consideration and that case is not before the court at this time. Dr. Aschberger actually recommended further diagnostic work up with regard to Claimant's symptoms

outside of the Workers' Compensation system considering his examination to determine if there was a true upper motor neuron condition, though he suspected there was. However, there was no specific diagnosis provided and little that shows that Dr. Orent is incorrect in his determination. Dr. Aschberger's opinion was, in fact, somewhat speculative and just a different opinion than Dr. Orent's. Dr. Aschberger's opinion amounted to a mere difference of medical opinion compared to those of Dr. Orent's, which does not rise to the level of clear and convincing evidence that is unmistakable and fee from serious or substantial doubts and is insufficient to show that it is highly probable the DIME physician's opinion on MMI is incorrect. See *In re Claim of Tomsha*, W.C. No. 5-088-642-002 (I.C.A.O. March 18, 2021).

With regard to Dr. Scott's opinions, he is simply not credible. In his estimation Claimant should have reached MMI within four months of her injury. In his opinion, based on his understanding of the mechanism of injury, Claimant should have reached MMI as of June 3, 2020 when the chiropractor identified Claimant was able to perform a squat, despite Claimant's continuing symptoms. He relied heavily on Dr. Parker's notations. However, Dr. Parker's notes are suspect and conflicting. From the initial exams on May 13, 2020 he stated that Claimant "transitions from a seated to a standing position without difficulty, pain complaints or pain behaviors," which is a phrase he frequently used in his notes despite complaints of pain and symptoms. Dr. Parker clearly documented that Claimant was having significant pain with ratings at 6/10 and 7/10, with left lateral knee pain and numbness traveling from her gluteus musculature laterally in the left lower extremity to the left great toe and second toe. He noted significant loss of range of motion, positive Patrick's, Hibb's, Yeoman's, and hyperextension, and while he may not have provided significant chiropractic care to the lower extremity, his exam notes that he clearly examined the lower extremity, manipulating them. On June 3, 2020 Dr. Parker documented that Claimant continued to have a 6/10 pain with activity and noted that she had palpable adhesions, trigger points and muscle spasms. Therefore, Dr. Scott's reliance of Dr. Parker's normal findings make his opinions not credible.

As found, Dr. Reichhardt found Claimant at MMI as of July 20, 2021 based on a stagnated system. He was awaiting authorization for SI joint injections he recommended with Dr. Quickert, which were denied. Dr. Reichhardt also recommended trigger point injections for the lumbar spine, an *MRI of the left knee* and noted that future considerations for a hip MRI arthrogram. Dr. Reichhardt also recommended an evaluation with an orthopedist with regard to Claimant's left knee complaints. None of which were authorized or took place. His hands were tied as he found his recommendations rejected and could offer no further treatment triggering him to find Claimant at MMI. Further, Dr. Reichhardt relied on communications from Mr. Toth that Claimant had not complained of leg pain during the initial visits. Mr. Toth mislead Dr. Reichhardt in this matter. And while this ALJ was more persuaded by Dr. Reichhardt's opinion than by Dr. Scott or Dr. Aschberger, his opinion did not rise to the level of clear and convincing evidence that was free from doubt to overcome Dr. Orent's DIME opinion. As found, Dr. Reichhardt's opinions were simply a difference of opinions.

Respondents argued that because Dr. Brady mentioned that Claimant was wearing an ankle brace on August 3, 2020 and that clearly the somatic distress and pain magnification were the causes of Claimant's continuing symptoms, and her continuing

problems were not the work related injury. This is not persuasive. In fact, Dr. Brady diagnosed a pain disorder and adjustment disorder which were either caused by or aggravated by the work related claim of 2019.

Respondents also argued that Dr. Orent made a mistake, which was not corrected, following the Incomplete Notice of August 18, 2022. This is not correct. In fact, Dr. Orent did correct his mistake and issued a letter on the same day, including the revised summary form.[17] Immediately thereafter, the DIME Unit at the Division issued the "Notice: DIME Report "Not at MMI"" on August 25, 2022 to the parties.[18] As found, Dr. Orent's true opinion is found to be inclusive of this revised report.

Respondents also argued that based on Dr. Scott and Dr. Kleinman's opinions, Claimant's conditions were preexisting. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Here, as found, Dr. Orent assessed Claimant's history, medical records and exam and determined that Claimant had work related injuries caused by the February 15, 2020.

As found, Claimant credibly testified that, before her workers' compensation incidents, Claimant was in good health and did not have any medical or health problems which affected her low back and bilateral lower extremities. Neither were any medical record in evidence presented that showed to the contrary. While the diagnostic testing showed Claimant clearly had degenerative conditions, those conditions were asymptomatic. Dr. Orent credibly testified that Claimant's current problems with her low back and bilateral lower extremities are related to her February 15, 2020 work related accident. He also credibly testified that the need for the recommended care was related to the claim. Further, he opined that it was not only the injuries she sustained at the specific date and time of the work related event or accident but the sequelae that results from those injuries were also related to the February 15, 2020 work related claim. In

[17] See Claimant's Exhibit 7, bates 25, and Exhibit 8, bates 27-29.
[18] See Exhibit 9, bate 32.

short, because Claimant was further injured during the course of her treatment for the work related injury, those additional injuries are also related to the February 15 2020 claim and compensable. While Dr. Parker's records did not record causing an injury to Claimant's right knee, he did examine them including doing range of motion of the knee. It is not surprising or unanticipated that he would not record causing an injury to a patient.

Respondents argued that Dr. Orent was in error because he relied on Claimant's reports instead of pointing to particular medical records to substantiate his opinion.[19] Respondents argued that Dr. Orent should be found to have been overcome as he failed to follow the *AMA Guides*. However, deviations from the AMA *Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the AMA *Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*. Whether the DIME physician properly applied the AMA *Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* ICAO, W.C. No. 4-677-750 (April 16, 2008); *In re Claim of Pulliam*, ICAO, WC 5-078-454-001, (July 12, 2021). Here, impairment is not a factor and not awarded, as Claimant was found to be not at MMI, and impairment is premature when a Claimant is determined to be not at MMI.

As found, Dr. Orent did substantiate his opinions, first by stating that he acknowledge that Dr. Reichhardt obtained better range of motions but that Claimant's condition had clearly worsened since that time. Secondly, Dr. Orent's range of motion testing was valid and therefore no second set needed to be completed under the *AMA Guides*. Further, he opined that Claimant clearly explained what had occurred with regard to the reporting. Claimant did complain of her lower extremity weakness. The medical records show a pattern of Claimant's complaints, despite the providers being told by Insurer that the knee complaints were not compensable. Dr. Reichhardt also documented in his records that Claimant was complaining of bilateral lower extremity pain and weakness from his initial report of October 5, 2020, despite noting that it was not initially reported because Employer did not list it initially.

As Dr. Orent testified, chiropractors are not trained in range of motion for the purposes of evaluating MMI and impairment. Dr. Scott's opinion also ignores the reports that followed from Dr. Parker. Claimant reported she still experienced low back pain, but treatment was helpful. The fact that treatment continued to be helpful to Claimant shows that Claimant had not reached the level of maximum improvement. It is reasonable to believe additional care would continue to improve Claimant's condition. All of Dr. Parker's impressions noted "slowly improving (objective greater than subjective) low back pain/ lumbosacral strain and thoracolumbar pain complaints." By definition, Claimant had not reached a point of stability.

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[19] Respondents specify in their brief that Dr. Orent's reliance of Claimant's statements is "outside of the Guides page 246." The AMA Guides have nothing on this page and the MTGs for both low back and lower extremities have less than 246 pages each.

Lastly, Respondents argued in their Brief in Support of Petition to Review that this ALJ erred by relying on Dr. Orent's testimony based on hypotheticals related to evidence that was not admitted. This is not correct. The evidence that was withdrawn, was the audio recording of the IME with Dr. Kleinman, Respondents' expert psychiatrist. Nothing in the facts listed in the original Findings of Fact, Conclusions of Law and Order issued by this ALJ on February 17, 2023 relied on hypotheticals concerning Claimant's psychological or psychiatric condition or examination.

Respondents are correct that Dr. Orent, the DIME physician in this case, is a non-retained expert as neither parties has the ability to communicate with the DIME without further steps. Rule 11-3(F) prohibits the DIME physician from communicating with the parties unless specifically authorized by order of an ALJ or agreed to by the parties. Rule 11-6 specifically prohibits the parties from contacting the DIME unless specifically authorized by order of an ALJ, by agreement or for purposes of deposing the DIME physician. Here, as found, Dr. Orent's opinions were detailed in his report and any testimony that was offered at hearing, and included in the findings in this and the prior order, were essentially reiterations or clarifications of those opinions from his report or opinions in response to other witnesses' testimony at hearing. Dr. Aschberger provided testimony regarding his opinion on the cause of the clonus. The hypothetical provide another explanation to that opinion and in no way relied on what was said during the IME with Dr. Kleinman. In fact, this ALJ never received the recording and it was not in evidence. Further, the DIME report provided Respondents sufficient basis to prepare for hearing in this matter.

As far as Respondents argue that the DIME physician was not allowed to address body parts that were not listed on the Application for a DIME, this case differs from the matter in *Rodriguez v. Aarons,* ICAO, WC 5-119-986 (March 8, 2023), which had not been decided at the time of this ALJ's original Order. In *Rodriguez,* Claimant was deemed to have reached MMI by an ATP who provided multiple impairments for physical and mental impairment. In that case, Respondents' requested a DIME but marked only the physical impairment to be considered. Here, Claimant did not reach MMI in accordance with the DIME physician's opinion. MMI is a status that a Claimant is either at or is not at, and particular body parts are not divisible and cannot be parceled out among the various components of a multi-faceted industrial injury. See *Paint Connection Plus v. ICAO,* 240 P.3d 429 (Colo. App. 2010); *In re Claim of Burren,* ICAO, WC 4-962-740-06 (March 15, 2019). Further, W.C.R.P. Rule 11-4(C) states the parties may agree to 'limit' the issues to be addressed by the DIME physician. To do so the parties are directed to use the Division form Notice of Agreement to Limit the Scope of the DIME. The form allows only for Maximum Medical Improvement, Permanent Impairment or Apportionment to be excluded from the determinations. In this case, neither party filed the Notice to Limit the Scope or body parts/conditions.

As stated in *Rodriguez*, the rule does not provide a different method by which Claimant may add a body region to the DIME application when an employer is making the application, like in this case, and only the requesting party (Respondent) is allowed to do so under W.C.R.P. Rule 11(4)(A)(1) when they are the requesting party. Claimant is impeded from filing an Amended DIME application by the rule, as the rule is silent when a Final Admission of Liability has not been filed, and Respondent is the one requesting

the DIME. The statute's purpose in providing a DIME system is, in part, to allow a Claimant to challenge the decisions of an Employer selected ATPs regarding MMI and/or impairment. Here, the ATP, Dr. Reichhardt did not state that Claimant was at MMI with regard to the lower extremity complaints. Rather, he simply followed the determination of the ATP, PA Toth, that he did not find the lower extremity complaints related to the claim and that the adjuster was not authorizing further care for the lower extremities. In this matter, Dr. Orent found Claimant was not at MMI as she required a repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs were so weak, consideration of hyaluronic or other viscosupplementation into the left knee and an MRI of the right knee and the right ankle. In short, the DIME physician found that diagnostic evaluations were necessary to flesh out what was really going on with Claimant in order to determine causation of work related injuries and provide appropriate treatment.

After considering the multitude of reports in evidence[20] from both the 2019 and the 2020 claims as well as the testimony of three experts, this ALJ concludes from the totality of the evidence, based on the heightened standard of proof, Respondents failed to show by clear and convincing evidence that Dr. Orent was in error. Based on the totality of the evidence, there is insufficient evidence establishing that it is highly probable Dr. Orent erred in his opinion on determining that Claimant is not at maximum medical improvement. To the extent Drs. Aschberger and Scott provided different opinions with regard to causation and need for medical care, their opinions represent mere differences of opinion that do not rise to the level of clear and convincing evidence.

C. Whether there was an Intervening Event

An intervening injury may sever the causal connection between the industrial injury and the claimant's condition. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). Further, the existence of an intervening event is an affirmative defense. Consequently, it is Respondent's burden to prove that Claimant's disability is attributable to the intervening injury or condition and not the industrial injury. *See Owens v. ICAO*, 49 P.3d 1187 (Colo. App. 2002); *see also Atlantic & Pacific Insurance Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983). Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.* It is also clear that, pursuant to the Court's conclusion in the *Owens* case cited above, that no compensability exists if the disability or need for treatment was caused as a direct result of an independent intervening cause. Whether Respondents have sustained their burden to prove Claimant's disability was triggered by an intervening event is a question of fact for resolution by the ALJ. *See City of Aurora v. Dortch*, 799 P.2d 462 (Colo. App. 1990).

Respondents stated that Claimant had an intervening event, speculating that something must have happened when Claimant was in Mexico on an emergency. Claimant testified that she had traveled to Mexico and stayed there for approximately one month but did not recall exactly when. She confirmed it was after she had been released from physical therapy in the fall of 2021 and when she restarted physical therapy in

[20] There are approximately 1,300 pages of records, including medical records and pleadings.

February 2022. However, there was no confirmation or credible evidence that Claimant suffered any accident or incident while she was in Mexico.

Claimant did testify that the weakness in her legs had caused her to fall multiple times. This was documented by Dr. Reichhardt in his November 2022 report. However, it has not been persuasively proven that it was more likely than not that Claimant's falls were caused by a condition other than the documented and diagnosed lumbar spine injury with radiculopathy or the bilateral lower extremity injuries diagnosed by Dr. Orent in his DIME report. The records are full of complaints that Claimant had weakness in her bilateral lower extremities. Dr. Aschberger and Dr. Reichhardt speculated that Claimant has some stenosis or upper motor neuron condition, but this has not been confirmed either, and no diagnostic testing has been completed to rule out the probability that the falls are a consequence of the weakness caused by the work related lower extremity injuries or the radicular symptoms. Dr. Reichhardt continued to note in his November 14, 2022 report that Claimant had suffered a work related low back discogenic injury with radicular involvement and a left knee injury. He rated both. And these records and opinions were considered by the DIME physician. Nothing in those reports persuaded this ALJ that there was clear and convincing evidence of a diagnosis that was not work related as determined by Dr. Orent.

Respondents also point to the event Claimant reported when she was walking with a friend in April 2020 and was feeling pain in her knee. This ALJ finds no merit in this theory or suggestion as walking in and of itself is found not to be a causative intervening event. Claimant likely walked many places, including in her home, the medical providers buildings, and for every other activity of daily living. Even if Claimant had just been walking while in the course and scope of her employment that would likely not be considered a work related injury as there would be no cause and effect, no heightened risk.

This ALJ has insufficient evidence to determine that it is more probable than not that Claimant suffered an intervening event. Respondents have failed to show that it was more probable than not that Claimant had an intervening event.

It is further found that Respondents have failed to overcome the determination of the DIME physician's opinion by clear and convincing evidence that there was no intervening event. Dr. Orent acknowledged reading the opinions of Dr. Aschberger and Dr. Reichhardt with regard to the clonus signs, as well as Dr. Aschberger's testimony, and this information did not change his opinions.

D. Entitlement of Temporary Total Disability benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, which she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity

evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. Sec. 8-42-105(3)(a)-(d), C.R.S.

Claimant was given work restrictions as of the date of her injury on February 15, 2020. She continued working until sometime in March 2020, when she was laid off from work due to the COVID-19 pandemic. This was a time when her employer failed to comply with her work restrictions. She continued on work restrictions when Dr. Reichhardt placed her at MMI on July 20, 2021. At that time she continued having work restrictions of 20 lbs. lifting, pushing and pulling, and limit bending and twisting at the waist to an occasional basis. In fact, Dr. Orent stated that he saw no possibility of Claimant engaging in any form of active employment at that time and Dr. Aschberger opined that Claimant could not work or was not employable. Claimant has established by a preponderance of the evidence that she is entitlement to TTD benefits as a result of her work related injury from the date she had previously been placed at MMI on July 20, 2021 until terminated by law.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents failed to prove by clear and convincing evidence that the DIME physician was incorrect. Claimant is not at maximum medical improvement.

2. Respondents shall pay for reasonably necessary and medical care related to the February 15, 2020 work injury, in accordance with the Colorado Fee Schedule, to cure and relieve her of the compensable injury.

3. Respondents shall pay temporary total disability benefits as of July 20, 2021 and continuing until terminated by law.

4. Respondents shall pay interest on any benefits at the rate of eight percent (8%) per annum for all benefits that were not paid when due.

5. Claimant's average weekly wage is $333.00 pursuant to the stipulation of the parties.

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

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

DATED this 14th day of September, 2023.

Digital Signature

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-773-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right knee injury during the course and scope of his employment with Employer on September 14, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the right knee surgery recommended by Authorized Treating Physician (ATP) Michael S. Hewitt, M.D. is reasonable, necessary and causally related to his September 14, 2022 industrial injury.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,666.43.

FINDINGS OF FACT

1. Claimant worked as a Driver for Employer. He explained that on September 14, 2022 he suffered an injury to his right knee while removing a directional sign. Specifically, after walking on wet grass, Claimant attempted to enter his utility truck. However, Claimant's right foot slipped, he fell backwards and struck his right knee on a curb.

2. Claimant testified that, on the day of the incident, he reported the event to Dispatcher [Redacted, hereinafter RC]. He remarked that he subsequently left town to attend his mother's funeral in California.

3. Claimant explained that on October 3, 2022 he told another dispatcher "[Redacted, hereinafter PL]" that he had injured his knee several weeks earlier. "PL[Redacted]" then directed Claimant to Employer's Safety and Training Manager [Redacted, hereinafter JE]. JE[Redacted] instructed Claimant to complete an incident report. He testified that October 3, 2023 was the first time he had heard about Claimant's knee injury. He immediately approved medical treatment and drove Claimant to Authorized Treating Provider (ATP) Midtown Occupational Health Services.

4. On October 3, 2022 Claimant visited ATP Lori Rossi, M.D. at Midtown Occupational for his September 14, 2022 right knee injury. Dr. Rossi noted the mechanism of injury was that Claimant had to "get a sign that was on wet grass. As he stepped up into his truck his foot slipped on the running board and hyperextended." Claimant's chief complaints were pain and instability of the right knee. Dr. Rossi diagnosed Claimant with a right knee strain. She determined that there was a greater than 50% probability that Claimant's knee strain was work-related.

5. Following the injury, Claimant continued to work with activity restrictions. The restrictions included no squatting, kneeling, climbing, or crawling.

6. On October 12, 2022 Claimant underwent an MRI of the right knee. The imaging revealed a full-thickness cartilage defect of the medial femoral condyle.

7. On November 3, 2022 Claimant returned to Dr. Rossi for an evaluation. She commented the MRI was "remarkable only for degenerative changes" and Claimant's "subjective complaints do not match the MRI findings." Dr. Rossi continued to diagnose Claimant with a right knee strain. She remarked that she had requested a referral to a knee specialist at Claimant's previous visit.

8. On November 28, 2022 Claimant visited Orthopedic Surgeon ATP Michael S. Hewitt, M.D. for an examination. Dr. Hewitt recounted that Claimant is a 57-year-old male who presented for evaluation of his right knee. He remarked that on September 14, 2022 Claimant had been walking on wet grass and was entering his truck. His foot slipped and he hyperflexed his right knee. Claimant was holding onto the door handle of the truck and did not fall to the ground. However, he experienced the immediate onset of right knee pain and swelling. Dr. Hewitt noted the October 12, 2022 right knee MRI revealed the following:

> Small joint effusion, no loose bodies, anterior and posterior cruciate as well as medial and lateral collateral ligaments are intact, mild patellofemoral chondromalacia, focal full-thickness, cartilage defect involving the medial femoral condyle measuring 3 x 18 mm with well-defined margins, focal subchondral edema, no loose bodies appreciated.

He commented that Claimant's occupational injury was a "right medial femoral condyle focal articular cartilage defect" and there was no "significant underlying arthritis." Dr. Hewitt discussed multiple treatment options with Claimant "including observation, activity modification, optimiz[ation of] body weight, therapy, [use of] medial compartment unloader brace, cortisone injections, viscosupplementation injections, PRP injections and finally surgery."

9. On December 5, 2022 Claimant returned to Dr. Hewitt for an evaluation. He remarked that Claimant was approaching three months after a right knee twisting injury at work. Dr. Hewitt again reviewed treatment options. He remarked that Claimant "understands prognosis in patients over the age of 50 with an elevated body mass index are decreased. Patient would like to consider treatment options and will follow-up with this clinic in the coming weeks, all questions were answered."

10. On December 22, 2022 Dr. Hewitt submitted a request for surgical authorization of Claimant's right knee. He specifically sought to perform a right knee arthroscopy with chondroplasty and microfracture of the MFC augmented with an intra-articular platelet rich plasma injection.

11. Claimant returned to Dr. Rossi on January 13, 2023. Dr. Rossi explained that Claimant had visited specialist Dr. Hewitt and discussed four treatment options. A decision was made to proceed with surgery. However, Insurer subsequently denied the surgical request

because Claimant had not completed any therapy or undergone injection treatment. Dr. Rossi noted that Claimant "has been adamantly against injections or therapy." She ordered six physical therapy visits and specified that Claimant "is quite against therapy and injections but realizes he will need to participate in these modalities if he wishes to have surgery." Dr. Rossi again diagnosed Claimant with a right knee strain.

12. Respondents referred Claimant for a medical record review with Orthopedic Surgeon William Ciccone, II, M.D. on January 2, 2023. Dr. Ciccone commented that Claimant's October 12, 2022 right knee MRI revealed a "full-thickness cartilage defect in the femoral condyle with patellofemoral degenerative disease." However, after reviewing Claimant's medical records, Dr. Ciccone concluded that Claimant only suffered a minor strain/sprain to his right knee at work on September 14, 2022. He explained that:

> [i]t is unclear from the MRI that the findings are actually related to a work injury. If the claimant had caused an acute cartilage defect from the work event one would expect to see a loose body. This is not present on the MRI. Appropriate care for early degenerative changes in a knee is conservative, not operative. The claimant has not had any physical therapy, injections, or other conservative measures. I do not believe that the need for a potential surgery is causally related to a work event. The findings on the MRI are likely preexisting.

13. Following conversations with Dr. Hewitt, [Redacted, hereinafter MS] decided to forego conservative treatment options. He did not obtain physical therapy and injections, but insisted on pursuing surgery. When asked at hearing if there was any medical treatment he wished to have prior to surgery, Claimant replied, "No. I just want my knee fixed."

14. Dr. Hewitt referred Claimant to Nathan Faulkner, M.D. for a second opinion evaluation. At a February 22, 2023 examination Dr. Faulkner recounted that Claimant developed the acute onset of right knee pain when he slipped getting into his work truck on September 14, 2022. Claimant twisted his right knee and struck it on a curb. After reviewing Claimant's October 12, 2022 right knee MRI he explained that:

> MRI shows full-thickness cartilage defect of the MFC. There is also adjacent edema which would indicate that this is more of an acute injury causing the patient's pain. Patient also had no right knee pain or dysfunction prior to his work injury, which would also make it more likely than not that he developed this cartilage defect from the work injury. Long alignment x-rays show only 3 degrees of varus to the femur, so I do agree with Dr. Hewitt's plan of a right knee arthroscopy with chondroplasty and microfracture of the MFC augmented with intra-articular platelet rich plasma injection. Patient has failed extensive more conservative treatment as outlined above.

15. On June 28, 2023 Claimant underwent an independent medical examination with Dr. Ciccone. After reviewing Claimant's medical records and conducting a physical examination, Dr. Ciccone determined that Claimant suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident. He detailed that the October 12, 2022 MRI revealed a full-thickness cartilage defect as well as cartilage loss along the patellofemoral joint. Dr.

Ciccone commented that Claimant's persistent complaints of instability were unrelated to the MRI findings. He noted Claimant did not suffer a ligament injury that would be associated with instability. Claimant's pain over the anterior aspect of the knee was likely related to the pre-existing degenerative changes on the patellofemoral joint. Dr. Ciccone also explained that it was unclear whether Claimant suffered an acute cartilage injury related to his work injury. He reiterated that, if the injury had been acute, there would likely have been a loose body of the cartilage that corresponded with the chondral loss.

16. Dr. Ciccone determined the proposed surgery was unlikely to improve Claimant's symptoms. He explained that it is well-known that the results of microfracture surgery are variable in patients over the age of 40 with a BMI over 25. Additionally, Claimant already exhibited degenerative changes in the right knee with cartilage loss noted in the patellofemoral joint. Dr. Ciccone ultimately concluded that a right knee arthroscopy with chondroplasty and microfracture was not reasonable or necessary and should be denied. He instead recommended physical therapy.

17. On August 1, 2023 the parties conducted the pre-hearing evidentiary deposition of Dr. Ciccone. He maintained that Claimant suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident. Appropriate treatment for the minor injury was physical therapy to focus on range of motion and strengthening. Dr. Ciccone determined that Dr. Hewitt's surgical recommendation of a right knee arthroscopy with chondroplasty and a microfracture with a PRP injection was not reasonable, necessary and causally related to the September 14, 2022 work incident.

18. After reviewing Claimant's October 12, 2022 right knee MRI Dr. Ciccone observed that Claimant "has a full-thickness cartilage defect along the medial femoral condyle," There was also "a piece of cartilage missing" from the femur bone. Dr. Ciccone explained that Claimant's cartilage defect would not necessarily have any associated symptoms. He specifically stated that Claimant's right knee MRI did not reflect an acute injury. Dr. Ciccone detailed that the imaging did not reveal any fracture, bone contusion, ostochondral fragmentation, significant swelling or loose bodies. Importantly, the MRI report noted that there was no joint effusion or abnormal swelling of the right knee. Because of the lack of any intra-articular loose bodies on the MRI, it was more likely that Claimant's missing cartilage constituted a pre-existing condition rather than an acute traumatic trauma. He thus could not "relate any of the findings on the MRI scan to the injury at work." Appropriate treatment for Claimant's right knee sprain/strain would be conservative care that included additional physical therapy. Notably, Claimant had only attended five physical therapy sessions during his course of treatment. If Claimant had persistent symptoms, Dr. Ciccone remarked that right knee injections might be appropriate.

19. Claimant has established it is more probably true than not that he suffered a compensable right knee injury during the course and scope of his employment with Employer on September 14, 2022. Initially, after walking on wet grass, Claimant attempted to enter his utility truck. However, Claimant's right foot slipped, he fell backwards and struck his right knee on a curb. On October 3, 2022, after returning from his mother's funeral in California, Claimant was directed to ATP Midtown Occupational Health Services for treatment.

20. On October 3, 2022 Claimant visited ATP Dr. Rossi for an examination. Dr. Rossi

noted the mechanism of injury was that Claimant had to "get a sign that was on wet grass. As he stepped up into his truck his foot slipped on the running board and hyperextended." Claimant's chief complaints were pain and instability of the right knee. Dr. Rossi diagnosed Claimant with a right knee strain. She determined that there was a greater than 50% probability that Claimant's knee strain was work-related. After an MRI of the right knee revealed a full-thickness cartilage defect of the medial femoral condyle, Dr. Rossi referred Claimant to surgeon Dr. Hewitt for an evaluation. Dr. Hewitt determined the September 14, 2022 work incident caused Claimant's full-thickness cartilage defect. He recommended right knee surgery. Furthermore, Dr. Faulkner recounted that Claimant developed the acute onset of right knee pain when he slipped getting into his work truck on September 14, 2022 and agreed with Dr. Hewitt that surgery was warranted. Finally, although Dr. Ciccone disagreed with the surgical recommendation, he determined that Claimant suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident.

21. The medical records thus reveal that there is no significant dispute about whether Claimant injured his right knee at work on September 14, 2022. Claimant has consistently maintained that he injured his right knee when he slipped on the running board of his truck after retrieving a sign from wet grass. The only conflict between physicians involves whether Claimant's right knee injury was limited to a sprain/strain that required conservative treatment or the September 14, 2022 incident caused Claimant's full-thickness cartilage defect that warranted surgical intervention. Accordingly, Claimant suffered a right knee injury during the course and scope of his employment with Employer on September 14, 2022.

22. Claimant has failed to demonstrate it is more probably true than not that the right knee surgery recommended by ATP Dr. Hewitt is reasonable, necessary and causally related to his September 14, 2022 industrial injury. Notably, Dr. Hewitt commented that Claimant's occupational injury was a "right medial femoral condyle focal articular cartilage defect." He discussed multiple treatment options with Claimant and ultimately requested surgical authorization for a right knee arthroscopy with chondroplasty and microfracture of the MFC augmented with an intra-articular platelet rich plasma injection. Dr. Faulkner agreed with Dr. Hewitt's surgical recommendation. He detailed that Claimant's October 12, 2022 right knee MRI reflected an edema that suggested an acute injury was causing Claimant's pain. Moreover, because Claimant had no right knee symptoms prior to his work injury, Dr. Faulkner reasoned it was more likely than not that Claimant developed the cartilage defect from the work accident. Dr. Faulkner also remarked that Claimant has failed extensive conservative treatment.

23. Despite the surgical recommendation of Dr. Hewitt and the support of Dr. Faulkner, the record reveals that the proposed right knee surgery is not causally related to Claimant's September 14, 2022 right knee injury. The record does not reflect that Dr. Hewitt connected Claimant's right knee full-thickness cartilage defect to the September 14, 2022 work event. Furthermore, Dr. Faulkner only noted that the right knee MRI revealed edema that was indicative of an acute injury. He did not provide any other details besides noting that Claimant had no right knee symptoms prior to his work injury.

24. In contrast, Dr. Ciccone maintained that Claimant only suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident. He reasoned that Dr. Hewitt's surgical recommendation of a right knee arthroscopy with chondroplasty and a

microfracture with a PRP injection was not causally related to the September 14, 2022 work event. Dr. Ciccone persuasively explained that Claimant's right knee MRI did not reveal an acute injury. He detailed that the imaging did not reflect any fracture, bone contusion, ostochondral fragmentation, significant swelling or loose bodies. Importantly, the MRI report noted that there was no joint effusion or abnormal swelling of the right knee. Furthermore, because of the lack of any intra-articular loose bodies on the MRI, it was more likely that Claimant's missing cartilage constituted a pre-existing condition. Moreover, ATP Dr. Rossi also consistently maintained that Claimant only suffered a right knee sprain/strain as a result of his September 14, 2022 work accident. Even after Dr. Hewitt sought surgical authorization, Dr. Rossi continued to diagnose Claimant with a right knee strain. Importantly, she commented the MRI was "remarkable only for degenerative changes" and Claimant's "subjective complaints do not match the MRI findings."

25. The record also reveals that the proposed right knee surgery is not reasonable and necessary because Claimant has not exhausted conservative treatment. Dr. Ciccone persuasively commented that appropriate treatment for Claimant's right knee sprain/strain would be conservative care that included additional physical therapy. Notably, Claimant had only attended five physical therapy sessions during his course of treatment. Dr. Ciccone commented that Claimant has not attended enough physical therapy appointments to see improvement and highlighted that "five [physical therapy visits] isn't very many." He also remarked that, if Claimant had persistent symptoms, right knee injections might be appropriate. The record also reflects that Claimant seeks to circumvent conservative treatment modalities suggested by Dr. Hewitt, including observation, activity modification, body weight optimization, therapy, a medial compartment unloader brace, cortisone injections, viscosupplementation injections, and PRP injections. Dr. Rossi also specified that Claimant "is quite against therapy and injections but realizes he will need to participate in these modalities if he wishes to have surgery." The record reveals that Claimant has not exhausted conservative treatment options before pursuing surgery. Claimant has thus failed to demonstrate that the proposed right knee surgery is reasonable, necessary and causally related to his September 14, 2022 industrial injury. Accordingly, Claimant's request for the right knee surgery recommended by Dr. Hewitt is denied and dismissed.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See*

Magnetic Engineering, Inc. v. ICAO, 5 P.3d 385, 389 (Colo. App. 2000).

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

Compensability

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

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

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

7. As found, Claimant has established by a preponderance of the evidence that he suffered a compensable right knee injury during the course and scope of his employment with Employer on September 14, 2022. Initially, after walking on wet grass, Claimant attempted to enter his utility truck. However, Claimant's right foot slipped, he fell backwards and struck his right knee on a curb. On October 3, 2022, after returning from his mother's funeral in California, Claimant was directed to ATP Midtown Occupational Health Services for treatment.

8. As found, on October 3, 2022 Claimant visited ATP Dr. Rossi for an examination. Dr. Rossi noted the mechanism of injury was that Claimant had to "get a sign that was on wet

grass. As he stepped up into his truck his foot slipped on the running board and hyperextended." Claimant's chief complaints were pain and instability of the right knee. Dr. Rossi diagnosed Claimant with a right knee strain. She determined that there was a greater than 50% probability that Claimant's knee strain was work-related. After an MRI of the right knee revealed a full-thickness cartilage defect of the medial femoral condyle, Dr. Rossi referred Claimant to surgeon Dr. Hewitt for an evaluation. Dr. Hewitt determined the September 14, 2022 work incident caused Claimant's full-thickness cartilage defect. He recommended right knee surgery. Furthermore, Dr. Faulkner recounted that Claimant developed the acute onset of right knee pain when he slipped getting into his work truck on September 14, 2022 and agreed with Dr. Hewitt that surgery was warranted. Finally, although Dr. Ciccone disagreed with the surgical recommendation, he determined that Claimant suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident.

9. As found, the medical records thus reveal that there is no significant dispute about whether Claimant injured his right knee at work on September 14, 2022. Claimant has consistently maintained that he injured his right knee when he slipped on the running board of his truck after retrieving a sign from wet grass. The only conflict between physicians involves whether Claimant's right knee injury was limited to a sprain/strain that required conservative treatment or the September 14, 2022 incident caused Claimant's full-thickness cartilage defect that warranted surgical intervention. Accordingly, Claimant suffered a right knee injury during the course and scope of his employment with Employer on September 14, 2022.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

12. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the right knee surgery recommended by ATP Dr. Hewitt is reasonable, necessary and

causally related to his September 14, 2022 industrial injury. Notably, Dr. Hewitt commented that Claimant's occupational injury was a "right medial femoral condyle focal articular cartilage defect." He discussed multiple treatment options with Claimant and ultimately requested surgical authorization for a right knee arthroscopy with chondroplasty and microfracture of the MFC augmented with an intra-articular platelet rich plasma injection. Dr. Faulkner agreed with Dr. Hewitt's surgical recommendation. He detailed that Claimant's October 12, 2022 right knee MRI reflected an edema that suggested an acute injury was causing Claimant's pain. Moreover, because Claimant had no right knee symptoms prior to his work injury, Dr. Faulkner reasoned it was more likely than not that Claimant developed the cartilage defect from the work accident. Dr. Faulkner also remarked that Claimant has failed extensive conservative treatment.

13. As found, despite the surgical recommendation of Dr. Hewitt and the support of Dr. Faulkner, the record reveals that the proposed right knee surgery is not causally related to Claimant's September 14, 2022 right knee injury. The record does not reflect that Dr. Hewitt connected Claimant's right knee full-thickness cartilage defect to the September 14, 2022 work event. Furthermore, Dr. Faulkner only noted that the right knee MRI revealed edema that was indicative of an acute injury. He did not provide any other details besides noting that Claimant had no right knee symptoms prior to his work injury.

14. As found, in contrast, Dr. Ciccone maintained that Claimant only suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident. He reasoned that Dr. Hewitt's surgical recommendation of a right knee arthroscopy with chondroplasty and a microfracture with a PRP injection was not causally related to the September 14, 2022 work event. Dr. Ciccone persuasively explained that Claimant's right knee MRI did not reveal an acute injury. He detailed that the imaging did not reflect any fracture, bone contusion, ostochondral fragmentation, significant swelling or loose bodies. Importantly, the MRI report noted that there was no joint effusion or abnormal swelling of the right knee. Furthermore, because of the lack of any intra-articular loose bodies on the MRI, it was more likely that Claimant's missing cartilage constituted a pre-existing condition. Moreover, ATP Dr. Rossi also consistently maintained that Claimant only suffered a right knee sprain/strain as a result of his September 14, 2022 work accident. Even after Dr. Hewitt sought surgical authorization, Dr. Rossi continued to diagnose Claimant with a right knee strain. Importantly, she commented the MRI was "remarkable only for degenerative changes" and Claimant's "subjective complaints do not match the MRI findings."

15. As found, the record also reveals that the proposed right knee surgery is not reasonable and necessary because Claimant has not exhausted conservative treatment. Dr. Ciccone persuasively commented that appropriate treatment for Claimant's right knee sprain/strain would be conservative care that included additional physical therapy. Notably, Claimant had only attended five physical therapy sessions during his course of treatment. Dr. Ciccone commented that Claimant has not attended enough physical therapy appointments to see improvement and highlighted that "five [physical therapy visits] isn't very many." He also remarked that, if Claimant had persistent symptoms, right knee injections might be appropriate. The record also reflects that Claimant seeks to circumvent conservative treatment modalities suggested by Dr. Hewitt, including observation, activity modification, body weight optimization, therapy, a medial compartment unloader brace, cortisone injections, viscosupplementation injections, and PRP injections. Dr. Rossi also specified that Claimant "is quite against therapy

and injections but realizes he will need to participate in these modalities if he wishes to have surgery." The record reveals that Claimant has not exhausted conservative treatment options before pursuing surgery. Claimant has thus failed to demonstrate that the proposed right knee surgery is reasonable, necessary and causally related to his September 14, 2022 industrial injury. Accordingly, Claimant's request for the right knee surgery recommended by Dr. Hewitt is denied and dismissed.

ORDER

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

1. On September 14, 2021 Claimant suffered a right knee injury while working for Employer.

2. Claimant's request for the right knee surgery recommended by Dr. Hewitt is denied and dismissed.

3. Claimant earned an AWW of $1,666.43.

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

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

DATED: September 14, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-159-034-003

ISSUES

1. Whether Respondents have established by clear and convincing evidence that DIME physician Matthew Brodie, M.D.'s determination that Claimant is not at maximum medical improvement is incorrect.

2. If Respondents establish that the DIME physician's MMI determination is incorrect, whether Respondent established by clear and convincing evidence that the impairment rating assigned by the DIME physician is incorrect.

FINDINGS OF FACT

1. On December 22, 2020, Claimant sustained admitted injuries to his right index finger and middle finger arising out of the course of his employment as a millwright for Employer. Claimant sustained fractures of the phalanx of the right index and middle fingers when his hand was crushed between a steel plate and a piece of machinery.

2. Following his injury, Claimant was evaluated by Chelsea Rasis, PA-C, physician assistant for Theodore Villavicencio, M.D., at Concentra. X-rays demonstrated a comminuted fracture of the right index finger proximal phalanx and possible fracture of the right middle finger proximal phalanx. Ms. Rasis diagnosed Claimant with fractures of the phalanx of the right middle and index fingers, a hand crush injury and laceration of the right index finger, and referred Claimant to hand specialist, Craig Davis, M.D., for further evaluation. (Ex. 5).

3. On December 29, 2020, Dr. Davis performed a closed reduction and percutaneous pin fixation of Claimant's right index finger proximal phalanx. Claimant was placed in a short arm splint following surgery. (Ex. 6).

4. On January 5, 2021, Claimant saw Ms. Rasis and reported continued pain in his right hand, with pressure and diffuse numbness throughout all fingers. He also noted pain in his right elbow since surgery. (Ex. 5).

5. On January 25, 2021, Dr. Davis removed the pin placed during surgery from Claimant's right index finger. Claimant reported to Dr. Davis that he felt numbness affecting all of his fingers. (Ex. 6).

6. Claimant continued to report similar symptoms to Ms. Davis when he returned on February 2, 2021, indicating that he felt a "grabbing sensation over the metacarpals as if someone is squeezing his hand." (Ex. 5).

7. On February 2, 2021, Claimant began occupational therapy through Concentra. Over the course of the following nine months, Claimant attended 45 sessions of occupational therapy. (Ex. 7).

8. On February 8, 2021, Claimant saw physiatrist Kathy McCranie, M.D., on referral from Ms. Rasis. (Ex. 5). Dr. McCranie noted significant pain throughout Claimant's right hand, numbness in all fingers (except the thumb), and tenderness in Claimant's right elbow with palpation. Dr. McCranie referred Claimant for electrodiagnostic testing of the right arm to rule out compressive neuropathy. (Ex. 5).

9. On March 1, 2021, Allison Fall, M.D., performed electrodiagnostic testing of Claimant right arm. ON examination, she noted that Claimant had no pain at the elbow or wrist, and had pain across the joints of his fingers. The electrodiagnostic testing was negative, with no evidence of compressive neuropathy. (Ex. 5).

10. Claimant returned to Dr. McCranie on March 8, 2023, continuing to report numbness in his hand, pain in the right wrist, and a continued crushing pain in his right hand. She noted that Claimant had tried gabapentin for ten days, which did not provide any relief of his symptoms. As with several other providers, Dr. McCranie noted signs in Claimant's right hand suggestive of complex regional pain syndrome (CRPS), including discoloration, increased hair growth, and cooler temperature. She indicated that Claimant was scheduled for MRIs of the right hand and wrist, and if those tests did not show the cause of Claimant's symptoms, a work up for sympathetically mediated pain would be considered. (Ex. 5)

11. Claimant underwent right hand and wrist MRIs on March 8, 2023. The right-hand MRI showed "sequela of likely subacute or chronic sprain of the ulnar collateral ligament of the second MCP joint," and apparent stripping/detachment of the ulnar sagittal band of the second MCP joint. The right-wrist MRI was interpreted as showing no specific internal derangement of the wrist, no fractures or bone contusion. (Ex. 8 & K).

12. On March 22, 2021, Claimant returned to Dr. Davis' clinic, and saw physician assistant Timothy Abbott, PA-C. Mr. Abbott indicated the MRI demonstrated a sprain of the left index finger MP joint and index finger sagittal band. He opined that it was unclear why Claimant was having diffuse pain throughout the right hand, and that his fingers did not appear to be the source of his pain. (Ex. 6).

13. Claimant returned to Dr. McCranie for follow up on April 16, 2021. Dr. McCranie noted that Claimant was continuing to experience pain predominantly across the right palm which was not specific to the distribution of objective findings. Dr. McCranie indicated that Claimant's examination did not fit the Budapest criteria (i.e., criteria for CRPS), although Claimant did have some varying discoloration of the right hand. To rule out a sympathetic component of his pain, Dr. McCranie ordered a triple phase bone scan. She also noted two cyst-like structures between the fingers of Claimant's right hand, and asked Claimant to follow up with Dr. Davis regarding those issues. (Ex. C).

14. On April 21, 2021, Claimant returned to Dr. Davis reporting some improvement in his hand, but experiencing discoloration and cold in the right hand, and the squeezing sensation previously reported. Dr. Davis noted that Claimant's right-hand pain was of "unclear etiology," and that Claimant did not appear to have CRPS. Dr. Davis indicated that he did not have further treatment to offer Claimant, and discharged Claimant from his

care. (Ex. 6). Also on April 21, 2021, Dr. Villavicencio referred Claimant to hand-specialist Tracy Wolf, M.D., for a second opinion concerning his continuing right-hand pain. (Ex. C).

15. Claimant saw Dr. Wolf on April 30, 2021. Dr. Wolf noted that Claimant's original injury "mainly smashed right along the distal half of the palm and then pulled the fingers backwards." Claimant reported continued pain in the right hand. She noted that Claimant had pain at the distal end of the palm and across the dorsal aspect of the hand, and that he was "getting a little wrist pain" as well. Dr. Wolf opined that the cyst-like structures in Claimant's hand were more consistent with Dupuytren's changes rather than a cyst. On examination, Dr. Wolf performed Tinel's testing at several locations in Claimant's right hand and arm, and noted an equivocal Tinel's signs over the dorsal aspect of the MP joint; questionable superficial radial Tinel's; questionable carpal tunnel Tinel's sign which produced numbness and tingling in the small finger; and "some tenderness and Tinel's with palpation over Guyon's canal." Dr. Wolf indicated that with a crushing injury, such as Claimant's, the soft tissues became swollen affecting neurovascular structures, scarring that can occur which causes stiffness. She opined that the color changes in Claimant's hand could relate to this. She agreed with Dr. McCranie's decision to perform a triple phase bone scan, and if that test was negative, to consider aa sympathetic block to see if it provided relief. Dr. Wolf indicated that she could not offer surgical options, and that if Claimant's condition was a soft tissue and/or nerve response, it would hopefully continue to get better. (Ex. C).

16. On May 14, 2021, the triple phase bone scan was performed. Claimant followed up with Dr. McCranie on June 11, 2021. Dr. McCranie noted that the bone scan demonstrated abnormalities which could be seen in the setting of CRPS or a more proximal vascular abnormality/injury. Given the abnormalities shown on the bone scan, Dr. McCranie recommended pursuing treatment and diagnostic testing for CRPS, including a right stellate ganglion block, and further CRPS testing, depending on the result of that the stellate ganglion block. (Ex. 5).

17. On July 1, 2021, John Sacha, M.D., performed the stellate ganglion block recommended by Dr. McCranie. Claimant reported a decrease in his pain at 30 minutes post procedure. (Ex. 9). However, at his July 15, 2021 visit with Ms. Rasis, Claimant reported no benefits from the block, and experiencing new symptoms in the right hand. These included a pressure sensation when making a fist, a constant "Charlie horse" sensation in the right elbow, and pain in his right rhomboid. (Ex. 5).

18. Claimant next saw Dr. McCranie on August 13, 2021. Dr. McCranie characterized the stellate ganglion block as non-diagnostic and non-therapeutic. Although she noted no specific signs of CRPS, she recommended a complete CRPS work-up including QSART and thermogram testing. (Ex. 5).

19. On October 18, 2021, George Schakaraschwili, M.D., performed the additional CRPS testing recommended by Dr. McCranie. Dr. Schakaraschwili indicated that that the testing results thermogram testing was normal, and the autonomic testing (which the ALJ infers was a QSART test), was negative or low probability for CRPS. (Ex. H).

20. Claimant returned to Dr. McCranie on November 5, 2021. She indicated that the testing performed by Dr. Schakaraschwili "definitively" ruled out CRPS, and that Claimant did not meet the clinical criteria for CRPS. She indicated that Claimant was approaching maximum medical improvement (MMI), and recommended an impairment rating after completion of visits with Dr. Villavicencio. (Ex. 5).

21. On November 19, 2021, Dr. Villavicencio recommended a functional capacity evaluation (FCE). (Ex. 5). The FCE was performed on January 3, 2022, and demonstrated Claimant could work in the "heavy work" category, and could lift up to 80 pounds in some situations. (Ex. J).

22. On January 14, 2022, Dr. McCranie placed Claimant at MMI, and assigned Claimant a right upper extremity permanent impairment rating of 17%. She recommended limited maintenance care, to include completion of therapy. (Ex. 5). When Claimant was placed at MMI, no provider had offered a definitive diagnosis of Claimant's continued right-hand symptoms, or identified the etiology of those complaints.

23. On February 16, 2022, Respondents filed a Final Admission of Liability consistent with Dr. McCranie's opinions regarding MMI and permanent impairment. (Ex. J).

24. On May 18, 2022, Claimant returned to Ms. Rasis reporting that he had a sudden spike of pain in the radial wrist, radiating to his right elbow. Claimant denied new trauma, and reported that prior to the sudden onset of pain, his right wrist was "achy", but he was progressing. Claimant reported that his work at that time was working at a front desk job, and required the use of a computer mouse. Ms. Rasis referred Claimant for acupuncture treatment. (No records of further treatment after May 18, 2022 were admitted into evidence).

25. On January 4, 2023, Claimant underwent a Division Independent Medical Examination (IME) with Matthew Brodie, M.D. Dr. Brodie determined that Claimant was not at MMI. On January 4, 2023, Claimant underwent a Division-sponsored independent medical examination (DIME) with Matthew Brodie, M.D. Based on his examination and review of records, Dr. Brodie opined that Claimant was not at MMI. Claimant reported persistent numbness and tingling in a circumferential pattern in the and through the fifth fingers of the right hand. Claimant also reported medial right elbow pain occurring approximately one year following the injury. Based on his examination and review of records, Dr. Brodie diagnosed Claimant with a crush injury to the right hand with closed fractures of the right index and middle finger proximal phalanx; and status post closed reduction with internal fixation of the right index finger with subsequent K-wire removal. In addition, he included diagnoses of clinical findings of right cubital tunnel syndrome with potential ulnar neuropathy at the level of the right elbow; and clinical findings of neurogenic right upper extremity thoracic outlet syndrome. (Ex. 4)

26. Dr. Brodie indicated neither the thoracic outlet syndrome nor cubital tunnel syndrome diagnoses were definitively attributable to Claimant's work injury, although he did opine that there is a "plausible causal association" between the right upper extremity symptoms and Claimant's work injury. He also indicated that other non-work-related

causes for these conditions were plausible, including Claimant's current occupation. He recommended additional diagnostic testing to investigate the diagnoses, causation, and validity of the potential diagnoses, including repeat electrodiagnostic testing, imaging, and specialist evaluation. Consequently, Dr. Brodie found that Claimant could not be considered at MMI until additional clinical testing could be obtained to determine the Claimant's diagnoses, and whether those diagnoses are related to his work injury. (Ex. 4).

27. Dr. Brodie found no impairment of Claimant's right hand and fingers, and provided a provisional 10% impairment rating for thoracic outlet syndrome, while acknowledging that the impairment rating was provided for "reference only at this time because the issues of diagnosis(es), validity, causality and permanence of impairment will require additional tests and evaluations…." (Ex. 4).

28. On March 21, 2023, Claimant underwent an IME with Sean Griggs, M.D. at Respondents' request. Dr. Griggs testified at hearing and was admitted as an expert in orthopedic surgery with an emphasis on treatment of upper extremity injuries. Dr. Griggs examined Claimant, reviewed his medical records, and issued a report dated March 21, 2023. (Ex. M). He testified that on his examination, Claimant did have ulnar nerve irritation some clinical findings of thoracic outlet syndrome, but that neither diagnosis was definitive. Cubital tunnel syndrome is caused by compression of the ulnar nerve, while thoracic outlet syndrome typically involves the brachial plexus, which is anatomically located near the neck. He indicated that the symptoms associated with cubital tunnel syndrome can be similar to thoracic outlet syndrome symptoms.

29. Dr. Griggs opined that the Claimant's mechanism of injury is not consistent with thoracic outlet syndrome or cubital tunnel syndrome. He testified that cubital tunnel syndrome is typically caused by trauma to the elbow or prolonged flexion of the elbow. He testified that neurogenic thoracic outlet syndrome is typically caused by postural issues or a traction injury to the arm. He further indicated that the distribution of Claimant's neurologic symptoms in his hand are more consistent with a nerve injury to Claimant's hand, than an injury to either the ulnar nerve or the brachial plexus. He indicated that if Claimant had experienced an injury to the brachial plexus, one would expect symptoms throughout the arm, rather than limited to the hand.. He further testified that Claimant's post-surgical splinting would not be expected to cause either cubital tunnel or thoracic outlet syndrome. Dr. Griggs indicated that Claimant had an extensive work-up which showed no evidence of thoracic outlet compression, and did not have findings of thoracic outlet compression until his January 4, 2023, evaluation by Dr. Brodie. Dr. Griggs also indicated that on his examination, Claimant had irritation of the brachial plexus bilaterally, which would indicate that it was the result of a postural issue, most likely related to his new job as a receptionist. Dr. Griggs agreed with Dr. McCranie's January 14, 2022, MMI determination, and percent scheduled impairment rating to the hand below the wrist.

30. Claimant testified at hearing that prior to his December 22, 2020 work injury, he had no symptoms in his right arm or hand. He testified that after receiving the stellate ganglion block, he had symptoms down his right arm, and after the block his symptoms in the right arm and palm expanded and worsened. He testified that when he was placed

at MMI, he continued to have numbness in his palm and the ulnar aspect of his wrist. Following his injury, Claimant switched jobs, and now works at the front desk for a dental practice. He testified that his current position consists of phone and computer work, and that his employer has supplied him with ergonomic devices, that do not aggravate his right hand or arm. Claimant further testified that he has not had any additional injuries or trauma to his right hand or arm since his work-related injury.

CONCLUSIONS OF LAW

Generally

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

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

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

OVERCOMING DIME ON MMI

Respondents contend that Dr. Brodie's determination that Claimant has not reached MMI was incorrect. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office*, *supra*.

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

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a

reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO, May 20, 2004). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

Respondents have failed to establish by clear and convincing evidence that Dr. Brodie's opinion that Claimant is not at MMI is incorrect. Since his initial injury, Claimant has continued to exhibit symptoms in his right hand. Although Claimant's ATPs ruled out CRPS as the cause of his symptoms, once that was done, no definitive diagnosis was provided. At his examinations with Dr. Brodie and Dr. Griggs, Claimant was found to have symptoms consistent with ulnar nerve irritation and thoracic outlet syndrome. While Dr. Griggs opined that these are not likely related to Claimant's work injury, Dr. Brodie opined that there is a plausible connection between the conditions and Claimant's industrial injury. Dr. Brodie's report points to several potential work-related causes for Claimant's symptoms, including immobilization, postural changes, and treatment associated with the work injury, as well as potentially unrelated causes. He further noted that the ulnar collateral ligament pathology noted on Claimant's MRI correlated with the site of the K-wire position during the fixation surgery. Because of this plausible connection, Dr. Brodie determined that Claimant is not considered at MMI until additional testing and evaluation is performed to define Claimant's condition and determine causation. Dr. Brodie's opinions amount to a determination that additional diagnostic procedures are necessary to define Claimant's condition, and determine if additional treatment is appropriate.

While Dr. Griggs' testimony and opinions regarding the distribution of Claimant's neurological symptoms is credible, his opinion regarding potential causation of Claimant's condition is a difference of opinion with Dr. Brodie that does not establish it is "highly probable" Dr. Brodie's opinion is incorrect.

Because Respondents' have failed to establish by clear and convincing evidence that Dr. Brodie's MMI opinion is incorrect, the issue of whether his provisional impairment rating is incorrect is not ripe for determination.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome Dr. Brodie's MMI opinion by clear and convincing evidence.

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

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

DATED: September 18, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-227-960-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that total shoulder replacement surgery recommended by ATP Nathan Faulkner, M.D. is causally related to his January 19, 2023 work injury.

FINDINGS OF FACT

1. Claimant is a 77-year-old man who works for Employer as a driving instructor. On January 19, 2023, Claimant slipped and fell while brushing snow off of a work vehicle, injuring his right shoulder.

2. In August 2020 and September 2020, Claimant was seen at Kaiser Permanente and reported lifting some heavy concrete blocks, resulting in pain and reduced range of motion in his right shoulder. Claimant reported pain with internal rotation and elevation of the right arm. An MRI was performed that demonstrated some rotator cuff tendinosis, bursal inflammation, and mild to moderate arthritic changes of the GH joint. Claimant was diagnosed with right shoulder rotator cuff syndrome and referred for physical therapy. Claimant refused steroid injections, indicating that he had them in the past and they were not effective. (Ex. I). No additional records of prior medical treatment for Claimant's right shoulder were offered or admitted into evidence.

3. Following his January 19, 2023, fall Claimant was first seen at Kaiser. Claimant reported he fell onto his right shoulder and heard a "pop." X-rays of his right shoulder were interpreted as showing no acute bony abnormality, but demonstrated a nonspecific widening of the acromioclavicular (AC) distance which could be due to "erosion, prior surgery or old trauma." It was also determined that Claimant had moderate AC osteoarthritis, mild glenohumeral (GH) osteoarthritis, and degenerative cysts in the humeral head. (Ex. 5).

4. Later that day, Claimant saw Lacie Esser, PA-C at Concentra. Claimant reported wiping snow off a car when he slid and landed on his right shoulder. Claimant reported going to Kaiser earlier in the day for x-rays, and indicated he was told he may have had a torn rotator cuff. Ms. Esser noted tenderness in the right shoulder, mostly lateral and anterior with limited range of motion and pain in all planes. She diagnosed Claimant with a right shoulder sprain and contusion. Claimant was referred to orthopedist Michael Hewitt, M.D., for physical therapy, and for a right shoulder MRI. (Ex. 6)

5. The right shoulder MRI was performed on January 20, 2023, and interpreted as showing advanced GH arthritis, extensive tearing of the superior to posterior glenoid labrum, and rotator cuff tendinopathy, but no full thickness tear. (Ex. 7)

6. Claimant returned to Ms. Esser on January 23, 2023. Claimant had minimal to no motion in the shoulder with significant pain. Ms. Esser indicated the MRI showed an extensive labral tear and partial rotator cuff tear, and significant GH arthritis. Claimant was assigned work restrictions to include no use of the right upper extremity and no driving. (Ex. 6).

7. Claimant began physical therapy for his right shoulder on January 24, 2023, and attended approximately 25 visits through April 24, 2023. (Ex. F). Claimant's right shoulder range of motion improved with physical therapy, but he continued to report significant pain in the right shoulder.

8. On January 31, 2023, Respondents filed a General Admission of Liability, admitting for medical benefits and temporary total disability benefits.

9. On February 6, 2023, Claimant saw Dr. Hewitt at Concentra. Claimant reported that he had undergone rotator cuff and labral repair approximately twenty years earlier. Dr. Hewitt reviewed Claimant's MRI films and indicated that Claimant had advanced arthritis pre-existing his work injury. In discussing potential surgical options, Dr. Hewitt indicated he did not believe shoulder arthroscopy would provide significant long-term benefits, and that surgery would require a joint replacement (a procedure Dr. Hewitt does not perform). He then referred Claimant to Nathan Faulkner, M.D., at Orthopedic Centers of Colorado (OCC) for further evaluation. (Ex. 6).

10. Claimant saw Dr. Faulkner on February 24, 2023. Claimant reported falling on his right side and feeling a pop in his shoulder with immediate pain. He advised Dr. Faulkner of his prior right rotator cuff/labral repair, and indicated he was doing very well until his injury. Dr. Faulkner reviewed Claimant's MRI films and interpreted them as showing advanced GH and moderate AC degeneration with several subchondral glenoid cysts, mild bursal-sided fraying of the supraspinatus, moderate partial articular subscapularis tearing, and but the rotator cuff was otherwise intact. Dr. Faulkner noted that Claimant had tried anti-inflammatories and physical therapy without significant relief. Dr. Faulkner completed a WC 164 form listing Claimant's work-related diagnoses as right shoulder degenerative joint disease and partial rotator cuff tear. He recommended a right total shoulder arthroplasty. (Ex. 8).

11. On March 2, 2023, Dr. Faulkner's office submitted a surgical request to Insurer, requesting authorization of total shoulder arthroplasty[1]. (Ex, 8).

12. On March 8, 2023, Insurer submitted Dr. Faulkner's surgical request to Jon Erickson, M.D., for utilization review. Dr. Erickson indicated that he did not see evidence of acute injury on Claimant's MRI report, or evidence of aggravation or worsening of Claimant's preexisting conditions. He opined that the surgery, the need for surgery was

[1] The Request for Authorization sought approval of a reverse total arthroplasty. Dr. Faulkner later noted that this was a mistake, and the recommended surgery was an anatomic right total shoulder arthroplasty. (Ex. 8).

to address Claimant's pre-existing conditions, rather than his work-related injury, and recommended denial of the authorization. (Ex. 8).

13. On March 13, 2023, Claimant had an increase in his symptoms after he braced his arm against a car dashboard when a car pulled in front of his wife's vehicle. Claimant reported the incident to his physical therapist, although the therapist noted that Claimant's tolerance for therapy on that day was poor due to his pain, Claimant's tolerance for treatment returned to normal at the following visit. At Claimant's March 23, 2023, visit, the physical therapist noted decreased range of motion since the incident. (Ex. F).

14. On March 15, 2023, Dr. Faulkner authored a letter responding to Dr. Erickson's opinion. Dr. Faulkner indicated that the lack of MRI evidence of an acute injury does not rule out an exacerbation of pre-existing conditions. He indicated that in a case of advanced arthritis, it is less common to see signs of injury on MRI. He noted that Claimant had objective findings of exacerbation including significantly decreased range of motion caused by his work injury (*i.e.*, barely able to lift his arm above 90 degrees). He opined that the recommended surgery (anatomic total shoulder replacement) was the best option to restore Claimant to his pre-injury status. (Ex. 8).

15. Dr. Erickson authored a response to Dr. Faulkner's letter on March 28, 2023, in which he opined that "the simple complaint of pain and limitation of range of motion is not considered an objective abnormality as evidence of aggravation or worsening." He recommended that Claimant's MRI be reviewed by "an expert" to look for evidence of an acute injury, and if evidence was found, the requested surgery should be approved. (Ex. H).

16. On April 3, 2023, Dr. Erickson authored a third report in which he indicated that he had reviewed the Claimant's MRI films, and found no evidence of acute injury. He opined that Claimant's January 19, 2023 fall "did not result in any significant worsening or aggravation of his pre-existing condition and that the increase in his symptoms are more likely than not due to the progression of his significant arthrosis." (Ex. H). Dr. Erickson's opinion that Claimant's sudden progression of symptoms following his January 19, 2023 fall were merely the progression of his pre-existing condition is neither credible nor persuasive.

17. On April 3, 2023, Claimant reported to his physical therapist that his car door struck him in the front of his right shoulder causing increasing pain and popping, prompting Claimant to wear a sling over the weekend. The therapist noted decreased range of motion due to this incident.

18. Claimant continued to follow up with physicians at Concentra through July 6, 2023. At Claimant's last documented visit with Theodore Villavicencio, M.D., he reported that his shoulder had not improved, and that he continued to experience high levels of pain. On examination, Dr. Villavicencio noted that Claimant remained symptomatic with shoulder pain, limited range of motion in all planes and limited functional status. As of July 6, 2023, Claimant remained subject to work restrictions, including no use of the right arm, and no driving for work. (Ex. E).

19. On June 29, 2023, Claimant underwent an independent medical examination (IME) with Mark Failinger, M.D., at Respondents' request. Dr. Failinger authored a report (Ex. C), and his testimony was presented through a pre-hearing deposition. Dr. Failinger was admitted as an expert in orthopedic surgery. Dr. Failinger opined that the surgery requested by Dr. Failinger is not causally related to Claimant's work injury. He indicated that Claimant's MRI films do not demonstrate objective evidence of an acute injury or new pathology in the Claimant's shoulder. He indicated that Claimant's right shoulder was a significantly degenerated joint, and that it could become symptomatic at any time and with no injury, or mild injury. In substance, Dr. Failinger opined that Claimant's MRI did not demonstrate an objective change in the pathology of Claimant's right shoulder, thus the need for surgery was unrelated to his work-injury, and that his need for surgery was solely due to his pre-existing condition. Dr. Failinger's opinion is not persuasive.

20. At hearing, Claimant testified that since his January 19, 2023 injury, he now has significant limitations using his right arm that did not exist prior to his injury. These include difficulty opening car doors, eating, cutting food, putting, using his cane, and doing other household chores with his right arm. He testified that his wife assists him in getting dressed and bathing. He testified that he can only lift his right arm to approximately his shoulder level. He testified, credibly, that he could perform these tasks prior to his injury.

CONCLUSIONS OF LAW

Generally

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

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

matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

SPECIFIC MEDICAL BENEFITS (Shoulder Surgery)

Respondents are responsible for medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S. When respondents challenge a claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits, including the causal relationship. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Trans. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009); Snyder v. Indus Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997). Whether a claimant meets his burden of proof is a question of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

"Further respondents are liable if employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for treatment." *Snyder, supra*. "Pain is a typical symptom from aggravation of a pre-existing condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition." *Id*. That is, the need for treatment must be proximately caused by the aggravation, and not simply as direct and natural consequence of the preexisting condition. *Witt v. James. J. Keil*, W.C. No. 4-225-334 (ICAO April 7 1998). This includes circumstances where a claimant has pre-existing arthritic conditions that are aggravated and result in the need for surgery. *See e.g., In re Claim of Johnson*, W.C. No. 4-963-269-01 (ICAO Nov. 24, 2015). "[W]hether there is a sufficient nexus or causal relationship between the claimant's employment and the injury is one of fact, which the ALJ must determine based on the totality of the circumstances." Id., citing In Re Question Submitted by the United States Court of Appeals, 759 P.2d 17 (Colo. 1988).

Claimant has established that the surgery proposed by Dr. Faulkner is causally related to Claimant's January 2023 work injury. There appears to be no dispute that Claimant's MRI does not demonstrate objective evidence of acute pathology in Claimant's shoulder. However, the Claimant's right shoulder was functional and minimally symptomatic prior to his January 19, 2023 fall. Prior to his work injury, Claimant was able to perform his job, including driving a car, and perform household tasks, and personal care. Immediately after his injury, and continuing at least through hearing, Claimant's right shoulder has greatly diminished range of motion and function. Respondent's contention

that the March 13, 2023 and April 3, 2023 incidents that caused temporary increases in Claimant's symptoms constitute intervening incidents is not persuasive. Dr. Faulkner recommended surgery based on Claimant's condition before these incidents occurred, thus, the need for surgery arose independent of these incidents, which may have further aggravated his underlying condition.

The ALJ finds credible Dr. Faulkner's opinion that the treatment most likely to return the Claimant to his pre-injury status is the recommended total shoulder arthroplasty. The ALJ does not find persuasive the opinions of Dr. Failinger and Dr. Erickson that Claimant's current symptoms and need for surgery are unrelated to his January 19, 2023 fall, or his condition is simply a progression of his pre-existing condition that coincidentally began to worse immediately after his work injury. While Claimant's pre-existing condition likely contributes to his symptoms, but for his work injury, he likely would not require the surgery recommended. The ALJ finds that, more likely than not, Claimant's industrial injury has combined with his preexisting conditions to cause the need for the recommended surgery.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the total shoulder arthroplasty recommended by Dr. Faulkner is granted.

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

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

DATED: September 18, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-214-571-001

ISSUES

- What is Claimant's Average Weekly Wage?
- Did Respondents prove they are entitled to modify terminate or suspend TTD based on Claimant's voluntary termination?

FINDINGS OF FACT

1. Claimant worked for employer as a meat/produce team associate.

2. Claimant gave his notice of his voluntary resignation prior to his injury. The notice was given on August 5, 2022 and he intended to stop working August 11, 2022 which was the last day of the pay period.

3. Claimant sustained an admitted injury to his low back while lifting a watermelon on August 11, 2022. He experienced deep shocking pain from his back into his legs. He rated his pain as a 9 ½ out of 10. The injury occurred on the Claimant's intended last day of work.

4. The general admission of liability was filed on September 7, 2022. Respondents filed a petition to modify, terminate or suspend benefits on January 24, 2023. As grounds for the petition, Respondents stated "[Redacted, hereinafter MW] was returned to work with restrictions on 9/15/2022 per Dr. Quackenbush. Light duty was available. . . Voluntary terminated employment before a light duty position could be offered". Claimant timely objected to the petition.

5. At the time of his injury Claimant's hourly rate was $16 per hour for 32 hours per week. However, the weekly hours varied. He also received quarterly bonuses of $300 that were based on the store's performance and the employee's performance.

6. Claimant participated in the Employers' 401K program where the employer matched 6% of Claimant's wages.

7. After he reported his injury, he received treatment at Centura Health. He was initially seen at Centura Health on the date of the injury. He was taken off work. On the following day, he was seen by Mr. Quakenbush, a physician's assistant. He ordered an MRI on August 12, 2022. The MRI showed mild disc desiccation at L5-S1 as well as small central and left paracentral disc herniation resulting in impingement left S1 nerve root and mild encroachment of the right S1 nerve root. He was again taken off work with

a return visit scheduled for August 15, 2022. He did return to Centura on August 15, 2022 and was again restricted from work. He was restricted to modified work with no lifting, carrying, pushing or pulling more than 5 pounds and limited to sedentary office work. Claimant was not notified that he was released to return to modified duty.

8. The employer did not offer the Claimant modified job within his restrictions.

9. On August 26, 2022 Claimant returned to Centura and referred to Dr. Sparr and was prescribed physical therapy and massage therapy. The Claimant continued to be restricted from work, with the anticipation that he might be restricted to modified work at the next visit.

10. Mr. Quakenbush referred Claimant to Dr. Stanton who in turn referred him to Dr. Malinky.

11. On January 31, 2023, Physician's Assistant Quackenbush again restricted Claimant from all work activities. (Exhibit F, p. 351).

12. In the twelve-week period predating August 11, 2023 the claimant's "regular" earnings, overtime earnings and bonus earnings, totaled $5,393.18. This results in an average weekly rate of $449.43. I find that this figure best represents the Claimant's earnings for a fair average weekly wage. This results in a TTD rate of $299.62.

CONCLUSIONS OF LAW

A. Generally

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

respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

B. Temporary Total Disability

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

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." A claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

It is well established that a claimant who voluntarily resigns his job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont*

Toyota, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (April 24, 2002). I conclude that on based on Claimant's testimony, which is credible, Claimant did voluntarily resign his job on August 5, 2023, effective for August 11, 2023.

Having determined that Claimant was responsible for his termination, Respondents are entitled to prospective relief from the admission filed September 7, 2022. C.R.S. §8-43-203(2)(d), *HLJ Management Group v. Kim, 804 P.2d 250 (Colo. App. 1990).* At the hearing, counsel for Respondents conceded that Respondents were liable for TTD beginning on January 30, 2023. Similarly, Respondents again conceded in their proposed order that Respondents were liable for TTD beginning On January 31, 2023 when Claimant was again restricted from all work activities. (Proposed Order Finding of Fact 16).

C. AVERAGE WEEKLY WAGE

Section 8-40-201(19)(a), C.R.S., provides, "'Wages' shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied". Section (19)(b) goes on to provide, "[T]he term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined

from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19). [Emphasis supplied]. The Employer's matching contribution to the claimant's 401K plan is not analogous to "board, housing, lodging, or any other similar advantages." See Gregory v. Crown Transportation, 776 P.2d 1163 (Colo.App.1989) (FICA tax payments are not wages under § 8–47–101(2) for purposes of calculating average weekly wage). To the extent the claimant seeks to include the value of the Employer's 401K matching contributions to his average weekly wage the request is inconsistent with the applicable statute and is denied.

Section 8-42-102(4), C.R.S., provides, "[W]here the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from said daily wage in the manner set forth in paragraph (c) of this subsection (2). The entire objective of wage calculation under the Act is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Campbell v. IBM Corporation, 867 P.2d 77 (Colo. App. 1994). I conclude that while the bonuses were discretionary they were paid in the past and constituted part of the wages paid to Claimant. I conclude that a fair calculation of the wages would be to include the bonuses, as an average, to be added to his average weekly wage.

ORDER

It is therefore ordered that:

1. Respondents are entitled to withdraw their admission for TTD benefits prospectively beginning the date of their petition to modify terminate or suspend compensation, namely January 24, 2023 until January 30, 2023, as requested by Respondents.

2. The Claimant's average weekly wage is $449.43. This results in a TTD rate of $299.62.

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

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

DATED: September 19, 2023

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the recommended surgical treatment is reasonable, necessary and related to the May 4, 2022 industrial injury.

FINDINGS OF FACT

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

1. Claimant worked for Employer as an Overnight Stocker. On May 4, 2022, Claimant suffered an admitted injury in the course and scope of her employment. She was on a ladder working when she slipped and slid down the last three steps of the ladder. Claimant testified she landed on her left ankle, then her buttocks, and eventually fell back on her arm. (Tr. 10:8-17).

2. Claimant testified on cross-examination that she fell approximately one foot. (Tr. 16:7-12). On redirect, Claimant testified she meant to say she fell closer to three feet. (Tr. 22:22-24). Claimant consistently told her medical providers that she fell approximately one foot. (Ex. E). The ALJ finds that Claimant fell approximately one foot.

3. Following the accident on May 4, 2022, Claimant sought treatment at the emergency department at Swedish Hospital (Swedish). Claimant told the providers at Swedish she injured her left ankle after falling about one foot off a ladder while at work. Claimant reported falling on her left foot and twisting her left ankle. The pain radiated from her left ankle to her leg. Ariel Chez, M.D. examined Claimant and documented tenderness over her left midfoot and lateral malleolus of the ankle, as well as the distal lateral tibia/fibula. Claimant had full passive range of motion of the left ankle mortise but with pain. Claimant had x-rays taken of her left foot, left ankle, and left tibia/fibula. The x-rays were negative for acute fractures or dislocations. Claimant was discharged home with an Ace wrap for comfort. (Ex. E).

4. The following day, May 5, 2022, Claimant was evaluated at CareNow Urgent Care (CareNow). Claimant told Jennifer Tetrault, P.A., she fell off a one-foot ladder at work, landed on her left foot, and twisted her left ankle. She told Ms. Tetrault that she injured her left ankle the previous year, and was diagnosed with an avulsion fracture. Ms. Tetrault examined Claimant and found she had no swelling or mass of her ankle, foot, or toes. There was no ecchymosis or rash of the ankle, foot, or toes. Claimant was diagnosed with a sprain of an unspecified ligament of her left ankle. She was given an ankle brace, and released to return to work with a restriction of seated duties only. If she did not improve, Ms. Tetrault would recommend physical therapy. (Ex. F).

5. Claimant returned to CareNow on May 11, 2022 for a follow-up appointment. She reported slight improvement in her symptoms and denied any swelling or ecchymosis. Claimant complained of tingling in her great left toe. Claimant's work restrictions remained. On May 18, 2022, Claimant was referred for physical therapy, twice a week for four weeks. (Ex. F).

6. At her follow-up appointment at CareNow on June 21, 2022, Claimant reported feeling better, and having less pain. She also told the provider that she still had numbness at the 1st MTP joint. Claimant felt like she could do more at work. Her previous work restrictions were lifted, but Claimant could still have breaks every hour as needed. Ms. Tetrault put in a referral to an orthopedic doctor to "evaluate continued numbness in the great toe." (Ex. F).

7. Claimant was seen at CareNow on September 9, 2022 for a follow-up appointment. She reported improvement in her symptoms, but also reported tripping at home because her ankle gave out. On physical exam, Claimant had a normal gait and posture. There was no swelling or bruising of the ankle, foot or toes. Claimant had normal active and passive range of motion of her ankle and foot. Ms. Tetrault noted in the record that she wanted Claimant to finish physical therapy to fully strengthen her ankle and foot, but anticipated closing Claimant's case at the next visit. (Ex. F).

8. Claimant first saw Stuart Myers, M.D., an orthopedic surgeon on September 27, 2022. Dr. Myers noted in the record that Claimant presented "for an evaluation of the ankle." Dr. Myers made no reference to the numbness in Claimant's toe. He noted Claimant was diagnosed with a sprain as a result of her May 4, 2022 injury. He further noted a prior October 25, 2021, left ankle injury treated by immobilization and physical therapy. Dr. Myers's impression was "multiple left ankle injuries culminating in workplace injury May 4, 2022, with ongoing symptoms." (Ex. H).

9. Dr. Myers referred Claimant for a left ankle MRI. The October 5, 2022, MRI was read as showing a previous high-grade/complete avulsion of the anterior talofibular and possibly calcaneofibular ligament from the distal fibula with a nondisplaced osseous fragment. A small chronic focus of subchondral cyst formation in the central talar dome with no discrete chondral defect, loose body, or joint effusion was also identified. Based on the MRI findings, Dr. Myers requested prior authorization to perform an ankle arthroscopy and Brostrom procedure with excision of the distal fibular ossicle. (Ex. H).

10. On December 16, 2022, Timothy O'Brien, M.D., conducted an Independent Medical Evaluation (IME) of Claimant. (Ex. K). Based on the opinions expressed in Dr. O'Brien's IME report, Dr. Myers' surgery request was denied. (Ex. 7).

11. Dr. O'Brien testified via deposition in support of his IME. Dr. O'Brien's opinion was influenced by Claimant's prior history of left ankle injuries, the associated pain, and Claimant's medical history. He noted that on September 18, 2018, Claimant went to the Federico F. Pena Family Health Center because of chronic left ankle pain. Claimant had fallen out of a truck a month prior and had sprained her ankle. Claimant, now four weeks later, still had constant pain in her left ankle, at a level of 7/10, with significant swelling,

lateral malleolus tenderness, and she had difficulty walking. Claimant was given an air cast and home exercises. (Ex. D).

12. Dr. O'Brien also noted that on October 26, 2021, Claimant sought treatment at the emergency room at Swedish after falling on the stairs and landing hard on her left ankle. X-rays of Claimant's left ankle were read as showing a possible osteochondral defect in the talar dome. The providers at Swedish imposed work restrictions, prescribed Norco for pain control, NSAID, RICE, and orthopedic follow-up if Claimant failed to improve as expected. (Ex. E).

13. Claimant did not improve, so she was evaluated by orthopedic surgeon, Joseph Assini, M.D., on November 2, 2021. Claimant told Dr. Assini she had a rollover injury and sustained an avulsion fracture to the left fibula. On physical exam, Claimant walked in a walking boot with a notable antalgic gait. She had significant pain over the distal fibula, especially over the tibial-fibular area anteriorly and over the anterior aspect of the fibula. There was an effusion anterolaterally. Her left ankle range of motion was limited by pain. Claimant was prescribed a knee scooter, and she was to continue using the walking boot. She was instructed to avoid weight bearing on the left as much as possible.

14. Claimant returned to see Dr. Assini on November 30, 2021, with ongoing complaints of left ankle pain. The x-rays confirmed a small avulsion fracture off of the distal fibula. She was instructed to continue in the boot for two weeks, following which she could transition to an ASO brace. Dr. Assini referred Claimant to physical therapy. (Ex. G).

15. Claimant started physical therapy on January 3, 2022. She reported pain in the left ankle when she moved in certain ways, but the pain was not constant. At times, she rated the pain as high as a 10/10, but this level of pain was short lived. Claimant noted difficulty walking and stiffness of the left ankle. On assessment, the physical therapist documented notable limitations in Claimant's left ankle range of motion. The recommended physical therapy was intended to decrease pain, improve balance, increase range of motion, increase strength, and return Claimant to work. Claimant continued physical therapy through April 7, 2022, although her participation was not consistent. The physical therapist noted that Claimant continued to complain of anterior ankle pain with soleus stretches and mobilizations. The physical therapist, however, was unable to assess Claimant's current understanding of her prognosis and home exercise program due to Claimant not completing her plan of care. On April 7, 2022, Claimant was discharged from physical therapy for failure to complete her plan of care and noncompliance. (Ex. I).

16. Claimant testified that prior to the May 4, 2022 work-related injury, she only experienced pain in her left ankle every once in a while when walking. She described the pain as feeling like a pinch or twitched nerve. Claimant testified that since the May 4, 2022 injury whenever she stands up, it feels like she is standing on pins and needles. (Tr. 13:5-25).

17. Claimant's testimony was not consistent with the medical records. From January through April of 2022, Claimant was reporting left ankle pain. (Ex. I). Based on the totality of the evidence, the ALJ finds that Claimant experienced left ankle pain prior to the admitted May 4, 2022 work injury.

18. Dr. O'Brien credibly testified that, based on his review of the physical therapy notes, Claimant's left ankle joint had not healed by April 7, 2022, less than one month prior to her work injury. Claimant's ankle remained inflamed, dysfunctional and unstable. (Depo. Tr. 22:14-17).

19. Claimant's October 5, 2022 imaging showed a previous high-grade/complete avulsion of the anterior talofibular and possibly calcaneofigular ligament from the distal fibula with a nondisplaced osseous fragment. In his October 31, 2022, treatment note, Dr. Myers specifically relates the need for the requested surgery to "the findings on the MRI". (Ex. H).

20. Dr. O'Brien credibly testified that the October 5, 2022, MRI findings, including the high-grade/complete avulsion of the anterior talofibular and calcaneofibular ligament from the distal fibula with a nondisplaced osseous fragment were present on the October 26, 2021, imaging. The radiologist interpreting the October 5, 2022, MRI read it as showing a ***previous*** high-grade/complete avulsion of the anterior talofibular and possible calcaneofibular ligament from the distal fibula with a nondisplaced osseous fragment. (emphasis added). Dr. O'Brien credibly testified the findings on the October 5, 2022, MRI are chronic and unrelated to the May 4, 2022, work incident. He further credibly testified the findings on the October 5, 2022, MRI were not aggravated or accelerated by the May 4, 2022, work incident. (Depo. Tr. 34:24-35: 25 and 41:17-42:8).

21. Dr. O'Brien credibly testified that while the surgery requested by Dr. Myers is reasonable, it is unrelated to the May 4, 2022, work incident. Dr. O'Brien credibly testified the surgery requested by Dr. Myers is to repair ligaments that have been incompetent for years and to address a bone fragment that was pulled off in 2018 or 2021. (Depo. Tr. 40:12-24). Dr. O'Brien credibly testified that the May 4, 2022, incident did not accelerate Claimant's need for surgery. (Depo. Tr. 47:3-9).

22. Dr. Myers disagreed with Dr. O'Brien and asserted that the May 4, 2022, accident permanently exacerbated Claimant's pre-existing condition. Dr. Myers argues, "Dr. O'Brien concludes that any symptoms currently being experienced are related to her prior injury and not that from May 04, 2022. In other words Dr. O'Brien indicates it is plausible that [Claimant] had symptoms following her first injury of November 2021 up until March 2022 which ceased to be present after her injury in May. The symptoms would then have had to again arise from a period of being asymptomatic later that year when she was referred to me, specifically for this issue. It is not plausible that the patient will be symptomatic for five months after an injury, then following a re-injury ceases to have symptoms to the affected body part for five or six months and then would out of nowhere resume having symptoms prompting orthopedic referral. In fact, it is much more likely that after her injury in November 2021, she had ongoing symptoms, but was functional and

making progress with physical therapy then following re-injury had a setback that has led to the current predicament." (Ex. 4).

23. There is no objective evidence in the record that Claimant ceased having symptoms with her left ankle after March 2022. Claimant was dismissed from physical therapy because of her non-compliance, not because she was functional and making progress. Further, Claimant was referred to Dr. Myers for numbness in her great toe, not for her ankle.

24. Dr. Myers' opinion is credible, and he certainly wants to help Claimant. The ALJ, however, does not find his opinion regarding the recommended surgery being related to the May 5, 2022 injury to be persuasive.

25. Dr. O'Brien credibly testified that Claimant's May 4, 2022 injury was not significant, as indicated by the lack of swelling, bruising, or redness. If a tissue tears there is almost always bruising and swelling. (Depo. Tr. 10:1-13). Dr. O'Brien further testified that Claimant has an unstable ankle, and was a candidate for the recommended surgery prior to the May 4, 2022 injury. The May 4, 2022 injury did not accelerate the need for the surgery. (Depo. Tr. 45:18-47:9). The ALJ finds Dr. O'Brien's testimony credible and persuasive.

26. The ALJ finds that Claimant has a preexisting chronic left ankle, and the May 4, 2022 injury did not exacerbate or aggravate her pre-existing condition.

27. Based on the totality of the evidence, the ALJ finds that the surgery recommended by Dr. Myers is not causally related to Claimant's May 4, 2022 injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the

evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1), C.R.S.; *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Snyder*, 942 P.2d at 1339. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and is reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colo., Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). It is the ALJ's prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met her burden of proof. *Id.* (citing *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999)).

As found, Claimant's work-related injury on May 4, 2022 was not a significant injury. There is no objective evidence that Claimant's left ankle was ever swollen, red or bruised following this injury. Dr. O'Brien credibly testified that when a tissue tears there is almost always bruising and swelling. (Finding of fact ¶ 25). Claimant has chronic left ankle pain related to previous injuries, and the May 4, 2022 injury did not exacerbate or aggravate her pre-existing condition. (Finding of fact ¶ 26) As found, Claimant was a candidate for surgery before the May 4, 2022 injury. (Finding of fact ¶ 25).

Dr. O'Brien and Dr. Myers agree that the recommended surgery is reasonable and necessary. As found, however, Dr. O'Brien's opinion regarding causality is more persuasive. (Finding of fact ¶ 24). Based on the totality of the evidence, Claimant has failed to prove, by a preponderance of the evidence, that the surgery requested by Dr.

Myers is related to the admitted May 4, 2022, work injury. Here, the evidence presented persuades the ALJ that the testimony and opinions of Dr. O'Brien are the most credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant's left ankle condition is not causally related to the May 4, 2022 industrial accident. Claimant's request for Respondents to authorize and pay for the recommended surgical treatment to her left ankle, is dismissed and denied.

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

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

DATED: September 19, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-211-460-001

ISSUES

I. Whether Claimant suffered a compensable injury.

II. Whether Claimant is entitled to temporary total disability benefits from May 26, 2022 through July 13, 2022.

III. Whether Claimant is entitled to medical benefits.

STIPULATIONS

1. Claimant's average weekly wage is $1,301.90.

2. If the claim is compensable, Claimant will receive temporary total disability benefits from May 26, 2022 through July 13, 2022.

3. If the claim is compensable, the surgery Claimant underwent is reasonable, necessary, and related.

FINDINGS OF FACT

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

1. Claimant, who was 57 on the date of the alleged accident, has worked for Employer as a "lumper" unloading trucks for about 15 years.

2. Claimant's job requires him to unload and move boxes that weigh up to 65 pounds.

3. On May 24, 2022, or May 25, 2022, Claimant was lifting and moving boxes at work and developed pain in his abdomen. As the day went on, his abdominal pain got worse. At some point, his abdominal pain got so bad, he told his supervisor, [Redacted, hereinafter JM], that he could no longer work that day due to his abdominal pain and left work early. Claimant did not, however, tell his supervisor that lifting and moving boxes at work caused his pain.

4. On May 26, 2022, Claimant still had bad abdominal pain, Thus, Claimant went to the emergency room at Platte Valley Medical Center. The medical records from this visit do not state Claimant injured himself while lifting and moving boxes at work. The records also do not indicate that Claimant alleged this was a work-related injury. The records do indicate that Claimant was "uninsured" and was a "self-pay." (*Resp. Ex., Page 38 and 50*.) As a result, it does not appear Claimant told them that he injured himself while lifting or moving boxes at work and that this was a work-related injury.

5. The medical report from his May 26, 2022, does note that Claimant's pain developed the day before. The report also states a horse kicked Claimant when he was seven years old and living in Mexico and that he suffered a bowel injury that required surgery.

6. At the emergency room, the doctor performed a physical examination and noted the surgical scar from Claimant's prior bowel surgery as a child as well as a current palpable hernia. Due to his findings, the doctor ordered a CT scan. Claimant underwent the CT scan and the scan showed a ventral hernia with small bowel obstruction – an incarcerated hernia. Based on having a bowel obstruction - an incarcerated hernia - Claimant required surgery that day.

7. After learning that he required surgery, Claimant called his supervisor, JM[Redacted], and told him that he had to have surgery that day and would be unable to return to work. Claimant, however, did not specifically tell his supervisor that he injured himself at work and needed surgery due to a work injury. After speaking with his supervisor, Claimant underwent surgery to repair his hernia and obstructed bowel.

8. On July 2, 2022, Claimant, who only speaks Spanish, completed an Employee Accident/Incident Statement with help from someone else. First, the statement indicates at the top of the Statement that the incident occurred on May 26, 2022, and that he reported it on May 26, 2022. The Statement later indicates the incident happened on the 25th. The Statement provides:

> I was feeling pain since 5/25 and let my supervisor know that I was having pain. Next day I went to emergency [room] in the afternoon the next day and doctors informed me I needed emergency surgery. I called JM[Redacted] to let him know I was going to have the surgery and that I was told the hernia was caused from heavy lifting at work.

9. Respondents retained Kathleen D'Angelo, M.D., to perform an Independent Medical Examination to determine the cause of Claimant's hernia and bowel obstruction. Dr. D'Angelo attempted to take a detailed history from Claimant to determine how and when he suffered his hernia and whether it was work related. In taking his history, she asked Claimant whether he was claiming that his pain developed due to a discrete event, or whether it came on gradually due to lifting and moving several boxes over time. Claimant was equivocal in answering her questions. At one point, Claimant could not tell her whether lifting or moving a single box caused his pain, or whether lifting and moving many boxes over time caused his pain. At another point, Claimant said he felt pain develop after he pushed some boxes. In the end, Claimant basically told her that he was lifting and moving boxes at work one day and developed stomach pain that prevented him from working the rest of his shift.

10. As part of her IME, Dr. D'Angelo went through several inconsistencies in Claimant's version of events when compared to statements or information contained in the medical records. For example, she pointed out that Claimant said he injured himself on May 24, 2022, but the medical records from May 26th, state Claimant developed pain the day before, May 25th. She also pointed out that none of the medical records from the emergency room state Claimant said he hurt himself at work.

11. After going through some of the factual inconsistencies in the record, Dr. D'Angelo addressed the medical causation issue. She stated that Claimant sustained an incisional hernia. She then stated that the primary etiology of an incisional hernia is weakness at a prior incisional site. She then provided additional risk factors for developing incisional hernias. These risk factors include obesity, smoking history, and chronically increased intraabdominal pressure associated with constipation, sneezing, and chronic coughing. Lastly, she also stated that heavy lifting could also cause incisional hernias because it increases the intraabdominal pressure. That said, in the end, she concluded that based on the inconsistencies in the record, combined with the other factors that can cause an incisional hernia, Claimant's incisional hernia was not work related.

12. Dr. D'Angelo, did not, however, adequately address how Claimant's daily job, of lifting and moving heavy boxes all day, which she agreed increases intraabdominal pressure, is not the most likely cause of Claimant's incisional hernia based on the temporal relationship between his work and the development of his symptoms. Instead, Dr. D'Angelo spent most of her report determining the credibility of Claimant based on the inconsistencies in the medical record and Claimant's lack of clarity during her IME. In essence, she provided more of a credibility opinion than a medical opinion. In the end, the ALJ credits a portion of her report. The ALJ credits that portion of her report that indicates a prior abdominal surgery can result in weakness at the prior incisional site and make someone more susceptible to an incisional hernia. The ALJ also credits that portion of her report that indicates the potential causes of an incisional hernia, which Claimant developed, includes lifting since it increases the intraabdominal pressure. The ALJ does not, however, credit or find persuasive her ultimate opinion that Claimant's incisional hernia was not caused by lifting at work.

13. Claimant also testified at the hearing. Claimant is not found to be a good historian regarding when and what he was doing when he developed abdominal pain. That said, the ALJ does find Claimant credible regarding his job duties and that he developed abdominal pain while moving boxes at work and told his supervisor the day of the accident that he developed abdominal pain and could no longer work.

Ultimate Findings of Fact

14. Claimant underwent abdominal surgery in Mexico when he was about 7 years old. The prior surgery resulted in an incision that made Claimant more susceptible to an incisional hernia.

15. Claimant's job duties required him to move heavy boxes. Moving and pushing boxes on May 24th or May 25th, 2022, caused an increase in Claimant's intraabdominal pressure and caused Claimant's incisional hernia that resulted in abdominal pain and an obstructed bowel.

16. Although Claimant's prior abdominal surgery combined with his obesity, and history of smoking, predisposed Claimant to suffer an incisional hernia, the primary and proximate cause of Claimant's incisional hernia was his lifting and moving boxes at work on May 24th or May 25th of 2022.

17. The Claimant's incisional hernia did not result from the natural progression of a preexisting condition. The Claimant's incisional hernia and need for medical treatment was proximately caused by him moving boxes at work on May 24th or May 25, 2022.

18. The is no credible or reliable evidence to suggest that Claimant was equally exposed to the same intrabdominal pressure that caused his hernia while he was not working. It was the increase in intraabdominal pressure caused by lifting and moving boxes at work on May 24th, or May 25th, 2022, that caused his hernia.

19. Due to the incisional hernia caused by his job duties, which caused an obstructed bowel, Claimant needed immediate surgery, which he underwent on May 26, 2022, to cure and relieve him from the effects of his work injury. f

20. The surgery was reasonably necessary to treat Claimant from the effects of his work injury.

21. Due to his injury and subsequent surgery, Claimant was unable to perform his regular job duties and work from May 26, 2022, through July 13, 2022.

22. Claimant's average weekly wage is $1,301.90.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

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

I. Whether Claimant suffered a compensable injury.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Off.,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Moreover, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Med. Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

While an accidental injury must be attributable to a specific date, time, and place, it is not required that the exact date and time be identified. Rather, the ALJ may determine that the claimant's testimony of a specific incident attributed to a reasonably definite time is sufficient. See *Gates v. Central City Opera House Assoc*., 100, 108 P.2d 880, 883 (1940)("A time reasonably definite is all that is required."); see also *London v. Tricon Kent*, W.C. No. 3-993-471 (April 2, 1992)(it is not required that exact date and time be identified; rather, ALJ may determine that claimant's testimony of a specific incident attributed to a reasonably definite time is sufficient); see also *Puderbaugh v. Kabance Janitorial Serv.*, W.C. No. 3-895-248 (Jan. 8, 1990)(inconsistencies in the evidence concerning exact date on which injury occurred do not render claimant's testimony concerning occurrence of the injury incredible as a matter of law).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000).

The Court finds and concludes that while Claimant is inconsistent as to whether he injured himself on May 24th or May 25th, 2022, the Claimant's overall testimony and statements to medical providers is found to be consistent and credible. In essence, Claimant was lifting and moving boxes at work and developed severe abdominal pain on May 24th or 25th, 2002. On the same day he told his supervisor that he had stomach pain and could not continue working, went to the emergency room, was diagnosed with an incisional hernia, and had emergency surgery.

The Court has considered the opinions of Dr. D'Angelo. While Dr. D'Angelo was retained to provide a medical opinion about causation, she spent a disproportionate amount of time pointing out information that was not contained in the medical records and inconsistencies in Claimant's description of when he developed pain, instead of the consistency of the Claimant's development of pain while moving boxes at work, which she concluded can be a causative factor for the development of an incisional hernia. In other words, she spent more time assessing the Claimant's credibility than assessing whether Claimant's job duties caused his incisional hernia. As a result, the Court does not find her ultimate opinion, that the incisional hernia is not work related, to be persuasive. The Court does, however, credit and find persuasive that portion of her report that concludes that lifting does cause an increase in intrabdominal pressure which can result in an incisional hernia.

The Court is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship and that correlation is not causation. *See Shaffstall v. Champion Technologies*, W.C. No. 4-820-016 (March 2, 2011). On the other hand, the Court is also mindful of the fact that such logic may also yield inaccurate results, *i.e*., that sequence is not relevant to causation. *See Wilson v. City of Lafayette*, No. 07-cv-01844-PAB-KLM, 2010 U.S. Dist. LEXIS 24539, at *23 (D. Colo. Feb. 25, 2010).

In this case, the Court finds and concludes that the sequence of events is relevant to causation here. As a result, the Court finds and concludes that the temporal relationship between Claimant lifting and moving boxes at work and the development of his abdominal pain, combined with the diagnosis of a hernia, establishes a causal connection between his work and his hernia.

Claimant did have a prior bowel injury, for which he underwent surgery when he was about 7 years old, that predisposed him to an incisional hernia. But, on May 24 or 25th of 2022, Claimant was lifting and moving boxes at work. The work activities increased Claimant's intrabdominal pressure and caused Claimant to develop an incisional hernia, which required surgery and prevented Claimant from performing his job duties.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that he suffered a compensable injury in the form of an incisional hernia, which caused the need for his surgery and prevented him from performing his regular job duties.

II. Whether Claimant is entitled to temporary total disability benefits from May 26, 2022 through July 13, 2022.

Pursuant to the parties' stipulation, Claimant is entitled to temporary total disability benefits from May 26, 2022, through July 13, 2022.

III. Whether Claimant is entitled to medical benefits.

Pursuant to the parties' stipulation, Claimant is entitled to medical benefits, including hernia surgery.

ORDER

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

1. Claimant suffered a compensable injury in the form of an incisional hernia.
2. Respondents' shall pay for reasonable and necessary medical treatment provided to Claimant – which includes the hernia surgery.
3. Respondents shall pay Claimant temporary total disability benefits from May 26, 2022, through July 13, 2022, based on an AWW of $1,301.90.
4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: September 20, 2023.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-148-399-004

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment with Employer on August 27, 2020.

IF THE CLAIM IS FOUND COMPENSABLE, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 27, 2020.

III. Whether Claimant has proven what his average weekly wage was at the time of the incident in question.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 28, 2020 and continuing until terminated by law.

V. Whether Respondents have proven by a preponderance of the evidence that Clamant was terminated for cause.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, Clinica Family Health was the authorized treating provider with regard to the claim and that Claimant's average weekly wage was $103.85. The stipulations of the parties are approved and incorporated into this order.

FINDINGS OF FACT

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

1. Claimant was 74 years old at the time of the hearing. He worked for Employer as a dishwasher, one day a week, working the 2 p.m. to 9:30 p.m. shift. He would wash pots, pans, receptacles, platters, plastic containers that would be reused and other utensils. He had started working for Employer in approximately June 2020.

2. On August 27, 2020 Claimant injured himself at work while lifting a 10 lb. pot three quarters full of water and food debris, which weighed close to 50 lbs. total with contents. He lifted it up from the floor to the counter sink, and hurt his back in the process, though he was able to lift it all the way into the sink. Claimant continued working until the end of his shift, when he advised his supervisor and shift manager, M.M., who did not respond. Claimant left the restaurant and went home.

3. The following Monday he went to Clinica Campesina or Clinica Family Health to seek treatment. Claimant was advised that they were too busy with patients due to the COVID-19 pandemic. They instructed him to leave and return at a later time.

4. Claimant was due to return to work on Thursday, September 4, 2020. However, on September 1, 2020 Claimant received a call from Employer's representative, F.M. who terminated his employment.

5. Claimant returned to Employer's premises on September 4, 2020 in order to ask Ms. F.M. to send him to a doctor because of his back pain. He parked at the restaurant right next to Ms. F.M.'s car. He got out of his car and at that moment Ms. F.M. was coming out of the restaurant and got in her car. He tried to get her attention and she rolled up her car windows and did not respond to him, driving out of the parking lot.

6. Claimant returned to Clinica Family Health again on September 4, 2020. They could not see him again. However, on this occasions they provided him an appointment for September 16, 2020. He was attended at that time and provided prescriptions for medications. They gave him steroids, muscle relaxants, anti-inflammatories, as well as injections into the back, all of which helped, and recommended he use Tylenol. But the pain would come back. He was also, eventually given work restrictions of 10 lbs. lifting. He explained that the doctors were in the process scheduling more injections.

7. At one point his back pain was very intense and he went to Clinica for medical care but they sent him on to the emergency room at Avista Adventist Hospital, where they charged him $9,800, which continued to remain unpaid. He noted that approximately two months before the hearing he had received his last injection into his back and was provided with continued 10 lbs. restrictions.

8. Claimant filed a Workers' Claim for Compensation on September 10, 2020 stating that he was lifting a few pan/pots on August 27, 2020 at approximately 5 p.m. and felt a pop and sharp pain in his back. He noted that he had numbness in his legs. He reported the incident to M.M.

9. On September 16, 2020 Claimant was evaluated at Clinica Family Health related to a reported August 27, 2020 incident where Claimant was lifting a heavy pot and strained his back, causing mid back, low back pain, hip pain, and bilateral leg pain. Nurse Practitioner Jennifer Manchester noted Claimant continued with symptoms that radiated to both legs causing difficulty ambulating and had an onset of urinary hesitancy.

10. On September 18, 2020 Nurse Manchester restricted Claimant from work as of his date of injury and continuing, though stated he could return to work as of October 2, 2020 with a 20 lbs. restrictions. She recommended an MRI and referral to an orthopedic spine specialist, which Claimant declined as he did not have insurance or the means to pay for them.

11. Dr. Upasana Mohapatra at Clinica also evaluated Claimant on September 23, 2020 and continued Claimant's order to be off work. He noted that Claimant's pain persisted in the middle and low back as well as the bilateral legs, specifically radiating to the left and right thighs. He diagnosed acute midline thoracic back pain. He noted that Claimant previously had reported tenderness to palpation over the lumbar spine but it

was most pronounced over the thoracic spine with a positive straight leg test. He prescribed oxycodone and cyclobenzaprine, an antidepressant. He ordered a thoracic x-ray and continued to recommend further diagnostic testing, which Claimant declined due to the cost.

12. On October 23, 2020 Dr. Mohapatra stated that Claimant continued to be unable to work. He noted that Claimant had pain in the middle back, low back and gluteal area with pain radiating down the left thigh and calf. Dr. Mohapatra continued to keep Claimant off work on November 23, 2020 noting that Claimant continued to have low back pain with radiculopathy affecting the lower extremity. His work status continued on December 13, 2021. In January 2021 his Clinica providers noted Claimant now had depressed mood related to his inability to provide for his family due to his ongoing chronic low back pain. In February 2021 Claimant was noted to have continued chronic low back pain with continued urinary hesitancy. This pattern continued with assessments of lumbar back pain with radiculopathy affecting the lower extremity, continued medications for both pain and depression related to the trauma.

13. On April 13, 2021 Claimant was evaluated by physiatrist Greg Reichhardt, M.D. for an Independent Medical Evaluation (IME) at the request of Claimant's counsel. On exam Dr. Reichhardt noted tenderness to palpation from T8 to the S1 area with most tenderness at the L1 to L3 level. Claimant had moderate lumbar paraspinal muscle spasm from L1 to L5. Straight leg raising was positive for back and leg pain. Patrick's maneuver was positive. Iliac compression test was positive. Dr. Reichhardt diagnosed thoracolumbar pain with bilateral lower extremity pain from lifting a pot at work on August 27, 2020 while-working as a dishwasher. He assessed that Claimant's exam was concerning for possible radiculopathy or myelopathy. He also noted Claimant had depression, which was multi-factorial, and only partly related to his work-related injury, and partially to the stresses of COVID, with possible adjustment disorder. Dr. Reichhardt opined that based on the history provided by Claimant, as well as the medical records available, to a reasonable degree of medical probability, Claimant current thoracolumbar pain and lower extremity symptoms were related to his August 27, 2020 work-related injury.

14. Dr. Reichhardt recommended Claimant undergo thoracic and lumbar MRIs to evaluate for potential nerve root or spinal cord compression leading to myelopathy or radiculopathy. After the MRIs, it would be appropriate for him to undergo physical therapy, progressing to an independent active exercise program. Depending on the results of the MRIs there might be consideration for selective spine injections or surgical intervention. He further stated that appropriate restrictions for Claimant were 10 pound lifting, pushing, pulling and carrying, with limited standing and walking to 30 minutes at a time with a five minute rest break, no climbing at unprotected heights, and no bending or twisting at the waist.

15. Claimant received trigger point injections on January 19, 2022 at Clinica Family Health. On January 27, 2022, Claimant returned for a follow up with Dr. Mohapatra when Claimant reported improvement with trigger point injections and muscle relaxants.

16. Claimant was seen on April 14, 2022 by Dr. Alejandro Stella at Avista Adventist Hospital for low back and right lower extremity pain. He was diagnosed with

back pain and lower extremity pain. The triage nurse noted that Claimant presented with a history of low back injury of approximately one and one half years now experiencing right buttock pain that radiated down the right leg and left foot numbness that extended up to the left knee. Dr. Stella ordered an MRI, which was conducted on April 14, 2022. The radiologist, Kevin Woolley, M.D. reported Claimant had lumbar spine degenerative changes with grade 1 anterolisthesis at L4-5 level to the basis of facet arthropathy, spinal stenosis noted at L4-L5 with bilateral foraminal impingement on the basis of degenerative change and listhesis, and bilateral foraminal impingement at L5- S1 with no disc herniation. They also performed a lower extremity ultrasound to rule out DVT.[1] Claimant was released to follow up with his primary care provider.

17. On April 25, 2022, Claimant returned to Clinica Family Health. Claimant reported previous trigger point injection helped for about two months. He received a second trigger point injection at this time. On a follow up with Clinica on May 10, 2022, Claimant reported improvement with trigger point injections, steroid burst, cyclobenzaprine, and gabapentin. On August 10, 2022, Claimant returned to Clinica for more trigger point injections. Dr. Mohapatra noted Claimant reported a reduction in pain previously. Four trigger points were injected. Claimant reported mild improvement after the procedure.

18. Claimant was seen for an IME by Dr. Lloyd Thurston on August 19, 2022, at Respondents' request. Dr. Thurston questioned Claimant on the weight of the pot at the time of the alleged injury. He informed him that 10-15 gallons weighs 80-120 pounds without a pot. Claimant stated that he believed he could not lift more than 60 pounds. Claimant stated he lifted the pot from the ground tipped it over and poured the water out, and then cleaned it with a spatula. He then put the pot away overhead. It was Dr. Thurston's opinion claimant exaggerated the mechanism of injury. He noted that if Claimant incurred an injury, it was a minor myofascial strain and resolved within 4-6 weeks of the date of injury. He opined there were no radicular symptoms. He explained that the continued subjective complaints were not consistent with a physical injury. He opined that Claimant significantly embellished and exaggerated the mechanism of injury to Dr. Reichhardt.

19. On October 10, 2022, Claimant received his last round of trigger point injections. On the last recorded visit to Clinica Family Health before the hearing, on October 20, 2022, it is noted Claimant received numerous treatments and most helpful were ibuprofen 600mg tablets taken twice a day, acetaminophen 500mg twice a day, lidocaine patches, and Cyclobenzaprine, trigger point injections and steroid bursts.

20. Since his back injury of August 27, 2020 Claimant has not returned to work due to ongoing back pain related to the work injury.

21. Ms. F.M. stated that Claimant was initially hired without a position but was doing dishwashing one day a week. The restaurant was slower around 2 p.m. when Claimant started, and then would pick up around 5 p.m. She stated that several of the pots, one for chili and one for beans were used for cooking which would be filled to about four inches below the top of the pans. The deep square pans were used to serve food

[1] Deep vein thrombosis.

and were placed on steamers by the wait staff. Claimant would wash them when they were empty. The pots full of chili or beans are taken out to the platers to put the food and then brought back with some residue and food at the bottom of the pots.

22. Mr. T.M. was also a Respondent representative. He stated the chili and bean pans weighed approximately 5 lbs. empty, that the pots are given to the dishwasher after all the food is scraped out and put into smaller containers, and that there was only residue in the pots. He stated that the diner rush lasted about one hour from 5:30 to 6:30 p.m. and that most of the cooking had been done by the time Claimant was there at 2 p.m. It was not until after the rush the steam pans were given to the dishwasher. What was not explained by any Employer witnesses was what was Claimant doing from 2 p.m. to 6:30 p.m. when the dinner crowd was done and Claimant had to start washing the trays.

23. The photographs showed a cooking pot (chili pot) that seems to be a 40 quart stock pot which is normally 12 to 14 inches wide at the mouth and approximately 15 inches tall. This ALJ deduces that it likely could hold up to 10 gallons of water. The second pot, behind the first, is a smaller, potentially a 32 quart stock pot (beans pot). Further in photograph 3 it showed Ms. F.M. rinsing the smaller pot (beans pot) by lifting it with one hand and using a hose. The pan already appeared to have been scrubbed and washed. Lastly, Ms. F.M. stated that they would wash the chili pot by submerging it in water then rinsing it as shown in the photo. Photograph 2 showed pans on the ground that appear to be the stated dimensions that Ms. F.M. testified of 12 by 14 inches. In the sink can also be seen a plastic container, which Ms. F.M. denied they reused.

24. Ms. F.M. stated that she had a conversation with Claimant by phone on September 1, 2020 to see if she could make arrangements with Claimant to change his schedule because the staff had complained he was taking too long to finish his job. She disclosed that Claimant became very upset. She denied that she terminated Claimant. However, in the responses to discovery she indicated she would testify that “when she informed him [Claimant] of his termination, he became quite agitated and threatened to call their corporate office and speak to individuals there who did not have connection with his termination.” This is also confirmed by discovery responses by Mr. T.M. Discovery responses also stated that Claimant was terminated for cause as he had been previously counseled that he worked very slow, and needed to improve the quality and speed of his work. Ms. F.M.’s testimony is found to be not credible or persuasive.

25. Dr. Thurston testified at the end of hearing and his testimony was concluded via deposition. He explained that the x-ray and MRI did not show an acute injury, and that this is corroborated by Dr. Mohapatra and Dr. Stella. He disagreed with the diagnosis of radiculopathy. He explained that Dr. Reichhardt’s conclusions were based on incorrect information. He opined that while a possible myofascial injury may have occurred, that it was not probable that it was a work injury.

26. While the clocked-in time shows seven or less hours worked per day, this does not count the time that Claimant was at the job site, including his breaks, which may be what Claimant was referencing and that is consistent with his testimony that he was at work seven to eight hours a day. The argument that co-workers were complaining and

that he was not finishing on time is inconsistent with the time clock which has Claimant clocking out between 9:00 p.m. and 9:30 p.m. at the latest each night.

27. As found, Claimant has shown he was injured in the course and scope of his employment for Employer on August 27, 2020 injuring his back and causing radicular symptoms down his legs as well as urinary hesitancy and aggravation of his depression due to the chronic back pain. The opinions of providers at Clinica Family Health and Dr. Reichhardt are more credible and persuasive than the contrary opinions of Dr. Thurston.

28. Claimant has shown he was unable to work after his August 27, 2020 work injury and has shown he is entitled to temporary disability benefits. The records fail to show that Claimant has been placed at maximum medical improvement through the date of the hearing of April 12, 2023.

29. Respondents have failed to show that Claimant was terminated for cause. Claimant reported the injury to his supervisor. Further, Ms. F.M.'s testimony was unpersuasive as her discovery responses indicated she terminated Claimant.

30. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Claimant has proven that it was more likely than not he was injured in the course and scope of his employment with Employer on August 27, 2020 when lifted a pot with water and food debris off the floor and strained his thoracolumbar spine. He subsequently developed lower extremity radicular symptoms and depression related to the chronic low back and radicular pain and numbness. Claimant's claim is determined to be compensable.

Respondents argue that Claimant's version of events was illogical and there was no reason for anyone to take the empty pot, fill it with water and then place it on the ground to be cleaned as it did not make sense. However, this ALJ concludes that it makes a lot of sense. It is clear that dirty pans do get placed on the floor waiting to be washed as seen in the photos taken by Respondents. It is evident from the photos that there is limited area to place dirty items as the space was needed to take items from the sink onto the small counter in order to wash them. Claimant's testimony that the pot he lifted was full of water and food debris was credible. A pot that has been used to cook may have

had food stuck and water was placed in the pot in order to assist with cleaning the pot later. And while Claimant's assessment of weight may be imperfect, it does not change the fact that Claimant lifted items that he considered heavy, and at one of those events, injured his thoracolumbar spine. This is supported by the records from Clinica Family Health and Dr. Reichhardt as well as Claimant's testimony, which are found credible. This ALJ does not consider Claimant's being a poor historian, which was documented in various records, as being untruthful but a result of multiple factors, including use of interpreters instead of direct communication with medical providers[2], his clear lack of education demonstrated by Claimant's word usage and patterns of speech at hearing, his demeanor and difficulty understanding simple questions, in addition to his age, memory, and documented depression. Claimant has shown that he was injured in the course and scope of his employment with Employer on August 27, 2020.

C. Medical benefits

Employer is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005). Here, the parties stipulated that Clinica Family Health were authorized treating providers for the work related conditions and the provider is accepted.

Claimant has shown he is entitled to medical benefits that are reasonably necessary and related. Following Claimant's lifting incident on August 27, 2022, Claimant immediately contacted his primary care provider at Clinica Family Health. Claimant has

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[2] While this ALJ is fluent in Spanish and heard both Claimant's direct testimony and the interpreters' interpretation, this ALJ only relied on the Claimant's testimony as documented in the transcription of the hearing to write these Findings of Fact, Conclusions of Law and Order.

proven by a preponderance of the evidence that Claimant's medical care through Clinica and Avista Adventist was authorized, reasonably necessary medical treatment causally related to the August 27, 2020 accident.

23. Only those expenses related to Claimant's August 27, 2020 work related injuries for his mid and low back, bilateral radicular symptoms, urinary urgency and depression are related and not any hypertension or other unrelated medical care.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The parties stipulated to an average weekly wage of $103.85 which provides a temporary total disability rate of $69.23. This stipulation is accepted.

E. Temporary Total Disability Benefits and Interest

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant's testimony and the medical records from Clinica Family Health show that Claimant was either unable to work or under restrictions from the day of his injury of August 27, 2020. Claimant continues to be under medical care and has not been placed at maximum medical improvement pursuant to the records submitted by the parties. Claimant has shown that he is entitled to temporary disability benefits from August 28, 2020 until terminated by law.

Claimant is also due interest on all benefits which were not paid when due pursuant to statute in the amount of 8% per annum. Temporary total disability benefits and interest through the date of the hearing were calculated as follows:

[Redacted, hereinafter IRC]

F. Termination for Cause

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant was terminated by Employer's representative before his next scheduled day of work, on September 1, 2020 as shown by the discovery responses and Claimant's credible testimony. Claimant persuasively testified that he was unable to work after his injury. Further, this is supported by the credible medical records from Clinica Family Health providers who stated Claimant could not work or was under restrictions. Any testimony or evidence to the contrary is specifically found not credible or persuasive. Respondents have failed to show that Claimant was terminated for cause.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's August 27, 2020 work related injury is compensable, including his mid and low back injuries, his radicular symptoms, urinary urgency and the sequelae of depression related to the ongoing chronic pain.

2. Respondents shall pay the authorized, reasonably necessary and related medical benefits including his providers from Clinica Family Health and Avista Adventist Hospital for his hospitalization of April 14, 2022. Any non-related conditions are not Respondents' responsibility. All medical bills shall be paid in accordance with the Colorado Fee Schedule.

3. The stipulation of the parties regarding average weekly wage of $103.85 is accepted and incorporated as part of this order.

4. Respondents shall pay temporary disability benefits from August 28, 2020 through the present until terminated by law. TTD benefits at the rate of $69.23 per week through the date of the hearing of April 12, 2023 is $9,475.30.

5. Respondents shall pay interest at 8% per annum on all benefits not paid when due, for a total of $10,525.63 through the date of the hearing including temporary total disability benefits. Interests shall continue to be paid until indemnity benefits are paid pursuant to this order.

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

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

DATED this 21st day of September, 2023.

Digital Signature

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

ISSUES

I. Whether Respondents established, by a preponderance of the evidence, that Claimant's need for a total knee arthroplasty (TKA) was causally related to an intervening July 11, 2022 non-industrial injury rather than his admitted September 18, 2021 work injury.

II. Whether Respondents produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Miguel Castrejon regarding causation and maximum medical improvement (MMI).

III. Whether Respondents produced clear and convincing evidence, to overcome Dr. Castrejon's impairment rating opinion.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Frank Polanco, the ALJ enters the following findings of fact:

Claimant's September 18, 2021 Injury

1. Claimant is a former heavy equipment/truck mechanic for Employer. On September 18, 2021, Claimant injured his left knee while exiting the cab of a large work truck. Claimant testified that he was in a hurry to get off the truck. Consequently, he descended the stairs from the cab facing forward. When he reached the last stair, Claimant testified that he strode forward off the stairway rather than using the truck's hand rail to turn around and lower himself to ground by stepping off the riser backward. As Claimant walked off the stairway, he dropped approximately 1 ½ feet, landing hard on his left leg. (See Clmt's. Ex. 1, p. 2). Claimant testified that he twisted his left knee slightly and experienced immediate pain upon making contact with the ground.

2. Claimant was able to complete his work shift and return home for the evening. He reported the injury to his supervisor the following morning.

3. Claimant was subsequently sent to Dr. Frank Polanco for evaluation and treatment. Dr. Polanco saw Claimant for an initial evaluation on September 21, 2021. (Resp. Ex. A, p. 1). Dr. Polanco diagnosed Claimant with a left knee sprain and referred him to physical therapy (PT). *Id*. Maximum medical improvement (MMI) was unknown as of this appointment because Claimant's injury was "acute". *Id.* Dr. Polanco provided Claimant with a prescription for Toradol and Naprosyn and imposed physical restrictions of no lifting or carrying greater than 15 pounds. *Id*. He also precluded Claimant from kneeling, crawling squatting of climbing. *Id*.

4. Claimant failed to respond to conservative care. Thus, on October 13, 2021, Dr. Polanco imposed additional restrictions to include limiting Claimant's walking and standing to 15-20 minute intervals. (Resp. Ex. B, p 2). He also referred Claimant for an MRI of the left knee. *Id*.

5. An MRI of the left knee was obtained on October 18, 2021. (Resp. Ex. C, p. 3). Indications for the MRI were documented as "[l]eft knee pan (sic) and swelling after [stepping] off a work truck and the knee gave way on September 28, 2021". *Id*. Based upon the evidence presented, the ALJ finds the reference to the injury occurring on September 28, 2021, a probable typographical error. Indeed, the ALJ is convinced that the injury occurred on September 18, 2021. Regardless, the MRI revealed a "large acute appearing bony contusion involving the entire medial femoral condyle", a "small osteochondral defect along the central articular surface" and "significant loss of the medial femoral condyle articular cartilage with full-thickness cartilaginous defects". (Resp. Ex. C, p. 3). Also noted was a "bony contusion involving the medial tibial plateau", "significant cartilage loss . . . along the medial tibial plateau articular surface" and minimal marginal osteophyte formation". *Id*. Finally, the MRI demonstrated "thinning and irregularity of the articular cartilage within the lateral compartment without full-thickness cartilaginous defect" along with "moderate irregularity and increased signal intensity of the cartilage within the patellofemoral joint". *Id.*

6. Claimant's MRI findings supported the following impressions according to Dr. Michael McCollum:

- Large acute appearing bony contusion involving the entire medial femoral condyle. Given history, this most likely is secondary to a traumatic impaction injury. There is a small osteochondral defect along the articular surface of the medial femoral condyle. Milder bony contusion is noted involving the medial tibial plateau.

- Complex tear of the body of the medial meniscus. This may be acute or chronic in nature.

- Grade 1 versus 2 injury of the MCL (medial collateral ligament).

- Large amount of soft tissue edema, consistent with a recent injury. There is a large knee joint effusion.

- Degenerative changes as described above.

7. Claimant returned to Dr. Polanco on October 20, 2021 following his MRI. (Resp. Ex. D). During this encounter, Dr. Polanco noted that he discussed with Claimant the results of the October 18, 2021 MRI. *Id*. at p. 7. According to Dr. Polanco the "MRI findings [were] not consistent with [Claimant's] report of injury and [gave] [him]

cause to believe something more happened to [Claimant's] knee other than stepping out of his truck". *Id*. Indeed, Dr. Polanco expressed his skepticism that Claimant was injured as he described as evidenced by the following passage contained in his October 20, 2021 report: "[Claimant's] imaging does not match with [his] report of injury and I believe [Claimant] may have had a previous injury aside from his reported work injury". *Id.* Nonetheless, Dr. Polanco referred Claimant to Dr. Michael Simpson for an orthopedic evaluation.

8. Dr. Simpson evaluated Claimant on November 8, 2021. (Resp. Ex. E). Dr. Simpson obtained a history of Claimant's injury noting that Claimant was injured "while stepping off a truck" during which time there was a "pop". *Id*. at p. 13. Dr. Simpson reviewed Claimant's October 18, 2021, MRI opining that it revealed "quite a bit of bone marrow edema in [the] medial femoral condyle", which in combination with Claimant's reported tenderness over this area, was "consistent" with a subchondral insufficiency type fracture that was posttraumatic in nature and which occurred in the presence of pre-existing osteoarthritis. (Resp. Ex. E, p. 11). While Claimant did have pre-existing arthritis[1], Dr. Simpson opined that the MRI also demonstrated a complex tear of the body of the medial meniscus which would be amenable to a meniscal debridement type surgery. *Id*. at p. 12. Because Claimant had been able to work for Employer for 9 years without restriction until the September 18, 2021 injury, Dr. Simpson concluded that "a lot" of Claimant symptoms were "posttraumatic in nature". *Id.*

9. Claimant was taken to the operating room on December 9, 2021, where Dr. Simpson performed an arthroscopic partial medial meniscectomy and subchondroplasty of the medial femoral condyle at the distal femur. (Clmt's Ex. 1, p.4).

10. Post-surgically, Claimant struggled with persistent pain. (Resp. Ex. H, p. 24). A platelet rich plasma (PRP) injection was not helpful in relieving Claimant's pain. *Id.* On July 6, 2022, Dr. Simpson noted that a review of Claimant's December 9, 2021 surgical photos demonstrated an extensive area of grade 4 degenerative change over the medial femoral condyle, some early grade 4 changes over the medial tibial plateau and a "pretty macerated degenerative meniscal tear". *Id.* While Claimant's bone marrow edema had been treated, Dr. Simpson noted that his pre-existing left knee arthritis remained symptomatic. *Id.* Dr. Simpson felt that Claimant needed to consider a TKA and reiterated his belief that any replacement procedure would fall outside the scope of Claimant's workers' compensation claim. *Id.* Dr. Simpson then referred Claimant to Dr. Douglas Adams for consultation regarding his candidacy for a TKA. Dr. Adams would go on to recommend that Claimant proceed with a total knee replacement procedure.

[1] Regarding this arthritis, Dr. Simpson noted that Claimant may, at some point, require a knee replacement arthroplasty for complete relief but that if that replacement procedure was required, it would need to be done outside the workers' compensation system under Claimant's primary insurance due to its preexisting nature. (Resp. Ex. E, p. 11).

11. On August 8, 2022, Claimant's counsel forwarded correspondence to Dr. Adams requesting his opinion as to whether Claimant's September 18, 2021 knee injury was one of the causes resulting in his need to undergo a knee replacement procedure. (Clmt's Ex. 4, p. 1; Resp. Ex. K, p. 41). Dr. Adams simply responded: "Yes". *Id.*

12. Dr. Polanco placed Claimant at MMI with 17% lower extremity scheduled impairment on August 15, 2022. (Resp. Ex. I, J, pp. 35-36). He returned Claimant to modified duty work with a 30 pound lifting restriction and walking and standing limited to 4 hours. (Resp. Ex. J, p. 35). Dr. Polanco opined further that Claimant did not require further active treatment and instead encouraged him to continue his home exercise program to increase his strength and range of motion (ROM). *Id.*

13. Claimant underwent a TKA procedure performed by Dr. Adams on September 29, 2022. (Clmt's Ex. 2). Findings during surgery included, "Severe, end-stage tricompartmental osteoarthritis of the left knee with varus deformity. *Id*. at p. 1. The costs associated with Claimant's TKA surgery were covered by his personal health insurance, Anthem who asserts a total claim for all medical and prescription costs of $37,755.80. (Clmt's Ex. 3).

14. Claimant requested a Division Independent Medical Examination (DIME) following his placement at MMI by Dr. Polanco. Dr. Miguel Castrejon was identified as the DIME physician and he completed the requested examination on January 5, 2023. (Clmt's Ex. 1, pp. 1-11; Resp. Ex. K, pp. 37-47). After taking a history, completing a records review and performing a physical examination, Dr. Castrejon diagnosed Claimant with the following:

- Left knee strain/sprain.
- Aggravation of pre-existing asymptomatic degenerative joint disease, left knee.
- Status post left knee arthroscopic partial medial meniscectomy, subchondroplasty of medial femoral condyle at distal femur and chondral debridement and mircofracture of 1 cm traumatic full thickness chondral lesion medial femoral condyle, 12/9/21, Michael Simpson, M.D.
- Status post left total knee arthroplasty, 9/29/22, Douglas Adams, M.D.

15. In support of his diagnostic opinions, Dr. Castrejon explained that the mechanism of injury (MOI) "consisted of a 'hard drop' from a distance of approximately 1 ½ feet onto a hard surface with the claimant having experienced a twisting motion to his knee on impact". (Resp. Ex. K, p. 44). Relying on the MRI findings, Dr. Castrejon concluded that the complex tear in the medial meniscus was acute and "consistent with [an] impact force that involved the 'entire' medial femoral condyle". *Id*. Dr. Castrejon

also commented on his opinion that the MOI also aggravated the pre-existing degenerative joint disease in Claimant's left knee, leading directly to his symptoms and his need for the TKA performed by Dr. Adams on September 29, 2022. Indeed, Dr. Castrejon noted:

> During surgery Dr. Simpson described grade IV [degenerative] changes involving the medial femoral condyle and similar early changes involving the medial tibial plateau with a "macerated" meniscal tear. Keep in mind that these are the same areas that were injured at the time of the fall, as described by the MRI finding. The lack of appreciable benefit following arthroscopy is well explained by ongoing symptomology at these areas of involvement. Were it not for the industrial fall the claimant would not have sustained injury to the medial femoral condyle, medial tibial plateau and medial meniscus that permanently aggravated the underlying previously asymptomatic degenerative changes involving these same body parts. Therefore, this examiner respectfully disagrees with Dr. Simpson's conclusion that any ongoing symptoms post-surgery were related to claimant's nonindustrial degenerative changes. At the time of the knee replacement surgery, Dr. Adams documented significant extensive full thickness cartilage loss involving the medial femoral condyle and medial tibial plateau, as well as degenerative changes at the level of the patellofemoral joint and lateral compartment. These latter anatomical areas were not described by Dr. Simpson during his initial operative evaluation of the claimant's left knee, nor were they described to any significant extent on MRI. One can only conclude that there was an objective worsening of the underlying asymptomatic degenerative changes that also involved the lateral compartment. In my professional opinion, the MRI and operative findings by both specialists serve only to support the fact that the industrial event resulted in a permanent aggravation of a previously asymptomatic degenerative condition.

(Resp. Ex. K, p. 45)(Emphasis in original).

16. Upon concluding that Claimant's ongoing symptoms and need for a TKA procedure were causally related to the September 18, 2021 work incident involving Claimant's stepping to the ground from a work truck, Dr. Castrejon noted that because Claimant was "just over three months post left total knee replacement he was not at MMI for the injuries related to that incident. (Resp. Ex. K, p. 43). After recommending additional physical rehabilitation to "maximize" function by improving range of motion and strength, Dr. Castrejon opined that Claimant could be expected to reach MMI within 6-9 months post-surgery.

The Testimony of Dr. Polanco

17. Dr. Polanco testified by deposition, as an expert in occupational medicine, on July 31, 2023. He testified that Claimant reported that "in the course of stepping down from his truck, that he felt a pop in his knee, and subsequently developed knee pain." (Depo. Dr. Polanco, p, 6, ll. 13-19). According to Dr. Polanco, Claimant's MRI demonstrated "extensive changes, degenerative changes with an insufficiency chondral injury", which he opined is a "repetitive-type injury that is associated with a meniscal tear. (Depo. Dr. Polanco, p. 7, ll. 14-17). According to Dr. Polanco, Claimant had a "tear through the body of the meniscus and osteophytes; and basically end stage degenerative changes of the knee"[2]. *Id*. at ll. 18-20.

18. During his direct testimony, Dr. Polanco again questioned Claimant's reported MOI. Dr. Polanco reiterated that during his initial evaluation, Claimant did not describe any twisting activity, but he subsequently reported twisting the knee to Dr. Castrejon. (Depo. Dr. Polanco, p. 6, ll. 21-24). Dr. Polanco also disagreed with the opinion of Dr. Castrejon that Claimant's need for knee replacement surgery was a direct result of the industrial event, noting instead that, like Dr. Simpson, the need for a TKA was not a part of the workers' compensation case. (Depo. Dr. Polanco, p. 8, ll. 24-25, p. 9, ll. 1-4). Dr. Polanco testified as follows:

> "And I am basically in disagreement with his conclusion – with his conclusions for a number of reasons.
>
> Q: And what are those?
>
> A: Well, first of all, there was no specific mechanism of injury to explain the extensiveness of the findings on the MRI. [Claimant] did not report, to me, a twisting-type injury; neither did he report that to Dr. Simpson.
>
> A twisting-type injury will cause a meniscus injury. I indicated I did believe, in my first or second visit with him, that I thought that the findings (MRI) were disproportional to [Claimant's] reported mechanism of injury. The findings were so extensive that they were end stage. Basically his knee was totally worn out.
>
> I was also in disagreement with his conclusion that these were acute findings, because an insufficiency chondral injury is a result of repetitive type of trauma. So the repetitive trauma, as a result of the torn meniscus, puts additional stress on the bone.

[2] Dr. Polanco admittedly reviewed and relied on the MRI report rather than conducting an independent review of the actual images obtained during the study. (Depo. Dr. Polanco, p. 20, ll. 1-3).

> So [Claimant] didn't actually have a fracture of bone. It's more of what we call a stress fracture, a repetitive type of trauma to the bone, resulting in the extensive edema that was seen in the MRI.
>
> So I disagree with – with Dr. Castrejon that this was necessarily an acute finding[3]. It was more consistent with the insufficiency chondral injury and the torn meniscus that he had.
>
> So basically, I dis – I disagree not only with the mechanism of the injury; I disagreed with the diagnostic findings that –he reported.

(Depo. Dr. Polanco, p. 10, ll. 19-25 and pp. 11-12, ll. 1-4).

19. Although Dr. Polanco pointedly disagrees with the diagnostic opinions of Dr. Castrejon, both Dr. McCollum and Dr. Simpson reached similar impressions in concluding that Claimant likely suffered acute injuries to the left knee. Indeed, Dr. McCollum, the radiologist interpreting the results of Claimant's October 18, 2021 MRI clearly indicated that Claimant had a "[l]arge acute appearing bony contusion involving the entire medial femoral condyle". He also noted that Claimant had a "large amount of soft tissue edema, consistent with a recent injury". While he noted that the complex meniscal tear could be acute or chronic, Dr. McCollum concluded, based upon the MOI described, that the bony contusions noted over the medial femoral condyle and medial tibial plateau along with the osteochondral defect along the articular surface of the medial femoral condyle were "most likely" secondary to a traumatic impaction injury, which the ALJ finds consistent with Claimant's report of landing hard on the left leg/knee after stepping off the truck in question. Moreover, Dr. Simpson noted that the observed bone marrow edema in the medial femoral condyle", in combination with Claimant's reported tenderness over this area, was "consistent" with a subchondral insufficiency type fracture that was "posttraumatic" in nature and which occurred in the presence of pre-existing osteoarthritis.

20. Because the evidence presented supports a finding that Dr. Castrejon relied, in part, upon the reports of Drs. McCollum and Simpson as support for his diagnostic impressions and these records support a finding that Claimant suffered acute bony changes to the left knee consistent with an impaction injury, the ALJ finds Dr. Polanco's cynicism regarding Claimant's reported MOI unpersuasive. Indeed, the ALJ finds Dr. Polanco's belief that Claimant's MRI findings (based upon his disagreement with Dr. Castrejon's opinions) were not acute and that Claimant may have had a previous injury aside from his reported work injury contrary to the reports of Drs. McCollum and Simpson, speculative in nature and without evidentiary support.[4]

[3] Here the ALJ finds that Dr. Polanco is probably referencing Dr. Castrejon's opinion that the complex tear in the medial meniscus was acute and "consistent with the impact force that involved the 'entire' medial femoral condyle" as those are the only MRI findings that Dr. Castrejon concluded were "acute".

[4] Respondents also seemingly reject Dr. Polanco's suggestion that Claimant's knee injury was caused by anything other than his work duties on September 18, 2021 as evidenced by their decision to admit liability and pay temporary total disability (TTD) benefits beginning December 9, 2021 following

Accordingly, the ALJ finds Dr. Polanco's tacit suggestion that Dr. Castrejon erred in regard to causality, including his diagnostic impressions unconvincing.

21. Regarding Dr. Castrejon's opinion that Claimant's need for a TKA was directly related to Claimant's industrial event because the incident resulted in an aggravation of a previously asymptomatic degenerative condition giving rise to symptoms and the need for treatment, Dr. Polanco opined that Claimant suffered what he termed a "ubiquitous or common injury" and that because of the advanced level of degeneration and meniscal tearing present in the left knee, Claimant would have required a TKA regardless of the incident involving stepping down from the truck. (Depo. Dr. Polanco, p. 13, ll. 13-24; p. 15, ll. 13-18).

22. During cross-examination, Dr. Polanco admitted that he had no idea of when Claimant would require a TKA in the future given the condition of his knee. Instead, he simply testified that based upon the level of degenerative change present in the left knee, a "total knee replacement" would be required "at some point in time". (Depo. Dr. Polanco, p. 15, ll. 8-18). Dr. Polanco also admitted that Claimant denied any left knee pain or loss of work due to knee pain prior to the September 18, 2021 incident. *Id*. at p. 17, ll. 1-2. Finally, Dr. Polanco admitted that there was a dearth of medical documentation to substantiate that prior treatment had been directed to the left knee. *Id*. at p. 17, ll. 5-14.

23. Regarding the onset of Claimant's left knee pain, Dr. Polanco agreed that the act of stepping down from the truck was seemingly the trigger causing that pain. (Depo. Dr. Polanco, p. 21, ll. 6-11; p. 23, ll. 6-10). Nonetheless, Dr. Polanco testified that because the act of stepping down from the truck did not result in "significant trauma", Claimant's symptoms appeared to arise, not from the act of stepping down from the truck, but rather coincidentally, at that point in time, from the extensive pre-existing pathology in the left knee. *Id*. at p. 22, ll. 17-25; p. 23, l. 1. Dr. Polanco then reiterated his opinion that Claimant suffered a "ubiquitous" injury "meaning [that] in the normal course of time, it would have happened regardless of whatever". *Id*. at p. 23, ll. 2-5. The ALJ interprets this statement to mean that Dr. Polanco believes that Claimant would have developed symptoms and a need for treatment, including a TKA based simply upon the passage of time and the natural progression of his pre-existing pathology.

The Testimony of [Redacted, hereinafter RB]

24. RB[Redacted] testified as Employer's equipment manager and Claimant's supervisor while he worked for [Redacted, hereinafter ST]. RB[Redacted] testified that he was aware that Claimant injured his knee while exiting a truck. RB[Redacted] testified that after being off work for a period of time, Claimant was released to return to work and he worked full duty for 4-5 months before an incident resulted in him having to leave work again. That incident, according to RB[Redacted], involved a report by

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Claimant's surgery with Dr. Simpson. (See Resp. Ex. L). Thus, the ALJ is convinced that Claimant established that he suffered a compensable industrial injury to his left knee on September 18, 2021.

Claimant that he reinjured his knee while grocery shopping. Indeed, RB[Redacted] testified that on or about July 11, 2022, he observed Claimant limping heavily about the shop and grimacing as if he were in significant pain. He then approached Claimant and asked him what was going on to which Claimant reportedly responded: "Well, I -- I think I -- I believe I hurt my knee at the -- at the grocery store this weekend or some, you know, and -- and it's hard for me to walk."

25. RB[Redacted] testified that upon hearing that Claimant was having a hard time walking he considered the nature of Claimant's job duties and informed him that he didn't know if he wanted Claimant working and climbing in and out of trucks until it was known what was going on with Claimant's knee. Accordingly, RB[Redacted] contacted Employer's safety coordinator ([Redacted, hereainfter FE]) and an attempt to contact Employer's Human Resources (HR) office in Detroit was made to determine the most appropriate course of action. Because of the time difference between Colorado and Michigan, Employer's HR office was closed. Consequently, RB[Redacted] testified that he and FE[Redacted] made the decision to allow Claimant to complete his shift that evening in a limited capacity.

26. RB[Redacted] testified that he and FE[Redacted] contacted HR the following morning and it was decided that Claimant would be asked to take time off and secure a release to return to unrestricted duty before he was allowed to resume work. According to RB[Redacted], it was at this time that Employer learned that Claimant was scheduled to undergo a second surgery.

Claimant's Hearing Testimony

27. Claimant testified that prior to September 18, 2021, he had no problems with or pain in his left knee while performing his job duties. Moreover, Claimant testified that prior to September 18, 2021, he had no work restrictions related to his left knee. Following his September 18, 2021 injury, Claimant testified that the condition of his knee did not improve. Indeed, Claimant testified that even after the surgery performed by Dr. Simpson on December 9, 2021, the condition of his left knee "stayed the same" and it continued to bother him despite physical therapy (PT) and a post-surgical injection. The ALJ credits Claimant's testimony regarding the condition and function of his left knee pre and post injury to find that prior to September 18, 2021, Claimant's left knee was probably asymptomatic and that he was able to work full duty without limitation caused by his pre-existing osteoarthritis.

28. Claimant testified that Dr. Simpson referred him to Dr. Adams for consideration of a total knee replacement and that Dr. Adams performed that surgery. According to Claimant, he elected to move forward with the TKA surgery despite a denial by Insurer because he could not walk. Claimant testified that the cost of the procedure was paid for by his health insurance.

29. Claimant conceded that he told RB[Redacted] that he reinjured his knee while grocery shopping. Claimant testified that he told RB[Redacted] that he injured his

left knee at the supermarket because he was being harassed by his supervisor. Claimant testified that he ultimately had to file a HR complaint against his supervisor due to the harassment and submitted that he only reported that he injured his knee at the supermarket so he could stop his supervisor's constant harassment and work without distraction. It is noted, that as of November 17, 2021, Claimant reported that he was having difficulty handling stress at work. Accordingly he requested counseling. (Resp. Ex. K, p. 40). Although the exact cause of Claimant's stress is unknown, because neither party presented any counseling or mental health records, Claimant appeared stressed when testifying about the harassment he was subjected to and he screened positive for distress depression on November 17, 2021. *Id.* Claimant testified that contrary to what he told RB[Redacted] on July 111, 2022, he never injured his knee at the supermarket. He also testified that he never told any his providers about being hurt at the grocery store because it never happened.

30. Based upon the totality of the evidence presented, the ALJ credits Claimant's testimony to find that he probably lied about injuring his knee while shopping in order to keep his supervisor at bay, assuming that because this alleged supermarket injury was not connected to his work, his supervisor would back off and he could work in relative peace.

31. As noted above, Claimant testified that he never reported suffering any injury at the supermarket to his medical providers. Careful review of the medical record supports this testimony. Indeed, there is no convincing indication in the records submitted that the condition of Claimant's knee worsened after July 11, 2022. Rather, the medical records substantiate that as of July 6, 2022, five days before Claimant allegedly injured his knee while shopping, he described sharp, aching, 8/10 left knee pain to Dr. Simpson[5]. (Resp. Ex. H, p. 25). During this encounter, Claimant reported "a lot" of medial sided pain, over the area where he was noted to have medial compartment arthritis. *Id*. at p. 24. Dr. Simpson noted that the previously mentioned PRP injection did not help and that Claimant was struggling with <u>continued</u> pain and difficulty completing his ADLs (activities of daily living). *Id.* at pp. 24-25 (emphasis added). The content of this report persuades the ALJ that as of July 6, 2022, Claimant's left knee was significantly symptomatic and functionally limiting.

32. Although it appears that Claimant saw Dr. Adams on August 8, 2022[6], approximately one month after the alleged intervening injury at the supermarket, neither party provided that record to the ALJ for review. Nonetheless, as summarized by Dr. Castrejon, the record from Claimant's August 8, 2022 appointment with Dr. Adams fails to support a finding that Claimant was suffering from a worsened condition due to an intervening injury. (Resp. Ex. K, p. 41). Moreover, the August 15, 2022 report of Dr. Polanco supports a finding that the condition of Claimant's left knee was similar to that he reported on July 6, 2022. In fact, the August 15, 2022 report of Dr. Polanco notes

[5] Prior to July 6, 2022, Claimant reported slightly better pain levels, i.e. 7/10 on October 20, 2021 during an appointment with Dr. Polanco (Resp. Ex. D, p. 5) and 7/10 during an appointment with Dr. Simpson on November 8, 2021. (Resp. Ex. E, p. 13).

[6] Per the DIME report of Dr. Castrejon. (Resp. Ex. K, p. 41).

that Claimant described a slightly better level of residual left knee pain (7/10) than he had during the July 6, 2022 appointment with Dr. Simpson. (Resp. Ex. J, p. 34). Nonetheless, Claimant demonstrated an antalgic gait, i.e. a limp[7] and impaired range of motion in the left knee when compared to the right. As presented, the medical record evidence fails to convince the ALJ that the condition of Claimant's knee was worse after July 11, 2022 than it had been before this date. Rather, the ALJ credits the content of the medical records to find Claimant's testimony credible that the condition of his knee was relatively unchanged after his December 9, 2021 surgery.

The Testimony of Dr. Castrejon

33. Dr. Castrejon testified at hearing as a board certified, Level II accredited expert with a specialty in Physical Medicine and Rehabilitation (PM&R). Dr. Castrejon reiterated his opinion that Claimant's MOI aggravated and accelerated his underlying degenerative left knee arthritis hastening his need for a total knee replacement. Indeed, Dr. Castrejon testified that in reviewing the MRI report of Dr. McCollum and comparing the operative reports, including the findings of Dr. Simpson and Dr. Adams, there was objective evidence that in the 10 months following Claimant's first surgical procedure at the hands of Dr. Simpson to the second TKA surgery with Dr. Adams, there was an acceleration/worsening of the degenerative findings in the left knee, including changes involving the patella femoral and lateral compartments of the knee that were previously "quite" limited as noted on the October 18, 2021 MRI. According to Dr. Castrejon, such a rapid acceleration would be atypical and contrary to the natural progression of a pre-existing condition, which would much longer to cause the same degree of change.

34. Dr. Castrejon attributed the aggravation/acceleration of Claimant's degenerative osteoarthritis to the MOI associated with stepping down hard on his diseased left knee. According to Dr. Castrejon, the MOI caused a tearing of the meniscus and an impaction injury to the cartilage of the femur and tibia (as outlined on the October 18, 2021 MRI) leading Dr. Simpson to perform a partial meniscectomy and a subchondroplasty, which in turn worsened/accelerated the degenerative arthritis in the knee hastening Claimant's need for a total knee replacement.

35. Dr. Castrejon testified that he did not account for any subsequent injuries after September 18, 2021, because none were reported to him. Regardless, Dr. Castrejon testified that he would need to see the radiological and clinical data to be able to determine whether any alleged intervening injury contributed to Claimant's need for a TKA.

CONCLUSIONS OF LAW

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

[7] According to Dr. Castrejon's hearing testimony.

Generally

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

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

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo. App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As noted elsewhere, the ALJ credits Claimant's testimony regarding the condition of his knee after his December 9, 2021 surgery and the fact that he fabricated the story regarding a second injury at the supermarket. Based upon the totality of the evidence, the ALJ also concludes that the opinions expressed by Dr. Castrejon are supported by the record and are more persuasive than the opinions expressed by Dr. Polanco and Dr. Simpson.

Claimant's Alleged Intervening Injury

D. It is well settled that the natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents contend that such an injury occurred in this case while Claimant was grocery shopping on or

about July 11, 2022. Respondents argue that the effects of this second intervening injury were sufficient to sever the causal relationship between Claimant's admitted September 18, 2021 work injury and his need for a left total knee replacement procedure. Indeed, Respondents assert that Claimant's need for a left total knee replacement procedure is rooted in a worsening of condition connected to this intervening injury. Accordingly, Respondents insist that Dr. Castrejon erred in concluding that Claimant was not at MMI despite his opinion that Claimant's need for a left total knee replacement was related to and necessitated by an aggravation and acceleration of his pre-existing osteoarthritis, which aggravation/acceleration, he concluded, was caused by Claimant's September 18, 2021 injury.

E. The question of whether a particular condition is the natural and proximate result of an industrial injury or the result of an intervening event is one of fact for the ALJ. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Lutgen v. Teller County School District No. 2*, W.C. No. 3-846-454 (June 12, 1996), aff'd., *Teller County School District No. 2 v. Industrial Claim Appeals Office*, (Colo. App. No. 96CA1194, December 27, 1996) (not selected for publication). Here, Respondents contend that the combined testimony of RB[Redacted] and Dr. Castrejon establishes that Claimant suffered a subsequent intervening injury which lead directly to his total knee arthroplasty. Accordingly, Respondents contend that this alleged injury was sufficient to severe any causal connection between Claimant's September 18, 2021 work injury and his need for a TKA. The ALJ is not convinced.

F. As found, the ALJ is persuaded that Claimant, as part of a misguided effort to dissuade his supervisor from harassing him, simply lied when he told RB[Redacted] that he was injured while grocery shopping, as he limped about at work. Outside of this declared injury, which Claimant readily admits he fabricated, Respondents presented no convincing evidence, such as a medical record or a first-hand witness to the incident to corroborate Claimant's alleged knee injury while grocery shopping on July 11, 2022. Thus, while Claimant foolishly lied about being injured while grocery shopping, the ALJ resolves the conflict between his prior statement to RB[Redacted] and his subsequent sworn hearing testimony to conclude that the injury he reported occurred while grocery shopping probably never happened.

G. In addition to RB's[Redacted] testimony as support for their contention that Claimant suffered an intervening injury, which severed the causal connection between his admitted industrial injury and his need for a TKA, Respondents assert that Dr. Castrejon himself "acknowledged that the condition of the joint at the point of the first surgery was significantly worse in the second event and far worse than one would have expected in a 10-month period between the surgeries." While it is true that Dr. Castrejon recognized that the condition of Claimant's left knee had worsened between his first surgery and his subsequent TKA procedure, he in no way attributed that worsening to an intervening event. Rather, Dr. Castrejon clearly ascribed the worsening to an aggravation/acceleration of the pre-existing degenerative changes within Claimant's left knee, which he concluded was caused by the September 18, 2021 injury and Claimant's subsequent December 9, 2021 surgery.

H. In this case, the evidence presented supports Dr. Castrejon's conclusion that Claimant sustained a compensable aggravation/acceleration of his previously asymptomatic left knee osteoarthritis and that this aggravation/acceleration is the proximate cause of Claimant's need for a total left knee arthroplasty. Taken in its entirety, the ALJ finds that the evidentiary record contains substantial evidence to support a conclusion that Claimant's September 18, 2021 work injury was a "significant" cause[8] of his need for a TKA in the sense that there is a direct relationship between the precipitating event, i.e. the September 18, 2021 injury and the need for this treatment. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); see also *Reynolds v. U.S. Airways, Inc.*, W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). For these reasons, the ALJ concludes that Respondents have failed to prove that the fictitious July 11, 2022, grocery shopping incident constitutes an intervening event that broke the chain of causation between Claimant's September 18, 2021 injury and his subsequent TKA.

Overcoming Dr. Castrejon's MMI Determination

I. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). To overcome a DIME physician's opinion regarding MMI, permanency or the cause of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians' determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

J. The question of whether the Respondents have overcome Dr. Castrejon's findings regarding MMI and/or causality, is one of fact for determination by the ALJ. *Metro Moving and Storage Co. v. Gussert*, *supra*. Because the question of whether Claimant attained MMI inherently requires a determination regarding the cause of Claimant's need for medical treatment, the ALJ concludes that an analysis of the cause of Claimant's September 29, 2022 TKA and its relationship to the September 18, 2021 industrial injury is fundamental to answering the question of whether he is at MMI. As outlined above, the totality of the evidence supports a conclusion that Claimant suffered

[8] To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the resulting disability and need for treatment. Rather, it is sufficient if the injury is a "significant" cause in the sense that there is a direct relationship between the precipitating event, Claimant's disability and his need for treatment. See *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

from latent osteoarthritis in the left knee, which manifested itself after he stepped down from an elevation of approximately 1 ½ feet while performing his work duties. As found, Claimant landed hard on the left leg causing an impaction injury to the left knee, as well as a probable complex tear in the body of the medial meniscus. Following this injury, Claimant experienced persistent pain and functional decline despite conservative treatment. Consequently, Dr. Simpson directed specific surgical treatment to the left knee which also failed to relieve Claimant's activated arthritic pain and which, according to Dr. Castrejon, likely accelerated the natural degenerative course of Claimant's pre-existing condition leading to his TKA. Such injuries are compensable. See, *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo. App. 1989); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); see also, *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990)(industrial injuries which aggravate, accelerate, or combine with preexisting conditions so as to produce disability and a need for treatment are compensable).

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

L. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Here, the evidence presented establishes that Dr. Castrejon opined that Claimant was not at MMI because he requires additional physical rehabilitation to maximize his function following a surgery which both he and Dr. Adams concluded are related to Claimant's September 18, 2021 industrial injury. As found above, the record evidence supports Dr. Castrejon's opinion regarding the cause of Claimant's persistent knee symptoms and his need for a TKA. In so concluding the undersigned finds Drs. Polanco and Simpson's contrary opinions unconvincing.

M. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if a course of treatment has "a reasonable

prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Because Dr. Castrejon's recommended treatment represents a reasonable prospect for curing and relieving Claimant of the ongoing symptoms/disability caused by his industrial injury and Claimant wants to pursue this treatment, he is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo.App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing PDM *Molding v. Stanberg*, 898 P.2d 542 (Colo. App. 1995) *and Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

N. After considering the totality of the evidence presented, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that Dr. Castrejon's determination regarding MMI is highly probably incorrect. As determined above, the persuasive medical evidence establishes that Claimant likely suffered a compensable aggravation and acceleration of his pre-existing left knee osteoarthritis hastening his need for a TKA. Accordingly, the ALJ finds/concludes that Claimant's need for a TKA is causally related to Claimant's September 18, 2021 industrial injury and he is not yet at MMI, having not participated in sufficient physical rehabilitation to maximize his function. While Dr. Polanco and Dr. Simpson have contrary sentiments, a professional difference of opinion between medical experts does not rise to the level of clear and convincing evidence that is required to overcome Dr. Castrejon's opinions concerning causality and MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set the MMI determination aside. Because Claimant is not at MMI, this order does not address whether Dr. Castrejon erred in calculating the impairment associated with Claimant's September 18, 2021 impairment rating.

ORDER

It is therefore ordered that:

1. Respondents request to set the causality and MMI opinions of Dr. Castrejon aside is denied and dismissed.

2. Respondents shall authorize the care recommended by Dr. Castrejon and upon completion of that care, return Claimant to Dr. Castrejon for a follow-up DIME to reassess whether he has reached MMI.

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

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

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

DATED: September 21, 2023

/s/ Richard M. Lamphere

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that medial branch blocks requested by Karen Knight, M.D., are reasonable and necessary to cure or relieve the effects of Claimant's January 4, 2021 industrial injury.

FINDINGS OF FACT

1. Claimant is a 51-year-old concrete finisher who has been employed by Employer for approximately 17 years. On January 4, 2021, Claimant sustained an admitted injury arising out of the course of his employment when he slipped and fell on ice, injuring his lower back.

2. On January 12, 2021, Claimant saw Joan Mankowski., M.D., at Denver Health Occupational Clinic for lower back pain. Claimant was assigned temporary work restrictions, and instructed to follow up with Jennifer Pula, M.D.[1] (Ex. 6). Dr. Mankowski's record indicates that Claimant had not yet begun physical therapy or massage, and notes a prior visit with Dr. Pula on January 5, 2021. From this, the ALJ infers that Dr. Pula is an authorized treating physician (ATP), and referred for physical therapy and massage therapy on January 5, 2021. (Ex. 6, p. 93-94).

3. Over the following months, Claimant continued to treat with Dr. Pula at Denver Health for lower back pain and right shoulder pain. In her February 2, 2021 report, Dr. Pula indicated that she considered Claimant's back injury to be work related, and that the history and mechanism of injury were consistent with the objective findings on examination. (Ex. 6). After a lumbar MRI demonstrated multilevel disc herniations, possible irritation of the left L4 nerve root, multilevel facet arthropathy, facet joint effusions, Dr. Pula referred Claimant for an orthopedic evaluation at Panorama Orthopedics on June 7, 2022. (Ex. 6 & F).

4. On July 1, 2022, Claimant saw Karen Knight, M.D., at Panorama for evaluation of his lower back pain. Dr. Knight is an ATP in the chain of referral from Dr. Pula. Dr. Knight noted that Claimant had received an epidural steroid injection on January 27, 2021 which provided six months of relief, but that a second injection in December 2021 provided no relief. After Dr. Knight reviewed Claimant's MRI, she indicated there were two explanations for Claimant's lower back pain: facet fusions, and "significant modic changes." She opined that Claimant's condition was consistent with his mechanism of injury, that he would be a good candidate for vertebral nerve ablation, and that she

[1] Claimant's January 12, 2021 Denver Health record states that the appointment was a follow-up visit, and references a prior visit with Dr. Pula on January 5, 2021. No record from the January 5, 2021 visit was offered or admitted into evidence.

recommended bilateral L4-5 and L5-S1 facet injections before performing any ablation. (Ex. E).

5. On August 25, 2022, Dr. Knight performed the L4-5 and L5-S1 facet injections. After two weeks, Dr. Knight noted that Claimant reported 100% symptomatic relief , and that Claimant remained below his baseline pain level, despite recently experiencing a recurrence of his lower back pain. Dr. Knight indicated Claimant's response to the facet injections was diagnostic for his facet joints being the source of his pain. She recommended Claimant return if his back pain started to worsen, and she would order two sets of bilateral medial branch blocks (MBB) at L3, L4 and L5, to determine if Claimant was an appropriate candidate for radiofrequency ablation (RFA) at those spinal levels. (Ex. E).

6. Approximately two months later, on November 7, 2022, Claimant returned to Dr. Knight reporting that his lower back pain was steadily returning. Dr. Knight requested authorization of bilateral MBB at L3, L4, and L5, noting that if Claimant had a good response, she would proceed with the RFA procedure. (Ex. 7). On December 14, 2022, Respondent authorized performance of the requested MBB. (Ex. 7, p. 205).

7. On December 29, 2022, Dr. Knight performed the first MBB procedure. (Ex. E). Claimant saw Dr. Pula on January 17, 2023, reporting he had temporary relief with the MBB. He also reported that his lower back pain was getting worse, and was exacerbated by shoveling snow on December 29, 2022. (Ex. 6).

8. On January 31, 2023, John Burris, M.D., performed an independent medical examination (IME) at Respondent's request. Based on his examination and review of records, Dr. Burris opined that Claimant had "nonspecific low back pain with nonphysiologic presentation." Dr. Burris opined that there was no documentation to support a diagnostic response to any of the injections Claimant had received, and there was no reasonable expectation that Claimant would benefit from further treatment. He opined that Claimant's lumbar spine condition was stationary and had plateaued. He opined that Claimant was at maximum medical improvement as of October 11, 2022. (Ex. C).

9. On February 22, 2023, Dr. Knight noted that Claimant's pain diary following the December 29, 2022 MBB showed his pain was reduced from a 6/10 to 1-2/10 for four hours. She stated that this reduction in pain qualified Claimant for a repeat MBB. (Ex. G).

10. On February 28, 2023, Respondent filed a General Admission of Liability, admitting for medical benefits and temporary disability benefits. (Ex. 3).

11. On March 8, 2023, Dr. Burris issued a second report in which he opined that the second set of MBB requested by Dr. Knight was not reasonable, necessary, or work related. He indicated that because there was no functional assessment performed after the first set of MBB, there was no support that Claimant's response was diagnostic. (Ex. D).

12. On April 21, 2023, Claimant returned to Dr. Pula, who noted that authorization for the repeat MBB had been denied based on Dr. Burris' opinion. In response, Dr. Pula stated that Claimant "[h]ad MBB on 12/29.22 with a single day response. Per the procedure note for that day, only Marcaine was injected as this was a diagnostic [MBB]. The fact that he had only a single day response was appropriate given only Marcaine and no steroid. This was considered a positive response and therefore subsequent request for [MBB] was submitted." (Ex. 6).

13. On June 21, 2023, Claimant underwent a 24-month Division IME with Kathy McCranie, M.D. Dr. McCranie diagnosed Claimant with a work-related lower back strain, and opined that Claimant was at maximum medical improvement as of March 23, 2023. She also indicated that Claimant's report to her that he had complete or near-complete resolution of symptoms following facet and MBB was not consistent with the records she reviewed. (Ex. 4).

14. On July 7, 2023, Respondents filed a Final Admission of Liability consistent with Dr. McCranie's 24-month DIME. (Ex. 4). The parties agreed that Claimant has not challenged the FAL, and that any further treatment Claimant may receive, if warranted, would be considered medical maintenance benefits.

15. At hearing, Claimant testified that he did receive temporary relief from the December 29, 2022 MBB performed by Dr. Knight, and that he wishes to receive the second set of injections. Claimant's testimony was credible, and supported by the medical records.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the

witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

SPECIFIC MEDICAL MAINTENANCE BENEFITS

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover,* 759 P.2d at 710-13; *Stollmeyer v. Indus. Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, WC No. 3-979-487, (ICAO Jan. 11, 2012). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Ctr.,* 919 P.2d at 704.

Claimant has established by a preponderance of the evidence that the repeat MBB recommended by Dr. Knight are reasonable, necessary, and causally related to his industrial injury. Dr. Pula, Dr. Knight, and Dr. McCranie each opined that Claimant sustained a work-related lumbar injury. Dr. Knight's opinion that Claimant's mechanism

of injury was consistent with facet injury and modic changes is credible. Dr. Knight reasonably recommended facet injections to determine the source of Claimant's pain, which demonstrated Claimant's facet joints as the pain generator. When Claimant's lumbar pain returned, Dr. Knight ordered diagnostic MBB injections as a precursor to a potential RFA. Claimant had a diagnostic response to the December 29, 2022 MBB, reporting relief lasting approximately four hours. The ALJ credits the opinions of Drs. Pula and Knight that Claimant's response was diagnostic. The opinions of Dr. McCranie and Dr. Burris, Claimant's medical records do no document a diagnostic response to the December 29, 2022 MBB are not persuasive. The ALJ also finds credible Dr. Knight's opinion that the diagnostic response to the first MBB justifies performing a repeat set of MBB to determine whether Claimant is an appropriate candidate for an RFA procedure. The ALJ concludes that the evidence establishes it more likely than not that repeat MBB injections are reasonable and necessary to relieve or prevent further deterioration of Claimant's work-related lower back injury. Claimant's request for authorization of repeat MBB injections as recommended by Dr. Knight is granted. The determination of whether an RFA would be reasonable, necessary, and related is premature, as no provider has currently recommended the procedure, and any such recommendation is contingent, at least in part, on the results of future MBBs. The ALJ makes no conclusion on the compensability of a potential RFA in the future.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of repeat medial branch blocks recommended by ATP Karen Knight, M.D., is granted.

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

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

DATED: September 22, 2023

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that dental treatment recommended by Benjamin Tobler, DDS, {specifically crowns on teeth #13 and #15; a nightguard; and a followup dental appointment), constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted December 18, 2020 work injury?

FINDINGS OF FACT

1. On December 18, 2020, Claimant was working for Employer as a cross utilized agent at the [Redacted, hereinafter MA]. Claimant's job duties included all aspects of preparing passengers and bags for departing and arriving flights.

2. On December 18, 2020, Claimant injured her right shoulder while lifting a heavy bag. Respondent has admitted liability for Claimant's work injury. Since her injury, Claimant has undergone two right shoulder surgeries. During the second surgery, Claimant's phrenic nerve was paralyzed. Since that time, Claimant has experienced pulmonary and cardiac complications.

3. Claimant testified that as a result of her paralyzed phrenic nerve, she has a partially deflated lung and the right side of her diaphragm does not function properly. Due to these complications, Claimant has breathing difficulties and has been referred to pulmonologists at National Jewish Hospital.

4. On November 28, 2022, Claimant was seen by pulmonologist Dr. Hilda Metjian at National Jewish Hospital. On that date, Dr. Metjian recommended Claimant use a BiPAP machine at night. A request for authorization for the machine was made on that same date. Unfortunately, Claimant experienced a delay in beginning that recommended treatment because of limited BiPAP machine availability.

5. On February 13, 2023, Claimant was seen by her authorized treating physician (ATP) Dr. Randal Shelton. At that time, Claimant reported that she had received her BiPAP machine and had begun using it at night. Claimant also reported that she was having a difficult time tolerating the BiPAP's pressure.

6. Claimant testified that the BiPAP machine is necessary because her diaphragm does not expel air from her lungs. Claimant uses the BiPAP machine every night. This machine forces air into Claimant's lungs through her nose. The machine then allows the air to be released. Therefore, the machine assists with both breathing in and breathing out.

7. Claimant testified that when she is using the BiPAP machine, she clenches her jaw and forces her tongue to the roof of her mouth. Claimant explained that this is necessary to keep her mouth closed so that the air does not escape. Claimant further testified that as a result of clenching her jaw in this way, she has experienced pain in the left side of her jaw. Claimant testified that she began to notice this pain two to three weeks after beginning the BiPAP treatment. It is Claimant's belief that the action of clenching her jaw while using the BiPAP machine has resulted in two cracked teeth; specifically tooth #13 and tooth #15.

8. On March 24, 2023, Claimant was seen at National Jewish Hospital by Dr. Nancy Lin. On that date, Claimant reported that she had begun using the BiPAP machine and that she was sleeping better as a result. Claimant also reported that "when using her BiPAP she clenched her teeth so hard that it broke a tooth." In the medical record of that date, Dr. Lin noted that Claimant's broken tooth was "due to BiPAP therapy which was consequential of the work related paralyzed right hemidiaphragm." Dr. Lin recommended Claimant see a dentist and obtain a mouth guard to prevent further damage to her teeth.

9. Claimant has seen dentist Dr. Benjamin Tobler for many years. On April 11, 2023, Claimant reported to Dr. Tobler that she was continuing to experience breathing issues and had pain in her upper left teeth. In addition, Dr. Tobler noted that "ever since her diaphragm was paralyzed she had been clenching and grinding her teeth significantly." Claimant stated that she was experiencing pain and was "concerned she would break teeth." X-rays taken on that date showed large cracks in both tooth #13 and tooth #15. Dr. Tobler noted that Claimant has cracked tooth syndrome and recommended crowns on both tooth #13 and tooth #15. He also recommended the use of a night guard to protect all of her teeth "due to heavy forces placed on them when she clenches and grinds."

10. On May 4, 2023, Claimant returned to Dr. Shelton and reported that she was continuing to use the BiPAP machine. Dr. Shelton noted that Claimant "has new broken teeth from bruxism since [BiPAP]. Documented by her dentist no such issues until she started [BiPAP], now needing crowns."

11. On May 16, 2023, Dr. Shelton replied to questions posed to him by Claimant's counsel. In his response Dr. Shelton stated his opinion that Claimant's dental issues are "a new [and] related problem secondary to her [BiPAP] treatments". Dr. Shelton further noted that the BiPAP machine is necessary to treat Claimant's phrenic nerve paralysis.

12. On June 12, 2023, Dr. Tobler authored a letter in response to questions posed to him by Claimant's counsel. In that letter, Dr. Tobler stated that Claimant did not have symptoms in tooth #13 and tooth #15 prior to the April 11, 2023 appointment. Dr. Tobler opined that placing crowns on both of these teeth and the use of a night guard would be reasonable and necessary treatment of Claimant's dental issues. With regard to causation, Dr. Tobler responded in the affirmative to the question of whether

Claimant's work injury exacerbated her dental condition. Dr. Tobler also stated "only after prolonged breathing issues from her nerve damage did she develop the need for a [BiPAPJ and a significant clenching habit."

13. In a medical record dated June 29, 2023, Dr. Lin stated "[f]rom the information I have, it does appear that [Claimant's] broken teeth/dental issues are largely due to her bipap use and [as such] should be compensable under [workers'] compensation."

14. Claimant's dental records dating back to July 1, 2014 were admitted into evidence. On July 1, 2014, Dr. Tobler noted a crack in tooth #30. He recommended a root canal at that time. On July 22, 2014, Claimant returned to Dr. Tobler to undergo the root canal on tooth #30. At that time, Dr. Tobler explained that due to the depth of the crack, the root canal might not be successful.

15. On July 10, 2018, Claimant reported to Dr. Tobler that teeth on her right side had been painful for approximately one week. Dr. Tobler noted that he informed Claimant that" sometimes clenching and grinding teeth can cause teeth to get sore." Dr. Tobler opined that this "may be what caused her issues [because] she had a very hectic and stressful week last week."

16. On July 24, 2018, Claimant returned to Dr. Tobler complaining of pain in tooth #5. On examination, Dr. Tobler noted that the tooth was split in two and would require extraction. The recommended extraction was performed on that date.

17. On September 5, 2018, Dr. Tobler noted large cracks down teeth #2 and #3. He also noted noncarious cervical lesions (NCCL) on teeth #19, #20, and #21. Dr. Tobler noted "we have been discussing several of these areas for years, but she had chosen to wait on all of them." Dr. Tobler also recorded "heavy wear facets [and] abfractions due to clenching."

18. On November 9, 2020, Dr. Tobler again raised concerns about Claimant's teeth #2 and #3. On May 10, 2021, Dr. Tobler recommended fillings on teeth #4, #3, #12. He also noted thinning on teeth #8 and #9 and recommended watching those teeth. Dr. Tobler also encouraged Claimant to pursue treatment of teeth #20, #21, and #28 which were "areas we have discussed in the past".

19. Claimant testified that prior to using the BiPAP machine, she did not have issues with her teeth. Claimant further testified that she was seen by Dr. Tobler for basic dental work. Claimant does not recall prior discussions with Dr. Tobler about clenching her jaw or grinding her teeth. Claimant also testified that although she was aware of other cracks in her teeth prior to her using the BiPAP machine, those cracked teeth did not cause her pain.

20. At the request of Respondent, Dr. Lawrence Lesnak performed a review of Claimant's medical records. In a report dated June 23, 2023, Dr. Lesnak stated his opinions regarding the relatedness of the dental treatment recommended by Dr. Tobler. Specifically, Dr. Lesnak opined that there is no medical evidence to support that the cracks in tooth #13 and tooth #15 were related to the work injury. Dr. Lesnak specifically noted that the use of a BiPAP device would not cause or aggravate Claimant's chronic history of bruxism/teeth clenching. In support of these opinions Dr. Lesnak noted that Claimant has a history of numerous cracked teeth. Specifically, Dr. Lesknak noted that on July 10, 2018. Dr. Tobler made note of his discussion with Claimant that "sometimes clenching and grinding can cause teeth to get sore." Dr. Lesnak also referred to a record dated September 5, 2018, in which Dr. Tobler noted that that there were large cracks in Claimant's tooth #19 and evidence of "heavy wear facets and abfractions due to clenching."

21. On July 7, 2023, Dr. Tobler authored a letter in which he responded to Dr. Lesnak's June 23, 2023 report. In that letter, Dr. Tobler reiterated his opinion that Claimant's work injury exacerbated and accelerated the need for crowns on teeth #13 and #15. Dr. Tobler stated that there were no prior concerns with these two teeth. He further stated that "(o]ver the past couple of years these teeth have shown moderate crack propagation to the point where we were worried about them splitting." Dr. Tobler agreed that Claimant has a history of worn and cracked teeth. However, he believes this condition has worsened since Claimant's work injury.

22. Dr. Lesnak's deposition testimony was consistent with his written report. Dr. Lesnak reiterated his opinion that Claimant's need for the recommended dental treatment is not related to the work injury. In support of his opinion Dr. Lesnak noted Claimant's long history of cracked teeth and bruxism. Dr. Lesnak also testified that the use of the BiPAP machine would not have led to the cracked condition of Claimant's teeth.

23. The ALJ is not persuaded by Claimant's testimony regarding the nature and onset of her dental issues. The ALJ credits the dental records and the opinions of Dr. Lesnak over the contrary opinions of Drs. Shelton and Lin. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the need for dental treatment (including crowns on teeth #13 and #15, a night guard, and a follow-up appointment) was caused by the use of the BiPAP machine. The ALJ specifically credits Dr. Lesnak's opinion that the use of the BiPAP machine did not cause damage to Claimant's teeth. The ALJ notes that Claimant has a history of cracked teeth and has been diagnosed with cracked tooth syndrome. The ALJ specifically finds that the use of the BiPAP machine did not aggravate the pre-existing condition of Claimant's teeth.

CONCLUSIONS OF LAW

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

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

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

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

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

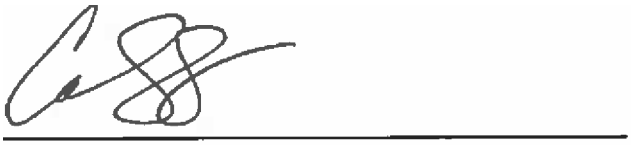
5. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H* & *H Warehouse v. Vicory,* 805
P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund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

6. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that the dental treatment recommended by Dr. Tobler is related to the work injury. As found, the use of the BiPAP machine neither caused damage to Claimant's teeth, nor aggravated the pre-existing condition of Claimant's teeth. As found, the dental records and the opinions of Dr. Lesnak are credible and persuasive on this issue.

ORDER

It is therefore ordered that Claimant's request for dental treatment, (including crowns on tooth #13 and tooth #15; a night guard; and a follow-up appointment with Dr. Tobler), is denied and dismissed.

Dated September 25, 2023.



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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.$. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-905-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered compensable industrial injuries during the course and scope of her employment with Employer on December 22, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her December 22, 2022 industrial injuries.

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

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period March 4, 2023 until terminated by statute.

FINDINGS OF FACT

1. Claimant worked for Employer as a Delivery Associate. Her job duties involved driving and delivering packages to customers. Claimant remarked that she earned approximately $800.00 each week from Employer.

2. Claimant testified that on December 22, 2022 she was delivering a package to a house that had 12-15 stairs. The stairs were icy. When Claimant was descending the stairs after delivering the package, she slipped and fell. Claimant specified that she injured her head, back, and left shoulder.

3. Claimant recounted that she immediately called Employer's dispatcher to report her fall. She remarked she was directed to drive back to Employer's warehouse and then go home.

4. In contrast to Claimant's contention, Owner of Employer [Redacted, hereinafter CS] and Manager [Redacted, hereinafter AL] described that it is Employer's policy for employees not to drive work vehicles after suffering injuries. They both emphasized that an employee who fell and injured her head would not be told to return to Employer's warehouse without assistance. Instead, Employer's policy is to send an individual to assist the injured worker and drive the employee back to the warehouse. The injured employee would then complete an injury report and receive a designated provider list unless emergency medical treatment was necessary.

5. AL[Redacted] testified that he was the dispatcher during Claimant's work shift on December 22, 2022. He denied that Claimant reported an injury or a fall to him on December 22, 2022.

6. On December 23, 2022 Claimant sent a text message to Employer's dispatch phone. The message stated the following:

> I not feeling well I feel really dizzy and my throat all swollen my chest is very tight and small fever 102 and my throats so bad it hurts to talk or swallow anything. I took meds for it. I can come in but I don't want to get in trouble for being slow. I think [Redacted, hereinafter NN] and [Redacted, hereinafter CH] finally gave me COVID or flu or both.

Although the preceding text message did not mention her work injuries on the previous day, Claimant testified that being "dizzy" referred to her work accident.

7. On December 24, 2022 Claimant visited the Emergency Department at Sky Ridge Medical Center. She presented with multiple concerns including a fever up to 105 degrees for the past three days, chills, a sore throat, nasal congestion, a cough, nausea, vomiting, diarrhea, dysuria, and chronic back pain. Claimant had also developed left-sided chest pain on the night before her visit. She commented that her son was currently sick with "COVID and flu." Claimant exhibited back pain, but no neck or extremity pain. She also did not have a headache or numbness/tingling. During a physical examination, Claimant demonstrated "full range of motion of 4 extremities" and no midline cervical, thoracic, or paraspinal tenderness. Her speech and mood were also normal. Claimant noted her back symptoms felt like her "usual back pain" for which she was on "chronic oxycodone." Testing for COVID-19, influenza, and strep were all negative. Medical providers assessed Claimant with a viral illness and back pain. Claimant did not mention any fall down stairs, a concussion, or shoulder issues during the Emergency Department visit.

8. Claimant testified that she has suffered consistent shoulder pain since her fall at work. She has also experienced headaches, dizziness, cloudiness, and memory loss since December 22, 2022. However, Claimant's testimony is not consistent with her medical or employment records.

9. Claimant worked seven additional shifts for Employer from December 27, 2023 through January 7, 2023 after her alleged fall on December 22, 2023. She specifically worked full duty including loading packages, unloading packages, and driving a delivery vehicle. AL[Redacted] testified that he saw Claimant at the beginning of her shifts and she did not display any visible signs of injuries while working. Claimant's ability to work full duty as a delivery driver is inconsistent with her interrogatory response #6 that stated she has been unable to lift anything and folding laundry is "very tough" with her left arm "out of commission" since suffering her work injuries.

10. Employer's Manager [Redacted, hereinafter RL] testified he met with Claimant on January 20, 2023 to obtain her First Report of Injury. Claimant commented that her fall occurred on Christmas Eve or December 24, 2022. She acknowledged that January 20, 2023 was the first time she reported the accident to Employer.

11. The First Report of Injury is dated January 23, 2022 and was prepared by

CS[Redacted]. Notably, the document specifies that Claimant could not remember any of the details about the location or area where she was injured. Although Claimant stated she was delivering packages during her work accident, she was unable to specify how she fell. Nevertheless, in her Answers to interrogatories, Claimant provided a very detailed explanation of the circumstances and location surrounding her work accident.

12. On January 20, 2023 Claimant began treatment under the present claim at OnPoint Urgent Care. She presented with neck pain, shoulder pain, and other possible concussive symptoms since a work injury on December 24, 2022. Claimant detailed that she slipped down approximately 12-15 icy steps and struck her "butt, back and then head." She denied a history of prior back pain. Cynthia Chavoustie, PA noted limited range of motion in Claimant's left shoulder and tightness in her neck. PA Chavoustie assessed Claimant with a closed head injury, left shoulder injury, post-concussion syndrome, paresthesia of her lower extremity, and a neck injury/strain.

13. On February 14, 2023 Claimant began receiving treatment from Authorized Treating Provider (ATP) Philip Stull, M.D. Claimant reported a left shoulder injury that occurred at work on December 24, 2022. Dr. Stull noted a left shoulder MRI had been completed on February 8, 2023. The imaging revealed a posterior superior labral tear. Dr. Stull found a painful arc of motion with limited range of motion on examination. He recommended a surgical labral repair.

14. On February 15, 2023 Insurer filed a Notice of Contest in the present claim stating that Claimant's injury was not work-related. Claimant testified she spoke with [Redacted, hereinafter AH], a representative from Insurer, around the same time. AH[Redacted] informed Claimant she did not work on December 24, 2022. Furthermore, Claimant's timecard reflects that she was not at work on December 24, 2022. Claimant testified that she provided the incorrect date of injury of December 24, 2022 because she was suffering from a concussion and COVID-19. She subsequently advised her medical providers she slipped and fell while delivering packages at work on December 22, 2022.

15. Claimant has failed to establish it is more probably true than not that she suffered compensable left shoulder, head, and back injuries during the course and scope of her employment with Employer on December 22, 2022. Initially, Claimant explained that while working for Employer on December 22, 2022, she fell down icy stairs while delivering a package. She testified she immediately reported the fall to a dispatcher who directed her to drive back to the warehouse then go home. Despite Claimant's assertions, the record reveals numerous internal inconsistencies and conflicts with other witnesses that cast doubt on the veracity of her account. Owner CS[Redacted] and Manager AL[Redacted] emphasized that an employee who fell and injured her head would not be told to return to Employer's warehouse without assistance. Furthermore, AL[Redacted] explained that he was the dispatcher during Claimant's work shift on December 22, 2022 and she did not report a fall. Finally, on December 23, 2022 Claimant sent a text message to Employer stating that she was suffering from dizziness, a fever, a sore throat and chest tightness. However, she did not mention a slip and fall at work on the preceding day.

16. The medical report from the Sky Ridge Medical Center Emergency Department

dated December 24, 2022 reflects Claimant was not suffering from any work injuries. She presented with multiple concerns including a fever up to 105 degrees for the past three days, chills, a sore throat, nasal congestion, a cough, nausea, vomiting, diarrhea, dysuria, and chronic back pain. Testing for COVID-19, influenza, and strep were all negative. Medical providers assessed Claimant with a viral illness and back pain. Notably, Claimant did not mention any fall down stairs, a concussion, or shoulder concerns during the Emergency Department visit just two days after the work accident.

17. Claimant's description of her accident is internally inconsistent. The record reveals that Claimant worked seven additional shifts for Employer from December 27, 2023 through January 7, 2023 after her alleged fall on December 22, 2023. She specifically worked full duty including loading packages, unloading packages, and driving a delivery vehicle. AL[Redacted] testified that he saw Claimant at the beginning of her shifts and she did not display any visible signs of injuries while working. Claimant's ability to work full duty as a delivery driver is also inconsistent with her Interrogatory response #6 that stated she has been unable to lift anything and folding laundry is "very tough" with her left arm "out of commission" since suffering work injuries.

18. Claimant acknowledged that January 20, 2023 was the first time she reported her injuries to Employer. She noted that her fall occurred on Christmas Eve or December 24, 2022. The First Report of Injury is dated January 23, 2022 and was prepared by CS[Redacted]. Notably, the document specifies that Claimant could not remember any of the details about the location or area where she was injured. Although Claimant stated she was delivering packages during her work accident, she was unable to specify how she fell. Nevertheless, in her Answers to interrogatories, Claimant provided a very detailed explanation of the circumstances and location of her work accident.

19. Claimant initially alleged a December 24, 2022 date of injury. However, she did not work on the preceding date. Claimant only changed the date of the fall to December 22, 2022 after she was informed by Insurer's representative AH[Redacted] that she did not work on December 24, 2022. Claimant's explanation, about suffering from a concussion and COVID-19 is not credible based on her ability to clearly recall other events around that time as well as her negative COVID-19 test on December 24, 2022. Based on the credible testimony of Employer witnesses, the medical records and Claimant's employment records, it is unlikely that Claimant suffered injuries while working for Employer on December 22, 2022. Claimant has specifically failed to demonstrate a causal nexus between her work activities and injuries to her left shoulder, head, and back. Claimant's work activities on December 22, 2022 thus did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

7. As found, Claimant has failed to establish by a preponderance of the evidence

that she suffered compensable left shoulder, head, and back injuries during the course and scope of her employment with Employer on December 22, 2022. Initially, Claimant explained that while working for Employer on December 22, 2022, she fell down icy stairs while delivering a package. She testified she immediately reported the fall to a dispatcher who directed her to drive back to the warehouse then go home. Despite Claimant's assertions, the record reveals numerous internal inconsistencies and conflicts with other witnesses that cast doubt on the veracity of her account. Owner CS[Redacted] and Manager AL[Redacted] emphasized that an employee who fell and injured her head would not be told to return to Employer's warehouse without assistance. Furthermore, AL[Redacted] explained that he was the dispatcher during Claimant's work shift on December 22, 2022 and she did not report a fall. Finally, on December 23, 2022 Claimant sent a text message to Employer stating that she was suffering from dizziness, a fever, a sore throat and chest tightness. However, she did not mention a slip and fall at work on the preceding day.

8. As found, the medical report from the Sky Ridge Medical Center Emergency Department dated December 24, 2022 reflects Claimant was not suffering from any work injuries. She presented with multiple concerns including a fever up to 105 degrees for the past three days, chills, a sore throat, nasal congestion, a cough, nausea, vomiting, diarrhea, dysuria, and chronic back pain. Testing for COVID-19, influenza, and strep were all negative. Medical providers assessed Claimant with a viral illness and back pain. Notably, Claimant did not mention any fall down stairs, a concussion, or shoulder concerns during the Emergency Department visit just two days after the work accident.

9. As found, Claimant's description of her accident is internally inconsistent. The record reveals that Claimant worked seven additional shifts for Employer from December 27, 2023 through January 7, 2023 after her alleged fall on December 22, 2023. She specifically worked full duty including loading packages, unloading packages, and driving a delivery vehicle. AL[Redacted] testified that he saw Claimant at the beginning of her shifts and she did not display any visible signs of injuries while working. Claimant's ability to work full duty as a delivery driver is also inconsistent with her Interrogatory response #6 that stated she has been unable to lift anything and folding laundry is "very tough" with her left arm "out of commission" since suffering work injuries.

10. As found, Claimant acknowledged that January 20, 2023 was the first time she reported her injuries to Employer. She noted that her fall occurred on Christmas Eve or December 24, 2022. The First Report of Injury is dated January 23, 2022 and was prepared by CS[Redacted]. Notably, the document specifies that Claimant could not remember any of the details about the location or area where she was injured. Although Claimant stated she was delivering packages during her work accident, she was unable to specify how she fell. Nevertheless, in her Answers to interrogatories, Claimant provided a very detailed explanation of the circumstances and location of her work accident.

11. As found, Claimant initially alleged a December 24, 2022 date of injury. However, she did not work on the preceding date. Claimant only changed the date of the fall to December 22, 2022 after she was informed by Insurer's representative AH[Redacted] that she did not work on December 24, 2022. Claimant's explanation, about suffering from a concussion and COVID-19 is not credible based on her ability to clearly recall other events around that time as well as

her negative COVID-19 test on December 24, 2022. Based on the credible testimony of Employer witnesses, the medical records and Claimant's employment records, it is unlikely that Claimant suffered injuries while working for Employer on December 22, 2022. Claimant has specifically failed to demonstrate a causal nexus between her work activities and injuries to her left shoulder, head, and back. Claimant's work activities on December 22, 2022 thus did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

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

DATED: September 25, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-142-174-004

ISSUES

- Did Respondents overcome the Division IME determination that the Claimant is not at MMI?
- If so, did Respondents overcome the DIME determination that the Claimant has 27% whole person impairment?

FINDINGS OF FACT

1. Claimant works for Employer as a mechanic. He sustained an admitted low back injury on February 24, 2020. He injured himself using a 3' pipe lever to straighten a bent snowplow mount.

2. A hearing was previously held in the matter before the undersigned Administrative Law Judge. In an order issued on November 22, 2022, the ALJ denied medical treatment for Claimant's hip and groin as unrelated. That order was not appealed. Following that order, Claimant's ATP, Dr. Johnson placed the Claimant at MMI on December 9, 2022 and issued a 30% whole person impairment rating.

3. Respondents requested a Division sponsored IME. On the Application for Division IME, Respondents only checked Region 4, the lumbar spine, as the body part at issue. Claimant did not request by motion that any other regions/body parts be added. Presumably, other body parts, including the hip (Region 2) or psychological (Region 3) could have been added by motion and order from an ALJ or PALJ. However, there is no specific mechanism in Rule 11 to add regions.

4. The DIME was performed by Dr. Ogden on April 12, 2023. Since Dr. Ogden was not familiar with complications from hip replacements, he conducted medical literature research including research with "UpToDate". Dr. Ogden determined Claimant has not reached MMI and he issued an advisory 27% whole person impairment rating.

5. Specifically, Dr. Ogden determined that Claimant could benefit from chronic pain evaluation and treatment. In accordance with the Chronic Pain Disorder Medical treatment Guideline, he suggested an evaluation by a psychologist or a psychiatrist. He also determined that the pain in Claimant's left hip needs to be addressed. He recommended an evaluation to provide a diagnosis and definitive care. After review of the medical literature, Dr. Ogden determined that the Claimant's L5-S1 fusion caused changes in the hip dynamics. Due to that change, he related the hip to the work injury.

6. Dr. Ogden was unaware that the ALJ had previously determined that the hip was unrelated to the work injury after a hearing on the matter. Dr. Ogden became aware of the Order after the DIME was completed and he was asked about it in his deposition.

7. Respondents filed an Application for Hearing on May 12, 2023 to challenge the determinations of the DIME that the Claimant is not at MMI and the 27% impairment rating.

8. Respondents obtained an IME with Dr. Wallace Larson. In his September 28, 2022 report, Dr. Larson stated that "(a)t this time his left groin pain has not been definitely diagnosed, but is most likely iliopsoas tendinitis either as an idiopathic condition or related to his total hip arthroplasty. . . it is not likely related to his anterior lumbar fusion." Exhibit E, p. 12. Additionally, Dr. Larson opined that Claimant was at MMI for his work related injury. Exhibit E, p. 13.

9. Dr. Larson also testified at hearing. He opined that the iliopsoas tendonitis is not related to the spine surgery that Claimant underwent. He also provided a peer review article (Exhibit G) which is a comprehensive article on iliopsoas tendonitis. It demonstrates that if the acetabular component of the hip replacement extends too far out, it will rub against the iliopsoas tendon causing tendonitis. This suggests that this would be a likely cause of hip pain following a total hip replacement as opposed to back surgery.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101,*et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

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

E. A DIME's findings may only be overcome by clear and convincing evidence. Clear and convincing evidence has been defined as evidence which demonstrates that it is 'highly probable' the DIME's opinion is incorrect. See Qual-Med, Inc., v. ICAO, 961 P.2d 590 (Colo. App. 1998); Metro Moving & Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995). However, prior to consideration of the DIME's findings, it is necessary to determine the scope of the DIME as requested by the parties. Here, the only body part selected by Respondents for consideration by the DIME is the lumbar spine. Since no other body part was selected, the DIME doctor's inclusion of hip and psychological are beyond the scope of the DIME. As such, the doctor's opinions that the Claimant is not at MMI for hip and psychological issues for chronic pain cannot be considered under C.R.S. §8-42-107.2(2)(b). That statute provides that "the authorized treating physician's findings and determination shall be binding on all parties and the division" if not made the subject of the DIME review. *See, Rodriguez v. Aarons, Inc*., W.C. No. 5-119-986 (March 8, 2023). (Since the 3% mental impairment rating was not an issue for consideration by the DIME, it is binding on the parties and the Division and the ALJ cannot consider it).

F. Having determined that the only body part that the DIME could consider is the lumbar spine, it is somewhat unclear to me as to whether the DIME doctor determined that the Claimant is at MMI for the spine alone. However, based on the fact that the DIME doctor did not include the spine in his determination that the Claimant was not at MMI, I conclude that it is his opinion that Claimant is at MMI for the spine alone. I reach this conclusion based on the fact that the Doctor mentions only two reasons that the Claimant is not at MMI, namely the hip and chronic pain. Additionally, to the extent that Dr. Ogden is opining that Claimant is not at MMI due to his lumbar spine, I conclude that Respondents have overcome that determination based on the opinions of Dr. Larson, whom I find to be credible and

persuasive. I am also persuaded by Dr. Larson's opinion that Claimant's hip pain is likely due to iliopsoas tendonitis rather than Claimant's lumbar surgery. The DIME doctor clearly erred when he opined that Claimant is not at MMI.

G. Respondents also challenge the impairment rating for the spine in their proposed order. They maintain that the correct impairment rating is 20% whole person as opined by Dr. Larson. They offer this rating utilizing preponderance of the evidence standard instead of providing evidence that Dr. Ogden's impairment rating is clearing incorrect. In reviewing the evidence I conclude that Respondents have failed to overcome the impairment rating of Dr. Ogden of 27% whole person.

ORDER

1. The parties are bound by the authorized treating physician's determination that the Claimant is at MMI for all work related conditions except for the lumbar spine.

2. The Claimant is at MMI for the lumbar spine.

3. The Respondents failed to overcome the Division IME determination that the Claimant has a 27% impairment rating.

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

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

DATED: September 26, 2023

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has proven by clear and convincing evidence that Claimant is not at maximum medical improvement (MMI), as found by Division Independent Medical Examining (DIME) physician Caroline Gellrick, M.D.

II. If Claimant is found not at MMI, whether Claimant has shown which body parts are related to the July 30, 2021 admitted claim, including a mild traumatic brain (mTBI) injury, psychological condition, left hip and left shoulder injuries, as well as cervical, thoracic, and lumbar spine,.

III. If Claimant is found to be at MMI, what is the correct impairment, including whether Claimant proved conversion.

IV. If Claimant is found not at MMI, whether Claimant has shown by a preponderance of the evidence she is entitled to temporary total disability (TTD) benefits from March 21, 2022 through the present and continued until terminated by law.

PROCEDURAL HISTORY

Respondents filed a First Report of Injury (FROI) on August 3, 2021 noting that Claimant had been "scrubbing and stripping Floor (sic.) with stripper and walked slightly to move the plug to the scrubbing machine and slipped on wet floor with stripper and water. Fell on buttock, back and hit head on floor." The Head Building Engineer IV reported that Claimant sustained injuries when she slipped on wet floor with chemical and hurt her back, hip and head, and when mentioning the body parts affected included the upper back as well.

Insurer filed a General Admission of Liability on September 3, 2021 admitting for medical benefits and temporary disability benefits at the rate of $700.69 per week from August 19, 2021. The admitted average weekly wage was $1,051.04.

Respondents filed a Final Admission of Liability (FAL) on November 15, 2022 based on a date of maximum medical improvement of March 21, 2022 in the DIME physician's report (Dr. Caroline Gellrick) dated November 7, 2022, admitting for impairment of 7% of the lower extremity, 14% of the upper extremity and 7% whole person of the cervical spine. The FAL also admitted to reasonable, necessary and related medical treatment and/or medications after MMI.

On December 20, 2022 the Office of Administrative Courts issued an Order Granting the Unopposed Motion to Withdraw Application for Hearing and Hold Issues in Abeyance. The order specified, if the parties were unable to resolve the issues, that Claimant must refile an AFH within 30 days of the settlement conference.

On March 23, 2023 Claimant filed an Application for Hearing on issues of overcoming the DIME physician's opinions with regard to MMI and impairment as well as conversion, temporary disability benefits and disfigurement, among other issues.

Respondents filed a Response to AFH on April 21, 2023 on similar issues but additionally on causation, preexisting condition, relatedness, credits and apportionment, among other issues.

STIPULATIONS OF THE PARTIES

The parties made the following stipulations:

1. The parties stipulated that the issue of permanent total disability (PTD) benefits and disfigurement would be held in abeyance.

2. The parties further agreed that the issue of permanent partial disability (PPD) benefits and maintenance medical benefits (Grover benefits) are not ripe unless this ALJ determines that Claimant has reached MMI.

3. Lastly, the parties agree that, if this ALJ determines Claimant is not at MMI, TTD benefits should be reinstated as of the last date Claimant was previously placed at MMI.

The stipulations of the parties is accepted and becomes part of this order.

FINDINGS OF FACT

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

A. Generally:

1. Claimant was 56 years old at the time of the hearing. Claimant worked as a custodian and housekeeper for Employer for approximately 19 years prior to the admitted work injury of July 30, 2021.

2. On July 30, 2021 Claimant was working, stripping and shining floors with a machine called a side-side or buffer, when she slipped and fell, hitting her head, injuring her head, neck, left shoulder, back and left hip.

3. Claimant does not know if she lost consciousness, and had never told any of her providers that she lost consciousness, only that she recalls being upright and her whole body was trembling. She also remembered disconnecting the machine and then walking on the chemical wax stripper on the floor, then slipping and falling directly onto her back, hitting her head. For several minutes she was not able to concentrate but then went in search of her supervisor to let her know about the fall, then she continued her shift.

4. Claimant had a prior low back injury approximately 25 years before her work injury. She did not have the problems she currently has with her back in the years leading

up to her work injury. She would take oxycodone for pain when her doctor prescribed it but not for some time. She had been prescribed oxycodone for her leg pain as she would walk extensive amounts while working.

B. Claimant's Testimony:

5. Claimant was first evaluated by Dr. Beach on August 3, 2021. At that time she complained of feeling dazed, a symptom which she has been having since then to the time of the hearing. She also stated, despite whether Dr. Beach documented it or not, that she was limping when she first saw him. She had never experienced any of these kind of symptoms before her admitted work related accident. She had also been experiencing problems with forgetfulness, loss of focus, concentration, crying a lot, not able to tolerate lights or bear noise very well. At the time she fell and hit her head, the pain was intolerable in both her head and her neck, which has caused difficulties with turning her head since then. The pain in her left shoulder caused a sense of dislocation that felt like her arm was unhooked or separated, including a burning sensation. She also felt a burning sensation in her low back and left hip and as if she was sitting on a pointy rock, with pain going down her leg. This has caused problems with sitting for long periods of time and she has to shift and sit on her right buttock. She stated that she got along well with Dr. Beach and did not understand why he would have documented somethings and not others.

6. Her symptoms were so bad that on August 11, 2021 she ended up going to the emergency room. She was having balance problems and felt very dizzy. Dr. Beach referred Claimant to Dr. Olsen first for the low back problems, for which she did not receive long term relief. Dr. Beach also referred Claimant to Dr. Hammerberg, a neurologist, and Dr. Ledezma who treated her for depression. Claimant testified that she had never had problems with depression previously and those symptoms began approximately five days following the July 30, 2021 work injury because she could not be around many people and could not endure loud noises. Further, while the dizziness was not occurring all the time, she continued to have dizziness. Sometimes the dizziness caused her imbalance but her pain in her left hip does as well.

7. Claimant stated that she used to be an extremely independent person that now has had to rely on others to most things for her. For example, she has had to stop cooking for herself because she has burned herself and would forget the stove on, causing the alarm to go off. She has had to stop going to the store by herself because she would get lost and have panic attacks or just starts crying.

8. Claimant stated that when Dr. Beach discharged her she continued having the same problems, including problems with her neck, head, left shoulder, back, left hip, with burning sensations going down her arm and her leg, and problems with depressive thoughts, all of which have continued through the time Claimant was seen by the DIME physician.

9. After Claimant was discharged by Dr. Beach on March 21, 2022, and evaluated by the DIME physician, Claimant was returned for treatment of her left shoulder. She saw Dr. Olsen who referred her for an MRI, which she understood showed a tear in her left shoulder tendons. Claimant was sent for physical therapy for her left

shoulder. She also was evaluated by the orthopedic specialist who discussed possible surgery of the left shoulder if the physical therapy did not work. Claimant stated that she would like the surgery if it was offered to her.

10. Dr. Olsen also referred her for an MRI of the left hip and advised Claimant that she did not require any surgery for the left hip.

11. Claimant conveyed that she did not get along with Dr. Ledezma but that if she was offered a different psychologist, she would be willing to continue treating her depression and anxiety.

12. Claimant disagreed with Dr. D'Angelo that she had not had left shoulder pain for some time before MMI as the pain had always been there and she reported as much to her providers. Lastly, she stated that, if she was offered treatment that would improve her condition, she would proceed with the treatment. She agreed that she had not improved much in the two years since her injury. She stated that she only recalls the injections helping temporarily and the limited physical therapy for the left shoulder has been limited to hot patches on her shoulder and a little massage without improvement, she has not had therapy that involved exercises to improve function.

13. Further, there were multiple things Claimant did not recall telling her providers or remembered them telling her, such as Dr. Ledezma instructing her on coping strategies for pain or handling anxiety or Claimant telling Dr. Ledezma than she did not think the instructions would help. She stated that sometimes her memory is fine but at other times it is not, especially if she is going into a panic attack. She stated that she did not remember a lot of things since her accident, including doctors, people, faces, appointments, and she has to rely on her son for many things.

C. Medical Records:

14. Claimant was initially examined by Dr. Dee Jay Beach on August 3, 2021 with a history of slipping and falling on a wet floor, striking her head, back, bilateral buttocks and had a left arm extended when she fell. She denied loss of consciousness but felt dazed for several seconds. She continued to work, stating her pain had decreased since the accident but she continued to have problems with concentration, occasional dizziness, headaches (HAs), pain in her neck, back, left shoulder and left hip. She provided a prior history of injury to her low back when she was approximately 35 to 36 years old, when she had physical therapy for three years, had difficulty walking but regained normal function slowly with no restriction or impairment. She reported that she had had intermittent back pain since. Dr. Beach noted Claimant had oxycodone two to three times a month for back pain for 20 years. Dr. Beach noted Claimant had headaches, head injury, muscle and joint pain, stiffness, back pain and neck pain. On exam he noted that Claimant was not tender on the head and he did not perceive any signs of trauma to the head, had a 3 cm by 3 cm bruise on her inferior right buttock, was tender to palpation over the paraspinal muscles from C3-T8 and L3-L5, left scapular muscles, left elbow, and left hip. He noted, under patient counseling, that claimant had normal balance, memory, coordination, speech, calculation and Romberg. He diagnosed concussion, neck pain, thoracic pain, lumbar pain, left hip pain, left shoulder sprain/strain and head pain. He recommended gentle stretching and heat and returned her to regular duty with no

climbing ladders. Claimant was to return to consult on August 16, 2021 or sooner if symptoms changed.

15. On August 11, 2021 Claimant was seen at the emergency room at UCHealth Anschutz due to headaches and altered mental status. Nurse Brittney Drapal noted Claimant had a concussion, with worsening memory, altered feelings, continual headache with neck pain and ear pain. Claimant reported her balance was off and had light sensitivity. Claimant's family members reported that Claimant had been confused and forgetful since the accident. Claimant mentioned her supervisor had also noticed these problems. Dr. Marianne Wallis had a working diagnosis of headaches and altered mental status. Dr. Wallis ordered a CT of the brain, which was read as normal, with no acute findings of intracranial abnormality.

16. Claimant was again evaluated by Dr. Beach on August 12, 2021, before her scheduled appointment with reports of feeling worse, with persistent headaches, nausea, dizziness, confusion, fatigue, pain in her neck, back and left hip. Dr. Beach noted a slow guarded gait, guarded trunk movements, mild dizziness while standing with eyes closed and turning head, positive Romberg, tender to palpation over the paraspinal muscles from C3-T4 and L3-L5, and SI joint on the left, left scapular muscles, left elbow, left hip. Dr. Beach ordered physical therapy at Select Physical Therapy for four weeks including exercise, joint mobilization, spine stabilization, ultrasound, electrical stimulation and concussion management. He decreased her hours to 4 hours a day, with a mostly seated restriction.

17. On August 19, 2021 Claimant reported to Dr. Beach that she continued with symptoms of headaches, dizziness, blurred vision, nausea, fatigue, memory loss, pain in her neck, back, left hip, and left shoulder, and was having difficulty working. On exam Dr. Beach noted that Claimant was anxious, fearful, tearful, and had an unsteady slow gait, improving memory but continued with tenderness to palpation of neck, back, left hip and left shoulder with guarded range of motion (ROM). Considering the continuing symptoms, Dr. Beach referred Claimant to a neurologist, Dr. Eric Hammerberg for management of the diagnosed post-concussive syndrome. He also kept Claimant off work, recommending brain rest, a bland diet and quiet environments.

18. Claimant had an MRI of the Head/Brain performed at Health Images at Church Ranch on August 25, 2021. Dr. Benjamin Aronovitz noted that there was minimal chronic small vessel ischemic disease but no acute findings.

19. Dr. Beach evaluated Claimant on August 30, 2021, four and one half weeks post slip and fall with multiple injuries, including a head injury. Claimant continued with post concussive syndrome with persistent headaches, nausea, dizziness, lethargy, brain fog, and pain in her left hip, left shoulder, neck and back. Claimant had a slow unsteady gait, poor balance with eyes closed and moderate swaying. Dr. Beach noted Claimant was in moderate distress, had tenderness to palpation (TTP) over the C3-T6, L3-L5, left lateral hip, left SI joint, left lateral shoulder, and left scapula area with guarded ROM. Claimant continued with a positive Romberg sign but normal speech. He discussed the normal MRI of the brain with Claimant, except for chronic mild ischemia. Dr. Beach ordered a MRIs of the lumbar spine and left hip, continued physical therapy and home

exercise program, continued use of heat and cold on neck, back and left hip, continued brain rest, bland diet and no work duties.

20. Claimant had an MRI of the lumbar spine performed at Health Images at Church Ranch on August 31, 2021. Dr. David Goodbee read the results noting that Claimant had multilevel degenerative changes with mild facet hypertrophy at L3-5, showing mild canal and left foraminal narrowing at L2-3 and L4-5. It also showed moderate bilateral foraminal narrowing at L5-S1 with subtle effect upon the exiting right L5 nerve root and a small broad-based disc. The left hip MRI showed left gluteus minimus tendinopathy and low-grade partial tearing as read by Dr. Seth Andrews.

21. Claimant returned to see Dr. Beach on September 7, 2021 with continued post concussive symptoms as well has continued issues with her neck, lumbar spine, left lateral and posterior hip, and SI joint as well as her left shoulder. He reviewed the findings on the lumbar spine MRI including the multilevel degenerative changes and foraminal narrowing. The MRI of the left hip showed gluteus minimus tendinopathy and low grade partial tearing. Claimant continued with daily headaches, dizziness, nausea, fatigue, and photophobia with reports of pain of 6/10 in the left shoulder and neck and 8/10 in the lumbar spine and left hip, which improved with rest. Dr. Beach noted that Claimant was walking slowly, was depressed, somber, and uncomfortable and had the same TTP points.

22. Dr. Eric Hammerberg evaluated Claimant on September 8, 2021 concerning her head trauma. He obtained a history consistent with that provided at hearing and to Dr. Beach, with the exception that when listing symptoms, he also listed significant sleep issues, and both short term and long term memory loss. On exam, he noted a grossly normal exam but did not test cognition, found decrease pin and touch sensation over the left face, increased neck pain with extension and left rotation, TTP over the posterior cervical muscles bilaterally, the superior trapezius muscle bilaterally and the left shoulder, markedly impaired tandem gait, decreased sensation over the left upper extremity and lower extremity with vibration and position sensation. He diagnosed postconsussion syndrome, dizziness and giddiness, adjustment reaction with mixed disturbance of emotion and posttraumatic headaches. He prescribed Claimant sertraline (Zoloft).

23. Claimant missed an appointment as she had tested positive for COVID-19 with household also in quarantine. Claimant did not have any symptoms though. She had been diagnosed with COVID-19 the previous April 2020, according to her son.[1]

24. By 9 weeks post injury, on October 4, 2021, Claimant reported to Dr. Beach she had improved concentration and balance but persistent headaches, nausea, photophobia and insomnia. She resumed driving short distances. On exam, Dr. Beach continued to note guarded gait with unsteady balance, was positive for photophobia and sonophobia. He noted that Dr. Hammerberg had prescribed Zoloft. Dr. Beach prescribed Amitriptyline as well. He also referred Claimant to Dr. Olsen for evaluation and treatment of left hip and low back pain.

[1] See November 9, 2021 report by Dr. Beach.

25. Dr. Nicholas Olsen evaluated Claimant on October 7, 2021 taking a history consistent with Claimant's testimony at hearing. She complained of pain in her left shoulder and left hip at 8/10, with depression, anxiety and irritability as well as moderate pain behaviors during exam. She provided a past history of back injury and motor vehicle accidents, though was performing her regular job at the time of the accident. He noted moderate axial back pain with palpation, positive facet loading on the left, limited ROM, negative for radicular features in the lower extremities. Neurologic exam showed light loss of strength on the left lower extremity, no focal motor loss, generalized give-away weakness, decrease in sensation to pinprick in the left L4, L5 and S1 dermatomes and absent long tract signs. He diagnosed L4-5, L5-S1 spondylosis with radiculopathy, left shoulder sprain and MRI of the left hip demonstrating left gluteus medius tendinopathy and low grade partial tearing. Dr. Olsen recommended bilateral L4-5 and L5-S1 facet injection.

26. On October 18, 2021 Claimant's symptoms had not improved. She had just started with Zoloft medication prescribed by Dr. Hammerberg and continued with headaches, photophobia, and brain fog as well as anxiety and depressed mood. Dr. Beach referred Claimant to Dr. Lupe Ledezma, a Spanish speaking psychologist for treatment of depression. Claimant was also to proceed with L4-5 and L5-S1 lumbar facet injections with Dr. Olsen.

27. On October 19, 2021 Dr. Hammerberg continued to document claimant's phonophobia, depression, crying spells, and headaches described as her "head is on fire." He prescribed divalproex sodium ER (Depakote ER) and increased her sertraline.

28. On November 1, 2021 Claimant was initially evaluated by Dr. Lupe Ledezma, a psychologist. Dr. Ledezma took a history consistent with Claimant's testimony noting that Claimant slipped and fell back onto her back, hitting her head on the ground. She remarked that Claimant felt dazed, immediate lower back, left shoulder, left hip pain and a strong headache. In the days following the July 30, 2021 accident, Claimant continued to feel increasingly mentally fuzzy and confused, with difficulty tolerating noise and bright lights. She felt frequent postconsussion nausea and cried at work almost daily. She was making mistakes while driving and one day ran into the wall of her garage. Her supervisor also had remarked that she was making mistakes at work, leaving equipment in the incorrect places, forgetting to perform tasks, not remembering instructions and her supervisor recommended she seek medical attention because of her symptoms. Claimant reported symptoms of depression and anxiety which included sadness, tearfulness, crying for no reason, isolation, lethargic, lack of motivation, difficulty around people, poor sleep, decreased appetite, loss of interest in hygiene, felt pessimistic, had decreased self-confidence, was not independent, and was uncomfortable in social situations. Dr. Ledezma diagnosed moderate major depression, mild anxiety and mild neurocognitive disorder. She prescribed psychotherapy to provided coping skills, pain control, cognitive compensatory strategies and mood stabilization, as well as neuropsychological testing with Dr. Laura Rieffel, and recommended continued antidepressant medication, and medical intervention.

29. Dr. Olsen proceeded with the bilateral L4-5, L5-S1 facet injections on November 2, 2021. Preinjection VAS score was 8/10 and a 6/10 post injection score.

30. Dr. Beach noted on November 9, 2021 that Claimant had been taking Depakote ER for three weeks pursuant to Dr. Hammerberg. Claimant continued with symptoms of headaches, irritability, anxiety, photophobia, and sonophobia. She reported some improvement with low back pain following injections. Symptoms with regard to the left hip, left shoulder and neck continued. Claimant was still unable to work.

31. Dr. Hammerberg conducted a telehealth visit on November 10, 2021 noting symptoms continued as before with severe generalized headaches, which began occipitally and then spread forward, with daily crying spells and occasional panic attacks. Dr. Hammerberg suggested that her headaches may be cervicogenic in etiology; that they should consider facet injections in the upper cervical spine and recommended she continue to be followed by Dr. Ledezma, with coordination of proper dose and choice of antidepressant medication.

32. Dr. Ledezma noted on November 22, 2021 that Claimant continued to have headaches, dizziness, neck pain, back pain, and general fatigue, as well as being overwhelmed by lights, sound and activities around her, and night panic, ruminations and negative thoughts. She focused on cognitive behavioral strategies, relaxation strategies, desensitization strategies as well as rehearsing the strategies to block negative thoughts, and utilize more proactive approaches, such as self-soothing instead of depending on others.

33. Claimant returned to Dr. Olsen on December 1, 2021 and reported that the facet injection provided 80% reduced pain with five days of relief following the procedure. He noted a diagnostic response to the anesthetic phase and stated she may be a candidate for radiofrequency neurotomy but would need to complete medial branch block series. He recommended a bilateral L3, L4 medial branch and L5 dorsal primary ramus block.

34. On December 1, 2021 Dr. Beach noted that Claimant's postconcussive symptoms were exacerbated by depression and a generalized anxiety disorder. Claimant continued with treatment with Dr. Ledezma. Due to continued back symptoms, Dr. Olsen recommended a medial branch block. Claimant was provided with mostly seated duty work restrictions. By December 6, 2021 Claimant returned to see Dr. Beach because she could not tolerate the modified duty work. She continued to be on Sertraline and Zoloft, she was fearful, nervous, and depressed, still exhibiting photophobia/sonophobia and spoke very little, having her son speak on her behalf. Dr. Beach increased her sertraline and took her off work again.

35. Claimant returned to Dr. Ledezma on December 9, 2021 with similar symptoms. They worked on strategies to avoid increased anxiety in social situations. Claimant also reported that she would become fearful and anxious when she was left alone. Dr. Ledezma encouraged Claimant to become more active. They discussed Claimant's continued problems with short-term memory, attention and concentration as her children became frustrated by her forgetting food burning, leaving water on or being unsafe in the household. Dr. Ledezma stated that Claimant was resistant to the idea that she could have a positive effect on her own function and she needed to be more proactive in managing and improving her symptoms without relying on medical providers to solve

her problems. She diagnosed major depression, generalized anxiety disorder and stated that a neurocognitive disorder needed to be ruled out.

36. Dr. Beach saw Claimant again on December 30, 2021 with continued postconcussive symptoms. She continued to appear anxious and depressed. He increased her Zoloft to 100 mg per day and recommended continued counselling as well as the medial branch block with Dr. Olsen.

37. On January 3, 2022 Claimant continued to report similar symptoms, including that she continued to isolate due to problems with lights and sound, especially around the holiday gatherings with her family. During the session, Claimant had a panic attack, and Dr. Ledezma had to assist her with breathing techniques.

38. On January 4, 2022 Dr. Olsen proceeded with the bilateral L3, L4 medial branch and L5 dorsal primary ramus block. Pre-injection VAS was 8/10 and post injection VAS was 0/10, with a change in ROM, facet loading, and iliac compression tests. Claimant reported a 1/10 VAS score after eight hours.

39. On January 6, 2022 Claimant reported to Dr. Olsen complete relief after the injection but only up to 30% relief after two days. Dr. Olsen recommended the second medial branch block for a double confirmation.

40. Dr. Olsen performed the second medial branch block at Belmar ASC on January 18, 2022, injecting only the lidocaine and not the corticosteroids, with a pre-injection VAS score of 9/10 and a post injection score of 2/10 and one exam noted improved testing. However, the second control MBB was not diagnostic. Dr. Olsen advised Claimant she was not a candidate for radiofrequency neurotomy. He offered her consideration of L4-5, L5-S1 transforaminal epidural steroid injection instead due to her continued low back pain.

41. Claimant returned to see Dr. Beach on January 20, 2022 with continued postconcussive syndrome, depression and anxiety, with symptoms of nervousness, irritability, depression, photophobia/sonophobia, speaking very little, and persistent HAs. She also exhibited continued TTP over L3-L5 and C3-C6. He ordered a cervical MRI to further evaluate Claimant's ongoing neck pain and possible cause of the chronic HAs.

42. The cervical MRI taken at Health Images North Denver on January 20, 2022 showed trilevel intervertebral disc space height loss and decreased signal as well as multilevel facet arthropathy. Dr. Fatemah Kadivar noted that Claimant had mild disc protrusions at C2-C3 and C3-C4; disc osteophyte complex with facet arthropathy and uncovertebral hypertrophy resulting in mild spinal canal stenosis and moderate right, severe left neural foraminal stenosis at C4-C5; disc osteophyte complex with facet arthropathy and uncovertebral hypertrophy resulting in mild spinal canal stenosis and mild right, moderate left neural foraminal stenosis at C5-C6; disc osteophyte complex with superimposed central disc protrusion effacing the ventral thecal sac and indenting the ventral spinal cord with mild spinal canal stenosis and facet arthropathy and uncovertebral hypertrophy with moderate to severe left neural foraminal stenosis at C6-C7.

43. Claimant returned to see Dr. Ledezma on February 3, 2022. Claimant continued to use pain coping strategies but was frequently overwhelmed by her symptoms, pain and external stimuli. Claimant indicated she attempted to try the

proffered strategies but Dr. Ledezma noted she had a negative outlook that exacerbated and interfered with her physical issues. She made suggestions of ways to build her sense of optimism about getting better rather than only focusing on her ongoing problems and she was encouraged to slowly build her sense of independence in not only managing her symptoms, but also in doing things at home.

44. Dr. Olsen performed the left L4-5, L5-S1 TESIs on February 21, 2022, with a pre-injection VAS score of 8/10 and a post-injection VAS of 3/10.

45. On February 28, 2022 Dr. Beach reported that Claimant had her left sided L4-5 and L5-S1 TFESI with Dr. Olsen. Claimant reported the injection only helped for up to four hours and then went back to baseline. The MRI of the cervical spine showed multilevel degenerative changes with foraminal stenosis and spinal canal stenosis. Claimant was ambulating with a guarded gait, needing her son for support. This was not the first time Dr. Beach noted this in his records. She continued to appear depressed but somewhat improved as she was making eye contact and answered some questions. She stated that lights and noise bothered her. He noted she should follow up with Dr. Olsen, Dr. Ledezma and should remain off work. He continued her medications.

46. Dr. Beach attended Claimant on March 21, 2022 and documented that Claimant had decided she did not wish to pursue treatment with Dr. Ledezma or with Dr. Olsen. She informed Dr. Beach that she was ready to be discharged from care. He stated that she was not a surgical candidate at that time. Claimant indicated that she did not wish to return to work unless she made progress. Dr. Beach continued to note Claimant ambulated slowly, with a guarded gait, holding on to her son for support. She was nervous, anxious with limited eye contact, wearing earplugs due to sonophobia/phonophobia. She had normal strength in her upper extremities and functional ROM in her neck and back. He stated that performed an impairment rating pursuant to the *AMA Guides,* 3rd Edition (*Revised*) and noted Claimant had a 25% whole person impairment due to the TBI. He assessed that impairment was based on Table 1, Spinal Cord and Brain Impairment. He limited her to return to work in an office setting only, 4 hours a day and stated she required no maintenance care. He placed Claimant at MMI and discharged her.[2]

47. Claimant was evaluated for a Division of Workers' Compensation Independent Medical Examination by DIME physician Caroline Gellrick, M.D. on September 27, 2022. Dr. Gellrick took a history consistent with Claimant's testimony at hearing. Dr. Gellrick documented Claimant had symptoms of pain in her left shoulder, headaches, left hip, neck (but none in the low back or thoracic spine), dizziness, balance, depression, anxiety and problems sleeping with occasionally getting nausea and feeling she had a sensation of being drunk every day. She stated Claimant did not get along with Dr. Ledezma. She confirmed that Claimant had asked her case be closed because she was not receiving benefit from the treatment offered by her medical providers. On exam she noted tenderness and spasms in the occipital area, complained of loud noises, crepitus of the left shoulder, positive impingement signs, loss of range of motion of the

[2] While Dr. Beach stated Claimant had functional ROM there were no range of motion measurements in accordance with the *AMA Guides* or *Impairment rating Rules*, nor were there any explanations why Dr. Beach did not rate the physical injuries.

shoulder, left hip and neck, a positive Patrick's and FABER's on the left, limping, could not do tandem walking or heel-to-toe walking, problems with balance. Otherwise, her exam was benign. Dr. Gellrick failed perform a psychological evaluation (despite knowing Claimant had depression and anxiety and not having Dr. Ledezma's psychological evaluation or reports). Dr. Gellrick found that Claimant's work related conditions included injuries to the cervical spine, the left shoulder and the left hip.

48. Dr. Gellrick noted that Claimant required further psychological evaluation and treatment with a different Spanish speaking psychologist. Potentially a psychiatric evaluation for administration of medicine to treat the depression and anxiety. She stated that Claimant required a left shoulder MRI, and an evaluation by an orthopedic specialist for both the left shoulder and left hip. She further stated that Claimant may need injections to treat the cervical spine. Dr. Gellrick noted that Claimant remained at MMI as found by Dr. Beach unless Claimant required surgical intervention. Dr. Gellrick provided an addendum report dated November 7, 2022. She assigned a 17% whole person impairment, after correcting her original report, which included a 14% left upper extremity that converted to an 8% whole person impairment, a 7% whole person for the cervical spine and a 7% left lower extremity impairment that converted to a 3% whole person impairment.

49. Claimant returned to see Dr. Olsen on February 9, 2023 who noted Claimant had moderate success with TESIs. He recommended repeat TESIs at the left L4-5, L5-S1 levels. On March 7, 2023 he proceeded with the TESIs, which again showed a pre-injection VAS score of 8/10 and a post-injection VAS of 0/10, with an improving physical exam. However, by April 6, 2023 Claimant returned with pain of 8/10 of the left hip. He reviewed the left hip MRI noting that surgery would likely help her findings but recommended pool therapy three times a week for two months and, if after that time, she still wished to see an orthopedic surgeon, that he would make the referral. He expressed that he was doubtful that orthopedic surgery would be particularly beneficial for the low grade partial tear of the gluteus medius. Dr. Olsen noted that the previous lumbar spine injection had the effect of breaking [Redacted, hereinafter EP]'s pain cycle and reduced her pain from an 8 to a three. Dr. Olsen recommended repeat L4-5, L5-S1 TFESI, but not injections for the left hip.

50. On April 14, 2022 Dr. Beach responded to correspondence from Insurer that there was no apportionment as he did not rate Claimant's lumbar spine.

51. Claimant proceeded with a left shoulder MRI on April 25, 2023 at Health Images North Denver. Dr. Steven Ross read the images as showing a moderate to high-grade partial thickness tear of the supraspinatus tendon, a low grade partial thickness tear of the infraspinatus tendon with secondary findings consistent with internal impingement (mild supraspinatus muscle atrophy), moderate subcoracoid bursitis as well as near complete circumferential labral tear. There was also osteoarthritis of the acromioclavicular joint.

52. Dr. Olsen examined Claimant again on May 3, 2023, who reviewed the MRI of the shoulder, recommending surgical consultation. With regard to the left hip pathology he stated that they would "put this on the back burner until her shoulder had been

addressed" and encouraged her to continue her exercise program which she was performing daily.

53. On May 31, 2023 Dr. William Ciccone of Orthopedic Centers of Colorado examined Claimant for the left shoulder problems. He noted Claimant had a deep ache, shooting, burning, cramping, sharp and stabbing pain of the left shoulder that occurred constantly. Following review of the MRI he stated that Claimant had "some pretty significant partial-thickness rotator cuff pathology." He recommended starting with physical therapy since Claimant did not have much conservative care for this problem. He noted that she had an antalgic gait due to a hip injury as well. He emphasized that, should Claimant require hip surgery it would have to be performed first, before addressing the shoulder pathology due to the need for crutches. Dr. Ciccone discussed the possibilities for shoulder arthroscopy with RCT repair and possible biceps tenodesis.

54. Claimant returned to see Dr. Olsen on June 1, 2023 who scheduled Claimant for physical therapy pursuant to Dr. Ciccone's recommendations for the left shoulder before considering surgical intervention.

55. On June 30, 2023 Claimant was evaluated by David Yamamoto, M.D. for an IME at Claimant's request. Claimant provided a history consistent with Claimant's testimony at hearing and in the medical records. He reviewed the medical records and examined Claimant. Claimant reported she had struck her head, her back, buttock, left arm extended, denied any loss of consciousness, but felt dazed, and had occasional continuing dizziness. She had problems with headaches, concentrating, had neck pain, back pain, left shoulder pain, arm pain, and left hip pain. She also had depression, anxiety, felt sad, helpless, and had crying spells and panic attacks as well as difficulty sleeping. She reported her prior workers' compensation injury in 1999. He commented that before her work injury, Claimant enjoyed working, going to church, dancing, doing exercise, going on long drives and cooking, reporting that she was no longer doing all of these activities.

56. On exam, Dr. Yamamoto remarked that Claimant appeared in some discomfort but had appropriate behavior, had tenderness in the cervical spine at the midline and over the paraspinal muscles, tenderness over the lumbar spine midline and over the left paraspinal muscles with mild spasm and decreased range of motion. She exhibited loss of ROM of the cervical spine, lumbar spine, left shoulder and lip. She had a positive Hawkins and Neer signs of the shoulder, and a positive impingement sign of the left hip. He noted she had balance problems and used a cane for support. He diagnosed the following:

> l. Cervical sprain/strain with ongoing symptoms and lack of function.
> 2. Cervical multilevel degenerative changes at C6-7 with a superimposed central disc protrusion impinging the ventral spinal cord with mild spinal canal stenosis.
> 3. Lumbar sprain/strain with ongoing symptoms and lack of function.
> 4. L5-S1 moderate loss of disc space with a small broad-based disc and moderate foraminal narrowing with subtle effect upon the exiting right L5 nerve root.
> 5. Traumatic brain injury and postconcussion syndrome with ongoing symptomatology and significant loss of balance.

6. Left shoulder strain with likely rotator cuff pathology. No MRI was performed.[3]
7. Left hip strain with left gluteus minimus tendinopathy and low-grade partial tearing.
8. Recurrent moderate major depression secondary to the injury of 07/30/2021.
9. Generalized anxiety disorder, mild, secondary to the injury of 07/30/2021.

57. Dr. Yamamoto opined that Claimant had not reached MMI at the time of his evaluation. He further opined that Dr. Gellrick was incorrect in failing to assign an impairment for the mTBI, depression and lumbar spine, in addition to the neck, left shoulder and left hip. Dr. Yamamoto agreed with Dr. Gellrick's recommendation for a left shoulder MRI and orthopedic evaluation, and potential surgery of the left shoulder RCT. He stated that injections into the left hip or shoulder as well as injections into the suboccipital cervical spine. He opined that Claimant should be afforded a different Spanish speaking psychological evaluation.

58. Dr. Yamamoto provided a provisional impairment of 43% whole person impairment. This included a 12% whole person impairment due to the cervical spine, 14% whole person due to the lumbar spine, a 10% for the mTBI due to complex integrated cerebral function disturbances, a 14% impairment for the left upper extremity which converted to an 8% whole person impairment, a 13% lower extremity impairment that converted to a 5% whole person impairment and a 6% whole person impairment due to the ongoing depression. He mentioned he did not apportion the 1999 lumbar spine injury because he did not have the records. He agreed with Dr. Beach's modified duty restrictions which included mostly seated duty.

59. On July 12, 2023 Dr. Ciccone examined Claimant again. He noted that Claimant remained nonoperative at that time and she would continue with physical therapy, including stretching and strengthening. He remarked that there was "[p]otential for shoulder arthroscopy with capsular release and rotator cuff repair."

60. Claimant was evaluated by Dr. Kathleen D'Angelo of Advanced Medical & Forensic Consultants on July 17, 2023, for an IME performed at Respondents' request. Dr. D'Angelo took a history, which was consistent with Claimant's testimony at hearing. She also performed a medical records review and examined Claimant. Claimant complained of headaches, neck pain, buttock pain, left leg pain, leg weakness, left arm pain, memory loss problems thinking, insomnia and stress, with ongoing complaints of HAs, memory, thinking and noise problems, hip, buttock and leg problems, shoulder, insomnia and stress problems. The pain diagrams were consistent with the complaints listed. Claimant advised Dr. D'Angelo that she continued to have panic attacks, which were triggered by loud noises, she did not know if she had depression because she liked being alone now but continued with anxiety. Dr. D'Angelo also noticed Claimant's limp, which Claimant reported she had since the accident. Claimant complained of neck pain and headaches, problems with light bothering her, crying and depression. Claimant conveyed she had burning sensations into her lateral thigh and buttock. Dr. D'Angelo documented Claimant had joint pain, loss of balance and coordination, anxiety, difficulty thinking and loss of memory. She shared that Claimant had a normal mental status exam, diffuse pain behaviors, loss of ROM, tenderness to the suboccipital musculature, shoulder

[3] Dr. Yamamoto testified he had not been provided the April 25, 2023 MRI report at the time of his evaluation.

diffusely, midline cervical spine, lower sacral area on the left, buttock region worse with palpation. Dr. D'Angelo noted that the only claim related diagnosis were buttock contusion, and lumbar and cervical myofascial irritation, which were temporary conditions.

61. Dr. D'Angelo remarked that "[I]n the two years since her injury … her physicians were either not effective in treating her complaints or ignored her pain." She opined that Claimant's two years post injury treatment course was marked by changing symptoms, worsening displays of pain behaviors, decreasing range of motion, increasing pain complaints and lack of improvement, multiple interventions and a decline in functional capacity. She opined that Claimant had increasing dependence upon her children and a lack of engagement with Dr. Ledezma. Dr. D'Angelo suspected secondary gain and a somatic symptom disorder (SSD) though could not point to malingering. She opined that Claimant was an unreliable historian. She opined that the shoulder pathology was not related to the work injury nor were any complaints regarding the left hip pathology. She opined that Claimant did not have any impairment related to her work related injuries or accident, should be released to return to full duty work and should not be afforded any maintenance care.

D. Dr. Yamamoto's Testimony:

62. David Yamamoto, M.D. testified as an expert in family and occupational medicine as well as a Level II accredited physician. Dr. Yamamoto indicated he had performed DIMEs and continues to be on the DIME panel. Dr. Yamamoto stated that he was familiar with Claimant as he had reviewed her records, took a history, examined Claimant and issued a report dated June 30, 2023. He stated that the only records he had not been able to review were the most recent records from Dr. Ciccone, Dr. Olsen and the MRI of the shoulder. He took a history that was consistent with Claimant's account at hearing including that she was using a stripper on the floor, slipped and fell, landing on her back and hitting her head. He noted that the original symptoms documented by Dr. Beach, including the head, back, buttock and left arm pain were all consistent with the mechanism of injury of July 30, 2021. He agreed with Dr. Beach's diagnosis of concussion, neck pain, thoracic pain, lumbar pain, left hip pain, and left shoulder sprain and strain, all of which were related to the July 30, 2021 admitted work related claim.

63. Dr. Yamamoto remarked that:

> She fell on her back and struck her head and -- simultaneously struck her head and her back and injured her shoulder. As a reflex, she fell back and extended her left arm, and it would be very difficult to suppress that reflex.
>
> And the -- although she did not have loss of consciousness, she has had ongoing central nervous system or brain and head symptoms since that fall. And so she had a clinical diagnosis of a concussion.

64. Dr. Yamamoto stated that the lumbar spine imaging showed degenerative changes and a small disc herniation but that Claimant also reported symptoms immediately following the accident, which were significant for radicular symptoms, back pain, neck pain, shoulder pain and the central nervous system symptoms or headaches,

which he considered in his causation analysis. He noted that Claimant had a diagnostic response to her first lumbar spine injection of eighty percent (80%) relief though it was not lasting and supported a diagnosis and impairment of the lumbar spine.

65. He noted that Claimant was not at MMI with regard to the left hip and she required further evaluation as the MRI showed a left gluteus minimus tendinopathy and low-grade partial tearing. Dr. Yamamoto opined that, since Claimant required further diagnostic and specialty evaluations with regard to the left shoulder, Claimant was not yet at MMI pursuant to Level II accreditation training. He opined that Dr. Gellrick was incorrect in placing Claimant at MMI. The MRI of the left shoulder taken after Dr. Gellrick's evaluation showed moderate to high-grade supraspinatus and low-grade partial thickness tear infraspinatus tendons with secondary findings consistent with internal impingement and a near circumferential labral tear, all of which are abnormal findings. Dr. Yamamoto opined that Claimant would likely require surgery. He stated that if Dr. Ciccone opined that Claimant was not a surgical candidate, that he disagreed with Dr. Ciccone and that Claimant would require a second surgical opinion.

66. Dr. Yamamoto recognized that Claimant had degenerative changes in the cervical spine as well as a disc protrusion that indented the ventral spinal cord with mild canal stenosis, which were significant findings justifying a Table 53IIB rating per the *AMA Guides*.

67. Claimant was evaluated by Dr. Hammerberg, a neurologist, who opined that Claimant had sustained a concussion and post-concussion symptoms and Dr. Yamamoto agreed with this diagnosis. Dr. Yamamoto opined that Dr. Gellrick was incorrect and was not accurate in her determination not to rate Claimant's post-concussive injury. Dr. Yamamoto opined that Claimant's headaches were a direct cause of the work injury blow to the head and was not just radiating pain from the neck. He opined that even though Claimant was not knocked out, that she had a head injury. He explained that while some patients heal from their head injuries, others do not. The fact that Dr. Gellrick stated that Claimant needed treatment from a different psychologist, and that she had not completed neuropsychological testing with Dr. Laura Rieffel were indications that Claimant was not at MMI. When a physician states that they cannot make a determination of impairment with the information they have that is an indication that the Claimant is not at MMI. He opined that Dr. Gellrick had committed an error because it would have been more proper for her to state that Claimant was not at MMI. He opined that Dr. Gellrick was incorrect because she did not have all the information she required in order to make an assessment of impairment, especially since she did not have the records from the treating psychologist. Dr. Yamamoto opined that Claimant continued to be symptomatic from the traumatic brain injury, which was supported by the ATP. Dr. Ledezma noted that the patient had requested another Spanish speaking psychologist to treat her as they were not communicating well. This was also recommended by Dr. Gellrick. This was a reasonable request and until she completes her treatment, Claimant is not deemed to be at MMI.

68. Dr. Yamamoto noted that Claimant had denied any problems with depression prior to sustaining the head injury and related the depression and anxiety to the July 30, 2021 work injury.

69. Dr. Yamamoto indicated that he had looked up the PDMP finding that Claimant had been prescribed oxycodone right before her injury but that the PDMP did not show for what condition Claimant was taking the medication. He also found that the medication was only sporadically obtained by Claimant prior to the injury. Following the July 30, 2021 injury she no longer took any oxycodone but was prescribed Tramadol by the workers' compensation providers. He was not provided with any provider records that indicated that the medication prior to the injury was for back pain.

70. Dr. Yamamoto opined, because Claimant provided a history of being quite functional prior to her injury of July 30, 2021 and performing he job without difficulties, and then following the work injury, she became functionally quite disabled, that she clearly had incurred a head injury.

71. Dr. Yamamoto also noted that both the ATP and the DIME physicians committed errors, the first because he only rated the TBI and the second because she only rated the physical complaint of the left shoulder, left hip and cervical spine. Dr. Yamamoto opined that, if Claimant was determined to be at MMI, that she had the following impairments in accordance with the *AMA Guides*:

a. Claimant should appropriately have at least a 10% whole person impairment related to the mTBI as caused by the concussion and post-concussive syndrome, for which she was not at MMI due to the need for more treatment. Further, she should have an additional 6% whole person related to her psychiatric depression and anxiety.

b. Claimant was entitled to a 12% whole person impairment for the cervical spine based on clear documentation that she injured her neck when she fell and is documented by the cervical spine MRI, and continued symptoms for a Table 53IIB plus loss of range of motion, for which she was at MMI.

c. Claimant was entitled to a lumbar spine impairment of 14% whole person rating, based on documented injury, documented treatment and continued symptoms based on Table 53IIB plus loss of range of motion, for which she is at MMI. He stated it was error not to rate this body part.

d. Claimant was entitled to an impairment of the left hip as it was part of the original injury and she had not fully recovered. Claimant was entitled to a 5% whole person impairment for the lower extremity, converted from 13% extremity impairment for loss of range of motion.

e. While Claimant is not at MMI for the left shoulder, Claimant was entitled to a 14% scheduled upper extremity impairment related to the left shoulder for loss of range of motion, which converts to 8% whole person impairment.

f. The total combined preliminary impairment in accordance with the AMA Guides was 43% whole person impairment.

72. Dr. Yamamoto did not believe that, after examining Claimant, her pain complaints were out of proportion to the objective findings in this case. He did agree that an individual could have post MMI diagnostic testing and physical therapy as a maintenance treatment. He agreed that Claimant's findings on exam documented by Dr. Beach on August 3, 2021 were not that significant but the objective findings on exam of

August 12, 2021 were significant and consistent with a mild TBI. He agreed that normally 75 to 90 percent of mTBI patients recovered within 90 days and that 3-10 percent of TBI patients recover within a year. He further agreed that ongoing improvement with eventual stability of symptoms was the general and accepted progress for TBIs. He stated that worsening over time was uncommon for mTBI patients. However, Dr. Yamamoto stated that there was a small percentage of patients that did not recover. He stated that Claimant had other problems that delayed her recovery, including depression and stress, anxiety and lack of coping skills, which needed to be addressed by having a therapist Claimant could identify with and trust during the treatment as recommended by Dr. Gellrick.

73. Dr. Yamamoto also noted that he did not have to have evidence that there was radiographic or diagnostic findings that showed Claimant's condition had been aggravated or accelerated, as Claimant met the criteria for Table 53IIB of minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with a none-to-minimal degenerative changes on structural tests.

E. Conclusory Findings:

74. Claimant has shown by clear and convincing evidence that Dr. Gellrick, the DIME physician was incorrect in her assessment that Claimant was a MMI on March 21, 2022 and with regard to the impairments she has assessed in this matter, including her causation determinations.

75. As found, one of the most striking problems in this case is that Claimant's ATP failed to address all of Claimant's work related injuries initially, when he diagnosed concussion, neck pain, thoracic pain, lumbar pain, left hip pain, left shoulder sprain/strain and head pain and decided to only recommend gentle stretching and heat and returned her to regular duty with no climbing ladders. He took them piecemeal. This ALJ interprets the sequence of treatment as part of the problem and one of the reasons why Claimant is not at MMI. Dr. Beach identified all the injuries, but he concentrated on two issues primarily. The first, the mTBI sending her to Dr. Hammerberg and Dr. Ledezma. Secondly the low back, sending Claimant to Dr. Olsen who provided injections. While the referral may have been made for the left hip as well, Dr. Olsen failed to make any recommendations regarding the hip condition.

76. As found, from the first August 3, 2021 evaluation by Dr. Beach, Claimant complained of low back, buttock and radiating pain in the lateral left leg. This ALJ infers from the records that Dr. Beach made a proper causation analysis and made appropriate referrals, first to physical therapy, then for an MRI of the lumbar spine and lastly to Dr. Olsen for treatment of the lumbar spine. Claimant credibly stated at hearing that she continued to have lumbar spine problems including low back pain with referral pain down the side of her leg. Dr. Yamamoto credibly and persuasively testified that, while Claimant does have a left hip condition, she also has a lumbar spine condition. This was identified on MRI findings and on objective testing and exams by her ATPs., including an antalgic gait, decreased sensation to pinprick, absent long tract sign, positive SLR causing bilateral buttock pain, positive iliac compression, multiple findings of MRI, impingement of the L5 nerve root, muscle spasm, focal motor loss and loss of range of motion. What is patently clear is that the treatment for the low back was effective, though temporary.

This indicates to this ALJ that Claimant clearly had an aggravation of a preexisting condition of her low back. Prior to the work injury, Claimant was able to perform her full activities, including heavy work buffing floors, as well as social activities such as exercise and dancing. After the accident, she was quite functionally disabled as credibly noted by Dr. Yamamoto and from Claimant's testimony. As found, Claimant has shown by clear and convincing evidence that Dr. Gellrick was incorrect in her assessment that Claimant did not have a lumbar spine condition which was aggravated by the July 30, 2021 work related injury and was entitled to an impairment for the same.

77. As found, the DIME physician considered only the cervical spine, left shoulder, and left hip for impairment. Even though Claimant had low back pain and diagnostic confirmatory response to TESIs, she dismissed the condition as part of the hip referred pain. This does not make sense as Claimant not only had hip pain but had pain in the low back and buttock with radiating pain on her lateral left leg also consistent with the objective findings on MRI. D.O.W.C. Rule 11-3(K) specifically states that "[f]or each DIME assigned, make all relevant findings regarding MMI, permanent impairment and apportionment of impairment, unless otherwise ordered by an ALJ." The Division also propounded Desk Aid #11 -- Impairment Rating Tips. Under General Principles, No. 2 it states that the rating physician should keep in mind the AMA Guides, 3rd Edition (rev.) definition for impairment: "The loss of, loss of use of, or derangement of any body part, system, or function." Given this definition, one may assume any patient who has undergone an invasive procedure that has permanently changed any body part has suffered a derangement. Therefore, the patient should be evaluated for an impairment by a Level II Accredited Physician. Although the rating provided may be zero percent, it is essential that the physician perform the necessary tests, as outlined in the AMA Guides, 3rd Edition (rev.) for the condition treated, in order to justify the zero percent rating. As found, Dr. Gellrick failed to do so. As found Dr. Yamamoto's testimony that Dr. Gellrick was in error for failing to follow these directives is credible and persuasive. As found, at the very least, Dr. Gellrick should have done range of motion measurements and then explained why she opined that Claimant had a zero percent impairment. As found, Claimant has shown that the DIME physician's opinion regarding lumbar spine impairment has been overcome by clear and convincing evidence.

78. As found, Dr. Gellrick recommended treatment of Claimant's psychological condition. She stated that Claimant required further evaluation and treatment from a different Spanish speaking psychologist. She stated this without having any of Dr. Ledezma's treatment notes, diagnosis or assessments. Nor did she know the extent of treatment Claimant had received under Dr. Ledezma other than what Claimant was able to recall at the time of the appointment and which was not documented in her report. Dr. Gellrick explicitly discerned that, as a DIME physician, she was asked to address both TBI and the psychological system. As found, Dr. Gellrick failed to comply with the requirements of the DIME rules, specifically noting that she did not make any assessments regarding the psychological condition, despite the multiple provider noting Claimant suffered from depression and anxiety, including Dr. Beach, Dr. Hammerberg and Dr. Ledezma. Further, D.O.W.C. Rule 12-5(A)(3) states in, pertinent part, that the physician must complete a full psychiatric assessment following the principles of the AMA Guides and complete a history of impairments, associated stressors, treatment, attempts at rehabilitation and premorbid history so that a discussion of causality and apportionment

can occur. Rule 12-5(C) also requires the use of the mental evaluation and worksheet. One of the impairment rating responsibilities is for the physician to assess whether the patient has returned to her pre-injury state, physically and/or mentally, and determined the impairment in accordance with Rule 12.

79. As found, Dr. Gellrick's failure to address the psychological conditions was in error. First by failure to consider the multiple notes and the Claimant's reports of psychological problems, including depression and anxiety as well as panic attacks listed by Dr. Beach. Secondly, as Claimant reported to Dr. Gellrick continuing dizziness, balance problems, depression, anxiety and problems sleeping with occasionally getting nausea and feeling she had a sensation of being drunk every day. This was a significant error and departure from the rules established for Level II accredited providers. Specifically, Desk Aid #11 under DIME Panel Physician Notes, Section 1, it states that "[A]lthough an impairment rating may not be provided for a condition listed on the DIME application, all issues and/ or body parts listed must be acknowledged and addressed in the narrative section of the DIME report." It goes on to instruct that "[F]or most conditions that have been treated under the claim, an impairment evaluation must be performed even if you do not believe the condition is work related." Dr. Gellrick failed to do so coming a significant error.

80. Dr. Ledezma, as early as November 1, 2021, recommended neuropsychological testing with Dr. Laura Reiffel, a neuropsychologist. This was to address symptoms that included dizziness, being mentally fuzzy, confusion, difficulty tolerating noises and bright lights, nausea, daily crying spells, difficulty tolerating people, loss of interest in hygiene, difficulty sleeping, isolation, making mistakes while driving, among other issues, night panics and panic attacks, leaving water or stoves on, and difficulty with memory. Dr. Gellrick does address the issue of mTBI, stating that Claimant just did not suffer from a TBI or post concussive syndrome as diagnosed initially by Dr. Beach, or Dr. Hammerberg. Clearly, throughout the medical records, Dr. Beach and Dr. Hammerberg both acknowledge the cervical spine pain Claimant reported from the beginning of her injury on August 3, 2021 and September 8, 2021, but they also acknowledge that Claimant has depression and anxiety. Further, on November 10, 2021 Dr. Hammerberg does not give a new diagnosis, he just simply notes that the headaches might be cervicogenic and should be evaluated and treated with injections. He also discussed Claimant's crying spells and panic attacks, noting those should be treated by Dr. Ledezma or another provider for proper antidepressant therapy. As found, Dr. Gellrick committed error in not requesting the missing reports in order to figure out whether Claimant was or not at MMI or had impairment for her psychological conditions.

81. As found, from the totality of evidence, Claimant continued to have symptoms that had either not been addressed at all, or required further evaluation, diagnosis, and curative care and treatment. This is inconsistent with a finding of MMI. If Claimant required a new therapist, this ALJ infers it is for purposes of further functional gains, as Claimant is continuing to suffer significant symptoms as noted above. While Claimant either lost faith in or never developed trust with Dr. Ledezma, regardless of whether Dr. Ledezma attempted to provide Claimant with multiple treatment tools that Claimant did not fully understand how to implement or was unable to appreciate their potential benefit, it is clear her depression was affecting her multiple physical problems

that had not yet been addressed either, such as her cervicogenic pain, or her rotator cuff tears, or her left hip tendon tear and tendinosis.

82. Pursuant to the Division's Medical Treatment Guidelines, Rule 17, Exhibit 2A, Mild Traumatic Brain Injury, Section F.1, post-traumatic headaches or cervicogenic headaches are the most common type of post-injury headache. There are multiple recommendations for treatment in the MTGs regarding cervicogenic headaches including manipulation, pharmaceuticals, Botulinum toxin injections (Botox), steroid injections, vestibular rehabilitation, proprioceptive retraining, manual therapy, physical therapy in order to maintain balance, or posture, equilibrium and adequate strength. Of all these treatments recommended, the only mention in the record was regarding vestibular therapy, which was suspended for an unknown reason.[4] Nothing in Dr. Beach's or Dr. Hammerberg's records show an actual referral for this treatment. As found, Dr. Yamamoto was credible and persuasive in his recommendation that further treatment for the ongoing headaches was necessary. As found, from the totality of the evidence, Claimant has not had specific treatment as recommended by the MTGs for cervicogenic headaches, which Claimant continues to experience. Dr. Gellrick is persuasive that Claimant may require further treatment for the cervicogenic headaches. Claimant is also credible and persuasive that she continues to have the problems and would accept further care, just not under Dr. Olsen. As found, Claimant has shown by clear and convincing evidence that she is not at MMI with regard to this condition.

83. From August 3, 2021 when Claimant was initially seen by Dr. Beach, Claimant complained of ongoing pain in her shoulder. Dr. Beach documented that Claimant's pain was so intense she had a sense of dislocation of the shoulder including a burning sensation into the arm. This was documented multiple times on August 12, 19, 30, September 7, October 7, November 1, 9, 2021, among other dates. Dr. Gellrick noted that, based on objective exam of the shoulder, Claimant required a left shoulder MRI and full orthopedic examination. As of the date Dr. Beach placed Claimant at MMI Claimant clearly had not received any treatment for the shoulder, not even basic diagnostic evaluations or therapy. The MTGs for the shoulder, under Rule 17, Exhibit 4, Section E.9-10 discuss treatments such as initial diagnostic evaluation, physical therapy, strengthening, modalities, medications, steroid injections, all of which may be appropriate treatments. When Claimant was placed at MMI, the shoulder condition had been identified (shoulder pain) but not fully diagnosed (RCT) by MRI or an orthopedic specialist. None of the treatment recommendations had been instituted. It was not until after Claimant was placed at MMI that the left shoulder condition was specifically identified as related to the July 30, 2021 work injury. Dr. Ciccone just started with conservative measures, which the MTGs recommend, and if Claimant does not recover function with conservative care, then surgical repair of the torn tendons may be appropriate. As found, since the treatment contemplated by Dr. Ciccone was intended to cure Claimant of the effects of the injury, including progressing with functional gains in the left shoulder or repairing the rotator cuff tears, Dr. Gellrick was incorrect and in error in finding Claimant at MMI for the left shoulder. Desk Aid # 11, Section 6 states that "[I]f there is a reasonable possibility that the results of a diagnostic test (such as an MRI or EMG) will change the patient's MMI status, then in most instances, the patient will not be at MMI." Here, we

[4] Respondents' Exhibit L, bate 115 (Treatment history).

have confirmation from the MRI, which took place after Dr. Gellrick evaluated Claimant, showed significant pathology including a near complete tendon tear. Claimant continues to be in physical therapy for the purpose of progressing with the function of her left shoulder injury. The treatment recommendations made by Dr. Gellrick, Dr. Ciccone and Dr. Yamamoto are inconsistent with MMI. Claimant has proven by clear and convincing evidence that the DIME physician was incorrect in her assessment of MMI.

84. Dr. Gellrick also recommended that Claimant be evaluated for further treatment of the left hip. This included an orthopedic evaluation to further investigate and assess what further care may be provided to cure Claimant of her left hip injury. Since Dr. Beach first diagnosed a hip injury, he ordered an MRI but no treatment was provided for the left hip specifically. While Dr. Ciccone casually made statements with regard to Claimant's left hip MRI findings and need for treatment, his only treatment recommendations were that Claimant needed to proceed with left hip surgery before embarking on the left shoulder surgery due to the need to use crutches that might affect the upper extremity. Dr. Beach did make a referral to Dr. Olsen for the left hip, however, Dr. Olsen concentrated on providing treatment for the lumbar spine and not the left hip. As Claimant requires care that may further her functional gains, Dr. Gellrick's findings and recommendations regarding the left hip condition is inconsistent with a finding of MMI. As found, Dr. Gellrick's opinion with regard to MMI was overcome by clear and convincing evidence.

85. Claimant clearly has continuing problems with headaches, neck pain, buttock pain, left leg pain, leg weakness, loss of balance and coordination, left arm pain, memory loss problems, thinking, insomnia and stress, ongoing complaints memory, thinking and noise problems, hip, buttock and leg problems, shoulder, light bothering her, crying and depression, insomnia and stress problems, and she continued to have panic attacks, which were triggered by loud noises, and anxiety. Claimant continued to have a limp, which Claimant insisted she had since the accident. These are all symptoms that Claimant reported to Dr. D'Angelo, which continued up to the day of hearing. This ALJ found Dr. D'Angelo unpersuasive in her opinions with regard to causation and MMI, especially considering the diverging opinions in the record. Dr. D'Angelo opined that Claimant had two injuries, the first to the cervical spine, and the second to the lumbar spine. She opined that both of the injuries were only temporary strains that resolved and that Claimant had no permanent impairment, which is unpersuasive.

86. As found, Claimant is not yet at MMI and requires treatment for her work related conditions, in order to cure and relieve her of those conditions that have yet to been fully evaluated and treated, and are found causally related to the July 30, 2021 work related slip and fall, including injuries to the head, depression, anxiety, panic attacks, neck injury, left shoulder and left hip conditions, and her low back. Since Claimant is not at MMI, an assessment of impairment is premature. Impairment should be determined after the authorized treating physicians provides the appropriate care for Claimant's conditions to become stable. Claimant has shown by clear and convincing evidence that she is not yet at MMI and that Dr. Gellrick erred in multiple of her determinations. These findings rise to the level of clear and convincing evidence that is unmistakable and fee from serious or substantial doubts and are sufficient to show that it is highly probable the DIME physician's opinion on MMI is incorrect.

87. This ALJ also observed Claimant during the hearing. Claimant was not comfortable, would change positions frequently, shifting from side to side or would get up from her chair at multiple intervals. Claimant had a flat effect but was emotional at times. These are signs of an individual that was not handling the challenges of her multiple conditions and injuries.

88. Further, Claimant's testimony was credible, despite some minor discrepancies in her memory. The medical records show Claimant reporting multiple times that she had memory problems from the very beginning and this ALJ does not assign the same importance to those *de minimus* differences in her testimony or in the record.

89. Dr. Ledezma, Dr. Yamamoto, Dr. Gellrick and Dr. Ciccone as well as Dr. Olsen all made assessments regarding the causality of the Claimant's multiple conditions. Each one of these providers are found to be credible. In order to reach the above conclusion, this ALJ found only parts of each of the providers' opinions to be persuasive as stated above. Those opinions that are not expressed above or were not highlighted as particularly persuasive are specifically found not to be persuasive. No one provider's opinions were fully persuasive.

90. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Whether Claimant Overcame DIME Determination of MMI

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. It represents the optimal point at which the permanency of a disability can be discerned, and the extent of any resulting impairment can be measured. *Paint Connection Pul v. ICAO*, 240 P.3d 429 (Colo. App. 2010). MMI exists when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Golden Age Manor v. Industrial Commission*, 716 P.2d 153 (Colo.App.1985).

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Sec. 8-42-107(8)(b)(III), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence means evidence which is stronger than a mere preponderance.

It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The DIME process necessarily requires a physician to ascertain the cause or causes of the claimant's condition in order to decide whether the claimant warrants additional treatment for any work-related problem. Consequently, the issues of whether all work-related conditions are stable and do not require additional treatment are an inherent part of the DIME process, and the DIME physician's opinion on causation must be overcome by clear and convincing evidence. See *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189-190 (Colo. App. 2002); see also *Qual-Med, Inc., v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo.App. 1998); see also *Egan v. Industrial Claim Appeals Office,* 971 P.2d 664 (Colo.App. 1998); *In re Claim of Robbins v. Qwest Corporation*, WC 5-113-544, ICAO (December 12, 2022).

A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. E.g., *Robbins v. Qwest Corp*., WC 5-588-918-010, I.C.A.O (December 19, 2022); *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523- 097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). Causation is the issue of fact to be determined by the ALJ based on an examination of the totality of the circumstances. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Such causality can even be inferred if the claimant presents evidence of circumstances indicating that the industrial injury necessitated medical treatment with reasonable probability. *Indus. Comm'n v. Riley*, 441 P.2d 3 (Colo. 1968).

A finding that the claimant needs additional medical treatment (including diagnostic evaluations) to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). That means that a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of

determining MMI. *Cordova v. Industrial Claim Appeals Office, supra.* Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. See *Cordova v. Industrial Claim Appeals Office, supra.*

Permanent impairment cannot be ascertained until all compensable components of the injury have stabilized. *Nunnally v. Wal-Mart Stores, Inc*., 943 P.2d. 26 (Colo. App. 1996). Thus, where a single industrial injury has multiple components, the claimant's permanent disability cannot be ascertained until the claimant has reached MMI for all components of the injury. MMI is a status that a Claimant is either at or is not at, and particular body parts are not divisible and cannot be parceled out among the various components of a multi-faceted industrial injury. See *Paint Connection Plus v. ICAO,* 240 P.3d 429 (Colo. App. 2010); *Fitzsimmons v. Lincoln Surgery Center,* WC 4-995-913, ICAO (December 16, 2020); *In re Claim of Burren,* ICAO, WC 4-962-740-06 (March 15, 2019).

If a DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*, (if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine the DIME physician's true opinion). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. ICAO*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO*, 984 P.2d 656, 659 (Colo. App. 1998); *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005);* and *Magnetic Engineering, Inc. v*. ICAO, *supra*; *In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016); *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. ICAO, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. ICAO, supra.* In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination [and true opinion] is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

In the case at bench, it was Claimant's burden to overcome Dr. Gellrick's opinions on MMI and impairment as well as causation. Claimant relied on the opinions of Dr.

Yamamoto as well as other medical reports and Claimant's testimony, to support her contentions. The conclusory findings will not be repeated in these conclusions of law. As found, Claimant is not yet at MMI and requires treatment for her work related conditions, in order to cure and relieve her of those conditions that have yet to been fully evaluated and treated, and were found causally related to the July 30, 2021 work related slip and fall, including the head, depression, anxiety, panic attacks, neck injury, left shoulder and left hip condition and her low back, an assessment of impairment is premature. Impairment should be determined after the authorized treating physicians provides the appropriate care for Claimant's conditions to become stable. Claimant has shown by clear and convincing evidence that she is not yet at MMI and that Dr. Gellrick erred in multiple of her determinations. These findings rise to the level of clear and convincing evidence that is unmistakable and fee from serious or substantial doubts and are sufficient to show that it is highly probable the DIME physician's opinion on MMI is incorrect. See *In re Claim of Tomsha*, W.C. No. 5-088-642-002 (I.C.A.O. March 18, 2021).

Dr. Ledezma, Dr. Hammerberg, Dr. Yamamoto, Dr. Gellrick and Dr. Ciccone as well as Dr. Olsen all made assessments regarding the causality of the Claimant's multiple conditions. Each one of these providers are found to be credible. In order to reach the above conclusions, this ALJ found only parts of each of the providers' opinions to be persuasive as stated above. Those opinions that are not expressed above in the conclusory findings or were not highlighted as particularly persuasive are specifically found not to be persuasive. No one provider's opinions were fully persuasive.

C. Whether Claimant Overcame DIME Determination of Impairment

The Workers' Compensation Act requires all physical impairment ratings be conducted in accordance with the *AMA Guides*. Section 8-42-101(3)(a)(I) & 8-42-101(3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to Sec. 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides*. Whether the DIME physician properly applied the AMA Guides, a rating physician has complied with the *AMA Guides* and whether the rating itself has been overcome are questions of fact for determination by the ALJ. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2004); *McLane W., Inc. v. Indus. Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, WC 5-078-454-001, ICAO (July 12, 2021); *In Re Goffinett*, W.C. No. 4-677-750 (ICAP, Apr. 16, 2008). Inherent in this rule is the concept that a deviation from the *AMA Guides* rating protocols does not automatically mean the DIME physician's rating has been overcome as a matter of law, because these issues are factual in nature. *Id.*; *Claim of Griggs v. A & R Construction LLC*., WC 5-146-595, ICAO (June 5, 2023). An ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Wilson, supra; Metro Moving and Storage, supra.*

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973,

981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Lastly, where an ALJ finds a claimant's description of his present symptoms credible, this is sufficient to overcome the DIME physician's opinion. *In re Claim of Conger*, WC 4-981-806-001, ICAO (October 21, 2021).

Once the ALJ determines that the DIME's rating has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *In re Claim of Serena*, WC 4-922-344-01, ICAO (December 1, 2015); *Paredes v. ABM Industries*, W.C. No. 4-862-312 (April 14, 2014); *Kamakele V. Boulder Toyota-Scion*, WC 4-732-992, ICAO (2010); *DeLeon v. Whole Foods Market*, W.C. No 4-600-477 (November 16, 2006); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). The claimant's correct medical impairment rating becomes a question of fact for the ALJ's resolution based on a preponderance of the evidence. *Garlets v. Memorial Hospital*, supra.

It is Claimant's burden to overcome the DIME physician's findings with regard to causation and impairment by clear and convincing evidence. Here, Claimant proved by clear and convincing evidence that the DIME physician was incorrect with regard to MMI. Claimant was not at MMI as March 21, 2022 for more than one causally related work injury, caused by the July 30, 2021 slip and fall. As Claimant was found not to be at MMI, a finding regarding permanent partial disability benefits is premature.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has overcome the opinions of the DIME physician by clear and convincing evidence. Claimant is not at MMI.

2. Respondents shall reinstate Claimant's TTD benefits beginning March 21, 2022, pursuant to the stipulation of the parties.

3. Respondents shall pay interest of eight percent (8%) on all benefits which were not paid when due.

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

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

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

DATED this 28th day of September, 2023.

DIGITAL SIGNATURE

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-174-047-003

STIPULATION

The parties stipulate that the requested respiratory therapy treatments are authorized by Respondent.

ISSUE

- Did Claimant prove entitlement to medical benefits for a torn meniscus including a referral to an orthopedic surgeon.

FINDINGS OF FACT

1. Claimant works for Employer as a mill tech. He suffered multiple injuries on May 29, 2021 when a steel mill furnace explosion occurred.

2. Claimant was taken by ambulance to Parkview Medical Center. He was treated by Dr. Shapiro for burns. Claimant was also experiencing burning in his throat. He was emergently intubated. He was then transferred to ICU where they took multiple CT scans of Claimant's neck, chest, abdomen and pelvis. Claimant was hospitalized for three days. The diagnoses included blast injury with multiple contusions and abrasions and airway edema.

3. Claimant came under the care of Dr. Centi at Southern Colorado Occupational Medicine. Dr. Centi first saw the Claimant on June 24, 2021. He diagnosed Claimant with inhalation injury, lumbar strain and face laceration. Also at that visit a physical exam was performed which showed, amongst other things "Bilateral hips – no edema, FROM Bilateral lower legs – no edema, normal sensory and normal motor function" This exam is essentially normal for the lower extremities, which includes the Claimant's knees. Additionally, the Claimant filled out a pain diagram for that day which indicates achiness in the calf and numbness in the back of the knee. There was nothing noted on the front of the knee.

4. Claimant continued to receive conservative care for his inhalation injury and his lumbar spine symptoms.

5. Claimant first reported issues of his right knee when he was seen on November 10, 2022, which was approximately 17 months after the date of injury. This is corroborated by Dr. Centi's additional entry on the list of problems of "Pain of right knee joint – Onset 11/10/2023. Claimant testified that Dr. Centi ordered a MRI of the knee at the request of Claimant.

6. Dr. Centi referred the Claimant to orthopedic surgeon, Dr. Walden on December 15, 2022 for tear of lateral meniscus of the right knee. In Dr. Centi's chart note he states "MRI – right knee – effusion, lateral meniscus tear". Exhibit 8, p. 264.

7. Following the orthopedic referral, Claimant was seen by Dr. Paz at the request of Respondent. The IME occurred on January 25, 2023. Dr. Paz opined "Considering the direct history provided by Mr. Henschel during this IME, the findings of the physical examination completed during this IME, and a review of the records provided based on reasonable medical probability, it is not medically probable that the right knee lateral meniscal tear is causally related to the May 29, 2021, referenced incident". He further commented that the right knee degenerative joint disease is also not related to the work injury. Exhibit I, p. 29.

CONCLUSIONS OF LAW

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

Generally

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

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

D. Once a claimant has established the compensable nature of his work injury, he is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the

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

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, the Claimant has failed to sustain his burden of proof that his right knee symptoms including the torn lateral meniscus are related to his admitted work injury. I am persuaded by the opinions of Dr. Paz, whom I find to be credible, that these symptoms are not related to the Claimant's work injury.

ORDER

1. The Claimant's request for medical treatment for his knee, including the referral to Dr. Walden is denied and dismissed.

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

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

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

DATED: September 28, 2023

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment with Employer on August 27, 2020.

IF THE CLAIM IS FOUND COMPENSABLE, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 27, 2020.

III. Whether Claimant has proven what his average weekly wage is at the time of the incident in question.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 28, 2020 and continuing until terminated by law.

V. Whether Respondents have proven by a preponderance of the evidence that Clamant was terminated for cause.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, Clinica Family Health was the authorized treating provider with regard to the claim and that Claimant's average weekly wage was $103.85. The stipulations of the parties are approved and incorporated into this order.

FINDINGS OF FACT

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

1. Claimant was 74 years old at the time of the hearing. He worked for Employer as a dishwasher, one day a week, working the 2 p.m. to 9:30 p.m. shift. He would wash pots, pans, receptacles, platters, plastic containers that would be reused and other utensils. He had started working for Employer in approximately June 2020.

2. On August 27, 2020 Claimant injured himself at work while lifting a 10 lb. pot three quarters full of water and food debris, which weighed close to 50 lbs. total with contents. He lifted it up from the floor to the counter sink, and hurt his back in the process, though he was able to lift it all the way into the sink. Claimant continued working until the end of his shift, when he advised his supervisor and shift manager, M.M., who did not respond. Claimant left the restaurant and went home.

3. The following Monday he went to Clinica Campesina or Clinica Family Health to seek treatment. Claimant was advised that they were too busy with patients due to the COVID-19 pandemic. They instructed him to leave and return at a later time.

4. Claimant was due to return to work on Thursday, September 4, 2020. However, on September 1, 2020 Claimant received a call from Employer's representative, F.M. who terminated his employment.

5. Claimant returned to Employer's premises on September 4, 2020 in order to ask Ms. F.M. to send him to a doctor because of his back pain. He parked at the restaurant right next to Ms. F.M.'s car. He got out of his car and at that moment Ms. F.M. was coming out of the restaurant and got in her car. He tried to get her attention and she rolled up her car windows and did not respond to him, driving out of the parking lot.

6. Claimant returned to Clinica Family Health again on September 4, 2020. They could not see him again. However, on this occasions they provided him an appointment for September 16, 2020. He was attended at that time and provided prescriptions for medications. They gave him steroids, muscle relaxants, anti-inflammatories, Tylenol as well as injections into the back, which helped. But the pain would come back. He was also, eventually given work restrictions of 10 lbs. lifting. He explained that the doctors were in the process scheduling more injections.

7. At one point his back pain was very intense and he went to Clinica for medical care but they sent him on to the emergency room at Avista Adventist Hospital, where they charged him $9,800, which continued to remain unpaid. He noted that approximately two months before the hearing he had received his last injection into his back and was provided with continued 10 lbs. restrictions.

8. Claimant filed a Workers' Claim for Compensation on September 10, 2020 stating that he was lifting a few pan/pots on August 27, 2020 at approximately 5 p.m. and felt a pop and sharp pain in his back. He noted that he had numbness in his legs. He reported the incident to M.M.

9. On September 16, 2020 Claimant was evaluated at Clinica Family Health related to a reported August 27, 2020 incident where Claimant was lifting a heavy pot and strained his back, causing mid back, low back pain, hip pain, and bilateral leg pain. Nurse Practitioner Jennifer Manchester noted Claimant continued with symptoms that radiated to both legs causing difficulty ambulating and had an onset of urinary hesitancy.

10. On September 18, 2020 Nurse Manchester restricted Claimant from work as of his date of injury and continuing, though stated he could return to work as of October 2, 2020 with a 20 lbs. restrictions. She recommended an MRI and referral to an orthopedic spine specialist, which Claimant declined as he did not have insurance or means to pay for them.

11. Dr. Upasana Mohapatra at Clinica also evaluated Claimant on September 23, 2020 and continued Claimant off work. He noted that Claimant's pain persisted in the middle and low back as well as the bilateral legs, specifically radiating to the left and right thighs. He diagnosed acute midline thoracic back pain. He noted that Claimant previously had reported tenderness to palpation over the lumbar spine but it was most pronounced over the thoracic spine with a positive straight leg test. He prescribed oxycodone and

cyclobenzaprine, an antidepressant. He ordered a thoracic x-ray and continued to recommend further diagnostic testing, which Claimant declined due to the cost.

12. On October 23, 2020 Dr. Mohapatra stated that Claimant continued to be unable to work. He noted that Claimant had pain in the middle back, low back and gluteal area with pain radiating down the left thigh and calf. Dr. Mohapatra continued to keep Claimant off work on November 23, 2020 noting that Claimant continued to have low back pain with radiculopathy affecting the lower extremity. His work status continued on December 13, 2021. In January 2021 his Clinica providers noted Claimant now had depressed mood related to his inability to provide for his family due to his ongoing chronic low back pain. In February 2021 Claimant was noted to have continued chronic low back pain with continued urinary hesitancy. This patterned continued with assessments of lumbar back pain with radiculopathy affecting the lower extremity, continued medications for both pain and depression related to the trauma.

13. On April 13, 2021 Claimant was evaluated by physiatrist Greg Reichhardt, M.D. for an Independent Medical Evaluation (IME) at the request of Claimant's counsel. On exam Dr. Reichhardt noted tenderness to palpation from T8 to the S1 area with most tenderness at the L1 to L3 level. Claimant had moderate lumbar paraspinal muscle spasm from L1 to L5. Straight leg raising was positive for back and leg pain. Patrick's maneuver was positive. Iliac compression test was positive. Dr. Reichhardt diagnosed thoracolumbar pain with bilateral lower extremity pain from lifting a pot at work on August 27, 2020 while-working as a dishwasher. He assessed that Claimant's exam was concerning for possible radiculopathy or myelopathy. He also noted Claimant had depression, which was multi-factorial, and only partly related to his work-related injury, and partially to the stresses of COVID, with possible adjustment disorder. Dr. Reichhardt opined that based on the history provided by Claimant, as well as the medical records available, to a reasonable degree of medical probability, Claimant current thoracolumbar pain and lower extremity symptoms were related to his August 27, 2020 work-related injury.

14. Dr. Reichhardt recommended Claimant undergo thoracic and lumbar MRIs to evaluate for potential nerve root or spinal cord compression leading to myelopathy or radiculopathy. After the MRIs, it would be appropriate for him to undergo physical therapy, progressing to an independent active exercise program. Depending on the results of the MRIs there might be consideration for selective spine injections or surgical intervention. He further stated that appropriate restrictions for Claimant were 10 pound lifting, pushing, pulling and carrying, with limited standing and walking to 30 minutes at a time with a five minute rest break, no climbing at unprotected heights, and no bending or twisting at the waist.

15. Claimant received trigger point injections on January 19, 2022 at Clinica Family Health. On January 27, 2022, Claimant returned for a follow up with Dr. Mohapatra when Claimant reported improvement with trigger point injections and muscle relaxants.

16. Claimant was seen on April 14, 2022 by Dr. Alejandro Stella at Avista Adventist Hospital for low back and right lower extremity pain. He was diagnosed with back pain and lower extremity pain. The triage nurse noted that Claimant presented with a history of low back injury of approximately one and one half years now experiencing

right buttock pain that radiated down the right leg and left foot numbness that extended up to the left knee. Dr. Stella ordered an MRI, which was conducted on April 14, 2022. The radiologist, Kevin Woolley, M.D. reported Claimant had lumbar spine degenerative changes with grade 1 anterolisthesis at L4-5 level to the basis of facet arthropathy, spinal stenosis noted at L4-L5 with bilateral foraminal impingement on the basis of degenerative change and listhesis, and bilateral foraminal impingement at L5- S1 with no disc herniation. They also performed a lower extremity ultrasound to rule out DVT.[1] Claimant was released to follow up with his primary care provider.

17. On April 25, 2022, Claimant returned to Clinica Family Health. Claimant reported previous trigger point injection helped for about two months. He received a second trigger point injection at this time. On a follow up with Clinica on May 10, 2022, Claimant reported improvement with trigger point injections, steroid burst, cyclobenzaprine, and gabapentin. On August 10, 2022, Claimant returned to Clinica for more trigger point injections. Dr. Mohapatra noted Claimant reported a reduction in pain previously. Four trigger points were injected. Claimant reported mild improvement after the procedure.

18. Claimant was seen for an IME by Dr. Lloyd Thurston on August 19, 2022, at Respondents' request. Dr. Thurston questioned Claimant on the weight of the pot at the time of the alleged injury. He informed him that 10-15 gallons weighs 80-120 pounds without a pot. Claimant stated that he believed he could not lift more than 60 pounds. Claimant stated he lifted the pot from the ground tipped it over and poured the water out, and then cleaned it with a spatula. He then put the pot away overhead. It was Dr. Thurston's opinion claimant exaggerated the mechanism of injury. He noted that if Claimant incurred an injury, it was a minor myofascial strain and resolved within 4-6 weeks of the date of injury. He opined there were no radicular symptoms. He explained that the continued subjective complaints were not consistent with a physical injury. He opined that Claimant significantly embellished and exaggerated the mechanism of injury to Dr. Reichhardt.

19. On October 10, 2022, Claimant received his last round of trigger point injections. On the last recorded visit to Clinica Family Health before the hearing, on October 20, 2022, it is noted Claimant received numerous treatments and most helpful were ibuprofen 600mg tablets taken twice a day, acetaminophen 500mg twice a day, lidocaine patches, and Cyclobenzaprine, trigger point injections and steroid bursts.

20. Since his back injury of August 27, 2020 Claimant has not returned to work due to ongoing back pain related to the work injury.

21. Ms. F.M. stated that Claimant was initially hired without a position but was doing dishwashing one day a week. The restaurant was slower around 2 p.m. when Claimant started, and then would pick up around 5 p.m. She stated that several of the pots, one for chili and one for beans were used for cooking which would be filled to about four inches below the top of the pans. The deep square pans were used to serve food and were placed on steamers by the wait staff. Claimant would wash them when they

[1] Deep vein thrombosis.

were empty. The pots full of chili or beans are taken out to the platers to put the food and then brought back with some residue and food at the bottom of the pots.

22. Mr. T.M. is also a Respondent representative. He stated the chili and bean pans weighed approximately 5 lbs. empty, that the pots are given to the dishwasher after all the food is scraped out and put into smaller containers, and that there was only residue in the pots. He stated that the diner rush lasted about one hour from 5:30 to 6:30 p.m. and that most of the cooking had been done by the time Claimant was there at 2 p.m. It was not until after the rush the steam pans from were given to the dishwasher. What was not explained by any Employer witnesses was what was Claimant doing from 2 p.m. to 6:30 p.m. when the dinner crowd was done and Claimant had to start washing the trays.

23. The photographs showed a cooking pot (chili pot) that seems to be a 40 quart stock pot which is normally 12 to 14 inches wide at the mouth and approximately 15 inches tall. This ALJ deduces that it likely could hold up to 10 gallons of water. The second pot, behind the first, is a smaller, potentially a 32 quart stock pot (beans pot). Further in photograph 3 it shows Ms. F.M. rinsing the smaller pot (beans pot) by lifting it with one hand and using a hose. The pan already appeared to have been scrubbed and washed. Lastly, Ms. F.M. stated that they would wash the chili pot by submerging it in water then rinsing it as shown in the photo. Photograph 2 showed pans on the ground that appear to be the stated dimensions that Ms. F.M. testified of 12 by 14 inches. In the sink can also be seen a plastic container, which Ms. F.M. denied they reused.

24. Ms. F.M. stated that she had a conversation with Claimant by phone on September 1, 2020 to see if she could make arrangements with Claimant to change his schedule because the staff had complained he was taking too long to finish his job. She disclosed that Claimant became very upset. She denied that she terminated Claimant. However, in the responses to discovery she indicated she would testify that “when she informed him [Claimant] of his termination, he became quite agitated and threatened to call their corporate office and speak to individuals there who did not have connection with his termination.” This is also confirmed by discovery responses by Mr. T.M. Discovery responses also stated that Claimant was terminated for cause as he had been previously counseled that he worked very slow, and needed to improve the quality and speed of his work.

25. Dr. Thurston testified at the end of hearing and his testimony was concluded via deposition. He explained that the x-ray and MRI did not show an acute injury, and that this is corroborated by Dr. Mohapatra and Dr. Stella. He disagreed with the diagnosis of radiculopathy. He explained that Dr. Reichhardt’s conclusions were based on incorrect information. He opined that while a possible myofascial injury may have occurred, that it was not probable that it was a work injury.

26. While the clocked-in time shows seven or less hours worked per day, this does not count the time that Claimant was at the job site, including his breaks, which may be what Claimant was referencing and that is consistent with his testimony that he was at work seven to eight hours a day. The argument that co-workers were complaining and that he was not finishing on time is inconsistent with the time clock which has Claimant clocking out between 9:00 p.m. and 9:30 p.m. at the latest each night. Unless the clock

was not accurate or changed, Ms. F.M.'s testimony is found to be not credible or persuasive.

27. As found, Claimant has shown he was injured in the course and scope of his employment for Employer on August 27, 2020 injuring his back and causing radicular symptoms down his legs as well as urinary hesitancy and aggravation of his depression due to the chronic back pain. The opinions of providers at Clinica Family Health and Dr. Reichhardt are more credible and persuasive than the contrary opinions of Dr. Thurston.

28. Claimant has shown he was unable to work after his August 27, 2020 work injury and has shown he is entitled to temporary disability benefits. The records fail to show that Claimant has been placed at maximum medical improvement through the date of the hearing of April 12, 2023.

29. Respondents have failed to show that Claimant was terminated for cause. Claimant reported the injury to his supervisor. Further, Ms. F.M.'s testimony was unpersuasive as her discovery responses indicated she terminated Claimant.

30. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Claimant has proven that it was more likely than not he was injured in the course and scope of his employment with Employer on August 27, 2020 when lifted a pot with water and food debris off the floor and strained his thoracolumbar spine. He subsequently developed lower extremity radicular symptoms and depression related to the chronic low back and radicular pain and numbness. Claimant's claim is determined to be compensable.

Respondents argue that Claimant's version of events was illogical and there was no reason for anyone to take the empty pot, fill it with water and then place it on the ground to be cleaned as it did not make sense. However, this ALJ concludes that it makes a lot of sense. It is clear that dirty pans do get placed on the floor waiting to be washed as seen in the photos taken by Respondents. It is evident from the photos that there is limited area to place dirty items as the space was needed to take items from the sink onto the small counter in order to wash them. Claimant's testimony that the pot he lifted was full of water and food debris was credible. A pot that has been used to cook may have

had food stuck and water was placed in the pot in order to assist with cleaning the pot later. And while Claimant's assessment of weight may be imperfect, it does not change the fact that Claimant lifted items that he considered heavy, and at one of those events, injured his thoracolumbar spine. This is supported by the records from Clinica Family Health and Dr. Reichhardt as well as Claimant's testimony, which are found credible. This ALJ does not consider Claimant's being a poor historian, which was documented in various records, as being untruthful but a contribution of multiple factors, including use of interpreters instead of direct communication, his clear lack of education demonstrated by Claimant's word usage and patterns of speech at hearing, his demeanor and difficulty understanding simple questions, in addition to his age, memory, and documented depression. Claimant has shown that he was injured in the course and scope of his employment with Employer on August 27, 2020.

C. Medical benefits

Employer is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005). Here, the parties stipulated that Clinica Family Health were authorized treating providers for the work related conditions and the provider is accepted.

Claimant has shown he is entitled to medical benefits that are reasonably necessary and related. Following Claimant's lifting incident on August 27, 2022, Claimant immediately contacted his primary care provider at Clinica Family Health. Claimant has proven by a preponderance of the evidence that Claimant's medical care through Clinica and Avista Adventist was authorized, reasonably necessary medical treatment causally related to the August 27, 2020 accident.

23. Only those expenses related to Claimant's August 27, 2020 work related injuries for his mid and low back, bilateral radicular symptoms, urinary urgency and depression are related and not any hypertension or other unrelated medical care.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The parties stipulated to an average weekly wage of $103.85 which provides a temporary total disability rate of $69.23. This stipulation is accepted.

E. Temporary Total Disability Benefits and Interest

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant's testimony and the medical records from Clinica Family Health show that Claimant was either unable to work or under restrictions from the day of his injury of August 27, 2020. Claimant continues to be under medical care and has not been placed at maximum medical improvement pursuant to the records submitted by the parties. Claimant has shown that he is entitled to temporary disability benefits from August 28, 2020 until terminated by law.

Claimant is also due interest on all benefits which were not paid when due pursuant to statute in the amount of 8% per annum. Temporary total disability benefits and interest through the date of the hearing were calculated as follows:

[Redacted as interest rate calculator with claimant's name, hereinafter RA]

F. Termination for Cause

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant was terminated by Employer's representative before his next scheduled day of work, on September 1, 2020 as shown by the discovery responses and Claimant's credible testimony. Claimant persuasively testified that he was unable to work after his injury. Further, this is supported by the credible medical records from Clinica Family Health providers who stated Claimant could not work or was under restrictions. Any testimony or evidence to the contrary is specifically found not credible or persuasive. Respondents have failed to show that Claimant was terminated for cause.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's August 27, 2020 work related injury is compensable, including his mid and low back injuries, his radicular symptoms, urinary urgency and the sequelae of depression related to the ongoing chronic pain.

2. Respondents shall pay the authorized, reasonably necessary and related medical benefits including his providers from Clinica Family Health and Avista Adventist Hospital for his hospitalization of April 14, 2022. Any non-related conditions are not Respondents' responsibility. All medical bills shall be paid in accordance with the Colorado Fee Schedule.

3. The stipulation of the parties regarding average weekly wage of $103.85 is accepted and incorporated as part of this order.

4. Respondents shall pay temporary disability benefits from August 28, 2020 through the present until terminated by law. TTD benefits at the rate of $69.23 per week through the date of the hearing of April 12, 2023 is $9,475.30.

5. Respondents shall pay interest at 8% per annum on all benefits not paid when due, for a total of $10,525.63 through the date of the hearing including temporary total disability benefits. Interests shall continue to be paid until indemnity benefits are paid pursuant to this order.

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

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

DATED this 1st day of August, 2023.

Digital Signature

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary partial disability ("TPD") benefits from February 14, 2022 to March 10, 2022.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits from March 11, 2022, ongoing.

III. Whether Respondents proved by a preponderance of the evidence Claimant was responsible for his termination from employment and thus not entitled to temporary indemnity benefits

FINDINGS OF FACT

1. Claimant is a 48-year-old who worked for Employer for approximately 2 years as a laborer and 16 years as a foreman.

2. Claimant's average weekly wage ("AWW") was $873.78.

3. Claimant sustained a work injury on March 8, 2021 when he fell a distance of six feet, landing on concrete and striking his head.

4. Claimant initially received medical care for the work injury at UC Health on March 13, 2021. He was diagnosed with a subarachnoid hemorrhage and underwent a pterional craniotomy operative procedure. Claimant was hospitalized for 20 days before being discharged on April 2, 2021.

5. Claimant subsequently began care with authorized provider Concentra on May 25, 2021. Claimant reported daily headaches, right eye pain, decreased vision, bilateral knee pain, swelling and clicking, right ankle pain, neck pain and low back pain. Nancy Strain D.O. gave an assessment of acute head injury, traumatic brain hemorrhage, bursitis of the right and left knees, cervical strain and lumbar strain. Dr. Strain restricted Claimant from all work and referred him for an orthopedic evaluation and physical therapy.

6. Respondents filed a General Admission of Liability ("GAL") admitting for medical benefits and TTD beginning March 9, 2021, ongoing.

7. On June 8, 2021, authorized treating physician ("ATP") Patrick Antonio, D.O. released Claimant to modified duty with the following work restrictions: no lifting greater

than 20 pounds, no kneeling, no climbing, no walking on uneven terrain, no bending, and no working in safety sensitive positions.

8. Claimant did not work from the date of injury to February 13, 2022. Employer paid Claimant TTD benefits during such time period.

9. Claimant underwent extensive evaluations and treatment and continued to complain of headaches, vertigo, dizziness, and right head pain.

10. On January 20, 2022, Respondents submitted a letter to Dr. Antonio requesting approval of proposed temporary modified duty work. Respondents' letter to Dr. Antonio outlined that in the modified duty position Claimant would "[w]ork with crew to assist with tool roll out, material handling and location, job review and supervision, job site cleanup, ride along in company vehicle to and from job site. Requires walking short distances, standing, handling, grasping, reaching, occasional bending and verbal communication. Lift/carry to 20 lbs." (R. Ex. E p. 17).

11. Dr. Antonio approved the proposed modified duty on February 1, 2022, noting "Recommend no bending, no uneven terrain. Allow to sit or stand as tolerated." (Id).

12. On February 3, 2022, Employer sent Claimant a written offer of modified employment to begin on February 14, 2022. The offer of modified employment was consistent with Dr. Antonio's approval. Claimant was to work eight hours per day, five days per week, at $26.00 per hour.

13. Claimant began the modified job on February 14, 2022. Claimant testified that his modified job duties included cleaning work trucks and retrieving and dispensing work materials including pipes, joints, and wire. Claimant testified that his modified work duties did not involve lifting over 20 pounds, but did involve walking over uneven terrain at the worksite. Claimant testified the modified work was not difficult, but that upon returning home after work he felt very tired.

14. On February 16, 2022, Respondents filed a GAL terminating Claimant's TTD as of February 14, 2022 based upon the offer of modified duty.

15. On February 23, 2022, Claimant reported to Dr. Antonio some overall improvement in his dizziness but worsened dizziness when walking on uneven surfaces. Dr. Antonio noted Claimant "Has returned to work Feb 14, handing tools but a lot of sitting. Even so, he returns home from work with increased dizziness." (Cl. Ex. 11 p. 985). Dr. Antonio continued Claimant on the same work restrictions.

16. On March 3, 2022, Claimant saw authorized provider John Aschberger, M.D., who noted Claimant's recurrent headaches seemed to be subsiding in form. He noted Claimant's main concern was recurrent dizziness. Dr. Aschberger documented, "He has been working. He tends to have increased symptoms at the end of the day." (Cl. Ex. 12 p. 23).

17. On March 7, 2022 Claimant sought treatment at the UC Health emergency department for headaches and dizziness that had worsened in the last two days. A CT scan of the head was without acute intracranial blood products or intracranial mass. Claimant was provided with symptomatic control and discharged to follow up with his primary care physician.

18. Between February 14, 2022 and March 11, 2022, Claimant worked only one to three days out of each scheduled five-day work week. Claimant testified he missed several days of work during this time period due to experiencing ongoing symptoms from the work injury. Claimant testified he did not notify Employer of each of his absences and that he did not remember what days he did notify Employer of any absences. Claimant testified he did not remember if he notified anyone when he would not be going into work. Claimant produced no records of text messages or phone call to Employer during this time period.

19. Claimant testified that, prior to his work injury, he would typically send a text message to [Redacted, hereinafter MR], Owner of Employer, notifying MR[Redacted] if he was going to be absent or tardy. Claimant also testified that, prior to the work injury, on occasion he would no-call, no-show, but never several days for multiple weeks.

20. Claimant testified it was his understanding texting was an acceptable method of notifying Employer of his absences or tardies. Claimant testified he was not aware of any formal Employer policy regarding how to report absences or tardies and that he was never informed that a certain number of absences would result in termination. Claimant had not received any warnings or reprimands from Employer.

21. Claimant further testified that when he went to the emergency department on March 7, 2022 he texted MR[Redacted] to notify MR[Redacted] he was sick and unable to return to work. Claimant testified he was not surprised when he received a letter of termination from Employer because he suspected he was going to be terminated due to his many absences. Claimant testified he understood that missing work without notifying Employer would result in termination. Claimant testified he just stopped going to work sometime in March 2022 because of the work injury. Claimant testified he did not reach out to Employer and attempt to explain that he was missing work due to symptoms of his injury. He testified that Employer worked with him to find duties within his restrictions and that MR[Redacted] did what he could to give Claimant a job.

22. Employer terminated Claimant effective March 11, 2022 for no-call, no-shows. Employer sent Claimant a letter dated March 10, 2022 informing him of his termination due to “no show or no call excusing your absence.” (R. Ex. H, p. 63).

23. MR[Redacted] credibly testified at hearing. He testified that three days after starting his modified duty position Claimant missed work on February 17, 2023, without calling or texting Employer to inform Employer of his absence. MR[Redacted] testified that Claimant returned to work on February 18, 2022. MR[Redacted] testified that Claimant worked only one day during the week of February 21 through February 25, 2022. MR[Redacted] testified Claimant did not communicate with Employer regarding

his absences that week until Friday, February 25, 2022, when Claimant sent MR[Redacted] a text message late in the day stating he was going to the doctor. No medical record was submitted in evidence which shows Claimant attended a medical appointment on February 25, 2022.

24. MR[Redacted] testified that from February 28 through March 4, 2022, Claimant again attended only one day of work and that Claimant did not call or send a text message to MR[Redacted] regarding his absences, except one text message on March 3, 2022, which stated that Claimant was not feeling well.

25. MR[Redacted] testified that the week of March 7-11, 2022, Claimant did not attend any work at all, and that Employer received no communication from Claimant regarding missing work. MR[Redacted] testified Claimant did not communicate with him regarding going to the emergency department on March 7, 2022. MR[Redacted] testified that, on March 10, 2022, he made the decision to terminate Claimant's employment due to Claimant's repeated no-call/no-shows. MR[Redacted] testified he did not terminate Claimant due to the work injury or work restrictions. He testified that there was modified duty available to Claimant within Claimant's restrictions at the time of his termination.

26. MR[Redacted] further testified Employer has no formal policy regarding attendance or disciplinary action. He testified that he did not issue any warnings to Claimant regarding Claimant's no-call, no-shows as there was not much communication with Claimant during that time period. MR[Redacted] testified that when other employees would previously stop attending work, he would terminate their employment and replace them with new employees. He also did not give those employees verbal or written warnings. MR[Redacted] estimated he terminated approximately 8-10 employees over the course of 20 years while operating Employer.

27. On March 30, 2022, Claimant was evaluated by Dr. Antonio and stated that no light duty work was available to him. Dr. Antonio did not increase Claimant's work restrictions at that time.

28. Claimant has continued to undergo treatment for his work injury and continued to report headaches, dizziness. As of the date of hearing, Claimant remained on the same work restrictions for the work injury.

29. Claimant has not worked or received any wages since March 11, 2022.

30. The ALJ credits Claimant's testimony regarding the reason for his absences subsequent to the work injury and finds Claimant proved it is more probably true than not the March 8, 2021 work injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual total wage loss as well as partial wage loss.

31. The ALJ finds Claimant was aware of Employer's expectation to notify Employer of his absences and that his failure to do so could result in termination. Respondents

proved it is more probably true than not Claimant is responsible for termination of his employment and thus Claimant is not entitled to TTD as of March 11, 2022.

CONCLUSIONS OF LAW

Generally

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

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

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

TPD

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the

claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

Between February 14, 2022 and March 11, 2022 Claimant did not work several days out of each scheduled five-day work week due to experiencing ongoing symptoms as a result of the work injury. While the offer of modified employment totaled $1,040 per week, exceeding Claimant's AWW, Claimant did not work multiple shifts and suffered partial wage loss as a result of the work injury. Accordingly, he is entitled to TPD benefits from February 14, 2022 through March 10, 2022.

TTD and Responsibility for Termination

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of*

Davis, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, Claimant proved the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Nonetheless, Claimant is not entitled to TTD as of March 11, 2022 as the preponderant evidence demonstrates Claimant was responsible for termination from his modified employment.

As credibly testified to by MR[Redacted] and documented in the termination letter, Employer terminated Claimant due to his failure to notify Employer of his repeated absences. That several of the absences were due to ongoing symptoms from his work injury did not, under these particular circumstances, absolve Claimant of the responsibility to notify Employer of his absences. Despite there being no formal policy regarding no-call, no-shows and disciplinary action, Claimant was aware of Employer's expectation that he notify Employer of absences and tardies and that failing to do so could result in his termination. Claimant testified that, prior to the work injury, he typically texted MR[Redacted] to notify him of absences and tardies. Even if, on occasion, Claimant had not provided prior notice to Employer of an absence, it was not a situation in which Claimant missed several days of scheduled work for multiple weeks, as he did February 14, 2022 through March 10, 2022. Claimant further testified that he was not surprised he was terminated as a result of his absences. Claimant did not testify, nor is there any evidence indicating, he had some sort of reasonable

understanding that he was not required to report to work nor notify Employer of his absences while on modified duty.

Claimant made no reasonable attempts to notify Employer of his repeated absences nor explain to Employer that his absences were due to his work injury. Moreover, although on March 3, 2022 Claimant reported to Dr. Antonio experiencing increased dizziness after a work day, the evidence does not demonstrate Claimant actively sought a change in his work restrictions at the time. Claimant simply stopped appearing for work and made no reasonable efforts to notify Employer of each absence. A reasonably prudent individual in the same or similar circumstances would provide prior notice to employer of such absences. While absences due to ongoing symptoms of the work injury may not have been within Claimant's control, his repeated failure to take any reasonable action to notify Employer of his absences, knowing that such action could result in termination, was volitional.

Based on the totality of the circumstances, the preponderant evidence demonstrates Claimant was at fault for his separation from employment and thus not entitled to TTD benefits as of March 11, 2022.

ORDER

It is therefore ordered that:

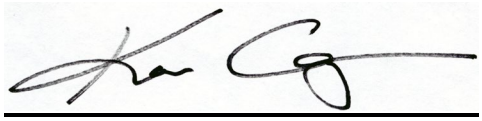
1. Respondents shall pay Claimant TPD February 14, 2022 through March 10, 2022.

2. Claimant was responsible for his termination from employment and thus not entitled to TTD benefits as of March 11, 2022.

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

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

DATED: August 1, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury or occupational disease arising out of and in the course and scope of his employment with Employer?

- If Claimant has proven he sustained a compensable injury or occupational disease, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable, necessary and related to his work injury and provided by a physician who was authorized to treat Claimant for his injuries?

- If Claimant has proven he sustained a compensable injury or occupational disease, whether Respondents have proven by a preponderance of the evidence that Claimant's claim is barred by the statute of limitations?

- If Claimant has proven he sustained a compensable injury or occupational disease, whether Respondents have proven by a preponderance of the evidence that Claimant is subject to a penalty for late reporting of his injury pursuant to Section 8-43-102(1)(a)?

- At the commencement of the hearing, the parties agreed that if Claimant has proven a compensable injury or occupational disease arising out of and in the course and scope of his employment with Employer that the issue of average weekly wage **("AWW")** would be held in abeyance.

FINDINGS OF FACT

1. Claimant was employed by Employer as an underground miner. Claimant began his employment with Employer on May 29, 2012. Claimant testified he has worked as a general laborer, shuttle car operator, an underground utility mine and a mine helper, in addition to a short stints as a roof bolter. Claimant is currently employed as a belt repairman. Claimant testified his job duties as a belt repairman is to look after the belts and shovel accumulations of coal that fall off the belts and land underneath the belts.

2. Claimant testified that on April 19, 2021 he was shoveling an accumulation from under the belt and while reaching under the belt, Claimant felt a "pop" in his right shoulder. Claimant testified he reported the incident to his foreman, [Redacted, hereinafter JP] and to [Redacted, hereinafter DR]. Claimant testified he did not initially seek medical attention nor was he referred for medical treatment by Employer. An incident report form was completed by JP[Redacted] and DR[Redacted] which documented Claimant reporting a pop in his right shoulder and reported the injury occurred while shoveling under the belt.

3. Claimant continued to work for Employer and in February 2022 he went to his supervisor, [Redacted, hereinafter SP], and advised SP[Redacted] that he needed to get medical treatment for his right shoulder. After reporting to SP[Redacted] that he needed medical treatment, Claimant completed an Employee Accident Report for Employer. The form lists Claimant's accident date as April 19, 2021 and indicates both shoulders had been injured. An Employer's First Report of Injury was completed by [Redacted, hereinafter DC], the Human Resource Manager for Employer, on February 22, 2022.

4. Respondents presented the testimony of SP[Redacted] at hearing. SP[Redacted] confirmed that it was protocol at the mine that if an employee sustains an injury they are to report the injury to a supervisor. SP[Redacted] testified that Claimant reported an injury to him on February 22, 2022 and he went back to the original complaint of shoulder pain on April 19, 2021 when completing the report, then took Claimant to the doctor.

5. Claimant had testified that he had previously reported a work injury for his left shoulder in 2018 and was told he had reported it too late and could not make a workers' compensation claim. Claimant specifically testified that he was informed by Employer that he was "out of luck" with regard to the left shoulder injury. SP[Redacted] testified he was not aware of any situation where Claimant was prohibited from making a workers' compensation claim.

6. Claimant testified at hearing that between April 19, 2021 and February 22, 2022, he continued performing his regular work for Employer. Claimant testified his shoulder symptoms increased after the April 19, 2021 incident and he eventually reported to SP[Redacted] that he wanted to seek medical treatment for his shoulder injury.

7. Claimant sought medical treatment at the Rangely District Hospital Emergency Room ("ER") on February 22, 2022. Claimant complained of an injury involving shoulder pain as a result of working in a mine and performing heavy shoveling and lifting. Claimant reported he had chronic shoulder pain for over a year with his left shoulder having more pain than his right shoulder. The ER records indicate Claimant denied any specific injury that led to the shoulder pain. Claimant underwent x-rays of the right shoulder which showed no significant abnormalities. Claimant also underwent an x-ray of the left shoulder that showed mild degenerative changes of the acromioclavicular joint. Claimant testified that the ER wanted to refer Claimant to a surgeon in Meeker, but Claimant requested a referral to a physician in Vernal, Utah. Claimant subsequently came under the care of Dr. Madsen.

8. Claimant testified he had previously received medical care from Dr. Madsen for a shoulder injury that he alleged was work related and occurred in 2018. As noted above, Claimant testified that when he tried to report the work injury, he was advised by Employer that he had waited too long to report the injury and it would not be accepted. Claimant testified he then sought medical treatment for his left shoulder outside the workers' compensation system.

9. According to the medical records, Claimant's treatment with Dr. Madsen began March 21, 2019 when he was treated for neck pain and stiffness. Claimant also

reported occasional tingling and numbness in his arms and reported mild tenderness of his upper left sided trapezius. Claimant denied any specific injury. Claimant testified this neck condition was treated as a workers' compensation claim. The medical records also contain a cervical magnetic resonance image ("MRI") on April 12, 2017 that showed some degenerative changes to the cervical spine along with bulging discs at the C5-6 and C6-7 levels.

10. Claimant was evaluated on August 26, 2020 with reports of left shoulder arm and elbow pain for the past 6-8 months. Claimant again denied any specific injury. Claimant returned on October 12, 2020 with complaints of bilateral shoulder pain and was diagnosed by Dr. David Perry with degenerative joint disease of the acromioclavicular joint of the left shoulder. Claimant returned for additional medical treatment on November 9, 2020. Claimant underwent an MRI of the left shoulder on November 9, 2020 which demonstrated degenerative joint disease along with a partial thickness tear of the distal supraspinatus and infraspinatus tendon. According to the medical records, this series of medical treatment represents the medical treatment for Claimant's left shoulder condition that Claimant testified he received after being informed by Employer that he was too late in reporting a workers' compensation injury.

11. Claimant was examined by Dr. Madsen on January 5, 2021 with complaints of left shoulder pain. Dr. Madsen noted that Claimant was scheduled for left shoulder surgery with Dr. Moore, but cancelled it to obtain a second opinion. Dr. Madsen recommended conservative treatment with physical therapy and anti- inflammatories. Claimant was provided with a left shoulder lidocaine injection.

12. Claimant returned to Dr. Madsen on March 2, 2021. Dr. Madsen noted Claimant had not been diligent with his physical therapy. Dr. Madsen recommended Claimant focus on strengthening the shoulder and away from formal therapy.

13. Claimant returned to Dr. Madsen for his left shoulder issue on April 27, 2021 and reported the work injury of April 19, 2021 to his right shoulder during this evaluation. Dr. Madsen noted that Claimant was going to file a claim for the right shoulder injury. Dr. Madsen noted that Claimant had been busy at work and had good improvement with regard to his shoulder and was not thinking he needed surgery. Dr. Madsen noted that Claimant would return and Dr. Madsen would see him for his right shoulder condition "whenever he is available and ready".

14. After this visit, Claimant did not receive treatment from Dr. Madsen for either shoulder issue until almost a year later on March 11, 2022. At this point, Claimant was reporting increased pain in both shoulders. Dr. Madsen recommended Claimant undergo an MRI of the right shoulder at this point. Claimant underwent an MRI of the right shoulder on March 25, 2022. The MRI revealed small partial thickness tears of the supraspinatus and infraspinatus tendon without retraction.

15. Claimant testified at hearing that following his injury to the right shoulder on April 19, 2021, he began compensating by using his left shoulder more which caused more pain in his left shoulder.

16. Claimant returned to Dr. Madsen on March 31, 2022. Dr. Madsen noted the results of the MRI and recommended conservative treatment. Claimant was provided with a lidocaine injection for the right shoulder and a prescription for physical therapy. Claimant was instructed to return in six (6) weeks.

17. Claimant was re-examined by Dr. Madsen on May 24, 2022 and reported that the subacromial injection provided him with 40% relief and he was able to sleep better at night. Claimant reported positive progress with physical therapy and Dr. Madsen recommended continuing conservative treatment.

18. Claimant was examined by Dr. Madsen on June 28, 2022 and August 18, 2022, who continued to recommend conservative treatment including anti- inflammatories, injections and physical therapy. Claimant was diagnosed with a non- traumatic incomplete tear of the left rotator cuff and an incomplete tear of the right rotator cuff. Dr. Madsen provided Claimant with a lidocaine injection into the left shoulder on August 18, 2022.

19. Respondents obtained an independent medical examination ("IME") of Claimant with Dr. Failinger on October 15, 2022. Dr. Failinger reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with Claimant's IME. Dr. Failinger reported Claimant was a relatively poor historian with regard to his shoulder injury and treatment. Dr. Failinger noted that Claimant reported an incident on April 19, 2021 but there were no clinical notes or any other records documenting a right shoulder injury and a filing of a claim at that point. Dr. Failinger opined in his report that Claimant was suffering from rotator cuff disease that was, in most all cases, one of degeneration. Dr. Failinger opined that Claimant's activities in the mine would not be sufficient activities to meet the criteria of performing repetitive shoulder movements pursuant to the Colorado Medical Treatment Guidelines. Dr. Failinger noted in his report that although Claimant reported he was raking and noticed a pop in his right shoulder two to three years agao, there were no records that provide such information to Dr. Failinger. Dr. Failinger ultimately opined in his report that Claimant's right shoulder condition was not related to his work with Employer.

20. Dr. Failinger testified by deposition in this matter consistent with his IME report. Dr. Failinger noted that at the time of his IME report he did not have a copy of the incident report dated April 19, 2021 completed by Employer. Dr. Failinger opined in his testimony that if Claimant had injured the rotator cuff while shoveling on April 19, 2021, he would not have been shoveling for very long and would have needed to stop and obtain treatment. Dr. Failinger opined that it was not medically probable that Claimant would have an injury when he experienced the pop in the shoulder and not obtain treatment for 10 months. Dr. Failinger opined that at most, Claimant experienced a sprain/strain during the incident which would resolve in four to six weeks.

21. The ALJ credits the testimony of Claimant at hearing along with the supporting medical records from Rangely District Hospital and Dr. Madsen and determines that Claimant has established that he has proven that it is more likely than not that he sustained a compensable injury arising out of and in the course and scope of

his employment with Employer on April 19, 2021 when he experienced a pop in his right shoulder.

22. The ALJ recognizes that Claimant did not seek medical treatment for this injury until February 22, 2022, but Claimant did report the injury and then continued to work for Employer before eventually deciding that he could no longer forgo on the need for medical treatment. The ALJ notes that Claimant reported the incident to Dr. Madsen on April 27, 2021 and finds the medical record consistent with Claimant's testimony at hearing. The ALJ therefore finds that Claimant has proven that it is more likely than not that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer.

23. The ALJ credits the medical records and Claimant's testimony at hearing and finds that the medical treatment provided by Rangely District Hospital ER and Dr. Madsen was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury to Claimant's right shoulder.

24. The ALJ notes that Claimant was taken for medical treatment to the Rangely District Hospital by Employer. However, there is insufficient evidence to establish that Employer referred Claimant to a physician willing to treat Claimant for his injuries. Therefore, Claimant is free to select Dr. Madsen as his authorized treating physician and the treatment provided by Dr. Madsen is deemed authorized.

25. With regard to the issue of the statute of limitations, Respondents argue that Claimant began seeking medical treatment for his right shoulder injury based on the fact that he sought medical treatment for the right shoulder as early as August 12, 2020 and reported to the physician that the symptoms began six to eight months prior. This argument ignores the fact that Claimant had a specific incident on April 19, 2021 that he immediately reported to his employer that involved a "pop" in his shoulder while shoveling under the belt.

26. The ALJ finds that based on Claimant's injury to his right shoulder on April 19, 2021, Claimant's claim for workers' compensation benefits is not barred by the statute of limitations as the claim for compensation was brought within 2 years of the date of injury.

27. The ALJ further credits Claimant's testimony that his left shoulder condition worsened after April 19, 2021 when he began over compensating for the right shoulder which caused increase pain in his left shoulder. The ALJ notes that when Claimant was examined by Dr. Madsen on April 27, 2021 he noted that his left shoulder was getting stronger doing better and less bothersome. Claimant did not then seek medical treatment for either of his shoulders until February 22, 2022 when he reported his injury to Employer.

28. The ALJ credits Claimant's testimony as credible and finds that Claimant' has established that it is more likely than not that his overuse of his left shoulder at work after April 19, 2021 right shoulder injury aggravated, accelerated or combined with

Claimant's preexisting condition of his left shoulder to cause the need for medical treatment provided by Dr. Madsen after February 22, 2022.

29. Respondents further contend that Claimant is subject to a penalty for late reporting of his workers compensation injury pursuant to Section 8-43-102(1)(a). The ALJ is not persuaded.

30. Claimant in this case reported the April 19, 2021 incident involving the "pop" in his right shoulder on the date of the incident. Claimant did not seek medical treatment immediately after reporting the injury, but Claimant did report the injury to Employer on the date the injury occurred. Section 8-43-102(1)(a) requires that an injured worker to report the injury to Employer in writing within four(4) days of the date of the occurrence. The statute provides that any other person who has notice of the injury may submit written notice to the person in charge, and in that event the injured worker is relieved of the obligation to give such notice.

31. In this case, Claimant testified at hearing that he reported the injury on April 19, 2021 to SP[Redacted] and DR[Redacted]. The ALJ finds Claimant's testimony credible as it is supported by the incident report form signed by SP[Redacted] and DR[Redacted] dated April 19, 2021. The incident report form which memorializes Claimant's report of injury and identifies Claimant and is signed by SP[Redacted] and DR[Redacted] satisfies the requirements of Section 8-43-102(1)(a) that Employer be provided with written notice of Claimant's injury.

32. Insofar as Respondents are arguing that Claimant failed to timely report an injury in 2018 that led to Claimant's medical treatment in 2019 and 2020, the ALJ credits Claimant's testimony that he attempted to report the injury to Employer and was told that he was out of luck as he had not timely reported the injury. However, based on the ALJ's finding that Claimant's actions of over compensating for his right shoulder after April 19, 2021 which resulted in his left shoulder to be aggravated, accelerated, or combining with a preexisting condition to cause the need for medical treatment in 2022, Claimant's written notice of the April 19, 2021 injury is sufficient for both is right and left shoulder claims.

CONCLUSIONS OF LAW

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

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2022. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

5. As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer when he was shoveling coal from under the conveyor belt on April 19, 2021. As found, Claimant's testimony that he felt a pop and had onset of pain in his right shoulder while performing work activities is found to be credible. As found, Claimant's testimony is consistent with Claimant's report to Dr. Madsen on April 27, 2021 and consistent with the Incident Report Form completed by Employer on April 19, 2021.

6. As found, Claimant's testimony that his overcompensating for the right upper extremity resulted in increased pain in his left shoulder is found to be credible. As found, Claimant's testimony is consistent with the medical records from Dr. Madsen which show Claimant's left shoulder symptoms improving on April 27, 2021 before worsening leading up to Claimant receiving medical treatment on February 22, 2022.

7. As found, Claimant has proven by a preponderance of the evidence that his overcompensating for the right shoulder injury of April 19, 2021 aggravated, accelerated of combined with Claimant's preexisting left shoulder condition causing the need for medical treatment. The ALJ recognizes that Claimant had a history of left shoulder medical treatment prior to the April 19, 2021 right shoulder injury, but credits the April 27, 2021 medical report of Dr. Madsen

8. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not

change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office,* 931 P.2d 570 (Colo. App. 1996).

9. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.,* W.C. No. 4-304- 437 (January 3, 2008). Section 8-43-404(5)(a} specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985), *citing,* 2 A. Larson, *Workers' Compensation Law* § 61.12(9)(1983).

10. As found, Claimant's medical treatment with Rangely District Hospital and Dr. Madsen are found to be reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury. As found, Claimant's treatment with Dr. Madsen is found to be authorized by virtue of the fact that Employer did not provide Claimant with a list of medical providers authorized to treat Claimant following Claimant's request for medical treatment on February 22, 2022 when Employer took Claimant to the emergency room.

11. Section 8-43-103(2), C.R.S. requires that claimant must file a claim for compensation within two years after the injury. The statute of limitations does not commence to run until claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of her injury. *City of Boulder v. Payne,* 162 Colo. 345 (Colo. 1967); *City of Colorado Springs v. Industrial Claim Appeals Office,* 89 P.3d 504 (Colo. App. 2004).

12. As found, in the present case, Claimant sustained a compensable injury arising out of and in the course of his employment with Employer on April 19, 2021 and immediately reported the injury to Employer. As found, Claimant's over compensation of his right shoulder related to the April 19, 2021 injury over the next ten months resulted in the need for treatment to the left shoulder, in addition to the right shoulder. As found, Claimant's claim for compensation was brought within 2 years of the April 19, 2021 injury.

13. Section 8-43-102(1)(a) states in pertinent part:

> Every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within four days of the occurrence of the injury. If the employee is physically or mentally unable to provide said notice, the employee's foreman, superintendent, manager, or any other person in charge who has notice of said injury shall submit such written notice to the employer. Any other person who has

notice of said injury may submit a written notice to the said person in charge or to the employer, and in that event the injured employee shall be relieved of the obligation to give such notice. Otherwise, if said employee fails to report said injury in writing, said employee may lose up to one day's compensation for each day's failure to so report. If, at the time of said injury, the employer has failed to display the notice specified in paragraph (b) of this subsection (1), the time period allotted to the employee shall be tolled for the duration of such failure.

14. As found, Claimant reported the injury on April 19, 2021 and the Employer completed an incident report form that was signed by JP[Redacted] and DR[Redacted]. As found, Claimant timely reported his work injury to Employer.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on April 19, 2021.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury, including the medical treatment provided by Rangely District Hospital and Dr. Madsen.

3. Respondents have failed to prove that Claimant's claim for compensation is barred by the statute of limitations.

4. Respondents have failed to prove that Claimant is subject to penalties for late reporting of his April 19, 2021 injury pursuant to Section 8-43-102(1)(a)

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

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

DATED: August 2, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKER'S COMPENSATION NO. WC 5-222-363-001

STIPULATED FACTS

1. [Redacted, hereinafter CC] was an employee of the Employer on November 15, 2022.

2. On November 15, 2022 CC[Redacted] was killed performing duties in the course and scope of his employment with the Employer.

3. At the time of his death, CC[Redacted] had two Dependents, [Redacted, hereinafter AP], spouse, and [Redacted, hereinafter KC], child.

4. Respondents filed a Fatal Case-General Admission on November 30, 2022 and began paying death benefits equally to the Dependents at the rate of $447.14 per week.

5. The parties agree that CC's[Redacted] Average Weekly Wage (AWW) for wages earned at the time of his death was $1,341.42. The total death benefit payable to the Dependents is $894.28 per week, divided equally among both Dependents.

6. At the time of his death, CC[Redacted] had a policy for health and dental insurance in place through his Employer.

7. The health and dental policy in place included coverage for both Dependents.

8. Meritain Health maintained the coverage of the Employer's health plan and verified coverage for both Dependents through November 30, 2022. Both Dependents were covered by the insurance at the time of CC's[Redacted] death and on the date the health insurance was terminated due to CC's[Redacted] death.

9. On December 6, 2022 the Employer issued a letter to the Dependents for a COBRA Election Form. Continuation of coverage for family medical coverage was priced at $2,205.04 per month for medical coverage and $125.59 per month for dental coverage. The combined cost for continuing health and dental insurance is $2,330.63 per month or $537.84 per week. Both Dependents were eligible for continuation of coverage in the COBRA Election Form.

10. The COBRA Election Form also specified that the Dependents would be entitled to continuing coverage under COBRA for 36 months.

11. Dependents' position is that the additional cost of continuing coverage of $537.84 per week should be added to the currently admitted AWW pursuant to §8-40-201(19), C.R.S.

12. Respondents position is that the cost of continuing coverage is not applicable to fatal claims because the Employee is deceased and will not have a continuing cost in the Employer's health insurance or cost of conversion. Death benefits for the Dependents are not increased for COBRA because they are not the "employee," as defined in §8-40-201(19)(b), C.R.S.

ISSUE

Whether Decedent's COBRA benefits should be included in the AWW used to calculate Dependents' death benefits.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-40-201(19)(b), C.R.S. provides, in relevant part, that "wages" include "the amount of the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan." It is well-established that, if a claimant is receiving lost wage benefits and insurance coverage is terminated by the employer, the cost of that insurance is added to the claimant's AWW. The question in this case is whether the same reasoning applies to dependents who were receiving group health insurance under a plan maintained by the decedent and the employer terminated the benefits after the decedent's death.

5. Section 8-42-114, C.R.S. provides in pertinent part, "in case of death the dependents of the deceased entitled thereto shall receive as compensation of death benefits 66 ⅔% of the deceased average weekly wages not to exceed a maximum 91% of the state's average weekly wage for accidents occurring on or after July 1, 1989…"

6. Section 8-42-115(1), C.R.S. specifies that, where death proximately results from an industrial injury, the decedent's dependents are entitled to receive the decedent's workers' compensation benefits. Under §8-42-115(1), C.R.S. the calculation of death benefits is based on the decedent's AWW. The amount and duration of death benefits requires a determination of whether the decedent was survived by whole or partial dependents. *Erickson v. Foxworth Galbraith Lumber Co,*, W.C. No. 4-497-321 (ICAO, Sept. 17, 2003).

7. There are prior decisions by the Industrial Claimant Appeals Office (Panel) that support the conclusion that the Dependents should be entitled to the cost of continuing the Employer's group health insurance plan included with the current admitted AWW. The decisions address the same issues regarding temporary total disability benefits and permanent benefits.

8. In *Gutierrez v. Plan De Salud Del Valle Inc.,* W.C. No. 4-257-435 (ICAO, Jan. 12, 2001) the Panel reiterated prior decisions that the plain meaning of §8-40-201(19)(b), C.R.S. incorporates the cost of health insurance coverage provided to the claimant's dependents in cases where the employer's health insurance plan allows such coverage. The Panel noted that, if the General Assembly wished to limit the statute to the cost of health insurance provided solely to the claimant, it could have used such limiting language. They were not persuaded by the respondent's attempt to distinguish between adjustments in the AWW for purposes of temporary disability benefits and adjustments for purposes of permanent disability benefits. The Panel noted that, although there are differences in the statutory methods used for calculating those benefits, temporary disability and permanent disability benefits are both designed to compensate for the claimant's loss of earning capacity. *Colorado AFL-CIO vs. Donlon, 914 P.2d 396* (Colo. App.1995).

9. There are additional cases that support amending the AWW to include the cost of continuing insurance in the present matter. Numerous cases have held that §8-40-201(19)(b), C.R.S. reflects a legislative compromise that attempts to value health insurance once the employer stops paying premiums. The amendment adds the cost of healthcare coverage when the employer stops paying. Whether the cost of insurance is included in the AWW is dependent on enrollment at the time the employer terminates coverage. *Gonzales v. City of Fort Collins and Occupational Healthcare Management Services,* W.C. No. 4-365-220 (ICAO, Nov. 20, 2003).

10. The Panel issued Identical holdings in *Maguire vs. Family Dollar Stores Inc.,* W.C. No. 4-738-209 (ICAO, Mar. 28, 2012) and *Villa vs. Leprino Foods,* W.C. No. 4-735-985 (ICAO, Nov. 3, 2009). In *Gonzales*, *Villa*, and *Maguire,* the Panel determined that the cost of continuing insurance for the dependents should not be included in the AWW for calculation of either temporary disability benefits or permanent benefits. The Panel

explained that, because only the claimant was covered under the employer's health insurance plan when the employer terminated coverage, the AWW would be increased by the cost of converting to a similar or lesser plan for only the claimant. The Panel reasoned that the dependents were not covered under the employer's health insurance plan at the time insurance terminated, and were thus not eligible for continuing coverage under COBRA. They acknowledged in all three cases that, when the General Assembly enacted §8-40-201(19)(b), C.R.S. it was aware that the value of COBRA insurance, and hence the inclusion of the cost of such insurance in the AWW, would be dependent on enrollment at the time the employer terminates coverage.

11. Under §8-40-201(19)(b), C.R.S. "wages" shall not include the employee's cost of continuing the employer's group health insurance plan if the employer continues to pay the cost of health insurance coverage. Relying on *In re Claim of Flake*, W.C., No. 4-997-403-03 (ICAO, Sept. 19, 2017), the Respondents contend that, because the employer continued to pay the cost of health insurance coverage until at least October 13, 2015 after a September 22, 2015 work accident, the cost of health insurance coverage should not be included in the Decedent's AWW before that date. Respondents assert that in the present matter Decedents health insurance coverage had not been discontinued or terminated prior to the time of his death. Therefore, it should not be included in the AWW used to compute the Dependents' benefits. However, importantly in *Flake*, the Panel reasoned that, because the employer continued to pay the cost of continuing health insurance coverage at least until October 13, 2022, it could not be included in the claimant's AWW "before that date." The temporary benefits the claimant received were for dates prior to October 13, 2022 and thus calculated on an AWW that did not include the cost of continuing health insurance.

12. *Flake* is distinguishable from the present case. Here, the Dependents are not seeking an increase in the AWW for a period before the Employer ceased paying for health care coverage, but only after termination of the payments. The Employer terminated health insurance payments on November 30, 2022. The Dependents do not seek an increase in the AWW for a period preceding the termination of the health insurance plan on November 30, 2022, but only urge an increase in the AWW by the cost of continuing health insurance coverage beginning on December 1, 2022.

13. In the present matter, the Dependents were enrolled in health insurance coverage at the time of termination of the plan. In Exhibit 2 from Meritain Health, there is confirmation of coverage for both Dependents effective May 1, 2021 until the date the letter was issued on January 3, 2023. Furthermore, in Exhibit 3, a letter from the Employer to Dependent, AP[Redacted], provides the notice of continuation of insurance coverage through the COBRA Election Form, and reflects ongoing premium payments would be due beginning January 1, 2023 in the amount of $2,205.04 per month for family medical coverage. Family medical coverage is the only plan under the COBRA Election Form that would be applicable to the Dependents. Therefore, the reasoning in the previously cited case law supports the conclusion that the Dependents were covered by the continuing health insurance coverage at the time health insurance was terminated.

14. The additional letter from Meritain Health at Exhibit 2 states that the Dependents' coverage for medical, dental and vision insurance existed from May 1, 2021 through November 30, 2022, and was terminated at that time. The preceding facts suggest that the AWW should be amended to reflect the cost of continuing healthcare insurance for medical and dental coverage that is outlined in Exhibit 3. The amount of continuing coverage is $2,205.04 per month for medical insurance and $125.59 per month for dental insurance for a total monthly cost of $2,330.63. The AWW would thus increase by $537.84.

15. The plain language of §8-40-201(19)(b), C.R.S. reflects that the AWW should be amended in this claim to include the cost of continuing health insurance to the Dependents. Specific reference to the claimant in the statute includes the dependents in a death case because they essentially occupy the position of the claimant. Here, the Dependents essentially became the Claimants after CC[Redacted] was killed within the course and scope of his employment on November 15, 2022. Furthermore, the amendment of the AWW to reflect the continuing cost of insurance should not be limited to 36 months as outlined in the COBRA Election Form at Exhibit 3. Despite any termination of the right to COBRA entitlement at 36 months, the Dependents would continue to require continuing health insurance coverage beyond that point. The loss of that insurance coverage is part of the wage loss benefit provided by CC's[Redacted] wages. The ongoing death benefits are meant to reflect the loss to the Dependents and should include the cost of insurance as part of their AWW.

16. The Dependents have met their burden to prove that the AWW should be amended to reflect the cost of continuing health insurance as set forth in §8-40-201(19)(b), C.R.S. At the time of CC's[Redacted] death and through November 30, 2022, the Dependents were included in a group health insurance plan provided by the Employer for medical and dental coverage. The cost of that insurance is $2,205.04 per month for medical and $125.59 per month for dental. The combined cost for continuing coverage for health and dental insurance is $2,330.63 per month or $537.84 per week. For purposes of evaluation under §8-40-201(19)(b), C.R.S. the Dependents are entitled to the cost of continued insurance as a benefit for the economic loss due to the death of CC[Redacted].

ORDER

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

1. At the time of CC's[Redacted] death within the course of the scope of his employment with the Employer, CC[Redacted] and his Dependents, AP[Redacted] and KC[Redacted] were enrolled in a health and dental insurance plan provided by the Employer. Both Dependents were also covered under that plan when the Employer terminated that plan on November 30, 2022.

2. Pursuant to §8-40-201(19), C.R.S. the Dependents are entitled to the cost of continuing coverage for the health and dental policies that were in existence on the

date of termination. The cost of the medical coverage for continuation was $2,205.04 per month and for dental coverage $125.59 per month. The combined cost for continuing coverage for health and dental insurance is $2,330.63 per month or $537.84 per week.

3. Respondents shall amend the AWW in their admission of liability to add an additional $537.84 per week to the current admitted AWW of $1,341.42. Respondents shall pay death benefits in accordance with statute and rule beginning December 1, 2022 until terminated by statute.

4. Any issues not resolved in this Order are reserved for future determination.

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

DATED: August 2, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-144-649-004

ISSUES

1. Whether Claimant has proved by clear and convincing evidence that the DIME physician erred in determining that she had reached maximum medical improvement (MMI).

2. Whether Claimant is entitled to temporary disability benefits.

3. Whether Claimant has proved by a preponderance of the evidence that she is entitled to a general award of maintenance medical benefits.

FINDINGS OF FACT

1. Claimant is a cashier who, on August 2, 2020, while working for Respondent-Employer, sustained an admitted injury when a shoplifter grabbed her and threw her to the ground. Among Claimant's injuries was an injury to the right shoulder.

2. Claimant had a significant medical history related to her right shoulder and adjacent body parts before her work injury.

3. Specifically, on June 2, 2017, Claimant underwent a right scapula x-ray due to persistent distal medial scapular pain radiating into her right shoulder. The pain, described as stabbing and burning, had worsened over the previous month without any known new injury.

4. On June 5, 2018, Claimant reported issues with her right shoulder after falling on it. Another x-ray revealed mild superior migration of the humeral head, subacromial space narrowing at 6 mm, and mild acromioclavicular and glenohumeral degenerative changes. The fall caused pain, swelling, tenderness, and limited range of motion. Claimant was also diagnosed with osteoporosis.

5. On February 21, 2019, Claimant sought evaluation for ongoing right shoulder pain and mentioned performing home exercises.

6. Subsequently, on December 5, 2019, Claimant reported an additional injury to her right shoulder that occurred two weeks earlier. A right shoulder x-ray revealed an impaction fracture of the humeral head and degenerative changes in the acromioclavicular and glenohumeral joints. The medical notes also mentioned a history of "right rotator cuff tendinitis." Claimant experienced pain when lifting and reaching overhead.

7. During a follow-up appointment on December 11, 2019, for the right proximal humerus fracture, it was noted that Claimant had been wearing a sling most of the time since her injury and had a chronic history of rotator cuff tearing.

8. On January 6, 2020, Claimant returned for evaluation, reporting a new mechanism of injury involving a "trunk" falling onto her right shoulder. She continued to experience pain, and her co-workers assisted her with lifting and activities requiring her to raise her arm above 90 degrees. A third right shoulder x-ray revealed osteoarthritis in the glenohumeral joint and subacromial space narrowing consistent with rotator cuff pathology and a probable tear.

9. On January 29, 2020, during a physical therapy appointment, Claimant mentioned not following the recommendation to wear a shoulder sling while working. She continued to report ongoing shoulder pain and weakness during subsequent physical therapy appointments on February 20, 2020. There were no further records of additional physical therapy or indications that Claimant's fracture had stabilized, with no likelihood of further treatment improving her condition.

10. There was also a January 29, 2020 physical therapy note documenting Claimant trying to use her left arm as much as possible and a January 6, 2020 note documenting that her coworkers would help her with anything that required her to raise her arm overhead

11. During her initial evaluation for her August 2, 2020 injury on August 3, 2020, Claimant reported that she had experienced a shoulder fracture in November 2019 and had to discontinue physical therapy earlier than anticipated due to COVID-19.

12. Claimant underwent a right shoulder x-ray which revealed findings consistent with mild glenohumeral osteoarthritis and a reduction in the acromiohumeral distance, indicative of a rotator cuff tear. The records document that scapular winging was observed on physical examination, though there was no mention of shoulder bruising. However, at a follow-up examination on August 14, 2020, Claimant reported bruising on her thighs, but no skin trauma was observed during the examination of her right shoulder.

13. Claimant underwent an evaluation by orthopedic specialist Dr. Cary Motz on August 18, 2020. Claimant denied any prior shoulder injury. Dr. Motz recommended a shoulder MRI, which Claimant underwent on August 21, 2020.

14. The MRI showed a massive chronic rotator cuff tear with a high-riding humeral head and signs of rotator cuff arthropathy. The radiologist noted that the findings were age-indeterminate. However, the radiologist did observe severe muscle atrophy in relation to the subscapularis tendon.

15. At Claimant's August 25, 2020 visit with Dr. Motz, Dr. Motz reviewed the MRI and noted that it was consistent with a long-standing rotator cuff tear due to significant

remodeling. Therefore, in his opinion, the injury did not appear recent. At that appointment, Claimant told Dr. Motz that she had fallen in 2019 while at work but did not report the injury. Dr. Motz mused, "I suspect that that was a portion of the tear as this does not appear to be a recent injury."

16. Claimant had another visit with Dr. Motz on September 29, 2020. At that time, Claimant reported that she had no significant improvement following a steroid injection and limited progress in physical therapy. Dr. Motz opined that a reverse total shoulder arthroplasty might be necessary. However, based on the MRI findings, he felt the need for surgery would be of a chronic nature, unrelated to the August 2, 2020 injury.

17. Claimant was referred to Dr. Nathan Faulkner for a surgical evaluation. Claimant saw Dr. Faulkner on October 2, 2020. At that appointment, Claimant denied any preexisting shoulder pain or dysfunction. Dr. Faulkner similarly made no mention in his report of Claimant's prior shoulder problems, including Claimant's November 2019 shoulder injury.

18. Ultimately, Dr. Faulkner recommended arthroscopic rotator cuff repair. He felt the surgery was reasonably necessary "[g]iven her younger age, acute nature of the injury, as well as her level of pain/dysfunction and failure with more conservative treatment." Regarding the relatedness of Claimant's rotator cuff tears, Dr. Faulkner opined that the atrophy appeared to be only grade 1 or grade 2, and that the tears therefore appeared "relatively acute."

19. Respondents ultimately denied the surgery recommended by Dr. Faulkner, relying on a respondent-sponsored independent medical examination (IME) report by Dr. Timothy O'Brien.

20. Claimant underwent an IME with Dr. O'Brien on December 8, 2020, pursuant to § 8-43-404, C.R.S., and Rule 8-8, W.C.R.P. Dr. O'Brien reviewed Claimant's medical records, examined Claimant, and took Claimant's history. Dr. O'Brien observed that Claimant had shoulder pain dating back to 2017 and radiographs in 2018 revealing a high riding humeral head that had been present for many years. Dr. O'Brien noted that this condition was a chronic condition that would gradually worsen until a reverse total shoulder arthroplasty would be needed. Dr. O'Brien also reviewed the MRI results, which he observed to show a high riding humeral head, re-modeling of the undersurface of the acromion, glenohumeral joint arthritic changes, and moderate to severe subscapularis atrophy associated with fatty atrophy, all of which Dr. O'Brien noted to be consistent with a longstanding rotator cuff tear.

21. Based on the imaging and prior history, Dr. O'Brien felt that Claimant's need for surgery was not related to the August 2, 2020 injury. He pointed out that the pre-injury imaging showed evidence of a massive rotator cuff tear. Regarding Dr. Faulkner's recommendation, Dr. O'Brien noted that Dr. Faulkner did not account

for Claimant's pre-injury medical history and committed several other errors in his analysis. Specifically, regarding Dr. Faulkner's finding that the atrophy was minor, Dr. O'Brien noted, "when we look at Dr. Motz's review of the MRI scan, as well as the radiology review of the MRI scan, we see that not only is fatty atrophy present (and it is considered to be moderate to severe in the subscapularis, which contradicts Dr. Faulkner's reading) but it is associated with fatty atrophy." He also noted that Dr. Faulkner failed to recognize that the high-riding humeral head and resulting severe glenohumeral joint arthritis were evidence that Claimant's rotator cuff tear was in fact old.

22. Dr. O'Brien also felt that an arthroscopic shoulder surgery was not reasonable, as it would likely be unsuccessful and cause scarring that would complicate a subsequent reverse total shoulder arthroplasty. Although Dr. O'Brien felt that a reverse total shoulder arthroplasty was indicated, he clarified that it would not be related to Claimant's minor work injury from August 2, 2020.

23. Claimant had Dr. Sander Orent attend the IME as well and prepare a report. In his report, Dr. Orent raised several concerns about Dr. O'Brien's evaluation and report.

24. First, he criticized Dr. O'Brien's description of the mechanism of injury as being brief, noting that important elements were omitted, such as the instruction to "go after" the assailant by the store manager and the severity of the assault.

25. Dr. Orent also disputed Dr. O'Brien's assessment of the patient's range of motion and found omissions in the report related to the patient's symptoms and physical examination. He disagreed with Dr. O'Brien's opinions, especially regarding the absence of cervical and lumbosacral spine injuries due to delayed onset of pain and the characterization of the shoulder injury as minor.

26. Dr. Orent emphasized that Claimant had a complete tear of the supraspinatus tendon and other significant injuries that required a reverse shoulder arthroplasty, contradicting Dr. O'Brien's assessment. He challenged Dr. O'Brien's extensive experience and questioned his understanding of the patient's age-related healing process and the severity of the injuries.

27. The Court finds Dr. Orent's analysis unpersuasive. Dr. Orent's critique of Dr. O'Brien's conclusion that Claimant sustained a minor injury was based on the argument that a rotator cuff tear would not be a minor injury. However, this misstates Dr. O'Brien's conclusions, which were that the rotator cuff tears pre-dated the injury itself and that the injury itself was minor. In other words, Dr. Orent's analysis is unreliable and misleading. The Court, therefore, does not rely on Dr. Orent's report.

28. The parties underwent a hearing on March 2, 2021, on the issue of whether an arthroscopic rotator cuff repair was reasonably necessary to cure and relieve Claimant of the effects of her August 2, 2020 injury. On May 24, 2022, the ALJ in

that dispute issued an Order finding that the arthroscopic rotator cuff repair recommended by Dr. Faulkner to be not reasonable or necessary. The ALJ did feel that a reverse total shoulder arthroplasty was reasonably necessary and found that Claimant‘s need for an arthroplasty was the result of several factors, including her prior trauma, the preexisting degenerative changes in the right shoulder, and the work injury of August 2, 2020. However, because there had been no request nor denial of a reverse total shoulder arthroplasty at that time, the issue of whether a reverse total shoulder arthroplasty would be reasonably necessary and related to Claimant's August 2, 2023 injury was not at issue. The ALJ's findings in this regard were simply part of his analysis as to whether arthroscopic shoulder surgery was reasonably necessary and related to the injury and was not an award of medical benefits.

29. Claimant continued to treat with physical medicine and rehabilitation specialist Dr. John Sacha during the pendency of the May 24, 2022 Order. Dr. Sacha placed Claimant at MMI effective January 31, 2022, prior to the May 24, 2022 Order, and assigned a 10% whole-person impairment rating for Claimant's cervical spine. Dr. Sacha recommended maintenance medical care be left open for possible medial branch block and radiofrequency on the right from C4-C7, as well as physical therapy, medications, and follow-up. Respondents filed a final admission of liability (FAL) admitting for permanent partial disability benefits and maintenance care based on Dr. Sacha's findings, and Claimant requested a DIME to challenge Dr. Sacha's MMI and impairment determinations.

30. Claimant underwent a DIME with Dr. Anjmun Sharma on October 11, 2022. Dr. Sharma issued a report on October 13, 2022, finding Claimant to have reached MMI as of the date of the DIME appointment with a 12% whole-person impairment for her cervical spine and an 18% right upper extremity impairment for Claimant's shoulder. Dr. Sharma felt that Claimant may need some medical treatment for her shoulder, but he felt that surgery would not be related, reasoning that Claimant's need for surgery appeared to pre-date her injury.

31. Although Dr. Sharma made reference in his report under the section "RATIONALE FOR YOUR DECISION" to Claimant's plans to pursue a reverse total shoulder arthroplasty under her private insurance, the Court finds that that comment did not demonstrate that Dr. Sharma in fact considered Claimant's access to private health insurance when determining whether a reverse total shoulder arthroplasty would be related to Claimant's work injury and therefore an impediment to MMI. Rather, the Court finds that comment to merely reflect Claimant's response to Dr. Sharma informing her that he did not feel the reverse total shoulder arthroplasty would be related.

32. Regarding the issue of post-MMI maintenance treatment, Dr. Sharma opined, "None at this time." Dr. Sharma did not provide any explanation in his report nor in his deposition testimony as to why he did not recommend maintenance medical treatment as to Claimant's neck or body parts other than the right shoulder.

33. Respondents filed a FAL based on Dr. Sharma's DIME report. Claimant filed an Application for Hearing to challenge the DIME's finding of MMI and to challenge Respondents' denial of maintenance medical care.

34. In anticipation of hearing, the parties obtained the deposition testimony of Dr. Sharma. Dr. Sharma affirmed that he felt that any need for surgical treatment for the shoulder would be due to Claimant's pre-existing condition and not due to her work injury. Dr. Sharma was also presented with a copy of the May 24, 2022 Order finding the need for a reverse total shoulder replacement surgery to be reasonably necessary to cure and relieve Claimant of the effects of her injury. Dr. Sharma's opinions remained unchanged.

35. The Court finds Dr. Sharma's opinions as to the issue of MMI, as expressed in his reports and findings, to be persuasive and credible. However, the Court does not find Dr. Sharma's opinions as to the need for maintenance medical treatment to be persuasive or credible, as he provides no analysis or explanation as to why he believes Claimant does not require maintenance medical treatment for conditions other than Claimant's right shoulder injury, including Claimant's neck.

36. Claimant testified at hearing and explained her mechanism of injury in a way consistent with that which is documented in the medical records. Claimant testified that the new pain that she developed in her shoulder was distinct from what she experienced prior to the date of injury. Regarding the level of pain, Claimant clarified that her pain in the morning was a nine or ten out of ten, but would subside to a six or eight during the day.

37. Regarding her prior symptoms and treatment, Claimant testified that she injured her right shoulder at work previously in November 2019 when she stepped on a dolly at work and fell but did not report the injury. Claimant also testified that she did not want to miss work during the holiday season, so she lied to her doctors at that time by telling them that she slipped on ice while getting mail. Claimant testified that she continued to treat for her November 2019 injury until March 2020 due to medical facilities closing as a result of the pandemic. She testified that she had been doing great around February or March 2020 and that she had never discussed the possibility of shoulder surgery with any physician prior to her date of injury.

38. During her testimony, Claimant denied that she told her doctors that she would only use her left arm for work and that her coworkers would help her with her job during that period of time prior to her August 2020 injury. This was despite a January 29, 2020 physical therapy note documenting Claimant trying to use her left arm as much as possible and a January 6, 2020 note documenting that her coworkers would help her with anything that required her to raise her arm overhead. When asked why she did not mention her November 2019 injury when

she saw Dr. Faulkner for the surgical consultation on October 2, 2020, Claimant explained that “He didn’t ask me.”

39. Based on the above inconsistencies documenting Claimant’s willingness to withhold relevant information or even provide false information to medical providers, including Claimant’s having denied to Dr. Motz on August 18, 2020, that she had any prior shoulder injury, as well as the inconsistencies between Claimant’s testimony and the medical records, the Court finds Claimant’s testimony not credible.

40. During the hearing, Dr. O'Brien acted as an expert witness for the Respondents, providing testimony as a Level II accredited orthopedic surgeon. Dr. O'Brien concurred with Dr. Sharma's opinion that any need for a right total shoulder arthroplasty was not work-related and that Claimant had reached MMI without requiring further maintenance care.

41. Dr. O'Brien explained that Claimant's current pain complaints were solely due to pre-existing rotator cuff tear arthropathy, not a result of the work-related injury. He noted that there was an absence of any shoulder bruising or other objective evidence of an acute injury, and the objective medical evidence did not support the presence of a new tear in the rotator cuff.

42. On cross-examination, Dr. O'Brien emphasized that based on Claimant's pre-injury radiographs, she was already a candidate for a right total arthroplasty due to her condition. He further stated that he had never seen an individual with her specific high-riding humeral head condition who did not experience pain and dysfunction, making it unlikely that she was functioning normally before the injury.

43. The Court finds Dr. O’Brien’ opinions, as expressed in his reports and testimony, to be credible and persuasive with regard to MMI. The Court finds that Dr. O’Brien’s explanation of the anatomy of Claimant’s shoulder condition most plausible, given the absence of bruising of the shoulder shortly after the injury and the evidence of the condition pre-dating the date of injury, including the high-riding humeral head, arthritis, and fatty atrophy in the rotator cuff. Although Dr. Faulkner noted the atrophy to be mild and likely traumatic, Dr. O’Brien’s reading of the MRI was more consistent with the radiologist’s. Furthermore, to the extent that Dr. O’Brien’s opinions differ from those of Dr. Faulkner, the Court finds significant that Dr. O’Brien had the opportunity to review Claimant’s complete medical history whereas Dr. Faulkner did not. The same is true for Dr. Sharma’s review of medical records, and the Court finds it telling that both Dr. O’Brien and Dr. Sharma reached similar conclusions as to whether Claimant’s right shoulder pathology arose from her August 2, 2020 injury.

44. Claimant’s need for a right total shoulder replacement surgery was not caused by Claimant’s August 2, 2020 injury.

45. Claimant has failed to prove by clear and convincing evidence that DIME Dr. Sharma erred in determining Claimant to have reached MMI.

46. As for the issue of maintenance medical treatment, Dr. Sacha recommended maintenance medical care be left open for possible medial branch block and radiofrequency on the right from C4-C7, as well as physical therapy, medications, and follow-up. Drs. O'Brien and Sharma recommended against maintenance medical care, but they did not address why maintenance medical treatment for body parts other than the right shoulder would not be reasonably necessary to maintain Claimant at MMI. The Court finds Dr. Sacha more persuasive than Drs. O'Brien and Sharma as to the issue of maintenance medical treatment.

47. Claimant has proved by a preponderance of the evidence that she is entitled to maintenance medical care.

CONCLUSIONS OF LAW

Generally

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

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

testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

Maximum Medical Improvement

Claimant seeks to overcome the DIME's opinion as to MMI.

The Workers' Compensation Act defines MMI to be:

> "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement."[1]

Section 8-40-201(11.5), C.R.S.

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo.App.2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo.App.1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools*, W.C. No. 4-974-718-03 (Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo.App.2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (May 20, 2004).

[1] Section 8-40-201(11.5), C.R.S.

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo.App.2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo.App.1998); *Lafont v. WellBridge,* W.C. No. 4-914-378-02 (June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 and 4-523-097 (July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (July 26, 2016).

As found above, Claimant's need for a right total shoulder replacement surgery was not caused by Claimant's August 2, 2020 injury. Prior radiographs showed evidence of a pre-existing changes to Claimant's shoulder anatomy consistent with a pre-existing rotator cuff tear. Imaging from after Claimant's August 2, 2020 injury show degenerative changes consistent with an old rotator cuff tear. Although Claimant testified that she was "doing great" with regard to her shoulder prior to the August 2, 2020 injury, the Court does not find Claimant's testimony credible for the reasons set forth above.

Because Claimant's argument in support consists primarily of an alleged error by Dr. Sharma in determining that a reverse total shoulder arthroplasty would not be related to Claimant's August 2, 2020 injury, the Court concludes that Claimant has failed to prove by clear and convincing evidence that Dr. Sharma erred in determining Claimant to be at MMI.

Claimant's argument includes that Dr. Sharma's rationale in reaching the finding that the need for a reverse total shoulder replacement was not related to Claimant's August 2, 2020 injury is contradictory and flawed. He acknowledged that the work injury exacerbated the Claimant's underlying conditions (rotator cuff tear and arthropathy) but stated that the need for shoulder replacement was not work-related. This, Claimant argues, is inconsistent, as the underlying conditions are precisely the reasons for the need for a reverse total shoulder replacement. Moreover, Claimant argued, Dr. Sharma's statement about the injury being "old" contradicts his own decision to assign an 18% impairment rating for the exacerbated conditions.

Claimant further emphasizes that Dr. Sharma's rationale for the surgery not being related to the work injury was based on a legal misunderstanding rather than medical evidence. Claimant then correctly recounts the state of established case law which dictates that a pre-existing condition does not disqualify a claim for medical benefits if the industrial injury aggravates, accelerates, or combines with the pre-existing condition to

necessitate treatment. *See Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990).

The Court finds these arguments unpersuasive. It may be both true that Claimant's need for a reverse total shoulder replacement predated Claimant's August 2, 2020 injury and that the August 2, 2020 injury caused an aggravation of Claimant's shoulder requiring medical treatment. Indeed, even where respondents admit for a compensable injury, the parties may dispute whether a particular condition is related. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). Because this Court finds that Claimant's need for a reverse total shoulder arthroplasty predates Claimant's work injury and does not arise from Claimant's work injury, the need for a reverse total shoulder arthroplasty is not an impediment to Claimant having reached MMI with regard to her August 2, 2020 injury.

Claimant also argues that Dr. Sharma's understanding of the May 24, 2022 Order was incorrect, leading to biased and erroneous conclusions. The May 24, 2022 Order indicated that Claimant's need for surgery was a result of a combination of factors, including the pre-existing conditions and the work injury, but Dr. Sharma disregarded this finding.

The Court finds this argument unpersuasive as well. Dr. Sharma, as a DIME physician, was free to make his own findings as to the causal relationship between Claimant's work injury and her need for a reverse total shoulder arthroplasty without regard to the May 24, 2022 Order. The findings in the May 24, 2022 Order, insofar as they conflict with those findings Dr. Sharma made in determining MMI, are superseded by Dr. Sharma's findings. *See Robbins v. Qwest Corp.*, W.C. No. 588-918-010 (Dec. 19, 2022)(no issue preclusion where prior order conflicted with DIME physician's findings). Therefore, Dr. Sharma's decision to diverge from the findings of the May 24, 2022 Order was within his discretion.

Next, Claimant's argument points out that Dr. Sharma seemed to consider Claimant's ability to receive treatment under private insurance, which should not have influenced his MMI determination.

As found above, Dr. Sharma's findings regarding MMI were not based upon consideration of whether Claimant could receive treatment under private health insurance. Because this was not something Dr. Sharma considered in reaching his MMI determination, the Court finds Dr. Sharma's comment uninformative as to whether Dr. Sharma erred in placing Claimant at MMI.

Therefore, the Court concludes that Claimant failed to meet her burden in proving by clear and convincing evidence that Dr. Sharma erred in placing Claimant at MMI.

Maintenance Medical Benefits

Claimant seeks to overcome Respondents' denial of maintenance medical benefits in Respondents' December 2, 2022 FAL.

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo.App.2003). An award for maintenance medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Office*, 992 P.2d 701 (Colo.App.1999); *Hastings v. Excel Electric*, W.C. No. 4-471-818 (May 16, 2002).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.*, 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Indus.l Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo.App.2003); *see Karathanasis v. Chilis Grill & Bar*, W.C. No. 4-461-989 (Aug. 8, 2003).

In this case, Dr. Sharma opined in his DIME report that maintenance medical care would not be needed at that time. In the December 2, 2022 FAL, Respondents denied maintenance medical treatment based on Dr. Sharma's DIME report.

While Respondents may rely on Dr. Sharma's opinion as to maintenance medical treatment in their denial of the same in their FAL, a DIME physician's opinion as to maintenance medical benefits carries no special weight. *Johnston v. Hunter Douglas, Inc.*, W.C. No. 4-879-066-04 at *3 (June 28, 2016).

As found above, Dr. Sharma did not provide any explanation as to why maintenance medical treatment for body parts other than the right shoulder would not be reasonably necessary to maintain Claimant at MMI. Dr. O'Brien, who similarly opined that maintenance medical treatment was not reasonably necessary, also did not provide any such analysis. To the contrary, Dr. Sacha credibly and persuasively opined in his MMI report that it was reasonably necessary that maintenance medical care be left open

for possible medial branch block and radiofrequency on the right from C4-C7, as well as physical therapy, medications, and follow-up.

Based upon Dr. Sacha's report, the Court concludes that Claimant has met her burden in proving by a preponderance of the evidence that maintenance medical treatment is reasonably necessary to maintain her at MMI.

ORDER

It is therefore ordered that:

1. Claimant's request for the Court to overturn the DIME's determination as to MMI is denied.

2. Claimant is entitled to a general award of maintenance medical benefits.

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

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

DATED: August 2, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Respondents established by a preponderance of the evidence grounds for withdrawal of their General Admission of Liability.

2. Whether Respondents proved by a preponderance of the evidence that sanctions should be imposed upon Claimant for willfully failing to comply with orders to provide discovery.

3. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant was employed by Employer as a temporary laborer beginning in December 2021. Claimant asserts that he sustained a compensable injury to his left foot as the result of a flatbed truck running over Claimant's foot.

2. Claimant has a history of issues with his left foot and ankle dating to approximately December 2021. On December 21, 2021, while working for a different employer, Claimant reported that he sustained an injury to his left foot when a large box fell on his left foot. Claimant was evaluated at UC Health for a left foot contusion, and underwent x-rays of the left foot. The x-rays demonstrated the presence of a foreign body in his left heel, suspected to be a portion of a needle. Based on the x-rays and evaluation, it was determined that the foreign body in his heel was pre-existing and unrelated to his work injury. (Ex. N).

3. During the course of the evaluation for the December 21, 2021 injury, Claimant was examined and treated at Concentra on February 16, 2022. Claimant reported swelling and tenderness on the bottom of his left foot, and was referred for a podiatry evaluation. Claimant's February 23, 2022 record from Concentra references a visit with a podiatrist named "Dr. Zyzda," however no records from that visit were offered or admitted into evidence. (Ex. O).

4. On February 25, 2022, Claimant returned to UC Health, reporting pain in the bottom of his left foot, and occasional numbness in his heel. (Ex. N).

5. On April 15, 2022, Claimant saw Dr. Chau at Concentra, reporting that he would have the foreign body removed from his foot through private insurance. Claimant reported diffuse pain in the anterior ankle and lateral Achilles, and swelling under the bottom of his foot. Dr. Chau placed Claimant at maximum medical improvement (MMI) for his December 21, 2021 injury. (Ex. O). Claimant resolved his workers compensation claim related to the December 21, 2021 incident through settlement.

6. On June 16, 2022, Claimant saw Lindsy Allen, DPM, at Podiatry Associates, to address the foreign body in his left heel. Claimant reported pain with palpation of his left heel. Examination of Claimant's foot and ankle demonstrated normal range of motion. On June 24, 2022, Claimant underwent surgery to remove the foreign body in his left heel. Post-operative x-rays demonstrated that small portion of the foreign body was not removed and would need to be removed in a subsequent surgery. Claimant was placed in a post-operative shoe and permitted to bear weight. (Ex. 4).

7. Claimant returned to Dr. Allen on July 21, 2022. Dr. Allen noted that Claimant had medial deviation of the 1st metatarsal and lateral deviation of the large toe on the left. Claimant reported constant pain in the large toe, with a date of onset of June 26, 2022. Claimant reported pain with movement and limited range of motion. Dr. Allen diagnosed Claimant with a mild, chronic bunion deformity on the left, recommended orthotics, and discussed performing an injection and/or bunion surgery. Dr. Allen's notes reference both the 1st toe and the 5th toe, however when read in context, the ALJ infers that Respondents was experiencing issues with the large toe. (Ex. 4).

Incident at Issue

8. On August 9, 2022, Claimant was working for Employer as a "flagger" directing traffic. Claimant testified that he was holding a stop sign at a four-way stop, and a flatbed truck ran over the toes on his left foot. At hearing, Claimant testified that others were present at the scene, but were 4-5 car lengths away. Claimant testified that after the alleged incident occurred, he called his supervisor, and was instructed not to call the police. Claimant also called his mother, who arrived at the scene and took him for medical care. No credible evidence was admitted indicating that anyone other than Claimant witnessed the alleged incident.

9. On August 9, 2022, Claimant was seen at AFC Urgent Care by Derek Miller, PA. Claimant reported that a flatbed truck ran over all of the toes on his left foot, and complained of diffuse pain in the large toe. Examination of Claimant's left foot demonstrated no objective evidence of injury. Claimant's foot was not swollen or discolored, and he was neurovascularly intact. The only evidence of injury was a subjective complaint of mild, diffuse pain, and tenderness to palpation over the 1st toe (*i.e.*, large toe), with mild range of motion restriction. X-rays were apparently performed of Claimant's left foot, although no radiologist report or other specific interpretation of the x-rays was included in the AFC Urgent Care records. PA Miller commented that Claimant should follow up with an surgeon regarding the foreign body in his left heel. Claimant was provided a prescription for a short walking boot, and celecoxib for pain. (Ex. L).

10. The following day, August 10, 2022, Claimant returned to AFC Urgent Care, indicating his pain was not well controlled. Bradley Qualizza, PA-C examined Claimant and noted the same findings as the previous day, and provided a prescription for 10 pills of ketorolac. (Ex. L).

11. On August 11, 2022, Claimant returned to Dr. Allen at Podiatry Associates. Significantly, Claimant did not report to Dr. Allen that his foot had been run over, or

otherwise indicate he was injured in the course of his employment. Dr. Allen examined Claimant and noted tenderness to his operative site, continued pain of the 1st metatarsal and left large toe, with limited range of motion. Dr. Allen diagnosed Claimant with a foreign body in the left foot, and a chronic, left bunion. She then performed a steroid injection into the left first metatarsophalangeal joint (MPJ), she had previously discussed on July 21, 2022. Dr. Allen also discussed a second surgery to remove the remainder of the foreign body in Claimant's left heel. (Ex. M).

12. On August 16, 2022, Claimant saw Stewart Harsant, PA-C, at AFC Urgent Care. Claimant reported pain between the 1st and 2nd toes on his left foot, and requested pain medication other than ibuprofen. Claimant did not report receiving a steroid injection into the large toe from Dr. Allen five days earlier. On examination, PA Harsant noted reports of tenderness between the toes, but otherwise found full range of motion, strength, and sensation, and noted Claimant walked with a normal gait, although in a walking boot. (Ex. L).

13. On August 22, 2022, Dr. Allen performed a second surgery on Claimant's left foot to remove the remaining foreign object in his left heel. (Ex. 4).

14. On August 23, 2022, Respondents filed a General Admission of Liability, admitting to medical benefits, and temporary total disability benefits at the rate of $7.89 per week, based on an average weekly wage of $11.83. (Ex. B).

15. Claimant returned to Dr. Allen for a post-operative visit on August 25, 2022. Claimant reported similar symptoms and pain as he reported on July 21, 2022. Claimant did not report that his left foot had been run over by a vehicle or that he sustained any work injury to his left foot on August 9, 2022. (Ex. M). No credible evidence was admitted indicating Claimant returned to Dr. Allen after August 25, 2022.

16. Between August 30, 2022 and February 28, 2023, Claimant returned to AFC Urgent Care multiple times, and was evaluated by several different providers. During this time, none of the providers documented objective evidence of injury, with the exception of October 30, 2022, where "slight swelling at 1st IP joint" was documented, and the only diagnosis provided was "pain in left foot." Although providers at AFC Urgent Care completed WC 164 forms which indicated, the records provide no objective evidence that Claimant sustained an injury to his left foot on August 9, 2022, or that the evaluations and treatment Claimant received were the result of a work-related injury. (Ex. L & 3).

17. Claimant's medical records from AFC Urgent Care reference referrals to an orthopedist, and physical therapy. However, no records or other credible evidence of such treatment were offered or admitted into evidence. Claimant alternatively testified that he did not see an orthopedic surgeon because he did not have information, and that he saw an orthopedic surgeon.

18. On April 17, 2023, Ryan Mazin, M.D., one of the providers Claimant saw at AFC Urgent Care, responded in writing to questions regarding Claimant alleged injury and care. In response to the question: "[Are Claimant's] current left symptoms causally related

to the alleged August 9, 2022 industrial injury?," Dr. Mazin responded "Yes" and "Patient claims such is the case." In response to the question "Has [Claimant] reached maximum medical improvement ("MMI") for the August 9, 2022 industrial injury?," Dr. Mazin indicated "No" and also wrote "Patient claims he is not at MMI." (Ex. 3). Dr. Mazin's April 17, 2023 letter offers no substantive explanation for his opinions, and appears to rely entirely upon Claimant's assertions that his alleged injury was work-related and that he was not at MMI. Dr. Mazin's opinions are neither credible nor persuasive.

19. On April 24, 2023, John Raschbacher, M.D., performed a record review at Respondents' request. Dr. Raschbacher opined that Claimant's medical records did not document any objective findings of injury related to the alleged August 9, 2022 incident. He noted that there was no documentation of swelling, bruising, redness or traumatic wound, bony abnormality, or other acute findings. He further noted that the only reported evidence of injury was Claimant's reports of tenderness, which is not an objective finding. (Ex. K).

20. Claimant's payroll records indicate he worked 9 hours the week of December 16, 2021, 5.5 hours the week of January 20, 2022, and 10.5 hours the week of August 9, 2022. In total, for the 35 weeks between December 16, 2021 and August 9, 2022, Claimant worked a total of 25 hours for Employer and received gross wages of $400.45. Claimant's average weekly wage over this 35-week period was $11.45. Respondents admitted to an average weekly wage of $11.83, and no basis exists to alter that calculation. Claimant's contention that he intended to work 40 hours per week, and that his average weekly wage should be $600 per week is not credible or otherwise supported by the evidence.

DISCOVERY ISSUES

21. On September 21, 2022, Respondents, through counsel, sent Claimant a letter enclosing authorizations for release of medical, employment, insurance, social security, and unemployment records.

22. Although Claimant testified that he did not receive the requests for authorizations, the emails in evidence demonstrate that Claimant likely did receive the requests for authorization, and elected not to provide the requested information. Claimant's testimony that he did not receive the releases from Respondents is not credible. Claimant offered no valid excuse for his failure to provide the requested documentation.

23. On October 11, 2022, PALJ Phillips issued an order requiring Claimant to provide the signed releases within ten days, and also permitted Respondents to engage in pro se discovery. (Ex. C). Claimant did not provide the signed releases within ten days.

24. On November 23, 2022, PALJ Mueller issued an order again requiring Claimant to provide signed releases within ten days, and also requiring Claimant to provide discovery responses. Claimant did not timely comply with the Order.

25. On March 9, 2023, PALJ Sisk issued a third order granting Respondents' motion to compel the releases, and required Claimant to provide those releases on or before

March 15, 2023. (Ex. F). Ultimately, Claimant did provide signed releases to Respondents at some point after March 9, 2023.

CONCLUSIONS OF LAW

Generally

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

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

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

Withdrawal Of General Admission Of Liability

By filing an admission of liability and admitting for benefits, Respondents' "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014). If Respondents seek to withdraw the admission of liability, they must prove by a preponderance of the evidence that Claimant

did not sustain an injury that arose out of and occurred in the course and scope of employment. *See* Section 8-41-201(1), C.R.S. ("a party seeking to modify an issue determined by a general or final admission . . . shall bear the burden of proof for any such modification."). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 592 P.2d 792 (1979).

The Workers' Compensation Act distinguishes between the terms "accident" and "injury." The term "accident refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), C.R.S. However, an "injury" refers to the physical trauma caused by the accident and is the result of an accident. *City of Boulder v. Payne,* 426 P.2d 194 (1967). The mere fact that an accident occurs does not rise to the level of compensability unless the accident results in an injury. *Leary v. Vail Resorts, Inc.* W.C. No. 5-075-399-002 (ICAO, April 24, 2020). A compensable industrial accident is one that results in an injury requiring treatment or causing disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The fact that medical treatment occurred does not require a finding that medical treatment was required because of a work incident. *Washburn v. City Market,* W.C. 5-109-470 (ICAO June 3, 2020).

Respondents have established by a preponderance of the evidence that Claimant did not sustain a compensable injury arising out of the course of his employment with Employer on August 9, 2022. Consequently, Respondents have established grounds for withdrawal of the August 23, 2022 General Admission of Liability. Although Claimant alleges his left foot was run over by a flatbed truck, no objective evidence was presented to support that allegation. While Claimant did report the incident to AFC Urgent Care on August 9, 2022, his examination and complaints were not consistent with a foot that had been subjected to the forces of a vehicle's weight. For example, Claimant had no swelling, edema, or erythema of his left foot, and his only complaint was of mild pain in the large toe, where Claimant had reported similar symptoms to Dr. Allen approximately three weeks earlier. In addition, Claimant did not report any incident involving his foot being run over to Dr. Allen, and had he done so, it is highly probable that Dr. Allen would have noted such a report in her records. Claimant's testimony that he reported the incident to Dr. Allen is not credible. At Claimant's later visits at AFC Urgent Care, no objective evidence of injury was documented, and the few objective signs that were documented corresponded to Claimant's pre-existing left foot issues.

The ALJ finds it more likely than not that Claimant did not sustain a compensable injury arising out of the course of his employment with Employer on August 9, 2022. Respondents' request to withdraw the August 23, 2022 General Admission of Liability is granted. Claimant's claim is dismissed.

Average Weekly Wage

As found, Claimant's average weekly wage on August 9, 2022 was $11.83. Claimant's testimony that he intended to work 40 hours per week at $15.00 per hour at

the time of his alleged injury was not credible, given the fact that Claimant had worked a total of 25 hours during the preceding 35 weeks.

Sanctions for Failure to Timely Respond to Discovery

Respondents' request that Claimant's claim be dismissed for discovery violations is denied. Claimant clearly received discovery requests and requests for releases, and failed to respond in a timely manner. The delay in providing timely responses resulted in some prejudice to Respondents. However, given the ALJ's decision with respect to withdrawal of the GAL, the ALJ finds additional discovery sanctions would be redundant and unnecessary. Respondents' request for discovery sanctions is denied.

ORDER

It is therefore ordered that:

1. Respondents General Admission of Liability is withdrawn, and Claimant's claim is dismissed.

2. Respondents' request for discovery sanctions is denied.

3. All remaining matters are moot.

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

DATED: August 2, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-216-026-002

ISSUES

- Did Claimant prove he performed services for Employer for pay?
- If so, did Employer prove Claimant was an independent contractor?
- If Claimant is Employer's employee, did he prove he suffered a compensable injury to his right knee on or about June 20, 2022?
- If Claimant proved a compensable claim, the following issues will be addressed:
- What is Claimant's average weekly wage?
- Did Claimant prove entitlement to TTD benefits from June 21, 2022 through March 3, 2023?
- Was the treatment Claimant received reasonably needed to cure and relieve the effects of the compensable injury?
- Did Claimant make a proper showing for a prospective change of physician to Dr. Miguel Castrejon?
- Did Claimant prove Employer should be penalized for failing to timely admit or deny liability?

FINDINGS OF FACT

1. Employer is a landscaping company, solely owned and operated by [Redacted, hereinafter LS]. According to LS[Redacted], Employer has no employees and performs all work using "subcontractors." LS[Redacted] testified he primarily used two subcontractors to provide labor: [Redacted, hereinafter OM] and [Redacted, hereinafter JJ]. He testified Claimant was a member of OM's[Redacted] crew. LS[Redacted] typically advised OM[Redacted] by text message where and when the crew should appear for various jobs. OM[Redacted] brought Claimant and the other crew members to the job site in OM's[Redacted] vehicle. LS[Redacted] conceded Claimant worked at least three days on one of Employer's projects in June 2020, including a large driveway project on [Redacted, hereinafter ED]. LS[Redacted] testified he had only brief conversations with Claimant because of Claimant's limited English proficiency.

2. Claimant primarily did concrete work on Employer's jobs, but also performed other landscaping tasks if needed, including planting trees. LS[Redacted] initially testified OM's[Redacted] crew did not plant trees because "[OM[Redacted]] is a concrete contractor." But he later testified Claimant and OM's[Redacted] crew brought tools such as rakes, shovels, and picks when doing "landscape jobs" or "tree digging."

3. LS[Redacted] scheduled and paid for concrete deliveries and advised OM[Redacted] when the concrete trucks were scheduled to arrive, to ensure the crew was there for the concrete pour.

4. Claimant testified Employer provided tools for use during some jobs. LS[Redacted] testified Claimant and other members of OM's[Redacted] crew brought their own tools to the jobs.

5. Employer provided Claimant no training because Claimant was already skilled at the work required of him.

6. In addition to working performing concrete and landscaping work on Employer's contracts, Claimant worked other jobs with OM[Redacted] and JJ[Redacted]. He also occasionally worked for his brother doing framing.

7. Claimant injured his right knee on or about June 20, 2022 while planting a tree on one of Employer's landscaping projects. The tree was being lowered into the ground by a skid loader when it struck and injured his right knee. Claimant testified LS[Redacted] was operating the forklift and was aware of Claimant's injury. LS[Redacted] offered no treatment and Claimant got a ride home from a coworker.

8. LS[Redacted] denied working with Claimant on June 20, 2022. He testified he was at a different property installing a stone veneer. However, Employer produced no work orders, calendars, schedules, receipts, or other documentation to substantiate LS[Redacted] testimony in this regard.

9. Claimant testified LS[Redacted] had agreed to pay him $18 per hour. LS[Redacted] denied having any specific conversations or negotiations with Claimant regarding pay. LS[Redacted] testified OM[Redacted] requested that checks be written directly to his crew members. He paid Claimant $175 per day because "that's what [OM[Redacted]] told me to pay him."

10. Employer paid Claimant $531 on June 21, 2022, by check drawn on Employer's business account. The check was payable to Claimant personally. The check contains no notations to identify the dates covered by the payment. LS[Redacted] testified the check was for a concrete job on June 13, 14, and 15, 2022.

11. LS[Redacted] initially denied he paid Claimant anything besides the June 21 check. However, he was confronted at hearing with copies of four other checks from July and August 2022, likewise drawn on Employer's business account and payable to Claimant personally. LS[Redacted] acknowledged the checks but claimed he did not know why he had made the payments. He suggested they showed Claimant was continuing to work after his injury. When asked why he failed to produce copies of the July and August checks in response to Claimant's discovery request, LS[Redacted] testified he "didn't look" for them and "didn't have time to get that deep into it." This testimony is not credible.

12. LS[Redacted] also testified he had no conversations with Claimant after June 20, 2022.

13. Claimant credibly denied working in the months after the accident because of difficulty standing and walking. He credibly testified LS[Redacted] gave him money in July and August to cover medical bills related to the injury. However, LS[Redacted] stopped covering any expenses once he learned Claimant needed knee surgery.

14. LS's[Redacted] failure to exchange the checks in discovery and his unconvincing testimony on the subject detracts from his overall credibility. Because Employer's case rests almost entirely on testimony, this shortcoming substantially undercuts Employer's defense.

15. Claimant saw Dr. David Lauritzen, a chiropractor, on June 29, 2022 for his right knee pain. Claimant told Dr. Lauritzen the injury happened at work on June 20, 2022, when "a tree fell off of a forklift and hit the patient's knee." The pain was constant and aggravated by walking and bending the knee. Claimant's right knee was noticeably swollen, and he was "in obvious pain especially when walking." McMurray's and compression tests were positive, and Dr. Lauritzen suspected a meniscus tear. He recommended an MRI and instructed Claimant to follow up with an orthopedist.

16. Claimant was seen at Peak Vista Community Health Center on July 13, 2022. He stated, "he was [planting] a tree on June 20 and the tree fell on his right knee." Claimant's knee was still painful and aggravated by bending, waking, and standing. Physical examination showed continued swelling, reduced range of motion, loss of strength, and tenderness around the MCL. The provider suspected a ligamentous injury and ordered an MRI.

17. Claimant underwent a right knee MRI on August 7, 2022. It showed a complex tear of the medial meniscus and moderate joint effusion.

18. Claimant filed a Workers' Claim for Compensation on September 7, 2022. He identified the employer as "[Redacted, hereinafter DC]." Claimant described the accident as, "We were planting pine trees, I was making a hole to plant the pine tree, at that time of putting the pine tree in the hole, my boss did not tie the pine tree well and it fell . . . the pine tree hit me on my knee." He listed "OM[Redacted]" as a witness to the accident. He further stated he reported the injury "to my boss, he was there." The ALJ infers Claimant was referring to LS[Redacted] as "my boss."

19. Claimant saw PA-C Leann Murphy at Kinetic Orthopedics on September 12, 2022. He reported his right knee pain started in June 2022 while "planting a tree." Claimant described pain along the medial joint line and mechanical clicking. He was having difficulty with standing, walking, and stairs. Ms. Murphy noted the pain "prevents him from being able to do his job." Ms. Murphy recommended arthroscopic surgery. However, she advised Claimant to apply for Medicaid and indicated they would wait to schedule the surgery until he had submitted the application.

20. A second Workers' Claim for Compensation form was filed by Claimant's counsel on September 15, 2022. The form stated Claimant was planting a tree and the tree struck his right knee as it was being lowered into the hole. The claim form identifies witnesses as "Supervisor, OM[Redacted] and Boss." It also states the injury was reported to "Supervisor, OM[Redacted] and Boss."

21. Employer never directed Claimant to a physician or clinic for treatment.

22. There is no persuasive evidence Employer filed a Notice of Contest or Admission of Liability after Claimant filed the claim.

23. Claimant saw Odessa Wright, LPC on January 27, 2023. He was distressed about being out of work since June 2022 because of his knee and unable to support his family. Claimant stated, "boss discussing he would support but did not follow through." This comment is consistent with Claimant's testimony that LS[Redacted] covered some medical expenses until learning Claimant needed surgery.

24. Claimant returned to Kinetic Orthopedics on March 27,2023 and saw Dr. Brian Kam. He reported continued mechanical pain in the right knee "since June 2022." Dr. Kam recommended arthroscopic surgery.

25. Claimant proved he was injured while performing services for Employer for pay. Claimant's testimony is generally credible, and more persuasive than the contrary testimony offered by LS[Redacted]. Claimant's testimony is buttressed by his consistent report to multiple medical providers that he injured his knee on June 20, 2022 while planting a tree. There is no persuasive evidence Claimant performed any other landscaping work around that time.

26. Employer failed to prove Claimant is an independent contractor. There is no persuasive evidence that Claimant is customarily engaged in an independent trade or business related to landscaping. There is no persuasive evidence Claimant has a business related to landscaping. Employer determined the place and time for performance each day. Employer produced no written contract or other documentation reflecting an agreement that Claimant would provide services as an independent contractor. LS[Redacted] testified he never discussed compensation directly with Claimant, which is inconsistent with the interactions one would expect with a true independent contractor relationship. Claimant considered OM[Redacted] his supervisor and LS[Redacted] to be his "boss." Claimant further believed LS[Redacted] could fire him at any time. Although Claimant's subjective impression is not dispositive, it speaks to the absence of any "meeting of the minds" regarding Claimant's alleged status as an independent contractor.

27. Claimant's average weekly wage is $531, with a corresponding TTD rate of $354. There is no persuasive evidence to show the average hours or days Claimant had worked, or reasonably expected to work, in a typical week. The June 21, 2022 check provides the most persuasive evidence of Claimant's earnings at the time of the injury.

28. Claimant proved he was disabled and suffered a wage loss commencing June 21, 2022. Multiple providers documented ongoing knee pain and difficulty with standing and walking, including using crutches for a time. Claimant's pre-injury work was physically demanding and required activities beyond his functional capacity after the injury.

29. Claimant returned to work on March 4, 2023. Claimant conceded his eligibility for TTD terminated upon his return to work.

30. The treatment Claimant received after the injury was reasonably needed to cure and relieve the effects of his compensable injury. Respondent conceded at the start of the hearing it has no defense to the medical benefits Claimant is seeking, other than the threshold issue of compensability. The evaluations and treatment Claimant has received to date were reasonably necessary.

31. Claimant made a proper showing for a prospective change of physician to Dr. Miguel Castrejon. Neither Dr. Kam nor any providers who evaluated Claimant at Peak Vista are listed as Level II providers on the Division's Accredited Provider Directory. It is in the interest of both parties to have a primary ATP who is Level II accredited.

32. Employer knew Claimant stopped working because of the injury on June 20, 2022. Accordingly, Employer was required to formally admit or deny liability no later than Monday, July 11, 2022. Employer never filed an admission of liability or notice of contest with the Division of Workers' Compensation. Employer should be penalized $15 per day, from July 20, 2022 through July 19, 2023 (365 days), for failing to admit or deny liability. This results in an aggregate penalty of $5,475.

33. Employer conceded at hearing it is uninsured for workers' compensation liability. Accordingly, Employer is liable to pay the Colorado Uninsured Employer fund 25% of compensation awarded to Claimant.

CONCLUSIONS OF LAW

A. Claimant is an Employee, not an Independent Contractor

Section 8-40-202(2)(a) provides that "any individual who performs services for pay for another shall be deemed to be an employee . . . unless such individual is free from control and direction in the performance of the service . . . [and] is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

Once a claimant shows they performed services for pay, the burden shifts to the putative employer to show the claimant was an independent contractor. The Act creates a balancing test to overcome the statutory presumption of employment and establish independence. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998). Section 8-40-202(2)(b)(II) sets forth several factors the General Assembly considers particularly "important" in distinguishing employees from independent contractors. *Industrial Claim Appeals Office v. Softrock Geological Services Inc.*, 325 P.3d

560, 565 (Colo. 2014). No single factor is dispositive, and the determination must be based on the totality of evidence in any given case. *Id*.

As found, Claimant proved he was injured while performing services for Employer for pay, and Employer failed to prove Claimant was an independent contractor. Claimant's testimony is generally credible and more persuasive than the contrary testimony offered by LS[Redacted]. Claimant told multiple medical providers he was injured in June 2022 while planting a tree at work, and there is no persuasive evidence he performed landscaping work for any other employers or on his own in June 2022. There is no persuasive evidence that Claimant is customarily engaged in an independent trade or business related to landscaping. Claimant was paid personally and not in the name of any trade or business. There is no persuasive evidence Claimant has a business related to landscaping, or concrete for that matter. Employer determined the place and time for performance each day. Employer produced no written contract or other documentation reflecting an agreement that Claimant would provide services as an independent contractor. LS[Redacted] testified he never discussed compensation directly with Claimant, which is inconsistent with the interaction one would expect with a true independent contractor relationship. Claimant considered OM[Redacted] his supervisor and LS[Redacted] to be his "boss." Claimant further believed LS[Redacted] could fire him at any time. Although Claimant's subjective impression is not dispositive, it speaks to the absence of any "meeting of the minds" regarding Claimant's alleged status as an independent contractor.

B. Average weekly wage

Section 8-42-102(2) provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $531, with a corresponding TTD rate of $354. There is no persuasive evidence to show the average hours or days Claimant had worked, or reasonably expected to work, in a typical week. The June 21, 2022 check provides the most persuasive evidence of Claimant's earnings at the time of the injury.

C. Claimant is entitled to TTD from June 21, 2022 through March 3, 2023

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning

capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until the occurrence of one of the factors enumerated in § 8-42-105(3), C.R.S.

The persuasive evidence shows Claimant was disabled by his knee injury and suffered an injury-related wage loss commencing of June 21, 2023. He was off work until March 4, 2023. Accordingly, Claimant is entitled to $12,946.29 in TTD benefits from June 21, 2022 through March 3, 2023.

D. Total TTD and statutory interest owed

Employers or their insurers must pay statutory interest of 8% per annum on all benefits not paid when due. Section 8-43-410(2), C.R.S. Based on the TTD rate of $354 per week, Employer owes $804.84 in interest from June 21, 2022 through August 4, 2023. Interest will continue to accrue at the rate of $3.01 per day until the past-due TTD is paid. The accrued interest and ongoing daily interest were calculated using the Division of Workers' Compensation Benefits Calculator, which is available on the Division's website: https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx

[Redacted, hereinafter IRC]

E. Medical benefits

An employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. Under § 8-43-404(5), the employer has the right to choose the treating physician in the first instance. But the employer must tender medical treatment "forthwith" upon receiving notice of the injury, or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

As found, Employer never referred Claimant to a specific physician or clinic, so the right of selection passed to Claimant. There is no reason to belabor the question of medical benefits because Respondent stated at the start of the hearing it had no defense to the injury-related medical treatment Claimant has received to date, beyond the threshold issue of compensability. In any event, the evaluations and treatment Claimant has received to date were reasonably needed. Respondent shall pay for the treatment by Dr. Lauritzen, the MRI, and Kinetic Orthopedics.

F. Change of physician to Dr. Castrejon

A claimant may obtain permission to treat with a physician of their choosing "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change or addition of an ATP. *Jones v. T.T.C. Illinois,*

Inc., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest to be apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider a wide range of factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995).

A change of physician can only be awarded prospectively; it cannot be granted retroactively to allow coverage for treatment that was unauthorized when it was provided. *Lutz v. Western Pacific Airlines, Inc*., W.C. No. 3-333-031 (December 27, 1999); *Consolidated Landscape v. Industrial Claim Appeals Office,* 883 P.2d 571 (Colo. App. 1994).

As found, Claimant made a proper showing for a prospective change of physician to Dr. Miguel Castrejon. Neither Dr. Kam nor any providers who evaluated Claimant at Peak Vista are listed as Level II providers on the Division's Accredited Provider Directory. It is in the interest of both parties for Claimant to have a primary ATP who is Level II accredited.

G. Penalties for failure to admit or deny

Claimant seeks a penalty under § 8-43-203 for "failure to file [a] General Admission of Liability." The employer must admit or deny liability within 30 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." Section 8-43-101; 8-43-203(1)(a). Under § 8-43-203(2)(a), an employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot exceed "the aggregate amount of three hundred sixty-five days' compensation." Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. Section 8-43-203(2)(a), C.R.S.

The phrase "may become liable" means imposition of a penalty under § 8-43-203(2)(a) is discretionary. *E.g., Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the

non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty. *Pioneer Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

Employer knew Claimant suffered a lost time injury on June 20, 2022, so the deadline to admit or deny liability was July 20, 2022. Employer has never filed an admission or denial of liability regarding Claimant's injury and offered no explanation for its failure to do so. However, Employer reimbursed Claimant for some medical bills, which is a mitigating factor that can be considered regarding imposition of a penalty. *E.g.*, *Lightle v. Sonic Drive In*, W.C. No. 4-416-066 (June 30, 2000). Claimant had retained counsel by mid-September 2022, which obviates the concern that he did not understand the legal ramifications of his situation. More important, Claimant produced no persuasive evidence of any specific harm or prejudice occasioned by Employer's failure to formally admit or deny liability. Nevertheless, besides providing a remedy to the claimant, § 8-43-203 serves a public purpose of apprising the Division of the claim and encouraging employers to follow the procedures set forth in the Workers' Compensation Act. As such, some penalty is warranted to promote and reinforce the integrity of the system, irrespective of any harm to Claimant.

As found, Employer should be penalized $5,475 from July 20, 2022 through July 19, 2023 for failure to admit or deny liability. This is based on 365 days at the rate of $15 dollars per day. The maximum allowable penalty of $129,210 ($354 x 365 days) would be grossly disproportionate to the gravity of the infraction and the harm to Claimant. An aggregate penalty of $5,475 is sufficient to provide a meaningful consequence for Employer's violation of the law and encourage future compliance, without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Subsequent Injury Fund.

H. Payment to the Colorado Uninsured Employer fund for failure to insure

Section 8-43-408(5), C.R.S. (2021) provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (February 13, 1998). Although the ALJ is not aware of a case directly on point, statutory interest is not properly considered "compensation or benefits" within the meaning of 8-43-408(5). Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991). Similarly, the ALJ concludes that the penalties awarded herein are not "compensation or benefits."

Employer has been ordered to pay Claimant $12,946.29 in TTD benefits. Twenty-five percent (25%) of the compensation awarded is $3,236.57, which shall be sent to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, CO 80202.

I. Payment to Division trustee or a bond to secure payment of benefits

Employer was not insured for workers' compensation liability at the time of Claimant's injury. Under § 8-43-408(2), Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. This Order awards no ongoing indemnity benefits, so the present value equals the total benefits awarded. No medical bills were submitted at hearing, so no specific payments for medical benefits are being awarded herein. The total of TTD, interest, and penalties Ordered herein is $19,226.13. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. Employer may contact the Division Trustee for assistance with its obligations in this regard. The Division Trustee may be contacted through the Division's customer service line at 303-318-8700 or by email to Mariya Cassin mariya.cassin@state.co.us The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on June 20, 2022 is compensable.

2. Employer's independent contractor defense is denied and dismissed.

3. Employer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to charges from Dr. Lauritzen, the August 7, 2022 MRI at UCHealth, and charges from Kinetic Orthopedics.

4. Dr. Miguel Castrejon is Claimant's primary ATP as of the date of this Order.

5. Claimant's average weekly wage is $531, with a corresponding TTD rate of $354 per week.

6. Employer shall pay Claimant $12,946.29 for TTD benefits from June 21, 2022 through March 3, 2023.

7. Employer shall pay Claimant statutory interest of $804.84 on the past-due TTD benefits. Interest shall continue to accrue at the daily rate of $3.01 until the past-due TTD is paid.

8. Employer shall pay a penalty of $5,475 for failure to admit or deny liability. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Subsequent Injury Fund. The check for the Subsequent Injury Fund shall be sent to the Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202, Attention: Mariya Cassin, Division Trustee.

9. In lieu of direct payment of the above compensation and benefits, Employer shall:

a. Deposit $19,226.13 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded. The check shall be sent to the Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202, Attention: Mariya Cassin, Division Trustee; or

b. File a surety bond in the amount of $19,226.13 with the Division of Workers' Compensation within ten (10) days of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation, penalties and benefits awarded.

10. Employer shall pay $3,236.57 to the Colorado Uninsured Employer Fund pursuant to § 8-43-408(5). The check shall be sent to the Division of Workers'

Compensation, Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, CO 80202.

11. Employer shall notify the Division of Workers' Compensation and Claimant's attorney of payments made pursuant to this order.

12. Filing any appeal, including a petition to review, shall not relieve Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the bond as required by paragraph 11(b) above. Section 8-43-408(2), C.R.S.

13. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

14. Pursuant to § 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

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

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

DATED: August 4, 2023

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

ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome the maximum medical improvement (MMI) determination of Dr. Dwight Caughfield regarding the left knee in W.C. No. 5-159-881.

II. If it is determined that Claimant is not at MMI, whether he established, by a preponderance of the evidence, that he is entitled to additional reasonable, necessary, and related care for his left knee condition, including, but not limited to a second surgical opinion regarding his candidacy for a total knee replacement.

III. If Claimant is found to be at MMI, whether he established, by a preponderance of the evidence, that he is entitled to maintenance care for the work-related injury associated with his left knee under Workers' Compensation Claim No. 5-159-881.

IV. Whether Claimant established, by a preponderance of the evidence, that he is entitled to maintenance care for the work-related injuries associated with his left hand/arm following his January 16, 2021 motor vehicle accident, which has been assigned Workers' Compensation Claim No. 5-160-957.

V. Whether Claimant is financially liable to Respondents for a late cancellation fee imposed by their retained medical expert for his failure to appear for a properly scheduled independent medical examination (IME) appointment on December 8, 2022.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Fall, the ALJ enters the following findings of fact:

1. Claimant is a former delivery driver for Employer. He suffered two separate injuries while working for Employer in January 2021. Specifically on January 9, 2021, Claimant slipped and fell injuring his left knee while walking in the snow from a parking lot into Employer's building to report to work. (Resp. Hearing Exhibit (RHE) I). This claim has been assigned workers' compensation claim number 5-159-881. Approximately one week later, on January 16, 2021, Claimant was involved in a motor vehicle crash while driving one of Employer's semi-trucks from New Mexico northbound towards Fountain, Colorado on I-25. Claimant lost control of the truck flipping it onto its left side in the ditch just north of Trinidad, Colorado. (RHE H). Claimant sustained multiple fractures and injuries to his left hand, arm, and shoulder. This claim has been assigned workers' compensation claim number 5-160-957.

2. Following his January 16, 2021 MVA, Claimant was transported, via ambulance, to the Emergency Room (ER) at Mt. San Rafael Hospital in Trinidad where he was diagnosed with multiple injuries, including abrasions, a fracture of his left little finger, and a displaced fracture of the middle left index finger. (RHE H, pp. 50-62). Claimant also reported pain in the left scapular area; dorsal aspect of his left forearm, wrist, and hand; palmar aspect of left forearm and left knee pain.

3. Claimant was first seen by a workers' compensation physician under both claims 2 days later on January 18, 2021. (RHE I). Dr. Douglas Bradley at Concentra Medical Center (Concentra) evaluated Claimant and assessed a contusion of the left knee and lower leg, neck pain, left hand abrasion, left forearm abrasion, multiple closed fractures of the finger with malunion, thoracic myofascial strain, left elbow contusion, and left shoulder contusion. Dr. Bradley provided Claimant with a knee brace wrap and imposed significant work restrictions to include no lifting, pushing/pulling or carrying more than 2 pounds, no crawling, no climbing, no driving of company vehicles, and no use of power/impact/vibratory tools the left upper extremity. (RHE I, pp. 66-67).

4. Dr. Bradley referred Claimant for an MRI of the left knee on February 8, 2021. (RHE I, pp. 99-103). The MRI was completed on February 22, 2021. (RHE K, pp. 127-129). MR imaging demonstrated: (1) mild osteoarthritis with patellar chondromalacia and small joint effusion; (2) a grade I MCL strain without tear; (3) a horizontal lateral meniscus tear extending into the anterior horn; (4) a small peripheral tear in the posterior horn of the medial meniscus; and (5) prepatellar and pretibial edema, and bone contusion versus reactive osteoedema in the lateral tibial plateau. *Id.*

5. Dr. Allison Fall performed an independent medical examination (IME) of Claimant at the request of Respondents on April 21, 2021. (RHE M). The focus of her examination was directed to the condition of Claimant's left knee. *Id.* After obtaining a history, reviewing security video, conducting a records review and completing a physical examination, Dr. Fall opined that while Claimant fell in the parking lot on January 9, 2021, his injuries were limited to a knee "contusion", which was self-limiting and did not require medical care. *Id*. at p. 139. Dr. Fall concluded that the findings on Claimant's February 22, 2021 MRI were "consistent with degenerative changes and [Claimant's] obesity"[1] and thus, unrelated to his slip and fall. *Id*.

6. Respondents requested a second IME with Dr. Nicholas Kurz at Work Comp Solutions, LLC to address Claimant's left upper extremity injuries. (RHE N). The IME was completed on July 12, 2021. *Id.* Dr. Kurz completed a records review and a physical examination directed to Claimant's left upper extremity. *Id*. at pp. 149-150. Following his examination, Dr. Kurz opined that Claimant had sustained a "left fifth metacarpal fracture, hand and elbow contusions & abrasions, contusions of muscles about [the] left shoulder upper back, neck, and [an] exacerbation of his previous left

[1] At the time of Dr. Fall's IME appointment Claimant was noted to weigh 400 pounds, which the ALJ notes is less than the 449 pounds (204.12 kg) Claimant weighed when he was transported to the ER following his January 16, 2021 MVA.

knee strain. *Id.* at p. 152. Dr. Kurz opined that Claimant "likely met the criteria for being at MMI approximately 8-10 weeks after his DOI (January 16, 2021) on or about March 30, 2021. *Id*. at p. 153. He also concluded that Claimant sustained no impairment as a consequence of his left upper extremity injuries. *Id*.

7. Claimant came under the care of Dr. Daniel Peterson at Concentra. Dr. Peterson evaluated Claimant on March 7, 2022, at which time he noted that Claimant had undergone an IME for his left knee with Dr. Fall and an IME for his left hand with Dr. Kurz. (RHE O, p. 161). Because Claimant had elevated blood pressure and no primary care provider (PCP) to get it under control, he had not completed a previously recommended functional capacity evaluation (FCE). *Id.* Moreover, Dr. Peterson noted that a request for a second opinion with Dr. Larsen regarding the condition of Claimant's left hand had been denied, but that he had been seen by Dr. Fitzpatrick, who had reviewed the MRI of his left knee and advised him regarding the potential for surgery. *Id*. at p. 162. Dr. Peterson scheduled a follow-up appointment for April 4, 2022, as he needed to "re-evaluate the medical records in greater detail to sort out what [was] appropriate to do next". *Id.* at pp. 161, 165.

8. Claimant returned to Concentra on April 19, 2022 where he was once again evaluated by Dr. Peterson. (RHE O, pp. 168-180). Dr. Peterson noted that he had reviewed the IME reports of Dr. Fall and Dr. Kurz. *Id*. at p. 168. Dr. Peterson completed a physical examination and obtained range of motion measurements of Claimant's left knee and hand. He subsequently placed Claimant at MMI, noting that he was a "functional goal" and "ready for discharge". *Id*. at p. 175. MMI was back dated to December 13, 2021, when Claimant was seen by Dr. Lisa Baron. *Id*. at p. 176. Included among the diagnoses provided by Dr. Peterson in his April 19, 2022 report is "Primary localized arthritis of the left knee." *Id.* at 176.

9. Dr. Peterson opined that the February 22, 2021, MRI showed degenerative changes and some meniscal abnormalities. (RHE O, p. 176). Nonetheless, Dr. Peterson noted that his examination findings did not support a suggestion of ongoing meniscal issues. *Id.*

10. Dr. Peterson noted that Claimant qualified for an impairment rating for both his left hand and left knee. (RHE O, p. 176). He assigned 16% left lower extremity rating for Claimant's knee, which included impairment for range of motion loss as well as a Table 40 diagnosis, specifically for "arthritis due to any cause, including trauma; chondromalacia". *Id.* (See Also, *AMA Guides, Third Edition, Revised*, p. 68). He also assigned a total of 9% left upper extremity impairment for the injuries Claimant suffered to his left fingers. (RHE O, p. 178).

11. Claimant challenged Dr. Peterson's MMI determination through a Division Independent Medical Examination ("DIME"). (Claimant's Hearing Exhibits (CHE) 7). Dr. Dwight Caughfield was selected to perform the examination and did so on September 14, 2022. *Id.* Dr. Caughfield documented that Claimant had fallen onto his left knee at work, causing immediate pain. *Id.* at p. 58. He also acknowledged Claimant's January

16, 2021 work-related MVA that is the subject of his second claim. *Id.* It was noted that Claimant was not able to get his CDL back due to the pain in his knee and shoulder weakness.[2] *Id.* Claimant reported ongoing 6/10 knee pain with his pain increasing to a 10/10 with standing and walking. *Id.* at p. 59.

12. Claimant reported to Dr. Caughfield that he had seen Dr. Fitzpatrick and that she had "recommended a surgery", although none of Dr. Fitzpatrick's records were provided to Dr. Caughfield for review. (CHE 7, p. 59). Claimant found his knee pain to be limiting his tolerance for walking and driving. *Id.* Dr. Caughfield reviewed the February 22, 2021, MRI of Claimant's left knee noting that it demonstrated "[m]ild osteoarthritis . . . with chondromalacia type III and small joint effusion" along with a strain of the medial collateral ligament without tear" and "[d]egenerative signal with a horizontal tear in the body of the lateral meniscus extending into the superior horn of the lateral meniscus. *Id.* at p. 60. Dr. Caughfield diagnosed Claimant as having "left knee pain with aggravation of osteoarthritis". *Id.* at p. 61.

13. Dr. Caughfield disagreed with Dr. Peterson's determination that Claimant had reached MMI, noting that the functional loss associated with Claimant's left knee injury had not resolved with treatment and was consistent with an occupational aggravation of his pre-existing degenerative arthritis. (CHE 7, p. 61). Citing the lower extremity medical treatment guidelines as support for his opinion that Claimant is not at MMI, Dr. Caughfield opined:

> Per the lower extremity treatment guidelines, [Claimant's] aggravated arthritis treatment opinions include surgical intervention, which has not been explored per the records provided. [Claimant] mentions, as do the records, that he was seen by Dr. Fitzpatrick and received both an injection that provided short term improvement, as well as a recommendation for surgery. The recommendation for surgery is appropriate per the guidelines but in acknowledgement of increased surgical complications due to his elevated BMI a 2nd expert opinion is needed before undertaking surgery. The Lower extremity treatment guidelines, page 194, 7th paragraph [provides]: "A number of studies suggest that obesity correlates with an increased risk of complications following TKA (total knee arthroplasty). Furthermore, several studies suggest that morbid obesity (BMI > or = to 40) is associated with lower implant survivorship, lower functional outcome, and a higher rate of complications in TKA patients. **Patients with BMI greater than 40 require a second expert surgical opinion"**.[3] (Emphasis in original).

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[2] Claimant left the employ of [Redacted, hereinafter FF] and subsequently found work through [Redacted, hereinafter ED] at [Redacted, hereinafter OL]. He was hired permanently by OL[Redacted] on May 16, 2022.

[3] During his initial appointment with Dr. Bradley on January 18, 2021, Claimant's calculated BMI, based upon his reported weight of 440 pounds was documented to equal 59.68 kg/m2.

> If the 2nd surgical opinion agrees with the need of a left total knee, then that would be consistent with the treatment guidelines as care for aggravated arthritis. If the 2nd opinion does not agree with a total knee replacement then [Claimant] would be at MMI after that evaluation.

Id.

14. Based upon the evidence presented, the ALJ finds that Dr. Caughfield assumed that the surgery Dr. Fitzpatrick suggested to Claimant, if a recommendation was actually made, consisted of a total knee arthroplasty. As noted, Dr. Caughfield was not provided with records from Dr. Fitzpatrick nor were any such records submitted to the ALJ for review. Accordingly, it is unknown what surgery, if any, Dr. Fitzpatrick recommended.

15. Respondent's scheduled a follow-up IME for Claimant with Dr. Fall after he completed his evaluation (DIME) with Dr. Caughfield. Notice that the IME had been scheduled for December 8, 2022 @ 1:45 p.m., with a 1:15 p.m. check in at Integrated Medical Evaluations, Inc. at 7447 E. Berry Ave., Suite 150, Greenwood Village, CO 80111 was sent to Claimant in care of his attorney on October 25, 2022. (RHE F, p. 43(A)). Claimant acknowledged receipt of the notice and testified that he was aware of the scheduled appointment. Nonetheless, Claimant failed to appear for the IME. Accordingly, Integrated Medical Evaluations, Inc. (Dr. Fall) directed an invoice to Respondents' counsel requesting payment in the amount of $1,435.00 for late cancellation of the December 8, 2022 IME. (RHE F, p. 43). The invoice was sent January 5, 2023 and the IME was rescheduled to January 12, 2023.

16. Dr. Fall re-evaluated Claimant on January 12, 2023. (RHE M). During this encounter, Claimant reported persistent left knee pain of the same intensity whether he was "sitting, standing or driving". (RHE M, p.141). Claimant described worsening pain about the entire knee, with recent pain development on both sides of the knee joint. *Id.* Physical examination revealed pain with end range extension of the knee but no medial or lateral joint line tenderness. Id. at p. 144. Rather, Claimant reported that his pain was proximal to the medial joint line. Claimant was noted to weigh 373 pounds, which represented a significant loss of weight when compared to previous reported weight readings exceeding 440 pounds at times. *Id.* at p. 141, 144.

17. Dr. Fall agreed with the conclusion reached by Dr. Peterson in his April 19, 2022 report when he noted that despite the presence of degenerative joint disease and some meniscal changes in the left knee, nothing on her examination from that day suggested that Claimant had ongoing meniscal problems in the left knee. (RHE M, p. 143-144). Indeed, Dr. Fall noted: I would agree with [Dr. Peterson's] opinion based upon my exam. In other words, there was no correlating finding on exam to the MRI findings that would indicate that he would benefit from a surgery". *Id*. at p. 144. Dr. Fall opined that the MRI demonstrated degenerative findings and a possible MCL strain and

reiterated her impression that Claimant's examination findings were not consistent with a symptomatic meniscus. *Id*. at p. 145. Regarding the question surrounding surgery directed to the left knee, Dr. Fall stated:

> . . . surgery for meniscal tears with underlying arthritis are not recommended based upon lack of efficacy in the scientific literature, Apparently, it was reported to the providers at Concentra and also to the DIME that [Claimant] had seen Dr. Fitzpatrick, who recommended surgery, however, the specific surgery was not noted. Dr. Caughfield inferred that this was a total knee arthroplasty. There was no other mention in the records of anyone recommending a total knee arthroplasty. [Dr. Caughfield then indicated that [Claimant] should have a second opinion, given his morbid obesity and that this was per the medical treatment guidelines. It is my opinion that Dr. Caughfield has made an error in stating that [Claimant] was not at MMI for the knee because he needed a second opinion with another orthopedic surgeon regarding a total knee arthroplasty. I have not reviewed documentation indicating that this has been recommended. Generally, [Claimant's] obesity would preclude that. Also, [Claimant's] examination is benign. The potential risks of a total knee arthroplasty would outweigh any benefit, at this point in time. Also it would be premature to recommend this, given that [Dr. Caughfield] has not seen Dr. Fitzpatrick's note. If Dr. Fitzpatrick recommended a different surgery or no surgery, then [Dr. Caughfield's] comments would not be applicable for pursuing a second opinion regarding a total knee arthroplasty.
>
> Therefore, in my opinion, [Dr. Caughfield] has clearly erred. The report from Dr. Fitzpatrick would be important to review to know what surgery he recommended. If he did recommend a total knee arthroplasty, then I would agree that a second opinion would be warranted."

Id.

18. Dr. Fall testified by deposition on June 5, 2023. She testified as a Level II accredited, board certified expert in Physical Medicine and Rehabilitation (PM&R). Dr. Fall testified that Dr. Caughfield did not recommend any specific treatment for Claimant to attain MMI. (Depo. Dr. Fall, p. 8, ll. 24-25, p. 9, l. 1). Rather, Dr. Fall testified that Dr. Caughfield simply stated that according to the Colorado Workers' Compensation Medical Treatment Guidelines when "there had been a recommendation for a surgery in the presence of . . . [an] elevated BMI, then a second expert opinion would be needed. *Id*. at p. 9, ll. 1-4.

19. Dr. Fall reiterated her opinion that "[i]n the situation where there is osteoarthritis, arthroscopic surgery has not been shown to lead to major benefit, and if "[Dr. Fitzpatrick] is recommending total knee arthroplasty, again that's not consistent with the MRI of [Claimant's] knee" noting further that it would typically take a more significant level of arthritis to lead to a total knee, and Claimant's morbid obesity would be a contraindication for that. (Depo. Dr. Fall, p. 9, ll. 9-17). Dr. Fall testified that because Dr. Caughfield was unware of what specific surgery, if any, Dr. Fitzpatrick recommended, it was "premature" to for him to recommend a second surgical opinion. *Id*. at p. 9, ll. 23-25. Dr. Fall testified that it would be erroneous to make additional recommendations based upon the presumed surgical opinion of Dr. Fitzpatrick because "we don't know what the surgery is". *Id*. at p. 13, ll. 15-21. Accordingly, Dr. Fall testified that Dr. Caughfield erred when he concluded that Claimant was not at MMI determination based upon his need for a second surgical opinion. *Id*. at p. 9, ll. 18-20.

20. In support of her opinion that Claimant had reached MMI with "good level function" of the left knee, Dr. Fall cited his ability to maintain full-time work. (Depo. Dr. Fall, p. 12, ll. 18-24). She also referenced Claimant's lack of active care as additional support that his left knee condition was "stable" and at MMI. *Id*. at p. 13, ll. 3-9. Moreover, Dr. Fall agreed with Dr. Caughfield's determination that Claimant reached MMI for the injuries he suffered to his left hand/arm. *Id*. at p. 16, ll. 6-9. She also opined that additional maintenance care for these injuries was not necessary.

21. Careful review of the record persuades the ALJ that none of Claimant's authorized providers have recommended maintenance care for the injury Claimant suffered to his left knee. Furthermore, thorough review of Dr. Caughfield's DIME report persuades the ALJ that Dr. Fall was correct when she noted that Dr. Caughfield did not recommend the completion of any actual treatment or diagnostic testing in order for Claimant to reach MMI. To the contrary, he simply concluded that Claimant needed a second surgical opinion based on an assumption that Dr. Fitzgerald recommended a TKA. Based upon the evidence presented, Dr. Caughfield recommended a "surgical follow-up" as post-MMI treatment for the left long finger, should Claimant's pain worsen, to "evaluate for the development of arthritis since the fracture extended into the MP joint". (CHE 7, p. 63). There is no indication that Claimant is currently experiencing worsening pain in the long finger.

22. The ALJ credits the reports and opinions of Dr. Peterson and the testimony of Dr. Fall to find that Claimant reached MMI for the sequela related to his left knee injury on December 13, 2021. Here, Claimant's medical records do not reflect a recommendation from Dr. Fitzgerald for any particular surgical procedure. Indeed, Dr. Caughfield did not have the records of Dr. Fitzgerald. Nevertheless, he made assumptions regarding the content of the same. Based on the evidence presented, the ALJ finds that Dr. Caughfield's request for a second opinion is based upon an incomplete understanding of Claimant's potential surgical needs. Because Dr. Caughfield's assumption that Claimant needs a TKA is not supported by medical record he reviewed as part of his DIME, the ALJ agrees with Dr. Fall to find that his "not at MMI" determination to obtain a second surgical opinion is premature. Had Dr.

Caughfield obtained Dr. Fitzgerald's records they may clearly have recommended a TKA. If so, even Dr. Fall agrees that Claimant should proceed to a second surgical opinion given the contraindications for a TKA in a person of Claimant's size. Yet, because Dr. Fitzgerald's have not been provided to either Dr. Caughfield or this ALJ, the record supports a finding that Dr. Caughfield erred when he determined that Dr. Fitzgerald recommended a TKA and Claimant needed a second consultation regarding the same.

CONCLUSIONS OF LAW

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

Generally

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

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

Overcoming Dr. Caughfield's DIME Regarding MMI

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo.App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in this regard is highly probably

incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (October 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998). Careful review and comparison of the written DIME report of Dr. Caughfield and the reports/opinions of Drs. Peterson and Fall persuades the ALJ that Claimant reached MMI for the effects of his industrially based knee injury and subsequent aggravation thereof on December 13, 2021.

E. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. In this case, Dr. Caughfield's not at MMI determination is inconsistent with the balance of the medical record as a whole. Here, Claimant's ability to maintain employment combined with the lack of any medical treatment for several months strongly supports Dr. Fall's opinion that Claimant is at MMI, especially when the basis for the "not at MMI" determination rests completely on an assumed treatment need not supported by the available record. Contrary to Claimant's assertion, the record supports an inference/conclusion that Dr. Caughfield recommended further evaluation solely because Dr. Fitzgerald recommended a TKA, not because surgical intervention had not been explored or that he required additional treatment to improve his condition. Moreover, Dr. Caughfield clearly concluded that Claimant was not at MMI because he needed a second surgical consultation based upon this perceived treatment need. As found, Dr. Caughfield's assumption that Claimant needs a TKA is not supported by available medical record and appears inconsistent with Claimant's demonstrated functional abilities. Because the "not at MMI" determination expressed by Dr. Caughfield is not supported by any surgical opinion from Dr. Fitzgerald and conflicts with Claimant's proven capability, the ALJ concludes that it is premature and highly probably incorrect. Accordingly, Dr. Caughfield's opinion regarding MMI has been overcome. Claimant is at MMI. The correct date of MMI is December 13, 2021 as determined by Dr. Peterson.

Claimant's Entitlement to Maintenance Medical Treatment

F. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in

the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

G. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the record evidence persuades the ALJ that Claimant has failed to prove he is entitled to medical maintenance care. None of his authorized treating physicians have recommended that he undergo maintenance care. Indeed, the only opinion recommending maintenance treatment in these claims come from Dr. Caughfield, who in both cases simply recommended a second surgical opinion regarding the left knee and a surgical following regarding the left hand. Here, the evidence presented supports a conclusion that Claimant has not suffered a deterioration of his present condition and no authorized provider has presented any recommendations that he requires further medical treatment to relieve the effects of his injuries. Accordingly, Claimant's request for medical maintenance treatment must be denied and dismissed.

Respondent's Request for Reimbursement of Late Expert Cancellation Fees

H. This ALJ has had the occasion to address the issue of Respondent's entitlement to reimbursement for a late cancellation/no show fee for a claimant's failure to attend an IME previously. Indeed, that case involved the same law firms and in the case of Respondents' counsel, the same attorney as in the instant claim. See generally, *Jason Fahler v. Redbox*, W.C. No. 5-111-049 (August 17, 2020). In *Fahler*, Respondents sought reimbursement for Claimant's failure to appear for an IME with Dr. Robert Rokicki. Respondents' asserted that C.R.S. § 8-43-404(1)(b)(II) entitled them to recover the missed IME fee imposed against them by the physician from any future indemnity benefits awarded to Claimant. This ALJ was not convinced, noting that § 8-43-404(1)(b)(II), C.R.S. provided that if an employer pays estimated expenses, including mileage, transportation, food and/or lodging expenses, to a claimant in conjunction with a Respondent requested IME and Claimant subsequently fails to appear for the examination, the employer may recover the "costs paid for the [Claimant's] expenses from future indemnity benefits". Concluding that § 8-43-404(1)(b)(II), was silent on recovering the physician fee charged for a missed IME appointment, this ALJ found that

Respondents' reliance on § 8-43-404(1)(b)(II), as authority to order Claimant to reimburse the costs of the missed IME with Dr. Rokicki was misplaced. Respondents appealed the issue to the Industrial Claims Appeals Panel (Panel) for determination. On appeal the Panel agreed with the ALJ that §8-43-404(1)(b)(II), C.R.S. did not require the claimant to reimburse the respondents for the $917.50 cancellation fee associated with a missed IME appointment. *Fahler v. Redbox, supra*. Holding that the "clear intent of §8-43-404(1)(b)(II), C.R.S. is to allow the employer or insurer to recover the advanced expenses made specifically to the claimant for his or her lodging, travel, and hotel costs associated with attending an IME, when the claimant misses such IME", the Panel affirmed this ALJ's determination that claimant was not responsible to reimburse Respondents for the cost of the missed IME. *Id*.

I. Additionally, the Panel, like this ALJ, was "unaware of any Workers' Compensation Rule of Procedure that required the claimant to reimburse the respondents for the costs of the missed IME". See W.C. Rule of Procedure 8-8, 7 CCR 1101-3 (addressing IMEs); see also W.C. Rule of Procedure 18-7(B), 7 CCR 1101-3 (addressing cancellation fees for payer-made appointments); see also Safeway, Inc. v. Industrial Claim Appeals Office, 186 P.3d 103, 105 (Colo.App. 2008)(when construing administrative rule or regulation, same rules of construction are applied when interpreting a statute). As was the situation set forth in *Fahler*, this ALJ is convinced that Claimant failed to appear for his December 8, 2022, IME with Dr. Fall without justification. Nonetheless, Respondents have failed to cite any authority under any statute or subsection of the Act or under any rule of procedure that specifically extends the authority to the ALJ to order Claimant to reimburse Respondents for the cost of his missed IME appointment. Since the Panel concluded that §8-43-404(1)(b)(II), C.R.S. does not provide the relief the respondents seek for the cost of the missed IME and Respondents have not set forth any alternative legal authority in support of their request for relief, the ALJ concludes that the request for reimbursement for the missed IME must be denied and dismissed as unsupported by statue or rule of procedure.

ORDER

It is therefore ordered that:

1. Respondents request to set aside Dr. Caughfield's MMI determination regarding Claimant's left knee in W.C. No. 5-159-881 is GRANTED.

2. Claimant's request for maintenance treatment for his left knee under W.C. No. 5-159-881 is denied and dismissed.

3. Claimant's request for maintenance treatment for the injuries associated with his left upper extremity in W.C. No. 5-160-957 is denied and dismissed.

4. Respondents request for recovery of the no show fee associated with Claimant's missed December 8, 2022 IME is denied and dismissed

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

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

DATED: August 7, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-223-731-004

ISSUES:

- Did Claimant prove by a preponderance of evidence that medical benefits related to his heart arrhythmia are reasonable, necessary, and related to the work injury?
- Whether Respondent should be awarded reasonable attorney fees and costs for Claimant's pursuit of an unripe issue after failing to request a DIME?

RESPONDENT'S CONCESSION

Respondent concedes responsibility for some medical bills incurred by Claimant in its position statement. It is in the process of paying the original Emergency Room and Ambulance bills for Claimant's post injury admittance to Rio Grande Hospital November 11, 2022 (Ex. 9 & 13.) This includes the bills on Ex. 4 pg. 13 as "Rio Grande HSP", "VLY Citizens FNDTN F", and "Northern Saguache." However, Respondent contests every bill related to Claimant's heart condition for treatment from November 12, 2022 onward, which is every bill identified in the excerpt below from Ex. 4 pg. 13 and other exhibits:

Victor N	4432236300832	I49.5	CAREPOINT EMERG ME	11/12/2022 - 11/12/2022	$1,091.00	$388.28
Victor N	4432232705335	R51.9	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$718.00	$293.26
Victor N	4432232705336	S29.9XXA	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$254.00	$104.70
Victor N	4432232905182	R55	HEALTHONE HEART CA	11/12/2022 - 11/12/2022	$261.00	$100.58
Victor N	4432232705334	S39.91XA	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$360.00	$153.18
Victor N	4432232996444	R55	HEALTHONE HEART CA	11/12/2022 - 11/12/2022	$202.00	$82.90
Victor N	4432232705338	S09.90XA	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$174.00	$71.50
Victor N	4432233602458	S19.9XXA	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$238.00	$83.97
Victor N	4432233499747	R55	MED CTR OF AURORA	11/12/2022 - 11/12/2022	$52,321.46	$6,647.99
Victor N	4432234396577	I49.8	HEALTHONE IRL PATH	11/12/2022 - 11/13/2022	$189.00	$20.00
Victor N	4432301097562	R55	HEALTHONE HEART CA	11/12/2022 - 11/12/2022	$27.00	$9.54
Victor N	4432232996997	R55	CRITICAL CARE PULMO	11/13/2022 - 11/13/2022	$161.00	$73.28
Victor N	4432232996740	R55	CRITICAL CARE PULMO	11/14/2022 - 11/14/2022	$238.00	$105.38

In addition to the above insurance letter listing bills, Claimant provided specific bills for the following already listed providers: $52,321.46 for the Medical Center of Aurora (ex. 10), $1,043.00 for Aurora Denver Cardiology Associates (ex. 11), and $447

for Critical Care & Pulmonary Consultants (ex. 12). Respondent asserts that all three of these bills are unrelated to the work injury.

FINDINGS OF FACT

1. On November 11, 2022 Claimant was not feeling well. As he was driving his patrol car on the highway near Alamosa feeling “funny” and “weird.” Claimant started pulling over and lost consciousness. Ex. 14 pg. 40. His car went off the south side of the road, through a fence, and into a ditch. Claimant woke up a few minutes later with a headache and a gentleman at the door of his vehicle. *Id.* During the crash, Claimant hit his head on a seat pillar. Ex. A pg. 13.

2. Claimant was taken to Rio Grande Hospital via ambulance and reported that he had headache and nausea with vomiting most of the day, and that he had been feeling sick since having Covid two weeks ago. Ex. 13 pg. 13. He complained of a severe pain in his head due to a blow to the head. *Id.* He did not complain of any chest or cardiac pain. *Id.* As part of his workup, an EKG was performed that returned an abnormal result. Ex. 13 pg. 39. He was diagnosed with syncope, syncope secondary to illness, and pneumonia. *Id.* The doctors at the emergency room referred Claimant to Aurora Medical Center for evaluation of his heart based on the EKG result. *Id.* & Ex. B pg. 19.

3. On November 12, 2022 after an overnight stay, Claimant left Rio Grande Hospital and his fiancé drove him to Aurora Medical Center, where he was admitted to the ER solely to obtain further treatment for his heart. Ex. 14 pg. 40. After two days of testing, he was discharged with normal results. *Id.* & Ex. B. The discharge paperwork for the Medical Center of Aurora listed only one consultation purpose for the admission:

"Cardiology." Ex. B pg. 16. Regarding his passing out, the doctors at Aurora determined that Claimant "likely had a vasovagal episode related to recent viral illnesses." *Id.* The diagnoses on discharge were syncope, abnormal EKG, recent covid infection, and history of anxiety and depression. *Id.*

4. Allison Fall, M.D. performed a records review in this matter. Ex. D. Dr. Fall examined the relevant medical records in this claim. *Id.* Dr. Fall opined that Claimant had a crash "due to an underlying medical condition unrelated to work." *Id.* pg. 30. Claimant "was transferred to the Medical Center of Aurora for a workup and evaluation of the cardiac arrhythmia, which was not caused by the motor vehicle collision." *Id*.

5. On November 16, 2022 Claimant went to his ATP, Michael Shell, D.O. and reported no ongoing symptoms other than a mild, improving cough. Ex. A pg. 13. On that day Dr. Shell put him at MMI with no impairment. *Id.* pg. 14. Throughout the records from this visit, the ATP repeatedly stated that Claimant's only work-related injury was his concussion. Ex. A. In his doctor's note, the ATP stated, "he was ultimately diagnosed with pneumonia and a heart arrhythmia associated with a fever." *Id.* pg. 13. In his assessment, the only diagnosis was "Concussion w LOC 30 minutes or less." *Id.* pg. 14. Similarly, the work-related medical diagnosis on the WC-164 form was "S06.06X1A concussion with LOC of 30 minutes or less." Ex. A pg. 12.

6. There is no causation opinion from the treating providers relating the heart arrythmia to the motor vehicle accident.

7. Respondent filed FALs on March 13, 2023 and April 6, 2023. In each case, Claimant did not seek a DIME and instead filed Applications for Hearing.

8. On May 17, 2023 a prehearing was held where Respondent attempted to strike the issue of medical benefits as unripe. Ex. E. It was denied. *Id.*

9. The only specific bills provided by Claimant at issue are: $52,321.46 for the Medical Center of Aurora (ex. 10), $1,043.00 for Aurora Denver Cardiology Associates (ex. 11), and $447 for Critical Care & Pulmonary Consultants (ex. 12). These medical bills are for Claimant's unrelated heart condition.

10. Claimant also provided a listing of medical bills by his insurance company for dates of service November 11-November 14. Ex. 4 pg. 13. Claimant presented no credible evidence that the listing of these medical bills from November 12 onward are for any care other than for Claimant's heart. In his testimony, Claimant stated he left Rio Grande Hospital and went straight to Aurora Medical Center for heart treatment. There was no claim that he sought treatment for his concussion at any of these providers from November 12, 2022 onward.

CONCLUSIONS OF LAW

A. Medical Benefits Must Be Related Even If They Were Needed on an Emergency Basis

Claimant relies on Sims v. Indus. Claim Appeals Off. of State of Colo., 797 P.2d 777, 781 (Colo. App. 1990) for the proposition that treatment sought on an emergent basis is compensable. However, a closer reading of Sims v. Indus. Claim Appeals Off. of State of Colo., 797 P.2d 777, 781 (Colo. App. 1990); reveals that it only excuses the need to seek authorization for the treatment during an emergency. It does not negate the requirement that the treatment be causally connected to the work injury. Initially, I find that the treatment at Aurora Medical was still part of the emergency. Although the Claimant was not

transported by Ambulance to that facility, since he requested that his fiancée drive him to the emergency room at Aurora Medical, Dr. Rose at Rio Grande Hospital recommended monitored transfer because of possible medical risks. (Claimant Exhibit 13, p. 39). Based on this, I find that the treatment was emergent in nature. However, although the treatment at Aurora Medical was emergent, Claimant must also prove that the treatment was related to the work related accident.

B. Claimant's Heart Condition is Not Work Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000).

Where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). However, where an industrial injury merely causes the *discovery* of the underlying disease to happen sooner but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO

May 15, 2007). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Claimant has not satisfied his burden in this claim.

As in Robinson, the automobile crash provided the opportunity for Claimant's hospital provider to find the pre-existing condition namely, his heart arrhythmia. This does not provide a basis for this being a compensable or related condition. *See Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Claimant's ATP found that Claimant's only work-related diagnosis was a concussion because of the motor vehicle accident. Ex. A. Claimant's own cardiologists and his treating physicians at both Rio Grande Hospital and Aurora Medical Center opined that Claimant's pre-existing viral illness was the cause of his heart arrhythmia. Ex. 13 & B. Claimant's ATP adopted that opinion in his note. Ex. A pg. 13. Dr. Fall's opinion that the heart condition was not work related is credible and persuasive. Ex. C. There is no credible medical opinion that Claimant's heart condition was caused or aggravated by the work injury. Based on the forgoing, the vast weight of the evidence supports the conclusion that Claimant's heart arrhythmia is not work related. Therefore, Respondent is not liable for all heart related medical bills.

C. Attorney Fees

C.R.S. §8-43-211(3) provides that an attorney who requests a hearing or files a

notice to set a hearing on an issue not ripe for adjudication may be assessed reasonable attorney fees for the expenses of the opposite party. An issue is ripe when it is real, immediate and fit for adjudication. *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App 2006). The term "fit for adjudication" refers to a disputed issue for which there is no legal impediment to immediate adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which never occur. *Olivas-Soto v. ICAO*, supra. (Citations omitted). *See also McMeekin v. Memorial Gardens*, W.C. 4-384-910 (ICAO 9/30/2014). Here, there was no requirement for the Claimant to seek a DIME in order to pursue medical benefits arguably related to automobile crash. The fact that Claimant sought the medical benefits incurred before MMI after a FAL was filed does not make that issue unripe. As such, the request for fees and costs is denied.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant's claim for medical benefits is denied and dismissed except for the benefits conceded by Respondent.

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

3. Any issues not resolved herein is reserved for future determination.

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

DATED: August 8, 2023

Michael A. Perales

Michael Perales
Administrative Law Judge
Office of Administrative Courts
Colorado Springs, Colorado

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-221-402-001

ISSUES

- Did Claimant prove she suffered a compensable right knee injury on September 17, 2022?
- Whether the medical treatment provided was authorized, reasonable, necessary and related to the claimed work injury?
- Whether the Claimant is entitled to temporary disability benefits?[1]
- If the Claim is compensable, the amount of Claimant's disfigurement due to the work injury.

FINDINGS OF FACT

1. Claimant worked for a destination management company where they assist large conferences staying at hotels and plan and operate their activities. She is a program coordinator for the employer.

2. Claimant is paid $30 per hour and works approximately 20 hours per week. She worked approximately 55 hours in the two week period prior to the date of injury. The work is seasonal and extends from April through November.

3. On September 17, 2022 at approximately 5:30 p.m., Claimant was working and was carrying a case of water bottles down the stairs of a bus when she missed the last two steps and fell down landing on the concrete twisting her right knee. She immediately felt pain and was limping. Prior to the incident, Claimant had no pain in her right knee. In the six month period prior to her fall, Claimant's knee was fine. She was able to hike five times per week from 3 to 5 miles per day. She also went on a hiking trip to Switzerland in the mountains in August of 2022 for 2 ½ weeks. She was able to hike 70 to 80 miles over the trip. She had no knee problems during the trip or when she returned.

4. Claimant reported the injury immediately to [Redacted, hereinafter LD], her manager for that day. LD[Redacted] told her to go see a doctor but did not specify a doctor. The Claimant went to the [Redacted, hereinafter OM] Center Urgent Care on September 19, 2022 and saw Dr. Cindy Lockett. The chart note for that date states: "Here with a work comp right knee injury. Pt tourguide for [Redacted, hereinafter RC] and was carrying case of water off bus at the time of injury. Acute discomfort after missing the last step of a bus and twisting her right knee when she fell. No other trauma from fall. Did not break skin. Able to wiggle toes and no numbness or tingling. . . Patient does have a history

[1] The issue of average weekly wage was reserved pending exchange of information regarding concurrent employment.

of chronic knee troubles has underlying ANA positivity and connective tissue disorder for which she is been under rheumatological care. Chronic knee discomfort and osteopenia. Most recent x-rays from just over a year ago were normal. Gets cortisone shots in right knee through Ortho MD – last shot 8 months ago and doing OK." (Respondents Exhibit G p. 81). Dr. Lockett diagnosed Claimant with a right knee strain. Dr. Lockett provided restrictions of walking and standing less than an hour, no kneeling or squatting and no climbing ladders. Claimant was allowed to use a cane or crutches. She was not allowed to drive while wearing the splint that had been prescribed. Dr. Lockett referred Claimant to Dr. McNulty, a workers compensation doctor, also with OM[Redacted] at a different location.

5. Dr. McNulty reviewed the x-rays taken by Dr. Lockett. Dr. McNulty told Claimant to rest and return in three weeks. When Claimant did not improve after the three weeks, Dr. McNulty referred Claimant for an MRI. He also prescribed physical therapy which she received from Synergy Physical Therapy. He also referred her to an orthopedic doctor. She selected Dr. Feign, whom she had seen in the past for a pulled muscle in her right knee. Dr. Feign had previously provided two cortisone injections for her right knee. One of the injections was in March 2022 and the prior one was a year before that. The injections did not help her pain. At some point in time, prior to the work incident, Dr. Feign told the Claimant that she would eventually need a right knee replacement. However there were no immediate plans for that procedure. After the work incident, Dr. Feign recommended a total knee replacement of Claimant's right knee. The workers compensation carrier denied the surgery.

6. Claimant underwent a total knee replacement on November 29, 2022, paid for by Medicare. After surgery, Claimant had physical therapy with Action Potential. Dr. Feign prescribed physical therapy but left the selection of the physical therapist up to Claimant.

7. Claimant was seen by Respondents' Independent Medical Examiner, Dr. Schwappach, post-surgery on April 7, 2023. Dr. Schwappach is an orthopedic surgeon who specializes in hips, knees and extremities. Dr. Schwappach noted that Claimant had significant prior symptoms and treatment to her right knee. She had a diagnosis of bilateral osteoarthritis in her knees. It was his opinion that Claimant sustained a right knee strain when she stepped off the bus. He also opined that there is no evidence that the incident accelerated her arthritis.

8. In his testimony, he reviewed the findings on the MRI performed on October 26, 2022. He explained that the finding of a full-thickness cartilaginous defect along the lateral femoral condyle is describing where the cartilage is gone and has been worn away. It is not an acute finding and is a long standing injury and the edema underneath it is consistent with edema that you would find from arthritis in the knee. It is the response of the bone when you do not have the cartilage protecting it. Also, the meniscus is morselized similar to the grinding when using a mortar and pestle. That is also an indication that this is not due to an acute injury but instead due to degeneration over a longer period of time.

9. At the time of the incident, Claimant had concurrent employment with [Redacted, hereinafter AS], [Redacted, hereinafter CI] and [Redacted, hereinafter IT]. Claimant did similar work as a program coordinator for these other employers as she did for RC[Redacted]. AS[Redacted] paid the Claimant $30 per hour with an average of 10 hours per week. She returned to work for AS[Redacted] in early May, 2023. CI[Redacted] paid Claimant $30 per hour and Claimant also worked about 10 hours per week on average. She returned to work for CI[Redacted] in early May. Claimant was paid $35 per hour with IT[Redacted]. She would work approximately 5 hours per week for them. She had not returned to work for IT[Redacted] as of the date of the hearing.

10. Claimant did not return to work for RC[Redacted] until May, 2023.

11. Due to the surgery, Claimant has a visible disfigurement to the body consisting of a scar on her right knee which is a thin line mostly whitish in color 1/8 inch in width and 8 inches long.

CONCLUSIONS OF LAW

A. Compensability

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

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

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

Claimant proved she suffered a compensable injury to her right knee on September 17, 2022. Claimant’s testimony regarding the incident and onset of symptoms after the incident was credible. These facts are sufficient to establish a compensable claim. The real issue is whether the fall on September 17, 2022 resulted in the need for a total knee replacement of whether it simply caused a strain, as initially diagnosed, and the total knee surgery was due to Claimant’s preexisting condition. Claimant had treated with Dr. Feign previously and Dr. Feign did tell Claimant that she would eventually need a knee replacement for her right knee. Dr. Schwappach credibly testified that the need for the total knee replacement was due to the natural progression of the degenerative process of the knee and was not due to the fall from the steps of the bus.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant’s entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Having found that the Claimant’s knee strain is compensable, the Claimant is entitled to medical benefits for the treatment provided by OM[Redacted] and Dr. Lockett and Dr. McNulty as well as the physical therapy provided based on their referral. However, Respondents are not liable for the total knee surgery or the treatment following that surgery since the need for surgery was not caused by the fall on September 17, 2022.

C. Temporary Disability benefits

The Claimant was given restrictions following the injury that prevented her from returning to work and is entitled to temporary disability benefits beginning September 18, 2022 until terminated by law.

D. Disfigurement

Since the scarring the Claimant has on her knee was due to the non-compensable total knee replacement surgery, no disfigurement is awardable.

ORDER

It is therefore ordered that:

1. Claimant's claim for her right knee strain on September 17, 2022 is compensable.

2. Respondents are not liable for the total knee surgery or the post-operative physical therapy.

3. Claimant is entitled to temporary disability benefits beginning on September 17, 2022.

4. Respondents are liable for the medical treatment Claimant received prior to the total knee surgery.

5. The request for disfigurement award is denied and dismissed.

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

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

DATED: August 8, 2023

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge

Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-202-999-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on December 14, 2021.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her left shoulder injury including the left shoulder surgery recommended by Nirav R. Shah, M.D.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $535.55.

2. Claimant withdrew with prejudice the issue of Temporary Total Disability (TTD) benefits from the date of injury through the hearing date with prejudice.

FINDINGS OF FACT

1. Employer operates grocery stores throughout Colorado. Claimant was employed as a cashier for Employer. Claimant's job duties sometimes required her to work a register in a grocery aisle. At other times she worked on the self-checkout, where she assisted customers as they scanned their groceries for payment at several terminals.

2. On December 14, 2021 Claimant was working at the self-checkout lanes assisting customers as they scanned their groceries. However, she became involved in an altercation with a male customer. A woman had entered the store in a wheelchair and Claimant offered to push her. Claimant testified that the woman and/or her son felt Claimant was pushing her too fast. When the son demanded to push his mother, a dispute ensued. As the male customer was leaving the store and Claimant was walking past, he "shoulder-checked" her. He specifically struck his right shoulder against Claimant's left shoulder. Claimant described the customer who struck her was a large male between six feet five inches and six feet nine inches tall. The incident was not captured on store security cameras because remodeling had disabled the cameras in that area.

3. Claimant testified that she immediately felt left shoulder pain at the level of a 10 out of 10. She did not doubt that she had sustained an extremely painful shoulder injury Claimant specified that "he hit me where I transferred my shoulder, so I stepped back, after he hit me, it jarred me back. I didn't hit the ground." She remarked that [Redacted, hereinafter JH] and other managers came over to break up the altercation. Claimant commented that no one asked her if she wanted to file a police report. She noted that Employer also never asked her if

she was injured or required medical care.

4. [Redacted, hereinafter MC] testified that on December 14, 2021 he was the Pickup Supervisor for Employer. He witnessed the interaction between Claimant and the male customer because he was standing a few feet away from the incident. MC[Redacted] remarked that Claimant did not stumble backwards, and that she acted "more as a surprise that that happened." He testified the customer lowered his shoulder and checked Claimant while they were next to him. "It was a shoulder check." MC[Redacted] commented, that after the contact, the customer and Claimant got "face to face, even close, almost to the point where they kind of wanted to push or fight." He described the customer as a bigger male, who was about six feet tall and over 200 pounds. MC[Redacted] noted Claimant did not state she was injured after the incident.

5. [Redacted, hereinafter JB] explained that he was the Front-end Supervisor for Employer on December 14, 2021. He was one of Claimant's supervisors and witnessed the altercation. JB[Redacted] commented that the impact was not hard and neither party stumbled. In fact, they both immediately "move[d] closer right in front of the face." JB[Redacted] stated that he and Store Manager [Redacted, hereinafter FD] spoke to Claimant and asked her if she needed any medical assistance. Claimant responded that she did not. He also noted that he talked to Claimant several times in the days following the incident "making sure that she was okay and that she felt safe at work." However, Claimant never mentioned she was injured or wanted medical care.

6. FD[Redacted] recalled that he spoke to Claimant shortly after the incident on December 14, 2021. He inquired whether Claimant was injured or if she needed medical assistance. Claimant replied she was not injured and did not need medical assistance. FD[Redacted] also remarked that he asked Claimant on subsequent occasions whether she was injured, but Claimant never mentioned any injuries. He also asked Claimant whether she wanted to file a Workers' Compensation incident report, but Claimant declined.

7. Claimant recounted that she was "positive" she did not finish her shift on December 14, 2021 because FD[Redacted] sent her home after the altercation. However, Claimant's testimony is inconsistent with the testimony of JB[Redacted] and Employer's time cards. JB[Redacted] testified that Claimant finished her shift on December 14, 2021. Notably, Employer's calendar reflects that Claimant was scheduled to work from 2:30 p.m. to 11:00 p.m. on December 14, 2021. Her time card shows that she punched out at 11:01 p.m. on December 14, 2021.

8. Claimant testified that she remained in "10 out of 10" pain from December 14, 2021 for the following several weeks. She remarked she has been unable to use her left arm after the injury. However, Claimant's testimony again is inconsistent with the testimony of Employer witnesses. JB[Redacted] and FD[Redacted] specifically stated they saw Claimant on a daily basis and she did not exhibit any difficulties in using her arm or performing normal job duties. Notably, Claimant never appeared injured and repeatedly stated she did not need medical care.

9. On December 21, 2021 Incident report [Redacted, hereinafter IT] was prepared

by the [Redacted, hereinafter FP]. The report documented that on December 20, 2021 Investigator [Redacted, hereinafter FP] was contacted by Claimant regarding an assault that occurred at Employer's store on December 14, 2021. Claimant described that she was assaulted by a customer and injured her shoulder. The Incident report reflects a classification of harassment. A [Redacted, hereinafter FC] transcript reflects that the customer was later convicted of the original charge of harassment.

10. FD[Redacted] testified that on January 5, 2022 Claimant was involved in another altercation with a customer. Claimant "ma[d]e a move" toward the individual, but did not actually swing at the customer. FD[Redacted] remarked that Claimant did not appear to be injured at all during the January 5, 2022 altercation. Because of the incident, Claimant was suspended from employment pending an investigation.

11. On January 7, 2022 FD[Redacted] met with Claimant to discuss her suspension. Notably, Claimant did not make any request for medical treatment for her left shoulder injury at the meeting.

12. On January 10, 2022 Claimant sought medical treatment from her personal primary care clinic at Salud Family Health Centers. Michael Beer, PA-C noted Claimant was a 62-year-old female with left shoulder pain suffered at work about three weeks ago. He recounted that Claimant was hit in the shoulder by an angry customer. PA-C Beer assessed Claimant with acute pain of the left shoulder.

13. FD[Redacted] testified that the first time Claimant requested any medical treatment was on January 12, 2022. He made a specific written note of the phone call because he was "concerned that there was no previous mention of her having any injury in regards" to the December 14, 2021 incident.

14. On January 14, 2022 Employer completed a Work Related Injury Report Form, Claimant completed the Employee's portion of the Form and signed the Workers' Compensation Designated Medical Provider List. FD[Redacted] stated that it is Employer's protocol to complete the paperwork when an associate reports an injury. He would have completed the documentation on December 14, 2021 if Claimant had reported an injury or wanted medical treatment.

15. On January 18, 2022 Claimant visited Katherine Drapeau, DO. at Authorized Treating Provider (ATP) Workwell for an examination. The patient history documented Claimant was assaulted by a large man who struck her in the shoulder with his shoulder. Claimant did not feel pain right away but experienced symptoms by the evening. She complained of continued pain in the anterior left shoulder that radiated down her upper arm and sometimes into the left base of her neck. Dr. Drapeau diagnosed Claimant with an unspecified strain of the left shoulder joint. She assigned work restrictions of no lifting over five pounds. Claimant was not permitted to cashier but could work at the self-checkout. Dr. Drapeau ordered an MRI of Claimant's left shoulder and referred her to physical therapy. The objective findings were consistent with a work-related mechanism of injury.

16. On January 24, 2022 Claimant visited Bruce B. Cazden, M.D., at Workwell.

Claimant reported persistent left shoulder pain and limited range of motion. Dr. Cazden diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. He summarized that, with the information available at the time, there was more than 50% probability that Claimant suffered a work-related injury.

17. On January 28, 2022 Claimant underwent a left shoulder MRI. The imaging showed a complete disruption of the supraspinatus tendon with medial tendon retraction accompanied by mild corresponding muscle atrophy. The radiologist's impression was a full-thickness supraspinatus tendon tear with secondary findings consistent with internal impingement.

18. On January 31, 2022 Claimant visited Teresa Ayandale, PA-C, at Workwell. PA-C Ayandale noted the MRI revealed a full thickness supraspinatus tear. Claimant reported no prior injury and had no pain symptoms prior to the assault. PA-C Ayandale diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. She summarized there was a greater than 50% probability Claimant suffered a work-related injury and referred Claimant for an orthopedic evaluation.

19. On February 2, 2022 Claimant visited orthopedic surgeon Nirav R. Shah, M.D. for an evaluation. The patient history documented that Claimant's shoulder was bumped by an angry customer on December 14, 2021. Dr. Shah recounted that Claimant suffered sudden, severe shoulder pain that had lasted for seven weeks. Based on a physical examination and review of the left shoulder MRI, Dr. Shah diagnosed Claimant with left shoulder impingement and a complete tear of the left rotator cuff. On February 3, 2022 Dr. Shah requested prior authorization for a left shoulder rotator cuff repair.

20. On March 14, 2022 Claimant followed up with Myles Cope, M.D. from Workwell. He continued Claimant's work restrictions of no lifting over five pounds and limited her to working the self-checkout line. Dr. Cope characterized Claimant's symptoms as an aching pain at a level of 3/10 in her left shoulder. He diagnosed Claimant with an unspecified sprain of the left shoulder joint and noted that the objective findings were consistent with a work-related mechanism of injury. However, Dr. Cope did not recommend surgery for Claimant's condition.

21. On March 28, 2022 F. Mark Paz, M.D., conducted an Independent Medical Examination of Claimant. He reviewed Claimant's medical history and conducted a physical examination. Dr. Paz documented that he reviewed the position of Claimant's upper extremities during the altercation on December 14, 2021. She confirmed that her upper extremities were at her side while she was walking at the time of contact. Dr. Paz explained that the surpraspinatus tendon begins to function at 60 degrees to approximately 120 degrees. The location of Claimant's arms was important when determining whether her supraspinatus tear was caused by the incident on December 14, 2021. Dr. Paz reasoned that Claimant's arms were at her sides when the contact occurred and thus located at zero degrees. Because Claimant's arm was located at zero degrees, Dr. Paz remarked that there would be no significant load tension across the supraspinatus tendon. He therefore concluded it was not medically probable that the incident on December 14, 2021 caused an acute rotator cuff tear.

22. Although Claimant stated that she experienced left shoulder pain shortly after the

December 14, 2021 event, all Employer witnesses at hearing commented that she never mentioned an injury or requested medical care after the incident. Dr. Paz explained that Claimant's lack of left shoulder pain immediately after the altercation rendered it medically improbable that Claimant sustained an acute supraspinatus tendon tear on the date. Importantly, Dr. Paz testified that the findings on the January 28, 2022 MRI revealed retraction of the supraspinatus tendon and muscle atrophy only 45 days after the incident on December 14, 2021. However, he explained that muscle atrophy does not develop in 45 days, but takes more than three months to occur. Therefore, it is medically probable that Claimant's supraspinatus tear was not caused by the incident on December 14, 2021.

23. Dr. Paz explained that the incident on December 14, 2021 also did not aggravate Claimant's pre-existing full-thickness rotator cuff tear. He remarked that "if there's already a torn, retracted, atrophied supraspinatus muscle, you can't aggravate that. It's … the end result, you can't aggravate it anymore." Considering all of the medical evidence, including the position of Claimant's arm at the time of impact, the lack of immediate pain complaints, and the existence of muscle atrophy on MRI only 45 days after the December 14, 2021 event, Dr. Paz concluded that it is more likely than not that Claimant's supraspinatus tendon tear was a degenerative condition caused by the internal impingement seen on the MRI.

24. Claimant has established it is more probably true than not that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on December 14, 2021. Initially, Claimant explained that, during an altercation at her store with a male customer, he struck his right shoulder against her left shoulder. Employees MC[Redacted] and JB[Redacted] witnessed the incident. Furthermore, on December 21, 2021 Claimant filed a report of the incident with the FP[Redacted]. She described that she was assaulted by a customer and injured her shoulder.

25. On January 10, 2022 Claimant sought medical treatment from her personal primary care clinic at Salud Family Health Centers. PA-C Beer recounted that about three weeks earlier, Claimant was hit in the shoulder by an angry customer. He assessed Claimant with acute pain of the left shoulder. On January 14, 2022 Employer completed a Work Related Injury Report Form, Claimant completed the Employee's portion of the Form, and signed the Workers' Compensation Designated Medical Provider List. On January 18, 2022 Dr. Drapeau at ATP Workwell documented Claimant was assaulted by a large man who hit her in the shoulder with his shoulder. Dr. Drapeau diagnosed Claimant with an unspecified strain of the left shoulder joint and assigned work restrictions. She noted the objective findings were consistent with work-related mechanism of injury. On January 24, 2022 Dr. Cazden, M.D., at Workwell also diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. He summarized that, with the information available at the time, there was a greater than 50% probability Claimant suffered a work-related injury. PA-C Ayandale subsequently diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. She also summarized there was more than a 50% probability Claimant suffered a work-related injury. Dr. Cope at Workwell later diagnosed Claimant with an unspecified sprain of the left shoulder joint. He also noted that the objective findings were consistent with a work-related mechanism of injury.

26. The record reveals that multiple medical providers at Workwell diagnosed

Claimant with an unspecified strain of the left shoulder joint and determined there was a greater than 50% probability that Claimant suffered a work-related injury. Moreover, Employer witnesses observed the incident and Claimant filed a police report describing the altercation. Although Claimant did not seek medical treatment immediately after the December 14, 2021 incident, the record reveals that a customer "shoulder-checked" her left shoulder during an altercation at Employer's store. Claimant thus suffered an unspecified strain of the left shoulder joint while working for Employer on December 14, 2021. Accordingly, Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

27. Claimant has demonstrated it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment for her left shoulder injury. The record reveals that Claimant received reasonable medical treatment in the form of examinations, imaging and physical therapy for an unspecified strain of her left shoulder. Notably, the treatment recommendations from Claimant's ATPs at Workwell were accompanied by written opinions that Claimant's injuries were work-related. Moreover, the referral to Dr. Shah was reasonable based on Claimant's left shoulder MRI that revealed a full-thickness supraspinatus tendon tear with secondary findings consistent with internal impingement. After reviewing Claimant's left shoulder MRI, Dr. Shah diagnosed Claimant with left shoulder impingement and a complete tear of the left rotator cuff. He then requested prior authorization for a left shoulder rotator cuff repair. However, based on a review of the medical records and the persuasive opinion of Dr. Paz, the left shoulder surgery requested by Dr. Shah is not causally related to the December 14, 2021 work incident.

28. Initially, multiple medical providers at Workwell diagnosed Claimant with an unspecified strain of the left shoulder joint. They determined there was more than a 50% probability Claimant suffered a work-related injury. However, the providers did not assess whether Claimant's torn left rotator cuff was causally related to the December 14, 2021 altercation. They did not consider whether the mechanism of injury described by Claimant was sufficient to cause a rotator cuff tear. In fact, at a March 14, 2022 visit after the MRI, Dr. Cope diagnosed Claimant with an unspecified sprain of the left shoulder joint and noted the objective findings were consistent with a work-related mechanism of injury. However, he did not recommend surgery for Claimant's condition. Finally, Dr. Shah failed to conduct a causality assessment in considering whether the proposed surgery for Claimant's left rotator cuff tear was related to the December 14, 2021 work incident.

29. Dr. Paz reviewed Claimant's medical history and conducted a physical examination as part of an independent medical examination. He reviewed the position of the Claimant's upper extremities during the altercation on December 14, 2021. Claimant confirmed that the upper extremities were at her side while she was walking at the time of contact. Dr. Paz explained that the surpraspinatus tendon begins to function at 60 degrees to approximately 120 degrees. Because Claimant's arms were at her sides when the contact occurred, they were located at zero degrees. Dr. Paz reasoned that there was thus no significant load tension across the supraspinatus tendon. Therefore, Dr. Paz concluded it was not medically probable that the incident on December 14, 2021 caused an acute rotator cuff tear.

30. Importantly, Dr. Paz testified that the findings on the January 28, 2022 MRI

revealed retraction of the supraspinatus tendon and muscle atrophy only 45 days after the incident on December 14, 2021. However, he explained that muscle atrophy does not develop in 45 days, but takes more than three months to occur. Therefore, it is medically probable that Claimant's supraspinatus tear was not caused by the incident on December 14, 2021. Finally, Dr. Paz explained that the incident on December 14, 2021 also did not aggravate Claimant's pre-existing full-thickness rotator cuff tear because it existed before the work incident. The supraspinatus muscle was already torn, retracted, and atrophied at the time of the work altercation. Considering all of the medical evidence, including the position of Claimant's arm at the time of impact and the existence of muscle atrophy on MRI only 45 days after the December 14, 2021 incident, Dr. Paz persuasively concluded that it is more likely than not that Claimant's supraspinatus tendon tear was a degenerative condition caused by internal impingement.

31. Based on the medical records and persuasive opinion of Dr. Paz, the surgery requested by Dr. Shah on February 3, 2022 is not causally related to Claimant's December 14, 2021 work incident. The record reveals that Claimant was injured at work when a male customer struck his right shoulder against her left shoulder. Claimant has received reasonable, necessary and causally related medical treatment for an unspecified strain of her left shoulder. She may continue to receive reasonable, necessary and causally related medical treatment for the injury. However, the medical records do not reflect that Claimant suffered a left rotator cuff tear during the incident. As noted by Dr. Paz, Claimant likely suffered from a pre-existing, degenerative left shoulder condition unrelated to her work activities. Claimant's employment thus did not aggravate, accelerate or combine with her pre-existing condition to produce the need for surgical intervention. Accordingly, Claimant's request for the left shoulder rotator cuff repair surgery recommended by Dr. Shah is denied and dismissed.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See*

Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

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

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

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

7. As found, Claimant has established by a preponderance of the evidence that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on December 14, 2021. Initially, Claimant explained that, during an altercation at her store with a male customer, he struck his right shoulder against her left shoulder. Employees MC[Redacted] and JB[Redacted] witnessed the incident. Furthermore, on December 21, 2021 Claimant filed a report of the incident with the FP[Redacted]. She described that she was assaulted by a customer and injured her shoulder.

8. As found, on January 10, 2022 Claimant sought medical treatment from her personal primary care clinic at Salud Family Health Centers. PA-C Beer recounted that about three weeks earlier, Claimant was hit in the shoulder by an angry customer. He assessed Claimant with acute pain of the left shoulder. On January 14, 2022 Employer completed a Work Related Injury Report Form, Claimant completed the Employee's portion of the Form, and signed the Workers' Compensation Designated Medical Provider List. On January 18, 2022 Dr. Drapeau at ATP Workwell documented Claimant was assaulted by a large man who hit her in

the shoulder with his shoulder. Dr. Drapeau diagnosed Claimant with an unspecified strain of the left shoulder joint and assigned work restrictions. She noted the objective findings were consistent with work-related mechanism of injury. On January 24, 2022 Dr. Cazden, M.D., at Workwell also diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. He summarized that, with the information available at the time, there was a greater than 50% probability Claimant suffered a work-related injury. PA-C Ayandale subsequently diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. She also summarized there was more than a 50% probability Claimant suffered a work-related injury. Dr. Cope at Workwell later diagnosed Claimant with an unspecified sprain of the left shoulder joint. He also noted that the objective findings were consistent with a work-related mechanism of injury.

9. As found, the record reveals that multiple medical providers at Workwell diagnosed Claimant with an unspecified strain of the left shoulder joint and determined there was a greater than 50% probability that Claimant suffered a work-related injury. Moreover, Employer witnesses observed the incident and Claimant filed a police report describing the altercation. Although Claimant did not seek medical treatment immediately after the December 14, 2021 incident, the record reveals that a customer "shoulder-checked" her left shoulder during an altercation at Employer's store. Claimant thus suffered an unspecified strain of the left shoulder joint while working for Employer on December 14, 2021. Accordingly, Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

12. As found, Claimant has demonstrated by a preponderance of the evidence that

she is entitled to receive reasonable, necessary and causally related medical treatment for her left shoulder injury. The record reveals that Claimant received reasonable medical treatment in the form of examinations, imaging and physical therapy for an unspecified strain of her left shoulder. Notably, the treatment recommendations from Claimant's ATPs at Workwell were accompanied by written opinions that Claimant's injuries were work-related. Moreover, the referral to Dr. Shah was reasonable based on Claimant's left shoulder MRI that revealed a full-thickness supraspinatus tendon tear with secondary findings consistent with internal impingement. After reviewing Claimant's left shoulder MRI, Dr. Shah diagnosed Claimant with left shoulder impingement and a complete tear of the left rotator cuff. He then requested prior authorization for a left shoulder rotator cuff repair. However, based on a review of the medical records and the persuasive opinion of Dr. Paz, the left shoulder surgery requested by Dr. Shah is not causally related to the December 14, 2021 work incident.

13. As found, initially, multiple medical providers at Workwell diagnosed Claimant with an unspecified strain of the left shoulder joint. They determined there was more than a 50% probability Claimant suffered a work-related injury. However, the providers did not assess whether Claimant's torn left rotator cuff was causally related to the December 14, 2021 altercation. They did not consider whether the mechanism of injury described by Claimant was sufficient to cause a rotator cuff tear. In fact, at a March 14, 2022 visit after the MRI, Dr. Cope diagnosed Claimant with an unspecified sprain of the left shoulder joint and noted the objective findings were consistent with a work-related mechanism of injury. However, he did not recommend surgery for Claimant's condition. Finally, Dr. Shah failed to conduct a causality assessment in considering whether the proposed surgery for Claimant's left rotator cuff tear was related to the December 14, 2021 work incident.

14. As found, Dr. Paz reviewed Claimant's medical history and conducted a physical examination as part of an independent medical examination. He reviewed the position of the Claimant's upper extremities during the altercation on December 14, 2021. Claimant confirmed that the upper extremities were at her side while she was walking at the time of contact. Dr. Paz explained that the surpraspinatus tendon begins to function at 60 degrees to approximately 120 degrees. Because Claimant's arms were at her sides when the contact occurred, they were located at zero degrees. Dr. Paz reasoned that there was thus no significant load tension across the supraspinatus tendon. Therefore, Dr. Paz concluded it was not medically probable that the incident on December 14, 2021 caused an acute rotator cuff tear.

15. As found, importantly, Dr. Paz testified that the findings on the January 28, 2022 MRI revealed retraction of the supraspinatus tendon and muscle atrophy only 45 days after the incident on December 14, 2021. However, he explained that muscle atrophy does not develop in 45 days, but takes more than three months to occur. Therefore, it is medically probable that Claimant's supraspinatus tear was not caused by the incident on December 14, 2021. Finally, Dr. Paz explained that the incident on December 14, 2021 also did not aggravate Claimant's pre-existing full-thickness rotator cuff tear because it existed before the work incident. The supraspinatus muscle was already torn, retracted, and atrophied at the time of the work altercation. Considering all of the medical evidence, including the position of Claimant's arm at the time of impact and the existence of muscle atrophy on MRI only 45 days after the December 14, 2021 incident, Dr. Paz persuasively concluded that it is more likely than not that Claimant's supraspinatus tendon tear was a degenerative condition caused by internal impingement.

16. As found, based on the medical records and persuasive opinion of Dr. Paz, the surgery requested by Dr. Shah on February 3, 2022 is not causally related to Claimant's December 14, 2021 work incident. The record reveals that Claimant was injured at work when a male customer struck his right shoulder against her left shoulder. Claimant has received reasonable, necessary and causally related medical treatment for an unspecified strain of her left shoulder. She may continue to receive reasonable, necessary and causally related medical treatment for the injury. However, the medical records do not reflect that Claimant suffered a left rotator cuff tear during the incident. As noted by Dr. Paz, Claimant likely suffered from a pre-existing, degenerative left shoulder condition unrelated to her work activities. Claimant's employment thus did not aggravate, accelerate or combine with her pre-existing condition to produce the need for surgical intervention. Accordingly, Claimant's request for the left shoulder rotator cuff repair surgery recommended by Dr. Shah is denied and dismissed.

ORDER

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

1. On December 14, 2021 Claimant suffered an unspecified strain of the left shoulder joint while working for Employer.

2. Claimant has received reasonable, necessary and causally related medical treatment for an unspecified strain of her left shoulder. She may continue to receive reasonable, necessary and causally related medical treatment for the injury.

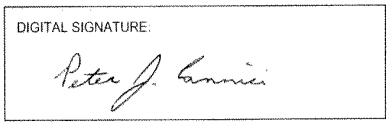
3. Claimant's request for the left shoulder rotator cuff repair surgery recommended by Dr. Shah is denied and dismissed.

4. Claimant earned an AWW of $535.55.

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

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

DATED: August 8, 2023.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-219-204-002

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Respondents are entitled to reduce Claimant's indemnity benefits by 50% for willful violation of a safety rule pursuant to section 8-42-112(1)(b), C.R.S.

FINDINGS OF FACT

1. Claimant has been employed by Employer for approximately thirteen years. Employer is a roofing company that employs approximately 430 employees, the majority of which are roofers and/or foremen. As relevant to the present claim, Claimant served in the role of service foreman, and received safety training from Employer. Claimant was designated as a "competent person," meaning he completed a 30-hour OSHA safety course and was trained to identify safety issues. In his role as a foreman and "competent person," Claimant was authorized to enforce safety rules, and take corrective action to remedy safety issues on the job site.

2. During the relevant time frame, Employer had in place a safety rule that required employees to maintain three points of contact when ascending or descending ladders. Claimant testified at hearing that he was aware of the rule and agreed that it was Employer's policy, and that the rule was enforced. Although the precise terms of the rule are not explicitly set forth in Employer's documentation, the parties agree the rule requires that employees ascending or descending ladders maintain three points of contact with the ladder at all times (*i.e.*, two feet and one hand; or two hands and one foot). The parties dispute what constitutes a "point of contact."

3. On October 7, 2022, Claimant was working on a jobsite in Colorado Springs. During the course of the day, Claimant made the decision to purchase coffee for the crew he was overseeing. The crew was working on a roof, which was accessed through a fixed, vertical ladder permanently attached to the side of the building. The ladder extended approximately twenty feet to the roof area where the crew was working. Claimant purchased cups of coffee from a nearby convenience store, and made the decision to deliver the drinks to the crew on the roof.

4. Claimant ascended the fixed ladder with a tray containing three cups of coffee in his right hand. Claimant's right hand and fingers were not grasping the rungs of the ladder, but his right wrist was "hooked" around the vertical rail on the side of the ladder while holding the tray of coffee in his right hand. Claimant testified that while ascending the ladder, he slid his right wrist/hand up the ladder and his left hand along outside of the other vertical rail, when his left hand slipped off the ladder, causing him to fall to the ground from approximately 15 feet. As a result of the fall, Claimant sustained injuries to both ankles and his left wrist. Claimant testified that he believed he complied with the three-points rule because his right wrist maintained contact with the vertical side of the

ladder while ascending, and that the tray of coffee did not cause him to be unbalanced. Given the vertical orientation of the ladder, the ALJ finds credible that Claimant was able to use his right hand/wrist to assist him in ascending the ladder.

5. Employer's safety manager, [Redacted, hereinafter GD] testified at hearing. GD[Redacted] testified that the three-points rule requires that employees maintain contact with the ladder with either two feet and one hand, or two hands and one foot. He testified that the rule requires that one hand be grasping a rung of the ladder. He testified that it would not be possible to comply with the rule while carrying an object in one hand while climbing a ladder. GD[Redacted] testified that he did not believe that the way the Claimant ascended the fixed ladder on October 7, 2022 (*i.e.*, carrying a tray of coffee in one hand) complied with the three-points rule, because Claimant was not grasping a rung with his right hand or maintaining contact. GD[Redacted] testified that Claimant was disciplined for failure to maintain three points of contact while ascending the ladder on October 7, 2022. GD[Redacted] testified that it is very seldom that he sees an employee not complying with the three-points rule without counseling them. He later testified that he always counsels employees he observes not complying with the rule, and that there had never been an exception.

6. As part of its operations, Employer issues "Infraction Notices" for violations of safety policies. (Ex. B). The "Infraction Notices' document the "Discipline Stage" for each infraction notice, which includes "Written Warning" and "Verbal." Four of the infraction notices document verbal discipline. From this the ALJ infers that, if Employer provided employees verbal warnings or verbal counseling, those actions would be documented in Infraction Notices.

7. Although GD[Redacted] testified the three-points rule was enforced, Respondents' exhibits demonstrate that Employer has issued only one infraction notice citing an employee for violation of this rule -- the infraction notice for Claimant's October 7, 2022 injury. Respondents' Exhibit B contains six additional "Infraction Notices" in which employees were disciplined for violating ladder safety rules between April 2019 and December 2022. None of these cite employees for violation of the three-points rule. Two infraction notices (*i.e.*, those issued on October 8, 2022, and December 12, 2022) include photographs of employees standing on ladders without maintaining three points of contact. Given the lack of Infraction Notices documenting disciplinary actions related to the three-points rule, the ALJ does not find credible GD's[Redacted] testimony that he always, without exception, counsels employees for violation of the three-points rule.

8. Employer's safety manual (Ex. 3), includes a section entitled "Job Site Safety - Ladder Safety." This section of the manual (Ex. 3, p. 38) advises employees to "Use all portable ladders safely. Properly select, inspect, erect, secure and safely use all ladders." This section does not reference or instruct employees on the three-points rule. The safety manual also defines the responsibilities of foreman (such as Claimant) with respect to safety at Section 12. (Ex. 3, p. 15). This section of the manual does not instruct foremen on the three-points rule. The only written reference to the three-points rule is contained in a slide presentation that GD[Redacted] testified was in OSHA training materials. (Ex. 5). A slide entitled "Climbing the Ladder," states the following "Face the ladder when

going up or down. Use at least one hand to grab the ladder when going up or down. Do not carry any object or load that could cause you to lose balance." (Ex. 5, p. 000194). The evidence was unclear if or when the OSHA presentation was provided to Claimant or other employees.

CONCLUSIONS OF LAW

Generally

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

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

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

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation "Where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." "Under § 8-42-

112(1)(b) it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule." *Horton v. Swift and Company*, W.C. No. 4-779-078 (ICAO, Apr. 21, 2010). A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining v. Indus. Claim Appeals Office*, 907 P.2d 715 (Colo. 1995). However, where an employer does not consistently and sufficiently enforce the rule, the employer effectively acquiesces in employee non-compliance, and therefore may not rely on the rule as a basis for reducing benefits under § 8-42-112 (1)(b), C.R.S. *In re Burd v. Builder Services Group, Inc.*, W.C. No. 5-058-572-01 (ICAO Jul. 9, 2019). "The question of whether the employer permitted noncompliance with its own safety rule and acquiesced in the violation is one of fact for resolution by the ALJ, and her determination must be upheld if supported by substantial evidence in the record." *In re Claim of Ronzon*, W.C. No. 4-914-996-01 (ICAO Nov. 6, 2014).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alvarado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995).

Respondents have failed to establish that Claimant's indemnity benefits should be subjected to a 50% penalty for willful failure to obey a reasonable safety rule. Although the parties agree that Employer had in place a "three-points-of-contact" safety rule, the specific requirements of the rule are in dispute. Respondents contend the rule requires that employees "grasp" the rungs of a ladder with the fingers of at least one hand at all times when ascending or descending. However, Employer's training materials do not reflect the interpretation urged by Respondents. Employer's safety manual does not reference or explain the three-points rule, and thus provides no guidance to employees on compliance. While Ex. 5, the OSHA slide presentation, indicates that employees should "grab" the ladder with at least one hand, it does not require that employees grab the rungs or prohibit employees from carrying objects in one hand while ascending. Claimant credibly testified that he understood the three-points rule to require that the employee maintain contact with the ladder using either two feet and one hand, or two hands and one foot at a time.

Claimant contends it is sufficient that an employee maintain contact with the ladder by "hooking" a wrist around the vertical rail of the ladder. Employer's training and safety materials do not address this issue, and Respondents have failed to establish by credible evidence what, precisely, the "three-points" rule requires.

Employer did not have in place a rule that prohibited employees from carrying objects up a ladder, and trained employees not to carry any object that could cause them to lose their balance. Thus, Employer's policies implicitly permitted employees to carry objects or loads that would not cause them to lose their balance, and if they could maintain three points of contact.

Respondents have also failed to demonstrate that Employer consistently enforced the three-points rule. As found, GD's[Redacted] testimony that he always, without exception, counsels employees who do not follow the three-points rule is not credible. Employer's "Infraction Notices," do not document any employee receiving written or verbal disciplinary action for non-compliance with the three-points rule, other than Claimant. Although Claimant testified that the three-points rule is enforced, given the lack of clarity regarding the terms of the rule, it is unclear what version of the rule was enforced. The lack of enforcement of the three-points rule calls into question whether the Respondents' interpretation of the rule was conveyed to employees, such that an employee would know and understand the conduct that would violate or comply with the rule. Because Employer did not articulate and enforce the three-points rule, Respondents have failed to establish that Claimant knew the rule as Respondents' interpret it and deliberately performed an act forbidden by the rule.

The ALJ also finds credible Claimant's testimony that he maintained three points of contact with the ladder on October 7, 2022, as he understood the rule to require. The ladder from which Claimant fell was vertical and attached to a building, requiring Claimant to climb straight up. Although Claimant has many years' experience climbing ladders, it would be extremely difficult (if not impossible) to ascend a vertical ladder with one hand, while carrying a tray of coffee in the other. Claimant could not likely have ascended the ladder to the height from which he fell without maintaining three points of contact in some meaningful manner, whether it be through hooking his wrist around the vertical rail of the ladder, or grasping a rung with his fingers.

Respondents have failed to establish grounds for reducing Claimant's compensation pursuant to § 8-42-112 (1)(b), C.R.S.

ORDER

It is therefore ordered that:

1. Respondents request to reduce Claimant's compensation by 50% pursuant to § 8-42-112 (1)(b), C.R.S. is denied and dismissed.

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

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

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

DATED: August 8, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-991-178-006

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on November 1, 2022 on issues that included medical benefits that are authorized and reasonably necessary, and penalties as follows:

> Medical benefits ordered by Administrative Law Judge Nemechek March 3, 2022, and July 6, 2022. Failure to pay Claimant and medical providers pursuant to 7/6/2022 ICAO Order, attached, and failure to make any meaningful attempt to arrange payment. $1000 per day since 8/26/2022. Section 8-43-401 (2)(a), CRS Respondents owe 8% of the amount of wrongfully withheld benefits. Respondents have unilaterally changed PTD benefits payment scheduled without Division or Claimant approval. Respondents owe 8% interest on all late direct deposit payments. Section 8-43-401 (2)(a).

Respondent filed a Response to November 1, 2022 Application for Hearing on December 1, 2022 listing as issues reasonably necessary, authorized and related medical benefits. Respondent also listed an affirmative defense to Claimant's alleged penalties as follows:

> C.R.S § 8-43-304(4) in Claimant has not stated with specificity the grounds on which the penalty is being asserted, therefore, pursuant to C.R.S. § 8-43-304(4), Respondents reserve the right to cure any alleged violation, if any, within 20 days of Claimant specifying the violation; statute of limitations. … Respondents properly denied medical treatment consistent with Rule 16…

Claimant's exhibits 1 through 8 were admitted into evidence. Also admitted over Respondent's objection were Claimant's Exhibit 9, Exhibit 10 bates 0001-0003 and 0006 (for purposes of a timeline and date documents were exchanged not for the truth of the matter asserted in the body of the email), Claimant's Exhibits 12 through 15, 17 and 18. This ALJ will take judicial notice of Exhibit 16 as part of the Act. Respondent's exhibits A through C were admitted into evidence.

On March 30, 2023[1] this ALJ issued an Order noting that the issues for hearing were to be bifurcated and that this ALJ would issue a separate Order regarding the issue of authorization of medical provider in this matter. The parties were granted through April 6, 2023 to provide briefs, post-hearing position statements or proposed orders with regard to the bifurcated authorization of medical provider issue.

On April 13, 2023 this ALJ issued a Summary Order on the bifurcated issue of authorization of medical provider determining that selection of authorized provider had passed to Claimant and Claimant selected Dr. Ryan Bozzell. The order was served to the parties on the same day. The Order specified that the parties were required to submit a request for a full order within ten working days of the date of service. Neither party requested a full order pursuant to Section 8-43-215 (1), C.R.S., so the Order issued on April 13, 2023 was final. Claimant's authorized treating provider (ATP) in this matter is now Dr. Bozzell, and any providers within the chain of referral he refers Claimant to are

[1] The order was mistakenly dated December 30, 2023 instead of March 30, 2023.

authorized with regard to Claimant's orthopedic, pulmonary and urological problems related to this July 23, 2015 claim.

The parties were provided through April 21, 2023 to submit post hearing positions statements, briefs or proposed orders on the remaining issues. Following two motions to extend this deadline, the motions were granted and the deadline was extended to May 3, 2023. The proposed Findings of Fact, Conclusions of Law and Order were timely filed.

This ALJ issued Findings of Fact, Conclusions of Law and Order on May 9, 2023, which was served on May 10, 2023 finding Respondent had failed to comply with Nemechek's order of March 2, 2022, ordering Respondent to pay the past due reasonably necessary and related medical benefits, denying interest, and ordering a penalty for failure to comply with the prior order and ordering reasonably necessary medical benefits.

Respondent filed a Petition to Review on May 30, 2023. The Briefing Scheduled was issued on June 8, 2023. Following the granting of an extension of time, Respondents filed Respondents' Brief in Support of Petition to Review on July 5, 2023. OAC also granted Claimant an extension of time. Claimant filed Claimant's Brief in Opposition to Petition to Review on July 25, 2023. This Supplemental and Corrected Findings of Fact, Conclusions of Law and Order follows.

STIPULATIONS OF THE PARTIES

At the time of the hearing on March 29, 2023 Claimant withdrew the penalty with regard to late indemnity benefits. This is considered a stipulation of the parties. Therefore both parties agreed to withdraw exhibits related to this issue, Claimant's Exhibit 11 and Respondent's Exhibit D.

Further, Claimant stipulated to the admission of Respondent's Exhibit E with the following conditions:

A. The exhibit be utilized only as a per unit or per line example of fair costs of the items Claimant itemized in Exhibit No. 17, not to represent the total owed to Claimant and only be utilized to calculate the expenses Claimant has had in the past, not for future costs.

B. Claimant be allowed to testify about her usage of the items enumerated in Claimant's Exhibit 17, including how much she is currently using the items listed and how much she used them in the past as well as how she will be using them in the future.

C. Claimant will, from the March 29, 2023 hearing forward, obtain receipts of all supplies purchased and submit them to Respondent for payment.

D. The bills paid by [Redacted, hereinafter BC] be paid in full by virtue of Sec. 8-42-101(6)(a) & (b), C.R.S.

E. Respondent provide the items listed that Claimant requires and are reasonably necessary or accept the receipt of the costs from Claimant in the future, reimbursing Claimant the full value of what Claimant has paid out of pocket pursuant to Sec. 8-42-101(6)(b).

This ALJ accepted that Exhibit E is not a document that would normally be admitted into evidence, without the laying of foundation, as it is hearsay, and notes that Claimant's conditions are reasonable. Respondent neither acquiesced nor provided sufficient arguments supporting an objection to the stipulation. Respondents noted in the proposed order that Exhibit E was admitted and this ALJ infers from these actions that Respondent conceded to the offered stipulations. The stipulation of the parties is accepted and is part of this order.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Respondent failed to comply with ALJ Nemechek's March 2, 2023 Findings of Fact, Conclusions of Law and Order following closure of the appeal process by July 27, 2022.

II. If Respondent failed to comply with the Order, what are the reasonably necessary and related maintenance medical benefits that Respondent owed to Claimant?

III. If Respondent failed to comply with the Order, whether Claimant proved by a preponderance of the evidence that she is owed eight percent (8%) interest on all benefits past due and owing pursuant to Sec. 8-43-401(2)(a), C.R.S.

IV. If Respondent failed to comply with ALJ Nemechek's March 2, 2022 Order to pay Claimant and medical providers within a reasonable time, whether Claimant proved by a preponderance of the evidence if a penalty is owed pursuant to Sec. 8-43-304 and 8-43-305, C.R.S. and the appropriate penalty, considering the *Demi* test.

FINDINGS OF FACT

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

1. Claimant was 58 years old at the time of the hearing. Claimant was adjudicated permanently and totally disabled after she was injured in the course and scope of her employment with Employer on July 23, 2015.[2] Claimant was working as an assistant produce manager for Respondent-Employer when she was injured while pulling a pallet of heavy bags of potatoes. The pallet began moving very fast and Claimant was thrown into a set of double doors. Claimant then fell on her back and left hip. Claimant initially received conservative medical treatment care, including physical therapy, injections, and medications. However, she continued to experience pain and urinary incontinence, which worsened over time.

2. Claimant continued to have trouble with mobility, function, and urinary incontinence, in addition to low back pain, left lower extremity radicular problems, breathing problems and chronic pain.

[2] Claimant testified that she had been injured on July 24, 2015 but all three of the prior orders issued by other ALJs as well as pleadings submitted all cite to July 23, 2015 as the date of the injury.

3. ALJ Kimberly Turnbow issued Findings of Fact, Conclusions of Law and Order on June 26, 2017 ordering further neurosurgical evaluation with Scott P. Falci, M.D. ALJ Turnbow specifically found that:

> The ALJ is concerned about the possibility of continuing progressive worsening of the urinary incontinence and left leg weakness conditions, and possible right leg weakness and even bowel incontinence as described by Dr. Falci. This ALJ finds and concludes that all reasonable conservative treatment and diagnostics have been exhausted, and is [sic.] that Claimant's conditions are significant and require urgent care. The ALJ notes that Claimant's description of her urinary incontinence was credible and compelling.

4. ALJ Turnbow ordered that:

> Respondents shall pay for a repeat neurosurgical consultation with Dr. Falci and, if he offers a spinal untethering surgery, Respondents shall pay for all reasonable and related pre-operative, operative, and postoperative expenses, according to the Colorado Fee Schedule, that are related to such surgery.

5. Following ALJ Turnbow's decision, Claimant did, in fact, follow up with Dr. Falci and he performed the untethering surgery in 2017. During the surgery her lungs collapsed. Subsequent to the surgery, Claimant developed problems breathing as a consequence of the lung collapse. Claimant also had urinary incontinence as a consequence of her low back injury. Claimant credibly stated that the low back surgery, while it did not solve all her problems with her lumbar spine or her urinary incontinence, and added additional pulmonary issues, the surgery helped her to stand up straight, when she had been bent over due to the pain for a long time. She explained that the surgery was necessary to stop the progression of nerve damage in the spine, going into her lower extremities and bladder problems.

6. On June 11, 2020 ALJ Glen B. Goldman issued Findings of Fact, Conclusions of Law and Order awarding permanent total disability benefits, and stated that "Respondents shall provide Claimant maintenance medical benefits for her back injury and urinary incontinence." ALJ Goldman found that Claimant testified she required the following supplies:

. Incontinence pads, extra heavy, two bags per week, since August 2015.
· Periodic visits with Dr. Paulsen who has assumed direct care.
· Wipes, which she has bought herself.
· Urinary pads for the bed, which she has bought on her own.
· Self-Catheterization supplies.
· Oxygen and oxygen supplies.
· Cane which she bought.
· Grabber which she has bought.
· Large ball, small ball, one and 3-pound weights, balancing pad, recumbent bike recommended by her physical therapist.

7. ALJ Goldman noted that "[D]uring her testimony, Claimant asked for a bathroom break, cried several times, and changed chairs because of discomfort." This ALJ noted similar behavior during her March 29, 2023 hearing, as Claimant was uncomfortable, would frequently shift, tear up during testimony and discussion of her claim, and required breaks.

8. In addition to making a finding that Claimant was permanently and totally disabled, ALJ Goldman found that:

> 53. Claimant's surgery was complicated by a collapsed lung which required her to stay in the hospital about two weeks. (*Exhibit 12, p. 2*).
>
> 54. Due to her work injury, Claimant has become less active, depressed, and unable to control her weight. As a result of her work injury, Claimant has gained approximately 76 pounds.
>
> …
>
> 58. Claimant's urinary incontinence and need for medical treatment for such condition was caused by her work injury when she suffered a contusion to her sacral nerve.
>
> 59. Claimant requires maintenance medical treatment to relieve her from the effects of her work injury and to maintain MMI.
>
> 60. Claimant requires maintenance medical treatment for her back injury and urinary incontinence.

9. On August 25, 2020, Respondent filed a Final Admission of Liability ("FAL") in which it admitted for reasonable necessary and related medical benefits for Claimant's back injury and urinary incontinence pursuant to ALJ Goldman's Order.

10. ALJ Timothy L. Nemechek issued a Summary Order on November 26, 2021 ordering as follows:

> 1. Claimant established by a preponderance of the evidence that she is entitled to maintenance medical benefits under the Colorado Workers' Compensation Act.
>
> 2. Respondents shall provide medical benefits to Claimant required to treat the effects of her work injury and to maintain MMI, pursuant to the Colorado Workers' Compensation Medical Fee schedule. Specifically, **Respondent shall pay** for the following:
>
> - All medical supplies related to Claimant's urinary incontinence (including catheters, small and large wipes).
> - Oxygen concentrator (reimbursement for expenses previously incurred).
> - CPAP machine and supplies (including cannula, tubing mask/headgear).
> - The walking cane, 4-wheel walker, wheelchair.
> - Exercise equipment (large and small exercise balls, 1 and 3 pound weights, treadmill, exercise bands, balancing pad, and recumbent bike), [reimbursement for expenses previously incurred].
>
> 3. Claimant's request for a one-year gym membership is denied and dismissed.[3]

[3] This was denied because Claimant was no longer in the Granby, Colorado area and had moved to New Mexico.

11. These findings were supported by a letter issued by Dr. Paulsen dated August 26, 2020 which noted that Claimant would require the following items and that Respondent had denied liability for the medical supplies by letter dated October 6, 2020:

I. Urinary Incontinence Supplies:

1. Urinary pads – 2 bags/week
2. Wipes – 10 bags/year
3. Cloth urinary pads for bed – 8 pads/year

II. Mobility Items:

4. Cane
5. 4 wheel walker
6. Wheelchair
7. Grabber

III. Exercise equipment including:

8. Large exercise ball
9. Small exercise ball
10. One and three pound weights
11. Treadmill
12. Exercise bands
13. Balancing pad
14. Recumbent bike
15. Suction handrails for bathroom
16. Pool therapy access
17. Annual pass to Durango Rec. Center

12. The hearings before ALJ Nemechek, took place on November 10, 2020. At that time Claimant testified that she had moved to New Mexico. The move was specifically noted in both the Summary Order and the Findings of Fact, Conclusions of Law and Order that was issued by ALJ Nemechek on March 2, 2022. This Order was consistent with his prior Summary Order in listing Respondent's same responsibilities to pay.

13. ALJ Nemechek found and ordered that "Counsel for Respondent stipulated to pay for the co-pays of (sic.) incurred by Claimant for urinary incontinence pads totaling $360.00. *This Stipulation was accepted by the Court and is made part of this Order.*" (Emphasis added.) However, Claimant stated that none of the items she listed on the request for reimbursement were part of any reimbursement. Claimant stated that she did not receive the $360.00 for urinary incontinence pads. Further, in examining the medical benefits payment log, no check was issued to Claimant following the date the stipulation was made on November 10, 2020 to the last payment of medical benefits on February 28, 2022. Neither did Respondent provide any evidence of actual payment of the stipulated amount.

14. ALJ Nemechek specified that Dr. Paulsen's testimony that Claimant required supplies for urinary incontinence, assistive devices for mobility and oxygen supplies was persuasive. Further, ALJ Nemechek found Claimant's testimony, that she requires the supplies, persuasive.

15. The process for the hearing before ALJ Nemechek likely started no later than August 2020, as a hearing is set between 80 to 100 days. Claimant stated that she had been waiting before this to receive payments without response. She stated that she had been excited to receive ALJ Nemechek's order with the hope that she would get the care and equipment she needed but after the order was issued nothing happened. She felt disappointed and disheartened when nothing happened. She felt emotionally drained by the process and was depressed, though she had good days and bad days. The same was true of her physical abilities, that she had good and bad days. She has had to take money out of her limited grocery budget for food and other items to get needed supplies that were indispensable, like pads and wipes. She stated she could not do anything in life and had to just wait to be reimbursed to get on with her life. She stated that, while Dr. Paulson had her on antidepressants previously, she no longer had access to them. Claimant was noted to breakdown on multiple occasions, and one of those occasions was while explaining what happened with her hopes of getting some resolution for medical care and reimbursement for items that she required.

16. Respondent appealed the decision of ALJ Nemechek and a Final Order was issued by the Industrial Claim Appeals Office (ICAO) on July 6, 2022 affirming ALJ Nemechek's decision of March 2, 2022. ICAO noted that Respondent had 21 days to file a Notice of Appeal to the Colorado Court of Appeals. Pursuant to Sec. 8-43-301(10), C.R.S., after July 27, 2022, the right to appeal was closed and the order became final.

17. The Application for Hearing dated November 1, 2022 before this ALJ listed Claimant's address in Farmington, New Mexico and was sent to Respondent's. In Respondent's Response to Application for hearing dated December 1, 2022, Respondent listed Claimant's address in Farmington, New Mexico.

18. At the current hearing Claimant stated that she moved from Granby, Colorado to Farmington, New Mexico, a little over two and one half years ago. She lived in Granby for approximately eight to nine years, where she had worked for Employer. She testified that she was planning to live in Farmington for the foreseeable future. She moved because most of her family lived in New Mexico and she wanted to live at a lower elevation. She explained that the lower elevation helped her breath easier.

19. While in Colorado, Claimant suffered from pulmonary issues following her 2017 surgery requiring her to use both a CPAP machine and an oxygen machine from that time until she moved to New Mexico. She currently continues using her CPAP machine nightly but not her oxygen machine as the lower altitude has help significantly. She does, however, continue to keep track of what her oxygen levels are, in case she has to start using the oxygen machine again.

20. After she last saw Dr. Paulson in approximately May 2021, Dr. Paulson advised her it was too far for Claimant to be travelling for maintenance care from Farmington, New Mexico to Denver, Colorado. She was no longer able to continue with her Colorado treating provider. Neither would Dr. Paulson do virtual/telemedicine appointments, especially to prescribe medications long distance. Claimant stated that she required a physician that could make the appropriate referrals, including to an orthopedic specialist, an urologist as well as a pulmonologist, to continue appropriate

maintenance care. Dr. Paulson not provide a referral to a medical provider in Farmington, New Mexico.

21. Claimant had been seeing her personal treating provider, Dr. Ryan Bozzell, a family doctor, in Farmington, New Mexico for her conditions, including for her low back and bladder incontinence problems but because he was not designated by Respondent as an authorized medical provider for the workers' compensation claim, Claimant had only seen him in a limited capacity for this claim. Claimant had other conditions which Dr. Bozzell had also addressed, including rheumatoid arthritis and ankylosing spondylitis. She had been on Medicare and Medicaid since approximately July 2020, when her health benefits were terminated by Employer and she moved to New Mexico. Dr. Bozzell was approximately ten minutes from where she lived for over two years. She had been seeing him for approximately one year. He was paid by Medicaid and Medicare.

22. This ALJ issued a Summary Order on April 13, 2023 that determined the selection of authorized provider had passed to Claimant and Claimant selected Dr. Ryan Bozzell. Dr. Bozzell became Claimant's authorized treating physician as the period to appeal that order expired, making the order final.

23. Since Claimant's July 23, 2015 work related injury to the present, Claimant has had bladder problems and incontinence. This was determined related by ALJ Turbow in her June 26, 2017 order. She specifically stated that the "ALJ finds credible and persuasive Dr. Falci's theory that a stretched spinal cord suffered in her fall at work in conjunction with Claimant's low-lying conus explains why Claimant suffers from urinary incontinence and left leg weakness." Claimant has been using pads, cloth wipes, bed pads, cleansing wipes and antibacterial hand wash since that time or shortly thereafter. Further, following the surgery of 2017, Claimant had to use catheters and urine bags for approximately 10 months. As found these were all reasonably necessary as previously found by ALJ Nemechek. Respondent is liable for these medical benefits and costs that are reasonably necessary and related to the claim. Claimant's estimate of usage and length of time of use is credible and are laid out below.

24. This ALJ found the price on the receipt Claimant submitted from Walmart as the actual cost Claimant incurred for maximum absorbency pads, which is what Claimant actually uses. (See ALJ Goldman Order of June 2020 listing "[I]ncontinence pads, extra heavy, two bags per week," and Dr. Paulson's letter of August 26, 2020 cited in ALJ Nemechek's Order.) This ALJ also determines that the antibacterial soap was critical to avoid infections and to remain sanitary in light of Claimant having to deal with dirty pads, wipes and accidents caused by the incontinence, including changing wet bedding and clothing. While Claimant may have used this product before her surgery in 2017, she credibly testified that she started using it regularly after her 2015 accident.

25. Claimant purchased a cane for walking, which cost her approximately $20.00, but has since purchased two others. She also bought a four wheel walker from a garage sale for approximately $25.00. Both of these items are shown in the pictures within Claimant's Exhibits. Claimant did not obtain receipts for these items and the costs were approximated. Claimant stated she required the use of these items to allow her to be as functional as possible. Claimant stated that she uses the cane in her home, and the walker when she leaves the house. Her left leg frequently gives out and is not stable

so she needs the wheel chair to prevent any further falls. The cane, the four wheel walker and the wheel chair were determined to be reasonably necessary medical benefits related to Claimants injury by ALJ Nemechek. As found, the canes and the walker are reasonably necessary should be reimbursed to Claimant.

26. It has become more and more difficult for Claimant to get around and she requires a wheel chair that has the outer large wheels so she can operate the chair herself and not have to rely on others to push her around in the chair. When on family outings that required too much walking, she could not participate because of her inability to be on her feet for long. She showed a picture of the kind of wheel chair she required (Empower lightweight wheelchair)[4] that was priced at $319.98. As found, this chair is reasonably necessary and related to the July 23, 2015 work injury.[5] ALJ Nemechek also found a wheel chair reasonably necessary and related to the injury when he issued his original Summary Order. As further found, the [Redacted, hereinafter WS] wheel chair (not the aluminum two wheel one listed by [Redacted, hereinafter OM]) is reasonably necessary and Claimant shall be reimbursed for this expense as well.

27. Claimant continued to be out of pocket for the cost, which were not covered by her personal insurance, of the oxygen concentrator, a large machine that holds 2 liters of concentrated oxygen, and CPAP machine. She paid a portion of the oxygen machine, purse and CPAP machine but some of the cost were paid by her prior insurance, BC[Redacted]. She paid $2,185.00, for the oxygen machine, oxygen purse (portable oxygen machine), and CPAP, which have not yet been reimbursed. She did not contact BC[Redacted] to find out how much the insurer had paid for their percentage because they discontinued her insurance since July 2020 and she was no longer a member. In addition, she required the cannulas (used to funnel the oxygen into her nose), the headset and mask since approximately 2017. This was noted by ALJ Goldman in June 2020 and ordered by ALJ Nemechek. She used the oxygen concentrator from the time she had her surgery in 2017 continuously while in Granby, CO. She has been able to taper off of the oxygen since moving to New Mexico due to the lower altitude. As found, the oxygen machine, purse and CPAP machine as well as all the necessary supplies are all reasonably necessary and related to the 2015 work injury and shall be reimbursed.

28. Claimant continued to use the CPAP machine, which is a machine that provides forced air (but not concentrated oxygen). It helps her breath while sleeping at night. The CPAP machine requires supplies as well, including cannula, mask, headgear, tubing, filters, replacement water chambers and a CPAP cleaner. She has purchased the equipment on her own, except for the CPAP cleaner, which she does not have as she could not afford to purchase the $264.99 cleaner at WS[Redacted]. The cleaner sanitizes the supplies including the headgear, cannula, and tubing. This is required to keep bacteria and germs from forming on and in the equipment and supplies. She explained that she runs the risk of infection without the sanitizer and has been operating the machine without cleaning it properly since 2017, sucking whatever forms on the supplies into her lungs. While ALJ Nemechek specifically stated Respondent shall pay for “CPAP machine

[4] There was also a picture of a “Transport chair,” which is one that a patient cannot move herself. Claimant credibly testified that this chair was not suitable for her as she would be dependent on others to push her.

[5] While there was mention of an electric chair, Claimant stated that she did not require one at this time.

and supplies (including cannula, tubing/headgear)" he did not specifically address the equipment necessary to keep the CPAP supplies clean. Claimant testified that the cleaner was recommended for use every day. As found, Claimant requires this machine to keep her CPAP equipment clean and sterile for use and avoid any further risks of infections or bacterial overgrowth. As found, this durable medical equipment is a reasonably necessary medical benefit and related to the July 23, 2015 work injury.

29. Claimant testified that her inability to care for herself as recommended by her prior provider has affected her emotionally and financially. Following the long process of trial and appeal, she continued to be somewhat skeptical that she would have resolution of the issues and finally obtain the funds to purchase those items she has been unable to obtain due to failure of the insurance to provide her with any options. As found, Respondent's failure to take any steps to provide Claimant the required medical maintenance care including, a medical provider, the equipment itself or the payment for the cost of the equipment is inexcusable.

30. Claimant continued to have to make the trip to Denver to see Dr. Paulson, until approximately May 2021. It is clear that Respondent provided consistent payments for medical care, including for prescription medication through [Redacted, hereinafter TS], until May 7, 2021. Following this date there were only three more payments to TS[Redacted], two for a date of service of November 12, 2021 and one for February 11, 2022. No other payments were shown on the payment log and there was no indication that the payment log was incomplete.

31. Claimant stated that she had worked long hours with the assistance of her sister to write all the expenses she had incurred since her injury that had not been paid or promised. She initially submitted the spreadsheet to Respondent by early December, 2022.[6] Further, on January 13, 2023 Claimant submitted some receipts and again, prior to trial, Claimant found several other receipts, found in her storage, and sent them to Respondent.

32. Respondent was responsible for the costs of reasonably necessary and related maintenance medical care as previously established by orders issued by ALJs Goldman and Nemechek. Claimant noted that she required additional assistance even when she was treating with the medical providers, which included the alternating use of over the counter Tylenol and ibuprofen. Further, to assist her with pain relief, Claimant obtained Theraworx, a topical pain relief foam. As found Claimant's use of these three products was and is reasonably necessary and related to her July 23, 2015 work related injury.

33. Claimant has been unable to purchase the recumbent bike ordered by ALJ Nemechek because she could not afford the purchase price of $469.99. Given ALJ Nemechek's denial of a gym membership, it was critical for her to receive the exercise equipment needed to maintain her functional abilities, to allow her to lose some weight, and help control pain and depression. She also has to keep up her strength as she needs to be able to keep as mobile as possible for as long as possible. Further, the balancing pad would help her as well. These were also items ordered by ALJ Nemechek to be paid

[6] As Claimant was unable to pinpoint the exact date, this ALJ will infer it was no later than December 31, 2022.

by Respondent. As found, these items continue to be reasonably necessary and related to the claim and shall be reimbursed to Claimant.

34. Claimant further paid for the exercise balls, weights, a treadmill, exercise bands, also photographed in the exhibits and listed on her spreadsheet. Claimant paid for this equipment out of her own pocket and requested that Respondent reimburse her, pursuant to ALJ Nemechek's order, without response. As found, for these items alone Claimant is still owed approximately $342.88 and shall be paid.

35. On March 3, 2023 Respondent obtained some of the pricing through OM[Redacted] for numerous of the items which Claimant purchased and that was ordered by ALJ Nemechek. The OM[Redacted] pricing was submitted as a spreadsheet of the individual items with prices.

36. As found, Respondent knew or should have known that Claimant would require continuing medical care. This ALJ issued a Summary Order dated April 13, 2023, finding that Respondent knew or should have known that Claimant moved to Farmington, New Mexico as of at least November 10, 2020, though more likely before July 2020. Respondent knew that Claimant required ongoing medical care for her low back, respiratory conditions and her urinary incontinence. Yet, when Claimant moved, Respondents failed to designate a provider nor did they pay for any further medical care other than the occasional prescription.

37. As found, Respondent knew or should have known that they were responsible to pay for the ordered medical benefits listed by ALJ Nemechek. The order put the onus on Respondent to comply with the order. It stated that "Respondents shall pay" for the items listed, which this ALJ determines was a proactive obligation. As further found, the order did not specify that Claimant had to make a claim or submit any receipts, as she had already made a claim and it was discussed by ALJ Nemechek and ordered.

38. As found, Respondents stipulated they would pay for past due benefits of $360.00, which ALJ Nemechek incorporated into his summary order of November 26, 2021, specifically stating that "*This Stipulation was accepted by the Court and is made part of this Order.*" This was also in his March 2, 2022 Findings of Fact, Conclusions of Law and Order. This was an order of the court and became final on July 27, 2022 when the appeal process terminated and the order became final. As found, Respondent failed to comply with this order of the court, which they had agreed to pay.

39. As found, Respondent were aware and had notice of the itemized list of medical benefits Claimant required by July 27, 2022 when the appeal process terminated and ALJ Nemechek's order became final. Respondent had knowledge of the items Claimant was requesting as they featured prominently in both ALJ Goldman's and ALJ Nemechek's Final Orders which ALJ Nemechek found as reasonably necessary medical benefits related to the claim. Respondent failed to comply with ALJ Nemechek's Order to pay the reasonable, necessary and authorized medical care.

40. As found, by combining the information that was persuasive and credible from both the Claimant's and OM's[Redacted] spreadsheets as well as considering Claimant's testimony and other receipts in the record, this ALJ makes the reasonable

choice to determine the actual cost of past due benefits that Respondent was ordered to pay.

41. After considering the pricing that OM[Redacted] recalculated, and Claimant's re-drafted second spreadsheet (Exh. 17) which more accurately reflected her expenses,[7] and Claimant's credible and persuasive testimony, it is determined that Respondent shall pay Claimant as follows:

Bladder & Incontinence Supplies			
Item description	**Price per unit**	**Amount**	Total price
EQUATE OPTION PADS, DISCREET BLADDER PROTECTION LONG LENGTH, MAXIMUM ABSORBENCY; BAG OF 72	$14.34	368	$ 5,277.12
CARDINAL HEALTH DISP DRY WASHCLOTH, 9" X 13.5", WHITE CS/500 (MFR# AT907)	$13.10	85	$ 1,113.50
FIBERLINKS TEXTILES INC AMERICARE ULTRA WATERPROOF SHEET PROTECTOR WITH HANDLES 34" X 36" TWIN SIZE (MFR# A12605/H)	$13.50	14	$ 189.00
BARD ALL PURPOSE RED RUBBER URETHRAL CATHETER 16FR, CASE/100 (MFR# 9416)	$82.30	10	$ 823.00
URINARY DRAIN BAG MCKESSON ANTI-REFLUX VALVE STERILE 2000ML, VINYL, CS/20 (MFR# 37-2802)	$40.95	10	$ 409.50
MEDLINE ALOETOUCH QUILTED PERSONAL CLEANSING WIPES 8 X 12, PK/48 (MFR# MSC263625)	$3.58	20	$ 71.60
DIAL ANTIBACTERIAL W/ MOISTURIZERS, SCENTED, 7.5OZ (MFR# 2461275)	$2.95	144	$ 424.80
*MINUS $360.00 PER THE STIPULATION		***Total***	**$7,948.52**
Mobility Aids			
		Amount	Total price
CARDINAL HEALTH ADJUSTABLE OFFSET PUSH BUTTON CANE, BLACK (MFR# CNE0014)	$22.50	3	$ 67.50
FOUR WHEEL WALKER	$25.00	1	$ 25.00
MEDLINE EMPOWER LIGHTWEIGHT WHEELCHAIR UP TO 300 LBS. WEIGHT CAPACITY	$319.99	1	$ 319.99
CANE HEAVY DUTY REPLACEMENT TIPS	$16.35	14	$ 228.90
		Total	**$ 641.39**
Oxygen Supplies			
	Item description	**Price**	**Amount**	**Total Price**
CPAP TUBING		$47.13	20	$ 942.60
CPAP MASK		$115.21	10	$ 1,152.10

[7] With the exception of the "Handicap Features for her Household," which have not been requested and were not at issue at this hearing, and reserved for future determination.

CPAP HEADGEAR	$30.26	10	$ 302.60
CPAP FILTERS (EACH FILTER)	$2.64	30	$ 79.20
CPAP CLEANER	$316.14	1	$ 316.14
REPLACEMENT WATER CHAMBER	$30.99	10	$ 309.90
PORTION PAID BY CLAIMANT OF PURCHASED CPAP MACHINE AND OXYGEN CONCENTRATORS	$2,185.00	1	$ 2,185.00
PULSE OXIMETER FINGER TIP	$29.97	1	$ 29.97
			$5,317.51
Other Miscellaneous Supplies			
Item description	**Price**		
LARGE BALL	$24.99	1	$ 24.99
SMALL BALL SET	$27.99	1	$ 27.99
WEIGHTS - BELL	$49.95	1	$ 49.95
USED TREADMILL	$200.00	1	$ 200.00
EXERCISE BANDS	$39.95	1	$ 39.95
RECUMBENT BIKE	$469.99	1	$ 469.99
BALANCING PAD	$159.99	1	$ 159.99
IBUPROFEN (OTC)	$13.70	42	$ 575.40
TYLENOL (OTC)	$8.99	28	$ 251.72
THERAWORX TOPICAL PAIN RELIEF SPRAY (MFG# AZVTWR08SPH)	$24.50	28	$ 686.00
ALJ NEMECHEK STIPULATED AND ORDERED FUNDS*	$360.00	1	$ 360.00
			$2,845.98
*(DEDUCTED FROM URINARY INCONTINENT TOTAL)			
		Cum. Total	**$ 16,753.40**

42. Respondent shall pay Claimant the total amount of $16,753.40 for those benefits as established by the chart above.

43. Respondent shall pay past due medical benefits to BC[Redacted] for any out of pocket reasonably necessary medical care they may have paid for problems with incontinence and oxygen or lung issues suffered by Claimant related to her July 23, 2015 work injury.

44. Further, as found, Respondent failed to comply with ALJ Nemechek's order, which merits an additional penalty due to the violation of the order to pay. This penalty is

deemed to be from July 27, 2022 and continuing until the funds are paid by Respondent to Claimant.

45. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

B. Failure to Comply with ALJ Order

Claimant alleges that Respondent failed to comply with ALJ Nemechek's Summary Order on November 26, 2021 and subsequent Findings of Fact, Conclusions of Law and Order of March 2, 2022 wherein he ordered Respondent to pay for, in compliance with the Colorado Workers' Compensation Fee Schedule, certain items he found were reasonably necessary and related to the injury. These items included, but were not limited to a stipulated amount of $360.00, medical supplies related to Claimant's urinary incontinence, oxygen concentrator, CPAP machine and supplies, walking cane, 4-wheel walker, wheelchair, and specific exercise equipment. Some of the items Claimant had already purchased, some had been partially paid by her personal insurance, some of the items required an ongoing recurring purchase and some of the items had not been purchased due to the costly nature of the items.

What is clear is that Respondent neither paid for nor made arrangements to pay for what they had stipulated to pay nor what Claimant paid for, what she could not pay for and/or failed to make arrangements for Claimant's receipt of the items prescribed. Nothing in ALJ Nemechek's order could be confused. He specifically stated that the stipulated amount of $360.00 was "*accepted by the Court and is made part of this Order."* Claimant had established she was entitled to maintenance medical benefits and that "Respondent shall pay for the following items." The use of "shall" here is interpreted as mandatory. Nothing in ALJ Nemechek's order indicated that they only needed to pay for the items if Claimant produced a receipt that Respondent accepted as accurate or reasonable. Nothing in the order noted that Claimant had to purchase the items and then produce the receipts. Neither did the order indicated that Respondent was able to reject the price or value of what Claimant had purchased. In fact, pursuant to Sec. 8-42-101(6)(b) Claimant must be reimbursed the full amount of what she paid.

No persuasive evidence was provided by either party as to the cost of the items listed pursuant to the Colorado Workers' Compensation Fee Schedule or what items were not listed on the Fee Schedule. It is not up to this ALJ to provide those costs and rule on what medical services or items are on the Fee Schedule. However, Claimant either provided a receipt, an estimate of the cost of the item or agreed to the number identified by Respondent on the OM[Redacted] listing, which Respondent tendered as an exhibit of potential costs of the item (Exhibit E, which was admitted by stipulation). Respondent did not state or assert that those per item cost listed on the OM[Redacted] document were in compliance with the Fee Schedule either. However, what is clear from the evidence is that ALJ Nemechek ordered Respondent to pay for items which were reasonably needed

to maintain Claimant at MMI and ordered Respondent to pay. Nothing in the evidence persuasively indicated that any of the items listed by Claimant in her spreadsheet had actually been paid for previously. In fact, the only statement that indicated that Respondent had paid pursuant to a stipulation of the parties which specifically stated "Counsel for Respondent stipulated to pay for the co-pays of (sic.) incurred by Claimant for urinary incontinence pads totaling $360.00. This Stipulation was accepted by the Court and is made part of this Order." However, Claimant credibly testified that she had not been paid pursuant to the stipulation and Employer's log does not show a payment.

What is patently clear to this ALJ is that Respondent failed to comply with ALJ Nemechek's order once it became final. They did not pay for the amount they had promised by stipulation. They did not make the arrangements necessary for Claimant to receive the items. They did not send any inquiries of what Claimant would prefer to happen or make arrangements with Claimant to pay for the items. They did not provide persuasive evidence that they were in the process of acquiring the items to send to Claimant through a vendor, which is commonly done within the workers' compensation system in cases like these, where Claimant has an ongoing disability that requires frequent refills, like medications, incontinence pads, or equipment. What is clear, is that, pursuant to ALJ Nemechek's order, Respondent had, at the very least, a list of Claimant's ongoing medical need requirements as authored by ATP Paulsen since August 26, 2020. It is inconceivable that Respondent had the list of these items by no later than the hearing of November 10, 2020 and, still, Respondent provided little evidence that they had taken any affirmative steps to procure the items or pay for the items or the funds promised. Therefore, they cannot credibly assert that they had no knowledge of them or not enough time to provide them. This pattern of behavior is a blatant disregard for the Workers' Compensation System and to the Act as it showed that Respondent, had indeed, not given any importance to the ALJ's findings and his order. Claimant has shown by a preponderance of the evidence that Respondent failed to comply with ALJ Nemechek's order when it became final.

C. Reasonably necessary and related medical benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and

naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000). Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Commission, supra*. When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.*

ALJ Nemechek found that multiple items were reasonably necessary and related to the July 23, 2015 work injury. This ALJ also finds those items are reasonably necessary and related to the July 23, 2015 work injury. That includes:

- All medical supplies related to Claimant's urinary incontinence (including catheters, small and large wipes).
- Oxygen concentrator (reimbursement for expenses previously incurred).
- CPAP machine and supplies (including cannula, tubing mask/headgear).
- The walking cane, 4-wheel walker, wheelchair.
- Exercise equipment (large and small exercise balls, 1 and 3 pound weights, treadmill, exercise bands, balancing pad, and recumbent bike), [reimbursement for expenses previously incurred].

This ALJ also determines that the antibacterial soap was critical to avoid infections and to remain sanitary in light of Claimant having to deal with incontinence and is reasonably necessary and related to the July 23, 2015 work injury.

While ALJ Nemechek specifically stated Respondent shall pay for "CPAP machine and supplies (including cannula, tubing/headgear)" he did not specifically address the equipment necessary to keep the CPAP supplies clean. Claimant testified that the cleaner is recommended for use every day. As found, Claimant requires this machine to keep her CPAP equipment clean and sterile for use and avoid any further risks of infections or bacterial overgrowth. This durable equipment is a reasonably necessary medical benefit and related to the July 23, 2015 work injury.

Claimant continued to be out of pocket for the cost, which were not covered by her personal insurance, for the oxygen concentrator, OxyGo (small portable oxygen purse) and CPAP machine in the amount of $2,185.00. She paid this portion but some additional costs were also paid by her prior insurance, BC[Redacted]. In addition, Claimant required the cannulas, the headset and mask since approximately 2017. This was mentioned by ALJ Goldman in June 2020. The oxygen machine, purse and CPAP machine as well as all the necessary supplies are reasonably necessary and related to the 2015 work injury. Claimant has shown by a preponderance of the evidence that both Claimant and BC[Redacted] should be paid for the costs listed above.

Claimant credibly and persuasively testified that she required additional assistance to control pain levels, even when she was treating with the medical providers, which included the alternating use of over the counter Tylenol and ibuprofen. Further, to assist her with pain relief, Claimant obtained Theraworx, a topical pain relief foam. As found Claimant has shown it is more likely than not that these three products were and are reasonably necessary and related to her July 23, 2015 work related injury.

Claimant purchased some exercise equipment that ALJ Nemechek already found reasonably necessary and related to her injury. What Claimant has not been able to afford on her own is the recumbent bike ordered by ALJ Nemechek because she could not afford the purchase price of $469.99. As found, the exercise equipment needed to maintain her functional abilities listed in the chart above including the recumbent bike are reasonably necessary and related to the injury.

Claimant has shown by a preponderance of the evidence that Respondent owes Claimant the amount of $16,753.40 for those benefits that are reasonably necessary and related to her July 23, 2015 work related injury, as established by the chart above, and which will not be replicated here. Further, Claimant has shown she has continuing needs for ongoing supplies, both due to the incontinence as well as for use of the CPAP machine. Respondent is liable for both past benefits set out in the chart above and ongoing benefits. Respondent shall reimburse Claimant pursuant to the stipulation laid out above or shall make arrangements to send Claimant the supplies through a vendor.[8]

D. Interest Penalties on Past Due Benefits

Sec. 8-43-401(2)(a), C.R.S. states as follows:

> After all appeals have been exhausted … all … employers shall pay benefits within thirty days after any benefits are due. If any … self-insured employer knowingly delays payment of medical benefits for more than thirty days …, such … employer shall pay a penalty of eight percent of the amount of wrongfully withheld benefits....

Claimant argues that Respondent owe eight percent interests on all benefits not paid when due, specifically citing to the items that ALJ Nemechek listed as reasonably necessary medical benefits in his final order of March 2, 2022. However, in looking at case law, the Court in *Pena v. ICAO*, 117 P.3d 84 (Colo. App. 2005) provides some guidance. In that case, the Court stated that the ALJ appropriately denied penalties under Sec. 8-43-401(2)(a) for failure to pay benefits timely because Claimant did not submit evidence of medical bills that were not timely paid. *Id.* at p. 90.

Like in the *Pena* case, here, there was no requirement for prior authorization and the insurer did not treat the order as a request for prior authorization by contesting it in accordance with rules that apply to prior authorizations. Further, it is not a situation in which Claimant received treatment, the provider submitted a bill for the treatment, payment was due, and Respondent delayed payment of that medical benefit for more than thirty days after the due date or stopped payment. Sec. 8-43-401(2)(a) does not apply as it does not specifically provide a penalty for Respondent's actions following

[8] The amounts may be subject to change and either party may request a change in the costs set out in the chart incorporated in this order or challenge the continuing reasonable, necessity of the supplies.

receipt of the ALJ's decision and Respondent's failure to provide medical benefits in accordance with the order. Claimant established that Respondent failed to comply with the Order issued by ALJ Nemechek and failed to provide the medical benefits Claimant was entitled to pursuant to the Order. The more appropriate penalty here is pursuant to Sec. 8-43-304, C.R.S. Therefore, Claimant's request for penalties under Sec. 8-43-401(2)(a) is denied.

E. Penalties Due for Violation of an Order

Under Sec. 8-43-304(1), C.R.S. (2022), penalties of up to one thousand dollars per day may be imposed against a party who: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order. *Pena v. Indus. Claim Appeals Office,* 117 P.3d 84, 87 (Colo. App. 2004). Further, Sec. 8-43-305, C.R.S. states that "Every day during which any employer … fails to comply with any lawful order of an administrative law judge … shall constitute a separate and distinct violation thereof."

To determine whether penalties should be imposed under Sec. 8-43-304(1), C.R.S. there is a two-step process, first requiring the ALJ to determine if the employer's conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must then determine whether the party's actions were objectively reasonable. An ALJ may impose a penalty under Sec. 8-43-304(1) if it is shown that the employer failed to take an action that a reasonable employer would have taken to comply with the order. The employer's conduct is measured by an objective standard of reasonableness. *Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965, 967 (Colo. App. 2003). Different divisions of the Colorado Court of Appeals have reached different conclusions regarding the measure of "objectively reasonable" conduct. Some divisions have concluded that the relevant inquiry is whether the conduct was based upon a rational argument in law or fact, while others have concluded that the question is merely whether the conduct was unreasonable. *See Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97, 100 (Colo. App. 2005) [discussing the two lines of cases]; *Diversified Veterans Corporate Ctr. v. Hewuse,* 942 P.2d 1312, 1313 (Colo.App.1997).

The ALJ also has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The penalty should be sufficient to discourage future violations, but should not be constitutionally excessive or "grossly disproportionate" to the violation found. *Colorado Dept. of Labor & Employment v. Dami*, 442 P.3d 94 (Colo. 2019). When assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many

offenses." *Id*. at 103. The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Actual prejudice or harm to the claimant is relevant but is not dispositive, particularly where the violation is not explained by the evidence. *Strombitski v. Man Made Pizza, Inc*., W.C. No. 4-403-661 (July 25, 2005).

Here, Claimant alleges Respondent failed to comply with ALJ Nemechek's Summary Order dated November 26, 2021 and subsequent Findings of Fact, Conclusions of Law and Order dated March 2, 2022, wherein the ALJ ordered Respondent to pay for medical benefits. First, ALJ Nemechek, pursuant to the parties stipulation to pay the $360.00, incorporated the stipulation as part of his order. Second, ALJ Nemechek ordered payment of medical benefits and supplies, in compliance with the Colorado Workers' Compensation Fee Schedule, for certain items he found were reasonably necessary and related to the injury. This ALJ acknowledges Respondent's right to appeal in this matter and the fact that the ALJ's order was not final until all appeals were abandoned on July 27, 2022. Here, this ALJ was persuaded there was a violation of the Order issued by ALJ Nemechek. Specifically, ALJ Nemechek issued an order that stated that Respondent "shall provide medical benefits to Claimant required to treat the effects of her work injury and to maintain MMI, pursuant to the Colorado Workers Compensation Medical Fee schedule" and that "Respondents shall pay" Claimant for specific items, which he listed in his order.

Respondent argues that they did not pay because Claimant had not provided receipts for the items she was purchasing. However, nothing in the order stated it was required Claimant to provide receipts, only that "Respondents will be required to reimburse Claimant for said equipment." And even if it implied that some form or proof was necessary, the Claimant's testimony alone was sufficient to establish what she paid and what should have been reimbursed to Claimant. Stated another way, Claimant was not required by the ALJ's order to provide a receipt for each item in order to receive reimbursement. The onus here was on Respondent, not Claimant, to make the payment in accordance with the Colorado Workers' Compensation Fee schedule. When Respondent's stipulated that they would pay $360.00, they did not put any conditions to the stipulation. The parties simply stipulated that the funds were owed to Claimant. And while Respondents argue that Claimant acknowledged she "may have been paid" the funds, this ALJ finds to the contrary as supported by Claimant's persuasive testimony and the lack of documentation in Respondent's pay log.

Respondent's "negligence in failing to take the action a reasonable carrier would take should result in the imposition of penalties..." See *Diversified, supra*, at p. 1313. As found, Respondent failed to take any credible or persuasive steps to even investigate the costs of the items until March 2, 2023 when they obtained the OM[Redacted] listing of items priced. Nothing in counsel's statements or in the evidence presented at hearing clarifying the OM[Redacted] pricing stated that the OM[Redacted] pricing was consistent with the Colorado Fee Schedule. While Claimant's statements clarifying her actual costs of what she had paid for certain items that were not provided by Respondent, was helpful in determining what Claimant was owed, this was not a critical element in determining the

reprehensibility of Respondent's failure to comply with ALJ Nemechek's order. Respondent provided no reasonable or appropriate explanation for violating the Order and Respondent's actions were not objectively reasonable.

Respondent knew what the Summary Order issued by ALJ Nemechek on November 26, 2021[9] stated. They knew what ALJ Nemechek stated in his order of March 2, 2022. Yet they waited until a year later to take any steps whatsoever to investigate the costs. And even when they obtained the OM[Redacted] pricing, still they paid nothing. Had this been a bill that was being disputed by a medical provider, they would have paid what they believed the Medical Fee schedule said and fought about the reasonable costs or discrepancy at a later time. The same would happen if Respondent had received a demand for mileage reimbursement. But most importantly, they did not explain why Claimant had not been paid the $360.00 that was stipulated and made part of the order issued by ALJ Nemechek. A reasonable Respondent would have paid what was undisputed and fought over the disputed amounts at a later time. Here, as found, Respondent failed to take any action that a reasonable Respondent would have taken to comply with the order and Respondent failed to act even when they received Claimant's spreadsheet or when they received the OM[Redacted] pricing estimate, by not paying Claimant anything even by the date of the hearing. A reasonable Employer would have paid something, even if it was less than what Claimant paid or what they had stipulated they would pay. Respondent's conduct was objectively unreasonable.

Respondent also argued that Claimant, in fact, obtained some of the equipment and supplies she needed and was not deprived of the needed medical benefits. This argument seems egregious. Claimant credibly testified that she had to set aside funds she would normally use for other household needs, like needed groceries and food, in order to get some of those supplies she needed. Further, Claimant was not able to obtain some of the essential supplies she does need, such as the CPAP cleaner that keeps the supplies sanitized and lowers her risk of infections or transferring germs into her lungs. Respondent was not the one to supply the funding, Claimant had to do so to her own detriment. This one simple thing, Respondent's failure to pay pursuant to the order, is in violation of the very principles of the Workers' Compensation Act, "to assure the quick and efficient delivery of disability and medical benefits to injured workers." Sec. 8-40-102(1), *supra.* Therefore, Respondent's conduct was objectively unreasonable.

Also as found, Respondent knew or should have known that Claimant required maintenance medical benefits to maintain her at MMI pursuant to both ALJ Goldman's and ALJ Nemechek's orders. The payment log showed that Respondent was consistently making payments for medical care through the time she was no longer able to see Dr. Paulsen. Since then, there were only three payments made to TS[Redacted].[10] However, this showed Claimant consistently required medical care which Respondent stopped providing and/or paying. Claimant cannot be faulted by the fact that she was attempting to handle her medical conditions in any manner she could. Respondent made a stipulation to make a payment of $360.00 and Respondent did not pay this agreed upon

[9] Mailed on November 29, 2021.

[10] It is not clear from the log whether the payments were made for medical services before she no longer had access to Dr. Paulson or after, but this ALJ is inferring that it was after. This ALJ also is assuming that the TS[Redacted] benefits was for prescription medications.

amount. This ALJ finds that Respondent acted reprehensibly in failing to act at all after Claimant moved to New Mexico, first to designate a provider, then not paying the stipulated amount of $360.00 and lastly to provide the maintenance care she required. The Workers' Compensation Act does not prohibit a Claimant from moving from the state of the injury. In this matter, Claimant acted in a reasonable manner given her circumstances, especially considering her continual need for oxygen in Colorado, which she was actually able to ween off of after the move, with the exception of the nightly forced air treatment provided by the CPAP machine. Despite Respondents' failure to pay other medical benefits ordered, the failure to pay the stipulated $360.00 alone is sufficient to determine that Respondents acted in an unreasonable manner in disregarding ALJ Nemechek's order. As found, Respondent's conduct was objectively unreasonable.

Next, this ALJ considers the appropriate amount of the penalty to "punish the violator and deter future misconduct." Case law instructs that when assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty." The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. Here, the ALJ considers that the failure to act and pay Claimant in accordance with the ALJ's Order significantly limited Claimant's ability to obtain the maintenance care she required to maintain MMI, including additional equipment ordered to maintain her functionality. The original Summary Order was issued in November 2021, so Respondent knew or should have known what benefits Claimant was due, and any further delays past the final order of July of 2022 was inexcusable. This has been an extremely stressful situation for Claimant and caused Claimant depression related to Respondent's failure to pay. Respondent failed to provide evidence regarding Respondent's ability to pay, so consideration of this factor is limited. However, this ALJ takes notice that the employer and its' parent company is a large chain store under multiple names and has stores in at least 10 states in the nation when considering their ability to pay. Respondent knew or should have known that the *Dami* test would be applied and they had the opportunity to put on evidence in defense of the penalties issue including ability to pay. This ALJ finds that Respondent not only acted reprehensibly but acted in a manner that showed total lack of regard to the Act and to the ALJ's order and failed to put on a defense to the issue despite the opportunity to do so.

Therefore, it is found and concluded that Claimant proved that Respondent acted objectively unreasonable in this matter. *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). Claimant proved by a preponderance of the evidence that a penalty is due. As found, Respondent shall pay $150.00 per day for each day's failure to comply with ALJ Nemechek's March 2, 2022 order beginning from the date the Order became final on July 27, 2022 to the present and continuing until paid. As found, from July 27, 2022 to the date of the hearing of March 29, 2023 a 245 day period, penalties owed are $36,750.00. Thereafter, Respondent shall continue to owe ongoing penalties per day until the benefits are paid. As found, this is a penalty that is reasonable (only 15% of the maximum allowed), and not grossly disproportionate to the violation in light of the reprehensible act of Respondent in failing to make any payments in accordance with the order. While this ALJ views Respondent's actions as extremely and objectively unreasonable and reprehensible in failing to act and should merit a $1,000.00 a day penalty for their non-actions, when comparing similarly placed parties in other

cases, this ALJ determined that the $150.00 per day may be viewed by any reviewing panel or court as "not disproportionate" to the harm caused to Claimant and Respondent's complete disregard of the order issued and a sufficient penalty to punish Respondent and deter future misconduct. As found, there is no evidence indicating Respondent is unable to pay a penalty that is proportionate to its offense. Based on the degree of reprehensibility of Respondent's conduct, the harm suffered by Claimant, and penalties assessed in comparable cases, the ALJ concludes that a penalty of $150.00 per day is appropriate. The amount of the penalty is more than proportionate to the harm to Claimant and Respondent's disregard for the order issued by the ALJ as well as to punish Respondent and deter this conduct in the future.

ORDER

IT IS THEREFORE ORDERED:

1. The Stipulation of the Parties is approved and ordered.

2. Respondent failed to comply with ALJ Nemechek's order of March 2, 2022.

3. Respondent shall pay the past due $16,753.40 for the reasonably necessary and related medical benefits itemized in the above chart.

4. Claimant's request for interest on the past due amounts pursuant to Sec. 8-43-401(2)(a) is *denied* and *dismissed*.

5. Respondent shall pay a penalty for failure to comply with ALJ Nemechek's order of March 2, 2022 in the aggregate amount of $36,750.00, and continuing thereafter at the rate of a $150.00 per day until Respondent issues payment to Claimant for the

$16,753.40 for ordered reasonably necessary and related medical benefits based on the chart shown above.

6. Of the penalties, seventy five percent shall be apportioned and paid to Claimant and twenty five percent shall be sent to the Colorado Uninsured Employer Fund. Payment to the CUE Fund shall be sent to DOWC Revenue Assessment Unit, 633 17th Street, Suite 400, Denver CO 80202.

7. Respondent shall either arrange for delivery of the monthly items Claimant requires, which have previously been found to be reasonably necessary and related to the July 23, 2015 injury, or reimburse Claimant pursuant to the stipulation of the parties.

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

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

DATED this 9th day of August, 2023.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-221-256-002

ISSUE

Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent.

FINDINGS OF FACT

1. Employer is a company that installs and maintains security systems. Claimant worked for Employer as a Senior Lead Technician.

2. On November 4, 2022 Claimant was sent to a jobsite at [Redacted, hereinafter PT] to replace a front keypad that was not functioning properly. While at the PT[Redacted], Claimant fell off a ladder. He struck shelves and cut his hand while falling. Claimant also briefly lost consciousness.

3. Employer's General Manager for the [Redacted, hereinafter RS] testified at the hearing in this matter. He explained that Employer has developed safety rules and procedures that apply when working on a job site. Once per month, Employer sends out LMS training courses that all employees are required to finish within that month. The LMS training courses cover safety policy and procedures, including ladder usage. Notably, on October 12, 2022 Claimant completed a ladder safety course and a fall prevention course. Moreover, in Claimant's position as a Commercial Service Technician he was required to attend monthly service manager meetings.

4. [Redacted, hereinafter TS] commented that Employer provides safety gloves for all employees. The safety glove policy specifies that anti-cut safety gloves should be worn by all employees. Safety glove policies and procedures are also covered in the service manager meetings.

5. TS[Redacted] explained that Employer's ladder usage safety policy specifies that two technicians must be on-site to use ladders. Notably, A-frame ladders or electric lifts are to be used while on a worksite.

6. On November 4, 2022 Claimant was dispatched to PT[Redacted] to repair a front door keypad on an alarm system. Claimant was not using an approved A-frame ladder or an electric lift on November 4, 2022. Instead, Claimant was using an extension ladder that he propped up against a wall. TS[Redacted] remarked that there was no reason for Claimant to use an extension ladder to repair a front door keypad.

7. Claimant's supervisor Service Manager [Redacted, hereinafter DH] also testified at the hearing in this matter. DH[Redacted] commented that Claimant was sent to PT[Redacted] on November 4, 2022 to fix a keypad at the front door of the facility.

Specifically, in the front of the store there is a keypad and a door contact. Because the door contact was showing a fault, Claimant was assigned to examine the front hatch in the middle of the door and make necessary repairs. There was no need to use a ladder to complete the job assignment.

8. DH[Redacted] explained that, according to Employer's ladder safety procedures and policies, two technicians must be present when using an A-frame or extension ladder over 12 feet in height. The purpose of the safety policy is to ensure that one technician remains at the bottom of the ladder to maintain stability. At the time of the accident, no coworker was holding the ladder for Claimant. DH[Redacted] explained that, under Employer's policies and procedures, Claimant should have waited for a co-worker to stabilize the ladder before he started climbing.

9. DH[Redacted] recounted that he spoke to technician [Redacted, hereinafter CV] at the job site after Claimant had fallen from the ladder on November 4, 2022. CV[Redacted] reported that he did not agree with what Claimant was doing on the jobsite. He stated the ladder was not positioned correctly and Claimant was not wearing safety equipment. Nevertheless, Claimant ascended the ladder. CV[Redacted] showed DH[Redacted] where the ladder was positioned. The ladder had been placed where the walls meet in which one side was straight and the other side was "kind of crooked." CV[Redacted] told Claimant that the ladder was not safe and he did not feel good about the location. As CV[Redacted] turned around, Claimant was already climbing up the ladder. Claimant then fell.

10. On November 4, 2022 DH[Redacted] told Claimant over the phone to wait for CV[Redacted] to arrive before he started working. He specifically stated "[d]on't start anything until CV[Redacted] gets there because you need another person." After the incident, Claimant admitted that the ladder was "a little squirrely, but he was trying to get the job done." DH[Redacted] observed Claimant without safety gloves after the accident on November 4, 2022. When he asked Claimant why he was not wearing his required safety gloves, Claimant responded "My bad. I'm sorry."

11. Respondents have proven it is more probably true than not that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant was dispatched to a jobsite at PT[Redacted] to replace a front keypad that was not functioning properly. While at the PT[Redacted], Claimant fell off a ladder and suffered injuries. The record reflects that Claimant was using an extension ladder that he propped up against a wall. No coworker was holding or stabilizing the ladder at the time of the incident. Based on the obvious danger presented by the use of the ladder, as well as the persuasive testimony of Employer's witnesses, Claimant acted with deliberate intent in violating Employer's reasonable safety rules regarding the use of ladders and other safety protocols.

12. The record reflects that Employer has adopted reasonable safety rules regarding the use of ladders and gloves while working on jobsites. Safety protocols include the wearing of anti-cut safety gloves. TS[Redacted] credibly explained that

Employer's ladder usage safety policy specifies that two technicians must be on-site to use ladders. Specifically, A-frame ladders or electric lifts are to be used while on a worksite. Moreover, DH[Redacted] credibly emphasized that, according to Employer's ladder safety procedures and policies, two technicians must be present when using an A-frame or extension ladder over 12 feet in height. The purpose of the safety policy is to ensure that one technician remains at the bottom of the ladder to maintain stability. Employer's safety rules are unambiguous, definite, and non-conflicting.

13. Claimant was aware of Employer's reasonable safety rules for technicians. Once per month, Employer sends out LMS training courses that all employees are required to finish within that month. The LMS training courses cover safety policies and procedures, including ladder usage. Notably, on October 12, 2022 Claimant completed a ladder safety course and a fall prevention course. Moreover, in Claimant's position as a Commercial Service Technician he was required to attend monthly service manager meetings.

14. The record reveals that Claimant willfully violated Employer's safety rules. On November 4, 2022 no coworker was holding the ladder as Claimant was climbing. DH[Redacted] explained that, under Employer's policies and procedures, Claimant should have waited for a co-worker to stabilize the ladder before he started climbing. Notably, on November 4, 2022 DH[Redacted] told Claimant over the phone to wait for CV[Redacted] to arrive before he started working. He specifically stated "[d]on't start anything until CV[Redacted] gets there because you need another person." After the incident, Claimant admitted that the ladder was "a little squirrely, but he was trying to get the job done." DH[Redacted] also observed Claimant without safety gloves after the accident. Moreover, DH[Redacted] spoke to CV[Redacted] at the job site after Claimant had fallen from the ladder on November 4, 2022. CV[Redacted] reported Claimant had not correctly positioned the ladder and was not wearing safety equipment. Notably, the ladder had been placed where the walls meet in which one side was straight and the other side was "kind of crooked." Nevertheless, Claimant ascended the ladder without assistance.

15. Respondents have satisfied their burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding the use of ladders and other safety protocols. Under the circumstances, Claimant's use of an improperly positioned extension ladder without the assistance of a coworker and failure to wear safety gloves violated Employer's reasonable safety rules. He suffered injuries as a direct result of not following Employer's safety rules. The record reflects that Claimant was aware of Employer's reasonable safety rules regarding ladder and glove use but deliberately ascended the ladder without the assistance of a coworker. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003).

5. The willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335-104 (ICAO, Feb. 19, 1999). Instead, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548, 550 (1968); *Miller v. City and County of Denver*. W.C. No. 4-658-496 (ICAO, Aug. 31, 2006).

6. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003).

Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.* 907 P.2d at 719.

7. Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, §35.04.

8. As found, Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant was dispatched to a jobsite at PT[Redacted] to replace a front keypad that was not functioning properly. While at the PT[Redacted], Claimant fell off a ladder and suffered injuries. The record reflects that Claimant was using an extension ladder that he propped up against a wall. No coworker was holding or stabilizing the ladder at the time of the incident. Based on the obvious danger presented by the use of the ladder, as well as the persuasive testimony of Employer's witnesses, Claimant acted with deliberate intent in violating Employer's reasonable safety rules regarding the use of ladders and other safety protocols.

9. As found, the record reflects that Employer has adopted reasonable safety rules regarding the use of ladders and gloves while working on jobsites. Safety protocols include the wearing of anti-cut safety gloves. TS[Redacted] credibly explained that Employer's ladder usage safety policy specifies that two technicians must be on-site to use ladders. Specifically, A-frame ladders or electric lifts are to be used while on a worksite. Moreover, DH[Redacted] credibly emphasized that, according to Employer's ladder safety procedures and policies, two technicians must be present when using an A-frame or extension ladder over 12 feet in height. The purpose of the safety policy is to ensure that one technician remains at the bottom of the ladder to maintain stability. Employer's safety rules are unambiguous, definite, and non-conflicting.

10. As found, Claimant was aware of Employer's reasonable safety rules for technicians. Once per month, Employer sends out LMS training courses that all employees are required to finish within that month. The LMS training courses cover safety policies and procedures, including ladder usage. Notably, on October 12, 2022 Claimant completed a ladder safety course and a fall prevention course. Moreover, in Claimant's position as a Commercial Service Technician he was required to attend monthly service manager meetings.

11. As found, the record reveals that Claimant willfully violated Employer's safety rules. On November 4, 2022 no coworker was holding the ladder as Claimant was climbing. DH[Redacted] explained that, under Employer's policies and procedures, Claimant should have waited for a co-worker to stabilize the ladder before he started climbing. Notably, on November 4, 2022 DH[Redacted] told Claimant over the phone to wait for CV[Redacted] to arrive before he started working. He specifically stated "[d]on't

start anything until CV[Redacted] gets there because you need another person." After the incident, Claimant admitted that the ladder was "a little squirrely, but he was trying to get the job done." DH[Redacted] also observed Claimant without safety gloves after the accident. Moreover, DH[Redacted] spoke to CV[Redacted] at the job site after Claimant had fallen from the ladder on November 4, 2022. CV[Redacted] reported Claimant had not correctly positioned the ladder and was not wearing safety equipment. Notably, the ladder had been placed where the walls meet in which one side was straight and the other side was "kind of crooked." Nevertheless, Claimant ascended the ladder without assistance.

12. As found, Respondents have satisfied their burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding the use of ladders and other safety protocols. Under the circumstances, Claimant's use of an improperly positioned extension ladder without the assistance of a coworker and failure to wear safety gloves violated Employer's reasonable safety rules. He suffered injuries as a direct result of not following Employer's safety rules. The record reflects that Claimant was aware of Employer's reasonable safety rules regarding ladder and glove use but deliberately ascended the ladder without the assistance of a coworker. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent.

ORDER

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

1. Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent.

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

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

DATED: August 10, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-201-823-001

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that he sustained compensable work injuries on March 8, 2022?
- If Claimant suffered a compensable injury are Respondents required to pay for medical benefits to cure and relieve the effects of the injury sustained on March 8, 2022?
- What was Claimant's Average Weekly Wage at the time of the injury?
- Is Claimant entitled to TTD benefits from March 9, 2022 and ongoing?
- If Claimant is awarded TTD benefits, are Respondents entitled to a reduction of those benefits pursuant to a child support garnishment?

PROCEDURAL

The undersigned ALJ issued a Summary Order on January 19, 2023. On January 26, 2023, Respondents requested a full Order. This Order follows.

FINDINGS OF FACT

1. Claimant worked for Respondent-Employer in the kitchen. His job duties included prep work in the kitchen. He worked for Employer for approximately 1 1/2 months before his injury.

2. Claimant testified that he was hired to work in the dish pit and to do prep work. The jobs Claimant performed for Employer, including the pizza station, required constant standing, lifting, grabbing, squatting and bending. Claimant was credible when he described the physical nature of his job duties.

3. Claimant's medical history was significant in that he previously injured his right knee. More particularly, Claimant was evaluated by James Teumer, D.O. at the ED of UC Health on September 25, 2021, at which time he reported right knee pain. Claimant reported he had several previous injuries, from which he recovered. There was not a specific reference to a bicycle accident in the record. Claimant said he was kneeling down when he felt a pop to the inner part of the knee.

4. On examination, Dr. Teumer noted tenderness over the medial joint line of the right knee, with possible joint effusion. Range of motion ("ROM") was 135° and 80°. An x-ray was deferred and Dr. Teumer's clinical impression was: meniscal injury, right. An immobilizer was provided and Claimant was told to follow up with an orthopedic surgeon. No restrictions for the right knee were issued by Dr. Teumer. Claimant testified he had occasional pain in his right knee after this time.

5. There was no evidence in the record that Claimant required treatment for his right knee between the evaluation on September 25, 2021 and March 3, 2022.

6. There was no evidence in the record Claimant missed time from work due to right knee symptoms between September 25, 2021 and March 8, 2022.

7. Claimant testified he rode his bicycle to work every day while working for Employer, which was a distance of four miles.

8. Claimant's payroll records from January 28, 2022 through March 8, 2022 were admitted into evidence. These records showed Claimant's earnings totaled $2,967.35.[1]

9. Included in these records were February 1, 2022 to March 6, 2022 as the injury occurred on March 8, 2022 and claimant did not work a full day. Subtracting out the three days from the total of $2,967.35 equals $2,892.21. When divided by 4.71 weeks, the AWW is $614.06. The ALJ found that the calculation of Claimant's AWW fairly approximated his AWW.

10. On March 8, 2022, Claimant was working at the pizza station, learning how to make pizzas. Claimant testified that he was bending down to take a pizza out of the oven and when he stood up, felt a pop in his right knee. Claimant said the pain was intense and he was unable to stand or walk after he felt the pop. Claimant testified he required assistance to leave the workplace.

11. Claimant testified he told his supervisor ([Redacted, hereinafter BW]) that he was injured at work and then talked to the GM ([Redacted, hereinafter JM]). He was referred to Workwell, the ATP for Employer. Claimant said he was not able to secure an appointment at Workwell until later in March.

12. Claimant presented at UC Health on March 8, 2022 and was evaluated by Dr. Teumer, who noted he had knee pain for months and then when he was at work tonight, bent over and felt a pop in his knee. Claimant reported he was able to straighten his leg, but not all the way and could not bear weight on the knee. Dr. Teumer prescribed hydrocodone-acetaminophen, and his clinical impression was: acute pain of the right knee. Dr. Teumer opined this was likely a ligamentous injury with joint effusion and pain. He was then given crutches, told to ice and elevate his knee. The

[1] Exhibit 12.

ALJ found this report provided evidence that Claimant's work activities were the cause of increased pain in his knee.

13. On March 14, 2022, Claimant was evaluated by Kolby Vaughan, PA-C at UC Health for right knee pain. PA-C Vaughan said there was no indication for an MRI, noting she understand the difficulty of obtaining outpatient imaging. Dr. Teumer also evaluated Claimant and referred him to orthopedic surgery. Hydrocodone was prescribed.

14. An Employer's First report of injury was prepared on or about March 17, 2022 by [Redacted, hereinafter EG], HR manager. It specified Claimant reported the injury to JM[Redacted] and the witnesses were [Redacted, hereinafter BK], [Redacted, hereinafter BK], and [Redacted, hereinafter JO].

15. Claimant was evaluated by Pamela Rizza M.D at Workwell on March 28, 2022 for right knee pain. Claimant reported he bent down to pick up a pan and felt a pop. Claimant's right knee ROM was 20° on extension and 80° on flexion. The ALJ found there were restrictions in his right knee ROM. Dr. Rizza's diagnosis was: right knee pain and a work restriction of limited weight bearing for right lower extremity was issued. Dr. Rizza referred Claimant for an MRI. Dr. Rizza's WCM-164, of the same date, described the evaluation of acute on chronic right knee pain. The work-relatedness of Claimant's injury was noted to be undetermined.

16. On March 31, 2022, Claimant underwent an MRI on his right knee, and the films were read by Seth Andrews, D.O. Dr. Andrews' impression was: bucket-handle tear of the medial meniscus displaced into the intercondylar notch; torn anterior cruciate ligament, which was likely chronic, given the lack of associated bony contusion; medial collateral ligament was thickened but appeared intact which may represent a prior partial injury. The ALJ concluded that the MRI was evidence of both prior and acute injuries.

17. In the follow-up appointment on April 6, 2022, restrictions in Claimant's knee ROM were noted. Claimant's right knee ROM was 13° lack of extension, 102° on flexion and passive flexion-120°. Dr. Rizza diagnoses were: other spontaneous disruption of anterior cruciate ligament; other tear of medical meniscus, current injury. Claimant was referred for physical therapy ("PT") and an orthopedic referral was also made. Claimant's work restrictions were continued.

18. Dr. Rizza's opinion on the issue of causation was expressed in the April 6, 2022 WCM-164: "…ACL likely torn during bike accident of Sept 2021. With reported deep flexion, pop and mechanical block of the knee following the work related accident on 3/8, it is medically probable that [Redacted, hereinafter JG] sustained at least an exacerbation if not new onset medial meniscal tear with joint extrusion. He has had a sudden loss of function following the work related event". The ALJ credited this opinion.

19. Respondent-Employer did not have work for Claimant within in his restrictions and has not returned Claimant to work in any capacity.

20. On April 8, 2022, a Notice of Contest was filed on behalf of Respondents, which listed as grounds for the denial: investigation for medical records, prior to date of injury and possible DIME.

21. Claimant returned to Workwell on April 22, 2022 and was evaluated by Kate Tumulty, P.A., at which time it was noted he was not working because Employer could not accommodate his restrictions. Claimant was continuing PT and seeing a specialist for consideration of surgery. On examination, Claimant had laxity in the ACL, with positive Anterior Drawer and positive Lachman's tests. PA Tumulty noted there were restrictions in his right knee ROM, including 25° lack of extension and 90° on flexion. The diagnoses were the same as the April 6, 2022 evaluation.

22. Claimant testified that he was referred to Dr. Hartman from Workwell. Dr. Hartman performed surgery on his knee. From this information, the ALJ determined Dr. Hartwell is an ATP. Claimant testified he continues to have pain in his left knee.

23. The ALJ concluded Claimant suffered a compensable injury on March 8, 2022 while working for Employer. He aggravated the condition of his right knee while working in the kitchen.

24. No ATP has determined that Claimant was at MMI.

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

CONCLUSIONS OF LAW

Generally

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the credibility of Claimant, as well the medical records admitted at hearing directly impacted the issue of compensability.

Compensability

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S. (2020). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As a starting point, there was no dispute Claimant was working on March 8, 2022. This was a job that required standing on his feet during his shift, as well as bending down. The question in this case was whether the facts established that the March 8, 2022 incident aggravated or accelerated the condition of Claimant‘s right knee. The ALJ concluded that it was more probable than not that the incident on March 8, 2022 aggravated the underlying condition of his right knee and therefore Claimant suffered a compensable injury.

The ALJ‘s reasoning was twofold; first, the reports of the physicians treating Claimant documented that while he had previous required treatment for the right knee, the incident on March 8, 2022 exacerbated the underlying condition. (Finding of Fact 23). As determined in Findings of Fact 3-4, Claimant treated at UC Health for right knee issues. The records from UC Health admitted at hearing established Claimant required treatment for the right knee prior to March 8, 2022. However, Claimant was not given work restrictions prior to the injury. (Finding of Fact 4). Also, there was no evidence that Claimant received treatment between September 25, 2021 and March 8, 2022. (Finding of Fact 6).

After March 8, 2022, the medical evaluations of Claimant showed restrictions in his right knee ROM as a result of the injury. These restrictions in ROM were worse than those documented in the September 25, 2021 evaluation. *Id.* As found the opinions of Dr. Rizza directly supported the conclusion that the injury aggravated the right knee. (Finding of Fact 18).

Second, the March 31, 2022 MRI documented a bucket tear of the medial meniscus, which was objective evidence of a traumatic injury interposed on the underlying condition of Claimant's right knee. (Finding of Fact 16).

In coming to this conclusion, the ALJ considered Respondents' argument that Claimant did not report a bicycle injury in September 2021 to the providers at UC Health, which reflected negatively on his credibility. Respondents also argued that Claimant's described mechanism of injury was similar to the description on September 25 2021. It is true that there was not a reference to a bicycle injury in the ED records, however, this discrepancy does not refute the fact that Claimant was working as he testified on March 8, 2022. The ALJ also found the report of injury was consistent in the medical records that followed. Claimant's testimony was also in accord with the description of his injury provided to Dr. Teumer. In addition, the E-1 reflected the fact that there were witnesses to the incident and the injury was reported. Considering all of the evidence, the ALJ found there was a discrete event, which occurred on March 8, 2022, which aggravated the condition of the right knee.

AWW

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW.

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

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the

administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage". *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages to based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

Based upon the wage records admitted at hearing, the ALJ was persuaded that the fair calculation of Claimant's AWW was $614.06 per week (excluding the training days and the date of injury). (Finding of Fact 9).

TTD

As found, Claimant's ATP-s assigned physical restrictions attributable to the work injury. The evidence in the record reflected that Employer had no work within Claimant's restrictions after the injury. (Finding of Fact 9). The wage records admitted at hearing also confirmed Claimant did not return to work after his injury. In addition, no ATP placed Claimant at MMI. (Finding of Fact 24). The ALJ found Claimant is entitled to ongoing TTD benefits until terminated by law.

Child Support lien

Claimant's TTD benefits are subject to garnishment pursuant to the Notice of Administrative Lien and attachment, dated April 6, 2022 (Adams County Case No. 13JV002012) [Exhibit 13]. The ALJ concluded Respondents are entitled to offset Claimant's TTD benefits by the amount of $485.00 per month.

ORDER

It is therefore ordered:

1. Respondents shall pay for Claimant's medical treatment at UC Health and Workwell, as well as referrals from the providers, pursuant to the Colorado Worker's Compensation Medical Fee Schedule.

2. Claimant's AWW was $614.06 per week, which gives a TTD rate of $409.37 per week.

3. Respondents shall pay TTD benefits at the rate of $409.37 per week from March 9, 2022 until terminated by law.

4. Respondents shall pay interest at 8% per annum on all benefits not paid when due.

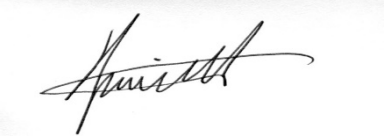
5. The amount of $485.00 per month shall be paid from Claimant's TTD benefits to the Child Support Registry.

6. All other issues are reserved for later determination.

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

DATED: August 10, 2023

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that on December 23, 2022, she suffered an injury arising out of and in the course and scope of her employment with Respondent?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of her left knee (including surgery performed by Dr. Tomas Pevny on April 26, 2023) is reasonable, necessary, and related to the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits?

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

5. Has Respondent demonstrated, by a preponderance of the evidence, that on December 23, 2022, Claimant engaged in a deviation, resulting in the December 23, 2022 incident falling outside of the course and scope of Claimant's employment?

FINDINGS OF FACT

1. Claimant has worked for Employer as a ski pro during ski season since 1988. She also works as a Mountain Bike Coach in the summer months. As a ski pro, Claimant provides professional ski instruction at Respondent's properties in Aspen/Snowmass. Claimant is certified as a Rocky Mountain Trainer by the Professional Ski Instructors of America (PSIA).

2. For a ski pro, such as Claimant, the paid work day begins at 9:00 a.m. Full day lessons are typically scheduled to begin at 9:00 a.m. and end at 3:00 p.m. However, Employer allows pros to begin their lessons earlier or later, as long as the lessons occur while ski lifts are in operation.

3. During the 2022-2023 ski season, ski pros are expected to be on the mountain and available to provide lessons during the period of December 18 through January 3. If a pro was not scheduled to give a lesson, they are to report to "line up" for job assignments. As with other normal work days, during this specific period, a ski pro's paid work day began at 9:00 a.m.

4. Claimant was assigned full day private lessons with the same two guests on December 21, 22, and 23, 2022. At the end of the lesson on December 22, 2022, the guests and Claimant agreed that the guests would contact Claimant in the morning on December 23, 2022 to finalize a meeting time and place.

5. On December 23, 2022, Claimant arrived at the staff locker room between 8:30 a.m. and 8:45 a.m. Claimant arrived during that time to dress in her work uniform and prepare her ski equipment for the day. Claimant remained in the locker room to await communication from her scheduled guests.

6. Shortly after 9:00 a.m. on December 23, 2022, the guests contacted Claimant and stated that they would meet for their lesson between 10:00 and 10:30 a.m. at the base of the gondola. As this was a pre-scheduled full-day lesson, Claimant could not report to line up for other assignments.

7. As a result, Claimant rode the gondola up the mountain to assess the conditions. Claimant then skied down a blue and recently groomed run. While on that assessment run, Claimant was engaging in short radius dynamic turns. These turns are a high level skill. While doing so, Claimant tipped on her skis and felt pain in her left knee.

8. Claimant immediately reported this incident to Respondent on December 23, 2022. Although her knee felt "fragile", Claimant still met her guests and completed the December 23, 2022 lesson.

9. Claimant testified that all of her actions on December 23, 2022 complied with guidelines set forth in the employee manual.

10. The operations manual for Employer's ski and snowboard school was admitted into evidence. This manual states:

> It is important for us to start our day in a way that allows us to warm up and assess conditions. When skiing to and from job assignments, pros are to use the easiest, most recently groomed run. Pros choosing not to ski/ride the easiest, most recently groomed run are choosing to free ski. This is outside the course and scope of employment and employees will not be entitled to workers compensation in the event of an injury.

11. The manual also notes that pros should "[t]ake time to acquaint yourself with the grooming and weather conditions prevailing on that mountain on that day."

12. In addition, the operations manual addresses a number of expectations for ski pros. This includes "[o]n-snow performance refers to the skiing/riding image and skill level a pro demonstrates. We will maintain a level of precision that matches, or exceeds our current certification level. We will demonstrate this precision while in uniform with or without guests... "

13. On December 23, 2022, Claimant completed an accident report at the direction of Employer. In that document, Claimant stated that while skiing "short radius dynamic turns" she lost her outside ski and "fell back and around". As a result, she felt soreness in her left knee.

14. On January 4, 2023, Claimant was asked to complete an Aspen Skiing Company Incident Analysis regarding the December 23, 2022 incident. Claimant did not complete this form. Rather, she provided information to a manager, [Redacted, hereinafter TF], who then typed data into the form. Claimant testified that it was TF[Redacted] who entered the term "free ski" into the January 4, 2023 documentation.

15. Claimant testified that she does not believe that she was free skiing on December 23, 2022. In support of her position, Claimant testified that she was checking conditions and setting an example as described in the operatioms manual.

16. Based upon documents entered into evidence, Respondent's position is that Claimant's injury was not work related because she was "free skiing" at the time of the incident. In an email communication between Employer and Claimant, Respondent takes the position that Claimant's injury would not be covered as a workers' compensation claim because Claimant was "coming and going" when she skied while waiting for her guests.

Left Knee Treatment Prior to December 23, 2022

17. Claimant testified that prior to the December 23, 2022 incident, she had experienced left knee pain during the summer months of 2022. On September 7, 2022, Dr. Glenn Kotz[1] referred Claimant to physical therapy to address left knee and left hamstring pain. On September 27, 2022, Claimant began physical therapy with Roaring Fork Physical Therapy.

18. Thereafter, Dr. Zotz ordered magnetic resonance imaging (MRI) of Claimant's left knee. On September 26, 2022, a left knee MRI showed a tear of the body and posterior horn of the lateral meniscus, mild proximal patellar tendinosis, Grade 2 chondromalacia of the lateral patellar facet, and Grade 3 to 4 chondromalacia of the medial femoral condyle. The MRI specifically notes that the anterior cruciate ligament {ACL) and medial collateral ligament (MCL) were both intact.

19. On September 29, 2022, Claimant was seen by Dr. Tomas Pevny. At that time, Claimant reported approximately two months of left knee pain, swelling, and limited range of motion. Dr. Pevny reviewed the MRI results and noted some subtle changes in the posterior horn of the lateral meniscus (indicating a possible small meniscus tear). Dr. Pevny recommended conservative treatment including physical therapy, ice, and over-the-counter pain medication. Dr. Pevney also noted that an injection could be considered.

[1] It appears from the medical records that Dr. Kotz is Claimant's primary care physician.

20. On October 31, 2022, Claimant returned to Dr. Pevny and reported continuing pain and swelling in her left knee. At that time, Dr. Pevny identified a diagnosis of osteoarthritis of the knee and noted a "subtle irregularity in the lateral meniscus". Dr. Pevny recommended and administered a cortisone injection to Claimant's left knee[2].

21. Claimant testified that following physical therapy and the injection from Dr. Pevny, she had no further left knee issues until the December 23, 2022 incident.

Left Knee Treatment After December 23, 2022

22. Claimant testified that on December 23, 2022, Employer provided her with a list of medical providers and she selected the urgent care clinic in Basalt, Colorado. Medical records entered into evidence demonstrate that on December 23, 2022, Claimant was seen at the Aspen Valley Hospital "after hours clinic" located in Basalt. At that time, Claimant was seen by Dr. Joshua Seymour. Claimant reported tenderness over the medial aspect of her left knee. Dr. Seymour noted that left knee x-rays taken on that date showed no acute bony abnormalities. Dr. Seymour opined that Claimant suffered a sprain of her medial collateral ligament (MCL) and recommended use of a splint, ice, rest, and elevation. In addition, Dr. Seymour referred Claimant for an orthopedic consultation.

23. On January 17, 2023, Respondent denied Claimant's claim by filing a Notice of Contest. The reason for the denial was that Claimant's injury was not work related.

24. On January 25, 2023, Claimant completed a Worker's Claim for Compensation regarding the December 23, 2022 incident. In that document, Claimant described the incident that resulted in a left knee injury as "skiing a blue groomed run to base of Aspen gondola moved back and inside when making a right turn fell and spun on my butt, left ski hit the snow".

25. On February 9, 2023, Claimant was seen for consultation with Dr. Pevny. On that date, Claimant reported immediate onset of pain in the medial aspect of her left knee while skiing at work on December 23, 2022. On examination, Dr. Pevny noted mild effusion of the left knee and instability. Dr. Pevny opined that Claimant suffered a tear of her anterior cruciate ligament (ACL). Dr. Pevny ordered a left knee MRI and recommended the continued use of a knee brace.

26. On March 14, 2023, an MRI of Claimant's left knee was administered. The MRI showed an "age-indeterminate" complete tear of the ACL; peripheral longitudinal tear of the posterior horn medial meniscus; Grade 3 chondral defect in the central weight bearing portion of the medial femoral condyle.

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[2] Specifically 5 cc of 32 mg Zilretta.

27. On March 15, 2023, Claimant returned to Dr. Pevny to discuss the MRI results. At that time, Dr. Pevny noted that there was a complete ACL tear and a medial meniscus tear. Dr. Pevny recommended surgical intervention that would include an ACL reconstruction (with cadaver graft) and medial meniscectomy. Claimant communicated to Dr. Pevny that she would prefer to wait until the end of the ski season before pursuing surgery.

28. On April 26, 2023, Dr. Pevny performed the left knee ACL reconstruction.

29. Since the surgery, Claimant has undergone physical therapy, uses a knee brace, uses a compression/ice machine daily, and follows a home exercise program. Claimant testified that she will have six to nine months of post surgical rehabilitation and recovery. Claimant testified that her current symptoms include stiffness, soreness, and swelling in her left knee.

30. Claimant testified that since her surgery, she has not returned to work for Respondent, or for any other employer. In addition, Claimant has not filed for unemployment benefits, as she is unable to work due to her surgical recovery.

31. Claimant testified that at the time of the December 23, 2022 incident she was paid as a Stage IV instructor at the rate of approximately $61.00 an hour. Claimant further testified that instructors receive a pay increase after working 255 hours, and a second increase after working 450 hours.

32. Employer's "pro pay grid" for the 2022-2023 ski season was admitted into evidence. For a Stage IV instructor the pay rate for Oto 225 hours was $53.36; for 225 to 450 hours it was $64.23; and for 450 hours and above the rate was $75.09.

33. For the two week pay period of December 18, 2023 through December 31, 2023, Claimant had gross pay of $4,832.58. This included 6 hours of pay at the rate of $57.83 per hour; and 72 hours at the rate of $62.30 per hour. The ALJ calculates that this results in an average pay of $2,416.29 per week. Two thirds of this AWW is $1,610.86.

34. The ALJ takes administrative notice that for injuries occurring in 2022, the maximum rate for temporary total disability (TTD) benefits is $1,228.99 per week.

35. Claimant proposes that her average weekly wage (AWW) is $3,449.53. Claimant calculations are based upon wages from the two week pay period of March 12, 2023 through March 25, 2023 (with a gross pay of $6,273.92). Claimant testified that this amount is representative of a normal two week period during the 2022-2023 ski season. In addition, Claimant asserts that an amount of $312.57 should be included in the calculation for her AWW to reflect the value of housing provided to Claimant by Employer.

36. Claimant is provided employee housing at a discounted rate as a benefit of working for Employer's ski school. Claimant testified that her current rent is $1,891.00 per month for a two bedroom apartment. Claimant further testified that market value rent for a similar apartment in Carbondale, Colorado would be $4,600.00 per month. Therefore, Claimant believes that her housing discount is in the amount of $2709.00 per month, ($4,600.00 less rent of $1,891.00 equals $2,709.00). Claimant shares this apartment with her partner. Therefore, she asserts that the amount of $312.57 should be added to her wages in calculating her AWW; ($2,709.00 divided by 2 equals $1,354.50; or $312.57 per week).

37. The ALJ credits Claimant's testimony, particularly testimony regarding her activities on December 23, 2022. The ALJ also credits the language of the operations manual regarding lessons, on-snow performance, and assessing conditions. The ALJ finds that claimant has demonstrated that it is more likely than not that on December 23, 2022 she suffered a left knee injury while within the course and scope of her employment with Employer. The ALJ further finds that Respondent has failed to demonstrate that it is more likely than not that Claimant was "free skiing" or engaged in any deviation from her job duties at the time of her injury. The ALJ finds that on December 23, 2022, Claimant was complying with all directives of Employer, as evidenced by the manual. Specifically, the ALJ finds that Claimant was preparing for her private lesson, assessing mountain conditions, skiing an easy blue run that was recently groomed, and skiing in a manner that was part of the "on-snow performance" expectation of Employer.

38. The ALJ is not persuaded by Respondent's assertion that Claimant engaged in a deviation when she skied prior to meeting her guests on December 22, 2023. Claimant expected to begin the lesson at 9:00 a.m., but due to the actions of her guests, the lesson was delayed. The ALJ finds that Claimant's decision to engage in appropriate job duties during this "down time" was well within the course and scope of her employment. Claimant could not report to lineup for additional duties, as she already had an assigned lesson. In addition, her decision to assess conditions rather than sit in the locker room for an hour (or more) was reasonable under the circumstances.

39. The ALJ credits the medical records and the opinions of Dr. Pevny The ALJ specifically credits the "before and after" MRI results which demonstrate that on September 26, 2022 Claimant's left ACL was intact, but after December 23, 2022, her ACL was torn. The ALJ finds that Claimant has successfully demonstrated that treatment of her left knee, including surgery performed by Dr. Pevny on April 26, 2023, constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

40. The ALJ credits the medical records and Claimant's testimony and finds that Claimant has demonstrated that it is more likely than that she suffered a wage loss beginning on April 26, 2023, (which was the date of her left knee surgery). Therefore,

Claimant has likewise demonstrated that it is more likely than not that she is entitled to temporary total disability (TTD) benefits beginning on April 26, 2023.

41. The ALJ credits the pay records for the period of December 18, 2022 through December 31, 2023 and calculates Claimant's AWW to be $2,416.29. The ALJ specifically excludes any value related to Employer provided housing in the AWW calculation pursuant to Section 8-40-201(19)(b), C.R.S. as discussed further in the ALJ's conclusions of law.

CONCLUSIONS OF LAW

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

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

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

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

5. As noted by the court in *City of Brighton,* the term "arising out or refers to the origin or cause of an employee's injury. *City of Brighton,* 318 P.3d at 502, *citing Horodyskyj v. Karanian,* 32 P.3d 470, 475 (Colo.2001). Specifically, the term calls for examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Id.* An injury "arises out of' employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *Id.* It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of the injury. *Id. citing City of Boulder v. Streeb,* 706 P.2d 786, 791 (Colo.1985).

6. When the employer asserts a personal deviation from employment "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroe,* WC 4-783-889 (ICAO, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). The issue is thus whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroe,* WC 4-783-889 (ICAO, Feb. 1, 201O); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). When the employee's personal errand is concluded, the deviation ends, and the employee is once again covered by Workers' Compensation. *Skywest Airlines, Inc. v. Industrial Claim Appeals Office* 2020 COA 131 (Colo. App. Aug. 27, 2020).

7. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that on December 23, 2022, she suffered an injury arising out of and in the course and scope of her employment with Respondent. As found, Claimant was engaged in activities that complied with Respondent'a manual. The ALJ concludes that at the time of Claimant's injury she had not deviated from her mandatory or incidental job duties. Furthermore, Claimant was not engaged in any activity that was for her sole benefit. On the contrary, Claimant was engaging in activities that benefited Respondent (specifically, preparing for her lesson, assessing mountain conditions, and skiing in a manner that was part of the "on-snow performance" expectation of Employer). As found, Claimant's testimony and Respondent's ski school operations manual are credible and persuasive on this issue.

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

9. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that treatment of her left knee, including surgery performed by Dr. Pevny on April 26, 2023, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. As found, the medical records and the opinions of Dr. Pevny are credible and persuasive on this issue.

10. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and
(2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymbum v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 P.2d 595 (Colo. App. 1998).

11. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that following her work related left knee surgery, she suffered a wage loss. Therefore, Claimant has likewise demonstrated, by a preponderance of the evidence, that she is entitled to to temporary total disability (TTD) benefits beginning April 26, 2023, and ongoing until terminated by law. As found, the medical records and Claimant's testimony are credible and persuasive on this issue.

12. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

13. Section 8-40-201(19), C.R.S. defines "wages". Section 8-40-201(19)(b), C.R.S. specifically provides that wages include "the reasonable value of board, rent, housing, and lodging received from the employer ... " Section 8-40-201(19)(b), C.R.S. further provides that "[i]f after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), ... that advantage or

benefit shall not be included in determination of the employee's wages so long as the employer continues to make payment."

14. In the present case, Claimant includes the value of the housing provided by Employer in the calculation of her AWW. The ALJ determines that Section 8-40-201(19)(b), C.R.S. provides clear direction on whether such an amount should be included as wages. Here, Claimant continues to receive the benefit of discounted housing from Employer. Therefore, the ALJ finds that this constitutes an incident in which "the employer continues to pay any advantage or fringe benefit". Therefore, this amount shall not be included in the calculation of Claimant's wages, and therefore not included in the AWW calculation at this time. If there comes a time when Claimant is no longer receiving discounted housing from Employer, the analysis on this specific issue would change.

15. As found, Claimant's AWW at the time of her injury was $2,416.29. As found, the wage records are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable injury on December 23, 2022.

2. Respondent shall pay for reasonable, necessary, and related medical treatment of Claimant's left knee, including surgery performed by Dr. Pevny on April 26, 2023.

3. Claimant is entitled to temporary total disability (TTD) benefits beginning April 26, 2023, and ongoing until terminated by law.

4. Claimant's average weekly wage (AWW) for this claim is $2,416.29.

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

Dated August 11, 2023.

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

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-218-741-002

ISSUES

- Did Claimant prove she suffered a compensable injury on August 16, 2022?
- If the claim is compensable, did Claimant prove the treatment she has received for her low back was reasonably needed to cure and relieve the effects of the injury?
- The parties stipulated to an average weekly wage of $607.87.
- The parties stipulated that Dr. Brianna Fox is Claimant's primary ATP.

FINDINGS OF FACT

1. Claimant works for Employer in the housekeeping and laundry department. The job is physically demanding and requires frequent lifting, pushing, pulling, and bending. Claimant transferred to the housekeeper position in March 2022. Before that, she worked approximately two years in the kitchen as a cook.

2. Claimant underwent functional capacity testing when she transferred to the housekeeping position. The evaluator noted a history of "arthritis, herniated cervical and lumbar spine, colon cancer SX. No report of [past medical history] hindering essential job functions." During the testing, Claimant pushed and pulled 100 pounds, lifted and carried 50 pounds at waist height and 25 pounds to head level, and performed repetitive squatting and reaching.

3. Claimant alleges an injury to her low back on August 16, 2022 while vacuuming an office. She twisted to the right to pull the hose off the vacuum and felt a pop in her left side. She felt sharp pain in her low back that radiated to her legs and up to her left-side ribs.

4. Claimant immediately reported the injury to the head employee nurse, [Redacted, hereinafter DAK]. She reported it to her direct supervisor the next morning.

5. Claimant saw Natasha Garver, FNP, at the Gordon Clinic on Augst 17, 2022. Ms. Garver documented that Claimant bent down while vacuuming and "felt something pop on left by her rib cage." She continued working despite the pain. The pain persisted, so she requested treatment. Physical examination showed point tenderness around the left lower rib. X-rays of the ribs showed no fracture or other focal lesion. The report makes no mention of low back pain. Claimant testified she marked back pain on a pain diagram, but no corresponding pain diagram is in evidence. Ms. Garver gave Claimant a Toradol injection and prescribed naproxen. Claimant did not want work restrictions and assumed she would be okay after a couple days of rest. She was instructed to follow up in two weeks.

6. Also on August 17, DAK[Redacted] completed an Employer's First Report. Regarding the mechanism of injury, the report states, "while vacuuming carpet, employee turned and twisted, felt discomfort." The injury was described as a "strain," affecting "multiple body parts."

7. Claimant was evaluated by Dr. Brianna Fox on September 7, 2022. Dr. Fox noted Claimant had initially felt chest wall pain "that she thought was her ribs," but "the following day, patient's pain acutely worsened and localized to her low back." Claimant reported tingling in her feet and weakness in her right leg. She appeared uncomfortable and had difficulty maintaining a static posture. She walked with an antalgic gait. Examination showed marked tenderness from the lower thoracic spine through the lumbar spine. Dr. Fox appreciated paraspinal muscle spasm from T-10 to the sacrum. Range of motion was limited because of pain. Strength and sensation were reduced in the right leg and foot. Dr. Fox diagnosed lumbar radiculitis and muscle spasm. She was concerned about possible spinal cord irritation or compression, and ordered a lumbar MRI. Dr. Fox thought it best to wait for the MRI results before starting therapy. She prescribed a muscle relaxer and a Medrol Dosepak. Claimant was given work restrictions of no lifting more than 10 pounds and no twisting or crawling.

8. The lumbar MRI was completed on September 23, 2022. It showed multilevel pathology including (1) moderate to severe facet arthropathy at L1-2 causing foraminal stenosis and possible right L1 nerve root impingement, (2) severe facet arthropathy at L4-5 and stenosis with possible L5 root impingement, and (3) severe facet arthropathy and foraminal stenosis with possible impingement of the L5 nerves and right S1 nerve. The pathology appears to be chronic and degenerative in nature, with no convincing evidence of acute structural changes.

9. Claimant followed up with Dr. Fox on September 27, 2022. She reported ongoing low back pain and muscle spasms. After reviewing the MRI report, Dr. Fox ordered physical therapy and recommended an evaluation with a spine surgeon. Dr. Fox took Claimant off work for a week to "try to get [the] spasms to break."

10. Claimant returned to Dr. Fox on October 10, 2022. She reported an acute exacerbation of her back pain that started three days earlier when she bent over to pick up a small trash bag at work. The pain eased after taking muscle relaxers, but intensified after trying to vacuum, to the point her back "feels like one big spasm." Dr. Fox reiterated the need for a surgical evaluation and referred Claimant to pain management for consideration of injections.

11. Claimant saw Dr. Michael Schweid, a spine surgeon, on October 12, 2022. Claimant explained she developed back and leg pain after she "performed a twisting maneuver" at work. Claimant related a history of "very mild chronic back pain that she was able to work through easily." Dr. Schweid discussed therapy and epidural steroid injections but Claimant was interested in a more definitive "fix" with surgery. Dr. Schweid indicated his office would contact Claimant to schedule a surgery date, although it is unclear whether this occurred. In any event, Claimant is not requesting approval of surgery in the present litigation.

12. Claimant underwent bilateral S1 epidural steroid injections on November 30, 2022. She had a positive short-term diagnostic response, but no sustained therapeutic benefit.

13. Dr. Barry Ogin performed an IME for Respondents on December 29, 2022. Dr. Ogin opined the spinal stenosis and other multi-level degenerative changes shown on the MRI were pre-existing and not causally related to the August 16 work accident. Dr. Ogin concluded the "minimal exposure episode on 08/16/2022, where she was simply bending over and lifting the hose off her vacuum, would not have significantly caused, aggravated, or accelerated" the pre-existing condition. To the extent Claimant may require a lumbar fusion, this would be necessary regardless of occupational exposure. Nevertheless, he acknowledged that Claimant probably suffered a minor muscle strain, and opined, "a short course of physical therapy, 6-8 visits, and a pain psychology evaluation, may reasonably be pursued through this claim to address any soft-tissue component to her complaints."

14. Claimant saw Dr. Jack Rook on January 23, 2023 for an IME at the request of her counsel. Dr. Rook concluded Claimant suffered "an acute work-related injury on August 16, 2022 which caused severe worsening of low back pain and development of bilateral lower extremity radicular symptoms." Dr. Rook cited several factors supporting this conclusion, including a biologically plausible mechanism of injury (bending, twisting, and lifting), Claimant's immediate report of the injury, and the lack of treatment for a low back condition in the years before the accident. Dr. Rook emphasized that Claimant was working full-time at a physically demanding job without difficulty or limitation before the work accident.

15. Dr. Ogin issued a supplemental report dated May 4, 2023 after reviewing pre-injury medical records, including the following:

- An emergency room report from October 2, 2014 documenting a four-year history of back pain that had recently worsened without trauma, causing sensory abnormalities in her feet and urinary incontinence. An MRI that same date showed an anterior disc herniation at L1-2, and a disc bulge and foraminal stenosis at L4-5 flattening the right L5 nerve root.

- PCP records from 2015 and 2016 showing chronic back pain and requiring the use of Vicodin, NSAIDs, and Tylenol. Claimant reported falling because her legs gave out and was applying for disability based on low back and neck issues. Claimant was referred for a surgical evaluation at least twice, although she did not pursue the evaluation.

- On February 23, 2017, Claimant saw her PCP for back pain flares on and off. She could not recall any injury. She had missed a couple of days from work and needed a doctor's note to excuse the absences.

16. The new records did not change Dr. Ogin's opinions and conclusions reflected in his initial report. In Dr. Ogin's view, the pre-injury records confirmed a long

history of chronic back pain with frequent flare-ups not associated with specific events. Thus, the records buttressed his opinion about the progressive nature of Claimant's underlying degenerative spinal pathology and lack of causal relationship to the work accident. He maintained his opinion that Claimant suffered a minor soft-tissue strain on August 16, but her ongoing symptoms are solely related to the pre-existing condition.

17. Dr. Rook and Dr. Ogin testified at hearing consistent with their reports. Dr. Ogin again conceded that Claimant suffered a minor "strain" from the work accident.

18. Claimant proved she suffered a compensable injury to her back on August 16, 2022. Although Claimant had underlying degenerative pathology affecting multiple levels of her lumbar spine before the work accident, she was working at a demanding job without limitation or difficulty. She developed acute pain after bending and twisting to remove the vacuum hose on August 16, 2022. Dr. Fox's September 7, 2022 report is persuasive that Claimant initially thought it was her ribs but the pain quickly "localized" to her low back. Even though Claimant has had multiple previous flare-ups without an inciting event, *this* flare-up was triggered by her work activity on August 16, 2022. Dr. Ogin essentially agreed that Claimant suffered a minor muscle strain at work that reasonably required conservative treatment. Claimant was eventually given temporary work restrictions. Those facts are sufficient to get Claimant over the initial hurdle of compensability.

19. Claimant proved the evaluations and treatment she received from and on referral by Ms. Garver and Dr. Fox and their referrals were reasonably needed to diagnose, cure and relieve the effects of her injury, including the September 23, 2022 lumbar MRI, medications, the October 12, 2022 evaluation by Dr. Schweid, and the November 30, 2022 lumbar ESIs. Claimant has not requested approval for a lumbar fusion, and that issue is reserved for future determination, if necessary.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Even a minor "strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused her to seek medical treatment. The ICAO's decision in *Garcia v.*

Express Personnel, W.C. No. 4-587-458 (ICAO, August 24, 2004) is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the theory that the claimant suffered no "injury." The ICAO reversed and held that the claimant had established a compensable injury as a matter of law:

> Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury.
>
> Here, the ALJ found there was an industrial accident which caused a minor lumbar strain. Further, the ALJ determined that when the injury was reported to the employer, the employer offered the claimant medical services from Dr. Caughfield, which the claimant accepted. Although Dr. Caughfield placed the claimant at MMI based upon his [ ] examination, the ALJ found with record support that Dr. Caughfield diagnosed a lumbar strain. Thus, the ALJ's findings compel the conclusion the claimant established a compensable injury which entitled her to an award of medical benefits. (Citations omitted).

Similarly, *Conry v. City of Aurora*, W.C. No. 4-195-130 (ICAO, April 17, 1996) involved a minor episode that was found to establish a compensable claim as a matter of law. In *Conry*, the claimant suffered from pre-existing asthma. One day she walked into work and encountered a "strong smell of ammonia." As a result, she "began wheezing and became short of breath." The claimant's supervisor advised that she go to the doctor. There is no indication in the decision that the claimant required any treatment other than that single physician visit. The ALJ denied the claim because the ammonia exposure merely caused a "temporary exacerbation" of the claimant's pre-existing asthma. She had no ongoing sequela nor required any additional treatment. Therefore, the ALJ determined the claimant failed to prove that she suffered a compensable "injury." The ICAO reversed the ALJ and found the claimant had proven compensability as a matter of law. The Panel stated, "the claimant's industrial exposure to ammonia caused her to experience respiratory symptoms for which she needed and received medical treatment. . . . [T]hese findings compel a conclusion that the claimant suffered a compensable aggravation of her pre-existing condition [asthma]. Therefore, we reverse the ALJ's determination that the claimant did not suffer a compensable injury."

As found, Claimant proved she suffered a compensable injury to her back on August 16, 2022. Although Claimant had underlying degenerative pathology affecting multiple levels of her lumbar spine before the work accident, she was working at a demanding job without limitation or difficulty. She developed acute pain after bending and twisting to remove the vacuum hose on August 16, 2022. Dr. Fox's September 7, 2022

report is persuasive that Claimant initially thought it was her ribs but the pain quickly "localized" to her low back. And even though Claimant has had multiple previous flare-ups without an inciting event, *this* flare-up was triggered by her work activity on August 16, 2022. Dr. Ogin essentially agreed that Claimant suffered a minor muscle strain at work that reasonably required conservative treatment. Claimant was eventually given temporary work restrictions. Those facts are sufficient to get Claimant over the initial hurdle of compensability.

B. Medical benefits

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). An industrial injury need not be the "sole cause" of a need for medical treatment to be deemed a "proximate cause." Rather, it is sufficient if the injury is a "significant factor" in the sense that there is a "direct causal relationship" between the injuy and the need for treatment. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

As found, Claimant proved the evaluations and treatment from Ms. Garver and Dr. Fox and their referrals were reasonably needed to cure and relieve the effects of the injury. This includes the September 23, 2022 lumbar MRI, medications, the October 12, 2022 evaluation by Dr. Schweid, and the November 30, 2022 lumbar ESIs. At a minimum, Claimant suffered an acute soft-tissue strain that reasonably prompted her to seek treatment. She was appropriately prescribed medication to alleviate her symptoms. Because she reported severe back pain and leg symptoms, Dr. Fox reasonably ordered an MRI, injections, and an evaluation by a spine surgeon. Diagnostic evaluations and testing are a compensable medical benefit if they have a reasonable prospect of defining the claimant's condition and suggesting a course of treatment. *E.g., Villela v. Excel Corp*., W.C. No. 4-400-281 (February 1, 2001).

Claimant has not requested approval for a lumbar fusion, and that issue is reserved for future determination, if necessary.

ORDER

It is therefore ordered that:

1. Claimant's claim for a low back injury on August 16, 2022 is compensable.

2. Dr. Brianna Fox is Claimant's primary ATP.

3. Claimant's average weekly wage is $607.87.

4. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to evaluations and treatment by Ms. Garver and Dr. Fox at the Gordon Clinic, the September 23, 2022 lumbar MRI, medications prescribed by ATPs, the October 12, 2022 evaluation by Dr. Schweid, and the November 30, 2022 lumbar epidural steroid injections.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 18, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-130-634-004

ISSUES

I. Whether the referral to Dr. Yi to evaluate Claimant's cubital tunnel syndrome is reasonable, necessary, and related to the November 29, 2019, industrial injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. This claim involves an admitted injury to Claimant's right upper extremity that occurred on November 29, 2019.
2. Claimant is diabetic and was diagnosed with diabetes in 2012. Due to his diabetes, Claimant had some numbness and tingling in his upper and lower extremities after he was diagnosed as diabetic. Upon being diagnosed as diabetic, Claimant's primary care physician prescribed Metformin and gabapentin, which resolved the numbness and tingling issues related to his diabetes. Thus, prior to his work injury, he was not having numbness and tingling in his upper or lower extremities like he was previously.
3. On December 3, 2019, Claimant treated with Concentra and reported he slipped and fell on a wet floor and landed on his right hand and lower back. Claimant reported right wrist, hand, and shoulder pain with some numbness in his right arm, as well as lower back pain. Claimant reported he is diabetic but that he has had no issues with diabetic neuropathy since starting gabapentin. Claimant was prescribed a right arm sling and a right wrist brace. *Claimant's Exhibit 4, pages 8-14*.
4. On December 16, 2019, Claimant treated at Concentra with Scott Richardson, M.D. and reported persistent right wrist, arm, and should pain and symptoms. *Claimant's Exhibit 4, pages 19-25*.
5. From May 11, 2020, through July 15, 2021, Claimant underwent physical therapy for his persistent right upper extremity pain and symptoms. *See Claimant's Exhibit 11, pages 372-512*.
6. On October 1, 2020, Claimant treated with his primary care physician. At this visit, it was noted that Claimant was not checking his blood sugar levels regularly, but when he did during the last week the levels were in the 200's and his A1C had worsened. *Respondents' Exhibit G, page 149-150*.
7. On January 13, 2021, Claimant treated with his primary care physician, who noted his underlying diabetic condition was controlled without complications. He added that Claimant was doing a great job of managing his diabetes and that he was not having any complications. *Respondents' Exhibit G, page 144-145*.

8. On January 26, 2021, Claimant underwent right shoulder surgery with Mark Failinger, M.D. *Claimant's Exhibit 5, pages 262-264*.

9. On February 26, 2021, Claimant followed-up with Dr. Failinger and reported persistent right shoulder pain, arm numbness, clicking/popping in his right elbow, right hand numbness and swelling, and tinging in his fingers on his right hand. Dr. Failinger ordered right elbow x-rays and an MRI, as well as an ultrasound (which was negative) of Claimant's right upper extremity. *Claimant's Exhibit 5, pages 269-271*.

10. On March 12, 2021, Claimant continued to report right upper extremity pain and symptoms. Dr. Failinger noted the likely onset of CRPS. *Claimant's Exhibit 5, pages 273-276*.

11. On February 8, 2021, Claimant returned to see Dr. Richardson and reported persistent right shoulder pain post-surgery, right elbow pain/symptoms, and tinging in his right hand/fingers. *Claimant's Exhibit 4, pages 53-56*. On February 22, 2021, Claimant treated with Dr. Richardson and reported pain and symptoms from his right shoulder down to his fingers. *Claimant's Exhibit 4, pages 57-61*.

12. On March 15, 2021, Clamant returned again to see Dr. Richardson and reported ongoing pain and symptoms involving his right upper extremity. At this visit, he also reported pain and tightness in his right wrist with swelling and increased warmth. At this appointment, Dr. Richardson also questioned whether Claimant had CRPS. *Claimant's Exhibit 4, pages 62-70*.

13. On March 31, 2021, Claimant treated with Nicholas Olsen, DO, and reported the nature of his injury and persistent right upper extremity pain and symptoms. Claimant reported that post surgically, he started feeling range of motion restrictions in his elbow with severe pain and paresthesia. Claimant reported right elbow pain and numbness with tingling into his hand/fingers. On physical examination, Dr. Olsen noted Claimant was tender at the median nerve at the wrist and that the median nerve test at the wrist had a positive Tinel sign, but yet Claimant had a negative Tinel sign at the elbow. Based on his assessment, Dr. Olsen recommended right upper extremity testing for CRPS. *Claimant's Exhibit 6, pages 301-309*.

14. On April 28, 2021, Claimant treated with Dr. Olsen and reported persistent pain and paresthesias in his right forearm and hand, along with swelling in his wrist and hand. On physical examination, Dr. Olsen noted that the median nerve compression test was positive at the wrist, the Tinel sign was positive at the wrist, and that the Tinel sign was negative over his cubital tunnel. *Claimant's Exhibit 6, pages 310-312*.

15. On May 14, 2021, Claimant treated with Dr. Failinger and reported persistent right upper extremity pain and symptoms and delays in treatment due to not receiving physical therapy authorization. Claimant's Exhibit 5, pages 281-284. On August 13, 2021, Dr. Failinger noted Claimant should see a hand surgeon regarding his ulnar nerve issues. *Claimant's Exhibit 5, pages 290-292*.

16. On April 29, 2021, Dr. Olsen noted the CRPS testing showed a likely positive diagnosis of CRPS. Dr. Olsen recommended Claimant undergo stellate ganglion blocks. Additionally, Dr. Olsen performed a right upper extremity EMG, which despite

Claimant having a negative Tinel's sign over his cubital tunnel, revealed ulnar neuropathy at the cubital tunnel. *Claimant's Exhibit 6, pages 313-317*.

17. On May 6, 2022, Claimant was evaluated by Dr. Richardson. At this appointment, Dr. Richardson noted that Claimant had a positive Tinel's sign at his cubital tunnel and diagnosed Claimant with cubital tunnel syndrome. *Claimant's Exhibit 4, pages 85-86*.

18. On May 12, 2021, Claimant underwent a right stellate ganglion block with Dr. Olsen. *Claimant's Exhibit 6, pages 318-319*.

19. On May 18, 2021, Claimant followed-up with Dr. Olsen and reported significant improvement in his CRPS symptoms following the block. In addition to evaluating Claimant for his CRPS, Dr. Olsen also assessed Claimant for his cubital tunnel syndrome and again found Claimant had a positive Tinel's sign at his cubital tunnel. *Claimant's Exhibit 6, pages 320-322*.

20. On May 20, 2021, based on a referral from Dr. Richardson, Claimant treated with David Bierbrauer, M.D., an orthopedic hand surgeon. He concluded that the Claimant developed CRPS after his right shoulder surgery. He also concluded that Claimant has electrodiagnostic evidence of cubital tunnel syndrome graded as moderate, but yet the Claimant's complaints and symptoms were more consistent with carpal tunnel syndrome despite the negative exam of the median nerve. At that time, Dr. Bierbrauer recommended complete resolution of Claimant's CRPS before addressing Claimant's cubital tunnel syndrome. *Claimant's Exhibit 4, page 89*.

21. On July 1, 2021, Claimant returned to Dr. Bierbrauer. At this appointment, he concluded Claimant had electrodiagnostically confirmed right cubital tunnel syndrome and clinically relevant carpal tunnel syndrome. He said that he would consider performing a cubital tunnel release with sub-muscular ulnar nerve transposition and carpal tunnel release, but not until Claimant's CRPS had resolved. *Claimant's Exhibit 4, page 104*.

22. On July 6, 2021, Claimant returned to Dr. Richardson. At this appointment, Dr. Richardson noted that Claimant was seen by Dr. Bierbrauer for his EMG confirmed cubital tunnel syndrome, but that Dr. Bierbrauer wanted to hold off on surgery until Claimant's CRPS was under control. Because Dr. Bierbrauer did not want to perform surgery at that time, and based on Claimant's request, Dr. Richardson referred Claimant to Dr. In Sok Yi for a second surgical opinion. *Claimant's Exhibit 4, pages 106-114.*

23. On August 17, 2021, Claimant was evaluated by Dr. Yi, an orthopedic surgeon, for his right upper extremity symptoms. Among other things, he found that Claimant had a positive elbow flexion test and that he also had a positive Tinel's at the elbow. Based on his physical examination and assessment, he concluded Claimant has CRPS and cubital tunnel syndrome involving his right upper extremity. Dr. Yi also discussed treatment options with Claimant for which included surgery – a cubital tunnel release. Dr. Yi stated that such treatment will help the numbness and tingling in Claimant's small finger and may also help his CRPS. *Claimant's Exhibit 7, pages 344-345*.

24. Also on August 17, 2021, Claimant was evaluated by Dr. Olsen. Claimant advised Dr. Olsen that he had consulted with Dr. Yi and that Dr. Yi recommended surgery. Dr.

Olsen maintained Claimant's treatment plan and recommended moving forward with a third right stellate ganglion block. *Claimant's Exhibit 6, pages 333-336*.

25. On October 26, 2021, Claimant underwent an independent medical evaluation with John Burris, M.D., Respondents' retained expert witness. Dr. Burris opined Claimant was at MMI, does not have CRPS, and that Claimant's right elbow pain and symptoms, including [right] cubital tunnel syndrome are unrelated to his industrial injury. *Respondents' Exhibit B, pages 37-53*.

26. From late 2021 through June 2022, Claimant continued to treat with Dr. Richardson and other Concentra providers. During this time, Claimant reported persistent right upper extremity, including right elbow, pain and symptoms. *See Claimant's Exhibit 4, pages 134-193*.

27. On June 6, 2022, Claimant underwent a 24-month Division IME with John Aschberger, M.D., who concluded Claimant is not at MMI. Dr. Aschberger stated that in order to further investigate whether Claimant's right sided cubital tunnel syndrome is work related, Claimant should undergo bilateral temperature controlled electrodiagnostic testing of his upper extremities. Dr. Aschberger also stated that if the findings were localized to the right upper extremity, then further intervention could proceed, but yet work relatedness would have to be evaluated further. He also stated that if there were similar findings in the right and the left, then it would not be work-related. *Claimant's Exhibit 8, pages 346-353*.

28. On November 17, 2022, Respondents filed a General Admission of Liability. *Claimant's Exhibit 1, page 1*.

29. On December 14, 2022, Claimant presented to Justin Green, M.D., for bilateral upper extremity electrodiagnostic testing. At this appointment, Claimant still complained of pain, tingling, numbness, and weakness of the right upper extremity, which included elbow and wrist pain. He also complained of loss of extension of his fingers. Dr. Green performed the electrodiagnostic testing. The results were normal – bilaterally. Based on the normal results, Claimant was referred back to Dr. Richardson for further management of his symptoms. *Claimant's Exhibit 10, pages 370-371*.

30. On February 3, 2023, Claimant returned to Dr. Richardson. Dr. Richardson evaluated Claimant and found tenderness at the cubital tunnel of Claimant's right elbow. Dr. Richardson also noted that the December 14, 2022, EMG was normal. At this appointment, Dr. Richardson stated Claimant said he needed a referral back to the hand surgeon, Dr. Yi, to see if he can get right cubital tunnel surgery. Despite the normal EMG, Dr. Richardson felt it was appropriate to refer Claimant back to Dr. Yi. Thus, Dr. Richadson referred Claimant to back to Dr. Yi to so Dr. Yi could "evaluate and treat" Claimant. *Claimant's Exhibit 4, pages 225-230*.

31. On February 15, 2023, Dr. Burris performed a records review. Dr. Burris opined Claimant's right cubital tunnel syndrome is unrelated to Claimant's industrial injury. He also concluded that because the DIME physician's suggestion for Claimant to undergo a bilateral EMG, which he did, and which was negative, there was no need for another evaluation by Dr. Yi. Thus, he concluded that the referral to Dr. Yi is not

reasonable, necessary, or related to Claimant's industrial injury. *Respondents' Exhibit B, pages 33-36*.

32. Dr. Burris also testified by post-hearing deposition on June 16, 2023, and maintained his opinions. During his deposition, he went over the findings on physical examination of various physicians, which included a positive Tinel's sign, that developed several months after the Claimant's injury, and the prior EMG that was positive. He also discussed the mechanism of injury and how Claimant fell. Dr. Burris concluded that the lack of a temporal relationship to the initial injury, and the mechanism of injury, did not support a finding that the cubital tunnel condition was related to Claimant's work accident. Dr. Burris also stated that based on the DIME opinion, and the negative bilateral EMG findings after the DIME, in December 2022, a referral to Dr. Yi would not be appropriate and in line with the recommendations of the DIME physician. *See Burris Deposition.*

33. At Hearing, Claimant credibly testified about the onset of his right upper extremity symptoms. Claimant credibly testified that his right elbow symptoms started after his January 2021 right shoulder surgery and that he continues to have persistent right upper extremity, including right elbow, pain and symptoms. Claimant did not have any left upper extremity symptoms. Claimant also credibly testified that he did not have any issues with his right upper extremity-like he is having now-prior to his work injury.

34. Claimant does have diabetes that could be causing his right upper extremity symptoms. For example, Claimant complained of tingling in his hands and legs in 2014 and a sense of vibration in 2015. *Respondents' Exhibit D, page 63, 66*. Plus, in September 2020, his diabetes was not under control. *Claimant's Exhibit D, page 400*. But Claimant was forthcoming with his providers (from day one) about his underlying diabetic condition and his diabetes appeared to be controlled with Metformin and gabapentin as of April 2021. *Claimant's Exhibit 6, page 313*.

35. But, Claimant's right upper extremity complaints, for which he is being referred back to Dr. Yi, started after his January 2021 right shoulder surgery. As a result, the ALJ finds that the temporal relationship between Claimant's shoulder surgery and the onset of his right elbow symptoms, combined with the varying physical findings, demonstrates a causal connection of his right elbow symptoms to his work injury to support the need for additional treatment in the form of an evaluation by Dr. Yi in order to assist in ascertaining and defining the extent of Claimant's work injury and the need for future treatment, which could include surgery.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of

the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether referral to Dr. Yi for a cubital tunnel syndrome surgery evaluation is reasonable, necessary, and related to the November 29, 2019, industrial injury.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The term medical treatment includes diagnostic or evaluative procedures required to ascertain the scope of the industrial injury and determine the extent of future medical treatment. *See Merriman v. Indus. Com.*, 210 P.2d 448 (1949); *Villela v. Excel Corp.*, W.C. No. 4-400-281 (February 1, 2001); *Hatch v. John H. Harland Co.*, W.C. No. 4-368-712 (August 11, 2000).

In this case, Claimant has been diagnosed with cubital tunnel syndrome. But his Tinel's and EMG test results have varied. Sometimes the testing has been positive for cubital tunnel syndrome and sometimes it has been negative. But, despite these findings, Dr. Richardson still determined that Claimant's symptoms support a finding and diagnosis of cubital tunnel syndrome and that he needs additional evaluative medical treatment.

Plus, the finding that Claimant's right upper extremity complaints, for which he is being referred back to Dr. Yi, started after his January 2021 right shoulder surgery, and did not exist before the shoulder surgery, is found to be highly persuasive. The ALJ is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship and that correlation is not causation. *See Shaffstall v. Champion Technologies*, W.C. No. 4-820-016 (March 2, 2011). On the other hand, the ALJ is also mindful of the fact that such logic that may also yield inaccurate results, *i.e*., that sequence is not relevant to causation. *See Wilson v. City of Lafayette*, No. 07-cv-01844-PAB-KLM, 2010 U.S. Dist. LEXIS 24539, at *23 (D. Colo. Feb. 25, 2010).

In this case, the ALJ finds and concludes that the sequence is relevant to causation here. As a result, the ALJ finds and concludes that the temporal relationship between Claimant's shoulder surgery and the onset of his right elbow symptoms establishes a causal connection of his right elbow symptoms to support the need for additional treatment in the form of an evaluation by Dr. Yi in order to assist in ascertaining and defining the extent of Claimant's work injury and the need for future treatment, which might include surgery. As stated above, medical treatment includes diagnostic or evaluative procedures required to ascertain the scope of the industrial injury and determine the extent of future medical treatment. *See Merriman, Supra*.

The ALJ also finds persuasive the fact that Claimant's treating physician, Dr. Richardson, who was treating Claimant for his work injury, referred Claimant to Drs. Bierbrauer and Yi to evaluate Claimant for his cubital tunnel symptoms. Such referrals indicate to this ALJ that Dr. Richardson thought Claimant's cubital tunnel symptoms were related to the Claimant's work injury and needed further assessment by a surgeon such as Drs. Bierbrauer and Yi under Claimant's workers' compensation claim. Thus, this is persuasive evidence that the need for an evaluation with Dr. Yi is reasonably, necessary, and related to the work injury. The ALJ has also considered the opinions of Dr. Burris. Overall, the ALJ does not find his opinions to be persuasive, when compared to the record as a whole.

Therefore, the ALJ finds and concludes that based on the totality of the evidence, Claimant has established by a preponderance of the evidence that the referral to Dr. Yi to evaluate Claimant for his cubital tunnel symptoms is reasonable, necessary, and related to his industrial injury to help determine the extent of his work injury and the need for future medical treatment.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The evaluation with Dr. Yi is reasonable, necessary, and causally related to the admitted industrial injury.
2. Respondents shall pay for Claimant to be evaluated by Dr. Yi for his right elbow symptoms.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 14, 2023.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening his claim based on a change in his condition.

2. Whether Claimant established by a preponderance of the evidence that medical treatment recommended by Rafer Leach, M.D., is reasonably necessary to cure or relieve the effects of his industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as the director of dining services for Employer's health care facility. On July 22, 2021, Claimant was assisting another employee moving a desktop into an office and sustained an admitted injury to his back and hip.

2. Claimant has a history of lower back issues, including a lower lumbar discectomy more than twenty years ago. In 2016, Claimant was treated for a lower back strain and groin pain, and underwent a lumbar MRI on September 30, 2016. (Ex. I). The MRI was interpreted as showing multilevel disc degeneration, with mild to moderate stenosis without nerve root deformity. (Ex. J). Claimant's last documented medical visit for lower back pain before July 22, 2021 was on October 19, 2016 when he was released from care without work restrictions. (Ex. K).

3. After Claimant's July 22, 2021 injury, he initially sought treatment at Concentra where he was examined by Michael Pete, PA. Claimant was diagnosed with hip pain and referred for physical therapy. (Ex. N).

4. Over the next several months, Claimant saw authorized treating physician (ATP) Kathryn Bird, D.O., at Concentra. Claimant reported consistent pain in the right hip and buttock area. On October 7, 2021, Dr. Bird referred Claimant for a physiatry evaluation with John Sacha, M.D. (Ex. N).

5. Claimant first saw Dr. Sacha on October 13, 2021, and reported pain in the right lower back, buttock, lateral thigh, and occasional numbness and tingling into his foot. Dr. Sacha diagnosed Claimant with lumbar radiculopathy and post-laminectomy syndrome. Dr. Sacha opined that although Claimant's pain was in the buttocks and hips, his issues appeared to be lumbar in nature. He opined that Claimant had a permanent exacerbation of a pre-existing problem in his lumbar spine, and that he had evidence of acute ongoing neural compromise. Dr. Sacha referred Claimant for a lumbar MRI. (Ex. O).

6. The lumbar MRI was performed on October 29, 2021, and demonstrated degenerative joint disease and facet arthropathy throughout the lumbar spine, with moderate neural foraminal stenosis on the left at L3-4, and bilaterally at L5-S1. The

radiologist also noted subarticular narrowing at the L5-S1 level which impinged on the S1 nerve root bilaterally. (Ex. 6).

7. Dr. Sacha reviewed Claimant's MRI on November 3, 2021, and noted it was difficult to determine the level causing Claimant's symptoms, but that Claimant was not a surgical candidate. He recommended a staged lumbar transforaminal injection at the L4-5 and S1 levels.

8. On November 23, 2021, Dr. Sacha performed the transforaminal injections at L4, L5 and S1 spinal levels. Claimant reported complete relief of his pain 30 minutes following the injections. (Ex. O).

9. Claimant returned to Dr. Bird on December 8, 2021. By that time, Claimant had completed 16 sessions and been released from physical therapy. Claimant reported no pain and Dr. Bird's examination was normal. She placed Claimant at maximum medical improvement (MMI) and assigned a 7% whole person impairment. She recommended maintenance care with Dr. Sacha over the following year, including, potentially, additional injections. (Ex. N).

10. On December 12, 2021, Respondents filed a Final Admission of Liability (FAL), admitting for a 7% whole person impairment and medical maintenance benefits. (Ex. B).

11. Claimant returned to Dr. Sacha on February 2, 2022, reporting he had a flare up of lower back, right buttocks, and right leg pain. Claimant was concerned that his symptoms may be hip related. Dr. Sacha did not believe the Claimant's pain was hip related, but ordered a right hip MRI to evaluate. (Ex. O).

12. A right hip MRI was performed on March 8, 2022. (Ex. R). Although the MRI demonstrated pathology in Claimant's right hip, Dr. Sacha reviewed the MRI and opined that the findings were old and degenerative, with possibly symptomatic gluteus proximal tendon attachments. However, Dr. Sacha also opined that the pathology shown on the MRI was not work-related. Claimant remained at MMI, and Dr. Sacha recommended additional injections. (Ex. O).

13. On March 28, 2022, Dr. Sacha performed injections on Claimant's right side at L5, S1, and the right hip bursa. Claimant had a complete resolution of pain 30 minutes following the injection. (Ex. 5).

14. On April 13, 2022, Claimant reported to Dr. Sacha that he did not receive lasting relief from the injections and still had ongoing pain. Dr. Sacha opined that no further interventions or surgery would be necessary, and recommended a "wait-and-see" approach, with a home exercise program and medical management of Claimant's symptoms. (Ex. O).

15. Claimant returned to Dr. Sacha on May 18, 2022, reporting no significant change in his condition. Dr. Sacha noted the care Claimant had received to date had not provided significant relief, and recommended discontinuation of Claimant's home exercise program and medications. He did recommend a e-stim unit and that Claimant return in two months.

He again indicated Claimant was not a candidate for further interventional procedures. (Ex. O).

16. On July 20, 2022, Claimant returned to Dr. Sacha reporting a flare up in right lateral hip pain. Dr. Sacha recommended that Claimant undergo a plasma-rich platelet (PRP) injection. (Ex. O).

17. On August 24, 2022, Claimant saw Samuel Chan, M.D., who performed the PRP injection recommended by Dr. Sacha. (Ex. P).

18. Claimant followed up with Dr. Sacha on September 28, 2022, reporting only mild relief from the PRP injection. Dr. Sacha ordered massage and/or acupuncture for Claimant's iliotibial bands and low back tightness, and discharged Claimant from maintenance care. (Ex. O).

IME Physicians

19. On May 6, 2022, Rafer Leach, M.D., performed an IME at Claimant's request. Dr. Leach testified at hearing, and was admitted as an expert in emergency and occupational medicine. Dr. Leach examined Claimant in May 2022, and conducted a virtual visit on June 21, 2023. Dr. Leach opined that Claimant was not at MMI in December 2021, and is currently not at MMI. Dr. Leach testified that in his opinion, Claimant's condition has worsened because Claimant has increased complaints of pain, but did not identify any change in Claimant's physical condition.

20. Dr. Leach testified that he believes Claimant sustained a lumbar disc injury and injury to the structure in and around the right hip. He further opined that claimant has underlying instability at the L5-S1 level, based on Claimant's October 29, 2021 MRI, which showed "mild retrolisthesis of L5 measuring 3 mm." He characterized this as spondylolisthesis and potentially a surgical issue. He recommended additional imaging studies to evaluate Claimant for lumbar instability. However, he offered no credible opinion that Claimant's retrolisthesis was causally related to Claimant's work injury.

21. Dr. Leach recommended that Claimant be re-evaluated, and that Dr. Sacha perform repeat epidural steroid injections at L4-5 and L5-S1. He also opined that Claimant has evidence of right lumbar facet syndrome in the lower lumbar segments, and that "should there be only a partial response with respect to lumbar axial symptoms with transforaminal epidural steroid, then it would be informative and likely therapeutic to perform lumbar medial branch blockade to determine the degree to which the lower right lumbar facets also contribute to lumbar axial and sclerotomal pain." He speculated that such treatment could improve Claimant's gluteal symptoms. None of Claimant's treating physicians have diagnosed Claimant with a lumbar disc injury, lumbar facet syndrome, or spondylolisthesis. Dr. Leach's opinions are not persuasive.

22. On October 17, 2022 Carlos Cebrian, M.D., performed an IME of Claimant at Respondents' request. Dr. Cebrian issued a report dated November 4, 2022, and testified by deposition in lieu of live testimony. Dr. Cebrian was admitted as an expert in occupational medicine. Dr. Cebrian testified that he believes Claimant sustained a lumbar

strain and a partial hamstring tear as the result of his industrial injury. Dr. Cebrian testified that he agrees with Dr. Bird's MMI opinion, and that Claimant remains at MMI. Dr. Cebrian did not recommend further maintenance care, and opined that he did not believe there was any additional treatment that would make a difference in Claimant's condition. Dr. Cebrian indicated that based on his review of medical records and examination of Claimant, he did not see any objective evidence of worsening of his condition. Dr. Cebrian also disagreed with Dr. Leach's recommendations with respect to treatment of Claimant's condition.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Reopening For Change In Condition

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Indus. Comm'n*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Constr. Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004

Claimant has failed to establish by a preponderance of the evidence that he sustained a post-MMI change in condition causally connected to his original work injury. Claimant's claim was closed pursuant to the FAL filed on December 20, 2021. Approximately six weeks after the FAL was filed, Claimant returned to Dr. Sacha reporting a flare up of pain in the low back, buttocks, and leg. Dr. Sacha investigated Claimant's condition through a right hip MRI, and opined that there was no additional work-related pathology. He then performed injections in Claimant's lumbar spine and right hip, and referred him for PRP injections, none of which provided lasting relief. No treating provider has credibly opined that Claimant's physical condition has changed, or credibly identified any objective basis for the increase in pain. In testimony, Dr. Leach did not opine that Claimant's physical condition has changed, and opined only that based on Claimant's reports, he has had increased pain. The fact that Claimant has experienced flare ups of pain is not credible evidence that Claimant's physical condition changed after being placed at MMI on December 8, 2021.

Claimant has also failed to establish that his claim should be reopened to obtain additional medical care. Respondents admitted for maintenance care and Claimant remains entitled to such care if recommended by his authorized treating physicians. However, none of Claimant's ATPs have recommended additional maintenance care, with the exception of Dr. Sacha's recommendation of acupuncture or massage. Dr. Leach is not an ATP, and his treatment recommendations and diagnoses are inconsistent with Claimant's treating providers.

Medical Care

Claimant has failed to establish that the medical care recommended by Dr. Leach is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. As found, Dr. Leach's recommendations for treatment are speculative and unpersuasive.

Claimant's authorized treating providers have not recommended additional treatment beyond acupuncture and/or massage, which was recommended in September 2022. Because no authorized treating physician has recommended Claimant receive additional treatment, the ALJ lacks authority to authorize such treatment. *Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995).

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim for a change of condition is denied.

2. Claimant's request for the medical treatment recommended by Dr. Leach is denied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 14, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-221-505-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable lower back injury arising out of the course of his employment with Employer on October 8, 2022.

FINDINGS OF FACT

1. Claimant is employed as an assistant manager in Employer's restaurant. On October 8, 2022, Claimant was carrying a 30-pound box of chicken into a freezer when turned to the right and experienced symptoms in his lower back and pain shooting down his left leg. Claimant reported the incident to Employer, and a First Report of Injury was filed on October 12, 2022.

2. Claimant has a remote history of lower back surgery more than 20 years ago, and testified that he had not had issues with his lower back after that surgery for many years. Claimant testified that he has lived in Colorado for approximately 7-8 years, and has not had medical treatment for his lower back during that time, with the exception of an incident approximately six weeks before October 8, 2022 when he "tweaked" his back lifting a stack of plates while working for Employer.

3. After the October 8, 2022 incident, Claimant first sought treatment for his lower back at Centura, where he saw James Machin, NP. Claimant reported pain in his lower back, and pain shooting down his left glute into his thigh. He was diagnosed with acute low back pain with sciatica, prescribed Flexeril, and recommended physical therapy. (Ex. 5).

4. On October 14, 2022, Claimant saw Hiep Ritzer, M.D., at Intermountain Health Care. Claimant reported to Dr. Ritzer that he was working in a freezer and lifted a box of chicken causing pain in his back and shooting pain down the left gluteus into the back of his knee. Claimant also reported the prior incident where he experienced pain lifting dishes, and his prior back surgery. Claimant reported that he had no back issues until the incident with the dishes, and that it worsened after lifting the box of chicken. Dr. Ritzer noted a positive FABER test on the left side.[1] Dr. Ritzer diagnosed Claimant with a back strain of the lumbar region and SI, and opined that his symptoms were consistent with a work injury. She recommended that Claimant attend six sessions of chiropractic care with Jennifer Walker, D.C., and undergo a lumbar MRI. (Ex. 6).

5. Claimant began seeing Dr. Walker on October 31, 2022, and attended 5 sessions. Dr. Walker performed chiropractic manipulations, trigger point dry needling, massage

[1] FABER (flexion-abduction-external rotation) or Patrick's test is a test used to identify sacral pathology such as SI joint pain. See 7 CCR 1103-3, WCRP Rule 17, Ex. 6.

therapy, and instructed Claimant on home exercises. Claimant reported that the treatment with Dr. Walker lessened his lower back pain, but did not improve his leg symptoms. (Ex. 7).

6. Claimant returned to Dr. Ritzer on November 2, 2022 and November 28, 2022, reporting no significant improvement in his lower extremity symptoms. Dr. Ritzer noted that her request for an MRI had been denied. On November 28, 2022, Dr. Ritzer referred Claimant to Yasuke Wakeshima, M.D., for pain management. (Ex. 6).

7. On December 15, 2022, Respondent filed a Notice of Contest, asserting that additional investigation was necessary for causation and relatedness. (Ex. B).

8. Claimant saw Dr. Wakeshima on December 15, 2022, and reported his injury history consistent with the history he provided to Dr. Ritzer. Dr. Wakeshima noted positive straight leg test and Yeoman's tests on the left. Based on his examination and review of Dr. Ritzer's records, Dr. Wakeshima opined that Claimant's reported mechanism of injury could be consistent with a disc herniation affecting the left SI nerve root, or a L4-5, L5-S1 disc injury. He diagnosed Claimant with low back pain with sciatica, left lumbar radiculopathy, and pain of the left lower extremity due to injury. Dr. Wakeshima concurred with Dr. Ritzer's recommendation for an MRI, and requested authorization. Additionally, he prescribed an electronic stimulation (e-stim) unit, and prescribed lidocaine patches for pain. (Ex. 8).

9. Claimant returned to Dr. Wakeshima on January 13, 2023 with essentially unchanged symptoms. He indicated that neither the lidocaine patches nor the e-stim unit provided relief. Dr. Wakeshima prescribed diclofenac gel, which also did not provide relief. Dr. Wakeshima noted that his request for an MRI had been denied, and requested the MRI again. (Ex. 8).

10. Claimant continued to see Dr. Ritzer over the following three months, with no significant change in his symptoms until April 3, 3023, when he reported that his pain had increased. (Ex. 6).

11. On April 4, 2023, Claimant saw Dr. Wakeshima, reporting increased pain. Again, Dr. Wakeshima noted positive testing on the left, including straight leg raise, Patrick's test (i.e., FABER), and Yeoman's. He again recommended a lumbar MRI, which had been denied by Insurer. (Ex. 8).

12. On April 18, 2023, Claimant underwent an independent medical examination (IME) with Anant Kumar, M.D., at Respondent's request. Dr. Kumar indicated that Claimant reported pain in his left leg with straight leg testing, and that tests for SI joint injury and abnormalities were negative. (In contrast to testing performed on multiple visits by Dr. Ritzer and Dr. Wakeshima). He opined that Claimant's reported radiculopathy was in a non-dermatomal distribution below the left knee, and concluded that he could not explain Claimant's paresthesias. He further opined that it was unlikely Claimant sustained an injury which could cause involvement of the L4, L5, and S1 nerve roots, which corresponded to Claimant's reports of paresthesia symptoms. Dr. Kumar further

speculated that it was unlikely an MRI would show significant abnormality other than age-related degenerative changes. He indicated that even if the MRI showed a disc herniation at L4-5, it would not explain the distribution of Claimant's paresthesias. Although not expressly stated, Dr. Kumar infers that Claimant sustained no injury. Dr. Kumar's report and opinions are not persuasive evidence that Claimant did not sustain a work-related injury. (Ex. C).

13. On April 26, 2023, Claimant had a lumbar MRI performed. The MRI was interpreted as follows: "Large posterior/left paramedian disc bulge/protrusion at L5-S1. There is mass effect upon and displacement of the origin of the left S1 nerve root and potential irritation upon the origin of the right S1 nerve root." (Ex. E).

14. Claimant saw Dr. Wakeshima again on April 28, 2023. Although his report is not included in the record, it is quoted in Dr. Ritzer's report of May 9, 2023. Dr. Wakeshima reviewed Claimant's MRI films and indicated that there "was definitely a prominent left-sided paracentral disc protrusion at L5-S1,. This is displacing the left S1 nerve root which correlates with the patient's current symptoms." Based on the MRI, Dr. Wakeshima recommended a left L5-S1 and left S1 transforaminal epidural steroid injection to address his S1 radiculopathy symptoms. He further indicated that because the MRI did not demonstrate significant central canal stenosis, and Claimant's symptoms were pain only without weakness, that an epidural steroid would be indicated before considering surgery. (See Ex. 6)

15. Claimant returned to Dr. Ritzer on May 9, 2023. Dr. Ritzer amended her original diagnosis of Claimant to include a herniated nucleus pulposus, left L5-S1. She again opined that Claimant's condition was consistent with a work injury. (Ex. 6).

16. At hearing, [Redacted, hereinafter AG], the general manager of the restaurant in which Claimant works testified. AG[Redacted] testified he had worked with Claimant since July 2022, and that Claimant had previously complained of back problems. He indicated that prior to October 8, 2022, Claimant complained of a sore back, and had requested duties that did not aggravate his back pain.

17. Claimant testified that he did not have symptoms in his left leg prior to October 8, 2022. He further testified, credibly, that he had frequently performed the same task of lifting boxes of chicken prior to October 8, 2022 without difficulty. He testified that he had back surgery more than 20 years ago, and that the surgery resolved the issues he was having at that time.

18. The parties stipulated that if Claimant's claim is compensable, his average weekly wage is $1,075.00.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that

had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury “has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee’s service to the employer in connection with the contract of employment.” *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm’n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int’l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his lower back arising out of the course of his employment with Employer on October 8, 2022. Although Claimant has a remote history of lumbar surgery, no credible evidence was admitted indicating that Claimant was experiencing radicular symptoms in his left leg prior to October 8, 2022. Claimant’s treating health care providers credibly opined that Claimant’s reported mechanism of injury was consistent with an injury to his lower back. Prior to Claimant’s MRI, Dr. Wakeshima suggested that the mechanism was consistent with a disc injury affecting the S1 nerve root. Claimant’s April 26, 2023 MRI confirmed Dr. Wakeshima’s suspicion. The ALJ finds persuasive, and credits the opinions of Dr. Ritzer and Dr. Wakeshima that Claimant sustained a work-related injury as a result of moving a 30-pound box of chicken on October 8, 2022.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his lower back, including a disc herniation at L5-S1 arising out of the course of his employment on October 8, 2022.

2. Claimant’s average weekly wage is $1,075.00.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 14, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-547-001

PROCEDURAL MATTER

On June 8, 2023 Claimant filed an Opposed Motion to Strike the IME Report of Dr. Erickson. The ALJ did not rule on the motion prior to hearing. At hearing Claimant asserted that, because Dr. Erickson's assistant did not email the IME report to Claimant at the same time she emailed the report to Respondents, the IME report must be stricken. It is undisputed that Respondents' counsel emailed Dr. Erickson's IME report to Claimant's counsel within 30 minutes of receipt and Dr. Erickson's office emailed a copy of the report to Claimant's counsel on June 8, 2023.

At hearing, the ALJ heard arguments on Claimant's Motion. He denied the Motion based upon the above undisputed facts. On July 11, 2023 the ALJ issued a written order again denying Claimant's motion to strike Dr. Erickson's IME report.

During Dr. Erickson's evidentiary deposition on July 10, 2023 Claimant objected to his qualifications as a medical expert under Colorado Rule of Evidence (CRE) 702 and WCRP 16-7-2(E). Dr. Erickson testified extensively with respect to his medical and surgical training. He also explained that his experience, knowledge, and skill were relevant to the disputed hip surgery in the present matter. Dr. Erickson also noted his decision to retire from performing surgeries prior to appearing before the Medical Board on two cases. He verified that he remains actively licensed to practice medicine in Colorado conditioned upon his agreement not to perform surgery.

CRE 702 provides that if scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. WCRP 16-7-2(E) involves prior authorization appeals and does not pertain to qualifying a witness as an expert. Dr. Erickson testified regarding his medical license and specifically his extensive knowledge, education, training, experience, and skill in the field of medicine. He also discussed hip anatomy, surgical indications for hip arthroscopies and hip replacements, and the Colorado Division of Workers' Compensation Medical Treatment Guidelines (MTGs). Based on the preceding testimony, Dr. Erickson is qualified to render opinions as a medical expert in the field of orthopedic surgery including hip surgeries. His testimony will assist the ALJ in understanding the evidence and determine facts relevant to the disputed issues. Therefore, Claimant's motion to disqualify Dr. Erickson from testifying as a medical expert is denied.

ISSUE

Whether Claimant has proven by a preponderance of the evidence that the left total hip replacement requested by Scott Resig, M.D. is reasonable and necessary.

STIPULATION

Respondents notified the ALJ that, if the proposed left total hip replacement is determined not to be reasonable and necessary, they will authorize a left hip arthroscopy under this claim once the correct arthroscopic procedure is determined by a specialist in hip arthroscopies. Claimant agreed and the ALJ accepted the stipulation.

FINDINGS OF FACT

1. Claimant is a 55-year-old female who began employment as a horse care worker for Employer on October 11, 2022. On December 30, 2022 Claimant injured her left hip and right shoulder while mucking out horse stalls at work.

2. Claimant presented to Authorized Treating Provider (ATP) Mary Susan Zickefoose, M.D. at Care Now Urgent Care on seven occasions between January 11, 2023 and May 11, 2023. During her initial visit on January 11, 2023 Claimant reported a work-related injury and complained of hip pain that had been present for two weeks. Non-weight-bearing, x-ray imaging revealed no osteoarthritis (OA). Dr. Zickefoose prescribed meloxicam, issued work restrictions and diagnosed Claimant with trochanteric bursitis.

3. Claimant returned to Dr. Zickefoose on January 20, 2023 and January 27, 2023. Dr. Zickefoose recommended physical therapy and proposed a left hip injection. The plan was to obtain an MRI of the hip and follow up with an orthopedist.

4. Claimant again visited Dr. Zickefoose on February 16, 2023 and March 9, 2023. During the March 9, 2023 consultation, Claimant reported receiving an injection with no relief. Claimant's pain levels remained 6-7/10. She noted anxiety, depression, and constant pain. Dr. Zickefoose recommended continued physical therapy twice weekly for four more weeks.

5. Between January 26, 2023 and May 18, 2023, Claimant presented to Orthopedic Surgeon Scott Resig, M.D. for evaluation of the left hip on six occasions. At the initial visit on January 26, 2023 left hip x-rays were again negative for OA. Dr. Resig recommended a left hip MRI.

6. Robert Stone, M.D. read Claimant's February 2, 2023 left hip MRI as showing a labral tear and " . . . up to grade III chondromalacia of the superior and anterior superior left acetabular cartilage measuring 9 mm AP by 7 mm traverse." He did not identify sclerotic changes, bone cysts, or osteophytes. Dr. Stone also did not characterize the chondromalacia as bone-on-bone or severe.

7. On February 9, 2023 Dr. Resig reviewed the left hip MRI and stated it showed an acetabular labrum tear with Grade 3 changes and femoral neck inflammation. He did not describe other findings of significance, nor did he characterize the chondromalacia as severe or bone-on-bone. Dr. Resig recommended a left hip joint injection that was administered on February 23, 2023.

8. On March 16, 2023 Claimant notified Dr. Resig that the hip joint injection provided a few hours of relief and had only minimal lasting relief. Additional left hip and pelvic x-rays

revealed only “mild” OA. In contrast, Dr. Resig reported that Claimant had “severe bone on bone arthritis on x-ray . . ..” Dr. Resig recommended a total hip replacement because there were no other options.

9. On March 28, 2023 Orthopedic Surgeon Jon Erickson, M.D. reviewed Claimant’s available medical records and issued a report addressing Dr. Resig’s surgical recommendation. Dr. Erickson explained:

> I am going to have to recommend denial of this request for surgery simply because of the inconsistencies in the medical record. The MRI failed to show the severe chondromalacia changes in either the acetabulum or the humeral head, and yet Dr. Resig relates that this is bone-on-bone arthritis. X-rays taken on that same visit showed only mild osteoarthritis.

On March 30, 2023 Insurer denied the recommended total hip replacement surgery based upon Dr. Erickson’s report and opinions.

10. In a letter dated April 11, 2023 Dr. Resig appealed the surgery denial. He explained that Claimant “has underlying osteoarthritis of the hip which was exacerbated by her workers’ compensation injury. She had no pain prior to this injury. The MRI shows a labral tear, unfortunately she also has grade 3 changes, which limits her treatment options to hip replacement.”

11. Orthopedic Surgeon Michael Hewitt, M.D. reviewed Dr. Resig’s appeal. In a report dated April 15, 2023 Dr. Hewitt reasoned that “[w]ith the arthritis apparently not grade 4, no significant trauma, and her relatively young age, I would agree with the previous reviewer [Dr. Erickson] that the surgery should be denied.” On April 21, 2023 Insurer again denied Dr. Resig’s recommendation for a left total hip arthroplasty. Dr. Hewitt subsequently reviewed additional information, and in a report dated April 28, 2023, he explained that “the proposed surgery, namely a total hip arthroplasty, in a 55-year-old female with a focal area of grade 3 chondromalacia, 9 x 7 mm, and no advanced grade 4 arthritis, appears relatively aggressive regarding the information provided.” He further remarked that it would be reasonable to obtain a second opinion with a hip arthroscopy specialist to assess whether Claimant’s labral pathology could be addressed without arthroplasty.

12. On May 31, 2023 Claimant underwent an IME with Dr. Erickson. He reviewed Claimant’s medical records and conducted a physical examination. Dr. Erickson also met with radiologist Dr. Elizabeth Carpenter to review Claimant’s x-rays and left hip MRI. Based upon the imaging review with Dr. Carpenter, Dr. Erickson concluded that the left hip x-rays from January 26, 2023 and March 16, 2023 were essentially identical. They showed normal joint space with perhaps slight narrowing. The finding was consistent with mild OA. In addressing Claimant’s left hip MRI, Dr. Erickson determined “[t]he MRI of the left hip from 2/2/2023 is consistent with these radiographs, with a reasonable mantle of articular cartilage, which measures between 3 and 4mm in width. There is a labral tear anterosuperiorly which shows some evidence of chondral labral separation and fluid in the tear.”

13. After reviewing the imaging, Dr. Erickson disagreed with Dr. Resig’s

recommendation for a left total hip arthroplasty. He explained that on March 16, 2023 Dr. Resig described "severe bone-on-bone arthritis on x-ray." However, in the note, x-rays from the same day revealed only "mild osteoarthritis." None of the imaging studies showed anything even remotely close to bone-on-bone arthritis. Notably, "the pathology barely justified an assessment of KL grade 1." Dr. Erickson further remarked that in Rule 17, Exhibit 6 the MTGs discuss indications for total hip arthroplasties. He specified that the standing radiographs in the present case do not identify the radiographic abnormalities listed in Exhibit 6 as indicators for a total hip arthroplasty. Dr. Erickson explained that Claimant's severe symptoms were likely due to her labral tear. The tear could be treated arthroscopically either from a repair or reconstruction. He recommended referral to a skilled hip arthroscopist to identify which of the preceding procedures was appropriate for Claimant.

14. Dr. Zickefoose testified at the hearing in this matter as an expert in occupational medicine with experience involving orthopedic injuries to the hip. Dr. Zickefoose has treated Claimant consistently since her December 30, 2022 date of injury. After reviewing Claimant's x-rays and MRI's, she noted there is a tear of the superior anterior labrum with chondrolabral separation associated with Grade 3 chondromalacia of the acetabulum over a very small area. Essentially Claimant's left hip was almost bone-on-bone. The MRI demonstrated the need for total hip replacement. Dr. Zickefoose summarized:

> because she is getting that Grade 3 in a smaller area, that simply just doing the arthroscopic is probably not going to relieve her pain, that it is going to require the total hip replacement because it is a large labral tear with separation. So no, there is not horrible arthritis in there, but I really don't honestly believe that an arthroscopy is just what she needs. I think she needs a total hip replacement.

15. In addressing the MTGs, Dr. Zickefoose testified that each patient must be viewed as an individual and treated for what they believe is going to be best for them. She remarked Claimant has a horrible time walking and cannot stand. Dr. Zickefoose explained that, if an arthroscopy with the labral repair does not work, Claimant will likely require a total hip replacement that would set her back another six months before she is relieved of pain. She commented that Claimant's hip limits her activities of daily living, she is not able to enjoy her life and cannot obtain a full-time job. Dr. Zickefoose noted that reasonable conservative measures have been addressed and exhausted. She summarized that, simply because Claimant does not have bone-on-bone arthritis does not necessarily disqualify her as a candidate for a total left hip arthroplasty.

16. Claimant testified at the hearing in this matter. She described her hip pain as achy and stabbing. Claimant has difficulty sitting for any length of time. She explained that she sleeps in a recliner because she cannot lie flat. Claimant experiences instability and uses a walker when performing activities of daily living.

17. On June 28, 2023 the parties conducted the deposition of Dr. Resig. He continued to recommend hip replacement surgery for Claimant. His surgical recommendation was based on Claimant's level of pain and the injury that was identified in the MRI. Nevertheless, he acknowledged that the March 16, 2023 medical record describing "bone-on-bone arthritis" was a clerical error involving electronic medical records. Notwithstanding the clerical error, his

recommendation was based more on the findings of the MRI and the fact Claimant had a labral tear combined with evidence of Grade 3 arthritis. Dr. Resig acknowledged that he is "not necessarily" recommending a total hip replacement, but it is a treatment option he could offer Claimant.

18. At the crux of Dr. Resig's opinion regarding surgery was his belief that a total hip replacement is an appropriate procedure for a patient with Grade 3 chondromalacia and a labral tear. Dr. Resig clarified that if a patient has minimal arthritis he would not perform a hip replacement, but if a patient has Grade 3 or Grade 4 arthritis he would perform a hip replacement. He agreed all of Claimant's left hip x-rays showed no to minimal OA. When asked about Dr. Stone's description of the chondromalacia being "up to" Grade 3, Dr. Resig replied that to him, "up to" Grade 3 means Grade 3. He admitted that the Grade 3 chondromalacia identified on Claimant's left hip MRI is in very small area, but was enough to guide his recommendation. He maintained that the orthoscopic repair/reconstruction suggested by Respondents would fail because Claimant suffers from underlying arthritis as reflected on MRI. Thus, using a scope and filling the joint with fluid to address Claimant's labral tear would be unsuccessful.

19. Dr. Resig recounted that he does not perform hip arthroscopies. He acknowledged that, if Claimant's left hip MRI showed the same small focal area of chondromalacia but it was characterized as Grade 2, he would refer her to a hip arthroscopy specialist and obtain another opinion. When asked whether Dr. Hewitt's recommendation for Claimant to be evaluated by a hip arthroscopist was reasonable, Dr. Resig responded that it is "certainly an option" and he was not opposed to obtaining another opinion. If a hip arthroscopist could help Claimant by performing an arthroscopic procedure, Dr. Resig would not be opposed.

20. On July 10, 2023 the parties conducted the deposition of Dr. Erickson. He testified as an expert in orthopedic surgery. Dr. Erickson explained that, to a reasonable degree of medical probability, a consultation with a hip arthroscopist is more appropriate than pursuing a total hip replacement. Dr. Erickson summarized:

> I think I would agree with the [Insurer] staffing that was performed by Dr. Hewitt that – as I said in my IME, that a reasonable course of action at this point, based on the lack of any significant arthritis in the left hip, that a hip arthroscopy, at least a consultation with a qualified hip arthroscopist would be an appropriate step at this time.

21. The primary basis of Dr. Erickson's opinion is the minimal OA identified on Claimant's left hip x-rays and MRI. Dr. Erickson agreed with the MTGs that severe OA is a required surgical indication for a total hip replacement. He commented that, from his review of Claimant's February 2, 2023 left hip MRI, there is only a small area of Grade 3 chondromalacia. However, it is not severe OA, there is no bone-on-bone OA, and there are no osteophytes or bone cysts that would suggest a disease process. Instead, Dr. Erickson classified the OA visible on the MRI as "mild." Moreover, he remarked there is a reasonable mantle of articular cartilage that reflects the hip is appropriate for arthroscopy.

22. Dr. Erickson noted that hip replacements carry greater risks than arthroscopies, particularly in terms of the risks of infection during the acute phase and difficulties with treating

an infected joint. He further explained in greater detail the more severe risks and complications associated with a total hip replacement procedure compared to a hip arthroscopy as follows:

> I think the cause of fear of most hip replacement surgeons [is] you can get failure of the device, fracture, loosening. There is a long list of things that can happen. But I think the one that makes everyone run in fear is the possibility of a periprosthetic or an intra-articular joint infection, because the treatment for that in the presence of a metallic foreign body is extremely difficult, and it is a nightmare for joint replacement specialists. Whereas with a hip arthroscopy, if you get an infection, it is usually a portal infection, and it usually goes away with benign care, plus antibiotics.

23. Dr. Erickson remarked that he reviewed Dr. Resig's deposition testimony and was aware that Dr. Resig did not oppose a referral to a hip arthroscopist for a second opinion. He reiterated that he is also recommending a referral to a hip arthroscopist for a second opinion. Dr. Erickson explained that he would defer to a hip arthroscopist to perform a proper evaluation and determine whether a left hip arthroscopy should be pursued in Claimant's case.

24. Claimant has failed to prove it is more probably true than not that the left total hip replacement requested by Dr. Resig is reasonable and necessary. Initially, on December 30, 2022 Claimant injured her left hip and right shoulder while mucking out horse stalls at work. Claimant subsequently received conservative medical treatment including hip injections and physical therapy. On March 16, 2023 Dr. Resig recommended a total left hip arthroplasty.

25. Dr. Resig explained that Claimant has underlying OA of the left hip that was exacerbated by her Workers' Compensation injury. Dr. Resig reasoned that Claimant's MRI showed a labral tear and grade three osteoarthritic changes that limited her treatment to a total hip replacement. At the crux of Dr. Resig's opinion was his belief that a total hip replacement was an appropriate procedure for a patient with Grade 3 chondromalacia and a labral tear. Dr. Zickefoose, who has treated Claimant consistently since her December 30, 2022 date of injury, agreed with Dr. Resig's analysis. After reviewing Claimant's x-rays and MRI's, she noted there was a tear of the superior anterior labrum with chondrolabral separation associated with Grade 3 chondromalacia of the acetabulum over a very small area. Essentially, Claimant's left hip is almost bone-on-bone. Dr. Zickefoose noted that reasonable conservative measures have been addressed and exhausted. She summarized that simply because Claimant does not have bone-on-bone arthritis does not necessarily disqualify her as a candidate for a total left hip arthroplasty.

26. In contrast, after conducting an IME Dr. Erickson disagreed with Dr. Resig's recommendation for a total left hip arthroplasty. He explained that none of the imaging studies revealed anything close to bone-on-bone arthritis. Notably, Dr. Erickson remarked that Rule 17, Exhibit 6 of the MTGs discusses indications for total hip arthroplasties. He specified that the standing radiographs in the present case did not identify the radiographic abnormalities listed in Exhibit 6 as necessitating a total hip arthroplasty. Dr. Erickson detailed that Claimant does not have severe OA, there is no bone-on-bone OA, and there are no osteophytes or bone cysts that would suggest a disease process. Instead, Dr. Erickson classified the OA visible on MRI as "mild." Moreover, he remarked that, because there is a reasonable mantle of articular cartilage, the hip was appropriate for an arthroscopy. Dr. Erickson commented that Claimant's labral tear could be treated arthroscopically through a repair or reconstruction. He also noted that hip

replacements carry greater risks than arthroscopies, particularly risks of infection during the acute phase and difficulties with treating an infected joint. Dr. Erickson thus recommended referral to a skilled hip arthroscopist to identify which arthroscopic procedure was appropriate for Claimant. Similarly, Dr. Hewitt explained that "the proposed surgery, namely a total hip arthroplasty, in a 55-year-old female with a focal area of grade 3 chondromalacia, 9 x 7 mm, and no advanced grade 4 arthritis, appears relatively aggressive regarding the information provided." He agreed that it would be reasonable to obtain a second opinion from a hip arthroscopy specialist to assess whether Claimant's labral pathology could be addressed without arthroplasty.

27. Based on the MTGs, a primary surgical consideration for a total hip arthroplasty is severe OA. Dr. Erickson noted that, while the MTGs are merely guidelines, they represent accepted standards of care in Colorado Workers' Compensation cases. They are written by highly competent physicians to offer a template for appropriate treatment. Dr. Erickson agreed with the MTGs that severe OA should be identified before consideration of a total hip replacement. No physicians, including multiple radiologists, who have reviewed Claimant's imaging believed she has severe left hip OA. Claimant's left hip x-rays identified at most minimal OA. Notably, Claimant's MRI only revealed an extremely small area of focal OA, the OA in that area was not severe or bone-on-bone, and there were no bone cysts or spurs.

28. Although Claimant acknowledged that application of the MTG's suggest severe or Grade 4 osteoarthritis must be identified prior to a total hip arthroplasty, Drs. Zickefoose and Resig testified that a total hip replacement is medically necessary based on Claimant's functional limitations, Grade 3 OA, and evidence of a labral tear. Claimant reasoned that, while an arthroscopic consult might be an option, the overwhelming weight of evidence reflects that all reasonable measures have been exhausted and Claimant will eventually require a total hip arthroplasty. Claimant summarized that consideration of the totality of the evidence, not solely the degree of arthritis, warrants deviation of the MTGs. However, despite Claimant's argument, the mild degree of OA identified on imaging directly undermines the reasonableness and necessity of a total hip replacement. Drs. Hewitt and Erickson have recommended Claimant visit a hip arthroscopist to determine whether her labral tear and modest degree of OA can be treated through an arthroscopy. Although Dr. Resig has asserted that a total hip replacement is appropriate, he is also not opposed to a second opinion by a hip arthroscopist.

29. Based on the medical records and persuasive opinion of Dr. Erickson, Claimant's request for a left total hip arthroplasty is not reasonable or necessary. Respondents notified the ALJ that, if the proposed left total hip replacement is determined not to be reasonable or necessary, they will authorize a left hip arthroscopy once the correct arthroscopic procedure is identified by a specialist. Claimant agreed to the stipulation, and the ALJ accepts the stipulation. The ALJ therefore orders that Claimant visit a hip arthroscopist to determine the appropriate arthroscopic procedure.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A

claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

6. The MTGs were propounded by the Director pursuant to an express grant of statutory authority. *See* §8-42-101(3.5)(a)(II), C.R.S. It is appropriate for an ALJ to consider the MTGs in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); *see Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the MTGs are a reasonable source for identifying diagnostic criteria). The MTGs are regarded as accepted professional standards of care under the Workers' Compensation Act. *Rook v.*

Indus. Claim Appeals Off., 111 P.3d 549 (Colo. App. 2005). In *Hall v. Indus. Claim Appeals Off.*, 74 P.3d 459 (Colo. App. 2003) the court noted that the MTGs shall be used by health care practitioners when furnishing medical treatment under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S.

7. While the MTGs may carry substantial weight and provide significant guidance, the ALJ is not bound by the MTGs in deciding individual cases. Notably, §8-43-201(3), C.R.S. specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

8. Rule 17, Exhibit 6 of the MTGs addresses lower extremity injuries. In specifically discussing surgical considerations for a hip arthroplasty, Rule 17, Exhibit 6, §5.e. of the MTGs provides in relevant part: "Surgical Indications/Considerations: Severe osteoarthritis, all reasonable conservative measures have been exhausted, and other reasonable surgical options have been considered or implemented." Therefore, based on the MTGs, a primary surgical consideration for a total hip arthroplasty is severe OA.

9. As found, Claimant has failed to prove by a preponderance of the evidence that the left total hip replacement requested by Dr. Resig is reasonable and necessary. Initially, on December 30, 2022 Claimant injured her left hip and right shoulder while mucking out horse stalls at work. Claimant subsequently received conservative medical treatment including hip injections and physical therapy. On March 16, 2023 Dr. Resig recommended a total left hip arthroplasty.

10. As found, Dr. Resig explained that Claimant has underlying OA of the left hip that was exacerbated by her Workers' Compensation injury. Dr. Resig reasoned that Claimant's MRI showed a labral tear and grade three osteoarthritic changes that limited her treatment to a total hip replacement. At the crux of Dr. Resig's opinion was his belief that a total hip replacement was an appropriate procedure for a patient with Grade 3 chondromalacia and a labral tear. Dr. Zickfoose, who has treated Claimant consistently since her December 30, 2022 date of injury, agreed with Dr. Resig's analysis. After reviewing Claimant's x-rays and MRI's, she noted there was a tear of the superior anterior labrum with chondrolabral separation associated with Grade 3 chondromalacia of the acetabulum over a very small area. Essentially, Claimant's left hip is almost bone-on-bone. Dr. Zickefoose noted that reasonable conservative measures have been addressed and exhausted. She summarized that simply because Claimant does not have bone-on-bone arthritis does not necessarily disqualify her as a candidate for a total left hip arthroplasty.

11. As found, in contrast, after conducting an IME Dr. Erickson disagreed with Dr. Resig's recommendation for a total left hip arthroplasty. He explained that none of the imaging studies revealed anything close to bone-on-bone arthritis. Notably, Dr. Erickson remarked that Rule 17, Exhibit 6 of the MTGs discusses indications for total hip arthroplasties. He specified

that the standing radiographs in the present case did not identify the radiographic abnormalities listed in Exhibit 6 as necessitating a total hip arthroplasty. Dr. Erickson detailed that Claimant does not have severe OA, there is no bone-on-bone OA, and there are no osteophytes or bone cysts that would suggest a disease process. Instead, Dr. Erickson classified the OA visible on MRI as "mild." Moreover, he remarked that, because there is a reasonable mantle of articular cartilage, the hip was appropriate for an arthroscopy. Dr. Erickson commented that Claimant's labral tear could be treated arthroscopically through a repair or reconstruction. He also noted that hip replacements carry greater risks than arthroscopies, particularly risks of infection during the acute phase and difficulties with treating an infected joint. Dr. Erickson thus recommended referral to a skilled hip arthroscopist to identify which arthroscopic procedure was appropriate for Claimant. Similarly, Dr. Hewitt explained that "the proposed surgery, namely a total hip arthroplasty, in a 55-year-old female with a focal area of grade 3 chondromalacia, 9 x 7 mm, and no advanced grade 4 arthritis, appears relatively aggressive regarding the information provided." He agreed that it would be reasonable to obtain a second opinion from a hip arthroscopy specialist to assess whether Claimant's labral pathology could be addressed without arthroplasty.

12. As found, based on the MTGs, a primary surgical consideration for a total hip arthroplasty is severe OA. Dr. Erickson noted that, while the MTGs are merely guidelines, they represent accepted standards of care in Colorado Workers' Compensation cases. They are written by highly competent physicians to offer a template for appropriate treatment. Dr. Erickson agreed with the MTGs that severe OA should be identified before consideration of a total hip replacement. No physicians, including multiple radiologists, who have reviewed Claimant's imaging believed she has severe left hip OA. Claimant's left hip x-rays identified at most minimal OA. Notably, Claimant's MRI only revealed an extremely small area of focal OA, the OA in that area was not severe or bone-on-bone, and there were no bone cysts or spurs.

13. As found, although Claimant acknowledged that application of the MTG's suggest severe or Grade 4 osteoarthritis must be identified prior to a total hip arthroplasty, Drs. Zickefoose and Resig testified that a total hip replacement is medically necessary based on Claimant's functional limitations, Grade 3 OA, and evidence of a labral tear. Claimant reasoned that, while an arthroscopic consult might be an option, the overwhelming weight of evidence reflects that all reasonable measures have been exhausted and Claimant will eventually require a total hip arthroplasty. Claimant summarized that consideration of the totality of the evidence, not solely the degree of arthritis, warrants deviation of the MTGs. However, despite Claimant's argument, the mild degree of OA identified on imaging directly undermines the reasonableness and necessity of a total hip replacement. Drs. Hewitt and Erickson have recommended Claimant visit a hip arthroscopist to determine whether her labral tear and modest degree of OA can be treated through an arthroscopy. Although Dr. Resig has asserted that a total hip replacement is appropriate, he is also not opposed to a second opinion by a hip arthroscopist.

14. As found, based on the medical records and persuasive opinion of Dr. Erickson, Claimant's request for a left total hip arthroplasty is not reasonable or necessary. Respondents notified the ALJ that, if the proposed left total hip replacement is determined not to be reasonable or necessary, they will authorize a left hip arthroscopy once the correct arthroscopic procedure is identified by a specialist. Claimant agreed to the stipulation, and the ALJ accepts the stipulation. The ALJ therefore orders that Claimant visit a hip arthroscopist to determine the

appropriate arthroscopic procedure.

ORDER

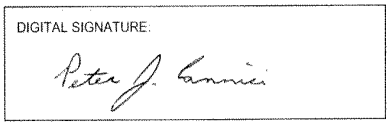
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. The left total hip arthroplasty recommended by Dr. Resig is not reasonable or necessary. Insurer shall authorize an evaluation by a specialist in hip arthroscopies, and if hip arthroscopy is recommended, Insurer shall authorize that surgery as reasonable, necessary, and related to this claim.

2. Any issues not resolved in this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 15, 2023.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-175-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on June 3, 2021.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits.

3. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant was employed by Respondent as a hostler. Claimant's job duties included operating a semi-tractor truck to transport and set up trailers. On June 3, 2021, Claimant was performing her normal job duty of moving a trailer through a dirt lot or road. Claimant reported that the truck hit a pothole causing her seat to bottom out and her seatbelt to tight, which caused pressure and pain in her left anterior hip. Approximately two minutes later, Claimant exited the truck, and felt a pain shooting down her left lower leg into her hip and buttocks. Claimant reported the incident to her supervisor, and was instructed to complete moving and setting up the trailer, and to complete appropriate paperwork later.

2. At approximately 11:30 p.m. on June 3, 2021, Claimant was seen at the St. Anthony's Hospital emergency department, reporting left hip pain. Claimant reported she was driving her work vehicle approximately 3-4 miles per hour when she hit a pothole and the seatbelt locked up, causing pressure on her left anterior hip. X-rays performed at St. Anthony's were negative. Claimant was diagnosed with hip pain, provided ibuprofen and acetaminophen, and advised to see an orthopedist. (Ex. 3).

3. On June 15, 2021, Claimant saw Chelsea Rasis, PA-C, at Concentra. Claimant reported she did not experience immediate pain when she hit the pothole, but two minutes later, she stepped out of the truck and felt pain in the left groin radiating to her leg and foot. On examination, Ms. Rasis noted tenderness in the gluteus minimus, ischial tuberosity, left paraspinal muscles, and facet joints; left sided muscle spasms and limited range of motion. Claimant was diagnosed with lumbar radiculopathy, referred for physical therapy and placed on modified duty. (Ex. 4).

4. Between June 15, 2021 and July 7, 2021, Claimant attended six sessions of physical therapy at Concentra. At the conclusion of physical therapy, Claimant's hip and lumbar symptoms had not resolved. (Ex. 4 & B).

5. On June 23, and June 30, 2021, Claimant saw Theodore Villavicencio, M.D., at Concentra. She reported left lower lumbar pain and hip pain with radiation into the groin.

On June 30, 2021, Dr. Villavicencio ordered a lumbar MRI and referred Claimant for a physiatry evaluation with Samuel Chan, M.D. (Ex. B). Dr. Villavicencio was an authorized treating physician (ATP).

6. Claimant saw Dr. Chan on July 6, 2021, reporting numbness and tingling radiating down the left leg to the toes. Dr. Chan documented positive provocative maneuvers on the left, including Patrick's sign, Ganslen test, Faber's test, and Yeoman's test. He also recommended a lumbar MRI to rule out discogenic issues. (Ex. B).

7. Claimant underwent a lumbar MRI on July 29, 2021. The MRI was compared to a December 19, 2019 MRI, and demonstrated a new synovial cyst at the L4-5 level with probable compression of the left L4 nerve, possible compression of the left L5 nerve, and severe narrowing of the medial left neural foramen. Neither the December 19, 2019 MRI nor medical records from this time frame were offered or admitted into evidence, and no credible evidence was admitted explaining the purpose of the 2019 MRI. (Ex. 5).

8. Following the MRI, Claimant returned to Dr. Villavicencio on August 10, 2021, with no change in her symptoms. Dr. Villavicencio prescribed dexamethasone, and instructed Claimant to return for a follow-up appointment in two weeks. He indicated Claimant was not at maximum medical improvement, and recommended on-going temporary work restrictions. (Ex. B). Although Dr. Villavicencio did not discharge Claimant, she did not return to him for treatment, and relocated to South Dakota.

9. On August 27, 2021, Claimant saw James MacDougall, M.D., in Aberdeen, South Dakota. Dr. MacDougall reviewed Claimant's MRI and noted it showed a facet cyst (*i.e.*, synovial cyst) compressing the L4 and L5 nerve roots. He discussed treatment options including surgical and conservative management, and opined that Claimant may require decompression and excision of synovial cyst depending on her response to conservative measures. He performed an epidural steroid injection and prescribed Lyrica. Claimant reported the injection provided approximately one week of relief. At that point, Claimant was scheduled for surgery, to include a L4-5 decompression with cyst excision(Ex. 2)

10. On October 1, 2021, Dr. MacDougall performed surgery on Claimant's lumbar spine, including a left L4-5 decompression with laminotomy, medial facetectomy, foraminotomy, and excision of the synovial cyst at L4-5. (Ex.2).

11. In follow-up appointments with Dr. MacDougall's clinic, Claimant reported doing much better and relief of her leg pain. On November 17, 2021, Dr. MacDougall's physician assistant, Brian Ermer, PA-C, prescribed one visit of physical therapy to set Claimant up on a home exercise program. (Ex. 2). No records of additional medical treatment after November 17, 2021 were offered or admitted into evidence.

12. No credible evidence was admitted that Dr. MacDougall sought, or received, authorization from Insurer for the treatment provided, or that he was within the chain of referrals from Claimant's ATPs.

13. On August 22, 2022, Nicholas Olsen, D.O., performed a virtual independent medical examination (IME) at Respondents' request. Dr. Olsen did not examine Claimant,

but did speak with her over the phone. Claimant reported that she hit a pothole, and her seat belt tightened up and pulled her into the seat, but she did not experience immediate pain. She reported first experiencing pain when she tried to step out of the truck to hook up a trailer, and then felt a sharp pain running up from her foot to her lower back. Claimant reported the surgery performed by Dr. MacDougall relieved her pain, but she gets stiff if she sits too long. Based on his review of records and interview of Claimant, Dr. Olsen opined that Claimant did not suffer trauma on June 3, 2021. He opined that Claimant moving to a standing position when leaving her truck caused her synovial cyst to become active. He indicated that it was the "presence of the synovial cyst arising from the left L4-5 facet that resulted in radiculopathy when [Claimant] was simply standing at work." He indicated that the cyst could become symptomatic when standing at home or standing at work, and that hitting the pothole and the seatbelt tightening did not cause or result in trauma that contributed to her symptomatology. (Ex. A).

14. Dr. Olsen testified at hearing and was admitted as an expert in physical medicine and rehabilitation, with level II accreditation. Dr. Olsen testified that Claimant has a synovial cyst at the L5-S1 level of her spine, and that such cysts developed due to facet joint degeneration. He testified that synovial cysts are typically asymptomatic, but can become symptomatic when someone is standing up or walking because the cyst narrows the neural foramen causing nerve impingement. He testified that Claimant's cyst became symptomatic when she exited her truck and stood up, but in his opinion it was not an action specific to her occupation. He testified that the surgery performed by Dr. MacDougall was reasonable and necessary to relieve Claimant's symptoms, although he does not believe Claimant's symptoms are causally related to her employment. Dr. Olsen's opinions regarding causation of Claimant's symptoms is not persuasive.

15. On April 12, 2023, Dr. MacDougall responded to a letter from Claimant's counsel requesting opinions regarding causation of Claimant's symptoms and relatedness of the surgery he performed. Dr. MacDougall opined that the cyst itself was from a degenerative process unrelated to work activities, but he felt that Claimant driving on a rough road caused the onset of symptoms. (Ex. 2).

16. Claimant testified that although it hurt when her seatbelt tightened and her seat bottomed out, she first felt shooting pain down her left leg when she stepped out of her truck. Claimant testified she immediately called her supervisor to report her injury.

17. Claimant gave a two-week notice to her employment sometime in August 2022, and Employer terminated immediately. Claimant then moved to South Dakota.

18. Claimant testified at hearing that she spoke with Insurer's claims manager who indicated that Claimant would be covered by Workers' compensation in South Dakota. Claimant testified that the claims manager later revoked this statement indicating she could not be covered if she left Colorado. Claimant testified that she then sought treatment under her own insurance. Claimant's testimony is inconsistent with her reports to Dr. MacDougall. When Claimant first saw Dr. MacDougall, she indicated that her workers' compensation coverage was "discontinued" after the MRI demonstrated the presence of the synovial cyst. The evidence demonstrates that Claimant saw Dr. Villavicencio after

the July 29, 2021 MRI on August 10, 2021, and was instructed to return for another follow up visit after that. Nothing in the record credibly demonstrates that Claimant's workers' compensation coverage was terminated.

19. [Redacted, hereinafter JS], a safety and training manager for Employer testified at hearing. JS[Redacted] testified that the lot in which Claimant was driving on June 3, 2021 was a dirt lot that does have pot holes. JS[Redacted] testified that the lot is graded every three months to reduce pot holes, and that it was graded on May 19, 2021. JS[Redacted] testified that she examined the lot approximately seven days after June 3, 2021, and that there were no potholes in the lot.

20. The parties stipulated that Claimant's average weekly wage at the time of injury was $1,419.00.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Id.*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); Enriquez v. Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO Oct. 2, 2015)

If the precipitating cause of an injury is a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the accident or the injuries sustained. *National Health Laboratories v. Indus. Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO July 29, 1999); *Alexander v. Emergency Courier Servs,* W.C. No. 4-917-156-01 (ICAO Oct. 14, 2014). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App.

1989); *Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO Oct. 14, 2014). In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" generally encountered outside the workplace. *Ramsdell v. Horn, supra*; *Briggs v. Safeway,* Inc. W.C. No. 4-950-808-01 (ICAO July 8, 2015). Conversely, if the precipitating cause of the injury involves conditions or circumstances of the employment, there is no need to prove a "special hazard" for the injury to arise out of the employment. *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). "[T]here is no requirement that a particular activity of employment which aggravates the preexisting condition be unique to the employment, or that it constitute a 'special hazard" of the employment. To the contrary, the special hazard requirement applies only where the precipitating cause of an injury is a preexisting non-industrial condition which the claimant brings to the workplace." *Shelton v. Eckstein Elec. Co.*, W.C. No. 4-724-391 (ICAO May 3, 2008).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014

Claimant has established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment on June 3, 2021. Claimant had a pre-existing, asymptomatic synovial cyst in her lower back that became symptomatic after her truck seat bottomed out while driving through a dirt parking lot and then stepped down from her work vehicle. Claimant's testimony that she initially experienced pain in her rear when her seat bottomed-out, but that she did not experience shooting pain into her hips and leg until she stepped out of her vehicle was credible, and consistently reported to her providers. Claimant's job duties required her to operate a semitruck, which necessarily included both entering and exiting the vehicle. Stepping down from a semitruck is not a "ubiquitous condition" generally encountered outside the workplace. Instead, it was unique to Claimant's employment. .

Dr. Olsen's opinion that Claimant's symptoms were caused by her merely standing up is not credible. This characterization of the mechanism of injury is not consistent with Claimant's testimony or her contemporaneous reports to her providers as documented in medical records. The ALJ finds that Claimant's injury was caused by the combination of her seat bottoming out, and her stepping down from her work vehicle, a semi-tractor truck. Because Claimant's preexisting condition was aggravated by work-related activity, the injury is compensable.

MEDICAL BENEFITS

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Indus. Claim Appeals Office*,

797 P.2d 777 (Colo. App. 1990). “The claimant bears the burden of proof to establish that a need for medical treatment was proximately caused by an injury arising out of and in the course of employment.” *In re Claim of Daniely*, W.C., No. 5-124-750 (ICAO, Feb. 26, 2021), citing 8-41-301(1), C.R.S,. and *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990), “Further, treatment necessitated by an industrial aggravation or acceleration of a pre-existing condition is compensable.” *Id*. Whether medical treatment is reasonable and necessary is a question of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

In addition to being “reasonable and necessary,” treatment must be “authorized.” “‘Authorization’ and the reasonableness of treatment are separate and distinct issues. *Repp v. Prowers Med. Center*, W.C. No. 4-530-649 (ICAO Sep. 12, 2005), *citing One Hour Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501* (Colo. App. 1995). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense, and not the particular treatment provided. *Popke v. Indus. Claim Appeals Office*, 797 P.2d 677 (Colo. App. 1997); s*ee also*, *One Hour Cleaners*, 914 P.2d at 504 (“authorized medical benefits” refers to legal authority of provider to deliver care). All treatment provided by an “authorized treating physician” is “authorized.” *Bray v. Hayden School Dist. RE-1*, W.C. No. 4-418-310 (ICAO Apr. 11, 2000). “However, treatment is not compensable unless it is also ‘reasonable and necessary’ to cure or relieve the effects of the industrial injury.” *Id*.

Respondents are liable for medical expenses when, as part of the normal progression of authorized treatment, an authorized treating physician refers the claimant to other providers for additional services. *Greager v. Indus. Comm’n*, 701 P.2d 168 (Colo. App. 1985). If a claimant obtains treatment from a provider who is not “authorized,” a respondent is not required to pay for it. Section 8-43-404(7), C.R.S; *Yeck*, *supra; Pickett v. Colo. State Hosp.*, 513 P.2d 228 (Colo. App. 1973). The existence of a valid referral is a question of fact. *Suetrack USA v. Indus. Claim Appeals Office*, 902 P. 2d 854 (Colo. App. 1995).

Because Claimant has established that she sustained a compensable injury, Respondents are liable for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

Claimant has failed to establish by a preponderance of the evidence that the treatment rendered by Dr. MacDougall was authorized. As found, Claimant moved to South Dakota in August 2022, and initiated treatment with Dr. MacDougall without authorization or a referral from one of her ATPs. No credible evidence was admitted indicating Claimant was referred to Dr. MacDougall, or that Dr. MacDougall sought or received authorization from Insurer. Because the care Claimant received from and through referral from Dr. MacDougall was not “authorized,” Respondents are not responsible for payment of that care.

Claimant’s testimony that Insurer’s adjuster informed her that care outside Colorado would not be covered by workers’ compensation is inconsistent with her reports to Dr. MacDougall and is not credible. Claimant reported to Dr. MacDougall that her

workers' compensation coverage was "discontinued" because she was diagnosed with a cyst, not that her care outside Colorado would not be covered. As noted above, no credible evidence was admitted indicating Claimant's workers' compensation medical benefits had been terminated.

In position statements, Claimant argues that Dr. Villavicencio discharged Claimant for non-medical reasons, and because Respondents did not then appoint a new ATP, the right of selection passed to Claimant. Claimant last saw Dr. Villavicencio on August 10, 2021, but he did not discharge her or otherwise refuse to provide additional care. To the contrary, the August 10, 2021 record indicates Dr. Villavicencio requested Claimant return for a follow up visit in two weeks, and nothing in his record indicates that Claimant was being discharged from care or being refused further care. The evidence does not support that Claimant was either discharged or refused further care for non-medical reasons.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury arising out of the course of her employment with Employer on June 3, 2021.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

3. Respondents are not liable for the unauthorized medical treatment Claimant received from Dr. MacDougall, or treatment Claimant received upon referral from Dr. MacDougall.

4. Claimant's average weekly wage is $1,419.00.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 15, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-187-993-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her admitted May 24, 2021 Workers' Compensation injury based on a change in condition pursuant to §8-43-303(1), C.R.S. after reaching Maximum Medical Improvement (MMI) on January 27, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the left knee replacement performed by Craig Hogan, M.D. on October 31, 2022 was reasonable, necessary and causally related to her May 24, 2021 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked as a school nutritionist for Employer. On May 24, 2021, while attempting to place a heavy tray into a refrigerator, Claimant suffered a compensable injury. She specifically twisted and felt a pop in her left knee.

2. Anticipating that her knee pain would subside, Claimant did not immediately seek medical treatment for her injury. Claimant eventually sought treatment on September 21, 2021 with Authorized Treating Physician (ATP) Martin Kalevik, M.D. Dr. Kalevik recounted that Claimant "twisted and felt a pop in her left knee. She did not fall but did have a limp." He assessed "pain in left knee" and recommended an MRI.

3. On September 27, 2021 Claimant underwent a left knee MRI. The imaging revealed "an 18 mm inferiorly displaced medial meniscal body flap tear and attenuation/tearing of the free apical margin of the central third of its posterior horn." On October 25, 2021 Jason L. Dragoo, M.D. recommended left knee arthroscopic surgery including a partial medial meniscectomy.

4. On November 3, 2021 Claimant underwent left knee surgery with Dr. Dragoo. The surgery consisted of a left knee arthroscopy with partial medial meniscectomy, synovectomy in all compartments, and chondroplasty of the lateral femoral condyle.

5. On January 26, 2022 Dr. Dragoo assessed Claimant. He determined that "her left knee is doing great" and recommended continued physical therapy. He permitted Claimant to return to "all activities per her strength and physical therapies' guidelines." Dr. Dragoo remarked that Claimant was "[d]oing well post-operatively."

6. On January 27, 2022 ATP Dr. Kalevik determined Claimant had reached MMI with an 8% permanent impairment of the lower extremity. Dr. Kalevik released Claimant to full duty without restrictions.

7. On February 25, 2022 Respondent filed a Final Admission of Liability (FAL). The FAL acknowledged medical maintenance benefits after MMI and a Permanent Partial Disability (PPD) award based upon the 8% lower extremity rating. Claimant did not object to the FAL and the claim closed by operation of law.

8. On May 3, 2022 Claimant returned to Dr. Kalevik with complaints of increased pain and swelling in her left knee for about the last six weeks. Although Claimant described pain and swelling, she denied any locking or giving out of the knee. Dr. Kalevik ordered a left knee x-ray. He permitted Claimant to continue working full duty without restrictions.

9. Claimant testified that on May 28, 2022 she was walking with her husband. Claimant's husband pointed out a bird flying to the left side. Claimant remarked that she looked over her shoulder to see the bird. However, she felt an immediate pop in her left knee followed by severe pain. Claimant explained that she did not pivot. She subsequently returned to Dr. Kalevik and Dr. Dragoo. Dr. Dragoo eventually referred Claimant to Craig Hogan, M.D. On October 31, 2022 Dr. Hogan performed a left knee replacement. Since the knee replacement, Claimant stated she has full range of motion and function.

10. On May 29, 2022 Claimant sought treatment from UC Health with Jason B. Guy, PA-C, for left knee pain. PA-C Guy recounted that "Yesterday she pivoted and heard a pop in her left knee." Claimant described that she had experienced pain since the May 28, 2022 injury to her left knee. PA-C Guy assessed "Acute pain of left knee."

11. On June 7, 2022 Claimant returned to Dr. Kalevik for an evaluation. Dr. Kalevik recounted that on May 28, 2022, while "outside and not at work, she was walking and has she pivoted her left knee popped. She was able to catch herself and did not fall on the ground." Dr. Kalevik maintained Claimant's release to work full duty without restrictions.

12. On June 8, 2022 Claimant was evaluated by PA-C Jamie Weiss. She reported left knee pain when she "felt a twist a few days ago in her knee when she had excruciating pain." PA-C Weiss diagnosed a left knee "acute traumatic lateral meniscus tear."

13. On June 9, 2022 Claimant underwent an MRI of the left knee. Corey Ho, M.D. noted the MRI revealed concerns for a "re-tear" and "new deep cartilage fissuring or flap formation along the lateral patellar facet."

14. Claimant returned to Dr. Kalevik on July 27, 2022. After reviewing the MRI and performing an orthopedic consultation, Dr. Kalevik noted the following:

> I have reviewed the reports and the MRIs again. An evaluation by Dr. Dragoo's PA impression is that it is "left knee acute traumatic lateral meniscus tear." This seems to be supported by the MRI. I relayed to [Claimant] that since it happened

> outside of work, it would most likely not be related to the work injury. And it appears that she has new aspects now involving the lateral meniscus since her surgery was for the partial medial meniscectomy.

Dr. Kalevik concluded "Causality Statement NOT WORK RELATED: Based on the information by the patient, MRI and specialist office, the incident is less than 51% likely related to the occupational events, if the history provided to me is accurate. This incident is determined NOT to be work-related." Dr. Kalevik maintained Claimant's release to work full duty without restrictions. He also reiterated that Claimant had reached MMI on January 27, 2022.

15. On August 29, 2022 Dr. Dragoo remarked "it became clear that [Claimant] was having pain and popping since approximately 3 months post left knee surgery and was not fully recovered." He then commented that Claimant had a bigger pop on May 28, 2022 that increased her pain. Dr. Dragoo summarized "this could be related to her existing postoperative state and never being completely healed." He recommended continued physical therapy for three months.

16. On January 27, 2023 Claimant underwent an Independent Medical Examination (IME) with Sander Orent, M.D. Dr. Orent also testified at the hearing in this matter. He explained that, when Claimant first returned to work following her May 24, 2021 admitted left knee injury and subsequent surgery, her knee had not fully recovered. He reasoned that, because of the physical demands of Claimant's job, the return to work compromised her recovery and left her knee in a fragile state. Dr. Orent commented that the medical records after the November 3, 2021 surgery revealed Claimant continued to experience pain and swelling. He also noted the May 3, 2022 visit to Dr. Kalevik's office where she reported unrelenting symptoms.

17. In addressing the May 28, 2022 incident, Dr. Orent explained that Claimant did not engage in an activity of daily living, but simply turned her head while walking. Using a hypothetical, Dr. Orent commented that, had the same mechanism occurred in the workplace, he would not consider it a work-related injury because the mechanism would not fall within the course and scope of employment. He also stated that the use of the word "pivot" in medical records may be misleading. Dr. Orent explained that it is unlikely Claimant pivoted because an individual normally pivots using the foot not the knee. He summarized Claimant was simply walking and turning her head when the pop occurred. Dr. Orent concluded that Claimant's "knee was getting progressively worse…and that simple step was the final straw."

18. Despite Dr. Orent's opinion, his hearing testimony reveals that he did not consider Dr. Kalevik's reports of June 7, 2022 and July 27, 2022 that explicitly addressed the cause of Claimant's ongoing left knee problems. Notably, Dr. Orent did not review ATP Dr. Kalevik's opinion that Claimant's May 28, 2022 left knee injury while walking with her husband was less than 51% likely related to occupational events. Furthermore, Dr. Orent also accepted at face value Claimant's account that the May 28, 2022 non-work-related incident did not involve a pivot or twist injury to the left knee. His report does not

include reference to the multiple contemporaneous medical records describing a pivot or twist event on May 28, 2022 causing an audible pop and the immediate onset of excruciating pain.

19. Claimant has failed to establish it is more probably true than not that she should be permitted to reopen her admitted May 24, 2021 Workers' Compensation injury based on a change of condition pursuant to §8-43-303(1), C.R.S. Initially, on May 24, 2021 Claimant suffered a compensable industrial injury to her left knee. She underwent surgery on November 3, 2021 and reached MMI on January 27, 2022. However, on May 28, 2022 Claimant again injured her left knee while walking with her husband. The record reveals that the May 28, 2022 incident constituted an intervening event that severed the causal connection to Claimant's May 24, 2021 industrial injury. Therefore, Claimant has failed to demonstrate a change in condition that entitles her to reopen her May 24, 2021 claim.

20. The record reflects that Claimant suffered an intervening non-work-related injury on May 28, 2022 when she pivoted or twisted her knee, suffered a pop, and experienced the onset of excruciating pain. Claimant consistently reported to medical providers a pivoting or twisting event on May 28, 2022 outside of work that caused an injury evidenced by an audible pop and the immediate onset of excruciating pain. The MRI on June 9, 2022 also revealed concerns for a "re-tear" and "new deep cartilage fissuring or flap formation along the lateral patellar facet." Importantly, the persuasive opinions of multiple authorized medical providers show that Claimant suffered an intervening injury on May 28, 2022 causing "acute pain of the left knee" and an "acute traumatic lateral meniscus tear."

21. Importantly, on July 27, 2022, after reviewing the MRI findings and performing an orthopedic consultation, ATP Dr. Kalevik determined that Claimant had "new aspects now involving the lateral meniscus since her surgery was for the partial medial meniscectomy." In assessing causality, Dr. Kalevik concluded that the May 28, 2022 incident was not work-related. He reasoned that, "based on the information by the patient, MRI and specialist office, the incident is less than 51% likely related to the occupational events, if the history provided to me is accurate. This incident is determined NOT to be work-related." Dr. Kalevik maintained Claimant's release to work full duty without restrictions. He also reiterated that Claimant had reached MMI on January 27, 2022.

22. In contrast, Dr. Orent explained that, when Claimant first returned to work following her May 24, 2021 admitted left knee injury and subsequent surgery, she had not fully recovered. He reasoned that, because of the physical demands of Claimant's job, the return to work compromised her recovery and left her knee in a fragile state. In addressing the May 28, 2022 incident, Dr. Orent explained that Claimant did not engage in an activity of daily living, but simply turned her head while walking. He explained that it was unlikely Claimant pivoted because an individual normally pivots using the foot and not the knee. Dr. Orent concluded that Claimant's "knee was getting progressively worse…and that simple step was the final straw." Similarly, on August 29, 2022 Dr. Dragoo remarked "it became clear that [Claimant] was having pain and popping since

approximately 3 months post left knee surgery and was not fully recovered." Dr. Dragoo speculated that the May 28, 2022 event "could be related to her existing postoperative state and never being completely healed."

23. Despite Dr. Orent's opinion, his hearing testimony reveals that he did not consider Dr. Kalevik's reports of June 7, 2022 and July 27, 2022 that explicitly addressed the cause of Claimant's ongoing left knee problems. Notably, Dr. Orent did not review ATP Dr. Kalevik's opinion that Claimant's May 28, 2022 left knee injury while walking with her husband was less than 51% likely related to occupational events. Furthermore, Dr. Orent also accepted at face value Claimant's account that the May 28, 2022 non-work-related incident did not involve a pivot or twist injury to the left knee. His report did not reference the multiple contemporaneous medical records describing a pivot or twist event on May 28, 2022 that caused an audible pop and the immediate onset of excruciating pain. The failure to consider the preceding medical record undermines Dr. Orent's opinion that Claimant was engaged in the "simple act of walking" without a "mechanism" of injury outside of work. Similarly, Dr. Dragoo noted that Claimant began experiencing symptoms approximately three months after her November 3, 2021 left knee surgery and the May 28, 2022 event "could be related to her existing postoperative state and never being completely healed." However, he did not conduct a causation analysis and only offered a speculative opinion.

24. Claimant's condition and need for additional medical treatment for her left knee did not proximately and naturally flow from the May 24, 2021 injury. The record reveals that the May 28, 2022 incident constituted an intervening event that severed the causal connection to Claimant's May 24, 2021 industrial injury. The May 28, 2022 event triggered her need for additional medical treatment and surgical intervention. Accordingly, Claimant has failed to establish it is more probably true than not that a change in condition of her May 24, 2021 left knee injury warrants reopening of her claim and additional medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. At any time within six years of the date of injury, an ALJ may reopen an award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. Section 8-43-303(1), C.R.S. specifically provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

5. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Indus. Claim Appeals Off.,* 49 P.3d 1187, 1188 (Colo. App. 2002); *Martinez v. Thoutt Bros. Concrete Contractors, Inc.*, W.C. No. 5-139-017-001 (ICAO, June 2, 2022). No liability exists when a later accident occurs as the direct result of an intervening cause. *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). However, the intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAO, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

6. As found, Claimant has failed to establish by a preponderance of the evidence that she should be permitted to reopen her admitted May 24, 2021 Workers'

Compensation injury based on a change of condition pursuant to §8-43-303(1), C.R.S. Initially, on May 24, 2021 Claimant suffered a compensable industrial injury to her left knee. She underwent surgery on November 3, 2021 and reached MMI on January 27, 2022. However, on May 28, 2022 Claimant again injured her left knee while walking with her husband. The record reveals that the May 28, 2022 incident constituted an intervening event that severed the causal connection to Claimant's May 24, 2021 industrial injury. Therefore, Claimant has failed to demonstrate a change in condition that entitles her to reopen her May 24, 2021 claim.

7. As found, the record reflects that Claimant suffered an intervening non-work-related injury on May 28, 2022 when she pivoted or twisted her knee, suffered a pop, and experienced the onset of excruciating pain. Claimant consistently reported to medical providers a pivoting or twisting event on May 28, 2022 outside of work that caused an injury evidenced by an audible pop and the immediate onset of excruciating pain. The MRI on June 9, 2022 also revealed concerns for a "re-tear" and "new deep cartilage fissuring or flap formation along the lateral patellar facet." Importantly, the persuasive opinions of multiple authorized medical providers show that Claimant suffered an intervening injury on May 28, 2022 causing "acute pain of the left knee" and an "acute traumatic lateral meniscus tear."

8. As found, importantly, on July 27, 2022, after reviewing the MRI findings and performing an orthopedic consultation, ATP Dr. Kalevik determined that Claimant had "new aspects now involving the lateral meniscus since her surgery was for the partial medial meniscectomy." In assessing causality, Dr. Kalevik concluded that the May 28, 2022 incident was not work-related. He reasoned that, "based on the information by the patient, MRI and specialist office, the incident is less than 51% likely related to the occupational events, if the history provided to me is accurate. This incident is determined NOT to be work-related." Dr. Kalevik maintained Claimant's release to work full duty without restrictions. He also reiterated that Claimant had reached MMI on January 27, 2022.

9. As found, in contrast, Dr. Orent explained that, when Claimant first returned to work following her May 24, 2021 admitted left knee injury and subsequent surgery, she had not fully recovered. He reasoned that, because of the physical demands of Claimant's job, the return to work compromised her recovery and left her knee in a fragile state. In addressing the May 28, 2022 incident, Dr. Orent explained that Claimant did not engage in an activity of daily living, but simply turned her head while walking. He explained that it was unlikely Claimant pivoted because an individual normally pivots using the foot and not the knee. Dr. Orent concluded that Claimant's "knee was getting progressively worse…and that simple step was the final straw." Similarly, on August 29, 2022 Dr. Dragoo remarked "it became clear that [Claimant] was having pain and popping since approximately 3 months post left knee surgery and was not fully recovered." Dr. Dragoo speculated that the May 28, 2022 event "could be related to her existing postoperative state and never being completely healed."

10. As found, despite Dr. Orent's opinion, his hearing testimony reveals that he did not consider Dr. Kalevik's reports of June 7, 2022 and July 27, 2022 that explicitly

addressed the cause of Claimant's ongoing left knee problems. Notably, Dr. Orent did not review ATP Dr. Kalevik's opinion that Claimant's May 28, 2022 left knee injury while walking with her husband was less than 51% likely related to occupational events. Furthermore, Dr. Orent also accepted at face value Claimant's account that the May 28, 2022 non-work-related incident did not involve a pivot or twist injury to the left knee. His report did not reference the multiple contemporaneous medical records describing a pivot or twist event on May 28, 2022 that caused an audible pop and the immediate onset of excruciating pain. The failure to consider the preceding medical record undermines Dr. Orent's opinion that Claimant was engaged in the "simple act of walking" without a "mechanism" of injury outside of work. Similarly, Dr. Dragoo noted that Claimant began experiencing symptoms approximately three months after her November 3, 2021 left knee surgery and the May 28, 2022 event "could be related to her existing postoperative state and never being completely healed." However, he did not conduct a causation analysis and only offered a speculative opinion.

11. As found, Claimant's condition and need for additional medical treatment for her left knee did not proximately and naturally flow from the May 24, 2021 injury. The record reveals that the May 28, 2022 incident constituted an intervening event that severed the causal connection to Claimant's May 24, 2021 industrial injury. The May 28, 2022 event triggered her need for additional medical treatment and surgical intervention. Accordingly, Claimant has failed to establish by a preponderance of the evidence that a change in condition of her May 24, 2021 left knee injury warrants reopening of her claim and additional medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to reopen her admitted May 24, 2021 claim based on a change in condition pursuant to §8-43-303(1), C.R.S. is denied and dismissed. Therefore, her request for additional medical benefits, including the left knee replacement performed by Dr. Hogan on October 31, 2022, is also denied.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 16, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-162-201-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising from the course of his employment with Employer.

2. If compensable, whether Claimant established by a preponderance of the evidence entitlement to reasonable and necessary medical treatment.

3. If compensable, whether Claimant established an entitlement to temporary total disability benefits for the period of December 31, 2020 to January 20, 2021, and temporary partial disability benefits from January 26, 2021 to July 28, 2021.

FINDINGS OF FACT

1. Claimant is a firefighter paramedic employed by Employer. Claimant's job duties include, among other things, providing patient assessment and treatment at a paramedic level.

2. On December 21, 2020, Claimant responded to a call for medical assistance in the course of his employment reporting an elderly woman ('patient") with breathing difficulty. The patient was in a small (approximately 600 square feet) apartment, and Claimant entered the apartment with others to assess Claimant's condition. The patient was located in the bedroom of the apartment and was not wearing a mask. Claimant entered the bedroom, knelt next to the patient, applied a blood pressure cuff and pulse oximeter, and then placed the Claimant on oxygen. Claimant testified that his direct interaction with the patient lasted a "couple" of minutes. During the encounter, Claimant was wearing appropriate EMS personal protective equipment (PPE) including gloves, a KN95 mask, and eye protection. Although it was not known to Claimant or his co-workers, the patient was COVID-positive at the time of the encounter.

3. After it was determined that the patient had a low pulse oximeter reading and was exhibiting symptoms of COVID, Claimant exited the bedroom and waited in the apartment until the ambulance arrived. Claimant testified that after his initial encounter with the patient, he remained at least six feet away from the patient for the remainder of the encounter. Claimant was present in the apartment for between 10-15 minutes.

4. On December 23, 2020, Respondent learned the patient was COVID-positive, and communicated this to Claimant on December 24, 2020. On December 29, 2020, Claimant began experiencing symptoms consistent with COVID, and tested positive on December 30, 2020. (Ex. D & 7).

5. Prior to December 21, 2020, Claimant had not tested positive for COVID, and had no symptoms associated with COVID. Claimant tested negative for COVID on December 1, 2020. (Ex. 4).

6. Claimant's initial symptoms were not severe, so he did not seek medical assistance. Claimant remained off work pursuant to Employer's policy from December 31, 2020 until January 20, 2021. On January 22 or 23, 2021, once Claimant returned to work, he began experiencing difficulty breathing and a fever. He then sought treatment from his personal medical provider at Kaiser Permanente on January 26, 2021. (Ex. 5). At Kaiser, Claimant was diagnosed with bilateral pulmonary emboli (*i.e*., blood clots) in his lungs, secondary to COVID, and placed on anticoagulant medication. (Ex. 4). It was also noted that Claimant had a history of factor V Leiden mutation, which can cause or contribute to blood clots.

7. On January 26, 2021, Claimant notified Employer. A first report of injury was completed on January 27, 2021, and Claimant was provided a list of authorized medical providers. (Ex. 1 & D).

8. On January 28, 2021, Claimant saw Annu Ramaswamy, M.D.[1] Dr. Ramaswamy opined that Claimant's COVID infection was more likely than not work-related and contracted from the elderly patient he saw on December 21, 2020, as this was Claimant's only known COVID exposure, and because the emergence of symptoms fell within the incubation period for the infection. Dr. Ramaswamy also noted that because Claimant was continuing to experience fatigue and dyspnea (*i.e.*, difficulty breathing), he was not currently working, and that as he improved, restricted duty would be recommended. He further indicated that Claimant could not return to full duty as a firefighter while on anticoagulation therapy. (Ex. D).

9. On January 29, 2021, Claimant's physician at Kaiser, Heath Henbest, D.O., opined that Claimant's lung blood clots were likely related to the effects of his COVID infection. He further indicated Claimant would be on blood thinners for up to six months. Because blood thinners increase the risk for prolonged bleeding in the event of trauma (either penetrating or blunt), Claimant should avoid situations in which trauma was possible. (Ex. 4).

10. On February 5, 2021, Respondent filed a notice of contest. (Ex. A).

11. Claimant's next documented medical visit was at Kaiser on July 19, 2021, where he saw Thomas Kenney, M.D.. At that time, it was noted that Claimant's pulmonary emboli was related to his COVID infection, and likely exacerbated by underlying factor V Leiden mutation. It was further noted that Claimant's blood clots had not completely resolved, and that he was unlikely to get additional clot resolution with longer-term anticoagulation, as the clot was likely chronic at this point. Dr. Kenney also indicated it was reasonable for Claimant to discontinue anticoagulation medications so he could return to work. (Ex. D). Claimant testified that he returned to work approximately one week after being taken off anticoagulants.

12. After testing positive for COVID on December 30, 2020, Claimant was unable to work for three weeks based on Employer's policies and guidelines. He returned to work

[1] The parties stipulated that if Claimant's claim is compensable, Dr. Ramaswamy would be an authorized treating physician.

on January 20, 2021. Claimant worked full duty from January 21, 2021 until January 25, 2021. Because Claimant was placed on anticoagulation therapy, he was unable to work full duty from January 26, 2021, until July 28, 2021. The evidence was unclear if Claimant worked modified duty during this time, or whether he was off work entirely.

13. Between December 21, 2020 and December 29, 2020, Claimant engaged in activities outside of work, including picking up take-out food at a bagel store, three trips to a grocery store, one trip to a Costco, and trips to a gym – [Redacted, hereinafter VF]. Claimant testified when he went to these locations he wore a mask and maintained social distance. Claimant testified he went to VF[Redacted] with his wife in the late mornings, on six occasions between December 22, 2020 and December 29, 2020. Claimant and his wife worked out for between 30-45 minutes on exercise machines such as treadmills, stair climbers or elliptical trainers. Claimant testified the VF[Redacted] was approximately 6,000 square feet (60 x 100 feet), with high (30 foot) ceilings, and large ceiling fans, and that approximately 30-40 people may have been at the gym during his visits. The VF[Redacted] enforced social distancing protocols, including limiting the number of people permitted in the facility, requiring members to reserve a time slot for workouts, and requiring members to wait outside, socially-distanced, until the reserved time slot. Once in the facility, Claimant testified that every other cardio machine was cordoned off to maintain distance between the machines, and Claimant wore a surgical mask while exercising.

14. As of December 21, 2020, Claimant lived with his wife, son, and daughter. Claimant testified that his family did not exhibit COVID symptoms prior to December 20, 2021. Claimant's wife tested negative for COVID on December 31, 2020. (Ex. 4). Claimant testified that his son and daughter also tested negative for COVID around that time. Claimant's wife eventually tested positive for COVID on January 5, 2021. Claimant testified that the only known COVID-positive person with whom he had contact prior to his wife testing positive was the elderly patient on December 21, 2020.

15. Daniel Mogyoros, M.D., is an infectious disease physician who performed a record review at Respondents' request and issued a report dated May 8, 2023. (Ex. C). Dr. Mogyoros was admitted as an expert in infectious disease, with expertise in COVID, and testified at hearing. Dr. Mogyoros opined that it was unlikely Claimant contracted COVID from the December 21, 2020 patient, based on the amount of time he was in close proximity to the patient, and the Claimant's use of PPE during the encounter. Dr. Mogyoros explained that individuals who contract COVID are typically contagious 48 hours before symptoms emerge, and remain contagious for approximately 5-7 days after the onset of symptoms. The virus is transmitted through aerosols or droplets that are expelled when breathing. The "incubation period," (*i.e.*, the time between exposure and the emergence of symptoms) varies from 3 days at the earliest, to as long as 12 days, with the average being 5-6 days. He also testified that there is some data that suggests the incubation period may be longer if a person is exposed to a lower viral load. Dr. Mogyoros indicated that it is not possible to determine the elderly patient's viral load, but that it was likely high.

16. Based on Dr. Mogyoros' testimony regarding the incubation period, and the emergence of Claimant's symptoms on December 29, 2020, it is more likely than not that Claimant contracted COVID from exposure to a COVID-infected person sometime between December 17, 2020 and December 26, 2020.

17. Dr. Mogyoros explained that the Center for Disease Control (CDC) defines "close contact" as being within 6 feet of an infected person for at least 15 minutes over a 24-hour period. Because Claimant was not in close proximity to the patient for 15 minutes, he indicated this would not meet the CDC definition of a "significant exposure." Exposure risk may be decreased through the use of PPE, including a KN95 mask, such as that worn by Claimant. Dr. Mogyoros opined that using a KN95 mask offers a high level of protection, which reduces the risk of COVID infection by 85-90%. Dr. Mogyoros opined that the Claimant's use of PPE during his encounter and the time of close contact, make it unlikely that Claimant's exposure on December 21, 2020 was the source of his COVID infection. Although, he did agree it is possible that Claimant could have contracted COVID from the patient on December 21, 2020.

18. Dr. Mogyoros believes it is more likely Claimant contracted COVID at VF[Redacted]. He indicated there were reports of COVID outbreaks associated with fitness centers in general, and that performing cardio exercises increased the rate of expulsion of the aerosols which transmit COVID. He further opined that the use of fans may spread aerosols within a room, which would increase the potential exposure. He also testified that Claimant's use of a surgical mask would not be as effective in decreasing the risk of exposure due to gaps on the sides of the mask. In his report, Dr. Mogyoros indicated the "risk of exposure being in proximity to vigorous gym-based exercise is no different than being in close proximity during a conversation with an infected person." He indicated that assuming both parties were masked, a 25-60 minute exposure to COVID-infected person at the gym could have been enough to infect Claimant. No credible evidence was presented to indicate that Claimant was exposed to a COVID-positive person at the gym. But Dr. Mogyoros indicated that it was a possibility given infected individuals are typically contagious for several days before COVID symptoms manifest. For example, Claimant worked out at VF[Redacted] on December 26, 28, and 29, 2020, when he was likely COVID-positive, but not exhibiting symptoms. While Dr. Mogyoros' testimony is credible, in the absence of credible evidence that Claimant actually encountered another COVID-positive individual at VF[Redacted] or elsewhere between December 21, 2020 and December 26, 2020, his opinion is speculative and not persuasive.

19. Dr. Mogyoros opined that the medical treatment Claimant received for his pulmonary emboli was reasonable and necessary, although he did not have the expertise to opine on the specific medications used. He further opined that Claimant's pulmonary emboli were likely due, in some part, to his COVID infection, but could not comment on how much Claimant's Factor V Leiden mutation may have contributed. (Ex. C).

20. Dr. Ramaswamy testified by deposition in lieu of live testimony, and was admitted as an expert in occupational medicine. Dr. Ramaswamy has treated COVID patients, but is not an infectious disease specialist. Dr. Ramaswamy testified that in his opinion,

Claimant contracted COVID from the December 21, 2020 patient. The primary rationale for this is that the exposure on December 21, 2020 was Claimant's only known contact with a COVID-positive person, and that Claimant's symptoms correlated with the accepted incubation period for that exposure.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of

the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014). All results flowing proximately and naturally from an industrial injury are compensable. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer. Claimant was exposed to a COVID-infected patient on December 21, 2020. He was in close proximity to the unmasked patient for several minutes while rendering paramedical care. Although Claimant's relatively low exposure time and use of appropriate protective equipment, including a KN95 mask, reduced the risk of transmission, it did not eliminate the risk of contracting COVID from the patient.

Claimant became symptomatic on December 29, 2020, indicating Claimant likely contracted the virus between December 17, 2020 and December 26, 2020 (*i.e.*, 3 to 12-day incubation period prior to symptoms). During this period, the December 21, 2020 patient is the only known COVID-positive person with whom Claimant had close contact. Although Claimant did go to VF[Redacted] and other places where he could have potentially encountered a COVID-positive person, no credible evidence was admitted indicating this occurred. While Dr. Mogyoros presented a potential alternative source of Claimant's infection, it is mere speculation to assume he had sufficient contact with a COVID-positive individual at VF[Redacted] or anywhere else. The ALJ finds it more likely

than not that Claimant became infected with COVID during the December 21, 2020 encounter with the elderly patient while delivering paramedical care in the course of his employment with Employer.

The ALJ finds credible the opinions of Claimant's treating providers at Kaiser Permanente that he developed pulmonary emboli as a result of his COVID infection. Because the pulmonary emboli were a proximal and natural result of Claimant's COVID infection, it constitutes a compensable injury as well.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has established a compensable injury, Claimant is entitled to all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his injury. Claimant has established both that he contracted COVID arising out of the course of his employment, and that he developed pulmonary emboli as a result of the COVID infection. Respondents shall pay for all authorized, reasonable, and necessary treatment to cure or relieve these conditions.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, Claimant must prove his industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

Claimant has established by a preponderance of the evidence an entitlement to temporary disability benefits. Claimant was not able to work from December 31, 2020 until January 20, 2021 due to contracting COVID per Employer's policy. The evidence demonstrates that Claimant developed pulmonary emboli in his lungs as the result of the COVID infection. As a result of the pulmonary emboli, Claimant was placed on anticoagulation therapy for approximately six months. Because anticoagulants

significantly increase Claimant's risk of bleeding in the event of trauma, and because his work as a firefighter potentially exposed Claimant to the risk of trauma, he was unable to work full duty while on anticoagulation therapy from January 26, 2021 until July 28, 2021. Respondents shall pay Claimant temporary disability benefits for the period of December 31, 2020 to January 20, 2021, and from January 26, 2021 to July 28, 2021.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury arising out of the course of his employment with Employer on December 21, 2020, when he contracted COVID in the course of his employment. Claimant's subsequent pulmonary emboli were caused by the COVID infection and are also compensable.

2. Respondents shall pay for all authorized medical care that is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

3. Respondents shall pay Claimant temporary disability benefits for the periods of December 31, 2020 to January 20, 2021, and from January 26, 2021 to July 28, 2021.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 16, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury in the course and scope of his employment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 43 year-old man who worked for Employer from October 3, 2017 until January 23, 2023 as an insulation installer. Claimant testified that prior to his alleged injury, he primarily worked in residential homes. (Tr. 13:16-18).

2. Claimant alleged that he suffered an injury on October 27, 2022. Claimant testified he was working in a commercial building in Estes Park, and had been working at that location prior to his injury. He testified that the work in the commercial building required him to use a heavier spray gun, about 20 pounds, and he had to drag a hose that was three to four inches thick and weighed about 30 pounds. (Tr. 15:19-25). Claimant testified that he would aim the insulation gun at the ceiling, and he worked over eight hours a day with his hands either at shoulder height or higher. Claimant further testified that when he worked on a residential project, he only worked overhead half of the time, or about three to four hours per day. (Tr. 22:11-23:2). Claimant testified that his work in the commercial building caused his injury. (Tr. 23.3-5).

3. Claimant testified he had been working at the commercial building for a couple of weeks. When questioned by the ALJ, Claimant testified that he started working on the commercial building in September 2022 and worked on the project for two weeks. Claimant's testimony regarding the dates he worked in the commercial building was inconsistent. Nevertheless, it is uncontroverted that Claimant worked in a commercial building prior to October 27, 2022. The ALJ finds that Claimant worked in a commercial building for two weeks sometime between September 2022 and October 27, 2022.

4. Claimant was evaluated by Authorized Treating Provider (ATP), Jeffrey Baker, M.D., on November 1, 2022. Claimant noted on the patient information form, that his upper back, neck and shoulders were injured because of repetitive movements and "looking up every day." Claimant denied any specific injury. Dr. Baker assessed Claimant with a cervical strain, but specifically noted that causality needed to be determined and he ordered a work-site evaluation. He also referred Claimant to physical therapy. There is no mention of Claimant recently working in a commercial building, or him working in a different environment than normal. Notably, according to the medical record, Claimant told Dr. Baker he "has been getting neck and upper back pain for 2 years. He believes it is from his job because he has to look up a lot." (Ex. F).

5. At the hearing, however, Claimant testified that his pain began when he started working on ceilings in the commercial building. Claimant testified that prior to working in the commercial building, he was just working on walls or windows in houses, which were within his normal reach for his height. (Tr. 18:3-7). Claimant later testified he had neck and back issues before October 27, 2022. (Tr. 25:22-24).

6. Claimant testified he had a prior work incident involving his right shoulder. According to the Concentra records, in 2018, Claimant suffered a work-related injury to his right shoulder. (Ex. D). Claimant testified he received treatment for his shoulder, but it was never really resolved. (Tr. 18:8-18).

7. The ALJ finds that Claimant experienced neck, back and right shoulder issues prior to October 27, 2022.

8. A Job Demands Analysis (JDA)[1] was completed on December 15, 2022. According to the JDA, approximately 20-30% of Claimant's work involved using a foam gun to apply liquid foam to designated locations in walls and ceilings. (Ex. J). Claimant testified that the JDA was not representative of his work in the commercial building. (Tr. 21:21-22:1). Claimant primarily worked in residential buildings. The ALJ finds the JDA to be accurate and representative of Claimant's work for Employer.

9. Claimant continued to treat with Dr. Baker and others at Concentra. On January 6, 2023, Claimant had a follow-up appointment with Dr. Baker who had recently reviewed the JDA. Dr. Baker concluded, based on his treatment of Claimant and his review of the JDA that Claimant's presenting complaints were not work-related. (Ex. F).

10. On January 20, 2023, Claimant underwent imaging of his cervical spine. The impression was mild multilevel degenerative changes, most apparent at C5-C6. On January 22, 2023, Claimant was evaluated by Elias Hernandez, M.D. Claimant's chief complaint was joint pain, and he wanted to discuss testing for arthritis because his dad had inflammatory joint disease. Claimant reported having pain in his neck for six months, along with pain in his back and knee and elbow joints. He told Dr. Hernandez he felt his work installing insulation in houses and buildings could be causing the pain. Dr. Hernandez opined that Claimant's pain was musculoskeletal due to a strain over his neck and upper back. (Ex. 11).

11. Claimant filed his Worker's Claim for Compensation on January 20, 2023. He noted his date of injury as being October 27, 2022. In describing the accident he wrote "I have back, neck and pain in my shoulders due to constantly having to be looking up to spray foam on ceilings all day. My hands are constantly over my shoulders while spraying also." (Ex. 1).

12. Claimant continued to go to Banner Health for treatment. On February 18, 2023, Claimant had an MRI of his thoracic spine that indicated no significant thoracic facet arthropathy. According to his February 27, 2023 medical record, Claimant reported that he "was required to look overhead and hold things overhead repeatedly." The record

[1] This is the work-site evaluation Dr. Baker ordered.

states that he was seen for bilateral shoulder pain, myofascial pain, and spondylosis without myelopathy or radiculopathy in the cervical region. He was referred to orthopedics for his shoulder complaints, and to Dr. Shonk for his myofascial neck and upper back pain and possible trigger point injections. (Ex. H).

13. Claimant was evaluated on March 6, 2023, presumably by Dr. Shonk.[2] According to the record, Claimant was seen for cervical facet arthropathy, among other issues. And it was recommended that Claimant get injections to block the pain from the facet joints in his neck, and some trigger point injections to diminish the muscle spasms in his neck, shoulder, and upper back. (Ex. H). There is no objective evidence in the record, however, to explain the basis for the diagnosis of cervical facet arthropathy, or the recommended treatment.

14. At Respondents' request, Claimant underwent an Independent Medical Examination (IME) with Frederick Mark Paz, M.D. on May 2, 2023. Claimant told Dr. Paz he developed symptoms in his neck, back and shoulders six months prior to the date of his alleged injury. Claimant further told Dr. Paz that he had been spraying overhead, and his activity was "mostly up in the ceiling." Claimant said his work was in houses. According to Dr. Paz's IME report, Claimant "states that prior to the onset of symptoms, the spraying that he applied to the ceiling was limited and not frequent." Claimant also told Dr. Paz that he received injections in his neck, but they provided no benefit, and in fact temporarily worsened his symptoms. (Ex. I).

15. Based on a review of the medical records and the direct history provided by Claimant, Dr. Paz did not find objective evidence to support Claimant's subjective complaints. (Ex. I). Dr. Paz was unable to find a specific date of injury, or a specific diagnosis. Without a diagnosis, Claimant failed to meet the threshold criteria for a cumulative trauma disorder, and a work-related injury. (Tr. 30:25-32:3).

16. Dr. Paz's opinion was consistent with Dr. Baker's that Claimant's injury was not work-related and was more likely than not, idiopathic in nature, with no correlation between Claimant's subjective symptoms or any defined exposure. (Ex. I). Dr. Paz, consistent with Dr. Baker, found it was not medically probable that Claimant suffered a work-related injury on October 27, 2022. The ALJ finds Dr. Paz's opinion to be credible and persuasive.

17. Claimant testified that his symptoms began when he worked on the commercial project for two weeks sometime between September 2022 and October 27, 2022. Yet he told Dr. Baker he experienced pain for two years, and he told Dr. Paz that he experienced pain for six months. Claimant testified that it was while working on the commercial property that he sprayed the ceiling for the majority of the time. But Claimant told different medical providers that he was constantly looking up and spraying ceilings, not just doing this over a two–week period. The ALJ finds that Claimant's testimony is inconsistent and not credible.

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[2] Dr. Shonk's name is hand-written on the March 6, 2023 record, and only pages 1 and 2 out of 16 were submitted into evidence.

18. Based on the totality of the evidence, the ALJ finds that Claimant did not suffer an injury in the course and scope of his employment. Claimant did not prove by a preponderance of the evidence that he suffered a compensable injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury, an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791

(Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold d/b/a Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa Cnty. Valley Sch. Dist.*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 P.2d at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant's testimony concerning his alleged injury was inconsistent and not credible. Claimant testified that while working in a commercial building for two weeks, he injured his neck and back because he was using heavier equipment to spray the ceiling. Claimant testified that he predominantly worked in residential buildings where he was not spraying ceilings. Claimant, however, told his medical providers that he had been in pain anywhere from six months to two years, and that he always worked looking up and spraying ceilings. Dr. Paz conducted an IME and concluded that Claimant did not suffer a work-related injury. Dr. Paz credibly opined that Claimant's injury was more likely than not, idiopathic in nature. Claimant's ATP, Dr. Baker, also opined that it was not medically probable that Claimant suffered a work-related injury. Based on the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that he suffered a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant did not suffer a compensable injury in the course and scope of his employment.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 16, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as a result of the admitted work related injuries of August 10, 2019.

PROCEDURAL HISTORY

Claimant was placed at MMI by Dr. Zimmerman on October 14, 2021 with a 21% rating. Respondents filed an Application for a Division of Workers' Compensation Independent Medical Examination (DIME). Claimant was evaluated by Dr. Mark Winslow, the DIME physician on March 15, 2022.

Respondents filed a Final Admission of Liability on June 2, 2022 admitting to temporary total disability benefits paid based on an average weekly wage of $859.63 and a TTD rate of $573.09. Respondents also paid permanent partial disability benefits beginning the date of MMI. Respondents admitted to maintenance medical benefits.

Claimant filed an Application for Hearing on December 7, 2022 on multiple issues including permanent total disability benefits. Respondents filed a Response to Applcaiton for Hearing dated January 4, 2023. Present during the were [Redacted, hereinafter JG], Esq. from [Redacted, hereinafter MM]'s office, and Claimant's daughter, [Redacted, hereinafter MA], as observers; Claimant, Dr. David Yamamoto and Cynthia Bartman who testified on behalf of Claimant; and Dr. John Raschbacher and Katie Montoya, who testified on behalf of Respondents.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Generally:

1. At the time of the hearings, Claimant was fifty nine years old, lived with his wife and had a ninth grade education in Mexico. Claimant worked as a laborer in construction. While he mainly performed manual labor, he also used machinery including the mixer and a forklift tractor. He had been doing the same kind of work for more than 20 years and would essentially perform the same kinds of tasks each day, so he understood the instructions in English. He would use a coworker to interpret when he was unable to understand his supervisor. He would frequently be lifting the 80 to 90 lbs. of mix when operating the tractor. His job required lifting, walking, standing, climbing scaffolding. After his accident, he performed modified duty for approximately four months sorting materials, washing cars, cleaning floors.

B. The Accident:

2. On August 10, 2019 Claimant had been preparing the mix for the mixer, went up the scaffolding to put the mix in the mixer, when the weight of the bucket of cement mix overbalanced him, it threw him back and he fell to the floor. The mixer had a solid piece of concrete in it which was shaking the scaffolding. He injured his low back and had almost immediate pain going into his right lower extremity all the way to his foot. About three weeks after the accident the pain started getting worse, then about six weeks later, the pain was even worse causing numbness going down his leg. Approximately three months prior to the March 2023 hearing, he developed increasing nerve pain radiating into the groin.

3. Claimant last worked on February 10, 2020. He had surgery on February 12, 2020. He was happy initially with the surgical results. The pain in his low back seemed to get worse after about another month or two, especially in his low back, and his right lower extremity. After the surgery he received medications, injections and physical therapy. Both the physical therapy and the injections helped with the pain. The medications only helped for a while and then the pain and symptoms would return. He continues to take Gabapentin at nighttime and sometimes when he wakes up he may take more of the Gabapentin.

C. Medical and Vocational Records:

4. Claimant was first evaluated by Dr. Carrie Burns of Concentra – Centennial on August 12, 2019. She documented that Claimant was operating a cement mixer when he felt back pain which immediately radiated down his right leg, reporting right leg pain and paresthesias. Dr. Burns noted loss of lordosis, tenderness at the L1-L5 left and right paraspinal, worse on the right, right sided muscle spasms, limited range of motion (ROM) and positive right straight leg raise (SLR). She assessed lumbar strain, right wrist sprain and acute lumbar radiculopathy. She ordered physical therapy, a wrist brace, x-rays of the right wrist (normal) and spine; and medications. She noted degenerative joint disease of the lumbar spine and suspected some nerve irritation or compression. Dr. Burns ordered restrictions of sedentary duty, no lifting greater than 10 lbs., limited bending and twisting. Claimant started physical therapy at Concentra shortly thereafter.

5. By August 16, 2019 Dr. Burns ordered an MRI of the lumbar spine, diagnosing lumbar radiculopathy, lumbar strain and right wrist strain.

6. The August 16, 2019 MRI read by Dr. Brian Steele of Health Images showed as follows:

> 1. At L4-LS there is a medium-sized broad-based right paracentral/foraminal caudally-directed disc extrusion that causes moderate thecal sac stenosis and impinges on the transiting right L5 nerve root in the lateral recess. The disc also contacts the transiting left L5 nerve root to a lesser degree and contributes to mild bilateral foraminal stenosis.
>
> 2. A caudally-directed central disc extrusion at L5-S1 only slightly narrows the thecal sac but contacts both transiting S1 nerve roots, without nerve root compression or displacement.

3. At L3-L4 there is a broad-based right paracentral disc protrusion that contributes to mild-moderate thecal sac stenosis and contacts the transiting right L4 nerve root in the lateral recess.

4. Smaller disc protrusions at L1-L2 and L2-L3 does not cause thecal sac stenosis or specific nerve impingement. No sites of severe degenerative foraminal stenosis are present.

7. On August 19, 2019 Dr. Burns noted that the MRI showed a large disc extrusion with compression of the nerve root on the right at L4-5. Claimant continued to have right sided paraspinal spasms, limited ROM and positive SLR on the right. Claimant complained of increasing pain and numbness. She injected a Ketorolac Tromethamine intramuscular solution, prescribed pain medication and referred Claimant to Dr. Pehler, an orthopedic spine surgeon.

8. Dr. Stephen F. Pehler of Colorado Orthopedic Consultants evaluated Claimant on August 29, 2019 and diagnosed lumbar disc herniation with radiculopathy, spondylosis of the lumbar spine with radiculopathy and low back pain. He documented that Claimant had low back pain with right lower extremity radiculopathy, numbness and tingling, and was not able to work due to the pain and limped when walking. He documented Claimant had increased pain with prolonged sitting and at nighttime. He reviewed the MRI films and noted L4-5 lumbar disc herniation with right neuroforaminal narrowing and nerve root compression, and recommended a right-sided transforaminal epidural steroid injection. He commented that if symptoms did not subside, then Claimant would require a microdiscectomy. He prescribed gabapentin, flexeril and lidocaine patches.

9. Dr. Burns noted on September 6, 2019 that Claimant continued with severe pain in the low back and radiating pain down the right leg. He was having problems sleeping as he would wake up with pain down his leg and would have difficulty going back to sleep. Exam, diagnoses and restrictions remained the same. Dr. Burns administered another Ketorolac injection on September 27, 2019 while awaiting authorization for steroid injection with the specialist.

10. Claimant was attended by Dr. Barry A. Ogin of Colorado Rehabilitation & Occupational Medicine on October 10, 2019 for a right L4 and L5 transforaminal epidural steroid injection (ESI). The 7/10 pre injection pain level was immediately reduced to 0/10 post-injection. He was given a pain dairy and recommended follow up with Dr. Pehler.

11. On October 18, 2019 Dr. Burns reported that Claimant was working but that it was a struggle to make it to the end of the 4 hours and he was in significant pain, even with an extended lunch break. On October 23, 2019 Nurse Hanna Bodkin noted that she was very concerned that Claimant was having problems with getting and understanding proper instructions for follow up, medications, procedures and would benefit from a nurse case manager.

12. Dr. Pehler submitted a request for authorization on November 1, 2019 for the right sided L4-5 microdiscectomy surgery for the large herniated disc as Claimant had failed conservative treatment including therapy and injections.

13. On November 7, 2019 Dr. Burns noted that Claimant was being scheduled for surgery but it had not yet been authorized. Claimant was again out of medications on

December 19, 2019 and was still awaiting authorization for surgery. Claimant was getting some weakness down his right leg. His daily pain was a 9/10. Dr. Burns noted that it was clear that Claimant needed surgery as he had a definite disc herniation that was compressing on his nerve. He was weak on the right side and short relief with injections. She discussed consulting with Dr. Pehler to refile the request for authorization since it had been 5 months since his injury.

14. Dr. Burns noted on January 31, 2020 that Claimant's back and right leg were more painful, and had been doubling up on his medications as his employer was working him for longer shifts. Dr. Burns noted that Claimant was moving very slowly, obviously limping when transitioning from sitting to standing and walking.

15. Dr. Pehler performed the surgery on February 12, 2020 at The Medical Center of Aurora with a post-operative diagnosis of lumbar disk herniation with radiculopathy, right sided at L4-L5.

16. On February 24, 2020 Dr. Pehler noted that Claimant had improving back and leg pain though still had ankle tingling. Claimant was taking oxycodone, Robaxin (Methocarbamol) and Tizanadine for pain and spasms, which were helping.

17. Claimant was not doing well three weeks post-op, when Dr. Burns examined him on March 6, 2020, with low back pain radiating down into the right leg, though his leg pain was improving. At that time Claimant was taking 3 Vicodin for pain per day. Dr. Burns noted that Claimant had been having significant difficulties with the physical requirements of his job before surgery.

18. On March 30, 2020 Dr. Pehler continued to assert that Claimant had significant improvement to his right lower extremity radiculopathy, however still noted some right toe and foot numbness. He also documented Claimant had stiffness in his low back as well as spasms. He reported that the oxycodone and Robaxin had been helping. He referred Claimant to physical therapy and provided further medications.

19. By March 27, 2020 Dr. Burns noted that Claimant's pain in the low back had intensified and the pain down his right leg was also worsened, with the right foot going numb and walking too long causing pain and fatigue. On exam she palpated bilateral muscle spasms of the lumbar spine.

20. Claimant was treated by Devan Ohi, P.T. on March 31, 2020 who noted on exam that Claimant demonstrated high level of pain, reporting 8/10 pain, minimally changed with posture changes, except that pain increased with prolonged sitting or standing. He demonstrate limited LS ROM in all directions, most significantly with extension, which also reproduced right sided great toe numbness. He noted glute atrophy and that Claimant would benefit from physical therapy to address the deficits. Notes continued through May 13, 2020 with further recommendations for PT.

21. Dr. Burns documented on May 1, 2020 that Claimant could not stand for more than 20 minutes before his back started to hurt so bad he had to sit down, and was still having numbness in his right foot and pain behind his right knee. He continued to be on gabapentin, skelaxin and Lidoderm patches, which helped but when off medication he was miserable. She made a referral for a neurosurgery consult with Dr. Rauzzino

regarding the post-surgical radiculopathy. Dr. Burns still had Claimant off work at this point

22. On May 12, 2020 Claimant had the evaluation with Dr. Michael Rauzzino, who documented that following the L5 disc extrusion surgery, Claimant had worsening low back and right leg pain, was increasingly frustrated due to failure to improve post-surgery and was unable to work. On examination he noted a well-healed lumbar incision, positive straight leg raise on the right, negative on the left; loss of ROM, subjective weakness of his right EHL. Claimant complained of diminished sensation on the top of his toe and he walked with an antalgic gait secondary to pain. Dr. Rauzzino recommended a follow up MRI.

23. The MRI was performed at Health Images -- Diamond Hill on May 20, 2020, and was interpreted by Dr. Kevin Woolley. It showed evidence of a previous right L4-L5 laminotomy with a broad-based disk bulge, a small right paracentral protrusion with mild degenerative changes, mild right-sided foraminal tension, and mild spinal stenosis. The impression was interval right-sided L4-L5 laminotomy with decreased spinal stenosis and disk extrusion, a small residual disk protrusion was noted with no recurrent disk herniation.

24. On May 28, 2020 Dr. Pehler reviewed the MRI noting that there was improvement at the L4-5 level though some degenerative compression on the descending L5 nerve root and he planned on referring Claimant for an L4-5 transforaminal ESI. Claimant reported low back and leg pain but there was no interpreter present so communication was difficult. He continued to diagnose lumbar radiculopathy.

25. Dr. Burns documented on June 1, 2020 that Claimant was unable to stand up straight, was in a flexed position, had loss of normal lordosis, had mild swelling at the incision, and had tenderness at the L3-L5 level paraspinals with bilateral muscle spasms, limited range of motion and antalgic gait. She provided ibuprofen. In July she added a Medrol pack, stating he was no better and needed a functional capacity evaluation and kept him off work.

26. Dr. Ogin performed a right L4 and L5 transforaminal ESI on June 29, 2020 at Belmar Surgery Center.

27. On August 3, 2020 Dr. Burns provided the first work restrictions of working only 4 hours a day, lifting 5 lbs. occasionally, push/pull 5 lbs. occasionally.

28. Claimant had another transforaminal ESI on November 5, 2020 by Dr. Ogin, who documented pre-injection pain of 8/10 and a post-injection 0/10 pain level.

29. Dr. Burns commented on November 5, 2020 that Claimant had his second injection with Dr. Ogin and was feeling better already, making him hopeful it would help. He was out of medications again and she prescribed Lidocaine patches and Metaxalone.

30. On November 30, 2020 Claimant reported to Dr. Burns that the injection had helped for about 2 weeks, and now he was getting worse again, had a pain level of 8/10 and felt like he was being stabbed in the right foot. On exam she noted that Claimant had loss of normal lordosis, tenderness in the bilateral paraspinals and right sacroiliac joint, right sided muscle spasms, loss of range of motion, increased pain with facet loading on the right and was limping on the right. She noted that Claimant needed to return to

his surgeon for further evaluation. She also increased his work restrictions to lifting, pushing and pulling 10 lbs. occasionally but only up to 4 hours a day.

31. Dr. Pehler's PA, Maria Kaplan mentioned on December 30, 2020 that Claimant received approximately two weeks of relief from a third post-surgical ESI. Claimant continued to have significant pain in the low back and right lower extremity radiculopathy, with reduced quality of life and difficulties sitting and walking. She recommended a two level interbody fusion of L3-5 as he had failed continued conservative care.

32. Dr. Burns recorded on January 19, 2021 that Claimant continued to worsen with pain in his low back, with muscle spasms and a sensation of nails driven into his foot from time to time. She noted that Dr. Pehler was recommending a fusion. She sustained that objective findings were consistent with history and work related mechanism of injury, and she decreased restrictions to lifting 20 lbs., with no repetitive bending or stooping.

33. While Claimant awaited the decision for further surgery and an IME result, Claimant's pain in the low back continued to be documented by Dr. Burns, who ordered further medications for pain control.

34. At Respondent's request for an independent medical evaluation, Dr. Brian E. Reiss, an orthopedic spine surgeon, examined Claimant on March 17, 2021. He did an extensive medical record review including the films of both MRIs. He stated that Claimant continued with constant central low back pain of 8/10 with 9/10 at its worst and 6/10 at its best. Claimant also complained of posterior leg pain at the knee and some numbness at the bottom of his right foot. Dr. Reiss wrote that Claimant did not show pain behaviors.

35. On exam Dr. Reiss noted Claimant was able to heel and toe stand, had loss of ROM, had some tenderness centrally, and at the right SI ligament and sciatic notch. SLR was positive on the right, with decreased sensation of the right big toe and some groin pain with a Faber test. Dr. Reiss indicated that the first MRI showed a herniated disc at L4-5 but the second one was done without gadolinium, which was not optimal. He mentioned that there might be a retained central disc protrusion at the L4-5 which might be touching the right L5. He recommended a new MRI with gadolinium and an EMG to determine nerve root involvement, but stated that there was no indication for a fusion. He diagnosed post-laminectomy syndrome[1], deconditioning, and primarily back pain.

36. Following additional record review, on April 23, 2021 Dr. Reiss opined that a multilevel fusion for the low back in the absence of instability was unlikely to provide any benefit. He specifically noted that the pain generator had not been identified and conservative care had not been completed. He recommended core strengthening, aerobic conditioning and a stretching program.

37. On June 17, 2021 Dr. Burns noted that the surgery had been denied due to failure to reinstate physical therapy after the surgery and Claimant's post-surgical decline. Dr. Burns recorded that Claimant requested a second surgical opinion and that

[1] Dr. Raschbacher described post-laminectomy syndrome as failed back syndrome

medications were helping with his night pain. She prescribed physical therapy, and changed the lifting restrictions to 25 lbs. with no repetitive bending or stooping.

38. Dr. Rauzzino saw Claimant for a second opinion on July 6, 2021. On examination, he observed Claimant had bilateral negative SLR, limited ROM, was not able to walk on his toes or his heels. Reflexes were 1/4. Dr. Rauzzino recommended updated imaging and flexion and extension x-rays. He stated that it was not clear what was Claimant's pain generator given the diffuse nature of his axial lumbar pain. Claimant continued to take oxycodone for pain but his pain continued getting worse. Dr. Rauzzino also recommended Claimant return to see Dr. Pehler since Claimant had not been evaluated since the fusion surgery was initially recommended in December 2020. He stated that it would be difficult to know that performing a lumbar fusion would actually clinically improve Claimant's symptoms given Claimant's poor response to the microdiskectomy and the fact that he had continued persistent leg pain in the absence of a significant structural lesion.

39. Claimant's MRI of July 25, 2021 showed multilevel degenerative changes in the lumbar spine with associated disc bulging and annular fissuring at the L1-2 and L2-3; circumferential disc bulging indenting the ventral thecal sac resulting in moderate right subarticular recess stenosis at the L4-5 level which might have been impinging on the exiting L5 nerve root; and circumferential bulging at the L5-S1 level with mild foraminal narrowing.

40. On August 3, 2021 Dr. Burns emphasized that Claimant had most pain with standing, walking and driving, though medications helped, and he had pain chiefly in his right lower back which radiated down his right leg. He was unable to squat. She continued to prescribe medications and reduced restrictions to 15 lbs. maximum lifting, limited bending, twisting and stooping.

41. Dr. Pehler attended Claimant on August 5, 2021 noting that Claimant continued to have fairly significant back pain as well as right lower extremity pain, especially worse with standing and extension. Dr. Pehler remarked that the repeat MRI demonstrated some slight worsening at the L3-4 and L5-S1 levels. However, the biggest area of work-related pathology was at the L4-5 level, the site of his previous microdiscectomy. He thought it would be reasonable to consider a one level L4-5 oblique lateral interbody fusion with percutaneous fixation to address his most significant level of pathology. In the interim, he sent Claimant for a right-sided transforaminal epidural steroid injection at the L4-5 level. He noted Claimant was still continuing to have worsening pain symptoms that were affecting his quality of life and ability to work.

42. Claimant was referred by Dr. Burns to Dr. Zimmerman for an impairment rating on October 12, 2021 noting that Claimant should have permanent work restrictions in the sedentary category.

43. Dr. Frederic Zimmerman placed Claimant at maximum medical improvement on October 14, 2021. He noted that Claimant failed conservative care and proceeded with surgery in February 2020. He had also had epidural steroid injections, which did not significantly improve his symptoms long term. He recorded that Claimant had constant low back pain across the lumbosacral region that radiated down the right lower extremity with bending activities, paresthesia down the right lower extremity which

resolved with position changes, difficulty walking community distances and was forced to sit down after five minutes of walking. He also documented weakness and decreased sensation in the great toe.

44. On exam, Dr. Zimmerman observed that Claimant went from a seated to standing position in a very slow and stiff fashion, ambulated with antalgia/stiffness of the right lower extremity with a very short stride length, had weakness in the right EHL compared to the left with sensation subjectively decreased to light touch in the right great toe, an equivocal SLR test, positive neural tension on the right and valid ROM testing. He diagnosed low back injury status post L4-5 laminotomy and post-laminectomy syndrome with pain and radiculitis down the right lower extremity. He provided a 21% whole person impairment rating. Dr. Zimmerman issued light physical demand category work restrictions with no stooping, bending, crawling, crouching, or ladders, as well as limited to ambulating on level ground and stated he qualified for a disability parking pass.

45. Dr. Burns noted Claimant was at MMI on October 18, 2021, noting that objective findings were consistent with history and work related mechanism of injury. On exam, Dr. Burns noted that Claimant had decreased lordosis of the lumbar spine, tenderness present in right paraspinal muscles from L3-S1, but not the left and loss of range of motion. Dr. Burns diagnosed status post lumbar surgery with lumbar radiculopathy (acute). She provided work restrictions of maximum lifting to 15 lbs., limited bending, twisting, stooping, no ladders or crawling. She made a referral for a health club membership.

46. Dr. Rauzzino issued a letter to Respondents in response to specific inquires on October 26, 2021. He stated that he did not see a new large recurrent disc protrusion at L4-L5; the discs at L3-L4, L4-L5, and L5-S1 showed similar degeneration and disc protrusions. He did not see a clearly definable pain generator that would require surgery, that fusion surgery would likely not treat Claimant's pain or relieve his symptoms; and more likely would worsen his condition. He was interested in knowing whether Dr. Pehler would consider a one level L4-L5 fusion instead of the two level fusion.[2]

47. Claimant was evaluated by Dr. Mark Winslow, the Division Independent Medical Examination (DIME) physician on March 15, 2022. Claimant reported that subsequent to the surgery, he continued to worse with lower extremity symptoms though was not sure he wanted to move forward with further surgery unless surgery was assured to relieve his symptoms. On exam, he found increased paraspinal muscle tone and pain with range of motion and valid measurements. He found no focal neurologic deficits. He diagnosed acute lumbar radiculopathy, status post lumbar surgery with residual symptoms and stiffness. He opined as follows:

> I reviewed the opinions from the neurosurgeons and their opinions regarding surgery. On review of the medical record, on clinical examination of the patient I must agree with Dr. Rauzzino. It is my opinion based on the patient's past history, current presentation, and the known pathology that the patient would most likely not do well with a subsequent surgery. In addition, it is my opinion that as Dr. Rauzzino stated he might actually be worse. The patient has had a poor outcome to his previous surgery, is a smoker, deconditioned,

[2] Dr. Reiss may not have had Dr. Pehler's August 5, 2021 report that recommended a one level fusion at the L4-L5.

there is not a significant identifiable pain generator, there is no instability demonstrated on imaging that is available.

48. Dr. Winslow found Claimant to be at MMI as of October 14, 2021 as no further active treatment was likely to change Claimant's symptoms. He provided an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised)*, of a Table 53IIE rating of 10% of the lumbar spine specific disorder and 14% for loss of range of motion for a combined impairment of 23% whole person. Under restrictions he stated "[l]ight physical demand category. No stooping, bending, crawling, crouching or climbing ladders. Level ground work with no stairs. Disabilities parking pass."

49. Claimant returned to see Dr. Pehler on April 1, 2022 who documented Claimant had persistent low back pain with right sided buttock and leg pain. Plain films showed spondylosis with an underlying spinal deformity and has a history of recurrent protrusion as well as progression of spondylosis at L4-5. He recommended a new MRI.

50. Respondents filed a Final Admission of Liability on June 2, 2022 consistent with Dr. Winslow's report, and admitted to maintenance medical care pursuant to Dr. Burns' October 18, 2021 report.

51. Claimant was evaluated by Cynthia Bartmann for an Employability Evaluation, who issued a report dated July 29, 2022. Ms. Bartmann interviewed Claimant and reviewed the medical records, specifically for restrictions. She relied upon the work restrictions provided by ATP Zimmerman and Dr. Winslow, of light physical demand category, no stooping, bending, crawling, crouching or ladders, ambulation on level ground only (no stairs) as well as noting he qualified for a disability parking pass. She also considered ATP Burns' restrictions of 15 lbs. lifting, limited bending, twisting, and stooping with no ladders and no climbing as well as DIME physician Winslow's light duty restrictions with no stooping, bending, crawling, crouching or ladder climbing, walking only on level ground and a disability parking pass. Ms. Bartmann noted that the lifting of 15 lbs. did not release Claimant to a full range of light work which requires up to 20 lbs. lifting. She noted that a physician's recommendation for a parking pass required limited walking no more than 200 feet without stopping.[3]

52. Claimant reported to Ms. Bartmann that he had typically 5/10 to 6/10 pain on a numeric pain scale, with pain radiating to his right leg to the knee and continuing down to his big toe, with numbness in the big toe, weakness in the right leg and occasional use of a cane. She highlighted that Claimant had a ninth grade education in Spanish and did not attend any English as a second language courses. Claimant reported working in a factory using a forklift and mixing cement to pour into molds, cutting down trees, picking up trash, and construction cement work. At his employer of injury, Claimant would lift 50 lb. bags of mix, standing and walking throughout the day. He was then moved to working modified duty, sorting materials in the shop, washing cars, and sweeping. Though while doing modified duty he required an extended break before he could complete the part time work. Claimant could not read or write English and for the majority of his time he had a bilingual supervisor, though was able to understand simple directions in English.

[3] Claimant only met the eligibility requirement of Colorado disabled parking permit eligibility guidelines for limited walking.

53. Ms. Bartmann opined that Claimant's entire work history involved working as a laborer in production, mainly unskilled work without transferable skills to other occupations. She opined that, considering Claimant's providers' restrictions, he fit more in the sedentary than light category of work, which comprised mainly of telemarketer, customer service, night auditor, concierge and front desk work, for which Claimant did not have the vocational skills. Ms. Bartmann opined that Claimant was permanently and totally disabled as any employment opportunities in the general labor market did not match Claimant's skills and work restrictions as well as the fact that employers would not be willing to train a 59 year old worker.

54. John Raschbacher, M.D. issued an Independent Medical Evaluation at Respondent's request on September 6, 2022. He took a history, reviewed the records and examined Claimant. Dr. Raschbacher noted no concerning findings on exam except for Claimant's exaggerated behaviors and complaints of pain and limitations, and that Patrick's test on the right produced groin pain. He opined that there was no physiologic or medical reason for him to have loss of range of motion, loss of strength and impairment. He mistakenly noted that Claimant qualified for a Table 53IIB impairment of 8% whole person for the lumbar spine and disagreed with both Dr. Zimmerman and Dr. Winslow regarding their assessments of restrictions and impairment. He provided a 40 lb. work restriction assuming that Claimant had any real symptoms at all, for the lumbar spine, "which he may well not, given his presentation" according to Dr. Raschbacher. ROM testing results were attached to the report August 25, 2022 Rule 8 IME but were not assessed for validity as Dr. Raschbacher did not believe them to be valid.[4] But the pain diagram attached showed a pain pattern consistent with Claimant's treaters' descriptions in the records.

55. Kristine M. Couch, OTR performed a Functional Abilities Evaluation on September 15, 2022. During the testing she noted that Claimant had a consistent and valid performance in 22 of 22 in multiple validity testing parameters. Testing showed Claimant was able to sit for up to 21 minutes, required position changes, and had increased low back with continual sitting. Claimant attempted the 12 minute treadmill test but was only able to complete 6:38 minutes and ambulated with an altered gait, favoring his right leg and leaned heavily on the rails. He reported low back pain radiating into the right groin with walking. Claimant had difficulty and limitations with positional tolerances. He was able to lift 15 lbs. shoulder to overhead, and 20 lbs. knuckle to shoulder but was unable to lift floor to knuckle. He was limited in his ability to lift with the bilateral upper extremities to 15 lbs. for 50 feet with an altered gait but only up to 10 lbs. with either the right or left upper extremity individually. Lifting testing was terminated due to increased pain in the lumbar spine.

56. Ms. Couch noted that Claimant's abilities demonstrated a capacity to lift between sedentary and light work categories as defined by the US Department of Labor. He was unable to demonstrate the ability to tolerate repetitive horizontal reaching and forward bending, the ability to tolerate repetitive supination/pronation of the forearms while stepping side to side, unable to demonstrate the ability to tolerate sustained

[4] Dr. Raschbacher did not take a second set of ROM numbers during his exam pursuant to the requirements of the *AMA Guides*.

standing while performing repetitive reaching between chest level and the overhead on an occasional basis, and was limited in his ability to tolerate stair climbing during the evaluation. Claimant was unable to complete any crouching, stooping, kneeling or repetitive bending testing, which was consistent with the restrictions provided by his ATPs. Claimant reported his abilities as less than what testing showed during the FCE. As found, Ms. Couch's findings were consistent with Dr. Burns and Dr. Zimmerman's work restrictions previously provided at MMI.

57. Claimant was evaluated by Dr. David W. Yamamoto of Peak to Peak Family Medicine at Claimant's request for an Independent Medical Evaluation (IME) on October 26, 2022. He interviewed Claimant, took a history, reviewed the medical records and examined Claimant. He was provided a mechanism of injury of being jerked back while mixing concrete using a portable mixer and being thrown back feeling immediate pain. Claimant reported a 7/10 pain with an aching in his lower back, radiating down his right leg and stated his great toe was numb . Claimant reported he had increased pain with standing and could only walk for 10 minutes before he had major pain. He stated that he could stand for only 20 minutes at a time, had difficulty putting his socks on and tying his shoes. He also conveyed he had depression and anxiety as a result of the work injury.

58. On exam, Dr. Yamamoto observed that Claimant appeared uncomfortable with movement, had tenderness over the inguinal area, noted the surgical incision, decreased ROM, antalgic gait favoring the right leg, positive straight leg test on the right, decreased sensation over the medial right foot and decreased EHL strength on the right compared to the left. He diagnosed lumbar radiculopathy, ongoing low back pain post lumbar surgery with residual symptoms and stiffness. He conveyed that Dr. Zimmerman and Dr. Winslow's evaluations, and permanent restrictions were consistent with the FCE performed by Ms. Couch. He averred that Dr. Raschbacher arbitrarily assigned a 40 lb. work restrictions without testing or evidence of ability. Dr. Yamamoto opined Claimant had sustained a lower back injury and was treated appropriately but did not do well with the L4-5 microdiscectomy. He disagreed with Dr. Raschbacher, noticing his mistaken citation to the *AMA Guides* for specific disorder and failure to properly assess ROM. He agreed with the restrictions that were provided by Dr. Winslow and Dr. Zimmerman. He further opined that Dr. Winslow had provided an accurate report and rating and that Claimant would be unlikely to find any work based on his chronic pain, lack of function and lack of English skills.

59. Ms. Bartmann provided an addendum report dated November 5, 2022. At that time she reviewed additional records including Ms. Couch's FCE, and IMEs from Dr. Raschbacher and Dr. Yamamoto. She noted that, even using Dr. Raschbacher's 40 lb. work restrictions, Claimant would be unable to return to his pre-injury job or any position he had performed in the past. She stated that these restrictions were categorically different and not consistent with the work restrictions of Dr. Zimmerman, Dr. Burns, Dr. Winslow, and Dr. Yamamoto. She stated that restrictions of no bending, crawling, crouching or stair climbing combined with the added work restrictions provided by Ms. Couch in her Functional Capacity Evaluation would eliminate all production and machine operator jobs. She agreed with Dr. Yamamoto's conclusion that Claimant would not be able to find any work based on his chronic pain, his lack of function and his lack of English

skills and opined that Claimant was essentially permanently and totally disabled from a vocational standpoint.

60. Katie G. Montoya performed a Vocational Assessment on November 15, 2022, though she interviewed Claimant on September 27, 2022. Claimant reported that he drove to the appointment five to ten minutes, but generally limited his driving as his low back pain would increase and his right foot would get tired. Claimant reported he had no prior injuries. Claimant reported he worked in cement, concrete and masonry work most of his working life, setting forms, making/mixing concrete, setting up scaffold, taking up materials, stacking materials, and bringing materials where they were needed. Claimant reported that he was never in a supervisory or lead position. Claimant reported to Ms. Montoya that he did not feel he could work, that he had gone to multiple companies, including restaurants, factories, and cement companies, they had seen him and had said no. Ms. Montoya reported Claimant stated he could not work because of the following:

> He explained it is due to the fact that he cannot walk long, cannot stand long, and cannot bend over. [Claimant] believes he can walk about five to 10 minutes. He can stand still approximately 20 to 30 minutes. [Claimant] is able to sit longer but explained that he still must move. He explained that he really does not lift from the floor at all. If he lifts from the table level it is 15 pounds. This is due to back pain. [Claimant] explained that he is able to use his hands at the table level. He does not use a cane but will use a cart when he is at the store. [Claimant] had been up and down during our interview, and he explained that was typical.

61. Ms. Montoya reviewed the medical records in this smatter, including Dr. Zimmerman's MMI report, Dr. Winslow's DIME report, Dr. Raschbacher's Respondent IME report, the FCE performed by Kristine Crouch and Dr. Yamamoto's Claimant IME report. She also reviewed Ms. Bartmann's vocational assessment. Ms. Montoya opined that Claimant's work history showed he was an unskilled worker. She noted that Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto's work restrictions were substantially similar and opined they allowed for light duty work, so long as Claimant was not required to perform bending, crawling, crouching, stooping, ladders and ambulate only on level ground with no stairs. She stated that Claimant had limited options due to his unskilled Spanish speaking profile but could perform production and packaging work. She opined that, when considering Dr. Burns' 15 lb. restriction, that Claimant's work availability was further limited but included food preparation, packaging, office cleaning, and some forklift operation. She opined that when considering Dr. Raschbacher's decreased limitations, the job opportunities increased.

62. On February 3, 2023 Claimant was evaluated by Nurse Kelly F. as a walk-in patient with complaints of middle back and right foot swelling. Dr. Lesley Pepin ordered an ultrasound of the right lower extremity, which was normal. X-rays of the hip findings were inconclusive and unclear. He was advised to follow up with his primary doctor.

63. Claimant was attended at Platte Valley Medical Center for low back and right leg pain and foot swelling. Claimant reported two weeks' history of increased pain and symptoms. PA Noel Kiley noted a normal exam. Claimant reported no numbness or tingling to his legs, no weakness, no loss of bowel or bladder function and advised Claimant that an MRI of the lumbar spine was not medically indicated at that time and recommended Claimant return to see his surgeon, take Tylenol and Motrin for pain,

provided a muscle relaxer, lidocaine patches to help pain control and recommended ice or heat. She diagnosed lumbar spine pain.

D. Claimant's Testimony:

64. In the past Claimant worked as a laborer driving a forklift, trimming trees, and in construction and masonry. Some of his supervisors were only English speaking and Claimant would understand some of their instructions regarding work to be performed. However, if he did not understand his supervisor, while working for Employer, he would request that the supervisor's assistant, someone from the office, the mechanic or one of the truck drivers to interpret for him, but while working modified duty, most of the time it was the mechanic that was in the shop all the time. Occasionally, his supervisor would give him instructions to wash a car or clean the floor and he would understand those instructions in English. Claimant speaks some English, but he does not read or write English.

65. He did have to fill out paperwork when he began employment with Employer, all of which were in English. He had help completing them and only signed them. He also was provided with an employee handbook and a benefits package, both of which were translated by a coworker at the Employer's yard. This ALJ noticed that the completed forms handwriting in Exhibit O and the signature handwriting were distinctly different, with the exception that the Benefit Enrollment and Change form at bate stamp 423 seems that have been completed by the signatory (name and identifying information only).

66. Approximately two months after his surgery in February 2020, Claimant went to where his original supervisor was working and was not offered any further employment. He was instructed to contact the main office to see what his options for employment would be. Claimant contacted Employer's main office and enquired about work. He was informed that there was no space for him. Employer never contacted Claimant after that time.

67. Claimant contacted multiple businesses in search for employment. He provided his phone number but did not fill out any written applications for employment.[5] He did make some specific enquiries about jobs as a laborer and did not provide his restrictions. The prospective employers were for production factories, a thrift store, an electrical business, construction work and framing work. He would go to the job sites and speak with the supervisors who had the ability to hire laborers. Claimant believed he was not hired because they would notice how he was walking but none mentioned his problems with walking.

68. Claimant understood that Dr. Pehler recommended a second surgery, which was not authorized or approve by Insurer.

69. He used to visit his father daily. His father lived approximately five blocks away but Claimant would drive to his house, not walk. His father moved away, and is now living with his brother, who is taking care of him, though now he lives in Mexico most

[5] This ALJ infers that Claimant did not have anyone available to assist him in completing any formal applications for employment.

of the time, coming to live with his brother only two to three weeks at a time. In the spring, he would water his plants and flowers every day during the season, but he did not have any grass. He would either stand or sit on a wooden chair, both at his own home and when his father lived near, his father's garden, which was approximately 10 by 10 ft., a little larger than his own. He could stand for approximately 10 minutes then would need to sit down. He did not use other tools other than the hose.

70. Claimant would drive his father to the store, appointments and other errands. He would only drive thirty to forty minutes at a time due to his back pain. At around twenty minutes his back pain increases and by thirty the pain is not tolerable and goes to his lower extremity into his foot. He attempted to get a handicap placard for his vehicle but when he went to the DMV (Department of Motor Vehicle) he was told he needed a medical form. Claimant went to Eastside Family Health Center, his primary care provider, and was told by one of the physicians that he had to be in a wheel chair to qualify for one.

71. Claimant recently sought medical attention at Denver Health Medical Center due to the increased pain in his low back and right leg, which was hurting and was swollen, changing colors on the sole of the foot. He was also having groin pain and that was the first time he had groin pain. They provided him medication, they ordered x-rays and gave him an injection for the pain. They also did an ultrasound due to the swelling of the leg and groin pain.

72. He attempted to return to Concentra but they personally declined to attend him. He then went to Brighton Platte Valley Hospital. They referred Claimant back to his surgeon, Dr. Pehler, at Concentra. He continues to take medications which include, Cyclobenzaprine 10 mg, three times daily, Morphine but only one tablet at the time of the visit to Platte Valley, prednisone 40 mg, once per day in the mornings, and Gabapentin.[6]

73. He had a functional capacity evaluation with Ms. Couch. Claimant stated that they tested his ability to sit, stand, and required change in positions. He was able to walk on the treadmill approximately six minutes before he asked to stop the tests due to back and groin pain. He was also limited in performing the bending test, and other tests with his arms away from the body as it significantly increased his pain. There were also some tests that he declined to perform due to the back and leg pain, like crouching and squatting. He was able to do lifts from chest to shoulder level and other lifts, but not from the floor.

74. Claimant continues to have problems with pain in his low back and right leg since his injury. He is able to walk approximately 10 minutes, then he needs to rest or sit down. He is unable to bend down and lift an item from the floor. He has to lie down during the day for approximately one hour. His wife does the cooking, shopping and cleaning. He only makes the bed in the morning. Sometimes he does go with his wife to do the shopping so that he can walk for a little but goes out to wait in the car when he tires out. He generally proceeds to bed around 9 to 10 p.m. but will wake up in pain around 1 a.m. and stays up until around 5 or 6 a.m. when he returns to lay down. He then

[6] The Final Admission of Liability dated June 2, 2022 shows that Respondents admitted to maintenance medical benefits. Counsel for Respondents indicated he would contact his client to have Concentra authorize the follow up visits.

gets up again around 10 or 11 a.m. He has to alternate between laying down, standing, walking and sitting during the day. During the night he may watch TV or walk to distract him with the pain. The pain is what limits him. He is unable to bend at the waist, crouch, and squat without pain. When he needs to pick up something from the floor, he has to hold on to the wall or a table. He continues to perform his home exercise program to help with the pain. When he walks greater than ten minutes the pain increases, coming from his low back. He uses a cane to walk every so often.

75. Claimant stated that, but for the leg symptoms, he might be able to work, but the symptoms going down the leg prevent him from being able to work.

76. On multiple occasions Claimant requested to have questions repeated. This ALJ observed and noticed Claimant's confusion and lack of understanding on those occasions.

77. Claimant continues to have problems with his low back as he cannot bend forward and touch the floor. He also has problems with his foot and leg, which limit his movement and function. He stated that, if not for his leg, he might be able to work at a fast food restaurant or at a vegetable factory separating vegetables. Claimant declared his leg symptoms prevent him from working.

78. He can walk approximately 10 minutes before the pain in his back increases and now the pain is worse with groin pain. Claimant's biggest problems continue to be with the low back pain, the right leg pain and the groin pain.

79. At times, during the hearing, Claimant was visibly uncomfortable, moving around in his chair, as well as standing and sitting. This ALJ noted that Claimant took breaks from sitting on more than one occasion and request formal breaks.

Dr. Yamamoto's Testimony:

80. David W. Yamamoto, M.D., an expert in medicine generally, occupational medicine and family medicine as well as a Level II accredited physician by the Division of Workers' Compensation, testified at hearing on June 23, 2023. Dr. Yamamoto reviewed the medical records, Claimant's restrictions as well as reviewing Respondent's IME physician's report.

81. Dr. Yamamoto agreed with the restrictions imposed by the DIME physician, as they were consistent with his examination of Claimant. He was considered to be in the light duty category, which means occasional lifting to 20 lbs., no bending, no crawling, no crouching or climbing ladders. He specifically opined that Claimant should not perform any job that would require him to bend repetitively. He also agreed that Claimant should have a handicap permit. He reviewed Kristine Couch's Functional Capacity Evaluation and stated she was extremely professional in how she did her work, was well known in the community and provided very dependable reports every time. He opined that Dr. Raschbacher's assignment of a 40 lb. restriction with no other limitations was very arbitrary and subjective. This is based on the fact that Dr. Raschbacher provided no evidence that he had done any testing for lifting limitations. He opined that Dr. Winslow and Dr. Zimmerman provided valid and objective reports in a scientific administration of the test for range of motion.

82. Dr. Yamamoto stated that it was a physician's responsibility to provide physical restrictions which can be used by vocational experts to reach an opinion with regard to the work they may perform. He expressed that Claimant had not recovered the function he had hoped following the microdiskectomy surgery. He mentioned that the MRI of May 20, 2020 showed a right-sided laminotomy with decreased spinal stenosis, a disc protrusion and multi-level degenerative changes but no longer showed the extrusion on the right at L4-L5 and stenosis. Dr. Yamamoto did not find any sign of instability post-operatively. Both he and Dr. Zimmerman observed that there was a decrease in the spinal stenosis post-surgery and no recurrent disc herniation. He noted that, unlike his examination of a positive straight leg test, a subjective finding, Dr. Zimmerman opined that Claimant had a tight hamstring, not nerve pain, which he did not consider a significant point.

83. Dr. Yamamoto opined that Claimant's work injury was the straw the broke the camel's back. In essence, Claimant was able to work a heavy duty job for many years, up to the point that he was injured, which is something that happens with laborers that are his age. He voiced that it was not uncommon to have degenerative changes in addition to what looked like a treatable condition. He specifically pointed out that neither the ATP nor the DIME physicians rated the radicular symptoms. This ALJ infers that the reason for the choice not to rate was not clear from either report. Dr. Yamamoto explained that it is the rater's choice, but under the *AMA Guides for the Evaluation of Permanent Impairment*, Third Edition (*Revised*), under Table 53IIE, Claimant had a surgically treated disc lesion with residual, medically documented pain and rigidity with or without muscle spasm. Dr. Yamamoto agreed with both Dr. Winslow and Dr. Zimmerman that the surgery, while technically successful, did not help Claimant's symptoms, as Claimant continued with radicular symptoms and he did not regain function.

E. Testimony of Cynthia Bartman:

84. Ms. Cynthia Bartman, an expert vocational evaluations, testified at hearing on June 23, 2023. Ms. Bartman interviewed Claimant, reviewed the medical records, and considered Claimant's work restrictions as well as his residual labor market, if any. She noted Claimant had light duty restrictions, no stooping, bending, crouching, crawling and no ladders and the Functional Capacity Evaluation performed by Kristine Crouch. She noted that, she considers whether a patient has a valid profile on the FCE to consider whether a Claimant had an indication of maximal effort and Claimant met 22 of 22 for validity markers. She also considered that Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto all agreed he should have a handicapped parking tag. The last requires limits on walking, which were consistent with the FCE. She stated that if a physician feels a claimant is able to walk over 200 feet, they should not recommend a parking permit.

85. Ms. Bartman opined that, contrary to Ms. Montoya's opinion, there is no work that would match Claimant's vocational skills and his sedentary to light work restrictions, and his limitations. She opined that the majority of the jobs identified by Ms. Montoya were primarily in the medium or heavy work categories and did not match Claimant's work restrictions or the overwhelming medical evidence. Those jobs identified fit only within the restrictions provided by Dr. Raschbacher. Further, in assessing Claimant's skill level based on the jobs and how he performed those jobs, he primarily

worked performing unskilled work and laboring manual jobs. Ms. Bartman opined that there were no jobs in the local labor market that he could perform within his skill set in the sedentary to light duty categories.[7] Ms. Bartman stated as follows:

> [Claimant] mainly worked in the unskilled work category, so what I indicated earlier is that there would be very few skills, if any, that would ever transfer into other occupations, so then you have to look at what is his chances of getting other unskilled work. But then you have to factor in his work restrictions. And when I look at his work restrictions, I do not believe there are any jobs in the local labor market that matches his vocational skills and his work restrictions and that would come available in his local labor market. There are no matches when I evaluate each one of those elements.
>
> …
>
> I do labor market research every single week by calling employers and inquiring on the physical requirements of many different jobs, I feel like I have a firm understanding.

86. Ms. Bartmann stated that there were certain types of jobs that employers would be willing train workers at Claimant's age (59) such as front desk and customer service if they had prior computer skills. However, considering Claimant's background of no skills and work restrictions, she opined employers were not willing to train. Further, she noted that while packing job may sitting allow, very infrequently, that they would also require horizontal reaching, which Claimant was unable to perform pursuant to the FCE and Dr. Yamamoto's recommendations pursuant to the FCE. Others required the ability to read and write in English, which Claimant could not do. Ms. Bartmann consulted the Dictionary of Occupational Titles (DOT)[8] to determine whether the jobs identified by Ms. Montoya were appropriate for Claimant considering his limitations and restrictions. The jobs, such as packaging, cleaning, food prep, required occasional bending, were inappropriate for Claimant considering his restricted, Ms. Bartmann never found any

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[7] This ALJ takes judicial notice of the *Dictionary of Occupational Titles (4th Ed., Rev. 1991)* -- Appendix C by the U.S. Department of Labor job category list of physical demands as follows:
A) S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.
B) Light Work - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.
C) Medium Work - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

[8] The Dictionary of Occupational Titles, Volume I & II (Forth Edition, Revised 1991) U.S. Department of Labor, Employment and Training Administration, U.S. Employment Service, found at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00357017o&view=1up&seq=1 and at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00357018m&view=1up&seq=1 as they are in the public domain and not updated since 1991.

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positions suitable for someone with Claimant restrictions. Ms. Bartmann opined that Claimant was permanently and totally disabled from employment,

F. Testimony of General Superintendent:

87. The general superintendent testified that he supervised Claimant's supervisor, as well as Claimant when he worked in the shop on modified duty after his injury form October 8, 2019 to February 11, 2020. [Redacted, hereinafter MZ] stated that he gave Claimant instructions of the jobs to perform each morning. He stated that he did not give instructions to have his instructions translated but that the workers were continuously speaking in Spanish, which was their native language. He did not recall having Claimant's supervisor or the main office contact him if Claimant went to either of them about a job following his surgery, as neither informed him as was the company policy.

G. Testimony of Katie Montoya:

88. Ms. Montoya testified as an expert vocational rehabilitation and assessment. Ms. Montoya interviewed Claimant on September 27, 2022. She obtained a history including that Claimant had ongoing low back and right leg pain that was constant. He stated that he was not the same person he used to be and could not do what he used to do. Claimant reported physical limitations consistent with his testimony at hearing. Ms. Montoya reviewed the medical records including the work restrictions prescribed by different providers, including the parking pass eligibility and the FCE performed by Ms. Couch. She discussed the jobs Claimant had sought out but that he had filed no formal applications for employment, as he had been turned away.

89. Ms. Montoya performed labor market research in this case after reviewing all available information by looking at local employment posting and sources as well as the DOT for the job classifications and determining any transferable skills. She relied on those restrictions that allowed Claimant to work the full range of light work, identifying jobs that fit that category, and possible job leads in the general metropolitan labor market. Ms. Montoya did not identify any that were within 20 minutes of Claimant's home. She opined that Claimant could earn a wage within the light duty category. She agreed that the DOT classification for forklift operator fell within the medium unless there was a job with cross-classification. She also agreed that hand packager was also in the medium category under the DOT. Further, Ms. Montoya did not consider any walking limitations.

H. Testimony of Dr. Raschbacher:

90. Dr. John Raschbacher testified at the second hearing as an expert in occupational medicine. At the time of his examination on September 6, 2022 Claimant was complaining of low back and leg pain. He noted that the post-surgical MRI of May 2020 showed resolution of the disc extrusion that was supposedly pinching the nerve and that Dr. Rauzzino indicated that Claimant had persistent leg pain in the absence of structural lesion. He also opined that the July 26, 2021 MRI did not show any re-herniation. Dr. Raschbacher went on to state that the surgery was "technically successful" and could not explain why the Claimant continued with symptoms, going so

far as to state “that assumes he is, in fact, suffering leg pain. I don’t – I doubt that he is. That’s just what he’s saying.” This ALJ infers that Dr. Raschbacher is stating that Claimant is lying when he is reporting that he has leg pain. He also stated that things to look for to determine whether there is some abnormality are normal lumbar lordosis and the presence of lumbar spine spasms, positive SLR or positive tripod sign.

91. Dr. Raschbacher went on to exhaustively articulate the need for an EMG to be ordered by providers, then stated that it would not change the outcome, his complaints, his treatment or the need for further surgery. Dr. Raschbacher noted that he did not belief Claimant was telling the truth and if he were, the surgical outcome would be successful. He disagreed with Dr. Winslow that Claimant had a poor outcome to the surgery.

92. Lastly, he opined that FCEs were rarely indicative of a patient’s abilities or restrictions despite the validity criteria being met as patients rarely if ever give a good effort. He recommended a 40 lb. work restriction and stated that Claimant really does not need any restriction at all. Dr. Raschbacher opined that Dr. Winslow and Dr. Zimmerman’s opinions that Claimant had a poor outcome of his surgery was incorrect because Claimant was not telling the truth. However, he could not site to any medical records where any other physician found Claimant not credible or not truthful.

93. This ALJ finds Dr. Raschbacher’s opinions not credible and contrary to medical records. Nothing in the DIME report, Dr. Zimmerman’s, Dr. Burns’ or other treater’s, or Dr. Yamamoto’s reports support the conclusion that Claimant was not truthful to his providers. It is well noted that while surgeries can be “technically successful” because it takes away the source of the original offending tissue, it may leave patients with permanent conditions and ongoing symptomology. While Dr. Raschbacher did not believe this Claimant, this ALJ does not doubt the veracity of the Claimant and his complaints of symptoms that limit his abilities as Claimant has consistently been reporting the same symptoms as shown above for the last four years.

I. Ultimate Findings:

94. As found, Claimant had no significant or relevant medical conditions that limited his ability to perform work as a heavy masonry worker prior to his work injury of August 10, 2019. Claimant is found credible and persuasive.

95. As found, Claimant had ongoing consistent low back pain from the day of the work related accident on August 10, 2019 to the present that limit his function. As found, the work related injury caused the ongoing symptoms despite providers being unable to identify a specific pain generator that would be amenable to surgery. As found, Claimant’s work related injury was admitted and was the reason for the surgical treatment that resulted in Claimant’s failed back syndrome or post-laminectomy syndrome. As found, simply because there is no identified pathology that can be address by surgery does not naturally indicate that there is nothing wrong with the patient. Here, throughout most of the medical care, Dr. Burns document that Claimant had ongoing lumbar spine spasms on the right, stiffness and significant loss of range of motion. Multiple other providers, other than the ATPs also highlighted objective findings. Dr. Rauzzino found positive straight leg raise on the right, negative on the left; loss of ROM, subjective weakness of his right EHL. Dr. Reiss wrote that Claimant did not show pain behaviors,

had loss of ROM, had tenderness centrally, a positive SLR on the right, decreased sensation of the right big toe and some groin pain with a Faber test. Dr. Winslow found increased paraspinal muscle tone, and loss of range of motion. Dr. Yamamoto found decreased ROM, antalgic gait favoring the right leg, positive straight leg test on the right, decreased sensation over the medial right foot and decreased EHL strength on the right compared to the left. This ALJ makes is persuaded by the multiple providers that recorded objective findings over the lone physician that did not even believe Claimant had any symptoms. As found, Claimant has ongoing chronic pain cause by the work related August 10, 2019 injury.

96. As found, Dr. Winslow's opinion regarding a 'significant identifiable pain generator" was in the context of his opinion against recommending further surgery and not that Claimant was either symptom magnifying or was not truthful as Dr. Raschbacher suggests. It was simply noting that, from a surgical perspective, there was not sufficient identified pathology to operate again, and was not a comment about his credibility or disability, which are for this ALJ to determine and not a medical opinion. As found, Dr. Winslow, Dr. Zimmerman and Dr. Burns clearly found Claimant trustworthy as they provided ongoing care recommendations, work restrictions and formal significant impairment ratings. The opinions of Drs. Burns, Zimmerman, Winslow and Yamamoto were consistent and more credible than the contrary opinions of Dr. Raschbacher, who is specifically not found credible.

97. As found, Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto all agreed Claimant qualify for a parking permit. As found, when a physician indicates that a patient qualifies for a permit, they are indicating that patient meets the legal criteria of limited walking up to 200 feet and ranges greater than that only with breaks or assistance.

98. As found, the job of office cleaner would require stooping, bending, crouching, and possibly stairs, which Claimant is unable to perform in a working capacity, which is fully document in the credible medical records. The job of hand packer and food prepare would require bending forward and horizontal reaching. Claimant was unable to perform these activities during the functional capacity evaluation, which is found credible, valid and consistent with Dr. Yamamoto's credible endorsement of the evaluation. These types of jobs would also require occasional bending to pick items off the ground, which Claimant credibly testified and Dr. Burns documented he was unable to perform. These jobs would also most likely involve standing and sitting for extensive periods of time, which Claimant is unable to do as he requires frequent rests to lay down during the day. As found, Claimant could not perform the job of fork lift driver pursuant to the work restrictions of his ATPs as it would involve climbing on to the machine, and would not be considered to be on level ground. As found, any of the job which were potentially identified as possibly available to Claimant do not meet all of the Claimant's functional limitations or work restrictions. As found, even if the work restrictions of the ATPs had fit within the parameters of the proposed jobs identified, Claimant is unable to obtain and retain a job because he is unable to rest a full night without frequently waking up for long hours at a time due to the unremitting low back and leg pain caused by the August 10, 2019 work injury.

99. As further found, considering Claimant's ongoing consistent complaints of low back pain and radicular symptoms, Claimant's background and experience, his

transferable skills or lack thereof, as well as the persuasive vocational evidence Claimant has proven that he is permanently and totally disabled. As found, despite the robust current labor market, Ms. Bartmann's opinions and testimony are found more credible and persuasive that those presented by Ms. Montoya. Not because Ms. Montoya is not credible, but because Ms. Montoya's assessment did not include all of Claimant's credible and persuasive work restrictions and physical limitations caused by the chronic pain that prevent him from performing the full range of light duty jobs identified. In light of Claimant's education, primarily Spanish language skills, limited unskilled laboring experience, the accumulation of work restrictions provided by his ATPs, the DIME physician and Dr. Yamamoto, related to the admitted work injury, and his ongoing functional limitations, from the totality of the credible and persuasive evidence, Claimant is permanently and totally disabled.

100. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility

of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Permanent Total Disability Benefits

To prove his claim that he is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Indus. Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 ¶ 26. Claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Wallace v. Current USA, Inc.* W.C. No. 4-886-464 (ICAO, Dec. 24, 2014).

The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether Claimant can earn any wages, the ALJ may consider various human factors, including Claimant's physical condition, mental ability, age, employment history, education and availability of work that Claimant could perform. *Weld County Sch. Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter* 2019 COA 53 ¶ 26. The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (ICAO. Apr. 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his particular circumstances. *Weld County Sch. Dist. Re-12 v. Bymer*, *supra*; *Blocker v. Express Pers.* W.C. No. 4-622-069-04 (ICAO, July 1, 2013.). Whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

This ALJ finds and concludes Claimant has proven, by a preponderance of evidence, that due to the restrictions that flow directly from his work injury he is permanently and totally disabled. Most important, the ALJ credits Claimant's testimony as it relates to his development of symptoms and limitations after his August 10, 2019 work injury and his surgery. This includes his limited ability to engage in activities of daily living, and physical activities necessary to obtain and retain employment.

The ALJ also credits the opinions of Dr. Burns, Dr. Zimmerman, and Dr. Winslow, all of whom listed work restrictions that were similar and substantially consistent. Those work restrictions include lifting no more than 15 to 20 lbs. occasionally, no bending, no stooping, no crouching, no crawling, no ladder climbing, as well as limited twisting, ambulating on level ground (no stairs or climbing) and was qualified to obtain a parking permit that includes limited walking up to 200 feet without breaks. These restrictions largely concurred with the findings of the Functional Capacity Evaluation which was later performed by Ms. Crouch. Ms. Crouch's evaluation is found to be persuasive, and markedly consistent with Claimant's acknowledged functional abilities.

This ALJ also credits and finds persuasive the testimony of Claimant's vocational expert, Cynthia Bartmann. Ms. Bartmann credibly explained Claimant's limited education, advanced age, lack of English skills including reading and writing, his limited work experience as an unskilled laborer, the physical restrictions as laid out by his ATPs Dr. Burns and Dr. Zimmerman, all support the conclusion that Claimant is permanently and totally disabled. Further, when these are considered with the opinions of Dr. Winslow and Dr. Yamamoto, and the findings of the FCE by Ms. Crouch, as well as the Claimant's inability to find, secure and retain any jobs that may have become available in the labor market due to his inability to sleep, requiring rest periods during the day and his ongoing chronic pain, are all human factors that, collectively, support the finding that Claimant is able to earn a wage due to his August 10, 2019 work related injuries, and therefore, is not employable in a competitive job market, despite its current robustness. This ALJ finds that Claimant has proven by a preponderance of the evidence that Claimant is permanently and totally disabled.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant is permanently and totally disabled.

2. Respondents shall pay permanent total disability benefits beginning October 14, 2021, which is the date Claimant reached MMI.

3. Based on the admission in the record, Claimant's TTD rate is $573.09. As a result, Claimant's PTD rate is currently $573.09.

4. Respondents may take credit for any temporary disability, permanent partial disability benefits or other allowable offset for benefits paid to Claimant after MMI against any retroactive PTD benefits payable to Claimant.

5. Respondents shall pay Claimant interest at the rate of eight percent (8%) per annum for all compensation benefits which were not paid when due.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 18th day of August, 2023.

Elsa Martinez Tenreiro
Digital Signature

By: _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a medical case manager of his choice and that [Redacted, hereinafter LB] should be removed as the nurse case manager on this claim.

II. Whether Claimant has proven by a preponderance of the evidence that family members are entitled to reimbursement for attendant care they provided to Claimant from November 23, 2021, through the present and the rate at which they should be reimbursed.

III. Whether interest is payable on the amount awarded for the care provided to Claimant.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to the costs and fees for services of a probate attorney and conservator.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

Procedural History of Claim

1. On September 24, 2021, Claimant was involved in work accident when he fell about 20–30 feet off a ladder and landed on the ground.
2. The claim was denied until an Order was issued by Administrative Law Judge Elsa Martinez Tenreiro on August 15, 2022, which found the claim compensable and the above-named Respondents liable for benefits.

Initial Medical Treatment

3. After the accident, Claimant was seen by Neurosurgeon Sara Menacho, M.D. at University of Utah Hospital as a transfer trauma 1 patient. Dr. Menacho noted that Claimant was found to have multiple supratentorial and infratentorial intraparenchymal hemorrhages, including in the brainstem, compatible with a severe Grade 3 DAI, as well as scattered traumatic subarachnoid hemorrhage and intraventricular hemorrhage. She documented that, upon arriving at the hospital, the patient was noted to be a GCS of 3. She also noted Claimant had a left fixed and dilated pupil and a sluggish right pupil. He had no motor response, no verbal response, eyes were closed, no corneal reflex but intact cough and gag reflex. He was taken for a CT scan, where repeat CT head demonstrated interval increase in diffuse intraparenchymal hemorrhages. During the CT scan, Claimant was both bradycardic and hypertensive and they were concerned of impending cerebral herniation. The providers also noted a right distal radius fracture and a trace right pneumothorax. Dr. Menacho noted that

Claimant did not open his eyes, make noise, or respond to pain. Following x-rays of the forearm Claimant was noted to have acute displaced fractures of the distal radius, ulnar styloid process and scaphoid. X-rays of the right wrist showed a comminuted fracture of the distal radius. More detailed x-rays showed a possible triquetral fracture. Dr. Menacho stated that "Unfortunately, this patient has suffered a severe closed head injury and currently is GCS 3T off sedation. As such, there are no plans for placement of an ICP monitor or operative intervention given the likelihood that it would not change the patient's poor prognosis." *Claimant's Exhibits 280-288*.

4. Despite the poor prognosis, Claimant survived the accident, but with severe impairments that prevented him from caring for himself.

Discharge from Hospital After
Two-Month Stay and Need for Emergent 24/7 Attendant Care

5. Claimant remained in the hospital for about two months. There came a point in time when Claimant was ready to be discharged so he could receive a different level of care. The original plan was to discharge Claimant into the care of Craig Rehabilitation Hospital in Colorado. However, Claimant could not be discharged and transferred to Craig because the workers' compensation carrier had not admitted liability for the claim at the time of Claimant's discharge. Thus, there was no payor to pay for Claimant's admission and treatment at Craig. *Claimant's Exhibits, page 107*.
6. Because Claimant could not be transferred to Craig Hospital, it was decided that Claimant would be discharged into the care of family members. Thus, before his discharge, the hospital staff in Utah trained Claimant's family members how to take care of Claimant's daily needs to keep him safe and alive.
7. On November 23, 2021, about two months after the accident, Claimant was discharged from the hospital into the care of his family. *Claimant's Exhibits, pages 293-323.*
8. Upon discharge into the care of his family, Claimant's impairments and disabilities were severe and he required "full time direct supervision" with "line of sight supervision." *Claimant's Exhibits, page 321*. The following impairments and disabilities were noted in the final discharge report:
    - Impaired safety awareness, insight, and impulse control.
    - Inability to recall conversations and directions, manage his medications, or manage complicated tasks.
    - Inability to independently perform activities of daily living such as bathing, toileting, eating, and getting dressed.
    - Claimant was also a high fall risk and could not walk without assistance. To prevent falls and additional injuries, Claimant was prescribed a bed alarm to alert caregivers if he tried to get out of bed and a chair alarm in case he tried to get up from his chair. He also needed assistance with bed mobility, including sitting, standing, and transferring to something else.

- Claimant was also at risk of aspirating on his food. Therefore, Claimant required assistance eating and had to be on a diet that included thin liquids. But even feeding Claimant thin liquids was problematic because Claimant was also having problems using a straw.

Claimant's Exhibits, pages 293-323.

9. Upon discharge, Claimant was also prescribed ongoing physical therapy, occupational therapy, and speech and language therapy. The discharge plan also prescribed ongoing patient caregiver training for Claimant's family members. Lastly, the discharge plan prescribed full-time direct supervision with a designated person to provide full-time line-of-sight supervision. Thus, based on Claimant's neurological and physical impairments, Claimant required, and was prescribed, 24/7 care and required the care immediately upon discharge. *Claimant's Exhibits, page 321*.

10. The Claimant's need for attendant care 24/7 immediately upon discharge from the hospital was emergent because without it, Claimant could not eat, get out of bed, use the bathroom, shower, or manage his hygiene, i.e., activities of daily living. Moreover, someone had to be available if Claimant decided got out of bed and tried to walk on his own – even though he could not. In other words, without 24/7 care being provided to Claimant immediately upon discharge, Claimant would suffer imminent harm and could not survive.

11. Based on Claimant's neurological and physical impairments and disabilities that existed at the time of his discharge, the need for 24/7 attendant care was reasonable, necessary, emergent, and related to his work injury.

12. Immediately upon discharge, Claimant's family members started taking care of Claimant by assisting him with all of his activities of daily living. This included eating, toileting, hygiene, medications, and keeping him safe, etc. This included watching Claimant at all times of the day to make sure he did not try to get out of bed or a chair – without assistance – and fall.

Initial Assessment After Discharge

13. On December 21, 2021, after his discharge from the hospital, Claimant was evaluated by Bethany Wallace, D.O. at Sinergy Medical Services. Dr. Wallace documented Claimant's fall from an indeterminate height in Utah. She noted Claimant was taken to the hospital and was noted to have multiple areas of bleeding seen in his brain imaging as well as a fractured right arm and blood in his right chest. She also noted that Claimant was placed on life support and his family was told his injuries were incompatible with life, but Claimant did improve, surviving the injuries. She also noted that he was discharged from the hospital on November 23, 2021, to his family's care in Colorado and that Claimant required 24/7 care, which his siblings have been providing. She also noted that while he continued to improve, he continued with multiple pain complaints and neurologic deficits.

14. Dr. Wallace performed a limited record review outlining Claimant's medical course while in the hospital. She stated the following:

On 10/01/21, he went to the operating room for a tracheostomy and PEG (feeding tube) placement. He was stable and then transferred to neuro acute care. He started to make progress, and the trach was downsized on 11/06. He was tolerating capping trials and was decannulated on 11/01. He progressed with SLP, and PEG was removed on 11/22. He was able to tolerate a regular diet. He made significant improvements in PT and OT. They were able to do family training since he had no funding. The family wished to take him back to Colorado where he has family support. He was given orders for outpatient PT, OT, and SLP (speech and language) therapy. It was recommended that he follow up with primary care in his area, attend therapy as able, and follow up with the University of Utah neurosurgery and orthopedics over telehealth until he can find providers in his area.

15. Dr. Wallace documented the following complaints through Claimant's sister, who acted as an interpreter:

- Neck, upper back, and lower back pain: Moderate and aching.
- Bilateral hip pain, knee pain, ankle pain, and shoulder pain: Aching.
- Bilateral elbow pain: Aching.
- Left wrist and hand pain: Moderate and aching.
- Right wrist and hand pain: Severe. This is where he has the three fractures.
- Dizziness and lightheadedness: Moderate and comes and goes.
- Vision changes: He has blurred vision in his left eye.
- Right leg: His right leg feels numb and it was severe.

16. Dr. Wallace further noted and concluded Claimant had to wear protection at night for loss of continence, had numbness of the right calf and leg, a locking right ankle that interfered with walking, a tremor in his head and neck, and blurry vision. She also noted and concluded Claimant had memory loss, difficulty with problem-solving, and getting lost or confused easily, had problems with bathing, showering, and dressing, could not perform any of complex self-care or household duties such as cleaning, financial management, vacuuming, sweeping, mopping, or managing his own medications. Claimant also had difficulty lifting above his shoulders, climbing stairs, and getting up from lying down, basic communication including with speaking, writing, typing, computer use, and texting.

17. On Exam, Dr. Wallace remarked Claimant had some spasticity with motion, a tremor, hypertonicity to palpation of the muscles in the cervical, thoracic and lumbar areas, mildly decreased range of motion of the shoulders bilaterally, right elbow tenderness to palpation, decreased motion of the right wrist and hand, tenderness in the right ankle, tremor in the head and upper body, his gait was antalgic with difficulty moving the right leg with abnormal reflexes bilaterally. Dr. Wallace diagnosed severe traumatic brain injury (TBI) with diffuse axonal injury and loss of consciousness, fracture of right wrist, resolved hemothorax, neck pain, back pain, bilateral shoulder

pain, bilateral hip pain, bilateral ankle injuries, history of tracheostomy and history of gastric feeding tube.

18. Dr. Wallace made a causation analysis and determined that, within a reasonable degree of medical probability, the traumatic fall of September 24, 2021 was the proximate cause of the injuries and disabilities listed. Dr. Wallace recommended a multidisciplinary team approach for recovery from the severe traumatic brain injury. She recommended Claimant be treated at Craig Hospital. She stated Claimant required ongoing neurology and neurosurgery consultations, physical therapy, occupational therapy, speech therapy, and an orthopedic consultation for the right hand wrist fractures. She also recommended care for his lower extremity mobility and coordination, visual distortions related to an eye injury or the brain injury, CT of the spine, MRIs of the cervical and lumbar spine, and acupuncture.

19. The ALJ finds Dr. Wallace's opinions and conclusions to be fully supported by the record and support the extent of Claimant's impairments and disabilities.

Treatment with Dr. Reinhard

20. On January 26, 2022, Claimant came under the care of Dr. Reinhard. Dr. Reinhard issued a detailed report. In his report, he summarized Claimant's injuries and the care he received to date. He noted that upon discharge from the hospital in Utah, the plan was for Claimant to transfer to Craig Rehabilitation Hospital, but that did not occur because the workers' compensation carrier had not admitted liability at that time for the claim. He also noted that Claimant was discharged from the hospital in Utah with no services and that his care had to be managed entirely by Claimant's sisters. *Claimant's Exhibits, pages 114-119*.

21. Dr. Reinhard discussed the physical problems Claimant was having and the need for his sisters to care for him because Claimant had significant motor control problems from the traumatic brain injury. For example, Dr. Reinhard noted Claimant was unable to independently dress himself, unable to write, and unable to feed himself and that his sister feeds him-and said that he often coughs after every bite. It was also noted that Claimant had involuntary movements of the neck and left upper extremity with a rhythmic cervical dystonia with torticollis and dystonic movements of the left upper extremity on the backdrop of ataxia. Moreover, he noted that Claimant had an ataxic gait and could not ambulate – walk - without assistance. *Claimant's Exhibits, pages 114-119*.

22. Dr. Reinhard concluded that due to his brain injury, Claimant has significant motor control problems with cervical dystonia with rhythmic torticollis, left upper extremity dystonia and ataxia, and gait ataxia. He noted Claimant has more of a pattern of clasp-knife spasticity affecting the right upper and right lower extremity. He has dysphagia, and though he was advanced to a regular diet in the hospital, he needed further evaluation of his swallowing to make sure he was not aspirating. He concluded Claimant had significant impairment in mobility, gait, activities of daily living, and also cognitive communication deficits. He also concluded that Claimant should be in inpatient rehabilitation at that point and the best option for him is Craig Rehabilitation Hospital. *Claimant's Exhibits, pages 114-119.*

23. Dr. Reinhard also addressed case management. He concluded that Claimant should have a case manager until he gets into Craig and will also require a nurse case manager to help coordinate medical care after he is discharged from Craig. *Claimant's Exhibits, pages 114-119*.

24. The ALJ finds Dr. Reinhards opinions to be credible, reliable, and persuasive. During his treatment of Claimant, Claimant remained severely disabled and impaired and could not perform activities of daily living such as dressing, eating, toileting, and walking-without assistance.

Treatment and Assessment at Craig Hospital

25. On March 9, 2022, Claimant started treating at Craig Hospital. The records from Craig also documented a fall from a ladder from 15 to 30 feet while working. They also noted a brain stem injury, significant cognitive impairments, hemorrhage to the right posterior midbrain and splenium of the corpus callosum, right cerebellum, dystonic posturing of the left arm, rhythmic torticollis of the cervical spine, and spasticity of the right upper extremity and lower extremities with non-sustained clonus of the right ankle. They noted Claimant continued to have blurred vision in the left eye and oculomotor dysfunction, dysconjugate gaze, diplopia on the left. He was evaluated for problems related to his vision, finding that the corrected vision was still lacking. They recommended he wear a patch over his left eye secondary to difficulties with prism correction for diplopia. They also noted and documented Claimant had additional impairments and disabilities. For example, he had difficulty with balance and would walk short distances with his arm over a family member's shoulders, which was very unsafe. He had cognitive impairments as shown by agitation, irritation, and was referred for psychological care with Dr. Torres. He also had problems swallowing, a right shoulder injury, right ankle sprain, and urinary incontinence. They were also concerned that Claimant might be aspirating while eating and drinking. They also noted that Claimant was living with his two sisters, [Redacted, hereinafter JL] and [Redacted, hereinafter MA], who shared caregiving duties. They also found that Claimant could not feed himself, unable to dress himself in a reasonable amount of time and needed help with general hygiene. They also concluded that Claimant still required 24/7 supervision for safety reasons.

26. On May 24, 2022, the records Craig hospital noted that Claimant presented as a "VERY high risk" for falls. As noted above, they documented that to walk, Claimant was putting an arm over a family member's shoulder and walking short distances. They also noted that using this method to help Claimant walk was very unsafe for both Claimant and his family members. *Claimant's Exhibits, page 205*.

27. While at Craig Hospital, Claimant remained severely disabled and impaired. He had problems with cognition, walking, seeing, eating, toileting, and required 24/7 care - which was being provided by his sisters JL[Redacted] and MA[Redacted].

Assignment of Medical Case Manager

28. On April 2, 2022, LB[Redacted], the medical case manager assigned by Respondents, provided her initial report. In her report, LB[Redacted] noted Claimant could not care

for himself and required assistance with many activities of daily living, such as eating, dressing, bathing, and ambulating. *Claimant's Exhibits, page 450-454*.

29. On May 2, 2022, LB[Redacted] issued her second medical case management report. In her report, she again documented that there were safety issues about Claimant and that he could not walk, eat, or perform other activities of daily living without assistance. It was also noted that Claimant was incontinent for urine and bowels. *Claimant's Exhibits, page 456, 457*.

Testimony of Dr. Reinhard

Need for 24/7 Attendant Care

30. Dr. Reinhard also testified via deposition on May 15, 2023, and June 1, 2023. Dr. Reinhard has been practicing for over 30 years and specializes in physical medicine and rehabilitation with an emphasis in brain injury rehabilitation. Dr. Reinhard concluded that Claimant suffered a very severe brain injury which will preclude Claimant from ever returning to some level of independence. *Dep. Vol. I, page 9*.

31. Based on Dr. Reinhard's testimony, which is credited, it is found that Claimant has the following limitations, impairments, and disabilities:

- He can be childlike and laugh inappropriately.
- He has basically lost the ability to effectively control and move his entire body.
- He is incontinent and his sisters have to take him to the bathroom every couple of hours.
- He cannot get up from a chair or get on and off the toilette without assistance.
- Claimant cannot stand or walk independently. At this time, his sister "basically puts him over her shoulder and then kind of drags him around. It's fairly dramatic how much sort of involuntary movement goes on when he tries to walk."
- Claimant needs help eating his food – and even with help - he still chokes a bit and has to clear his throat often.
- Requires maximal assistance with dressing, eating, cooking, hygiene, and bathing.
- Is completely dependent for all instrumental activities of daily living, such as planning, taking care of finances making medical decisions.

See Dep. Vol. I.

32. In the end, Dr. Reinhard concluded that "He can't take care of himself… He needs somebody there all the time to get him through the day. *Dep. Vol. I, page 49*. He further concluded that Claimant should have been placed in Craig Hospital for inpatient services when he was released from the University of Utah hospital. "You don't send somebody like this home. I'm so surprised that this ever happened this

way." *Dep. Vol. I., page 56*. He also commented that "It takes one special family to take care of somebody like this home where they have to then do everything for them with no home care. It's mind boggling." *Dep. Vo. I, page 56-57*.

33. Dr. Reinhard also commented on the level of care Claimant would have received at Craig compared to the care he received from his family members. He stated that Claimant could have better care [at Craig], instead of "basic care by untrained family members." *Dep. Vol. I, page 58*.

34. As for the need for 24/7 care, Dr. Reinhard concluded that a CNA would need to be hired to help Claimant with activities of daily living such as hygiene, bathing, brushing teeth, and getting fed. He also stated that if Claimant was home alone, the CNA would have to be there 24/7 because the Claimant would not be safe at home because:

> He can't move. He can't get up and leave the house if the house starts on fire. He can't make a meal or feed himself or bathe without assistance. All of those things – maybe you could put him in a chair and leave him for an hour; even there is a certain risk, so you need 24/7.

Dep. Volume 1, page 62.

35. Dr. Reinhard also concluded that Claimant could possibly die if left unattended - for example, "if he got ahold of some food and started eating, he could choke." *Dep. Vol. I, page 61-62, and 65*.

36. Dr. Reinhard also stated that because Claimant is not mobile and is cognitively impaired, "somebody has to be, at least, within the home and not necessarily in the same room with him but there in case if something happens that he needs assistance." *Dep. Vol. II, page 39*.

37. Dr. Reinhard concluded that the services provided by the family 24/7 are reasonably necessary to keep Claimant safe, clean, and hygienic and that the services provided by the family are not just reasonably necessary, they are mandatory.

38. Based on Dr. Reinhard's testimony, and the underlying medical records, it is found that Claimant has required 24/7 attendant care, that is medical in nature, since his discharge from the hospital in Utah. It is further found that such care has relieved the symptoms and effects of the injury and are directly associated with Claimant's physical needs.

Level of Care Being Provided by Family

39. Dr. Reinhard also testified about the level of care being provided by the family, especially MA[Redacted], as she provides most of the care for Claimant. Dr. Reinhard did not think MA[Redacted] was providing the level of care that a CNA would provide. *Dep. Vol. I, page 67*. But on the other hand, he concluded that the family was providing care that would be considered nursing services – such as dealing with Claimant's incontinence, medication management, and providing skin care when Claimant developed an ulcer. He did not, however, think they were providing any type of meaningful therapy. *Dep. Vol. II, pages 116-117*.

40. Although the family is caring for Claimant, Dr. Reinhard believes Claimant needs the assistance of a "home health aide as opposed to an RN" but yet he would need a CNA for bathing. *Dep. Vol. II, page 130*.

41. He also concluded that the family is basically providing basic care - or unskilled care – by family members.

42. Based on Dr. Reinhard's testimony it is found that Claimant's family members are providing Claimant basic attendant care-which is primarily unskilled care-and that such care is medical in nature because it relieves the symptoms and effects of the work injury and is directly associated with Claimant's physical needs.

43. Need for Conservator

44. In November 2022, Dr. Reinhard recommended and prescribed a conservator due to Claimant's limited abilities due to his work injury and inability to make medical and financial decisions. *Dep. Vol. I, pages 39-40*. He also concluded that having a bi-lingual conservator, since Claimant only speaks Spanish, would be appropriate. *Dep. Vol. I, pages 39, 40, 41, and 49.*

45. It is found that Claimant needs a conservator to help make medical and financial decisions.

46. *Need for a medical case manager.*

47. Dr. Reinhard also testified that a nurse case manager is critical in the case of a catastrophic brain injury – like this case - because there are multiple providers involved and multiple things that to be authorized. He also testified that having a bilingual nurse case manager would be even better. He concluded that placing the case management obligations on the family would be too much. *Dep*. V*ol. I, page 42*.

48. Dr. Reinhard also testified as to the qualities that a nurse case manager should have. Those qualities include, but are not limited to, being compassionate, prompt, a good communicator, and knowledgeable about the relevant medical conditions being treated. Dep. Vol. I, pages 42-46.

49. The ALJ finds Dr. Reinhard's testimony and opinions to be credible, reliable, and persuasive. His opinions are fully supported by the record and consistent with the other medical providers and observers of Claimant's injuries, impairments, and disabilities. As a result, it is found that Claimant needs a medical case manager and that one has been provided by Respondents.

Testimony and Affidavits of Family Members Taking Care of Claimant

MA[Redacted]

50. MA[Redacted], Claimant's sister, testified at the hearing and submitted an affidavit. Based on her testimony and affidavit, which the ALJ credits, it is found that since Claimant's discharge from the hospital in Utah on November 23, 2021, she has cared for Claimant by helping him with his activities of daily living. This care includes, but is not limited to, bathing, brushing his teeth, shaving, dressing, feeding, picking up and administering medications, providing physical therapy and occupational therapy,

monitoring his condition during the night while he is sleeping, getting him out of bed, getting him out of chairs, walking with him, helping him with drinking and eating, transporting him to medical appointments, and attending most of his medical appointments.

51. Along with helping Claimant with his activities of daily living, which are necessary to keep Claimant safe and alive, she also does his laundry, takes him to social outings, and provides a clean and safe living environment. However, doing Claimant's laundry, taking him on social outings can be done while she is watching Claimant and keeping him safe. In other words, her primary responsibilities and the care she provides Claimant is helping Claimant with his activities of daily living and being with Claimant so he remains safe, cared for, and alive.

52. Moreover, she was trained by the staff at the hospital in Utah and Craig Hospital how to care for Claimant by helping him perform his activities of daily living, provide various therapies, and keep Claimant safe and alive. She also trained other family members how to do the same tasks.

53. Since his discharge from the hospital on November 23, 2021, through June 30, 2023, she estimates she has provided Claimant 7,740 hours of care.

54. MA[Redacted] also testified about the medical case management being provided by LB[Redacted]. According to MA[Redacted], it is her opinion that LB[Redacted] is providing inadequate case management services and should be replaced by a new case manager.

55. Based on her testimony and affidavit, it is found that she has provided Claimant attendant home health care services since his discharge from the hospital in Utah and that she has provided Claimant approximately 7,740 hours of care up through June 30, 2023.

[Redacted, hereinafter BR]

56. BR[Redacted] also testified at the hearing and provided an affidavit. Pursuant to BR's[Redacted] affidavit, and testimony, which the ALJ credits, BR[Redacted] cared for Claimant by helping him with his activities of daily living, consistent with the care provided by MA[Redacted]. It is found that the attendant and home health care BR[Redacted] provided Claimant kept Claimant fed, safe, and alive. From November 23, 2021, through June 30, 2023, BR[Redacted] provided Claimant approximately 936 hours of attendant care from the date of his discharge from the hospital in Utah through June 30, 2023.

[Redacted, hereinafter SG]

57. SG[Redacted], who is Claimant's sister-in-law, also testified at the hearing and provided an affidavit. Pursuant to her testimony and affidavit, which the ALJ credits, she cared for Claimant by helping him with his activities of daily living, consistent with the care provided by SG[Redacted]. It is found that the care she provided kept Claimant fed, safe, and alive. From November 23, 2021, through June 30, 2023, she provided Claimant approximately 1,600 hours. In addition to caring for Claimant, she also cared for MA's[Redacted] baby. Thus, while taking care of Claimant, she also

had to take care of the baby. Despite having to take care of both at the same time, she was available for both and on call for Claimant. Thus, she still provided attendant health care services to Claimant for approximately 1,600 hours during the time period stated above.

JL[Redacted]

58. JL[Redacted], is Claimant's sister. She also testified at the hearing and provided an affidavit. Pursuant to her testimony and affidavit, which the ALJ credits, she cared for Claimant by helping him with his activities of daily living, consistent with the care provided by her sister, MA[Redacted]. It is found that the attendant and health care JL[Redacted] provided kept Claimant fed, safe, and alive. It is also found that from November 23, 2021, through June 30, 2023, JL[Redacted] provided Claimant approximately 3,652 hours of attendant care.

Type of Care Being Provided by Family Members.

59. The attendant care being provided by all family members is medical in nature and should be classified as a medical benefit under the Colorado W.C. Act and therefore a covered benefit because it is medical in nature and relieved Claimant from the symptoms and effects of his work injury and is directly associated with claimant's physical needs. This finding, however, is not a finding that the family members are providing the level of care that would be provided by a licensed, certified, or registered nurse, nurse aid, or nursing assistant.

60. Due to his injuries and inability to independently perform his activities of daily living, Claimant requires attendant care to provide attendant care services. The care provider is also required to remain nearby and "on call" 24/7 and the family members have been providing such care.

Hourly Rate of Pay for Family Members Providing 24/7 Care

Report of Ann Sandstrom and Kelli Gora

61. Claimant presented the report of Ann Sandstrom, who is a Certified Nurse Life Care Planner, Registered Nurse, Family Nurse Practitioner, and Doctor of Nursing Practice, and Keli Gora who is an RN, FNP, DNP, and a CNCLP.

62. Ms. Sandstrom was asked to determine the type and level of home health care the family members were providing Claimant as well as the hourly charges for those services in the Denver metro area. Ms. Sandstrom concluded that the type and level of care the family has been providing Claimant since he was discharged from the hospital in Utah as follows:

> Since his discharge from the Salt Lake City Hospital, he has been unable to independently manage activities of daily living (ADLs), including but not limited to hygiene, toileting, dressing, medication management, communication, household chores, meal preparation, feeding, transportation, community and social access, ability to leave home, ability to

> access medical care, and ability to perform other items required to sustain functional living without home health care services. Caregivers also provide assessment of psychological status, medication administration, assessment of vital signs, and performance of home therapy programs.

63. She also concluded that Claimant needs 24/7 care. In reaching her conclusion, she reviewed the deposition of Dr. Reinhard as well as Claimant's medical records. Based on her review of the Claimant's medical records and Dr. Reinhard's deposition, she concluded that Claimant's needs are often unpredictable and that varying levels of assistance are required at unpredictable times throughout the 24-hour daily period, including overnight. Thus, she concluded that the medical record supported Dr. Reinhard's opinion that 24/7 care was required.

64. She also concluded that the type and level of care Claimant's family is providing falls within the semi-skilled category. She reached that conclusion based on the following factors:

> Although Claimant's family has no formal training as Home Health Aides, the range of essential services required by [Redacted, hereinafter MQ] falls within the realm of semi-skilled (SVP 3: supervisory/companion for safety, personal care attendant for routine ADLs) and semiskilled to skilled (SVP 4 and higher: Skills required to perform and supervise home therapies, medication management including ordering, sorting, administration; medical case management, assessment and monitoring of vital signs, monitoring of psychiatric status, etc.)

65. In order to support her opinion about the level of work the family members were providing, Ms. Sandstrom included a "Skill Level" chart. The chart describes unskilled, semi-skilled, and skilled work. Unskilled work is work that requires little vocational preparation and judgment and can usually be learned within 30 days. Semi-skilled requires the requirement to be alert and to pay close attention to details. In this case, many of the skills used to take care of Claimant would appear to be skills that could be learned in less than 30 days. On the other hand, some of the skills, like providing Claimant with his medication, watching to see if Claimant starts choking or aspirating his food, requires alertness and attention to detail-which might be in the semi-skilled category. Based on the facts of this case, the ALJ finds that the majority of Claimant's care being provided by the family members could be learned in less than 30 days and can be classified as unskilled attendant/home health care.

66. Ms. Sandstrom then set forth the hourly rate an Agency would charge to provide the services of various providers. She provided the rates below, which are not the rates at which the actual care provider – employee - would be paid, but the rates charged by the Agency. The Agency rates are as follows:

- Home Health Care Companion: $29.50 per hour;

- Home Health Care Personal Care Services: $24.06 per hour; and
- Home Health Aid services: $50.00, per the WC Fee schedule and $75.00, if not paid under the fee schedule.

67. Ms. Sandstrom also provided the hourly minimum wage during time the family has been providing home healthcare. The hourly rate for 2021, 2022, and 2023, is $14.77, $15.87, and $17.29, respectively.

68. Ms. Sandstrom also testified about the training the family received from Salt Lake University Hospital as well as various people at Craig Hospital.

69. The ALJ finds her opinions to be persuasive and helpful.

Testimony of Kelli Gora

70. Ms. Gora also testified at the hearing. She is a Registered Nurse, Family Nurse Practitioner, and a Legal Nurse Consultant. She testified consistent with her report. As for the level of care being provided by the family members, she concluded that it includes companion type work, which is unskilled, and also semi-skilled work.

71. As for hourly rates, she concluded that the family provides more than companion care. Since companion care through an agency would cost about $29.50 per hour, she stated that obtaining a provider through an agency to provide more than companion care, a Home Healthcare Aid, would be $51.00 per hour under the Colorado Workers' Compensation Fee Schedule. Thus, she concluded that the family members should be paid more than the rate for a companion.

72. The ALJ finds her testimony to be helpful in determining the hourly rate at which Claimant's family members should be paid.

Report and Testimony of Sue Ann Knoblauch

73. Ms. Sue Ann Knoblauch, RN, BSN, CM, MSCC, CNLCP, also provided a report and testified at the hearing. She was also asked to determine the level and type of care Claimant's family has been providing Claimant and determine the average hourly rate agencies in the Aurora, Colorado, area charge to provide such services. She was not, however, asked to determine the rate the actual worker is paid in each category.

74. Ms. Knoblauch also analyzed the level of care Claimant's family is providing. After reviewing all of the records and the affidavits by the various family members, she concluded that most of the care being provided is unskilled.

75. To determine the level of care Claimant's Ms. Knoblauch reviewed Claimant's medical records and researched the average hourly rates in the Aurora, Colorado, area. She ultimately concluded that Claimant requires 24/7 care. In formulating her opinion, she stated that:

> The medical records were reviewed, especially focusing on the most recent set of evaluations from Craig Hospital and the

> treating providers in Colorado. It appears that [Claimant] required at the minimum unskilled attendant care for Activities of Daily Living as evidenced by the medical records documentation of his deficits both physical and cognitively. His family has outlined the care that they provided during those weeks, and this appears to match his functional deficits and needs. His difficulty with mobility, transferring, and toileting also would suggest that [Claimant] would require nighttime attendance or at least someone in the house to be alerted that he needed assistance. Therefore, it seems reasonable that 24/7 care would have been required.

76. She also assessed the level of care that the family is providing. She basically concluded that the level of care being provided by the family is unskilled. She based her opinion on the following rationale:

> The family that provided the care, it seems likely, was not licensed or certified in nursing. They most likely received family education on all aspects of home care needed by the Craig Hospital medical professionals before discharge and at evaluations. The fact that the family state that they provided monitoring and assessing for medical complications and conditions, could be described as the function of a nursing licensed professional. However, family are routinely involved in discharge planning and training for home care of discharging individuals. Craig Hospital most likely provided this family training and also "signs and symptoms" of medical complications to contact medical professionals. These are also higher-level skills that of a trained nursing professional, that was not likely provided at the home.

77. Regarding the hourly rate, she concluded that an unskilled, but agency trained, home health attendant could be hired for $28.00 per hour.

> As far as the hourly rate is concerned, research of the available services in the area show a rate of $28.00 per hour for an unskilled home aide that is trained by the hiring home health nursing agency. As the family has most likely less training than an unskilled home attendant aide. Therefore, it could be considered that the pay rate would be lower than that of an agency trained home health attendant.

Claimant's Exhibits, pages 357-371.

78. The ALJ finds Ms. Knoblauch's opinions to be reliable, persuasive, and helpful.

79. The ALJ finds that the attendant care services being provided by Claimant's family fall primarily in the unskilled area. On the other hand, the family members were trained to do various tasks such as physical therapy, occupational therapy, how to take Claimant's blood pressure, how to use the TENS unit, and how to use the Heimlich

maneuver in case Claimant is choking. But they have not been formally trained by an agency. As a result, the ALJ finds most of the time spent taking care of Claimant and being "on call" is unskilled attendant care that is medical in nature.

80. As for the rate of pay, the ALJ finds that the testimony provided by the witnesses only provides the rate that would be paid to an Agency for the service of a worker and not the rate of pay each worker would receive. But Ms. Sandstrom did provide the minimum wage for workers, and the court finds those rates helpful in determining the rate of pay for each family member-who is primarily providing Claimant unskilled attendant care. As a result, the ALJ finds that a rate of $22.00 per hour, since Claimant's discharge, is reasonable.

Need for a Conservator

81. In November 2022, Dr. Reinhard recommended-prescribed-a conservator due to Claimant's limited abilities due to his work injury and inability to make medical and financial decisions. *Dep. Vol. 1, pages 39-40*. He also concluded that having a bi-lingual conservator, since Claimant only speaks Spanish, would be appropriate. *Dep. Vol. 1, pages 39, 40, 41, and 49*. The ALJ credits this testimony and find that it supports the need for a conservator.

Testimony of [Redacted, hereinafter DS] - Conservator

82. DS[Redacted] testified at the hearing. DS[Redacted] is an attorney who is bilingual and speaks English and Spanish. Therefore, when working with a client that speaks Spanish, such as Claimant, he does not need an interpreter. He has specialized for the last 26 years in probate, disability law, and protective proceedings. The protective proceedings include guardianships, conservatorships, and disability trusts. He also has experience setting up conservatorships in workers' compensation cases. DS[Redacted] has set up approximately 100 conservatorships and has served as a conservator approximately 30-40 times. As a result of his expertise, he was admitted as an expert in his areas of practice.

83. DS[Redacted] testified that he charges $375.00 per hour for his services and that his fee might be a little on the high side. He also testified that the fees for a conservator can range from $100 to $500 per hour – depending on the services being provided. But DS[Redacted] does speak Spanish and speaking Spanish will negate the need for an interpreter and the associated costs.

84. DS[Redacted] concluded that based on his interactions with Claimant, Claimant cannot make decisions involving any financial decisions, including entering into agreements with experts to secure medical benefits under his workers' compensation case. *Hearing Tr. 48-49*.

85. In order to have DS[Redacted] appointed as the conservator, the Claimant had to retain the services of a probate attorney. In this case, Claimant's counsel retained [Redacted, hereinafter KK], Esq., to procure the appointment - through the probate court - of DS[Redacted] as Claimant's conservator. *Hearing Tr. 60-61.*

86. As set forth in the pleadings from the probate court, and after Dr. Reinhard recommended and prescribed a conservator, KK[Redacted] filed a Petition for

Appointment of Conservator for Adult on February 17, 2023. In the Petition, she set forth the basis for why a conservator was required. She stated in the Petition that the Claimant suffers from the effects of a traumatic brain injury and in support of his injuries and disability she provided the court the November 30, 2022, report from Dr. Reinhard. In addition to providing the court with the need to appoint a conservator, she also set forth the duties of the conservator. In the Petition, she asked for the following:

> [T]he appointment of the Special Conservator be limited in scope acting on behalf of Respondent in the Worker's Compensation case, any ancillary or third-party claims, litigation decisions, settlement negotiations, mediations and all other matters related to the his injury until all litigation or legal claims are concluded or at a point that Respondent's physician opines Respondent is able to manage property and business affairs because he is able to effectively receive and evaluate information or both or to make or communicate decisions regarding these matters.

Claimant's Exhibits, page 603-611.

87. On March 15, 2023, the probate court issued an order appointing a Court Visitor to investigate the allegations made in the Petition for Appointment of a Conservator. The Court Visitor was authorized to interview Claimant and review his medical records to determine whether the appointment of a conservator was reasonable, necessary, and appropriate. *Claimant's Exhibits, page 590*.

88. On May 31, 2023, a hearing was held in Denver Probate Court to determine whether Claimant was legally incapacitated and required a conservator and whether DS[Redacted] should be appointed as Claimant's conservator. On the same day as the hearing, the Court issued an Order appointing DS[Redacted] as the conservator for Claimant, *i.e.*, finding Claimant was legally incapacitated. *Claimant's Exhibits, page 575-577*.

89. The ALJ finds DS's[Redacted] testimony to be credible, reliable, and persuasive.

90. The ALJ finds that based on the record as a whole, and due to his work injury, Claimant is unable to effectively receive and evaluate information and communicate decisions to such an extent that that he lacks the ability to satisfy essential requirements for physical health, safety, and self-care. As a result, Claimant is legally incapacitated due to his work injury.

91. The ALJ finds that the medical records, opinions of Dr. Reinhard and DS[Redacted], combined with the findings of the probate court, establish that the retention of KK[Redacted] to appoint DS[Redacted] as Claimant's conservator, and for DS[Redacted] to be Claimant's conservator, is reasonable and necessary to help Claimant, who is legally incapacitated, make decisions regarding his workers' compensation claim and other associated financial matters as set forth in the Order appointing DS[Redacted] as the conservator.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a medical case manager of his choice and that LB[Redacted] should be removed as the nurse case manager on this claim.

Section 8-42-101(3.6)(p)(II) provides that Respondents shall offer at least managed care or medical case management. In this case, Respondents appointed

LB[Redacted]. to provide medical case management – and she did provide medical case management. Claimant is arguing that because LB[Redacted] is not providing adequate medical case management, Claimant has the right to have a new medical case manager assigned to the case.

Even if she is providing substandard medical case management, medical case management can only be offered by Respondents and rejected by Claimant. Claimant lacks the right to request a particular medical case manager or to have particular case manager replaced. *See Muir v. King Soopers*, W.C. No. 4-350-892 (ICAO May 20, 2003). In *Muir*, Claimant was arguing that Respondents had to pay for a case manager that one of her authorized treating providers had designated. The ICAO affirmed the ALJ's determination that Respondents would not be responsible for payment of case management services based on the ATP's designation of that case manager. The ICAO, interpreting Section 8-42-101(3.6)(p)(II), concluded that it was Respondents, in the first instance, that are allowed to designate the case manager and that statutory provision does not allow for an authorized treating provider to designate a different case manager-even if the currently assigned medical case manager is not doing an adequate job.

Therefore, even if the current medical case manager is not doing an adequate job, this ALJ does not have the authority to appoint a new medical case manager. Such authority is vested with the Respondents. Thus, based on the rationale in *Muir,* Claimant's request for the removal of the current medical case manager, LB[Redacted], and to have her replaced with a new medical case manager is denied.

II. Whether Claimant has proven by a preponderance of the evidence that family members are entitled to reimbursement for attendant care they provided to Claimant from November 23, 2021 through present and the rate at which they should be reimbursed.

a. Whether the family members are entitled to reimbursement for home health care.

The determination of whether attendant care services are reasonably necessary is one of fact for determination by the ALJ. *Suetrack v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995); *Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992). To be compensable as medical benefits, the expenses must be for medical or nursing treatment or incidental to obtaining such medical or nursing treatment. The service must be reasonably needed to cure and relieve the effects of the injury and be related to a claimant's physical needs. *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997). In assessing the evidence, the ALJ may consider whether the services were medically prescribed, and whether they are directly associated with Claimant's physical needs. *See Bellone, Supra.* Moreover, there is no requirement that the attendant care services be provided by a licensed medical professional, and such services may encompass assisting Claimant with activities of daily living, including matters of personal hygiene. *Suetrack v. Industrial Claim Appeals Office*, *Supra*.

Claimant suffered catastrophic injuries. Due to his injuries, Claimant was hospitalized for approximately two months. During his hospitalization it was noted that Claimant had problems with all activities of daily living and that he needed assistance with

his activities of daily living upon discharge. Thus, while he was hospitalized, family members were taught how to care for Claimant.

Claimant was discharged from the hospital on November 23, 2021, and into the care of his family. Upon discharge, Claimant was prescribed 24/7 care, which was to be provided by his family. The attendant care was necessary for Claimant to be able to eat, bathe, walk, get out of bed, go to the bathroom, take his medication, get to medical appointments, and be safe, etc. Moreover, the need for the care was emergent. Without the provision of attendant care – that was medical in nature - immediately upon discharge, Claimant's health would have quickly deteriorated, he could have been severely injured, and he would have died.

Upon discharge, it was anticipated that Claimant would be admitted to Craig Hospital for care and rehabilitation. His admission would result in Claimant having 24/7 care until discharged from Craig. However, Claimant's claim was still being denied and Craig Hospital would not admit him. As a result, Claimant's family started providing Claimant attendant care 24/7 as of November 23, 2021, and immediately upon discharge.

The need for Claimant to have 24/7 attendant care, since he was discharged from the hospital in Utah, is supported by the medical records, the opinions of the experts who evaluated the need and cost of providing home health care, and the reports and testimony of Claimant's authorized treating physician, Dr. Reinhard.

The care provided to Claimant is medical in nature because the care relieved Claimant from the symptoms and effects of his catastrophic injury and is directly associated with Claimant's physical needs. The care was also incidental to medical treatment because the services were provided as part of an overall home healthcare program designed to treat Claimant's condition.

Respondents contend that because Claimant's family members provided some care that is not medical in nature, such as ordinary household services, which might have included cleaning and laundry, that 24/7 care is not necessary. But Respondents fail to appreciate that, as found, the care providers in this case must be available, or "on call" 24/7 to assist Claimant as needed. For example, someone needs to be available during the night if Claimant needs to get out of bed to go to the bathroom, if there is a fire in the house, or if he decides to engage in a dangerous activity, like using the treadmill unsupervised, or chokes on water while drinking during the night. Thus, as here, when Claimant's injury is of a nature that requires an attendant to remain nearby or "on call," the fact that a caretaker may be able to perform household tasks when not actually rendering a specific service to Claimant does not alter the essential nature of the services being provided by the family member. This is so because, if the employer provided the services of an outside professional, that professional would be entitled to pursue their own interests during such "on call" periods without diminution of compensation. *See Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286, 1289 (Colo. App. 1992).

Since his discharge from the hospital, Claimant's family members have been providing Claimant attendant care 24/7. The care consists of, but is not limited to, helping Claimant get out of bed, get dressed, walk, eat, bathe, take his medications, get to medical appointments, and go to the bathroom, etc. This care is found to be attendant

care that is medical in nature, incidental to obtaining medical treatment, and part of an overall home healthcare program designed to treat Claimant's condition.

Respondents did not endorse the issue of authorization. But Respondents stated on their Application for Hearing that the home healthcare was not initially "recommended." Moreover, they did not raise this issue in their proposed order. However, home healthcare benefits do not have to be "prescribed" for Respondents to be liable for such treatment. *See Bellone, Supra.* Moreover, Respondents are liable for emergency medical treatment reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). In *Sims*, the Colorado Court of Appeals held that in cases of medical emergency the claimant need not seek authorization from the employer or insurer before obtaining medical treatment from an unauthorized provider. A medical emergency affords an injured worker the right to obtain immediate treatment without undergoing the delay inherent in notifying the employer and obtaining a referral or approval.

There is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. *See Timko v. Cub Foods*, W. C. No. 3-969-031 (June 29, 2005). In this case, the ALJ finds and concludes that the need for home attendant care upon discharge was recommended and prescribed by the hospital and was also emergent and continues to be emergent.

Respondents also contend that the Colorado Nurse and Nurse Aide Practice Act § 12-255-10101, et., seq, C.R.S., precludes Respondents from being liable to the family members for home attendant care services because the services are that of a certified nurse's aide or nurse. As found, the majority of the services being provided by Claimant's family members are unskilled attendant care. Moreover, the family members are not holding themselves out as certified nurse aides or certified nurses. Plus, there is no requirement that the attendant care services be provided by a licensed medical professional to be payable, and such services may encompass family members assisting Claimant with activities of daily living, including matters of personal hygiene. *See Suetrack USA v. Indus. Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Therefore, the ALJ finds and concludes that the Colorado Nurse and Nurse Aide Practice Act does not preclude the reimbursement to family members for the attendant care services they provided.

As a result, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that the attendant care services, which were and are emergent, are reasonably necessary, and related to Claimant's work injury and that Respondents are liable for the attendant services provided by Claimant's family members since the date of discharge from the hospital in Utah on November 23, 2021 – 24/7.

b. <u>The hourly rate to pay Claimant's family members for providing home healthcare – assistance</u>.

The reasonable value of medical services is a question of fact for resolution by the ALJ. *See Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992).

One of the factors to consider in determining the rate at which to compensate the family members is to determine the type of care being provided. In this case, there was testimony about the type of care being provided. The evidence here provides and defines various levels of work. For example, one report defines the type of work that is considered unskilled, semi-skilled, and skilled. The report indicates that unskilled work is considered work tasks that can be learned in 30 days or less. Semi-skilled is work that requires more training and attention to detail.

In this case, none of the family members are licensed healthcare providers. Moreover, none of them have gone through professional training classes. However, they have undergone training by Claimant's medical providers to do certain tasks required by Claimant.

Each expert that evaluated and provided the hourly rate Claimant would have to pay an agency to obtain home services. The problem with these rates is that they are the rate at which an agency would be paid, but not the rate at which an employee providing the care would be paid. One expert did, however, provide the minimum wage for workers, and the ALJ finds that information, combined with the other wage information to be helpful in determining the hourly rate at which to pay the family members.

In this case, the ALJ finds and concludes that Claimant's family members are mostly providing unskilled care, with a bit of care maybe rising to the level of semi-skilled.

While the agency rates have been considered, the ALJ finds that paying family members the rate at which an agency charges would overpay the family members since those rates do not take into consideration other factors, such as the overhead incurred by an agency, and is not an accurate representation of what an employee who is providing the service would be paid.

Considering the minimum wage, which is the wage that is probably paid to an unskilled worker, and the wages paid to an agency for what appears to be an agency trained home health aide, the ALJ finds and concludes that an hourly wage for each family member providing home health care to Claimant shall be $22.00 per hour.

III. Whether interest is payable on the amount awarded for the care provided to Claimant.

Section 8-43-410(2) provides the respondents "shall pay interest at the rate of eight percent per annum on all sums not paid on the date fixed by the award" for the payment thereof. Pursuant to *Stephens v. Gary North & Air Package Express Services, Inc.*, W.C. No. 4-492-570 (February 16, 2005), interest is also payable on unpaid medical expenses.

In this case, the payment of home healthcare services is found to be a medical expense. As a result, the ALJ finds and concludes that Claimant has established that interest is payable on the unpaid medical expenses for home healthcare services provided by the family members.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to the costs and fees for services of a probate attorney and conservator.

Section 8-42-101, C.R.S., provides that in addition to medical benefits, every employer shall furnish conservator services that are reasonably needed due to the work injury and that such fees shall include reasonable attorney fees and costs that are required to appoint a conservator through the probate court. *See* 8-42-101(a).

As found, Claimant is legally incapacitated due to his work injury and requires a conservator to manage Claimant's affairs, such as medical and financial decisions, as set forth in the Order appointing DS[Redacted] as the conservator. Moreover, an attorney, KK[Redacted], was required to get DS[Redacted] appointed as the conservator.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the need for the probate attorney, KK[Redacted], and the need for a conservator, DS[Redacted], is reasonably necessary, and related to Claimant's work injury and shall be paid for by Respondents.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to have the current case manager removed and replaced is denied.
2. Claimant's request for the payment of attendant care services is granted. Respondents shall pay Claimant for 24/7 attendant care services as of November 23, 2021, at an hourly rate of $22.00 per hour. Such money, plus interest, shall be distributed by Claimant to the people who provided Claimant's care based on the hours of care they provided.
3. Should an agency be retained to provide any care during a 24-hour period, Respondents shall not be required to pay Claimant for the hours of care provided by an outside agency. For example, if Claimant's family members provide 16 hours of home healthcare and then an agency provides 8 hours of home health, or attendant care, during a 24-hour period, Respondents only need to pay Claimant for 16 hours of care during that 24-hour period.
4. Respondents shall pay the fees and costs of the probate attorney and the conservator.
5. Respondents shall pay interest at the rate of eight percent per annum upon all sums - for 24/7 attendant care - not paid beginning November 23, 2021.
6. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 21, 2023.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that he suffered a work injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of his right shoulder is reasonable, necessary, and related to the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits?

4. If the claim is found compensable, what is Claimant's average weekly wage {AWW)?

5. If the claim is found compensable and Claimant is entitled to TTD benefits, have Respondents demonstrated, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment, thereby severing his entitlement to TTD benefits?

FINDINGS OF FACT

1. Claimant began working for Employer on August 29, 2022. Claimant was hired as a production operator on the cleaning and inspection crew. Claimant worked full-time and was paid $16.20 per hour. Claimant testified that he worked 10 hour shifts, specifically, the 4:00 a.m. to 2:30 p.m. shift, five days per week. Claimant had two 15 minute breaks in the morning, a 30 minute lunch, and then a 15 minute break in the afternoon.

2. Claimant testified that his job duties involved cleaning and inspecting parts called "setters". Setters are used to hold other parts when placed in the kiln. After setters were used in this way, they were sent to Claimant for cleaning and inspection. The setters came to Claimant in tubs. Claimant would lift full tubs and then remove the setters from the tub and place them into the cleaning machine. Once the items were cleaned, Claimant would inspect the items for damage. Then he would place the newly cleaned parts into tubs and lift those full tubs. Claimant would repeat these steps during his 1O hour shift. Claimant estimated that he cleaned and inspected between 3,500 and 4,000 setters each shift.

3. Claimant estimates that a full tub weighed between 20 and 30 pounds. Individual setters would vary in size and weight. Claimant estimates that the heaviest setter would weigh approximately one-half of a pound.

4. Claimant testified that in the first few weeks of his employment, he experienced pain and soreness throughout his body. This included pain and soreness in his bilateral shoulders. Over time, these symptoms subsided in all areas of Claimant's body, with the exception of his right shoulder. Claimant testified that he is not sure exactly when his right shoulder pain began, but in the month of October his right shoulder was the only body part that continued to be painful.

5. On November 2, 2022, Claimant reported his right shoulder pain to his lead. Claimant did so at that time because he lifted a full tub of setter parts and his right shoulder pain was so intense that he dropped the tub. Claimant further testified that at that moment his pain intensified and felt like he had been "stabbed with a knife". Claimant testified that prior to dropping the tub at work on November 2, 2022, he had non-stop right shoulder pain and he could barely lift his right arm.

6. On November 4, 2022, an accident report was completed by Employer. In that document, the date of injury is identified as October 20, 2022. Claimant testified that when he reported his right shoulder pain he indicated that he did not know exactly when his pain started. As a result he and the individual from human resources "decided on October 20".

7. Thereafter, Employer referred Claimant for medical treatment. On November 4, 2022, Claimant was seen by Dr. Lori Fay. At that time, Claimant reported right shoulder pain due to "over use at his new job." Claimant also reported a prior right shoulder injury that occurred 20 years ago. Claimant told Dr. Fay that following that prior injury his symptoms resolved. With regard to his current symptoms, Claimant reported that "on Tuesday of this week [claimant] was in so much pain he could not raise his arm."

8. Dr. Fay ordered a right shoulder x-ray, which was performed on that same date. The x-ray showed no acute fracture or traumatic malalignment. The radiologist, Dr. Bryan Stover, noted minor osteoarthritic changes.

9. Dr. Fay identified a diagnosis of right shoulder tendonitis and/or bursitis. She recommended rest, ice, gentle range of motion exercises, and anti-inflammatories. In addition, Dr. Fay assigned work restrictions of no right arm lifting, carrying, pushing, pulling, pinching, gripping, reaching overhead, and reaching away from the body. In the WC164 form completed by Dr. Fay on November 4, 2022, she indicated that her objective findings were consistent with a work related injury.

10. On November 9, 2022, Claimant was seen at SCL Health Medical Group - Occupational Health by Dr. Spencer Olsen. In the medical record of that date, Dr. Olsen notes that after starting a new job, Claimant experienced several weeks of bilateral shoulder pain, with his left shoulder pain resolving. Claimant also reported a right

shoulder injury that occurred 18 years prior. Dr. Olsen noted the prior issue resolved following physical therapy and the right shoulder remained asymptomatic thereafter. Dr. Olsen opined that Claimant had impingement syndrome of the right shoulder. Dr. Olsen further noted that Claimant's condition was "not clearly work related". Dr. Olsen opined that "cumulative trauma disorder was unlikely." In addition, Dr. Olsen noted that "[i]ndustrial aggravation of [Claimant's] underlying shoulder pathology is unlikely under the circumstances."

11. Dr. Olsen recommended light duty and physical therapy. In addition, he ordered magnetic resonance imaging {MRI) of Claimant's right shoulder. Dr. Olsen issued work restrictions of "light duty" with no lifting, carrying, pushing, or pulling over ten pounds, no overhead work, and no forceful or repetitive use of the right arm.

12. On November 17, 2022, Claimant returned to Dr. Olsen. On that date, Dr. Olsen opined that Claimant had right shoulder impingement syndrome. Dr. Olsen further opined that there was probably "no aggravation of patient's underlying condition". Dr. Olsen assessed the same work restrictions.

13. On December 14, 2022, a right shoulder MRI showed, *inter alia,* tendinosis with mild partial-thickness intrasubstance tearing of the distal infraspinatus tendon; moderately severe acromioclavicular (AC) joint arthrosis with narrowed supraspinatus outlet; and teres minor atrophy.

14. On December 18, 2022, Claimant returned to Dr. Olsen to discuss the MRI results. Dr. Olsen opined that claimant had a "nonwork related right shoulder condition." Dr. Olsen specifically noted that "his work with his new employer for several weeks likely flared up his right shoulder condition, but there is no clear evidence of aggravation." Dr. Olsen recommended further treatment that would include a steroid injection and surgical consultation. However, Dr. Olsen noted that further treatment should be done through Claimant's personal physician.

15. On December 19, 2022, Respondents filed a Notice of Contest in this matter.

16. The last day Claimant earned wages with Employer was November 2, 2022. Claimant has not returned to work for Employer, or any other employer. Claimant provided Employer with all work restrictions assigned by Ors. Fay and Olsen. Claimant testified that he was informed that Employer had no work for him within those restrictions.

17. Claimant testified that he did not quit his job with Employer. In early 2023, Claimant received written notification from Employer that his employment was terminated as of February 17, 2023. The reason provided for the termination was "poor job performance". Claimant was not aware that Employer had any concerns regarding his job performance. Claimant did not work after November 2, 2022, because his work restrictions prevented him from performing his normal job duties for Employer.

18. Claimant's current symptoms include right shoulder pain. Claimant testified that if he is sitting and engaging in no activity, his right shoulder pain will be at a four to five out of ten. If he attempts any activity, the pain will increase to as much as eight to nine out of ten.

19. Claimant provided testimony regarding the prior right shoulder injury that he reported to Ors. Fay and Dr. Olsen. Claimant testified that 18 or 19 years ago, he was working as a mechanic and he injured his right shoulder. This occurred when a vehicle transmission fell off a jack, and Claimant reached out to try to stop it. Claimant further testified that following that incident, his right shoulder symptoms completely resolved and he had no further issues until the autumn of 2022.

20. The ALJ credits Claimant's testimony regarding the nature of his job duties and the onset of his symptoms. The ALJ credits the medical records and the opinions of Dr. Fay over the contrary opinions of Dr. Olsen. The ALJ finds that Claimant has demonstrated that it is more likely than not that he suffered a right shoulder injury arising out of and in the course and scope of his employment with Employer. The ALJ further finds that an acute right shoulder injury occurred on November 2, 2022, when Claimant was lifting a tub of parts and felt immediate right shoulder pain, causing him to drop the tub. The ALJ finds that at that time, Claimant suffered an aggravation of his pre-existing right shoulder condition, resulting in the need for medical treatment.

21. The ALJ credits the medical records and finds that Claimant has successfully demonstrated that it is more likely than not that treatment of his right shoulder is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

22. The ALJ credits the medical records and Claimant's testimony and finds that after November 2, 2022, Claimant suffered a wage loss as the direct result of his work injury. Claimant's work restrictions prevented him from performing any job duties for Employer, which has resulted in a wage loss. The ALJ finds that Claimant has successfully demonstrated that he is entitled to temporary total disability (TTD) benefits beginning November 3, 2022 and ongoing until terminated by law.

23. On the issue of average weekly wage, the ALJ credits Claimant's testimony regarding his hours and earnings.

24. On the issue of whether Claimant is responsible for the termination of his employment, the ALJ credits the medical records and Claimant's testimony on this issue. The ALJ finds that Respondents have failed to demonstrate that it is more likely than not that Claimant is responsible for the termination of his employment. Claimant's employment ended when Employer had no work for him within his work restrictions. Employer's decision to terminate Claimant's employment in February 2023, (more than two months after the first assignment of work restrictions), constitutes a factor or circumstance outside of Claimant's control.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306,592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vicory; supra.*

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a

proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or prox;mately caused by the employment or working conditions. *Wal-Marl Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.$. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. Id. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. As found, Claimant has demonstrated, by a preponderance of the evidence, that on November 2, 2022, he suffered a work injury arising out of and in the course and scope of his employment with Employer. As found, on November 2, 2022, Claimant suffered an aggravation of his pre-existing right shoulder condition, resulting in the need for medical treatment. This aggravation occurred when Claimant was lifting a tub of parts and felt immediate right shoulder pain, causing him to drop the tub. As found, Claimant's testimony, the medical records, and the opinions of Dr. Fay are credible and persuasive on this issue.

8. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

9. As found, Claimant has demonstrated, by a preponderance of the evidence, that following November 2, 2022, treatment of his right shoulder is reasonable medical treatment, necessary to cure and relieve Claimant from the effects of the work injury. As found, the medical records are credible and persuasive on this issue.

10. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TT□ benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to

resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 P.2d 595 (Colo. App. 1998).

11. As found, Claimant has demonstrated, by a preponderance of the evidence, that following November 2, 2022 he suffered a wage loss as the result of the work injury. Therefore, Claimant has also demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning November 3, 2022, and ongoing until terminated by law. As found, the medical records and Claimant's testimony is credible and persuasive on this issue.

12. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food* & *Commercial Workers Local No.* 7, W.C. No. 4-240-475 (ICAO, May 7, 2007).

13. The ALJ credits Claimant's testimony and calculates that at the time of his work injury, Claimant's average weekly wage (AWW) was $769.50. The ALJ calculated the AWW as follows: with a 30 minute unpaid lunch, Claimant worked shifts of 9.5 hours, five days per week. This is a total of 45 hours each week. The first 40 hours were paid at the rate of $16.20 per hour (totalling $648.00 per week). The additional five hours of overtime would be paid at time and a half (or $24.30 per hour). Thus, Claimant received weekly overtime of $121.50. Therefore, his AWW is $648.00 plus $121.50, which is a total of $769.50.

14. Sections 8-42-105(4) and 8-42-103(1)(9), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 {Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing,* W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In

that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

15. As found, Respondents have failed to demonstrate, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment with Employer. As found, the medical records and Claimant's testimony are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable right shoulder injury on November 2, 2022.

2. Respondents shall pay for reasonable and necessary medical treatment of Claimant's right shoulder.

3. Respondents shall pay Claimant temporary total disability (TTD) benefits beginning November 3, 2022 and ongoing until terminated by law.

4. Claimant's AWW for this claim is $769.50.

5. All matters not determined here are reserved for future determination.

Dated August 22, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after

mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. In **addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured while performing services for pay by Employer.

II. Whether Respondent has proven by a preponderance of the evidence that Claimant was an independent contractor.

III. Whether Respondent has proven by a preponderance of the evidence that Claimant is subject to Sec. 8-40-302(4), C.R.S.

IF CLAIMANT WAS AN EMPLOYEE, THEN:

IV. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment with Employer on August 29, 2022.

IF CLAIMANT HAS PROVEN COMPENSABILITY, THEN:

V. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 29, 2022.

VI. Whether Claimant has proven what her average weekly wage was at the time of the incident in question.

VII. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 30, 2022 until terminated by law.

VIII. Respondents withdrew the issue of whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for her termination or responsible for her wage loss.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

Claimant's Testimony:

1. Claimant worked for Employer as a housekeeper in August of 2022 for approximately eight months. Her job primarily involved cleaning a very large mansion of over 50,000 square feet.

2. When she first started working at prior employer's mansion, there were three people cleaning. They would start at one end and continued during the following days until the house was completely clean and then would start all over again.

3. Claimant had worked with the prior employer approximately 19 years. The property was sold to Employer in December, 2021. Both the prior Estate Manager, N.M, and Claimant stayed on with Employer. The remaining housekeeping staff did not stay.

4. Claimant was paid every 28th of the month and a check would arrive at her house in the mail. She also received medical and dental insurance from Employer, and vacation for two weeks every year.

5. She identified the contract she had with Employer. That contract described her arrangement with Employer, which was an agreement that was adhered to during her employment with Employer, even after Mr. M.N., the prior Estate Manager, left in June, 2022.

6. Unlike the prior owner, the current owner lived in the mansion full time, and Claimant was by herself for a while, until they hired the second housekeeper. She did what she could, then they would assign Claimant on the top floor and the second housekeeper to the bottom level and vice versa, alternating them. She was working from 7:00 a.m. to 3:30 p.m. with a lunch break from 12:00 to 12:30 p.m. She had to punch a card in and out. When the current Estate Manager started, they gave her a key chain that they used to punch in, with a little camera. If she took even a couple minutes more than a half hour for lunch, that caused problems. The new Estate Manager instituted the new system so that they could keep track of her and her hours while she was on the premises. Her hours were established when she first worked for the prior property owner and that same scheduled was kept when she was hired by the new owner, Employer, with some modifications as to the cleaning schedule and areas. She worked 40 hours a week every week.

7. Claimant brought nothing with her to perform the job. Employer provided everything she needed to clean the premises of the property, including providing her with a cart, which was not something that she had used before working for Employer. She did not work for anyone else.

8. At the beginning, when Employer hired her, she was by herself. For a short time two other women went in to help clean the house once a week. Then Mr. M.N. asked Claimant if she knew someone that would come to work for Employer. She contact the second housekeeper through a friend and then that additional housekeeper started working with her full time.

9. Claimant knew the other housekeeper was paid differently as she did not get medical insurance, and her check would be a personal check every week. The other housekeeper did, however, work the same hours and days that Claimant did. The second housekeeper often car pooled with Claimant. Her co-worker was employed up through the time when Claimant was injured.

10. Claimant knew the job since she had been there for so long, but when Ms. K.M. started as the new Estate Manager in July 2022, she gave instructions on what and how she wanted things done. For example, Claimant had never used a maid's cart before but was instructed to use one. Then the new Estate Manager instituted other changes of how she required Claimant to clean and what areas to clean and when to clean them.

11. Claimant received a W-2 from the prior owner, but never received anything from Employer, neither a W-2 nor a 1099 for the year 2022. Claimant was never disciplined during her employment. No one complained to her about the work she performed.

12. Claimant never worked for anyone other than Employer and continued to be unable to work following her accident.

13. Other workers that had to clock in and out were the gardener and the handyman worker.

The injury:

14. On Monday, August 29, 2022 Claimant showed up at 7 a.m. She got her cart ready and went to the second floor.

15. Employer had purchased a popcorn machine that would make a mess all over the floor during the weekends. She went to first clean the theater lobby where the machine was, cleaning all the greasy machine parts. There was also construction happening in the little room. So the shelves, where there was glassware, were dusty. She got a ladder from an adjoining area. She cleaned the bottom two shelves first but could not reach the last shelf, so she went up two additional steps.

16. She did not know exactly what happened but she remembered falling off the ladder on her left knee. She rolled and attempted to get up. She could not and noticed that her knee was facing one way and her foot was facing the other way. She dragged herself from the little room out into the hallway on her bottom, propping herself against the hallway wall. She knew that the construction workers would be there soon because they needed to finish the work.

17. The painter arrived first. Claimant knew him and she called out to him. He ran to her and tried to help her up, saying that she had fallen but when Claimant told him she thought her leg was broken, he went to call an ambulance and Employer's wife. The EMTs arrived, gave her medication through an IV and took her to Parker Adventist Hospital.

18. Claimant was at the hospital for two days but they could not do the full surgery until the swelling went down. They placed some external rods on her knee.

19. She returned for the second surgery on September 8, 2022, when they placed two plates with six or seven screws into her knee area. Claimant has two scars. Both were approximately a 6 to 7 inches. One from the upper mid-calf through the knee on inner side of the leg. The second large scar was located on outer portion of the lower extremity through the knee including a large indention at the base with observable swelling and stippling. Both surgical scars are significant, keloid and disfiguring.

20. Claimant has been unable to return to work following her termination as she has not been able to walk well or bend her knee. For approximately six months she was

unable to put any weight on the leg and used a wheel chair that her children would help with. They also helped her with baths or showers. She started using a walker about six months after the last surgery, then progressed to a cane. The leg continues to get very swollen around the knee cap, especially when she walks greater than a block.

21. Dr. Fine performed the surgery and he sent her to physical therapy with Select Physical Therapy on Potomac. She has also had difficulty sleeping following the accident so Dr. Fine referred her to her personal care provider (PCP), Jennifer Olaf, M.D. at Strike Clinic in Aurora, to address the sleep problems. Dr. Olaf placed her on sleep medications. In addition, she had problems with controlling her glucose levels following the surgery, caused by the trauma of the injury, which was also handled by her PCP. She would see Dr. Olaf every two months. Dr. Fine provided her with restrictions but it had been some time since she had seen him because she was to complete her PT before returning to see him. As of the date of the hearing, she had another 10 sessions of PT to complete. She would attend PT twice a week.

22. All her medical care is being paid for by Medicaid because her health insurance stopped right after she was fired by Employer. The current Estate Manager, K.M., went to Claimant's house right after the accident to advise her that she was terminated because the current owner could not wait for her to heal, as they required immediate services, and she would be out too long.

Medical records:

23. Following the August 29, 2022 injury, Claimant was transported by ambulance to Parker Adventist Hospital. The paramedics (EMTs) were delayed in reaching the patient due to the gate to the property being locked. EMTs documented finding Claimant in the basement on the tile floor, leaning against the wall. Claimant reported that she worked on the property and was working when the accident happened. Claimant stated that she had been climbing on a step ladder and was about 4 feet off the ground, dusting a shelf, when she lost her balance, falling and hitting her knee on the tile floor. She had an obvious deformity of the left knee and lower leg below the knee cap. Claimant's pants were cut and the injury exposed. They administered an IV with Fentanyl. They splinted Claimant's left leg and secured her for transport to the ambulance. Claimant requested to be transported to Parker Adventist

24. On August 29, 2022, Samantha Mauck, M.D. documented that "The patient was at work, on a stepstool. She went to step down, and missed the step, falling and landing directly on a bent left knee. She did not strike her head. She immediately had severe pain in her knee and was unable to bear weight on it."

25. Seana L Benham, N.P. documented that:

> HLD who presented to the ED with Left leg pain after a fall from a ladder. Patient reports fall occurred this am while she was on a ladder trying to clean some bookshelves for her employer. She was on the same ladder the day before cleaning without any issues. This am when she got on the ladder; the side handles broke immediately throwing her forward while her knee was bent. She noted a deformity immediately and could not stand up. She scooted on the floor until she could get help.

26. They immediately ordered x-rays of the left knee and dosed Claimant with fentanyl, following which they ordered a CT of the knee and requested a consult from orthopedics. They also did multiple labs, which were abnormal, and an EKG. The records documented that Claimant was admitted with a left closed fracture of the tibial plateau after falling off of a ladder at work. They noted that she was a full time housekeeper at a "mansion." It was documented that Claimant was to go to the operating room.

27. The CT performed on August 29, 2022 showed:

> There is a comminuted proximal tibial plateau fracture. The fracture extends into the medial and lateral articular surfaces as well as the tibial spine. There is depression along the lateral tibial plateau articular surface by approximately 6 mm. Transversely oriented fracture extends into the tibial metaphysis. Sagittally oriented fracture extends distally into the tibial diaphysis. There is a nondisplaced fracture involving the anterior cortex of the proximal fibula.

There was also small joint effusion and surrounding soft tissue edema.

28. Dr. Landon R. Fine, the orthopedic surgical consultant, stated Claimant had a closed reduction with manipulation, external fixation and large joint aspiration evacuation hemarthrosis of the left knee on August 30, 2022. The preoperative diagnosis was a closed left bicondylar tibial plateau facture. He specifically noted that this was a staged procedure as the internal fixation could not be accomplished until the swelling and soft tissue recovered for the open reduction total fixation for definitive fixation.

29. Dr. Fine, documented that Claimant:

> …sustained a mechanical fall off a stepstool resulting in a left knee injury. Patient had swelling pain and inability to bear weight and as result was brought to the emergency department where imaging was taken demonstrating a bicondylar tibial plateau fracture that was complete displaced. Patient was initially treated in the knee immobilizer with ice and non-weightbearing. At the time of the consult the patient was in her hospital room she had pain that was 4 or 5 out of 10 that was relatively well controlled and tolerating the knee immobilizer. Patient swelling has progressed causing increasing pain but denies any loss of sensation motor function and states that pain is easily controllable at this time. This is patient's only injury or isolated injury.

30. During her hospital stay between August 29, 2022 and September 1, 2022 Lorette Johnson, M.D. at Centura Health documented that Claimant's glucose levels ranged from 186 to 382. The large majority of the voluminous medical records admitted into evidence involved discussion, monitoring and treatment of Claimant's trauma induced situational uncontrolled diabetes, development of sleep apnea and use of pain medications as well as a multitude of lab work up.

31. Claimant was also evaluated by physical therapy on September 1, 2022. Ms. Kristin M Jessen, PT, noted that Claimant was status post external fixation surgery and was to have an internal fixation surgery the following week. Claimant was demonstrating bed mobility, limited gait with a front wheel walker (FWW) and guard assist for stability and safety due to intermittent loss of balance with minimal assistance to steady. She noted Claimant was able to maintain non-weight bearing on the left lower extremity. She anticipated that Claimant would progress quickly post internal fixation and

recommended that Claimant be able to return home only with family support. She recommended a home health PT, a front wheel walker and a wheelchair.

32. Dr. Johnson used the AM-PAC (activity measure for post-acute care) to determine Claimant's mobility status and determined that, with assistance of family, she could be discharged safely so long as she did not use her FWW for distances greater than 50 ft.. He noted that she should use a wheel chair for most mobility requirements, with full non-weight bearing of the left lower extremity and continue to have an elevated leg. She was discharge with instructions, in addition to taking over the counter Tylenol and Motrin for pain, stool softeners and Miralax as well as reporting for surgery the following week.

33. On September 1, 2022 she was instructed to keep her left leg elevated as much as possible with a strict non-weight bearing restriction with the left leg by Dr. Johnson. The surgery was programed for September 6, 2022. The discharge note also documented the mechanism of injury. It stated as follows:

> [Claimant] is a 57 y.o. female who presented with a history of DM type II, HLD who presented to the ED with Left leg pain after a fall from a ladder. Patient reports fall occurred this am while she was on a ladder trying to clean some bookshelves for her employer. She was on the same ladder the day before cleaning without any issues. This am when she got on the ladder; the side handles broke immediately throwing her forward while her knee was bent. She noted a deformity immediately and could not stand up. She scooted on the floor until she could get help.

34. Claimant was admitted on September 7, 2022. Dr. Fine documented that Claimant was ready for surgical intervention. He discussed the risk and benefits as well as possible complications. He noted that swelling was still significant but believed that it was safe to proceed with the intervention. He recommended ice and elevation until they proceeded with the surgery.

35. The surgery was performed on September 8, 2022 for the external fixation removal and open reduction internal fixation of the bicondylar tibial plateau. Dr. Fine made a lateral side incision, lateral to the tibial plateau, allowing exposure to the fracture and after splitting through the iliotibial band, was able to expose the joint where the subtle meniscal arthrotomy was performed. He noted that the patient had a complex impacted lateral plateau fracture that required reopening the fracture site, tamping up the depressed segment of the joint, backfilling it and then securing the fracture. Claimant also had a displaced medial plateau fracture that was addressed elevating the meniscus with a tag stitch and completely separated from the rest of the bone, which allowed complete exposure of joint and the depressed middle lateral plateau segment. Dr. Fine secured multiple k wires to hold the joint. He placed the appropriate plates and secured with k wires and multiple screws including the locking screws. Following the procedure, he removed the external fixation. He obtained near anatomic reduction.

36. Films taken on September 8, 2022 showed at least nine or ten screws as well as two plates.

37. Victoria Franco, P.T. evaluated Claimant on November 22, 2022 noting Claimant had been referred to Select PT for treatment of the left lower extremity, status

post closed bicondylar fracture and surgical treatment with internal fixation. She noted that Claimant remained non-weight bearing since surgery and had a follow-up with Dr. Fine on December 5, 2022. She noted that Claimant fell off a ladder at work on August 29, 2022 from a height of approximately 4.5 feet. She noted that Claimant was a housekeeper and that she could not work at that time. She recommended treatment to reduce pain, improve balance, function, motor control, range of motion, strength, return to premorbid state and return to work. Ms. Franco noted that Claimant required skilled physical therapy to address the problems identified.

38. On December 27, 2022 Maeve Humphreys PT continued with therapeutic exercises, neuromuscular reeducation, manual therapy, gait training, self-care home management, electrical stimulation, heat/ice, traction, ultrasound, and dry needling.

Testimony of Prior Estate Manager, Mr. M.N:

39. Mr. M. N. is in financial services, was with the sheriff's department for 20 years and in addition was a real estate property manager. He had been a good friend of the prior owner of the property, and when the prior owner had decided to sell, he asked Mr. M.N. to manage the property in the interim. Mr. M.N. started working for the prior owner in approximately October, 2020. They had known each other for some time as his property was adjacent to the prior owner's property. His job was to deal with the real estate agent and prepare the property so that it would pass inspection. Both of the prior caretakers had decided to move and left the property around the October 2020 timeframe, so he started managing all aspects of the property, internally and externally. That encompassed managing the employees, including Claimant.

40. The property was sold to the current owner, Employer, on December 13, 2021. The property was a very large one of approximately 70 acres with an extremely large house that has approximately 58,000 square feet. It also had a separate large car barn that was two stories.

41. The current owner, Employer, also requested that Claimant stay on as a housekeeper.

42. Mr. M.N. continued on as the Estate Manager. He had a physical office in house, he managed all the vendors that came into the house, and managed Claimant. The housekeeper worked cleaning the house. Claimant had been there in the same capacity prior to the new owner, Employer, purchasing the property. The new owner asked that Claimant stay on because she knew the house. They then hired another woman that was also a housekeeper for a short period of time, a few months after Employer purchased the property. Mr. M.N. worked for Employer from the day he purchased the property on December 13, 2021 until June 7, 2022.

43. Both Claimant and the other housekeeper were expected to be on the job from 7:00 a.m. to 3:30 p.m. during the week, Monday through Friday. They each had a 30 minute lunch break in the middle of the day. They would clock in and out. At one point Employer upgraded the time clock.

44. Mr. M.N. was employed as contract labor, paid a flat rate and had no benefits. His situation was a little different than Claimant's. He was Claimant's immediate supervisor.

45. He had a conversation with Employer regarding what Claimant had been making in wages with the prior owner. He agreed to pay the same amount but he did not wish to deal with handling the day to day payroll taxes and withholdings. He decided that he would keep 25% of her wages and when he was to present her with her 1099 in January, he intended to also write Claimant a check for her so that she could pay her own taxes. Employer made the verbal agreement and a form was prepared but Employer simply declined to sign it as "he did not sign ANYTHING." Mr. M.N. authenticated the unsigned document identifying it as the document and agreement they had prepared and to which Employer agreed. Employer also paid for Claimant's insurance every single month as stated in the agreement. Mr. M.N. also wrote the checks from the household account for Claimant's premiums. At least through June 7, 2022, the document memorialized the agreement and was evidence that Claimant was an employee of Employer's.

46. Mr. M.N. stated that Claimant brought nothing to the job, in terms of supplies that were needed to perform the cleaning duties for the home. She did not bring any tools, mops, brooms, or other equipment. She was not required to wear a uniform while she was there. Neither was she free to come and go as she please. She was a salaried employee and was receiving a W-2 while she worked for the prior owner. Then Employer agreed to provide her with a 1099 because he did not want to get into paying for taxes. He stated that there should have been a clock in/out log. Both the prior and current owner insisted that Claimant clock in and out. The clock was in the laundry room first and was later moved into the small room where Claimant would take her breaks, right across from the laundry room. While he was the estate manager for Employer, Employer did not have any "official" W-2 employees. Claimant was not trained because she had already been trained as she had been there for 18 years, working 40 hours a week. He only knew Claimant to have worked for Employer.

47. Mr. M.N. terminated his arrangement with Employer because Employer became very difficult. He only spoke with the current Estate Manager, Ms. K.M. once and offered to be of any assistance needed for her transition.

Testimony of Current Estate Manager, Ms. K.M.:

48. Ms. K.M. worked for Employer as the Estate Manager since July 2022, for almost a year at the time of the hearing. She worked on site at Employer's property. She managed employees and vendors. She did hiring, training, termination, managed vendors and oversaw the assistant estate manager. She had a background in hotel management for a couple of hotels. She had since been working for private families, for the last 10 to 15 years.

49. She knew Claimant, who was providing housekeeping and cleaning for Employer. When Ms. K.M. started working for Employer, Claimant was already working for Employer. She denied that Claimant had set hours to work, but asserted Claimant had her own schedule. She also denied that Claimant clocked in or clocked out, though

agreed that both the landscaper and the handyman did, in fact, clock in and out. She denied that she provided Claimant with any instructions or training. She also denied that she was able to locate any personnel information of any individual that was working for Employer when she started her employment with Employer.

50. She stated that Claimant stopped providing any services for Employer the day she was hurt and denied that she had terminated Claimant. She was hurt and never returned to work for Employer. She did state that Employer no longer needed her services. She stated that as of November 2022 everyone working on the property was on payroll with W-2s. She was the one that implemented this change with Employer's permission. She never provided any tax information to Claimant.

51. Ms. K.M. stated that she never reprimanded Claimant and all supplies were provided by Employer. Claimant was not expected to bring any supplies or equipment to perform her work.

Wage information:

52. Claimant was issued checks in the amount of $3,769.00 on the 28th of each month, paid directly to Claimant in her own name. The checks were paid consistently from January 2022 through August of 2022.

53. The Employment Contract showed that Claimant was being paid $45,000.00 in an annual salary plus medical and dental insurance at the cost of $7,031.00 a year for a total of $52,031.00 per year. It noted that Employer would withhold 6,800.00 for taxes due from her 2022 income and would be paid on January 31, 2023 when she would be presented with a 1099. It also noted that Claimant was entitled to a two week vacation.

54. A monthly pay of $3,769.00 times twelve months is $45,228.00. When this is added to the $6,800.00 being withheld and the $7,031.00 in medical/dental benefits costs, it totals to a yearly income of $59,059.00, (not an income of $52,031.00 as noted in the agreement).

Ultimate Findings:

55. As found, Claimant has shown that she was performing services for Employer for pay. As found Claimant worked 40 hours a week, five days a week performing housekeeping duties and was an employee.

56. As found, Respondents have failed to show by a preponderance of the evidence that Claimant was an independent contractor. Claimant was under the control and direction of Employer at all times. Claimant did not have control of her schedule. She reported to work Monday through Friday at 7:00 a.m. and left work at approximately 3:30 p.m. each day. She would clock in and out and would only take a designated break each day. This is the reason the Estate Manager changed the clock-in system.

57. Claimant was not "customarily engaged in an independent trade or business." She had no business related to housekeeping activities for any other employer, and never performed similar services for anyone else. She worked exclusively

for employer, and had been cleaning the same mansion for over 19 years. Claimant's tasks for each day were dictated by Employer and there was no persuasive evidence Claimant had any control over the work assignments. Claimant credibly testified that under the prior employer, she knew the job and performed a scheduled cleaning. When hired by the new employer, the tasks, household cleaning schedule and order of cleaning the individual areas of the home were changed.

58. As further found, Employer paid Claimant a designated monthly salary, and additionally paid health and dental benefits. Further, Employer retained Claimant's taxes from her pay. As found, there was no persuasive evidence of any limitation on Employer's ability to terminate Claimant's services at will. In fact, when Claimant was injured, she was immediately terminated because Employer decided that they needed another housekeeper immediately and could not await Claimant's recovery. Further, Employer also terminated Claimant's health and medical benefits at that time as well. This was confirmed by the current Estate Manager. As found, the reason the current Estate Manager did not provide greater than minimal training was because Claimant had been cleaning the same mansion for approximately 19 years and was hired by Employer because of her intimate knowledge of how to clean and attend to the housekeeping duties of this particular mansion. As found, Employer provided all tools and cleaning supplies Claimant needed to complete her housekeeping work. Claimant did not bring anything to the mansion with which to complete her duties as a housekeeper.

59. As found, Claimant was expected to work daily, Monday through Friday from 7:00 a.m. to 3:30 p.m. each day. Claimant was credible and persuasive that this was her schedule and Employer required her to be at the mansion during these times. They installed and kept a timekeeping system to make sure that Claimant adhered to this schedule. As found, Employer paid Claimant personally and not in the name of any business. Employer never sent Claimant a 1099 or any other appropriate tax documentation consistent with being an independent contractor. Employer did not even send her a W-2 for 2022. Lastly, as found, Employer had no independent contractor agreements or similar documentation, consistent with the statutory requirements, to corroborate the assertion that Claimant and "all" Employer's employees were independent contractors. Claimant is found credible and persuasive over the contrary testimony of the current Estate Manager, Ms. K.M.

60. As found, Claimant was an employee not subject to the domestic worker exception. Claimant worked full time, 40 hours a week, five days a week. Respondents have failed to show that Claimant was subject to the domestic worker exception.

61. As found, Claimant was cleaning the theater room lobby area on August 29, 2022, when she climbed a step ladder to clean some glassware shelves and fell off the ladder, injuring her left lower extremity. Claimant was in the course and scope of her employment with Employer when the accident happened. Claimant has proven by a preponderance of the evidence that her claim is compensable.

62. As found, Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are authorized, reasonably necessary and related to the accident of August 29, 2022 and that she sustained disabling injuries to her left lower extremity that required surgical repair. Claimant was appropriately taken for emergent care to Parker Adventist Hospital by an ambulance service. These providers

are authorized, and the care she received was reasonably necessary and related to the injuries she sustained on August 29, 2022. Further, Claimant was treated by Dr. Fine, her orthopedic surgeon who referred her to her personal physician Dr. Olaf for sleep hygiene and control of her trauma induced uncontrolled diabetes as well as physical therapy, at Select Physical Therapy, who are found authorized, and the treatment that they and any other providers within the chain of referral provided was reasonably necessary and related to the injury.

63. As found, Claimant has proven that her average weekly wage is $1,135.75,[1] including the cost of medical and dental benefits, at the time of the work related August 29, 2022 injury.

64. As found, Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 30, 2022 until terminated by law. This is based on the fact that she was hospitalized and underwent surgeries on August 30, 2022 and September 8, 2022. Following this she was non-weight bearing for an extended period. The last records submitted noted that Claimant continued to have limitations and required assistance of family members to carry out activities of daily living. This is also confirmed by Claimant who stated that she continued to be unable to return to work.

65. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is

[1] Wages were calculated as the total earnings of $59,059.00 divided by 52 weeks.

not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Services for Pay:

Section 8-40-202(2)(a) provides that "any individual who performs services for pay for another shall be deemed to be an employee . . . unless such individual is free from control and direction in the performance of the service . . . [and] is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." The claimant has the initial burden to prove they suffered an injury while performing services for another for pay. If the claimant carries that burden, the burden shifts to the employer to prove the claimant was an independent contractor. *Cordova v. Artistry Drywall*, W.C. No. 4-653-327 (April 10, 2006). As found, Claimant has shown that she was not free from her Employer's control and direction. Claimant reported to work each day, Monday through Friday from 7:00 a.m. to 3:30 p.m., taking only those breaks that she was allowed and performing the services her Employer dictated in the manner that they dictated. Claimant has shown that she was deemed an employee under the circumstances in this matter pursuant to the statutory definition.

C. Employee vs. Independent Contractor

The Act creates a balancing test to overcome the statutory presumption of employment and establish independence. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998). Section 8-40-202(2)(b)(II) sets forth several factors the General Assembly considers particularly "important" in distinguishing employees from independent contractors. *Industrial Claim Appeals Office v. Softrock Geological Services Inc*., 325 P.3d 560, 565 (Colo. 2014). No single factor is dispositive, and the determination must be based on the totality of evidence. *Id*.

After considering the totality of circumstances, including the factors enumerated in Sec. 8-40-202(2)(b)(II), the ALJ concludes Claimant was an employee at the time of her accident. Some of the most significant factors are: (1) Claimant was not "customarily engaged in an independent trade or business." She had no business related to housekeeping activities for any other employer, and never performed similar services for anyone else. She worked exclusively for employer cleaning the same mansion for over 19 years. (2) Claimant's tasks for each day were dictated by Employer and there was no persuasive evidence Claimant had any control over the work assignments. Claimant credibly testified that under the prior employer, she knew the job and performed a scheduled cleaning. When hired by the new employer, the tasks, household cleaning schedule and order of cleaning the individual areas of the home were changed. (3) Employer paid Claimant a designated monthly salary, which included health and dental benefits. And Employer retained Claimant's taxes from her pay. (4) There was no persuasive evidence of any limitation on Employer's ability to terminate Claimant's services at will. In fact, when Claimant was injured, she was immediately terminated because Employer decided that they needed another housekeeper immediately and could not await Claimant's recovery. Further, Employer also terminated Claimant's health and medical benefits at that time. This was confirmed by the current Estate Manager. (5) The reason the current Estate Manager did not provide greater than minimal training was because Claimant had been cleaning the same mansion for approximately 19 years and was hired by Employer because of her intimate knowledge of how to clean and attend to the housekeeping duties of this particular mansion. (6) Employer provided all tools and cleaning supplies Claimant needed to complete her housekeeping work. Claimant did not bring anything to the mansion with which to complete her duties as a housekeeper. (7) Claimant was expected to work daily from Monday through Friday from 7:00 a.m. to 3:30 p.m. each day. Claimant was credible and persuasive that this was her schedule and Employer required her to be at the mansion at this time. They installed and kept a timekeeping system to make sure that Claimant adhered to this schedule. (8) Employer paid Claimant personally and not in the name of any business. Employer never sent Claimant a 1099 or other appropriate tax documentation consistent with being an independent contractor. He did not even send her a W-2 for 2022. (9) Employer had no independent contractor agreements or similar documentation to corroborate the assertion that Claimant and "all" its employees were independent contractors at the time of the injury. The only documentation was the draft agreement where Claimant was to be paid a certain amount a month, was entitled to vacation and medical benefits and that the amount for her taxes would be withheld, all of which points to Claimant being an employee, not an independent contractor.

Claimant was not "contracted" to perform any specific job or series of jobs but was hired on an open-ended basis to perform whatever tasks Employer designated, in this

case, the cleaning of a home that was approximately 58,000 square feet. In the estimation of this ALJ this kind of home is equivalent to a small hotel or a large size bed and breakfast. Claimant reported to work at Employer's mansion with no prior negotiations about cost or the scope of work and was paid a designated salary for the work she was assigned. This arrangement was far more akin to an employer-employee relationship than an independent contractor situation.

Employer was clearly motivated to avoid the regular payment of payroll taxes, and other requirements associated with having employees and despite that, Employer continued to pay for Claimant's continuing costs of medical and dental insurance. Employer specifically retained a portion of Claimant's salary for the sole purpose of paying for taxes at the end of the year. While Employer may have intended to provide those retained wages to Claimant so that Claimant could make the payment, there was no indication that Employer made that payment in January 2023 for the 2022 year. The parties' mutual willingness to avoid payroll taxes and other employment-related obligations is not dispositive of whether Claimant was, in fact, an independent contractor. The preponderance of persuasive evidence shows Claimant was Employer's "employee" working as a housekeeper, cleaning this vast mansion on a daily basis. As found, Claimant was an employee not an independent contractor.

D. Domestic Worker:

Section 8-40-302(4) provides that the Workers' Compensation Act is:

> … not intended to apply to employers of persons who do domestic work … or similar work about the private home of the employer if such employers have no other employees subject to ... [the Workers' Compensation Act] and if such employments are not within the course of the trade, business, or profession of said employers. This exemption shall not apply to such employers if the persons who perform the work are regularly employed by such employers on a full-time basis. For purposes of this subsection (4), 'full-time' means work performed for forty hours or more a week or on five days or more a week.

"Domestic work" is not defined in the Act. *Connor v. Zelaski*, 839 P.2d 501 (Colo. App. 1992). The Act provides that the Act is not intended to apply to "employers of persons who do domestic work," if such an employer has no other employees and if the employment is not within the course of the trade, business, or profession of the employers. This limitation upon the scope of the term does not apply, however, if the domestic worker is employed "on a full-time basis." And, for this purpose, a "full-time" worker is one who performs services "for forty hours or more a week or on five days a week." Thus, an employer who employs a domestic worker for 40 or more hours or five or more days per week must secure disability compensation for those workers, while an employer of a domestic worker less regularly employed need not do so. *Naiden v. Epps*, 867 P.2d 215 (Colo. App. 1993)

The characterization of the employment relationship depends on the particular facts of the case and is a question of fact for resolution by the AL J. *Kalmon v. Industrial Commission,* 583 P.2d 946 (Colo. App. 1978). *Victoria Roop v I.C.A.O*, WC No. 4-384-408 (November 9, 1999). Further, where the evidence is subject to conflicting inferences, it is the ALJ's sole province to determine the inference to be drawn. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). As found, Claimant was clearly

hired as an employee to work full time, starting each day at 7:00 a.m. and ending at 3:30 p.m., Monday through Friday. She was allotted two weeks' vacation each week and provided medical and dental insurance. She was also not the only employee as another housekeeper was working and was paid each week and had to clock in and clock out. Other workers that also had to do this were the gardener and the handyman. Because Claimant was a full time employee, she does not fall within the exception of Sec. 8-40-302(4), C.R.S. as a domestic worker.

E. Compensability:

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

To establish a compensable injury an employee must prove by a preponderance of the evidence that her injury arose out of the course and scope of employment with her employer. Sec. 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989).

The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

As found, from the totally of the credible and persuasive evidence presented at hearing, Claimant has proven by a preponderance of the evidence that she was at work when she fell from the ladder on August 29, 2022 and injured her left lower extremity. Claimant was in the performance of her housekeeping duties when she used the ladder to reach the last shelf of glassware to remove the dust caused by the construction work. Claimant had immediate onset of pain to the extent that she could not get up and had to drag herself into the hall to await someone to rescue her. Her co-worker, a painter, called 911. An ambulance arrived and EMTs assessed that she had a broken knee and splinted

her left leg, and administered pain medication before taking her to the hospital. All these facts and events amount to sufficient proof and nexus that Claimant was injured in the course and scope of her employment, and that it was more likely than not that the fall onto her left lower extremity caused her need for benefits. Claimant has shown that the claim is compensable.

F. Medical Benefits:

Once a claimant has established the compensable nature of her work injury, she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant required immediate attention, which she received. First, by ambulance staff then hospital staff and lastly care to cure and relieve her of the severe injury to her lower extremity that caused the need for two surgeries and rehabilitation, and included loss of sleep and trauma induced uncontrolled diabetes. Claimant has proven that it was more likely than not that the need for medical care was caused by the August 29, 2022 accident while working for Employer. As found, the ambulance provider, Parker Adventist, Dr. Fine, Dr. Olaf and any providers within the chain of referral were authorized, and the care reasonably necessary and related to the August 29, 2022 work injury.

G. Average Weekly Wage:

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW

in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007); *Campbell v. IBM Corp*., *supra*. As found, the cumulative evidence shows that Claimant's fair computation of her average weekly wage is $1,135.75, which includes the cost of medical benefits and is based on the persuasive and credible evidence presented in the contract of hire as verified by the prior Estate Manager's testimony, the check stubs and Claimant's testimony.

H. Temporary Disability Benefits:

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sec. 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Sec. 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic, supra*, at 833.

As found, Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 30, 2022 until terminated by law. This is based on the fact that she was hospitalized and underwent surgery on August 30, 2022. Following this she was non-weight bearing for an extended period. The last records submitted noted that Claimant continued to have limitations and required assistance of family members to carry out activities of daily living. This is also supported by Claimant's credible testimony that she continued to be unable to work.

From August 30, 2022 through the day of the hearing of June 6, 2023, at the rate of $757.17 per week, Claimant was owed $30,394.97. Pursuant to the statutory interest

mandated by Sec. 8-43-410(2), C.R.S., Claimant is owed interest on all benefits that were not paid when due. Interest was calculated on the Division's benefits calculator as follows:

[Redacted as interest rate calcuator including claimant's name, hereinafter RI]

As found, Claimant was owed a total of $31,300.99 through the date of the hearing of June 6, 2023 and continues to be owed benefits until terminated by law, including interest on benefits that were not paid when due.

Respondents shall continue to pay TTD until terminated by law and interest on benefits not paid when due.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has established, by a preponderance of the evidence, that she sustained a compensable injury to her left lower extremity including the sequelae of sleep disorder and situational trauma induced uncontrolled diabetes, on August 29, 2022.

2. Respondent is liable for Claimant's treatment with the ambulance provider, Parker Adventist, Dr. Fine and Dr. Olaf, and all treatment based upon referrals therefrom, including but not limited to her care/surgery with Dr. Fine and Select Physical Therapy.

3. Claimant's average weekly wage is $1,135.75 and her temporary disability rate is $757.17.

4. Respondents shall pay temporary total disability benefits beginning August 30, 2022 and ongoing until terminated according to law at the rate of $757.17 per week.

5. Employer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. Respondents shall pay past due benefits, which includes interest, through the hearing of June 6, 2023 in the amount of $31,300.99. TTD benefits shall continue thereafter until terminated by law and interest shall continue for all benefits not paid when due.

7. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see

section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 24th day of August, 2023.

Digital Signature

By: _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant established by a preponderance of the evidence that ketamine infusions and a trial spinal cord stimulator recommended by Vanston Masri, M.D., are deemed authorized by operation of law for Respondents' failure to comply with W.C.R.P. 16-7-1.

2. Whether Claimant established by a preponderance of the evidence that ketamine infusions and a trial spinal cord stimulator recommended by Dr. Masri are reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant sustained an admitted left hip injury on June 10, 2020 arising out of the course of her employment with Employer. (Ex. 3).

2. Claimant reported progressive hip and groin pain, and underwent left hip arthroscopy and labral reconstruction surgery on September 1, 2020 performed by Brian White, M.D. (Ex. 20). Following surgery, Claimant developed pain in the left leg extending to her foot and ankle, numbness and paresthesias in the left foot and ankle, and difficulties with dorsiflexion and plantar flexion of the left foot (*i.e.*, foot drop). Post-surgically, Claimant also developed a deep vein thrombosis, which required anticoagulant therapy.

3. On October 9, 2020, Dr. White opined that her symptoms sounded like a early form of chronic regional pain syndrome (CRPS), and recommended Claimant see Haley Burke, M.D. to evaluate Claimant for potential CRPS. (Ex. C).

4. Claimant saw Dr. Burke on October 21, 2020. Dr. Burke found Claimant's symptoms "suggestive of a CRPS-type picture however are somewhat atypical given the degree of weakness that she is endorsing along with the severe and acute nature of her symptoms." Dr. Burke prescribed medications, including Nucynta, which Claimant reported as reducing her pain. In November 2020, Dr. Burke referred Claimant for an EMG study of her left leg which demonstrated a severe neuropathy of the left peroneal nerve. (Ex. D & E).

5. On December 10, 2020, Dr. Burke indicated that if Claimant's symptoms had not improved, she would consider autonomic testing for CRPS. Dr. Burke also recommended MRIs of Claimant's left knee and ankle. (Ex. D). The MRIs were performed on January 5, 2021, and were interpreted as suggesting swelling in or around the peroneal nerve. (Ex. D).

6. Although autonomic testing was not performed, Dr. Burke diagnosed Claimant with CRPS Type I of the left lower extremity on January 13, 2021[1]. She also noted that it did not appear that Claimant's symptoms were the result of her September 1, 2020 hip surgery, and discussed performing a peroneal nerve steroid injection to address the swelling. (Ex. D).

7. By February 10, 2021, Claimant reported to Dr. Burke experiencing constant dull aching in the dorsal foot, ankle, and calf, reporting her pain at a level of 2/10 to 4/10. Claimant also reported substantial improvement in her pain levels, and gradual improvement in strength and motion of her foot. Dr. Burke indicated she was uncertain how Claimant's peroneal nerve inflammation began. (Ex. D).

8. In March 2021, Dr. Burke noted that Claimant's severe pain had resolved, but she continued to have pain in the knee and ankle, numbness in the left lateral knee radiating to the shin, and mild improvement in her foot drop. Dr. Burke felt a steroid injection would not likely be successful, given the amount of time Claimant's symptoms had persisted, and recommended an amniotic allograft to treat the peroneal nerve. Authorization for the recommended allograft was denied, and the treatment was not pursued. (Ex. D).

9. On June 10, 2021, Dr. Burke indicated Claimant's left knee pain and foot drop persisted. She noted mild cyanosis (discoloration) of the left foot, and diaphoresis between the toes with an "icy foot and ankle." She indicated that Claimant was a suitable candidate for a lumbar sympathetic block and superficial peroneal block. (Ex. D).

10. On July 27, 2021, Claimant saw Lynn Parry, M.D., a neurologist for an independent medical examination (IME) (apparently at Claimant's request). Dr. Parry diagnosed Claimant with CRPS Type II, and noted that it can have all the same autonomic characteristics as CRPS Type I, such as changes skin color and temperature. Dr. Parry further opined that Claimant did not have CRPS Type I, because she did not demonstrate characteristic findings and had a significantly abnormal EMG which accounted for her paresthesias, pain, weakness, and sensory loss. Based on this, Dr. Parry opined that Claimant did not require testing for CRPS Type I, because the CRPS Type II diagnosis was "clear." (Ex. 11).

11. On August 31, 2021 and September 21, 2021, Dr. Burke performed lumbar sympathetic nerve blocks and a superficial peroneal nerve block. (Ex. 9). At her follow up appointment on October 5, 2021, Claimant reported at least a 60% improvement in pain, and continued ankle weakness, but an improved ability to walk since the injections.

[1] Two types of CRPS exist. CRPS I is "a syndrome that usually develops after an initiating noxious event, is not limited to the distribution of a single peripheral nerve, and appears to be disproportionate to the inciting event." WCRP 17, Ex. 7, § C. CRPS II "is the presence of burning pain, allodynia, and hyperpathia usually in the hand or foot after partial injury to a nerve or one of its major branches. Pain is within the distribution of the damaged nerve but not generally confined to a single nerve." *Id*.

Claimant reported her pain was “almost non-existent” at a level of 0.5/10. Dr. Burke indicated if Claimant’s symptoms regressed, a third block may be considered. (Ex. 9).

12. Claimant returned to Dr. Burke on December 28, 2021, reporting that she had continued numbness in the foot, “some days without pain” in her left leg, and other days she had spasms in her foot and ankle. Claimant’s current pain was 1.5/10 up to 4/10 on a “bad day.” Claimant reported being unable to stand, walk or sit for more than one hour, and reported substantially worsened symptoms with any activity level. For reasons that were not explained, Claimant did not pursue a third sympathetic block. (Ex. D).

13. In March 2022, Claimant was referred to neurosurgeon Giancarlo Barolat, M.D., for evaluation of other pain management options. Claimant reported a pain level of 3/10 up to 10/10. Dr. Barolat noted that Claimant had gone through extensive treatment, which had not provided lasting relief of her symptoms, and opined that Claimant was an appropriate candidate for a trial spinal cord stimulator and ketamine infusions, and referred Claimant to Vanston Masri, M.D., for evaluation and consideration of these approaches. (Ex. G).

14. Claimant saw Dr. Masri on May 2, 2022, and has not seen him since. Dr. Masri was admitted as expert in anesthesiology and pain management and testified by deposition in lieu of live testimony. Dr. Masri testified he saw the Claimant one time, and that his exam of the Claimant was consistent with CRPS. He testified he recommended ketamine infusions and neuromodulation because Claimant had failed conservative treatment, including physical therapy,[2] rehabilitation, medication management and sympathetic blocks. He described neuromodulation as “first-line treatment” for individuals with refractory CRPS. He indicated it was atypical to prescribe ketamine infusions, and that he typically recommended ketamine infusions for patients who had failed other aspects of CRPS treatment. He testified that ketamine is sometimes used in conjunction with neuromodulation, and at times is used to address ongoing symptoms that exist once neuromodulation is in place. He further testified that in some patients, neuromodulation alone may provide sufficient relief of CRPS symptoms. Dr. Masri testified that patients with 3/10 pain levels can benefit from neurostimulation.

15. When Dr. Masri examined Claimant in May 2022, he recommended that Claimant undergo neuromodulation, but did not specify the specific type. (Ex. H). He later recommended and requested authorization for a spinal cord stimulator, rather than a peripheral stimulator, because that was the approach the Claimant chose. He opined that differentiation between CRPS type I and type II is not necessary because his treatment recommendations would remain the same.

16. On August 29, 2022, Dr. Masri faxed a request for authorization to Insurer seeking authorization of a spinal cord stimulator and ketamine infusions. The request for authorization was faxed to Insurer, and attached medical records in support of the request. (Ex. 4 & 10). Insurer did not respond to the request for authorization until January

[2] From September 2020 through October 2021, Claimant underwent approximately one year of physical therapy with Panther Physical Therapy for treatment of both her hip pain and the pain in her left distal leg. (Ex. 16).

20, 2023. At that point Insurer, through counsel, notified Dr. Masri that the request for authorization of a spinal cord stimulator and ketamine infusions had been received, and that the request was "not a properly formatted request" under the WCRP, without further explanation. Insurer indicated an IME was pending with Barton Goldman, M.D., and that the results of the IME would be forwarded to him, regarding whether authorization would be granted or denied. (Ex. 5). Dr. Masri testified he did not receive Dr. Goldman's IME report until his June 21, 2023 deposition.

17. On October 25, 2022, Dr. Parry, M.D., reexamined Claimant in follow up to her prior IME. Dr. Parry noted that Claimant's examination was similar to her July 2021 examination, with some improvement in her foot drop. She noted that Claimant had not done well on a variety of medications, and had a limited response to sympathetic and peroneal nerve blocks. She opined that Claimant has a chronic pain syndrome not likely to respond to sympathetic blocks. Dr. Parry opined that Claimant is a candidate for a trial of spinal cord stimulation, and that it is unlikely that ketamine injections would provide long-term relief. She also indicated Claimant's long-term treatment may include management on Nucynta, and long-term access to physical therapy. (Ex. 11)..

18. In January 2023, Dr. Goldman performed an IME of Claimant at Respondents' request. Dr. Goldman issued a report dated February 27, 2023 (Ex. A), and testified at hearing. Dr. Goldman was admitted as an expert in physical medicine and rehabilitation. Based on his examination of Claimant and review of medical records, Dr. Goldman opined that Claimant meets the diagnostic criteria for a partially sympathetically mediated left lower limb CRPS Type II, associated with a chronic common peroneal neuropathy which may or may not meet criteria for CRPS Type I . He agreed the diagnosis is causally-related to Claimant's June 10, 2020 work injury, and that Claimant had not yet reached maximum medical improvement. Dr. Goldman opined that further diagnostic work up is needed to determine Claimant's appropriate treatment option for her work-related conditions. (Ex. A).

19. Dr. Goldman addressed the reasonableness and necessity of the proposed treatment at issue (*i.e.*, ketamine infusions and spinal cord stimulator ("SCS")). He opined that ketamine infusions are considered experimental and not recommended as a preliminary treatment for CRPS, and that there is not good data showing significant effectiveness of ketamine for chronic pain.. Thus, he opined that ketamine infusion is not reasonable or necessary. In Dr. Goldman's opinion, the simultaneous use of ketamine infusions and an SCS is also not reasonable because the use of ketamine would make it difficult to determine the effectiveness of the SCS, because the source of any symptom relief could not be differentiated.

20. Dr. Goldman explained there are several types of neuromodulation, including SCS and peripheral nerve stimulation. With respect to an SCS. Dr. Goldman opined that a trial SCS is not reasonable treatment of Claimant's condition for several reasons. Dr. Goldman testified that SCS is a broader type of neuromodulation that may be less effective for CRPS affecting a limb, as in Claimant's case. He opined that a trial SCS would be premature because Claimant's diagnosis has not been sufficiently defined. He indicated that with peripheral common peroneal neuralgia and/or CRPS Type II, Claimant has a

potentially better prognosis through peripheral nerve stimulation than SCS, and believes Claimant should undergo additional testing to confirm the diagnosis and identify an appropriate pathway for treatment. Dr. Goldman also recommends that Claimant's symptoms be managed through medication, including Nucynta, gabapentin, ibuprofen, and acetaminophen.

21. Dr. Goldman opined that neuromodulation is likely to be of limited benefit to Claimant. He testified that with neuromodulation, most patients do not achieve complete pain relief, and that the best results typically achieved are to reduce pain to a level of 4/10. Claimant has consistently reported her pain levels at approximately 2-4/10. Because Claimant's existing baseline pain levels are at or below those levels, he does not anticipate that the use of neuromodulation would improve Claimant's condition. He also opined that neuromodulation carries a risk of worsening Claimant's CRPS symptoms in the left leg.

22. Claimant testified at hearing that she has not yet received a spinal cord stimulator or ketamine infusions. Claimant has resided in Texas since April 2023. She has not seen a physician in Texas for her work-related injuries. Claimant has difficulty traveling and has not returned to Colorado for further evaluations, although Respondents have apparently requested she do so.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d

684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL BENEFITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

"Authorization" and Compliance with WCRP 16

Claimant contends that Respondents failed to timely deny Dr. Masri's August 29, 2022 request for authorization, and thus the ketamine infusions and trial spinal cord stimulator are "authorized" by operation of WCRP 16-7 (E). WCRP 16-7(B) provides that a payer denying a request for prior authorization must do so within seven business days of the completed request. WCRP 16-7 (E) provides "Failure of the payer to timely comply in full with section 16-7(A), (B), or (C) shall be deemed authorization for payment of the requested treatment unless the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding set forth in section 16-7 (B)."

"'Authorization' and the reasonableness of treatment are separate and distinct issues. *Repp v. Prowers Med. Center*, W.C. No. 4-530-649 (ICAO Sep. 12, 2005), *citing One Hour Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501* (Colo. App. 1995). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense, and not the particular treatment provided. *Popke v. Indus. Claim Appeals Office*, 797 P.2d 677 (Colo. App. 1997); s*ee also*, *One Hour Cleaners*, 914 P.2d at 504 ("authorized medical benefits" refers to legal authority of provider to deliver care). Treatment provided by an "authorized treating physician" is "authorized." *Bray v. Hayden*

School Dist. RE-1, W.C. No. 4-418-310 (ICAO Apr. 11, 2000). "However, treatment is not compensable unless it is also 'reasonable and necessary' to cure or relieve the effects of the industrial injury." *Id*.

Dr. Masri submitted a request for authorization on August 29, 2023. Insurer did not respond to the request until January 30, 2023, well outside the time for response under WCRP 16-7. Contrary to Claimant's position, however, a respondent's failure to timely deny authorization of treatment under WCRP 16 does not render treatment that has not yet been provided compensable. Instead, a respondent's default under Rule 16 only requires them to provide the treatment until the issue is resolved by an administrative law judge following a hearing. *See Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (ICAO May 10, 2007). Although Dr. Masri sought authorization of the ketamine infusions and trial spinal cord stimulator in August 2022, the treatment has not been provided, and Respondents are entitled to challenge the reasonableness, necessity, and relatedness of the proposed treatment. Accordingly, Respondents' compliance or non-compliance with Rule 16, and whether Dr. Masri's request was "not properly formatted," (as Respondents argue) are moot issues.

Neuromodulation (Spinal Cord Stimulator)

Claimant has established by a preponderance of the evidence that neuromodulation is reasonable and necessary to cure or relieve the effects of her industrial injury.

The evidence establishes that Claimant meets the diagnostic criteria for CRPS Type II. Whether Claimant also has CRPS Type I is undetermined. Claimant has undergone extensive treatment to address her symptoms, including multiple sympathetic blocks, physical therapy, and medication management. Although Claimant has had moderate improvement in her symptoms, they have not resolved and continued to affect her function.

Although Dr. Goldman's testimony was credible, his primary opinion is that Claimant's condition should be further investigated and treated with alternative modalities before pursuing neuromodulation. He also opined that it has not yet been determined whether Claimant would benefit more from SCS or peripheral nerve stimulation. In contrast, Dr. Parry opined that Claimant does not require further evaluation because her diagnosis is clearly defined, and opined that Claimant was an appropriate candidate for SCS. Additionally, Dr. Barolat opined that Claimant was an appropriate candidate for SCS. Dr. Masri testified that he considered both options and elected to request authorization for SCS, based on the Claimant's election to pursue that course of treatment. He further opined that his treatment recommendation would not be different if Claimant had CRPS Type I versus Type II. Given the extensive treatment Claimant has already undergone, the lack of significant improvement or resolution of her CRPS symptoms, and the fact that her EMG demonstrated a peroneal nerve injury, the ALJ finds persuasive Dr. Parry's opinion that Claimant does not require further testing. Based on the totality of the evidence, the ALJ finds it more likely than not that a trial of neuromodulation is reasonable and necessary to cure or relieve the effects of Claimant's

industrial injury. Whether Claimant receives a spinal cord stimulator or peripheral nerve stimulation is a medical decision for Claimant's authorized treating physicians.

Ketamine infusions

Claimant has failed to establish by a preponderance of the evidence that ketamine infusions are reasonable and necessary to cure or relieve the effects of her industrial injury.

The ALJ finds persuasive the opinions of Dr. Parry and Dr. Goldman that ketamine infusion is not a reasonable or necessary treatment for Claimant's condition. Dr. Goldman credibly opined that ketamine is considered experimental, not recommended as a preliminary treatment for CRPS, and that there is not good data showing significant effectiveness of ketamine for chronic pain. Similarly, Dr. Parry opined that ketamine was not likely to provide long-lasting relief for Claimant's condition.

Dr. Masri's testimony regarding the rationale for his recommendation of ketamine was not persuasive. He testified he requested authorization of ketamine because Claimant elected to pursue that course of treatment, and that it can be used in conjunction with neuromodulation, but otherwise offered no cogent medical basis for using both treatments in Claimant's case at this time. The ALJ also finds persuasive Dr. Goldman's testimony that concurrent use of ketamine and neuromodulation is not appropriate (at least in the trial stage) because one cannot assess the effectiveness of neuromodulation. Dr. Masri's testimony that ketamine is atypical, and that neuromodulation may, by itself, resolve Claimant's symptoms raises doubt as the need to treat Claimant with both modalities simultaneously. Based on the totality of the evidence, ketamine infusions are neither reasonable nor necessary at this time.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of neuromodulation is granted.

2. Claimant's request for authorization of ketamine infusions is denied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 24, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence that she was injured in the course and scope of her employment with Employer on December 20, 2022.

IF CLAIMANT HAS PROVEN COMPENSABILITY, THEN:

II. Whether has proven by a preponderance of the evidence that she is entitled to medical benefits that are reasonably necessary and related to the injury.

III. Whether Claimant has shown what her average weekly wage is.

IV. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits beginning December 2022 until terminated by law.

IF CLAIMANT IS ENTITLED TO TTD, THEN:

V. Whether Claimant has shown that she is entitled to reinstatement of leave.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant has worked for Employer from August 1, 2001, to the present. She has held her current role with Employer as a Corrections Case Manager I from November 1, 2008, to the present. This job is primarily a sedentary, office job, meeting with offenders. Recently, due to staffing shortage problems, she has had to do other post position duties that included going up and down stairs, especially during a shakedown of the prison. Claimant testified that her knee started getting sore and became a problem after having to do stairs repeatedly, as well as standing, crouching, and walking, which caused her to start limping. She self-treated with Ibuprofen two to three times a day, applied ice and would rest but the right knee pain did not abate.

2. On December 12, 2022 she was working in the control center, which was reached by going up stairs that were steep, with worsening symptoms, including pain and stiffness. Then, while walking into the building on December 20, 2022, the pain increased while walking over the uneven surfaces of the parking lot, including the snow on the ground. Claimant notified her supervisor on December 20, 2022 that she was having symptoms, which by the end of the day, became more of a problem.

3. On December 21, 2022 Claimant completed the paperwork to report a right knee injury to Employer and to seek medical attention. She first consulted with the Triage Nurse as instructed, who referred her to the Banner Health Clinic in Brush, CO.

4. Claimant indicated that she had experienced stiffness and gradual pain in her knee for the past two months, and the pain had worsened by the date that she reported it. Claimant was unable to pinpoint an exact day that the pain had started but that it was gradual, and increasing as she was required to go up and down stairs multiple times a day, including walking and standing. Claimant stated that no slipping, falling, or any other specific event caused the onset of symptoms.

5. Claimant denied she had any problems with her knee prior to October 20-22 and had no medical treatment for the right knee prior to being seen after she reported a work injury.

6. Outside of work, Claimant engages in activities such as walking, yard work, gardening, camping, fishing, and reading. She would bend, walk and do stairs on an occasional basis and only did standing on an occasional basis.

7. Claimant also assists her partner, who is disabled, on a daily basis. Her tasks include assistance with bathing and hygiene, food preparation, laundry, transportation to appointments, and lifting a light walker that also serves as a chair for her partner to rest from walking.

8. The X-rays from December 21, 2022 showed mild medial compartment and mild to moderate patellofemoral compartment degenerative changes with no acute fracture, lesion, erosion, or periostitis or significant joint effusion. Dr. Samuel Fuller noted there was no evidence of acute radiographic abnormality.

9. The Banner Health Hospital-East Morgan Physician Report of Workers' Compensation Injury of January 5, 2023 issued by Mr. Reiss noted Claimant had right knee pain, was prescribed physical therapy and pain medication. She was also provided with restrictions that included 25 lbs. lifting, carrying, pushing/pulling, standing up to six hours a day but no more than 30 minutes at a time, no stairs, and should be allowed to sit and stand as needed.

10. Ryan S. Reiss, NP documented on January 6, 2023 a history of present illness as follows:

> Patient states that pain in the right knee kind of built up over time. There was no direct fall or twisting mechanism of injury. Patient states her right knee just slowly became stiff as her duties at work changed. Patient for years has had a desk position at local correctional facility. However recently has been required to ambulate more through the jail. Going up and down stairs walking on concrete floors. Over a week or so. Patient eventually could not make it up the stairs. Does not recall any direct date of the injury occurred on but patient believes injury started around December 20, 2022.

11. The State denied liability for this claim on January 11, 2023. Employer's third-party administrator (TPA) advised that all conservative treatment would be paid for through the date of denial, including mileage reimbursement to and from medically related appointments.

12. Claimant continued to receive full time pay since the date of injury, as she used a combination of sick leave, vacation time, and FMLA benefits anytime she had to miss work for medical appointments and recovery.

13. On February 14, 2023 Claimant stated that she had ongoing right knee pain. Nurse Reiss noted that Claimant had developed right knee pain with just "walking at work and got worse over time." He further documented that there was no known date of injury. On exam, Nurse Reiss reported that she had joint line tenderness, had difficulty bearing weight with an extended right leg, and when proceeding downstairs the pain was reproduced along the joint line. He found no significant weakness with flexion or extension and took note that there might have been a "mild amount of swelling likely present although no palpable fluid on the right knee." He diagnosed right knee pain and osteoarthritis.

14. The February 16, 2023 MRI of the right knee performed at ProActive MRI without contrast was notable for a mild effusion. Dr. Shobi Zaidi stated that there was a complex tear in the posterior root of the medial meniscus but no other abnormality.

15. Claimant filed an Application for Hearing to challenge Employer's denial of benefits on February 17, 2023.

16. On March 15, 2023 Dr. Steven Sides, of the Orthopedic Clinic, noted that Claimant reported "[S]he does not remember 1 specific injury but does remember tweaking on the stairs and also with a twisting motion getting out of a chair having some increased pain about that time." [This is not consistent with Claimant's testimony at hearing or the majority of the medical records in evidence, and is not credible.] He observed possible effusion, intact straight leg test, good active flexion, noted the knee was stable upon testing though she had a positive for McMurray's test and Bounce home test, and had an intermittent click. He diagnosed a meniscal tear of the right knee and recommended arthroscopic surgery.

17. X-rays taken at Dr. Sides' office of the bilateral knees showed bilateral knee mild to moderate compartment degenerative changes as well as mild degenerative changes involving the articulation of the lateral femoral condyle and lateral intercondylar eminence in both the right and left knees. Otherwise they were normal with no evidence of acute bony or soft tissue abnormality.

18. Dr. Sides noted on exam that Claimant ambulated with a heel-toe gait pattern, rose from a chair with some discomfort, had an antalgic gait, and was favoring her right knee as she moved around.

19. Dr. Mark S. Failinger conducted an independent medical examination at Respondent's request on April 20, 2023, and issued a report. Dr. Failinger, an orthopedic surgeon and sports medicine specialist, took a history, consistent with Claimant's testimony, reviewed the medical records available and examined Claimant. Claimant reported to Dr. Failinger that she could be standing up to an hour at a time and walk up and down two flights of stairs between nine and ten times a day. She also reported that these staffing jobs were generally up to three times a week, but sometimes only once a week, and that she would have to be on her feet for longer periods of time. She stated her standing times each day would vary from "just a little" time on her feet to multiple hours per day, and that her standing time was quite intermittent and unpredictable as to how much she was working on her feet.

20. On exam, Claimant was positive for right thigh decreased bulk and tone of the quadriceps and loss of range of motion of the right knee. Dr. Failinger noted retropatellar crepitus with range of motion of a mild-to-moderate degree. He also noted posterior popliteal tenderness to palpation and significant tenderness to palpation on the lateral aspect of the right knee, but otherwise, Claimant's exam was normal.

21. Dr. Failinger noted that there was no significant trauma reported to the emergency staff, to subsequent providers or himself. He opined that the diagnosed LCL sprain was not reasonably probable or consistent with a lack of injury or trauma of some kind. He stated that Claimant would have to have had some kind of trauma, like a slip and fall with a varus torque (or inward bending) of the knee, which did not occur, for the injury to be work related.

22. Dr. Failinger's observation of the MRI films was that it showed a complex tear of the posterior root of the medial meniscus, but there was preservation of chondral surfaces, though no significant high grade chondromalacia, which was unusual. He commended that the MRI films were of very poor resolution and of poor quality. There was poor visualization and clarity of whether there was any significant medial and lateral meniscus tear. She was noted to have an apparent posterior and medial meniscus tear, although he did not clearly identify it. There was apparent chondral thinning of the medial femoral condyle articular surface. The anterior cruciate ligament, the posterior cruciate ligament, and the collateral ligaments all appeared to be intact. He noted that Dr. Sides was recommending arthroscopic surgery.

23. Dr. Failinger, stated in his report that "although [Claimant] may have noted increasing symptoms in the fall and winter 2022, the degenerative findings on the MRI are not due to a work injury. [Claimant]'s symptoms are due to the ongoing degeneration which are experienced by millions of people every year."

24. Dr. Failinger opined that the surgery was not related to any incident at work. He stated as follows:

> With the gradual and progressive onset of right knee pain, and with no work injury nor activity that reasonably would have created a meniscus tear, it is not with reasonable medical probability that the recommendation for knee arthroscopy, and that the pathology identified on the MRI scan of 02-16-2023, are related to the patient's work activities. That is to say, it is with high medical probability that the patient's meniscus pathology and "tearing" were due to progressive degeneration, and not due to a work "incident or injury." Although stairs and walking can initiate "symptoms" due to a degenerative meniscus or due to chondromalacia, it is not with reasonable medical probability that the tearing of the meniscus was due to any work injury, even in a case where the patient was walking more than she previously had been.
>
> …
>
> Although the recommendation for an arthroscopy may not be unreasonable, the need for arthroscopy is not due to any pathology created due to her work activities, nor due to any injury that occurred on the job. The patient is not involved in heavy physical manual labor which could possibly provide significant stresses on a knee that was undergoing degeneration. Therefore, the need for the surgery is most reasonably due to ongoing degeneration, and not reasonably due to any work pathology that was created. Although the symptoms may have increased while performing job duties, that does not equate to the creation of pathology nor the acceleration of pre-existing pathology.

25. At hearing, Claimant indicated that the only issues she was pursuing were the return of her sick and vacation leave and reimbursement of her medical bills. Claimant also referenced incurring out of pocket expenses in her opening statement. However, Claimant did not tender any persuasive testimony or documentary evidence that she paid for any care out of pocket, to whom such payments may have been made, or the amounts.

26. Dr. Failinger testified at hearing as an expert in orthopedic surgery and sports medicine, specializing in knees and shoulder surgeries for the prior 30 years. He testified that Claimant's loss of range of motion, including flexion and extension, had more to do with Claimant's body habitus than Claimant's knee degeneration as the contralateral knee had similar limitations. On exam he noted that Claimant had tenderness on the outer side of the knee and not the inner knee where the meniscus tear was shown. Dr. Failinger noted that the x-rays and imaging were representative of a degenerative process and not a traumatic injury.

27. He explained that it is clear from the medical records, Claimant's testimony, and his own evaluation that there was no significant traumatic event in this case that could have caused the tearing and that the tearing was a result of the degenerative process. Dr. Failinger testified that having to walk quickly up the stairs at work or having to walk on cement at work, would have no extra impact on a knee problem than walking or taking the stairs anywhere else. Dr. Failinger also testified that Claimant's symptoms reasonably could have occurred in any activity she took in her daily life, including anything that involved walking, taking the stairs, or squatting. He agreed that the activities Claimant testified she engaged in could easily have caused Claimant's knee pain. He also noted in the emergency visit record that Claimant was assessed with no tenderness or swelling and full range motion of the right knee.

28. Lastly, Dr. Failinger explained that this is a classic case of having developed arthritis in the right knee with degenerative changes and an atraumatic meniscal tear which developed due to the degenerative condition without any likelihood that activities at work, as described by Claimant, including walking on concrete and up/down stairs, could have caused any part of the right knee condition. Claimant simply had wear and tear of the knee. Dr. Failinger opined that within a reasonable degree of medical probability Claimant's right knee condition was not caused by any event, conditions, or activities at work but was the consequence of a degenerative joint and, if any activities at work may have caused symptoms, they did not cause the pathology itself.

29. As found, Claimant has failed to show by a preponderance of the evidence that she incurred a work related injury. Dr. Failinger was credible and persuasive that simply walking or going up stairs could not have caused the complex tear of the posterior root of the medial meniscus, or aggravated the underlying condition, for which Claimant requires surgery. He opined that a trauma needed to have occurred or an incident of traumatic twisting of the knee. There is no persuasive or credible evidence that such an incident occurred in this matter. Also as found, Claimant has failed to show she has an occupational disease or aggravation of her preexisting condition. Dr. Failinger explained that simply walking, going up stairs, and squatting at work are activities Claimant likely also performed equally outside of the work setting. Further, Dr. Failinger opined that for an occupational disease to have any merit, Claimant would have had to work on her feet, on the concrete continuously for many years to actually cause any occupational disease

caused by employment related activities. Claimant's claims for benefits under the Workers' Compensation Act are denied.

30. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seek medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the

conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Section 8-41-301(1)(c), C.R.S. states that a claimant is entitled to worker's compensation when "the injury…is proximately caused by an injury or occupational disease arising out of or in the course of the employee's employment…" Claimant has stated on multiple occasions that there was no specific fall, slip, or trauma that caused her knee pain. Claimant cannot point to a specific work activity that caused the knee pain, or even the exact day when this pain began to occur.

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See, Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993).

The Act imposes additional requirements for compensability of a claim based on an occupational disease. A compensable occupational disease must meet each element of the four-part test mandated by Section 8-40-201(14), C.R.S. that defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "equal exposure" element, the "peculiar risk" test, which requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The employment must expose the claimant to the risk causing the disease "in a measurably greater degree and in a substantially different manner than are

persons in employment generally." *Id.* at 824. The conditions of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. at 824. If the condition resulted from multiple or concurrent causes, the respondents may mitigate their liability by proving an apportionment of benefits. *Id*. If the claimant proves that the hazards of employment caused, intensified, or aggravated the disease process "to some reasonable degree," the burden shifts to the respondents to prove the existence of nonindustrial causes and the extent to which they contribute to the disability or need for treatment. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *Vigil v. Holnam, Inc*., W.C. No. 4-435-795 & 4-530-490 (August 31, 2005).

The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

Dr. Failinger, an expert in orthopedic surgery and sports medicine, stated in his report that despite Claimant noting increasing symptoms in the fall and winter of 2022, the degenerative findings on the MRI were not due to a work injury. Further, he opined that Claimant's symptoms were due to the ongoing degeneration which is experienced by millions of people every year. At hearing, Dr. Failinger testified that having to walk quickly up the stairs at work or having to walk on cement at work, would have no extra impact on a knee problem than walking or taking the stairs anywhere else. Dr. Failinger also testified that Claimant's symptoms reasonably could have occurred in any activity she took in her daily life, including anything that involved walking, taking the stairs, or squatting. He agreed that the activities Claimant testified she engaged in could easily have caused Claimant's knee pain. He further testified that in order for Claimant to experience effects directly from taking the stairs and walking at work, she would have had to be standing and walking upstairs for about ten hours a day for thirty years. This is not the case for Claimant, who testified that her normal job position was primarily sedentary other than the new tasks she was asked to do intermittently when the facility was short-staffed.

Claimant presented no credible testimony or medical evidence that the effect of walking up the stairs and standing at work would have any more of an effect on her right knee than engaging in activities outside of work. The activities Claimant engaged in outside of work involved standing, stairs, and squatting, thereby making these actions hazards that Claimant was equally exposed to outside of her employment. Therefore, Claimant has failed to establish that she was exposed to a greater hazard at work than she was outside of work.

In this case, Dr. Failinger clearly and credibly found that no part of Claimant's condition could be accurately attributed to work. To the extent any of Claimant's treating providers made statements to the contrary, those providers failed to establish in their notes a credible and proper causation analysis taking into consideration all of Claimant's

non-work-related tasks. Nor did they explain the progression of Claimant's symptoms after the stairs at work had been removed from the equation. Therefore, Claimant's knee condition is not a compensable injury nor is it an occupational disease. Claimant has failed to show by a preponderance of the evidence that she sustained either a traumatic injury or an occupational disease caused by her work for Employer on or about December 20, 2022.

Any other issues are moot in light of Claimant's failure to prove compensability in this matter.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant failed to prove that she sustained a compensable injury or occupational disease on or about December 20, 2022. Claimant's claim is *denied* and *dismissed*.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 25th day of August, 2023.

By: /s/ *Elsa Martinez Tenreiro*

Elsa Martinez Tenreiro
Administrative Law Judge
525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury as an employee for Respondent on February 14, 2022.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical treatment arising from his February 14, 2022 injury.

3. What amount most fairly represents Claimant's average weekly wage for purposes of Claimant's February 14, 2022 injury.

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits arising from his February 14, 2022 injury.

5. Whether Claimant proved by a preponderance of the evidence that he is entitled to a disfigurement award for his February 14, 2022 injury.

FINDINGS OF FACT

1. Claimant is a truck driver who on February 14, 2022, was working at a loading dock for Respondent when he fell backward to the ground. He reached backward and landed on his outstretched left hand, fracturing his left wrist.

Medical History

2. Claimant was taken to the Platte Valley Medical Center emergency department. There, he reported that he had left wrist pain after falling four feet off a truck bed falling backward onto an outstretched hand. The attending physician took an X-ray of Claimant's left wrist. The X-ray showed a "displaced Colles' type fracture of the distal radius with extension close to but not definitively reaching articular surfaces." Claimant was taken to the operating room where Dr. Aaron Baxter performed a "closed reduction." He discharged Claimant home that day with instructions for Claimant to return to the office the following week, mentioning the possibility for a need for a future fixation.

3. Claimant returned to Platte Valley Medical Center one week later on February 21, 2022, for a follow-up X-ray. The X-ray showed "stable alignment from initial post reduction radiograph although remains dorsally impacted with dorsal tilt of the radial articular surface. The Fracture line does demonstrate osteolysis indicating

early healing. Positioning on this exam demonstrates 4mm of negative ulnar variance."

4. Claimant returned the next day on February 22, 2022, where he was attended by Dr. John Mangelson. Dr. Mangelson reviewed the most recent X-rays and noted a 14-degree dorsal tilt. Dr. Mangelson recommended surgery and Claimant chose to proceed.

5. On February 24, 2022, Claimant underwent another open reduction internal fixation surgery. However, this time, Dr. Mangelson implanted a distal radius plate. The procedure was completed without complication.

6. Claimant returned for an X-ray on March 11, 2022. Again, on April 11, 2022, Claimant underwent an X-ray of his wrist. The X-ray showed the implant appeared intact with stable alignment and no acute findings. Claimant was instructed by Nickolas Curcija, PA-C, to wean out of the splint over the next two weeks, to follow up with physical therapy, and to return in six to eight weeks for a final check.

7. Claimant returned to Platte Valley Medical Center on August 12, 2022, where he was seen by PA Curcija. Claimant reported pain coming back in his pinky and ring fingers, as well as in the ulnar aspect of his wrist when lifting. Claimant also noticed numbness in his pinky and ring finger when sleeping on his arm bent at the elbow. Claimant reported that he did not participate in physical therapy and missed multiple follow-up appointments because he had to return to work. He also reported that lifting heavy things made his symptoms worse, and he requested work restrictions from lifting anything heavy.

8. Claimant underwent a repeat X-ray that same day. The X-ray was unremarkable. Claimant was diagnosed with cubital tunnel syndrome. PA Curcija restricted Claimant to lifting no more than five pounds with the left hand, noting that ulnar pain could persist for up to a year. Claimant was to follow up in two months. PA Curcija excused Claimant from work for the day.

9. On October 12, 2022, Claimant returned to Platte Valley Medical Center where he was seen by Dr. Mangelson. Claimant reported hand weakness as well as numbness and pain in his fingers that would come and go, though it would be worse with ulnar deviation and flexion of the wrist. Dr. Mangelson noted that Claimant almost certainly had cubital tunnel syndrome, but noted the timing with surgery was suspect given the wide displacement and open wound on the ulnar side of the wrist. Dr. Mangelson recommended an EMG to ensure that the neurological issue was localized to the elbow. However, Claimant wanted to wait until he had insurance.

Procedural History

1. On April 14, 2022, the Division of Workers' Compensation issued a letter to Claimant notifying him that Respondent had denied his workers' compensation claim. Respondent had filed a Notice of Contest[1] denying the claim, noting that it did not have workers' compensation insurance coverage for Claimant because Claimant was an independent contractor.

2. On April 25, 2023, Claimant filed an Application for Hearing endorsing the issues of compensability, medical benefits, average weekly wage, disfigurement, and temporary total disability benefits from February 14 to December 7, 2022. Claimant asserted in the AFH that he was out of work for three weeks with no pay. Respondent did not file a response to the AFH.

August 8, 2023 Hearing

3. Hearing took place on August 8, 2023. At hearing, Claimant testified on his own behalf. His testimony was as follows. While working on a shipping platform on February 14, 2022, Claimant slipped and fell, sustaining a wrist injury. [Redacted, hereinafter MO] tried to assist him, and they went to the hospital. Claimant could not stand due to pain and confirmed he broke his wrist in the fall.

4. Claimant could not recall how he got on the platform but affirmed that he fell from it. Claimant indicated that workers often climbed the platform, using various points of access, but he was not sure where he climbed that day.

5. Claimant clarified that his request for temporary total disability benefits was based on a reduced work capacity due to the injury. Claimant clarified that he received payments both as checks and cash from [Redacted, hereinafter TT], and his last recorded work for the company was reflected in the last check in his exhibits. Claimant admitted that he was working for another employer, [Redacted, hereinafter JT], performing tasks like tie-down straps and driving, with varying paychecks, during the period of time for which he seeks temporary disability benefits.

6. Regarding the nature of his employment, Claimant testified that [Redacted, hereinafter CB] hired him over the phone. CB[Redacted] told Claimant that he needed a driver. Claimant testified that he worked according to the schedule indicated by CB[Redacted] using TT[Redacted] trucks and loader.

7. The Court finds Claimant's testimony credible.

8. Claimant also called coworker MO[Redacted] to testify. MO[Redacted] recounted the events surrounding the accident, stating that he witnessed Claimant's fall from a red truck belonging to TT[Redacted]. MO[Redacted] was in the cab of the truck and the truck was positioned in the classic-brick section near the pallets where

[1] The NOC is undated.

trailers were loaded, from where MO[Redacted] saw the incident unfold. The accident occurred on the driver's side of the truck in an area now marked as “F1.”

9. Though MO[Redacted] was parked at the time, he was about 30 feet away from the platform when he noticed Claimant falling. MO[Redacted] tried to assist Claimant after the fall, and eventually, other individuals arrived to aid Claimant. It appeared to MO[Redacted] that Claimant’s wrist may have been broken. Claimant was then taken to the hospital by safety personnel.

10. During cross examination, MO[Redacted] admitted that he could not precisely recall the manner in which Claimant fell, as it happened quickly. However, he reasoned that most people instinctively use their hands when falling. He also mentioned that the color and name on the truck led him to believe it was a TT[Redacted] vehicle, although he could not specifically remember where on the truck he saw the name.

11. MO[Redacted] clarified that he testified voluntarily and was not coerced or offered any incentives to testify against the Respondent. He recalled that the accident involved one of Claimant’s hands being injured but could not confirm whether it was the right or left wrist.

12. The Court finds MO’s[Redacted] testimony to be credible.

13. Respondent was represented at hearing by the owner of Respondent TT[Redacted], CB[Redacted]. CB[Redacted] testified about how he regarded his workers at TT[Redacted]. He mentioned that when hiring, he communicates the worker’s pay, tasks, working hours, and all necessary details. CB[Redacted] would monitor workers’ arrival, departure, and adherence to rules to ensure the correct handling of product. He would remain involved in overseeing their work.

14. CB[Redacted] testified that he would convey to his workers the safety instructions, specifying where climbing is allowed or required. CB[Redacted] explained that workers do not need to be on the platform of the loading dock in order to do their work.

15. CB[Redacted] personally instructed Claimant in tasks such as strapping and safety protocols, including the use of safety equipment like helmets and an automatic loader in the truck. He directed where strapping could be done and emphasized safety rules and the importance of wearing safety gear.

16. CB[Redacted] defended his classification of workers as independent contractors, highlighting that various workers have distinct arrangements. TT’s workers understand they are contractors whose compensation depends on the work done, are paid through 1099s, need to pay their own taxes, and must obtain their own insurance. CB[Redacted] consistently communicated this arrangement to Claimant in particular.

17. Regarding the injury, CB[Redacted] recounted Claimant's accident his communications with Claimant afterward. CB[Redacted] received a call from the delivery supervisor, who reported the accident to CB[Redacted] and arranged to transport Claimant to the hospital. While Claimant was en route to the hospital, Claimant and CB[Redacted] spoke on the phone. Claimant explained the incident to CB[Redacted], describing how he fell and injured his wrist.

18. Claimant later reached out to CB[Redacted] to obtain financial assistance with paying medical bills from the accident. Claimant resumed work with TT[Redacted] with modified pay, and CB[Redacted] provided additional compensation to support medical costs.

19. CB[Redacted] also disputed that he never paid Claimant in cash. CB[Redacted] testified that he would pay Claimant in checks or via Zelle.

20. The Court finds CB's[Redacted] testimony credible. However, the Court does not defer to CB's[Redacted] characterization of Claimant as an independent contractor rather than an employee.

21. Claimant proved by a preponderance of the evidence that he sustained a compensable left wrist injury on February 14, 2022, while employed by Respondent. Respondent's involvement in training Claimant, supervising Claimant's work, monitoring working hours, and establishing workplace rules, leads the Court to find that Claimant was not free from control and direction in the performance of the services for Respondent. Claimant was most likely an employee of TT[Redacted] at the time of the injury, not an independent contractor.

22. Claimant has proved by a preponderance of the evidence that he has out-of-pocket medical expenses for medical treatment reasonably necessary to cure and relieve him of the effects of his February 14, 2022 injury, totaling $16,272.32. He has also proved by a preponderance of the evidence that he has been billed for an additional $4,104.01 in medical expenses for medical treatment reasonably necessary to cure and relieve him of the effects of his February 14, 2022 injury that have yet to be paid.

23. The Court finds the expense report admitted as Claimant's exhibit C, bates 145, to be consistent with the medical bills admitted into evidence and the dates of service for which Claimant obtained treatment for his wrist injury. The expense report reflects that Claimant's total medical expenses as of June 2023 were $20,376.33, and that Claimant had paid $16,272.32. The Court finds this to accurately reflect Claimant's medical bills and payment of those bills as of that date.

24. Although CB[Redacted] testified that he paid Claimant additional money after the injury to compensate Claimant for medical expenses, there is insufficient evidence in the record for the Court to determine how much extra CB[Redacted] paid to

Claimant. Therefore, the Court makes no findings as to whether Respondent is entitled to a credit toward medical benefits.

25. Claimant submitted at hearing paychecks received from Respondent, which are summarized in the table below:

DATE	AMOUNT	DATE	AMOUNT
5/4/2021	$ 1,500.00	10/7/2021	$ 1,500.00
5/13/2021	$ 2,000.00	10/14/2021	$ 1,800.00
5/19/2021	$ 1,500.00	10/20/2021	$ 1,500.00
5/26/2021	$ 1,500.00	10/27/2021	$ 1,500.00
6/3/2021	$ 1,650.00	11/2/2021	$ 1,700.00
6/8/2021	$ 1,300.00	11/10/2021	$ 1,700.00
6/22/2021	$ 1,500.00	11/17/2021	$ 1,700.00
6/30/2021	$ 1,940.00	11/24/2021	$ 1,300.00
7/6/2021	$ 2,800.00	12/3/2021	$ 1,100.00
7/23/2021	$ 1,500.00	12/8/2021	$ 1,500.00
8/5/2021	$ 1,600.00	12/14/2021	$ 1,800.00
8/12/2021	$ 1,500.00	12/30/2021	$ 1,500.00
8/17/2021	$ 1,500.00	1/5/2022	$ 1,000.00
8/25/2021	$ 1,500.00	1/11/2022	$ 1,200.00
9/1/2021	$ 1,800.00	UNDATED	$ 1,500.00
9/9/2021	$ 1,500.00	6/2/2022	$ 2,000.00
9/16/2021	$ 1,500.00	6/7/2022	$ 2,000.00
9/24/2021	$ 1,500.00	6/22/2022	$ 1,900.00
9/30/2021	$ 1,500.00	7/6/2022	$ 1,360.00

26. The Court finds that each paycheck was compensation for a period up to and including that date. Based on Claimant's records of earnings from May 5, 2021, to January 11, 2022, the Court finds that Claimant's average weekly wage during that time was $1,399.72.

27. The Court finds that Claimant has failed to prove by a preponderance of the evidence entitlement to temporary total disability benefits. Although Claimant asserted on his Application for Hearing that he had three weeks of lost wages, Claimant also testified that he had secondary employment with another employer, JT[Redacted], during the period during which he is requesting temporary total disability benefits. There is insufficient evidence in the record for the Court to determine whether Claimant sustained a total wage loss for any period of time.

28. Claimant also submitted into evidence a photograph of what the Court finds to be a surgical scar on the volar aspect of Claimant's left wrist. The scar is approximately three inches long and one-half inch wide, consisting of a central line that would coincide with an incision and point scars running parallel on either side which would correspond with stiches. The Court finds the scarring to be the result

of Claimant's multiple surgeries to his left wrist. The scarring consists of a serious permanent disfigurement to an area of the body normally exposed to public view.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo.App.2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App.2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App.2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Workers' Compensation Act, he was performing service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo.App.2000).

As found above, Claimant sustained an injury to his left wrist when he fell backwards working at the loading dock for Respondent on February 14, 2022. Respondent contests, however, whether Claimant was an employee at the time of the accident.

The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied." §8-40-203(1)(b), C.R.S. The term "employee" is defined as any person in the service of any person or corporation "under any contract of hire, express or implied." §8-40-202(1)(b), C.R.S.

An employer-employee relationship is established when the parties enter into a "contract of hire." §8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo.App.1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994); *Martinez Caldamez v. Schneider Farm*, W.C. No. 4-853-602 (July 16, 2012). A contract of hire may be formed even in the absence of every formality attending commercial contracts. *Rocky Mountain Dairy Products v. Pease*, 422 P.2d 630 (1966).

Pursuant to §8-40-202(2)(a), C.R.S., "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed."

Section 8-40-202(2)(b)(II), C.R.S., enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. However, the test considered by the Colorado Supreme Court in the unemployment insurance case of *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) concerning whether a worker is an employee or an independent contractor applies to workers' compensation claims. The test requires the analysis of not only the nine factors enumerated in § 8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Pella Windows & Doors, Inc. v. Indus. Claim Appeals Office*, 458 P.3d 128 (Colo.App.2020). The *Softrock* decision noted indicia that would normally accompany the performance of an ongoing separate business in the field and included whether: the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Softrock Geological Services*, 325 P.3d 565.

In this case, Respondent argues that it classifies its workers as independent contractors, and therefore, so should the Court. In defense of classifying its workers as independent contractors, Respondent points to the following facts: workers are told at the time of hire that they are independent contractors; the workers understand that their compensation is based on the work completed; the workers are paid through form 1099; and that the workers are expected to pay their own taxes and obtain their own insurance. Respondent also pointed to the fact that the paychecks made out to Claimant clarified that Claimant was an independent contractor.

On the other hand, as found above, there are numerous facts that lead the Court to find that Claimant was not free from control and direction in the performance of the services for Respondent. For example:

- When hiring, Respondent communicates the worker's pay, tasks, working hours, and all necessary details;
- Respondent would monitor workers' arrival, departure, and adherence to rules to ensure the correct handling of product;
- Respondent would remain involved in overseeing the work performed by its workers;
- CB[Redacted], on behalf of Respondent, would convey to the workers the safety instructions, specifying where climbing is allowed or required;
- CB[Redacted], on behalf of Respondent, personally instructed Claimant in tasks such as strapping and safety protocols, including the use of safety equipment like helmets and an automatic loader in the truck. He directed where strapping could be done and emphasized safety rules and the importance of wearing safety gear.

Based on these findings, the Court concludes that Claimant was an employee of Respondent at the time of the injury. Therefore, Claimant has sustained a compensable injury while employed by Respondent.

Medical Benefits

Claimant seeks an order granting him entitlement to medical benefits arising from the February 14, 2022 injury. In support thereof, Claimant has submitted medical records for his treatment consistent with the above findings concerning his medical history. He has also submitted medical bills and proof of payment of those medical bills as found above.

The Colorado Workers' Compensation Act provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. "If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer . . . shall reimburse the claimant for the full amount paid. . . ." Section 8-42-101(6)(b), C.R.S.

As found above, Claimant has proved by a preponderance of the evidence that he has out-of-pocket medical expenses for medical treatment reasonably necessary to cure

and relieve him of the effects of his February 14, 2022 injury, totaling $16,272.32. He has also proved by a preponderance of the evidence that he has been billed for an additional $4,104.01 in medical expenses for medical treatment reasonably necessary to cure and relieve him of the effects of his February 14, 2022 injury that have yet to be paid.

The Court concludes that Claimant is entitled to reimbursement from Respondent of $16,272.32 pursuant to § 8-42-101(6)(b), C.R.S. The Court also concludes that Respondent is responsible for paying the remaining $4,104.01 in medical bills that remain unpaid, as well as all other medical expenses for treatment reasonably necessary to cure and relieve Claimant of the effects of his February 14, 2022 injury.

Average Weekly Wage

Claimant endorsed the issue of average weekly wage for hearing. In support thereof, he submitted copies of pay checks he received from Respondent dated between May 4, 2021, and July 6, 2022.

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corporation*, 867 P.2d 77, 82 (Colo.App.1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d 548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

In this case, the parties did not present any argument as to the correct average weekly wage applicable in this case. However, as found above, each paycheck was compensation for a period up to and including that date. Based on Claimant's records of earnings from May 5, 2021, to January 11, 2022, the Court finds that Claimant's average weekly wage during that time was $1,399.72. Therefore, for purposes of Claimant's February 14, 2022 injury, Claimant's average weekly wage was $1,399.72.

Temporary Total Disability Benefits

Claimant seeks temporary total disability in this claim. In his Application for Hearing, he noted that the issue was temporary total disability from the date of injury, February 14, 2022, to December 7, 2022. However, on the Application for Hearing, Claimant also indicated that he had three weeks of lost wages.

Temporary total disability benefits are designed to compensate an injured worker for wage loss while employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson,* 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

The pay checks Claimant provided ended on January 11, 2022, followed by an undated check, with the next check in chronological order being on June 2, 2022. Claimant testified at hearing that he had secondary employment with another employer, JT[Redacted], during the period during which he is requesting temporary total disability benefits.

As found above, given Claimant's testimony that he had secondary employment with JT[Redacted] during the time that Claimant seeks temporary total disability benefits, the Court finds and concludes that Claimant has failed to prove by a preponderance of the evidence that he has sustained a temporary disability resulting in total wage loss of at least three working days.

Disfigurement

Claimant submitted in support of his endorsement of the issue of disfigurement a photograph of his left wrist, including scarring on the volar aspect of that wrist.

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

As found above, the scar on Claimant's left wrist is approximately three inches long and one-half inch wide, consisting of a central line that would coincide with an incision and point scars running parallel on either side which would correspond with stiches. The Court finds the scarring to be the result of Claimant's multiple surgeries to his left wrist. The scarring consists of a serious permanent disfigurement to an area of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to § 8-42-108(1), C.R.S. As a result, the Court awards Claimant $901.00 in disfigurement benefits.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury on February 14, 2022, while employed for Respondent.
2. Respondent shall reimburse Claimant $16,272.32 for out-of-pocket medical expenses for treatment that was reasonably necessary to cure and relieve Claimant of the effects of the February 14, 2022 injury.

3. Respondent shall pay the unpaid medical bills totaling $4,104.01 for treatment that was reasonably necessary to cure and relieve Claimant of the effects of the February 14, 2022 injury.

4. Respondent shall pay for all medical treatment reasonably necessary to cure and relieve Claimant of the effects of the February 14, 2022 injury.

5. Claimant's average weekly wage is $1,399.72.

6. Claimant's request for temporary total disability benefits is denied.

7. Respondent shall pay Claimant $901.00 for disfigurement of Claimant's left wrist.

8. All matters not determined herein, including credits for amounts already paid, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 28, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES[1]

1. Whether Claimant has proved by a preponderance of the evidence that she has experienced a change of condition of her work injury warranting a reopening of her claim.

2. Whether Claimant has proved by a preponderance of the evidence that she is entitled to a change of authorized treating physician.

FINDINGS OF FACT

1. Claimant sustained a compensable injury to her right thumb, hand, and wrist on February 27, 2020, when she fell backward while using a pallet jack. As a result of the accident, Claimant fractured her right distal radius.

2. Claimant underwent wrist surgery on July 8, 2020 with Dr. Bret Peterson, as well as follow-up treatment through Dr. Peterson for recovery from her surgery. The records document Claimant being prescribed tramadol throughout her course of treatment.

3. Claimant underwent a functional capacity evaluation on March 31, 2021, in anticipation of maximum medical improvement. At that appointment, Claimant reported that her right hand and wrist pain was about three or four out of ten. However, Claimant also reported that her pain over the past thirty days, when at its worst, would be at a seven out of ten. This would be when Claimant would be gardening or after engaging in activities. Claimant reported that gardening, lifting, swinging a golf club, and opening lids on medications would exacerbate her symptoms. Claimant's current medications noted at that appointment included Tylenol and Aleve.

4. Claimant's authorized treating physician, Dr. Pamela Rizza placed Claimant at maximum medical improvement on April 19, 2021, with an 11% impairment of the right upper extremity. At that appointment, Claimant complained of right hand pain of three out of ten, worse with overuse. Claimant complained of cramping in her hand and an ache that would arise from use. Claimant reported some difficulty with repetitive gripping or pinching and wrist-motion tasks. Dr. Rizza assigned Claimant permanent work restrictions as well, limiting Claimant to medium work,

[1] A third issue was endorsed for hearing: "*Grover* medicals." The Court dismissed this issue in a June 5, 2023 Order granting partial summary judgment. The Court concluded the issue was not ripe, as Respondents had already admitted for maintenance medical benefits in their FAL and had not denied any specific medical treatment.

lifting no more than fifty pounds at a time with frequent lifting or carrying up to twenty-five pounds. No medications were recommended for maintenance care. Dr. Rizza recommended maintenance medical care consisting of visits with Dr. Peterson over the eighteen months following surgery.

5. Respondents filed a final admission of liability (FAL) on May 4, 2021, admitting for the impairment rating assigned by Dr. Rizza and admitting for maintenance medical care. Claimant objected to the FAL and requested a Division independent medical examination (DIME).

6. The DIME took place on April 18, 2022, with Dr. Alicia Feldman. At the DIME, Claimant reported difficulty writing at times, some numbness and weakness in her hand, and right elbow, shoulder, and neck pain. Claimant reported that she was able to return to riding her road bike, but had not returned to playing golf. She also reported dropping things at times, presumably due to a loss of grip strength. She told Dr. Feldman that she was taking Voltaren for pain. Voltaren is diclofenac.[2]

7. Among the records that Dr. Feldman reviewed was a February 10, 2019 record, approximately one year prior to the date of injury, that documented that Claimant had difficulty feeling low back pain at that time due to the use of tramadol.

8. Dr. Feldman concurred with the date Dr. Rizza determined for MMI but assigned an 18% impairment of the upper extremity. Dr. Feldman agreed with Dr. Rizza's recommendation for maintenance medical treatment of follow-up visits with Dr. Peterson for the eighteen months following the date of surgery.

9. Respondents filed an amended FAL on May 4, 2022, based on the DIME report, revising the permanent partial disability award to reflect the new impairment rating. Other than the admission for ongoing maintenance medical treatment, the claim closed on the amended FAL.

10. On August 2, 2022, Claimant's counsel sent an e-mail to Respondents' counsel, requesting, "Would you kindly make sure that Claimant is authorize [sic] to seek Grover meds."

11. Claimant's counsel sent a second e-mail to Respondents' counsel on January 12, 2023, and requested "a one time [sic] evaluation with Dr. Peterson."

12. Claimant's counsel's office sent four more e-mails on January 26, January 31, and February 2, and February 9, 2023, renewing the January 12 request. Respondents neither "authorized" nor "denied" the requests. All of these requests were made by Claimant's counsel on behalf of Claimant. None were made by a treating provider.

[2] *See* Rule 17, WCRP, Exhibit 9, page 119.

13. On March 14, 2023, Claimant filed an Application for Hearing (AFH) endorsing the issues of reopening, "Grover medicals,"[3] and change of physician.

14. There is no persuasive evidence in the record that any authorized provider declined to see Claimant after MMI, that Respondents impeded Claimant's ability to schedule appointments with any authorized provider, that any medical provider has provided inadequate treatment, or that any authorized provider submitted to Respondents a post-MMI request for prior authorization for medical treatment. The Court finds that it is more likely than not that Claimant has not reached out to her medical providers directly to schedule follow-up appointments.

15. Claimant underwent an independent medical examination with Dr. Lloyd Thurston on May 4, 2023, at Respondents' request.

16. During the IME, Claimant informed Dr. Thurston that she had taken a break from playing golf and only resumed the sport in the fall of 2022. She described to Dr. Thurston that she experienced hand cramping after biking, with the cramping appearing to worsen over time. Notably, she noted that since her surgery, she had been dropping objects frequently. In addition, she informed Dr. Thurston that her range of motion was limited, and she would often feel a pronounced ache during activities such as biking, golfing, shoveling, gardening, and any physical exertion. She also mentioned to Dr. Thurston that she had been utilizing diclofenac to alleviate her pain, although it was causing stomach discomfort.

17. Claimant expressed some frustration to Dr. Thurston that she had attempted to communicate her persistent right-sided neck and shoulder pain to her previous doctors, a pain she characterized as a constant, unchanging ache.

18. Dr. Thurston asked Claimant whether the hand had gotten worse or why she believed it should be reopened. Claimant responded, "It's just, well, you know, I don't have the full range of action. . . . It cramps like crazy. . . . I mean, it just cramps, and I don't understand it. There's an aching pain in it. . . . I just feel like there could be more range of motion, or, you know, when I go golf. It's really hard for me to golf anymore and ride my bike, and that's what I've done all my life, you know."

19. The Court finds that this statement was non-responsive and reflects that Claimant is motivated by frustration with a lack of improvement since MMI rather than any actual worsening of condition.

20. Dr. Thurston issued a report on May 7, 2023. In his report, Dr. Thurston noted that Claimant "admits her hand condition has not changed since she was placed at MMI. She is disappointed she did not get a better outcome." Dr. Thurston's report noted that the physical exam of Claimant's hand was virtually identical to that of

[3] The issue of *Grover* medicals, or maintenance medical benefits, was dismissed on summary judgment prior to hearing.

Dr. Rizza's (presumably at the time of MMI). Dr. Thurston felt that no further treatment was necessary under the claim as none would positively affect her condition or outcome. Further, he opined that Claimant's condition resulting from the February 27, 2020 injury had not materially worsened since she was placed at MMI.

21. The parties took a prehearing deposition of Dr. Thurston on June 6, 2023. At the deposition, Dr. Thurston testified that it would be expected for Claimant to be dropping things more in light of Claimant's injury and surgery. Although Dr. Thurston acknowledged that a worsening of grip strength or range of motion could be evidence of a change of condition, Dr. Thurston felt that Claimant was simply noticing her tendency to drop things more because she was using her hand more.

22. Regarding Claimant's complaints of cramping, Dr. Thurston testified that the cramping would be more problematic the more active Claimant is. He felt that increased pain could be an indication of increased use.

23. Dr. Thurston clarified that he did not use a goniometer to test Claimant's range of motion. Therefore, Dr. Thurston admitted on cross examination that his statement in his report that Claimant's range of motion remained unchanged since the DIME was an inaccurate statement, since having not measured Claimant's range of motion using a goniometer he did not know for certain what Claimant's range of motion was. Dr. Thurston also admitted on cross examination that his statement that Claimant "admits her hand condition has not changed since she was placed at MMI" was probably inaccurate.

24. The Court finds Dr. Thurston's accounts of what Claimant said at the IME to not be credible. The Court instead relies on the IME audio transcript. The Court also finds Dr. Thurston's determinations regarding Claimant's range of motion and strength exhibited on physical examination to be not credible, as he acknowledged during his deposition that those findings in his report were probably inaccurate. However, the Court does find his opinions credible and persuasive in other regards, including his opinion that Claimant most likely was simply noticing her tendency to drop things more because she was using her hand more.

25. At the July 12, 2023 hearing, Claimant testified on her own behalf. Claimant testified that she works full time and uses her hand more than she was when she reached MMI. She also testified that she has increased pain since MMI, causing a need to now take medications, including diclofenac, Tylenol, and tramadol.

26. Claimant also testified that she experiences cramping as well as daily stiffness. She also testified that she drops things daily, which she did not recall doing much before, that her grip has worsened, affecting her golf game, and that she can no longer carry fifty pounds with her right hand without pain, cramping, and stiffness afterward.

27. Claimant testified that she made five to twelve attempts to schedule follow-up appointments and that Respondents never authorized the requests. Claimant also testified that she tried to see Dr. Rizza for maintenance care, but that the treatment was denied. Claimant also testified that she attempted to see Dr. Peterson. Claimant was asked whether Dr. Rizza and Dr. Peterson refused to see her. Claimant acknowledged that Dr. Rizza never refused to see her, but, regarding Dr. Peterson, Claimant responded only that she tried to go through her attorney. She did not clarify whether Dr. Peterson ever actually refused to see her.

28. The Court finds Claimant credible, except insofar as Claimant testifies that she has experienced worsening of her symptoms, and except insofar as noted below.

29. Although Claimant testified that she now must take Tylenol, diclofenac, and tramadol, the Court finds significant that Claimant was taking Tylenol at the time of her functional capacity evaluation just shortly prior to MMI, that Claimant reported to Dr. Feldman at the DIME that she was taking diclofenac, and that Claimant had been taking tramadol since well prior to her injury in this matter. Claimant's needs for these medications did not arise after reaching MMI. The Court does not find Claimant's testimony credible insofar as Claimant testified that her need for medication has changed.

30. The Court also finds significant that, despite Claimant's testimony that she now experiences cramping and stiffness, and that she now drops things on a daily basis, these symptoms are not new. Claimant complained at her MMI appointment with Dr. Rizza that she had cramping and aching that would arise from use. She also complained at the DIME that she had some numbness and weakness in the hands and would drop things at times. Although Claimant testified that she now drops things more often, the Court does not find this credible.

31. Furthermore, Claimant was restricted to lifting up to fifty pounds at the time she was placed at MMI. At that time, she also complained of increased pain corresponding with increased use of her hand when gardening, lifting, swinging a golf club, and opening lids on medications. If indeed Claimant experiences pain, cramping, and stiffness after lifting fifty pounds, the Court does not find this to be persuasive evidence of a change of condition. Rather, the Court finds this to be consistent with Claimant's condition at the time she was placed at MMI.

32. The Court finds that Claimant has not experienced a change of condition since MMI.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo.App.2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App.2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App.2000).

Reopening

Claimant seeks to reopen the claim on the basis of a change of condition.

Once a claim is closed, it may be reopened only on grounds of fraud, overpayment, error, mistake, or change in condition. § 8-43-303, C.R.S. A "change in condition" refers

to a "change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Cordova v. Indus. Claims Comm'n*, 55 P.3d 186, 189 (Colo.2002); *Caraveo v. David J. Joseph Co.*, W.C. No. 4-358-465 (October 25, 2006). Reopening is appropriate when the claimant's degree of permanent disability has changed since MMI or where the claimant is entitled to additional medical or temporary disability benefits that are causally connected to the compensable injury. *See Duarte v. Glen Ayr Health Ctr.*, W.C. No. 4-521-453 (June 8, 2007).

As found above, Claimant has not proved by a preponderance of the evidence that she experienced a change of condition since reaching MMI. The symptoms of which she currently complains are well documented as existing at the time Claimant was placed at MMI and evaluated by the DIME physician. Although Claimant testified that the magnitude of those symptoms have changed, the Court does not find testimony credible. Claimant has testified that she now takes medications to alleviate her allegedly increased symptoms. However, as the Court found above, each of those medications were either medications Claimant was taking at the time of MMI or which Claimant had been taking since prior to the work injury. The Court does not find Claimant's testimony credible insofar as Claimant alleges that she has an increased need for these medications due to a change of condition. The Court finds it most likely that Claimant notices her symptoms more when she is active, and Claimant has been more active since reaching MMI. Furthermore, the Court finds that Claimant's pursuit of the issue is motivated more by frustration with a lack of progress or follow-up from her providers post-MMI rather than a genuine change of condition.

Therefore, the Court concludes that reopening is not warranted.

Change of Authorized Treating Physician

Claimant seeks a change of authorized treating physician.

There are three means by which a claimant may seek a change of physician.[4] First, a claimant may, as a matter of right, change physicians within ninety days of the date of injury if he or she has not yet reached MMI. § 8-43-404(5)(a)(III), C.R.S. See Rule 8-5, WCRP. Second, a claimant may obtain a change of physician where the claimant submits a written request, on a Division form, to the respondents for a change of physician and the respondents fail to deny the request. § 8-43-404(5)(a)(VI)(A), C.R.S. See Rule 8-6, WCRP. This second means permits a claimant to obtain a change of physician without obtaining a hearing should the respondents either grant the change or fail to timely deny such request. The third means is where the claimant requests a hearing before the Director or an ALJ and requests a change of physician upon a "proper showing." Specifically, section 8-43-404(5)(a)(VI)(A), C.R.S., provides that "[u]pon the

[4] These exclude the mechanism whereby a claimant may select a new physician of his or her choice where the respondents receive notice that the original treating physician refuses to treat the claimant for non-medical reasons and the respondents fail to designate a new physician. *See* § 8-43-404(10), C.R.S. (2022).

proper showing to the division, the employee may procure the division's permission at any time to have a physician of the employee's selection treat the employee . . . ." (Emphasis added.) This last means does not require the filing of any division forms or compliance with Rule 8, WCRP.

In this case, Claimant argues for a change of physician on the third basis—the "proper showing" basis.

In support of Claimant's showing, Claimant argues that Respondents have denied authorization for Claimant to seek treatment with her authorized providers, despite having admitted for maintenance medical care, thus unlawfully thwarting Claimant's ability to obtain maintenance medical treatment. Claimant argues that Respondents have thus "made a voluntary waiver of its right to have Claimant continue to treat with its designated providers." Claimant did not specify whom she wished the Court to designate as Claimant's new authorized treating physician.

The Court is not persuaded that Claimant has made a proper showing for a change of authorized treating physician.

Notwithstanding Claimant's argument that Respondents have impeded Claimant's access to maintenance medical care with her authorized treating providers by denying Claimant's counsel's requests for prior authorization, the Court finds no persuasive evidence that Respondents have in fact impeded Claimant's access to medical treatment.

First, the Court notes that the record is devoid of any persuasive evidence of a denial of prior authorization. Although Claimant's counsel reached out to Respondents' counsel on several occasions requesting that Respondents provide assurance that maintenance medical treatment was authorized and requesting authorization of a visit with Dr. Peterson, Respondents did not respond. Respondents, however, were under no legal obligation to authorize or deny Claimant's counsel's requests or provide any assurance of future authorization, since those requests were not from a provider.

Rule 16-7, WCRP, provides that "Prior Authorization for payment shall only be requested when: (1) A prescribed treatment exceeds the recommended limitations set forth in the MTGs; (2) the MTGs require Prior Authorization for that specific service; (3) A prescribed treatment is not priced in the Medical Fee Schedule or is identified in Rule as requiring Prior Authorization for payment." Where prior authorization is not otherwise required by Rule 16-7, Rule 16-6 provides a means whereby a provider may nevertheless request assurance that the insurer will indeed pay the medical bill when it comes due. Requests for prior authorization under Rules 16-6 and 16-7 may be submitted only by medical providers. There is no legal mechanism by which a Claimant may request prior authorization, and therefore no legal obligation for Respondents to respond to any such request.

There is no persuasive evidence of the record that Claimant or her attorney in fact reached out to any of Claimant's authorized treating providers' offices to schedule a

follow-up appointment, let alone that any of the providers declined to see her for non-medical reasons. While it may be customary for respondents in workers' compensation matters to assist with scheduling medical appointments, Claimant identifies no legal authority for the proposition that Respondents were obligated to schedule any such appointment on Claimant's behalf. In other words, Respondents have not impeded Claimant's ability to seek medical treatment, even if they have not volunteered to facilitate scheduling of appointments or provided assurances to Claimant.

The Court further finds significant that Claimant has not identified whom she wishes the Court to designate as Claimant's new authorized treating physician. Rather, she has requested a blank check to choose at some future date the undisclosed physician of her choice.

When considering whether Claimant has made a proper showing for a change of authorized treating provider, one relevant consideration is whether the prior authorized treating physician provided inadequate medical care. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician). Another relevant consideration, which naturally follows, would be whether the new authorized treating provider would be in a better position to provide the claimant with adequate medical treatment. Without knowing whom Claimant identifies as the new authorized treating physician—let alone why that new authorized treating physician is in a better position to provide Claimant with adequate medical treatment—the Court is inclined to find an incomplete showing as to why a change of physician is warranted.

The Court finds and concludes that Claimant has failed to prove by a preponderance of the evidence a proper showing justifying a change of authorized provider.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen this matter is denied.

2. Claimant's request for a change in authorized treating physician is denied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 28, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS STATE OF COLORADO

WORKERS' COMPENSATION NO. 5-235-415-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Respondent?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant testified at hearing that he met Respondent (although not for the first time) on March 12, 2023 at a mutual friend's house where they discussed Claimant working on a job trimming trees that Respondent was working the next day. Claimant testified that during their discussion Respondent agreed to pay Claimant $20 per hour for his work. Claimant testified that he told Respondent he would not fill out a 1099 form for his work.

2. Claimant testified Respondent picked him up the next morning, March 13, 2023, and took him to the job site where Respondent started gearing up. Claimant testified he picked up a chain saw and began operating the chain saw. Claimant testified that later, Respondent told him to come grab the rope which was attached to part of the tree they were felling and wrap it around the trunk of a tree. Claimant testified that as the part of the tree fell, he was pulled into the air and thrown to the ground. Claimant was later transported to the hospital by ambulance.

3. Respondent testified at hearing and confirmed portions of Claimant's testimony. Respondent testified that he had met Claimant through a friend/neighbor and spoke to Claimant on March 12, 2023 where they discussed Claimant working for Respondent. Respondent denied that he agreed to hire Claimant or that they had agreed on a compensation rate of $20 per hour.

4. Respondent testified he picked Claimant up in the morning and took Claimant to the job site where Claimant picked up a chain saw and began operating the chain saw. Respondent testified that it appeared as though Respondent could use a chain saw, but he did not provide Claimant with any personal protective equipment ("PPE"). Respondent testified he did not instruct Claimant to pick up the chain saw and Claimant was not authorized to operate the chain saw. Respondent did not testify that he advised Claimant to cease using the equipment when Claimant began operating the

chain saw.

5. Respondent testified Claimant was supposed to observe the work being performed in the morning, and if Claimant decided he wanted to work for Respondent, they would fill out the paper work in the afternoon and agree at that time on the terms of employment. Respondent testified that Claimant did not sign anything and did not complete any on boarding documents.

6. Respondent testified that Claimant at one point took hold of the rope and was thrown into the air and to the ground when the tree fell. Respondent denied telling Claimant to grab the rope before Claimant's accident. Respondent testified that Claimant's fall caused some damage to the property.

7. Following the injury, Claimant was taken by ambulance to the St. Mary's Hospital Emergency Room ("ER"). The medical records document that Claimant presented with complaints of trauma that were sustained when a rope he was holding onto tightly flung him into the air as a tree it was attached to fell to the ground. Claimant reported being thrown approximately 20 feet in the air and presented with pain over his low back. The ER noted that Claimant had a prior history of IV drug abuse and alcohol abuse.

8. Claimant underwent a computed tomography ("CT") of the head, neck chest, abdomen, and pelvis as well as initial portable chest x-ray and x-rays of the lumbar spine. The diagnostic testing showed no intracranial hemorrhage on the head CT scan and no acute fracture on the cervical spine films. The CT scan of the chest demonstrated no pneumothorax or rib fractures or pulmonary contusion. The CT scan of the abdomen demonstrates no solid organ injury, intraperitoneal fluid or blood, and no spine fracture, though swelling and hematoma in the subcutaneous tissues of the lumbar area was noted. The initial chest x-ray was unremarkable with the exception of a deformity that was later determined to be a rib shadow. The lumbar spine films demonstrated no obvious displaced fracture.

9. Claimant subsequently became combative with the ER staff. The records note that Claimant was writing in pain, yelling and screaming at the staff to "do fucking something". It was noted in the medical records that Claimant stated "I'm in pain and your (sic) fucking useless." Claimant also stated to the ER staff "I could get better drugs off the street, fuck you all ... and fuck this!!" When Claimant was transferred to the bed, he refused to turn in order to visualize the lumbar sacral area. Claimant was advised that no verbal abuse would be tolerated.

10. The medical records note that Claimant refused to turn or get out of bed. Claimant eventually became agitated and got dressed and stated he was leaving when a few visitors showed up. The nurse tried to educate Claimant on leaving against medical advice, but was unable to address Claimant before he left. The physician was made aware that Claimant was leaving and discharge orders were placed.

11. It was noted in the medical records that Claimant's only documented condition during the ER visit was the large hematoma on his low back.

12. According to the medical bill entered into evidence at hearing, Claimant's ER bill came to $33,551.25.

13. The ALJ credits the testimony of Respondent in this case that he transported Claimant to the job site and Claimant began performing actions associated with the work being performed by Respondent, including operating a chain saw and holding the rope attached to the tree that was being cut down. While Respondent maintains that Claimant was not an employee at that time as Claimant was only to be obseiving the work in order to decide if he wanted to work with Respondent, Claimant's actions indicate that he was performing work for Employer at the time he was thrown to the ground.

14. The ALJ finds that Claimant has established that it is more probable than not that a contract for hire was entered into in which Claimant agreed to go with Respondent to the job site on March 13, 2023 and perform work associated with Respondent's business. Claimant was taken to the job site by Employer, and while at the job site, was performing work associated with Respondent's business, including operating a chain saw and holding a rope attached to a tree that was being cut down.

15. While Respondent maintains that Claimant had not signed any documents and may not have had proper identification to sign the employment paperwork when Claimant was taken to the job site on March 13, 2023, this is not dispositive of an Employer-Employee relationship.

16. The ALJ credits the testimony of Respondent and finds that Claimant has established that it is more likely than not that he was an employee of Respondent on March 13, 2023. The ALJ makes no determination as to average weekly wage or temporary disability benefits as that issue was not before the court.

17. Claimant was taken by ambulance to the emergency room after the injury where Claimant was treated for injuries sustained in the fall that included diagnostic testing. The ALJ credits the medical records entered into evidence at hearing and finds that Claimant has proven that it is more likely than not that the treatment at the ER was reasonable and necessary to cure and relieve Claimant from the effects of his industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.

A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. The Colorado Workers' Compensation Act defines an "Employee" in Section 8-40-202(1)(b) in pertinent part:

> Every person in the service of any person, association of persons, firm, or private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, under any contract of hire, express or implied, including aliens and also including minors, whether lawfully or unlawfully employed, who for the purpose of articles 40 to 47 of this title are considered the same and have the same power of contracting with respect to their employment as adult employees, but not including any persons who are expressly excluded from articles 40 to 47 of this title or whose employment is but casual and not in the usual course of the trade, business, profession, or occupation of the employer.

4. For purposes of the Colorado Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a "contract of hire." Section 8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991). It is the contract of hire with the respondent employer that triggers coverage under the Act, and the reciprocal benefits and duties of the workers' compensation system flow to each party because of their entry into that contract of hire. A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman,* 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Aspen Highlands Skiing Corp. v Apostolou,* 866 P.2d 1384 (Colo. 1994). A "contract of hire• is created when there is a "meeting of the minds" which creates a mutual obligation between the worker and the employer. Id. A contract of hire may be formed even though

not every formality attending commercial contracts is found to exist. *Rocky Mountain Dairy Products v. Pease,* 161 Colo. 216,220,422 P.2d 630,632 (1966).

5. As found, Claimant has established by a preponderance of the evidence that he was an employee of Respondent as they had discussed Claimant appearing on the job site and performing work for Respondent. As found, when Claimant arrived on the job site, he began operating a chain saw and held a rope that was attached to a tree that was being cut down by the operations of Respondent. While holding the rope, Claimant was involved in an accident that caused his injury.

6. The mere fact that Claimant had not yet signed his paperwork does not negate the fact that the evidence establishes that Claimant and Respondent had entered into a contract of hire for the work being performed on March 13, 2023.

7. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

8. As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Respondent when he was holding a rope at the job site attached to a tree that was being cut down and was subsequently thrown into the air and landed on the ground causing injury to the Claimant which took Claimant to the ER.

9. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

10. As found, Claimant has proven by a preponderance of the evidence that the medical treatment he received at the ER was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

1. Respondent is liable for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury.

2. All issues not herein decided are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

DATED: August 29, 2023

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant established by a preponderance of the evidence that Respondents are subject to penalties for violation of § 8-43-404 (5)(a)(v), C.R.S.

2. Whether Claimant established by a preponderance of the evidence that Respondents are subject to penalties for violation of § 8-43-503 (3), C.R.S.

FINDINGS OF FACT

1. Claimant sustained an admitted low back injury on November 20, 2020 arising out of the course of his employment with Employer.

2. On November 20, 2020, Employer provided Claimant a "Designated Provider List" which identified four physicians from whom Claimant could chose for treatment. (Ex. B). Claimant selected Daniel Bates, M.D., at Banner Health as his authorized treating physician. (Ex. B).

3. On November 24, 2020, Claimant initiated treatment at Banner, and saw Douglas Drake, PA-C, a physician assistant for Marc Chimonas, M.D. (Ex. D). On November 30, 2020, Claimant saw Douglas Scott, M.D., at Banner, and continued to see Dr. Scott through September 23, 2021, during which time Dr. Scott served as Claimant's authorized treating physician (ATP). (Ex. D). Sometime after September 23, 2021, Dr. Scott left Banner, and Claimant elected to continue care at Banner, with Dr. Bates.

4. On October 21, 2021, Claimant saw Dr. Bates for the first time. Beginning on October 21, 2021 Dr. Bates served as Claimant's primary ATP. Claimant saw Dr. Bates monthly from October 21, 2021, until June 15, 2022. (Ex. D). Dr. Bates directed Claimant's care, prescribed medications, and referred Claimant for consultations with specialists. (Ex. D).

5. By his June 15, 2021 visit with Dr. Bates, Claimant had undergone diagnostic SI joint blocks, and was considered a candidate for SI joint fusion surgery. Dr. Bates noted that Claimant's pain management physicians had recommended a trial spinal cord stimulator, and Dr. Bates agreed with that recommendation. He noted that Claimant's weight may prevent Claimant from undergoing either procedure, and he referred Claimant to Banner's bariatric department for weight management options to help facilitate Claimant's ability to receive the spinal cord stimulator and/or the SI joint fusion. At that time, the only regular medications Dr. Bates prescribed was Percocet 5/325, which he prescribed in a thirty-day supply. Dr. Bates also assigned work restrictions. Claimant was advised to return to the clinic in four weeks. (Ex. D).

6. Sometime between June 15, 2022 and July 5, 2022, Dr. Bates left Banner, and moved his practice to Workwell. Both Banner and Workwell are "corporate medical providers" as that term is defined in section 8-43-404 (5)(a)(I)(A), C.R.S.

7. On July 5, 2022, Claimant's counsel emailed Respondents' counsel, indicating Dr. Bates had moved his practice to Workwell, and that Claimant would "continue treating with Dr. Bates." (Ex. 9).

8. On July 12, 2022, Claimant emailed his counsel, indicating that Dr. Bates' office would not schedule an appointment or see him, until it was approved by Insurer. (Ex. 11).

9. On July 20, 2022, Claimant returned to Banner. Claimant and saw Mark Krisburg, M.D. Claimant received treatment at Banner through Dr. Krisburg until October 13, 2022. During this time, Dr. Krisburg consistently refilled Claimant's Percocet prescriptions, and agreed with Dr. Bates' work and treatment recommendations, including the recommendation for SI fusion surgery, spinal cord stimulator, and a referral for a bariatric consultation. Although he noted the request for a spinal cord stimulator had been denied. Dr. Krisburg also referred Claimant for dietary assistance for weight loss. On September 16, 2022, Dr. Krisburg responded to an August 19, 2022 letter from Claimant's counsel indicating his support for the recommendations for SI fusion surgery, and a bariatric consult. (Ex. D).

10. On August 17, 2022, Claimant's counsel emailed Respondents' counsel indicating that Dr. Bates had agreed to continue Claimant's care and that Claimant would like to continue his care with Dr. Bates "if Respondents will agree." Claimants counsel also indicated that Claimant was "low on his medications and needs to see [Dr. Bates] as soon as possible." (Ex. 12).

11. Claimant was scheduled for an appointment with Dr. Krisburg on August 17, 2022, at which his medications could have been refilled, but Claimant was documented as a "No Show" for the appointment. At Claimant's September 15, 2022 visit, Dr. Krisburg refilled Claimant's pain medications. (Ex. D). Claimant's final visit with Dr. Krisburg was October 13, 2022, at which time Dr. Krisburg refilled Claimant's medications, and indicated that a dietary consultant was recently authorized. Claimant was scheduled to return to Dr. Krisburg on November 23, 2022, but did not attend the appointment. (Ex. D).

12. Between August 2022 and November 2022, counsel for the parties exchanged emails regarding Claimant's request that Respondents authorize Dr. Bates to continue treating Claimant and remain as his ATP. (Ex. 13, 14, 15, 16, 17, 18, 19).

13. On November 1, 2022, Respondents' counsel emailed Claimant's counsel indicating that Insurer was "authorizing [Claimant] to treat with Dr. Bates." Respondents' counsel directed Claimant to schedule an appointment with Dr. Bates and Insurer would authorize it. (Ex. A).

14. On November 8, 2022, Insurer's adjuster [Redacted, hereinafter LG] sent a letter to Dr. Bates indicating that Respondents were "agreeing to allow [Dr. Bates] to be the ATP on this case file." (Ex. A).

15. On November 18, 2022, Claimant re-initiated care with Dr. Bates now at Workwell. Claimant saw Dr. Bates four times between November 18, 2022 and December 29, 2022. During this time, Dr. Bates continued to prescribe Claimant's medications and did not alter his course of treatment, with the exception of requesting a functional capacity evaluation prior to issuing an impairment rating. On December 29, 2022, Dr. Bates placed Claimant at maximum medical improvement (MMI), and assigned Claimant a permanent impairment rating. (Ex. E). Claimant continued to see Dr. Bates for maintenance care after being placed at MMI.

16. On December 7, 2022, Claimant filed the Application for Hearing in the present case, seeking penalties for alleged violations of § 8-43-304 and 8-43-404(5) C.R.S.

17. Claimant testified at hearing that after Dr. Bates moved his practice from Banner to Workwell, he had no choice but to return to Banner for treatment because Respondents had not authorized Dr. Bates to remain as Claimant's ATP. Claimant testified that Dr. Bates and Dr. Krisburg made the same treatment recommendations, including a spinal cord stimulator.

18. LG[Redacted], Insurer's claim adjustor assigned to Claimant's claim, testified at hearing. LG[Redacted] testified that Insurer did not authorize Claimant to continue to see Dr. Bates after he moved his practice to Workwell because Insurer took the position that Banner was the designated "corporate provider" and that all patients would continue to receive treatment at Banner. LG[Redacted] agreed that before moving his practice, Dr. Bates was Claimant's primary ATP. She agreed that Insurer denied Claimant's transfer of care to Dr. Bates until November 2022. She testified that Dr. Bates did not request a transfer of care to him at Workwell until November 2022, and once that request was made, Respondents agreed and informed Dr. Bates' office on November 8, 2022.

19. [Redacted, hereinafter JC] was a clinic manager or center administrator for Workwell during the relevant period. JC[Redacted] testified that she requested authorization for Dr. Bates to treat Claimant at Workwell from Respondents in November 2022. She testified that the request for authorization was not expressly denied, although she had difficulty reaching Respondents or their representatives. She testified that the only direct communication she received from Insurer was the November 8, 2022 letter authorizing Dr. Bates as Claimant's ATP.

20. JC[Redacted] also testified that Workwell was previously on Employer's panel of clinics designated to treat Employer's injured workers, but was no longer on the panel as of 2019. Sometime in May or June 2022, Workwell was restored to Employer's workers' compensation panel, although only two providers at Workwell were permitted to treat Employer's injured workers. Dr. Bates was not one of the designated providers. JC[Redacted] had no direct knowledge of why Dr. Bates was not included on the panel of designated physicians.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any person who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty, and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

In relevant part, section 8-43-304(1) provides: "Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any

duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, … shall also be punished by a fine of not more than one thousand dollars per day for each offense …"

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

If it is determined that a person violated a statute or order, the question then turns to whether the insurer's conduct was objectively unreasonable. This is a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Alleged violation of Section 8-43-404 (5)(a)(V), C.R.S.

Claimant has failed to establish that Respondents violated § 8-43-404 (5)(a)(V), and has therefore failed to establish a basis for imposition of penalties.

Penalties may be imposed under § 8-43-304 (1), where a person or party "violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby." "It follows that no penalty may be imposed under § 8-43-304 (1) unless the challenged conduct is a violation of the Act." *Moseley v. U.S. Express Enterp*., W.C. No. 4-530-546 (ICAO Dec. 12, 2002). In determining whether a statutory violation has occurred, the "ALJ must look to the express duties and prohibitions imposed by the statutory language in determining whether the challenged conduct violates the Act, and should not create implied duties and responsibilities." *Id*., citing *Allison v. Indus. Claim Appeals Office,* 916 P2d 623 (Colo. App. 1995); see also *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480,482 (Colo. 1985) (court should not read nonexistent provisions into the Act.").

In relevant part, § 8-43-404(5)(a)(V), provides "If the authorized treating physician moves from one facility to another, or from one corporate medical provider to another, an injured employee may continue care with the authorized treating physician …" While the statute confers upon injured workers the right to continue care with a relocating ATP, it imposes no express duties on injured workers, insurers, or employers. Claimant asserts that Respondents violated § 8-43-404(5)(a)(V) by failing to timely authorize Claimant's treatment with Dr. Bates after he relocated his practice to Workwell. Had the General Assembly intended § 8-43-404(5)(a)(V) to require injured workers to seek approval for

continuing care, or imposed obligations upon the insurer to "authorize" a relocating ATP, it could and would have included mechanisms for doing so, as it did in § 8-43-404 (a)(5)(III) and (VI). Claimant's request for penalties would require the ALJ to improperly impose implied duties and responsibilities upon Respondents that are not contained in § 8-43-404(5)(a)(V). Because Respondents have not violated any express duty or obligation imposed by § 8-43-404(5)(a)(V), Claimant's request for penalties for violation of this section is denied.

Alleged violation of Section 8-43-503 (3), C.R.S.

Claimant has failed to establish that Respondents violated section 8-43-503(3), C.R.S. Section 8-43-503(3), C.R.S. provides that "Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment. This section precludes an insurer or its representative from "issuing commands to a treating physician concerning the type or duration of treatment to be provided to the claimant." *Williams v. City of Colorado Springs,* WC 4-565-576 (ICAO, Feb. 15, 2008). Evidence that the conduct of the insurer or its representative influenced an ATP to "engage in a specific course of conduct because of the actions of the respondents," or that treatment "was delayed or that course of treatment was altered because of the actions of the respondents" may be considered in determining whether treatment was dictated. *Gianzero v. Wal-Mart Stores, Inc.,* WC 4-669-749 (ICAO, July 14, 2009).

Although Respondents did not facilitate Claimant's continuation of care with Dr. Bates until November 2022, no credible evidence was admitted indicating that Respondents dictated the type or duration of treatment provided to Claimant. No credible evidence was admitted that Respondents issued any commands to any treating physician regarding his treatment, or that Claimant's treatment was delayed or altered.

At his June 15, 2022 visit, Dr. Bates recommended Claimant return in four weeks. Claimant saw Dr. Krisburg on July 20, 2022, and continued to see him at the same frequency he saw Dr. Bates until October 13, 2022. Dr. Krisburg did not alter Dr. Bates' treatment plan. He continued to regularly refill Claimant's pain medication, imposed Dr. Bates' work restrictions, and continued to advocate for the same treatments Dr. Bates recommended, such as SI joint fusion surgery, spinal cord stimulator and a bariatric consult. When Claimant did return to Dr. Bates after November 18, 2022, he did not alter Claimant's course of treatment. He continued to prescribe the same medications, and did not make any further referrals for treatment. Dr. Bates then placed Claimant at MMI within six weeks of resuming his care.

Because Respondents did not dictate either the type or duration of treatment Claimant was prescribed or received, the evidence does not establish that Respondents violated section 8-43-503(3), C.R.S. Claimant's request for penalties for dictation of medical care is denied.

ORDER

It is therefore ordered that:

1. Claimant's request for penalties is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 29, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether the Claimant proved by a preponderance of the evidence that she sustained a compensable work injury on September 26, 2021.

IF THE CLAIMANT PROVED COMPENSABILTIY, THEN:

II. Whether Claimant proved by a preponderance of the evidence that she is entitled to medical benefits which are authorized, reasonably necessary and related to the compensable September 26, 2021 work injury.

III. Whether Claimant has proved by a preponderance of the evidence what her average weekly wage is.

IV. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 26, 2021, until terminated by law.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if Claimant's claim was deemed compensable and TTD benefits awarded, the issue of offsets, either short term or long term benefits, is reserved for future determination.

The parties further stipulated, if the claim is deemed compensable, that Dr. Mitchel Robinson is an authorized treating physician.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Generally

1. Claimant was a customer service agent for Employer for over fourteen years and was 53 years old at the time of the hearing. She assisted passengers and met the planes at the gate. She would bring the mobile swing gate to the plane so passengers could disembark from the plane and would then disconnect them so the aircraft could depart.

2. Claimant started with Employer as a line station worker. This position involved all the work of a customer service agent as well as having to go below the wings and bring in the planes and load and unload bags. She then moved to Denver where she worked as a customer service agent.

B. The Injury

3. On September 26, 2021, Claimant was at the gate, meeting planes, which had to be performed quickly when there were back-to-back flights. She had a plane at the gate and was using a swing gate, which had to be connected to the mobile bridge adapter (MBA) to the aircraft. She went to grab the MBA, a 150 pound piece of steel, and pulled it quickly, and the adapter "got hung up." When she pulled up on it to get it unstuck, she felt a pop in her right shoulder. She pulled back and it didn't release, and she jerked it again and it came loose. This occurred at approximately 7:30 p.m. She felt immediate pain, but since she had to get the next plane deplaned, she had to work quickly and ignored the immediate onset of pain. She stated that she was working quickly and was under time pressure which caused her to have an adrenaline rush. She believed this helped her control the pain, so it was not crippling.

4. The pain continued to increase through the evening until she arrived home at around 9 p.m. She rushed home because she knew she had to be back to work by 6:30 a.m. the following morning. The pain was sharp and caused her to not be able to move her extremity well. The pain was so severe, that she was unable to take off her sweater and required her husband to assist her to undress. As she unhooked her bra, whatever was being held by the pressure of the bra released and the sharp pain became unbearable. It was sharp and pinching, not like what she had experienced before, which was only an achy soreness. It was something that she had never felt before.

5. She described the location of the pain after the injury as "indicating the top portion of her shoulder along the edge from the neck down to the glenohumeral joint and the trapezius muscle in the back up to the neck."

6. By 3 a.m. the following morning, on September 27, 2021, she could not stand the pain. She called the call-in number for Employer, to be excused from work. She went to St. Anthony's emergency room where they took x-rays, prescribed a medication regimen and put her in a sling, referring her to orthopedics.

7. The following day, on September 28, 2021 she went to Panorama Orthopedics. They ordered x-rays and an MRI. She also saw Dr. Hugate at Panorama, who was an orthopedic oncologist. She was treated primarily with physical therapy, to the extent that, because she was gaining range of motion, Dr. Robinson no longer recommended surgery.

C. Medical Records

8. Claimant was attended at St. Anthony Hospital in Lakewood on September 27, 2021 by Gina Soriya, M.D. She documented that Claimant presented with right shoulder pain after sustaining a work-related injury, when she was moving a heavy object at work and not protecting her arm when she had the onset of pain, with pain of 10/10.[1] She ordered x-rays and medications, including Tylenol, Flexeril, and Lidoderm patches. She denied Claimant any narcotic pain medication. She provided a differential diagnosis

[1] Dr. Soriya noted a history of prior rotator cuff tear but no prior surgery but this is deemed a mistake in the record and not credible.

and acute pain in the right shoulder. Claimant was referred to her primary care physician (PCP) regarding her x-ray results of small nonspecific sclerotic lesion of the proximal humeral head, recommending a whole body scan and to an orthopedist with regard to other symptoms in her shoulder. Lastly, Dr. Soriya provided Claimant with light-duty restrictions until cleared by her primary care provider (PCP).

9. The September 27, 2021 x-rays read by Dr. William Berger showed very mild degenerative joint disease (DJD) of the acromioclavicular joint and no significant evidence of glenohumeral DJD, and noted the 7 mm sclerotic lesion of the right humeral neck.

10. On September 28, 2021 Claimant was seen at Panorama Orthopedics and Spine Center by Samuel F. McBride, PA-C, for the right shoulder. Claimant provided a history consistent with her testimony at the hearing. At that time Claimant described the pain as aching, burning, numbing, radiating, sharp, and tingling (in alphabetical order). Her pain was a 9/10. Claimant had associated symptoms of a limited range of motion, tingling and numbness in the right hand, and swelling. Her symptoms were exacerbated by lifting, pushing/pulling, twisting/turning, activities for an extended period of time, driving, standing and walking. Her symptoms were alleviated by ice, rest, elevation, stretching, massage, ibuprofen, and Tylenol. Functionally, Claimant reported difficulty with daily activities such as sleeping, opening her medication bottle, and putting on her clothes.

11. On exam, Mr. McBride found a limited range of motion but no instability. He noted positive empty can and Hawkins tests. Mr. McBride stated that they would move forward with an MRI of the right shoulder to evaluate the patient's right rotator cuff for further treatment plan. They provided Claimant prescriptions for Tramadol and Mobic since her pain was not well controlled at that time and she was having a lot of difficulty sleeping and performing her daily activities.

12. The x-rays from September 28, 2021 showed mild to moderate degenerative changes of the acromioclavicular joint and the glenohumeral joint with a type 2 acromion. Mr. McBride also identified an acute on chronic calcification superior to the greater tuberosity of the humerus.

13. The MRI performed on September 30, 2021 read by Andrew Sonin, M.D., showed calcific tendinopathy of the distal rotator cuff eroding into the humeral head with some calcification in the adjacent superolateral humeral head. Additional areas of signal void[2] in the proximal humeral shaft were surrounded by marrow edema with a thin irregular linear low signal connection between the erosion proximally and the low signal more distally, possibly representing an extension of calcification into the humeral shaft. He also noted significant delamination of the distal rotator cuff with areas of linear nondisplaced full-thickness tearing in the distal supraspinatus and infraspinatus. Dr. Sonin recommended an MRI of the entire humerus to assess the extent of abnormal marrow signal and to assess for the possibility of a more distal lesion such as a tumor or

[2] "Signal void" is interpreted by this ALJ as an area of the MRI which was unable to be clearly visualize due to accumulation of fluid.

fracture. He also recommended a CT of the proximal humerus to distinguish between this process and separate ossifications in the humerus.

14. Dr. Robinson referred Claimant to Dr. Hugate, an orthopedic oncologist with Panorama when the MRI taken on September 30, 2021, showed not only the calcific tendinitis of the shoulder joint and a tear of the rotator cuff but also a differential diagnosis of a more distal lesion such as a tumor or fracture.

15. An MRI was performed of the right humerus at Health Images at Church Ranch on October 8, 2021 was read by Eric Handley, M.D. He identified the calcific infiltrates into the bone but no cortical bone marrow edema. He also identified some moderate supraspinatus tendinopathy and some edema surrounding the bone.

16. On October 14, 2021 Claimant was seen by Ronald R. Hugate of Panorama Orthopedics, for an interoffice referral. Claimant provided a history of having had some aching pain in her shoulder off and on for a few years, but on September 26, 2021 she was pulling a heavy object while at working for Employer and she felt a pop and significant pain in the shoulder.[3] He noted that Claimant had no personal history of cancer. It was noted Claimant was there to determine if she had a tumor. On exam ,Dr. Hugate noted loss of active range of motion with significant pain, but otherwise normal. He noted the calcific tendinitis but also calcium in the proximal humerus. He observed that she had a partial rotator cuff pathology with mixed signal edema in the proximal humeral metaphysis (neck), which affects the physeal scar (growth plate at the neck) and some surrounding edema around the humerus. He did not believe that anything looked like a mass but referred her to Dr. Peter Horner, an interventional radiologist for a needle biopsy and culture to rule out infection or malignancy. He also referred Claimant back to Dr. Robinson for further care of the right shoulder pain.

17. On November 10, 2021 Dr. Robinson continued Claimant off work until further workup could be completed to assess the underlying bone lesion and treatment of the acute right shoulder injury.

18. A CT and bone biopsy of the right shoulder was completed by Dr. Peder Horner on November 12, 2021. The interpretation was not available.

19. On December 2, 2021 Claimant returned to see Dr. Robinson with unrelenting, but improving right shoulder pain. She continued having problems sleeping. He observed that the needle biopsy showed no evidence of abnormality, and was negative for cancer. He diagnosed strain of the muscles and tendons of the rotator cuff of the right shoulder and calcific tendinitis. He made the following medical decisions:

> She has a very unusual case of calcific tendinitis, which then made its way into her approximate humerus. She has some scattered degenerative changes and some wear and tear of the rotator cuff with a large calcium deposit. We talked about treatment options. We are going to move forward with physical therapy for the next 4-5 weeks. We might repeat her MRI. We are trying to decide whether or not the rotator cuff requires repair. I would like some of the inflammation to settle down, probably repeating her MRI and making her final decision.

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[3] This history provided to Dr. Hugate is considered roughly consistent with the Claimant's testimony at hearing. The reference to a "conveyor belt" is simply a misinterpretation of Claimant's explanation of the mechanical parts involved.

…

> We discussed surgery as a possible treatment course and the patient elected to consider options before deciding. We also discussed the patient's history of thyroid disease, which may increase the level of risk associated with this surgery.
>
> The procedure risks, benefits, side effects, and alternatives of the procedure were discussed at length with the patient. We discussed the following risks of arthroscopy: Allergic reactions to anesthesia, postoperative infection, stiffness, swelling, blood clots, continued pain, and in some severe cases osteonecrosis or rapid deterioration of the surrounding cartilage.

20. Dr. Robinson referred Claimant to physical therapy for rotator cuff tear arthropathy of the right shoulder, to begin with isometric, and progress to PRE's (progressive resistance exercises) as tolerated, but to avoid impingement positions. He also ordered scapulothoracic strengthening, stretching, soft tissue manipulation and mobilization, and modalities as needed.

21. Claimant had a virtual appointment with Dr. Hugate on December 6, 2021. He reported Claimant was negative for cancer but commented that she had an unusual condition that caused the calcific tendinitis to infiltrate the marrow space of the humerus bone, which was very rare. He recommended Claimant be evaluated by Dr. Stuart Kassan, a rheumatologist. The diagnosis history was a strain of muscles and tendons of the rotator cuff of the right shoulder, calcific tendinitis of right shoulder, acute pain of the right shoulder, arm mass, and other calcification of muscle of the right shoulder.

22. Dr. Robinson wrote down on March 16, 2022 that Claimant continued to have work restrictions regarding her work-related injury, which included, not opening aircraft doors, pulling off mobile bridge adaptors; and no pushing, pulling, lifting, or overhead pressing more than 5 lbs.

23. On March 30, 2022 Dr. Robinson took a history of improving right shoulder pain with unremitting difficulty sleeping. He continued physical therapy for another 18 visits for range of motion and strengthening. He ordered an updated MRI. Claimant reported that she was having difficulty with workers' compensation and her personal insurance had been terminated.

24. On April 1, 2022 Dr. Robinson wrote that Claimant:

> … is a patient of mine at Panorama Orthopedics and Spine Center. Due to her recent injury we are ordering an MRI of her shoulder. This will be a necessary diagnostic test in order to help us decide how to move forward. She will need the MRI and to follow up with us afterwards. At that time we will discuss how it is best to move forward with the injury.

25. Claimant was also seen by Panorama Orthopedics Physical Therapy on April 1, 2022. Claimant reported she had a 3-4/10 pain all the time and sharp pain occasionally up to 8/10. Ms. Martha Myers documented Claimant was unable to work due to the injury. The history of the mechanism of injury was consistent with Claimant's testimony at the hearing. She mentioned Claimant continued to have signs and symptoms of rotator cuff tear with decreased ROM, strength, impairments in body mechanics, posture, soft tissue restrictions, edema, and pain. She recommended ongoing physical therapy.

26. The MRI performed on April 28, 2022 showed a small full-thickness perforation of the posterior supraspinatus, and that the previously noticed edema had nearly resolved. Though there was a hyperintensity[4], likely a bone infarct (osteonecrosis) as a result of the previous biopsy.

27. Dr. Robinson reexamined Claimant on May 11, 2022. He commented that Claimant had continued right shoulder pain that was sore and sharp. Associated symptoms included tightness and stiffness. Her symptoms were exacerbated by certain movements and alleviated by rest. Functionally, Claimant reported being limited by pain with certain motions. He mentioned that Claimant had been previously advised that her case was likely surgical and was a work-related concern from September 26, 2021 with continued functional limitations. He noted Claimant had loss of ROM but otherwise had a stable exam. Dr. Robinson continued to diagnose calcific tendinitis[5] and strain of the right shoulder. Dr. Robinson reviewed the MRI and noted no surgical pathology as the rotator cuff was nearly entirely intact with only a small perforation of the posterior supraspinatus. He continued physical therapy regularly and recommended Claimant avoid movements that were causing her pain for the time being.

28. Dr. Robinson completed a Physician's Report of Workers' Compensation Injury dated June 1, 2022, noting Claimant's therapy, medications and diagnostic testing. He stated Claimant continued to be unable to work. He further provided restrictions which included no lifting, repetitive lifting, carrying, pushing, pulling, gripping, reaching overhead, and reaching away from the body.

29. On June 18, 2022 Dr. Robinson ordered physical therapy for another 12 visits.

30. Claimant continued to attend physical therapy. Ms. Myers remarked, on August 2, 2022, that Claimant had pain of 6/10 if she moves "wrong" with external rotation, and wakes with pain, though with medications the pain was reduced to 2/10. She recorded Claimant had been unable to lift items out of the oven as her arm was unreliable. She highlighted that Claimant was showing signs of improvement, yet still experiencing restricted range of motion. She recommended ongoing PT. The last note by Ms. Myers was from October 18, 2022 noting that PT was suspended because of problems with insurance.

31. On August 4, 2022 Dr. Robinson noted, on exam, that Claimant was much improved but continued with painful ROM, specifically external and internal rotation. He indicated that, in addition to PT Claimant was doing pool therapy. He also gave Claimant a referral to a rheumatologist for a second opinion and to follow up with him within six weeks.

32. Claimant followed up with Dr. Robinson on November 23, 2022. He noted that Claimant continued to improve her ROM, with stable stability and negative tests otherwise. He attributed her improvement to the pool therapy though she did not feel

[4] This ALJ understands that "hyperintensity" shown in an MRI report refers to white spots that denote some problematic area on an image.

[5] Dr. Robinson commented that the calcific tendinitis was a rare form that infiltrated the bone, which caused some concern for cancer, but which was ruled out early on.

confident enough in her shoulder to perform significant movement overhead, lifting, pushing, pulling and Dr. Robinson agreed with her. He recommended continued therapy.

33. On January 30, 2023 Claimant was evaluated by Sander Orent, M.D. by virtual examination at Claimant's request. He took a history consistent with Claimant's testimony at the hearing. He reviewed the medical records and noted Claimant's motions on the video call, which were still limited. He opined that Claimant was clearly not at MMI and was unclear as to why Claimant would be discharged with ongoing symptomology and no impairment rating. He documented that Claimant continued having significant pain with simple activities such as putting her arm into flexion, sleeping at night, lifting pans from the oven, and getting dressed. He recommended a second opinion with a different orthopedic surgeon such as Scott Gottlob, M.D. to consider possible surgical repair, injections, physical therapy or a combination of treatments depending on the evaluation of the consulting orthopedist.

34. Dr. Orent opined that Claimant required substantial work restrictions of no lifting at or above the shoulder level, and lifting from floor to shoulder of no more than 5 lbs. on an occasional basis. He opined that Claimant required an impairment rating as Claimant continued with a significant amount of functional limitations. He also mentioned the possibility of a functional capacity evaluation.

35. Claimant was evaluated by Lawrence Lesnak, D.O., of Colorado Rehabilitation and Occupational Medicine on June 13, 2023, at Respondent's request. Dr. Lesnak took a history, reviewed the medical records, and examined the Claimant. The reported mechanism of injury was consistent with what Claimant testified at the time of the hearing. Dr. Lesnak ultimately opined, after reviewing the medical records and critiquing Claimant's memory regarding them, that while there may have been an incident during working hours on September 26, 2021, there was no medical evidence to support the assertion that she sustained any type of injury to her right shoulder as a result of her work activities on that day. Dr. Lesnak partially based his opinion on his interpretation of the March 2021 physical examination conducted by Dr. Ozbay, which repeated the previous diagnoses from 2019 and earlier. (It is not evident to this ALJ whether Dr. Ozbay was reporting a new or ongoing complaint.)

D. Prior medical records

36. Claimant was evaluated by Julie Sefcik, DO, at Rocky Mountain Primary Care on November 5, 2019 regarding shoulder pain. She noted that Claimant presented with right shoulder pain after having an upper respiratory infection (URI) the prior September. She was having problems moving her arm with pain when using it overhead. She reported that it was pain like a toothache but did not have any further URI symptoms. She documented some loss of range of motion due to pain, a positive Hawkins and crossover test. She diagnosed rotator cuff impingement. Ms. Sefcik injected the shoulder with Toradol and stated that Claimant should follow up for a steroid injection if she did not have relief of her symptoms. She also ordered therapy. Claimant did not return to the Clinic for over a year and did not follow up for therapy.

37. The Health Images x-ray read by Dr. Brian Cox on November 5, 2019 showed a calcific conglomeration and he interpreted it as calcific tendinosis of the rotator cuff. He also noted Claimant had mild acromioclavicular degenerative joint disease. He recommended a follow-up MRI.

38. Later that afternoon, on November 5, 2019, Dr. Sefcik reviewed the x-ray and changed her diagnosis to calcific tendinosis of the rotator cuff. She noted that the calcium deposits were causing pain with shoulder movement. She continued with the prior recommendations that if the Toradol injection did not improve her symptoms, they would recommend a steroid injection and referral to an orthopedic specialist.

39. Claimant's next appointment with her PCP, Dr. Behice Ozbay at RMPC was March 23, 2021 for a general physical. Her only "present concerns" was "easy bruising." The records were standard for review of every one of Claimant's chronic conditions as well as routine wellbeing exams. While the report mentions chronic shoulder[6] problems this is inferred as a reference to the calcific tendinosis and there were little in recommendations for treatment nor were there referrals made at that time, other than advice to continue stretching.

40. Lastly, Claimant was evaluated at Colorado Center for Arthritis and diagnosed with fibromyalgia, morphea (scleroderma), and a positive ANA in 2016. Prateek Chaudhary, DO, performed a physical exam in 2016, 2017 and 2018 that showed no abnormalities, including no tenderness, no swelling, no erythema, no nodules or cysts, no deformities, no crepitus, normal range of motion and normal alignment of all four extremities.

41. Other records from prior to 2016 were not considered relevant other than the diagnosis of calcium pyrophosphate arthropathy, as this showed Claimant was at least aware that she had calcium crystals deposits in her joints that were causing her multiple symptoms.

E. Wages

42. Claimant testified that she worked full time and was working some overtime hours or double shifts.

43. The payroll records submitted by Respondents showed earnings beginning with the pay period ending January 16, 2021.

44. There were no wages before this date and no significant explanation as to why wages prior to this date were not submitted for consideration or why Claimant was not earning wages, other than some indications of Claimant being on medical leave from October 2020.

45. Based on the total wages earned from pay period ending January 16, 2021 (beginning as of January 3, 2021) through pay period ending September 25, 2021, Claimant earned a total of $41,087.32, which divided by 38 weeks provides an average weekly wage of $1,081.25.

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[6] This ALJ determined that any reference to an "old work injury" was incorrect and not credible.

F. Pleadings

46. Respondent's third-party administrator (TPA) filed a Notice of Contest on March 14, 2022 stating the denial was for further investigation.

47. Claimant filed a Workers' Claim for Compensation on May 31, 2022 noting that she was pulling an MBA off the aircraft and the MBA got hung up on the ledge of the swing gate. When the MBA got stuck she pulled and felt a pop in her shoulder. She noted that she had a torn rotator cuff of the right shoulder. Claimant had started the day at approximately 6:15 a.m. and was injured at approximately 7:30 p.m. on September 26, 2021. She notified her supervisor on September 27, 2021.

G. Claimant's Testimony

48. Claimant testified she had multiple preexisting conditions. One of them was calcific tendinosis, which she treated with anti-inflammatory medication, and she was unaware of a cure for this condition. She also reported she had two autoimmune system conditions. The first was Hashimoto's disease, where her immune system fights her thyroid function. The second was scleroderma. Further, she noted her body reacted to stress, food, activity, and different triggers. She had also been diagnosed with fibromyalgia, as documented in her medical records as if it were another symptom of her autoimmune system disease. Prior to her work injury, she had not seen the diagnosing provider since 2018.

49. Claimant acknowledged that she had previous inflammation in her right shoulder as a result of the calcific tendinitis, and had achiness in her right shoulder prior to September 26, 2021, but they were not the kind of symptoms that rendered her unable to work. The inflammation caused by the calcific tendinitis was only an achy sensation and much different than the stabbing sharp pain she felt following the work injury of September 26, 2021. The pain that she felt after this accident was an intense sharp pain that did not go away. She could not move her arm and there was nothing that she could do to get rid of the pain.

50. She had received a cortisone injection in approximately 2009 or 2010 for the inflammation due to the calcific tendinitis. Then in 2019 she had a Toradol injection, as she could not take ibuprofen or anti-inflammatories because she was having stomach problems. She did not see any providers between November 2019 and the March 2021 physical, in part due to the COVID-19 pandemic. Claimant denied that she had complained to her personal care provider that she was having right shoulder problems at that time of her physical in March 2021, but that it had been a complaint carried over from when she saw Julie in 2019.

51. Claimant testified that with the inflammation from the calcific tendinitis, she was able to lift her arm overhead for years while working for Employer opening aircraft doors and moving the MBA, as well as loading bags and other tasks.

52. She could not perform all of these tasks after the September 26, 2021 injury. It was the injury to her rotator cuff that was causing her the pain in conjunction with the

aggravation of the tendinitis. Initially they had told her she would be scheduled for surgery in January 2022 but that never took place as she continued to improve with therapy and time.

53. Claimant testified that she had not yet been placed at maximum medical improvement (MMI) by her treating provider, Dr. Robinson, as of the date of the hearing. Nor had Employer offered her any modified job duties.

54. As she has not recovered full range of motion, which is a necessary function to open aircraft doors and to move the MBA, she has been unable to return to work. Neither could she pick up bags as required of a customer service agent due to the pain associated with movements. She could do reservation service. In fact, she had been trying to get into reservations without any response from Employer.

55. Claimant testified that Employer never referred her to a medical provider or doctor for medical care and treatment following her report to her supervisor. Her supervisor never mentioned a different provider or she would have shown up for care to see any physician that they had identified.

56. Claimant never had any workers' compensation claims regarding her right shoulder prior the accident on September 26, 2021 while working for Employer or any other employer.

H. Conclusion of Findings

57. As found, Claimant was injured on September 26, 2021 when she attempted to release the MBA from the airplane, while she was in a hurry, and the MBA got caught. She pulled to get it dislodged and felt a pop in her right shoulder and had immediate pain. She was diagnosed with a rotator cuff strain and calcific tendinosis.

58. As found, while calcific tendinosis was a preexisting condition, Claimant's insult to an already affected body part caused edema and a small tear of the rotator cuff. As found, the original MRI showed a full-thickness tearing in the distal supraspinatus and infraspinatus. While these were small tears, this does not void the effect the injuries had on Claimant, which aggravated Claimant's intermittent symptoms of pain and discomfort experienced due to the occasional complaints of fibromyalgia or calcific tendinosis over the years.

59. The ALJ has reviewed the reports of both Dr. Lesnak and Dr. Orent and has considered those reports in light of the medical records before the ALJ from Drs. Robinson, Hugate, Ozbay, and St. Anthony's Hospital as well as the previous records from Christ Hospital, and Colorado Center for Arthritis, and finds that prior to the injury of September 26, 2021, Claimant had been diagnosed with autoimmune issues, thyroid disease, calcific tendinitis in her right shoulder, and fibromyalgia among other issues.

60. As found, although Claimant had a history of calcific tendinitis and fibromyalgia that predated the on-the-job injury of September 26, 2021, there was no persuasive or substantial evidence that such resulted in a disability to Claimant prior to the on-the-job injury of September 26, 2021.

61. As found, Claimant heard a pop in her shoulder, developed immediate pain, and the care and treatment for that condition was described in the records reviewed above. The X-Rays performed on September 28, 2021, indicated an "acute on chronic" calcification superior to the greater tuberosity of the humerus," as well as edema surrounding the humeral head. These records indicated to this ALJ that Claimant sustained an aggravation of the calcification at the time of the September 26, 2021 injury as well as an injury to her rotator cuff, both of which Dr. Robinson has been treating since the onset of his treatment of Claimant beginning September 28, 2021.

62. As found, Claimant worked full time as a customer service agent for an airline, opening aircraft doors, moving very heavy bridges and bridge adaptors in order to perform her job for the airline, without significant difficulty, despite her preexisting medical diagnosis. As found, Claimant's injury aggravated her preexisting condition in addition to cause a new injury as represented by her small rotator cuff tear. This is supported by Dr. Robinson's records above.

63. As found, the medical records reflect that Claimant sustained an injury that resulted in the need for medical treatment on September 26, 2021, and that the diagnostic testing performed shortly thereafter showed a supraspinatus rotator cuff tear and calcification going into the humerus head and a condition that Dr. Robinson described as complex. As found, the medical care and treatment was authorized, reasonably necessary and related to the injury.

64. As found, the fair approximation of Claimant's average weekly wage is $1,081.25 per week.

65. As found, Claimant was unable to return to work after the September 26, 2021 work-related injury and is entitled to temporary total disability benefits beginning as of September 27, 2021 until terminated by law.

66. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. Sec. 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

"Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires Claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

Claimant has established by a preponderance of the evidence that she sustained a compensable injury arising from the course of her employment with Employer on September 26, 2021. The evidence demonstrates that, although Claimant had a preexisting calcific tendinosis in the right shoulder and fibromyalgia, Claimant was, while not free from any symptoms, able to perform her full time job with Employer, which required her to perform heavy activities on a daily basis. Those included opening aircraft doors, moving the bridge and mobile bridge adapter in order to allow flying customers to get on and off the planes, and moving or loading baggage. Claimant was in the process of detaching the MBA when it got stuck. Claimant hurried to pull it free, felt a pop and immediately intense pain. This occurred at approximately 7:30 p.m. in the evening. She was able to complete her work that evening and went home by 9:00 p.m., at which time, after the adrenaline rush she felt had subsided, she could not even undress herself. This is supported by the history given in the emergency room, to her treating providers as well as the IME physicians whom examined Claimant on her own behalf as well as on behalf of Respondents.

It is specifically persuasive to this ALJ, Dr. Robinson's multiple indications that Claimant had a right shoulder strain and small rotator cuff tear caused by the work-related events of September 26, 2021. Further, it is persuasive and supports a finding of compensability that the there was a showing on the MRI performed in April 28, 2022, of a small full thickness perforation of the posterior supraspinatus, and that the previously noticed edema had nearly resolved. The fact that there was edema that resolved is another indication that there was a traumatic aggravation of the tissue surrounding the humerus where the calcification was present. As found, from the totality of the evidence, including Dr. Robinson's opinion and Dr. Orent's opinion that Claimant sustained injuries on September 26, 2021 whose opinions were more credible and persuasive than the contrary opinions of Dr. Lesnak, Claimant has shown than her claim is compensable. Dr.

Lesnak concentrates his review of the records going back years showing that Claimant had chronic health problems but did not offer a cogent opinion that no actual injury occurred and this ALJ does not find Dr. Lesnak's opinions credible or persuasive. The reality is that those preexisting problems were not interfering with Claimant's work in September of 2021. The accident and injuries which Claimant sustained on September 21, 2021 did prevent Claimant from returning to work. As found, while Claimant had a history of chronic complaints and had occasional right shoulder problems that were prone to exacerbation, Claimant was not experiencing ongoing symptoms in the months before September 26, 2021, when the symptoms returned and were aggravated while Claimant was performing her work for Employer. Regardless of any inconsistencies in Claimant's memory of past chronic problems, the specific injury she sustained to her right rotator cuff, including the strain, the small tendon tear and the aggravation of the calcific tendonitis were proximately caused by the incident which occurred when Claimant, on September 26, 2021, pulled on the MBA to dislodge it and move it so the next aircraft to be hooked up. Claimant has shown by a preponderance of the evidence that she was injured within the course and scope of her employment with Employer and that the injuries to her right rotator cuff, including the strain, the small tendon tear and the aggravation of the calcific tendonitis were proximately caused by the September 26, 2021 accident. The ALJ finds it more likely than not that Claimant's work-related accident caused injuries and an aggravation of her preexisting conditions. As such, Claimant has established that it is more likely than not she sustained a compensable injury.

C. Authorized Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Because Claimant sustained a compensable injury, she is entitled to reasonable and necessary authorized medical treatment to cure or relieve the effects of his injury. Claimant's treatment at the emergency room at St. Anthony's, with Panorama Orthopedics and providers within the chain of referral are authorized, reasonably necessary and related to the injury.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM*

Corp., 867 P.2d 77 (Colo. App. 1993). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

This ALJ determined that the fair approximation and calculation was to average out the Claimant's wages beginning on January 3, 2021 with pay period ending January 16, 2021 through pay period ending September 25, 2021. Claimant earned a total of $41,087.32, which divided by 38 weeks provides an average weekly wage of $1,081.25. As found, the fair approximation of Claimant's average weekly wage is $1,081.25 per week.

E. Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbios* Logic, 952 P.2d 831 (Colo. App. 1997).

As found, the persuasive evidence shows Claimant was disabled by the September 26, 2021 injury because she could not use her right upper extremity. She was initially given temporary restrictions by the emergency physician. Later, Dr. Robinson, her authorized treating physician, kept Claimant off of work. Claimant credibly testified that with the inflammation from the calcific tendinitis she was able to lift her arm overhead for years while working for employer opening aircraft doors and moving the MBA, as well as loading bags and other tasks. She could not perform all of these tasks after the September 26, 2021 injury. It was the injury to her rotator cuff and the aggravation of her calcific tendinosis that caused her to be unable to return to work for Employer at her same job duties. Further, Claimant testified that she had not yet been placed at maximum medical improvement by Dr. Robinson, and nothing in the records and evidence submitted at the time of the hearing were persuasive otherwise. Nor had Employer offered her any modified job duties. As found, Claimant was unable to return to work beginning on September 27, 2021. Claimant credibly testified that she was unable to return to work due to her injuries of September 26, 2021 and continued to be unable to perform her job. Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits beginning on September 26, 2021 until terminated by law. Claimant is owed TTD benefits from September 27, 2021 until terminated by law.

Based on Claimant's AWW of $1,081.25, Claimant's TTD rate is $720.83. TTD benefits calculated through and including the date of the hearing of July 26, 2023 (628 days or 95 week and 3 days) are in the amount of $68,842.97.

Further, Claimant is owed statutory interest at the rate of eight percent (8%) on all benefits not paid when due, which is calculated through the date of hearing as follows:

[Redacted, hereianfter IRT]

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has proven by a preponderance of the evidence she suffered compensable work-related injuries to her right upper extremity and shoulder on September 26, 2021 while in the course and scope of her employment with Employer.

2. Respondents shall pay all authorized, reasonably necessary and related medical benefits including but not limited to St. Anthony Hospital, and Panorama Orthopedics as well as medical providers within the chain of referral. All payments shall be made pursuant to the Colorado Fee Schedule.

3. Claimant's average weekly wage is $1,081.25 and her temporary total disability benefits rate is $720.33.

4. Respondents shall pay temporary total disability benefits beginning on September 27, 2021 and continuing until terminated by law.

5. Respondents shall pay interest at the statutory rate of 8%, pursuant to Section 8-43-401 (2)(a), C.R.S. (Cum. Supp. 2023), on all benefits that were not paid when due.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 31st day of August, 2023.

By: /s/ Elsa Martinez Tenreiro

Elsa Martinez Tenreiro
Administrative Law Judge
525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-267-002

ISSUES

- Did Claimant prove that the L4-5 surgery recommended by Dr. Crowther's office is causally related to her February 6, 2022 industrial injury and if so, is it reasonable and necessary?

- Whether claimant's work restrictions on and after February 14, 2023, are causally related to claimant's injury covered by this claim, and, if not, whether Respondent is relieved of any obligation to pay Claimant ongoing TTD benefits on and after February 14, 2023?

FINDINGS OF FACT

1. Claimant worked for the Employer stocking grocery items. On February 6, 2022, she was stocking potato chip bags from boxes on a pallet on to a shelf. She testified that as she was about to put the last bag on the shelf, she was twisting around reaching for the last bag to put on the shelf when she experienced severe pain in her low back. She screamed "ouch". A co-worker asked if she was ok. She told him she was in pain. She sat down on the step stool that she was using. She tried to go back to work and picked up the bag of chips to put it on the shelf when she experienced pain again and screamed "ouch" again. She and the co-worker went to the break room and the co-worker contacted the head clerk in the front of the store to let the clerk know what had happened.

2. After reporting the injury, the Claimant went to the emergency department at St. Francis Hospital. Claimant was seen by Physician Assistant Justin Jester. He noted "This a 41 y.o. female with no significant medical problems presents here complaint of back pain. Is located in the left lower back. She was at work today stocking potato chips she states she was pushing and it made it hurt in the left lower back. It radiates into her buttocks. It does not go below that area." In the physical exam section, he notes "Positive tenderness in the left lower back. No midline tenderness. It radiates into the buttocks. Negative straight leg raise. No saddle anesthesia. Normal flexion-extension of her feet and toes. No paresthesias below the buttocks". The final diagnosis was "strain of lumbar region, initial encounter". (Exhibit I, pp. 259 -260).

3. Claimant was next seen at [Redacted, hereinafter OM] by Dr. McNulty on February 7, 2022. He took a history that "the patient is a 41-year-old female who is a Worker's Compensation injury. Apparently yesterday she experienced pain in the left side of her lumbar spine after pushing a 5 pound box of potato chips at work. She said the pain is now starting to go over onto the right side and is going into her buttocks. She denies any weakness or loss of function or sensation in the lower extremities. She went to the emergency room where she had a fairly extensive work-up but no x-rays. She was

diagnosed with a lumbar strain and given lldocaine patches, IV fluids, cyclobenzaprine and ibuprofen. She said her pain is somewhat better with these medicines. She works as an all-purpose clerk at a local grocery store where she only stocks food on shelves. Her job description however says that she needs to be able to lift and carry upwards of 75 pounds. She works 4-hour shifts with a 15-minute break and spends most of her shift standing. She has been doing this job for 15 years. Her past medical history is significant for seizures and hypertension, she only smokes medical marijuana for her seizures and she is on lisinopril and hydrochlorothiazide for her hypertension. Her social history is positive for smoking marijuana but she does not smoke tobacco and she does not use alcohol or any other recreational drugs by history." Objectively, Dr. McNulty noted near full lumbar flexion actively with some acute tissue changes in the paralumbar musculature from L3-S1 bilaterally. It was worse on the left than the right. There was no straight leg raising noticed. He ordered x-rays which did not reveal any acute osseous abnormalities. He diagnosed the Claimant with a lumbar sprain. He recommended continuing the medication she was taking, recommended physical therapy and recheck in 2 weeks. (Respondent's Exhibit C, p. 30). Dr. McNulty imposed restrictions of 2 pounds lifting, carrying, pushing and pulling. He also gave a restriction of sitting for 30 minutes for each hour of work.

4. Claimant went back to Dr. McNulty on February 21, 2022. He noted that Claimant took it upon herself not to return to work with the restrictions he provided. He also noted that Claimant had not gone to physical therapy as ordered. His impression was "lumbar sprain, no clinical improvement". He maintained the previous restrictions. In his treatment plan, he noted that she had acute left-sided low back pain without sciatica. He recommended a referral to "orthopedics". He also noted in his treatment plan that she had lumbar paraspinal muscle spasm and re-recommended physical therapy. In order to ensure that Claimant went to physical therapy, Dr. McNulty had his staff escort the Claimant to Colorado Institute of Sports Medicine. Claimant's restrictions remained the same.

5. Claimant was next seen by Virginia Quiroz, N.P. at OM[Redacted] on February 23, 2022. In addition to managing her medications, Ms. Quiroz administered a cortisone injection into Claimant' left SI joint.

6. On March 16, 2022, Claimant returned to OM[Redacted] and was seen by Dr. McNulty. In his objective evaluation, He notes that "She has full range of motion in her lumbar spine today and no real acute tissue changes. She has full active flexion extension and sidebending left and right". His impression was "Lumbar sprain and symptomatic but with full function". He also noted that Claimant stopped physical therapy due to her hospitalization for some gastrointestinal illness.

7. Ms. Quiroz, at OM[Redacted], saw the Claimant on March 23, 2022. Claimant was following up on low back pain. She reported pain level of 7 out of 10. Claimant stopped taking muscle relaxants because she thought she was having pancreatitis. She went to the hospital, and was told her pain was due to her colon. Ms. Quiroz noted that Claimant had a cortisone injection previously on February 23, 2022, which helped a little. Claimant reported that she was sore for five days after the injection

and slowly got better after that. The physical exam only revealed tenderness in the left sciatic notch and muscle spasms on the left side. The straight leg raise was negative.

8. Dr. McNulty next saw Claimant on April 13, 2022 and continued with the diagnosis of lumbar sprain. He also noted in the treatment plan that they were waiting on worker's compensation to establish causality and compensability. The pain diagram the Claimant filled out on this day showed pain localized to the lower back and was rated a 6 out of 10. He scheduled the Claimant to be seen on May 19, 2022.

9. The next treatment visit note was on June 24, 2022. Dr. McNulty indicated that her worker's compensation case had been "reactivated". However, prior to this visit the Claimant had not been treating. Objectively, Dr. McNulty noted she was in no apparent distress and was ambulating easily without a limp. She had lost 60% of active flexion and extension in her lumbar spine and there was no midline tenderness and straight leg raising was negative. He continued with the diagnosis of lumbar sprain. He referred the Claimant to outside orthopedics. He also order PT to be restarted and prescribed muscle relaxants. The pain diagram filled out by Claimant still showed lower back pain that was localized and was not radiating down either leg.

10. When Claimant was seen on July 8, 2022, the assessment was lumbar paraspinal muscle spasm and acute left-sided low back pain without sciatica. Claimant was prescribed continued physical therapy.

11. Dr. McNulty saw her again on August 1, 2022. For the first time, Claimant's pain diagram including pain emanating from her low back and down the back of her left leg. Also new was the diagnosis of lumbar radiculitis. The chief complaint was "pain from low back is now starting to shoot down to above the knee". In addition to a referral to pain management was the continued referral to orthopedics that was awaiting precertification.

12. An MRI was taken on September 11, 2022. The findings included mild facet arthropathy at L4-5 with disk herniation or stenosis. It also showed that the L5-S1 disk was narrow and desiccated with Modic type 2 changes and a broad-based right paracentral and lateral disc protrusion which narrowed the right inferior foramen and right lateral recess. There was mild facet arthopathy at that level.

13. Claimant saw Dr. Crowther, an orthopedic physician, on December 22, 2022. The history given to him was "This pleasant 42 year-old present to clinic for evaluation of her back and bilateral leg pain. Patient states that she had a work injury earlier in 2022 which has caused significant pain and discomfort in her back and down her legs." This history is different than that given to Dr. McNulty at the inception of the work injury. Initially, the Claimant reported pain in the lower back, only. The history given to Dr. Crowther now includes low back pain and bilateral leg pain. Dr. Crowther recommended ongoing conservative care. This included additional injections and physical therapy. Claimant was to follow up with Dr. Crowther after completion of the conservative care.

14. When claimant returned to Dr. Crowther on February 2, 2023, Claimant said the injections did not give her any relief or improvement. Claimant had not, despite his recommendation and referral, had physical therapy. He recommended claimant continue with conservative treatment and medications including physical therapy and chiropractic care. (Ex. F, pgs. 198-199).

15. Claimant still had not gone to or attempted physical therapy or chiropractic treatment when she saw Brianne Wagner, N.P. at Dr. Crowther's office on March 16, 2023. She still maintained no treatment she had received had given her any improvement or relief. Sensation in her lower extremities, and provocative testing, were all normal. Despite claimant not attempting physical therapy, Nurse Wagner wrote claimant had failed conservative therapies for her lumbar spine, and she recommended surgery, a right L5-S1 hemilaminotomy and discectomy with facet cyst excision (Ex. F, pgs. 200-201). Nurse Wagner did not address causation or relatedness, or document review of any of claimant's medical records from her other providers.

16. Claimant saw Dr. Michael Rauzzino for an IME on February 13, 2023 at Respondent's request. A recording of the evaluation was submitted by both parties and was reviewed in its entirety by the ALJ in addition to Dr. Rauzzino's report and testimony. Claimant complained of low back pain and pain going down her right leg. Claimant denied prior low back pain. In addition to taking a history, Dr. Rauzzino performed a physical examination which included range of motion measurements. At the conclusion of the evaluation, Claimant was crying and complained of pain of 10 out of 10.

17. In Dr. Rauzzino's report, he states "I do not have an anatomic diagnosis to account for [Redacted, hereinafter SA] severe pain complaints. Her mechanism of injury is very benign and not likely to injure the lumbar spine or musculature. I don't believe that the chronic changes seen at L5-S1 are the cause of her current symptomatology. Based on my experience as a practicing neurosurgeon, I do not believe that the chronic changes seen there would produce the progressive and severe types of symptoms she is reporting…I therefore do not believe that her current symptoms and subjective complaints are related to the mechanism of injury described: they are not consistent with the radiographic findings seen on MRI. At best, SA[Redacted] may have sustained some sort of lumbar strain, but that should have resolved in a very brief period of time." (Respondent's Exhibit A, p. 21).

18. In addition to these opinions, Dr. Rauzzino testified at hearing that the initial pain diagram did not document a disc herniation injury since the pain was localized to the low back and did not radiate to the lower extremities. (Respondent's Exhibit C, p.35). He added that if the injury did include a disc herniation, there would be an indication of pain down to the lower extremities.

19. Dr. Rauzzino also opined that the surgery proposed by Dr. Crowther is not reasonable and necessary. This opinion is based on the risks of surgery which include scarring in the area of the surgery, weakening of the structure of the spine, chronic pain and failed back syndrome. He also questioned the reasonableness of surgery based on positive Waddell's testing. Finally, Dr. Rauzzino opined that the surgery proposed by Dr.

Crowther is to treat pain, and not to correct any anatomical or structural defect that is generating the pain.

20. Dr. Rauzzino's causation opinions and opinions on reasonableness and necessity are credible and persuasive.

21. Claimant testified that none of the treatment provided has improved her condition. She is worse now than when the injury occurred.

22. Dr. Rauzzino testified at hearing and wrote in his report there are no current diagnoses, need for medical treatment, or restrictions causally related to claimant's incident covered by this claim. (Ex. A, pp. 21-23).

22. The last report in the exhibits is from Dr. McNulty and is dated April 10, 2023. He noted that surgery had been denied by the workers compensation carrier. He maintained restriction of 2 pounds lifting, carrying, pushing and pulling. He also indicated that Claimant was not at MMI since she needed surgery.

CONCLUSIONS OF LAW

A. Medical Treatment

The Respondent is liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondent admits liability, it retains the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment to the same body part was proximately caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondent disputes the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not prove an injury objectively caused any structural anatomical change to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have

required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact a claimant experiences symptoms after an accident at work does not necessarily mean the employment aggravated or accelerated a preexisting condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Ultimately, the ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Claimant failed to prove the L4-5 hemilaminectomy and discectomy is reasonable necessary and causally related to her industrial injury. I am persuaded by the opinions of Dr. Rauzino that the Claimant's request for surgery is not reasonable and necessary or related to the incident on February 6, 2022.

B. Temporary Disability

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*.

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019). Since Respondent has failed to prove any of the elements required under §8-42-105(3), Respondent's request to terminate TTD is denied.

ORDER

It is therefore ordered that:

1. Claimant's request for L5-S1 hemilaminotomy and discectomy with facet cyst excision surgery is denied and dismissed.

2. Respondent's request for termination of TTD is denied since Respondent has failed to satisfy any of the requirements of §8-42-105(3).

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 31, 2023

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues addressed in this order concern the calculation of Claimant's average weekly wage (AWW). The specific question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a post injury increase in her AWW due to the loss of her employer paid health insurance coverage and other fringe benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a former Certified Nursing Assistant (CAN) and transportation driver for Respondent-Employer. She sustained compensable injuries to her low back on August 21, 2020.

2. Respondent admitted liability for Claimant's injuries and paid lost wage benefits based upon an AWW of $825.21 pursuant to a General Admission of Liability (GAL) filed by [Redacted, hereinafter LC] on October 21, 2022. (Resp. Ex. A, p. 1; Clmt's. Ex. 1, p. 1). It is unknown what information LC[Redacted] used to compute Claimant's AWW as no calculations are included on the GAL admitted into evidence. *Id*.

3. At hearing, Respondents asserted that Claimant's earnings from August 1, 2019 through July 31, 2020 support an AWW of $811.10 rather than $825.21. Respondents rely on Claimant's earnings history contained at Exhibit B, pp. 5-6 for their contention that Claimant's AWW equals $811.10. Claimant contends that Respondents AWW calculation is incorrect and that she is entitled to an increase above any calculated AWW because of the cost associated with replacing the loss of her employer paid group health insurance.

4. Respondents' Hearing Exhibit B, pp. 5-6 consists of a compilation of Claimant's wages extending from August 1, 2019 through July 31, 2020. Careful review of this exhibit supports a conclusion that Claimant is paid a recurring amount of $2,750.00 on the last day of each month. The ALJ infers from the evidence presented that this payment probably reflects Claimant's regular monthly salary. The remaining payments reflected on Claimant's earnings history probably represent periodic payments for ancillary services Claimant provided to Respondent-Employer or mileage reimbursement for distances traveled in connection with her driving position. Regardless, Respondents seemingly agree that these additional payments also constitute wages for inclusion in Claimant's AWW calculation.

5. Careful review of the admitted earnings history report supports a finding that for the 52 week work history beginning August 1, 2019 and ending with her July 31, 2020 paycheck, Claimant earned $42,177.07. Dividing Claimant's total wages by 52 weeks supports Respondents AWW calculation of $811.10. ($42,177.07 ÷ 52 weeks = $811.10). (Resp. Ex. B, pp. 5-6). Nonetheless, Claimant's employment was terminated and she lost her employer paid health insurance effective January 31, 2022. (Resp. Ex. C, p. 7). Claimant qualified for [Redacted, hereinafter CA] coverage beginning February 1, 2022. *Id.*

6. Although she qualified for CA[Redacted] coverage beginning February 1, 2022, the evidence presented supports a conclusion that Claimant did not continue her health coverage through CA[Redacted] following the loss of her employer paid group health insurance plan. Indeed, Claimant testified that she "did nothing" to replace her health insurance for "quite a while" until she "finally went out and purchased [her] own" coverage.

7. The evidence presented supports a finding that Claimant obtained replacement health insurance through a "[Redacted, hereinafter CH]" plan through [Redacted, hereinafter KR]. (Resp. Ex. D, p. 16). Her coverage was effective December 15, 2022. *Id.* Claimant's cost of conversion to the CH[Redacted] plan is $251.31/month or $58.00/week. ($251.31 × 12 months ÷ 52 weeks = $58.00). *Id*.

8. Claimant also had dental and vision insurance coverage while working for Respondent-Employer. The cost to continue Claimant's dental and vision insurance coverage through CA[Redacted] is $37.52/month and $4.49/month respectively. (Resp. Ex. C, p. 14). Respondents indicated that for purposes of calculating Claimant's AWW after the loss of her employer paid health insurance and conversion to her private plan on December 15, 2022, they added the weekly cost ($58.00) of Claimant's private health insurance and the monthly CA[Redacted] related costs for continued dental and vision insurance to her average weekly wage of $811.10. Respondents maintain that when the cost of Claimant's conversion to a similar or lesser health insurance plan and the CA[Redacted] cost for dental and vision coverage is added to her average weekly wage of $811.10, her new AWW equals $911.11. ($811.10 + $58.00 (weekly health insurance cost) + $37.52 (monthly dental cost) + $4.49 (monthly vision cost) = $911.11).

9. Claimant requests that the value of other "incidental" benefits she was receiving at the time of her injury be included in her AWW calculation, including employer paid contributions for [Redacted, hereinafter PA], life insurance and short term disability insurance. (Claimant's Testimony; Clmt's Ex. 4).

10. Based upon the evidence presented, the ALJ generally adopts Respondents' methodology in calculating Claimant's AWW. Indeed, the wage records submitted into evidence support Respondents' asserted AWW of $811.10. Moreover, the evidence presented substantiates a finding that Claimant converted to a private health insurance plan at a weekly cost of $58.00, which the ALJ finds should be included in her AWW pursuant to C.R.S. § 8-40-201 (19)(b) and 8-42-103 (2). Where the ALJ diverges from Respondents' AWW calculation is their inclusion of the monthly

rather than the weekly CA[Redacted] cost for continuing dental and vision insurance coverage. The weekly cost of Claimant's dental coverage through CA[Redacted] continuation is $8.66. ($37.52 × 12 months ÷ 52 weeks = $8.66). The weekly cost to continue Claimant's vision coverage through CA[Redacted] is $1.04. ($4.49 × 12 months ÷ 52 weeks = $1.04). Accordingly, the ALJ finds that Claimant has proven that her AWW should be increased to $878.80 ($811.10 + $58.00 + $8.66 + $1.04 = $878.80).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993)[1]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

D. Sections 8-42-102(3) and (5)(b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*; *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has

[1] The claimant in Campbell suffered three periods of temporary disability and for each subsequent period was earning a higher average weekly wage. The question resolved was whether Ms. Campbell was entitled to temporary disability benefits based on the higher AWW she was earning during each successive period of temporary disability. The Court held that it would be unjust to calculate her disability benefits in 1986 and 1989 on her substantially lower earnings she was making in 1979.

discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp., supra*.

E. Pursuant to § 8-40-201 (19)(b) provides:

> The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19).

F. The workers' compensation act also provides that upon termination of a fringe benefit or advantage enumerated in § 8-40-201 (19)(b), including the loss of employer paid group health insurance requires an injured workers' employer, or if insured the employers' workers' compensation carrier or third-party administrator to recalculate the AWW and pay benefits in accordance with this recalculation with interest beginning on the date the benefit was terminated. (C.R.S. § 8-42-103 (2)).

G. The best evidence of Claimant's actual wage loss and therefore a fair approximation of her diminished earning capacity at the time of her industrial injury comes from the wage records admitted into evidence. As found here, careful review of the wage records (Resp. Ex. B) persuades the ALJ that the computation of Claimant's AWW based upon 52 weeks of earnings yields an AWW of $811.10. Moreover, the evidence presented persuades the ALJ that Claimant is entitled to a recalculation of her AWW based upon the loss of her employer paid health, dental and vision insurance following the termination of her employment. Because the value of the additional advantages, including employer paid PA[Redacted] contributions, life insurance payment and short term disability insurance contributions are not enumerated in C.R.S. § 8-40-201 (19)(b), the request that they be included in the calculation of Claimant's AWW must be denied. Accounting for the cost of the conversion to a similar of lesser health plan and the CA[Redacted] cost to continue her dental and vision coverage, Claimant has established that she is entitled to an increase in her AWW to $878.80.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that she is entitled to an increase in her AWW to $878.80.

2. Pursuant to § 8-42-103 (2), Respondent-Employer shall pay benefits in accordance with the above outlined recalculated AWW with interest beginning on the date Claimant's employer paid health, dental and vision insurance was terminated.

3. All matters not determined herein are reserved for future determination.

DATED: August 31, 2023

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-191-762-003

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that all medical treatment after June 8, 2022 (including all recommendations and referrals made by Dr. Kennan Vance and Dr. Benjamin Sears) constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted September 20, 2021 work injury?

Have Respondents demonstrated, by a preponderance of the evidence, that Claimant experienced an intervening event on June 8, 2022 or June 9, 2022 that was sufficient to sever Respondents' liability?

Has Claimant demonstrated, by a preponderance of the evidence, that on August 30, 2023 she suffered further injury while in the quasi-course of employment?

FINDINGS OF FACT

1. Claimant worked for Employer as a cashier and "self check-out host". On September 20, 2021 Claimant suffered an injury to her right shoulder while lifting a case of beer while working for Employer. Respondents have admitted liability for the September 20, 2021 work injury.

2. Following the September 20, 2021 injury, Claimant was diagnosed with a torn right rotator cuff. On December 22, 2021, Dr. Keenan Vance performed a repair of Claimant's torn rotator cuff. Specifically, the procedure included "diagnostic operative arthroscopy of the right shoulder with extensive intra articular debridement", and "repair of a massive retracted rotator cuff tear and subacromial decompression including acromioplasty".

3. Unfortunately, the initial surgery failed and on May 17, 2022, Dr. Vance performed a right reverse total shoulder arthroplasty. In the operative report, Dr. Vance noted "63-year-old female with osteoporosis that failed her rotator cuff repair. Intraoperatively on the rotator cuff repair we had difficulty with her anchors holding into the bone."

4. At the completion of the May 17, 2022 surgery, x-rays were performed and showed that the hardware from the reverse total shoulder arthroplasty was "intact and well seated".

5. Thereafter in June 2022, Claimant suffered two falls at home. Claimant testified that the first fall occurred on June 8, 2022, when she was exiting her vehicle, and she slipped and fell onto her right side.

6. Claimant further testified that she fell a second time on June 9, 2022. In this instance, Claimant was on her porch and placing a water bowl for her cat. As she returned to standing, she began to feel lightheaded and fell backwards onto her buttocks.

7. In a medical record dated June 22, 2022, Claimant was seen by her primary care provider (PCP) Dr. Daniel Sullivan regarding recent shortness of breath. At that appointment, Claimant reported to Dr. Sullivan that she had fallen twice at home. Dr. Sullivan recorded that the first fall occurred when "she was getting some bags out of the trunk and she landed on her side and knees." Dr Sullivan also noted that with this first fall she thought she had broken ribs on her right side. With regard to the second fall, Dr. Sullivan noted that it was "a porch fall as she began to black out due to not having her oxygen. She landed on her bottom".

8. On July 6, 2022, Claimant returned to Dr. Vance. In the medical record of that date, Dr. Vance noted Claimant's report that she had fallen at home "a couple of weeks ago". Claimant informed Dr. Vance that she "tried everything not to fall on her shoulder but she did break [four] ribs and she fell on her knee." Based upon Claimant's report of a fall, Dr. Vance ordered x-rays.

9. On that same date, x-rays of Claimant's right shoulder revealed a heme fracture of the glenoid with dislodgement of the glenoid component. Dr. Vance listed it as an active problem of an acute periprosthetic fracture around the prosthetic joint.

10. Dr. Vance advised Claimant that due to this fracture; another revision surgery would be necessary. Dr. Vance noted that such a revision surgery would require bone grafting and a new glenoid component. As a result, Dr. Vance referred Claimant to another surgeon with experience with such complex procedures. This referral was made to Dr. Benjamin Sears in Denver, Colorado.

11. On August 3, 2022, Claimant was seen by Dr. Sears. In reciting Claimant's history, Dr. Sears noted that after the reverse total shoulder arthroplasty, Claimant "had another fall about [six] weeks later". Dr. Sears noted that the fall resulted in loosening the surgical hardware that is now "completely dislodged". Dr. Sears recommended a two stage procedure and placement of a custom glenosphere. Prior to scheduling the procedure, Or. Sears also expressed concern about a possible infection and ordered a CT scan of Claimant's right shoulder. Dr. Sears also ordered nerve conduction studies.

12. On August 30, 2022, Claimant attended an independent medical examination (IME) with Dr. John McBride. In connection with the IME, Dr. McBride reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. McBride opined that Claimant's need for the initial rotator cuff repair and the reverse total arthroplasty were both related to the September 20, 2021 work injury. Dr. McBride also noted that both of those procedures were reasonable and necessary medical treatment. Dr. McBride further opined that Claimant's fall at home resulted in the fracture of Claimant's scapula and caused the glenosphere to become dislodged. Specifically, Dr. McBride noted that it was that fall

that was "the etiology for [Claimant's] need for revision of her reverse total shoulder replacement." Dr. McBride agreed that it would be wise to determine if there is an underlying infection in Claimant's shoulder. However, he further noted that if such testing was negative, then the trauma of the fall would be the cause of Claimant"s periprosthetic fracture, and therefore not related to the work injury.

13. Clamant resides in Grand Junction, Colorado and the IME with Dr. McBride was conducted in Denver. Respondents provided Claimant with air travel to attend the IME. On August 30, 2022, Claimant was at Denver International Airport (DIA) to take her flight back to Grand Junction. While at DIA, Claimant suffered another fall.

14. Claimant testified regarding her fall at DIA. Specifically, she testified that the fall occurred while she was on a moving sidewalk. While on that moving sidewalk, she moved to the side and "blacked out". When she was next conscious she discovered she had fallen face first with both of her hands extended in front of her. Claimant further testified that emergency services were called and she was transported to the hospital by ambulance. With regard to the reason for the loss of consciousness on this occasion, Claimant testified that Dr. Sullivan had diagnosed her with severe anemia.

15. The August 30, 2022 paramedic record states that when emergency services personnel arrived, Claimant was "prone at the end of a walkalator'. At that time, Claimant complained of pain in her right shoulder, and the shoulder was observed to be "grossly deformed". Claimant reported to emergency personnel that while on the moving sidewalk she turned her head and "her vision started to go black." Claimant further reported that she was unable to step off the moving sidewalk and "tripped at the threshold falling forward." At that time, Claimant denied losing consciousness.

16. Claimant was transported from DIA to the emergency department (ED) at University of Colorado Hospital. Claimant testified that she remained in the hospital for two days.

17. On September 7, 2022, x-rays of Claimant's right humerus showed an acute oblique fracture of the midshaft of the right humerus "at the tip of the humeral component of the reverse total shoulder arthroplasty".

18. On September 22, 2022, Dr. Sears authored a letter to Respondents' counsel. In that letter, Dr. Sears again noted his concern that there may be an underlying infection in Claimant's right shoulder. Dr. Sears also stated his opinion that Claimant's current need for revision surgery is related to her workers' compensation injury. In support of this opinion, Dr. Sears stated that "[t]he complication of a catastrophic base plate failure requiring revision arthroplasty would only occur as a secondary condition to her placement of a reverse shoulder arthroplasty which was due to a [workers' compensation] accident." Dr. Sears also noted that the most recent fall on August 30, 2022 resulted in "a relatively nondisplaced midshaft fracture distal to the stem of the implant." Dr. Sears noted the most recent fracture was being treated nonoperatively.

19. On October 10, 2022, an x-ray of Claimant's right humerus showed a prosthetic fracture of the right humerus.

20. On November 8, 2022, Dr. Sears performed revision surgery on Claimant's right shoulder. Specifically, the procedure included resection arthroplasty right reverse shoulder arthroplasty; placement of long intramedullary (IM) nail; placement of allograft at the humeral shaft fracture and at the glenoid; and placement of a cement spacer.

21. On January 13, 2023, Dr. McBride authored an addendum to his September 2022 IME report after reviewing additional medical records. In the addendum Dr. McBride reiterated his opinion that Claimant's falls at home resulted in the periprosthetic fracture. Dr. McBride also addressed Claimant's fall on August 30, 2022 at DIA. Dr. McBride opined that Claimant's falls that occurred after the successful reverse total shoulder arthroplasty are unrelated to the work injury.

22. Claimant testified that on April 25, 2023 she underwent the second revision surgery with Dr. Sears. Claimant testified that it is her understanding that in that second procedure Dr. Sears removed the IM nail from the humerus and performed a second replacement operation. Claimant testified she has improved since surgery and is now undergoing treatment with a bone clinic. Claimant testified that she is planning to undergo additional post-surgery physical therapy, as recommended by Dr. Sears.

23. Dr. McBride's testimony was consistent with his written reports. Dr. McBride testified that the procedures performed by Dr. Vance (the initial rotator cuff repair and the reverse total shoulder arthroplasty) were both reasonable, necessary, and related to Claimant's work injury. Dr. McBride noted that immediately following the reverse total shoulder procedure imaging showed that the hardware was intact and well seated. Dr. McBride testified that this indicates that the reverse total shoulder arthroplasty was successful. Dr. McBride further testified that the fall Claimant suffered that resulted in four broken ribs was a significant fall. Dr. McBride testified that he agrees with Dr. Vance that the periprosthetic fracture occurred secondary to that fall. With regard to Dr. Sears's concern related to infection, Dr. McBride testified that was a reasonable concern. Dr. McBride further testified that ultimately infection was ruled out in this case.

24. Prior to the June 8 and June 9, 2022 falls at her home, Claimant has a history of other falls. Medical records entered into evidence show that in October 2018, Claimant underwent x-rays following a "fall into tub back in August". On June 11, 2020, Claimant underwent a number of imaging studies (including x-rays of her right wrist and cervical spine, and a CT scan of her pelvis) after suffering a fall. This June 2020 fall is further addressed by Dr. Sullivan in a July 19, 2020 medical record. At that time, Dr. Sullivan noted that Claimant had suffered a sacral and pubic rami fracture in a fall.

25. The ALJ credits the medical records and the opinions of Drs. Vance and McBride. The ALJ finds that Claimant's fall at home on June 8, 2022 resulted in four broken ribs and the fracture to the reverse total shoulder hardware. That fall was not

related to the admitted work injury. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that medical treatment she received after the June 8, 2022 fall is related to the work injury. The ALJ also finds that Respondents have successfully demonstrated that it is more likely than not that the June 8, 2022 fall at home was an intervening event sufficient to sever Respondents' liability for the September 20, 2021 work injury.

26. With regard to specific medical treatment requested in this case, the ALJ finds that although the two revision surgeries performed by Dr. Sears were reasonable and necessary in treating Claimant's condition, those procedures are not related to Claimant's work injury.

27. Although the ALJ has determined that Respondents' liability in this matter was severed as a result of the June 8, 2022 fall at home, the ALJ must now turn to the August 30, 2022 fall at DIA. Specifically, the ALJ must determine whether the quasi-course of employment doctrine is applicable to that fall. Furthermore, if that fall did occur within the quasi-course of employment, the ALJ must consider Claimant's pre-existing condition of anemia and determine if there was any special hazard present at the time of the August 30, 2022 fall.

28. The ALJ finds that it is clear that on August 30, 2022, Claimant was within the quasi-course of employment as she was traveling home after the IME with Dr. McBride. However, the ALJ finds that Respondents have successfully demonstrated that Claimant's fall was precipitated by her pre-existing conditions of anemia and syncopal episodes. Her dizziness and resulting fall upon the moving sidewalk at DIA does not rise to the level of a "special hazard". The ALJ finds that the surface upon which Claimant fell is immaterial. Due to her pre-exisitlng tendency to fall, whether Claimant had fallen upon the walkway at DIA or on any other sidewalk, floor, or ubiquitous hard surface, the end result would have been the same.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that medical treatment after June 8, 2022 is related to the admitted September 20, 2021 work injury. As found, the medical records and the opinions of Drs. Vance and McBride are credible and persuasive on this issue.

6. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See* Post *Printing* & *Publishing* Co. *v. Erickson,* 94 Colo. 382, 384, 30 P.2d 327, 328 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

7. As found, Respondents have demonstrated, by a preponderance of the evidence, that on June 8, 2022, Claimant suffered an intervening event that was sufficient to sever Respondents' liability related to the admitted work injury. As found, the medical records and the opinions of Drs. Vance and McBride are credible and persuasive on this issue.

8. Under the quasi-course of employment doctrine injuries sustained while undergoing or traveling to and from authorized medical treatment are compensable, even though they occur outside the ordinary time and place limitations of normal employment. *Excel Corp. v. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1998); *Schreiber v. Brown* & *Root, Inc.,* 888 P.2d 274 (Colo. App. 1993). The rationale for this principle is that because an employer is required to provide medical treatment, and because the claimant is required to submit to treatment in order to receive benefits, travel to receive authorized treatment is an "implied part of the employment contract." *Turner v. Industrial Claim Appeals Office,* 111 P.3d 534 (Colo. App. 2004).

9. If the precipitating cause of an injury is a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the accident or the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO July 29, 1999); *Stanley Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO Oct. 14, 2014). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks
sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Hom,* 781 P.2d 150 (Colo. App. 1989); *Stanley Alexander v. Emergency Courier Services, supra.* In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" generally encountered outside the workplace. *Ramsdell v. Horn, supra; Joan Briggs v. Safeway,* Inc. W.C. No. 4-950-808-01 (I.C.A.O July 8, 2015). Conversely, if the precipitating cause of the injury involves conditions or circumstances of the employment, there is no need to prove a "special hazard" in order for the injury to arise out of the employment. *Cabe/a v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *H&H Warehouse v. Vicory,* 805 P.2d 1167 {Colo. App. 1990).

10. As found, the August 30, 2022 fall, while within the quasi-course of employment, occurred due to Claimant's preexisting conditions and no special hazard was present. Therefore, the injuries sustained on August 30, 2022 are not compensable. As found, the medical records and Dr. McBride's opinions are credible and persuasive on this issue.

ORDER

It is therefore ordered that Claimant's request for medical treatment after June 8, 2022 is denied and dismissed.

Dated July 5, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the

ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, It is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-212-813-001

ISSUES

1. Whether Claimant sustained a compensable injury on May 4, 2022.

2. Whether Claimant is entitled to medical benefits arising from a May 4, 2022 injury.

3. Whether Claimant is entitled to temporary disability benefits arising from a May 4, 2022 injury.

FINDINGS OF FACT

1. Claimant is an employee of [Redacted, hereinafter WC] who alleges a May 4, 2022 low-back injury. Claimant was loosening an oil filter on a road grader, and, when it broke loose, Claimant jolted forward and felt a warm, tingling sensation in his mid and left low back.

2. Prior to the incident, Claimant had a significant history of low back symptoms and treatment.

3. In 1991, Claimant had low back surgery to his L5-S1 level. Then, in 1996, Claimant had a laminectomy performed at the L4-L5 level.

4. Records from as early as March 23, 2013, documented that Claimant had a history of low back pain. Every few months during 2013 and 2014, records documented low back pain, and left anterior thigh numbness.

5. Records from 2017 through the date of injury documented consistent low back pain, including a number of instances where Claimant experienced temporary flare-ups in low back pain resulting from physical exertion. For example, a record from January 16, 2017, documented that Claimant threw out his mid back while lifting bins of mail. A month later, in February 2017, Claimant reported that his back when out when he jolted in response to somebody pretending to throw something heavy toward him. In October of that year, Claimant reported his low back went out as a result of having to sleep sitting up. He reported that his symptoms were so bad that he was almost unable to walk. In March 2019, Claimant reported that his back had gone out a couple weeks earlier. He again reported throwing his back out on the morning of October 8, 2019. On August 13, 2020, Claimant reported having "jammed" his back the night before while trying to scale a fence. On August 20, 2021, Claimant reported throwing his back out while rolling over in bed that morning. On April 28, 2022, Claimant reported that his back popped and started hurting while he was pulling out a post.

6. The Court finds that each of the instances of increased pain consisted of temporary flare-ups, and that none of these prior instances aggravated or accelerated the course of Claimant's degenerative low back condition.

7. On May 4, 2022, Claimant was attempting to remove an oil filter from the road grader at work as part of his work duties. When the filter came loose, Claimant jolted and experienced a pop and immediate low back pain. Claimant attempted to report the incident to his supervisor, but the shop was noisy, and Claimant's supervisor did not hear Claimant report the incident. Claimant finished working the rest of the day.

8. On May 6, 2022, Claimant saw his chiropractor, Dr. Blach. Claimant reported his "[h]ips out again." The May 6, 2022 record does not specifically document any complaints of low back symptoms and does not specifically mention the May 4, incident. The Court finds that Claimant did not complain of low back pain at the May 6, 2022 appointment.

9. Claimant again saw his chiropractor, Dr. Blach, on May 12, 2022, and reported that he "got bucked" in his road maintainer and instantly experienced low back pain radiating to his hip. Claimant also saw his primary care physician on May 12, 2022, at UC Health, for an annual follow-up. The record documents discussions regarding his medications, blood pressure, inhaler, diet, exercise, and other bodily functions. The May 12, 2022 record does not document a discussion regarding Claimant's low back symptoms. The Court finds that Claimant did not report low back pain at the May 12, 2022 annual follow-up with UC Health.

10. On May 19, 2022, Claimant saw his chiropractor, Dr. Blach. Claimant reported that he had felt good for three days then "felt it slip out while sleeping." He reported that his entire left side hurt, including his knee and ankle.

11. On May 27, 2022, Claimant saw Dr. Blach and reported that he was still experiencing pain radiating into his left leg. He reported that it possibly happened when he was working on his road grader a month earlier when he felt something go out. He reported that it troubled him ever since.

12. On August 4, 2022, Claimant completed a written report of injury, describing the oil filter incident as having occurred on May 25, 2022. Claimant reported, "I continued to work, but the injury has progressively grown worse."

13. On August 5, 2022, Claimant underwent a lumbar spine MRI. The radiologist noted multilevel disc herniations, including:

> "This started at T10-11, was also present at T1 1-12. There was a large disc herniation at L2-3 which displaced the left L2 nerve root with mild to moderate central spinal stenosis at that level. A large herniation at L3-4

displaced and compressed multiple nerve roots of the cauda equina and produced moderate to severe central spinal stenosis and moderate to severe bilateral lateral recess stenosis. There was also mild stenosis at L4-5 with moderate to severe bilateral lateral recess stenosis at that level. There was a medium to large right paracentral disc osteophyte complex at L5-S1 which displaced the right S1 nerve roots without central stenos is. There was normal cord signal and no compression fracture on MRI."

14. Claimant reported to the radiologist that his pain was "manageable most of the time" and that he was taking over-the-counter analgesics only as needed.

15. At an August 10, 2022 visit to Yuma District Hospital, Claimant reported that his pain had increased progressively such that he was experiencing new difficulties performing work duties in a timely manner and pain extending down into his toe consistent with an L5 dermatome.

16. On January 9, 2023, Claimant reported that he was finally getting some improvement and able to stand for ten to fifteen minutes up until about two weeks ago when something was falling out of the door of his truck and he quickly reached down to grab it, causing his symptoms to worsen again.

17. The Court finds the above-referenced medical records to have accurately documented Claimant's subjective complaints at those appointments.

18. Claimant underwent an independent medical examination (IME) with Dr. Douglas Scott at Respondents' request on October 12, 2022. Dr. Scott issued a report consistent with the IME. Dr. Scott recounted Claimant's medical history, including Claimant's 1991 L5-S1 discectomy and 1996 L4-L5 laminectomy, as well as Claimant's treatment from 2013 through the date of the report. Ultimately, Dr. Scott opined that Claimant's reported history of the injury was inconsistent with the medical records, pointing out the May 12, 2022 medical report that did not document a low back injury. He opined that Claimant "has a spinal problem at multiple levels which are probably daily aggravated by his obesity, diabetes and general deconditioning." The Court finds Dr. Scott's opinions in his IME to be credible.

19. At hearing, Claimant testified on his own behalf. Claimant testified that he injured his low back on May 4, 2022, as described above. Claimant testified that he reported his alleged injury to his supervisor, [Redacted, hereinafter JL], that same day, but that he did not believe JL[Redacted] heard him over the engine noise in the shop. Claimant testified that he saw his chiropractor on May 6, 2022, and reported his symptoms. Claimant testified that he made it through the weekend, and that by Monday it was not so bad, that he "[d]idn't think about it," and he returned to work. Though, Claimant reported increased difficulty spending time standing up.

20. Claimant also testified that on May 10, 2022, he again experienced low back pain that did not go away after an incident in which he was operating his road grader and the road grader downshifted, causing Claimant to be thrown forward and then back again. Claimant testified that after August 2, 2022, Claimant has not returned to work.

21. On cross examination, Claimant testified that he would still experience pain of 6 out of 10 on a daily basis, that he would experience numbness in his leg only when standing, and that he did not know how much he could lift, but he suspected up to one hundred pounds. Claimant testified that he could do his job without weight restrictions, but would likely need an accommodation in order to avoid further injury.

22. Respondent called JL[Redacted] to testify as well. JL[Redacted] testified that he did not recall Claimant reporting an injury on May 4, 2022. The Court finds this testimony credible.

23. Respondents also called Dr. Scott to testify at hearing. Dr. Scott testified consistently with his IME report. He clarified that Claimant's low back symptoms would be expected to worsen over time given Claimant's history. He observed that Claimant's prior surgeries predisposed adjacent disc levels to degenerate and collapse, causing increased chronic low back pain. He also noted that Claimant's diabetes would cause microvascular narrowing of the blood vessels that provide blood to the lumbar discs, resulting in acceleration of his disc structure degeneration. Regarding Claimant's periodic flare-ups, Dr. Scott testified that these could occur in the absence of trauma and do not result in a worsening of Claimant's low back condition.

24. The Court finds Dr. Scott's testimony credible.

25. The Court finds Claimant's testimony credible, except insofar as he testified: that he sustained an injury on May 4, 2022; that his symptoms or level of function deteriorated as a result of the May 4, 2022 incident; that his symptoms did not improve between May 4, and May 10, 2023. To the extent that Claimant's testimony conflicts with medical records, the Court finds the medical records more credible.

26. The Court finds that the May 4, 2022 incident, just like those of January 2017, February 2017, October 2017, March 2019, October 2019, August 2020, August 2021, April 2022, May 19, 2022, and January 9, 2023, merely elicited pain symptoms without aggravating or accelerating Claimant's degenerative low back condition so as to require additional medical treatment or cause a disability.

27. Claimant likely experienced symptoms at the time of the May 4, 2022 incident, and those symptoms likely endured for several days. However, the Court finds that it

is more likely than not that Claimant did not require any medical treatment nor sustain any disability as a result of the May 4, 2022 incident.

28. Claimant did continue to see his chiropractor after the May 4, 2022 incident, but those early visits, including the May 6 and May 12 visits do not document a May 4, 2022 injury while removing an oil filter. The Court finds that Claimant did not mention the incident at those appointments because it was not apparent to him at that time that the May 4, 2022 incident was related to his ongoing low back pain. From this, the Court infers that the May 4, 2022 incident was not significant enough to aggravate or accelerate Claimant's pre-existing low back pain.

29. The Court finds it most likely that Claimant's low back condition did eventually deteriorate with time, necessitating greater medical intervention, but that the deterioration was more likely the result of a natural progression of his pre-existing condition rather than an aggravation or acceleration resulting from the May 4, 2022 incident.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals*

Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

An injury must “arise out of and occur in the course of” employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S.; *see also*, *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999).

The existence of a preexisting condition will not prevent an injury from "arising out of" the employment. *Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 124 Colo. 217, 220, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). Generally, an injury will be found compensable if the employment aggravated, activated, caused, or accelerated a medical disability or need for medical treatment. *Id*.

An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Barba v. RE 1J School District*, W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company*, W.C. No. 3-850-024 (December 14, 1989). Rather, a claimant must establish to a reasonable degree of probability that the need for additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo.1949); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) *cf. Valdez v. United Parcel Service*, 728 P.2d 340 (Colo. App. 1986).

As found, the May 4, 2022 incident, just like those of January 2017, February 2017, October 2017, March 2019, October 2019, August 2020, August 2021, April 2022, and January 9, 2023, most likely elicited pain symptoms without aggravating or accelerating Claimant’s degenerative low back condition so as to require additional medical treatment or cause a disability. The Court finds it most likely that Claimant’s low back condition did eventually deteriorate with time, requiring greater medical intervention, but that the deterioration was not causally related to the May 4, 2022 incident.

Therefore, because the Court finds that Claimant’s May 4, 2022 incident neither aggravated nor accelerated his pre-existing low back condition so as to cause a need for

medical treatment or disability, the Court concludes that Claimant has not proven that it is more likely than not that he sustained a compensable injury on May 4, 2022, while working for Employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation for the alleged May 4, 2022 injury is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 6, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-207-183-001

ISSUES

- Did Claimant prove she suffered a compensable injury to her right shoulder?
- If Claimant proved a compensable injury, the following issues will be addressed:
- Was treatment provided by Dr. Benjamin Kam, including a right shoulder surgery on June 9, 2022 reasonably needed to cure and relieve the effects of the injury?
- Was treatment provided by and on referral from Dr. Kam authorized?
- Is Claimant entitled to TTD commencing June 9, 2022?
- The parties stipulated to an average weekly wage of $924.14.

FINDINGS OF FACT

1. Claimant works for Employer as a baker, preparing items such as bread, croissants, and pastries a large-scale commercial kitchen. The kitchen produces thousands of items daily for consumption around the resort. Claimant is one of approximately 20 bakers working at the property.

2. Claimant performs a variety of tasks during a typical shift, including lifting and carrying bags of ingredients, mixing doughs and batters, moving baking trays, and pushing wheeled racks of bread and pastries.

3. Most of the work is performed below chest height. However, a few tasks such as loading baking trays on the top shelves of the rolling racks or accessing higher shelves in the walk-in cooler require reaching at or above shoulder level. Claimant estimated she performs these tasks up to 45 times per shift.

4. In early January 2022, Claimant experienced the gradual onset of pain in her right shoulder. There was no specific injury or other inciting event. Claimant noticed symptoms at work but also while performing various tasks at home.

5. Claimant told her supervisor, [Redacted, hereinafter MH], that her shoulder was bothering her in min-January 2022. She did not state the symptoms were related to her work.

6. Claimant saw Dr. Benjamin Kam, an orthopedic surgeon, on January 19, 2022. Claimant knew Dr. Kam because he had previously worked with her husband. Claimant reported the onset of "spontaneous right shoulder pain approximately 2 weeks ago." Claimant did not mention work activities as a cause of the symptoms. Hawkins, Neer, and empty can tests were positive, suggesting rotator cuff pathology and

impingement. O'Brien's test was positive, consistent with a SLAP lesion. Dr. Kam opined, "Given her history of no trauma and her underlying ligamentous laxity, I do think her current issues relate to the mild multidirectional instability causing her pain." He prescribed NSAIDs and referred Claimant to physical therapy.

7. Claimant continued working her regular job, although she self-modified her duties by asking co-workers to perform whisking tasks.

8. Claimant's started PT on January 24, 2022. She described "acute insidious onset R shoulder pain" in early January. She said her pain was aggravated by routine activities such as sleeping, washing her hair, putting on a seatbelt, and dressing. She could not stir items at work. The therapist opined Claimants symptoms and clinical findings were consistent with a partial rotator cuff tear, labral instability, and subacromial impingement. Claimant attended PT for approximately three months.

9. Claimant followed up with Dr. Kam on May 4, 2022. He noted the PT was initially helpful, but she had recently "hit a standstill and began to digress." Dr. Kam recommended an MR arthrogram. At hearing, Claimant could identify no specific trigger or cause for the worsening of her shoulder symptoms.

10. The MR arthrogram was completed on May 12, 2022. It showed a probable SLAP tear and large paralabral cyst in the spinoglenoid notch. Dr. Kam recommended surgery.

11. Claimant returned to Dr. Kam on June 1 to discuss the etiology of her shoulder issues. Dr. Kam opined, "while she did not sustain an injury at work—she did not fall or get hit with a blow on her shoulder—her shoulder has definitely been aggravated by her regular work duties. These have included lifting, pushing, pulling heavy objects sometimes overhead, mixing batters and baking items in the kitchen, and rolling and pressing baked goods."

12. Also on June 1, 2022, Claimant reported her shoulder problems to Employer as a work-related injury. She ascribed the injury to "repetitive motion." Employer gave Claimant a designated provider list from which she chose Concentra.

13. Claimant saw Mendy Peterson, PA at Concentra on June 2, 2022. She described "spontaneous onset" of symptoms with no specific incident. She denied any recent changes to her work duties or ergonomics. Ms. Peterson opined the symptoms were neither caused nor aggravated by Claimant's work. She noted no temporal relationship between Claimant's work and the onset of symptoms, and no risk factors associated with her work. Dr. George Johnson reviewed Ms. Peterson's report and agreed with the conclusions. He put Claimant at MMI with no impairment and released her to work with no restrictions.

14. Dr. Kam performed arthroscopic right shoulder surgery on June 9, 2022. He repaired an unstable Type 2 SLAP tear, debrided a partial-thickness rotator cuff tear, and performed a biceps tenodesis.

15. Dr. Wallace Larson performed an IME for Respondents. Dr. Larson opined Claimant did not suffer a work-related occupational disease involving her shoulder. Dr. Larson explained that SLAP tears are not typically associated with repetitive activities, except for cases involving repetitive forceful overhead use such as pitching. Although Claimant's job requires heavy lifting, pushing, and pulling, she performs only occasional overhead activities. As a result, her work does not involve sufficient repetition, force, or positions to cause a SLAP tear or rotator cuff tears. The spinoglenoid cyst was probably incidental to the SLAP tear. Additionally, Dr. Larson concluded Claimant's work did not aggravate or accelerate her underlying, nonwork-related shoulder pathology. Dr. Larson emphasized the distinction between correlation and causation, and opined the mere fact Claimant felt pain while working did not establish a work-related condition absent any established risk factors or other medically plausible causal link.

16. Dr. Larson and Dr. Johnson's opinions are credible and more persuasive than any contrary opinions in the record.

17. Claimant failed to prove a compensable injury to her right shoulder.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). An injury need not cause any identifiable structural change to a claimant's underlying anatomy to cause a compensable aggravation. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Id*. However, the mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition or the need for treatment. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). The claimant must prove by a preponderance of the evidence that their work proximately caused the need for treatment.

As found, Claimant failed to prove a compensable injury to her right shoulder. Dr. Larson and Dr. Johnson's opinions are credible and more persuasive than any contrary opinions in the record. There is no persuasive evidence Claimant's work caused the SLAP tear, spinoglenoid cyst, or any other pathology shown on the MRI or during surgery. Even though Claimant's job required heavy lifting and frequent pushing and pulling, most of the tasks are performed below chest height. The occasional overhead activities did not entail sufficient force or repetition to cause the SLAP tear.

Nor did Claimant prove her work aggravated, accelerated, or combined with the nonwork-related shoulder pathology to cause disability or a need for treatment. The fact that certain work tasks elicited symptoms does not establish a causal nexus between the work and the treatment Claimant received. Claimant had an unstable Type 2 SLAP tear, which reasonably required treatment irrespective of her work. The persuasive evidence fails to establish that Claimant's job triggered or accelerated the need for treatment, or otherwise altered the course of her condition.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email

address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: July 7, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-229-971-001; 5-236-519-001

STIPULATIONS

At the commencement of the hearing, the parties agreed that at the time of his death, [Redacted, hereinafter MB] had an average weekly wage (AWW) of no less than $1,420.00, which equates to a weekly death benefit of $946.66. Questions regarding the amount of MB's[Redacted] overtime earnings and its effect on his AWW were outstanding at the time of hearing. Thus, the parties requested additional time to obtain supplementary wage records and recalculate the decedent's AWW and death benefit to reflect his overtime income if applicable. Assuming that they may be unable to obtain the aforementioned overtime records prior to the deadline for issuance of an order, the parties requested that the ALJ issue an order apportioning the minimum death benefit of $946.66 among MB's[Redacted] dependents per § 8-42-121 of the Workers' Compensation Act. However, on June 28, 2023, after review of MB's[Redacted] overtime wages, Respondents filed an unopposed motion for approval of a stipulation increasing MB's[Redacted] AWW to $1,610.47 which corresponds to a death benefit rate of $1,073.54. The parties also agreed to reserve all statutory offsets. The parties' June 28, 2023 stipulations were approved by order of the undersigned on June 29, 2023.

REMAINING ISSUE

I. Apportionment of the stipulated death benefit of $1,073.54 between MB's[Redacted] dependents per C.R.S. § 8-42-121.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The above captioned claim numbers were consolidated for hearing pursuant to WCRP 9-6 (A) by order of Pre-hearing Administrative Law Judge (PALJ) John Sandberg on April 28, 2023. (Resp. Ex. K).

2. Decedent worked as a police officer for the [Redacted, hereinafter FD]. On February 2, 2023, while pursuing a fleeing suspect, MB[Redacted] fell from a bridge landing on the hard surface below and sustaining multiple blunt force injuries. (Resp. Ex. C, p. 29). MB[Redacted] succumbed to his injuries 9 days later, on February 11, 2023. *Id.*

3. MB[Redacted] is survived by his widow [Redacted, hereinafter KA]. He is also survived by two dependent children, [Redacted, hereinafter IB], born April 15, 2014, to [Redacted, hereinafter VB], decedent's former wife, and [Redacted, hereinafter MA], born September 19, 2021, to MA[Redacted]. (Resp. Ex. D and E). No disputes

surround the dependency of MA[Redacted], IB[Redacted] or MA[Redacted]. Indeed, the evidence presented supports a finding that each of these individuals are presumed to be wholly dependent persons pursuant to C.R.S. § 8-41-501(1) (a) & (b) and no party presented evidence sufficient to rebut this presumption.

4. As decedent and VB[Redacted] were divorced, they shared custody of their minor daughter, IB[Redacted], prior to his death. KA[Redacted] testified that prior to MB's[Redacted] passing, custody of IB[Redacted] was divided 50 percent to MB[Redacted] and 50 percent to IB[Redacted] or roughly 3½ days/week each. Since MB's[Redacted] death, KA[Redacted] testified that the 50/50 custody split has ended and she has not seen IB[Redacted] since MB's[Redacted] funeral.

5. At the time of his death, MB[Redacted] was subject to a court order requiring him to pay child support in the amount of $372.53/month to VB[Redacted] for the care and support of IB[Redacted]. (Resp. Ex. B, pp. 27-28). This child support payment ended with MB's[Redacted] untimely death.

6. KA[Redacted] testified that in addition to MB's[Redacted] child support payments, she and MB[Redacted] would also pay for IB's[Redacted] living expenses while she stayed with them to include food, clothing, school supplies and the costs of incidentals such as the fees associated with her sports activities. No evidence regarding the precise cost of these additional living expenses was presented. Based upon the evidence presented, the ALJ finds that IB[Redacted] is presently residing exclusively with her mother and the costs associated with her care and support now rest solely with VB[Redacted].

7. MB's[Redacted] untimely death has garnered significant community attention and KA[Redacted] has received considerable financial support from the public. KA[Redacted] testified that a "Go Fund Me" account has been established in her name and that between this account, community donations and public fundraisers, approximately $130,000.00 has been raised for her and the children. She testified that donations are still coming in and she plans to establish a trust fund with the assistance of her attorney for both IB[Redacted] and MA[Redacted] from some of these donations. According to KA[Redacted], she, with the assistance of her attorney, will set the terms of the trust, including the percentage of funds to be directed into the trust for IB[Redacted] and MA[Redacted]. She testified that she will place an equal amount of funds from the charitable accounts into the trust funds for IB[Redacted] and MA[Redacted]. KA[Redacted] also testified that IB[Redacted], akin to she and MA[Redacted], will also receive a share of MB's[Redacted] Fire & Police Pension Association (FPPA) survivor's benefit.

8. KA[Redacted] testified further that she was aware that specific fundraising has been carried out especially for IB's[Redacted] benefit, but no details concerning these efforts or the amounts raised were presented and KA[Redacted] acknowledged that she had no understanding of VB's[Redacted] financial situation.

9. Neither IB[Redacted] nor MA[Redacted] have other sources of income.

10. KA[Redacted] testified further that she received a "great gift" when the mortgage on the home she owned jointly with MB[Redacted] was paid off by Tunnels to Towers, an organization dedicated to lessening the financial burden/stress on families of fallen law enforcement officers.

11. Prior to MB's[Redacted] passing, KA[Redacted] worked as a registered hospice nurse. As a hospice nurse, KA[Redacted] indicated that she earned approximately $70,000.00 annually. KA[Redacted] testified credibly that she has been unable to return to work as a hospice nurse as she continues to adjust to the sudden and tragic passing of KA[Redacted]. Nonetheless, KA[Redacted] stated that she plans to return to work at some point in the future.

12. KA[Redacted] testified that with the passing of MB[Redacted] his entire income and support into their household has been lost. Moreover, she testified that with MB's[Redacted] absence in the home, the cost of day care for MA[Redacted] will increase. Accordingly, she proposed that MB's[Redacted] death benefit be allocated equally among herself and the two minor children. Given the financial benefits that KA[Redacted] has received, including the various charitable accounts and the payoff of her outstanding mortgage, Mr. Werner proposed that MB's[Redacted] death benefit be allocated 40% to IB[Redacted] and 60% to KA[Redacted] and MA[Redacted].

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. C.R.S. § 8-43-201.

B. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo.App. 2002). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact

finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Apportionment of Death Benefits

D. The Workers' Compensation Act provides that spouses and the minor children (under the age of 18) of an injured worker who succumbs to his/her injuries are presumed to be wholly dependent and entitled to death benefits. C.R.S. § 8-41-501(1) (a) and (b). Section 8-41-503(1), C.R.S., provides: "Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions except as provided in section 8-41-501(1) (c). Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the director may designate." As noted above, there is no dispute regarding the dependency of the various claimants in this case. Moreover, the parties have stipulated to the amount of MB's[Redacted] average weekly wage (AWW) and the corresponding death benefit representing sixty-six and two-thirds percent of this AWW. Nonetheless, because there are multiple claimants in this case, including a dependent child who now resides separately from KA[Redacted] along with various financial considerations to account for, the parties have requested an apportionment of the death benefit among the interested parties.

E. Pursuant to § 8-42-121, C.R.S. 2022, "[d]eath benefits shall be paid to such one of more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable". This statutory provision does not require that all persons deemed to be wholly dependent be treated on an equal basis. (*Spoo v. Spoo*, 142 Colo. 268, 358 P.2d 870 (Colo. 1961). Rather, it is well settled that the ALJ may consider the relative incomes and the unique financial circumstances of the claimants when determining a "just and equitable" apportionment of the death benefit in any particular case. *Spoo v. Spoo supra*; See also, *Randall Ward v. Apex Heating and Air*

Conditioning, W.C. 4-129-484 (ICAO February 8, 2001). Simply stated, a "just and equitable" distribution will turn on the unique facts of each case.

F. In this case, the evidence presented supports a conclusion that MB's[Redacted] child support payment to VB's[Redacted] for IB's[Redacted] care/support terminated with his passing. Moreover, the ALJ is convinced that both MB[Redacted] and KA[Redacted] were contributing, as a family unit, to IB's[Redacted] care and support at a level above the formal child support payment while she resided with them as part of the custody arrangement between the MB and VB[Redacted] following their divorce. Because the shared custody arrangement ended with MB's[Redacted] untimely death and IB[Redacted] is now living exclusively with VB[Redacted] this additional support has also come to an end. While the ALJ applauds VB's[Redacted] sagacity and foresight to protect both MA[Redacted] and IB's[Redacted] future needs through the establishment of a trust fund, IB[Redacted] is entitled to and presently needs financial support. Without MB's[Redacted] child support payment and the extra maintenance he and KA[Redacted] were providing, IB[Redacted] will undoubtedly experience a substantially different standard of living than the one she enjoyed while MB[Redacted] was living.

G. Although the financial and emotional impact of MB's[Redacted] death to all of the claimant's in this case cannot be overstated, the ALJ is convinced that IB[Redacted] is at particular risk currently and in need of increased support. At 9 years of age, IB[Redacted] is capable of understanding that her father's absence in her life is permanent. Moreover, she is now estranged from her half-brother and stepmother, whom the ALJ is convinced played a significant role in her life. Accordingly, the ALJ is persuaded that the opportunity for IB[Redacted] to continue her sports and other activities are of particular importance to provide her with an outlet and a distraction from external issues caused by the loss of her father. Based upon the evidence presented, the ALJ is also convinced that the current costs of caring for and supporting IB[Redacted] are higher than those associated with nurturing MA[Redacted].

H. While the ALJ is convinced that KA[Redacted] and MA[Redacted] have and will face future challenges connected to the loss of MB[Redacted] and his income, KA[Redacted] is highly educated and this education, combined with her proven skills as a hospice nurse, affords her the prospect of returning to a profession where she has earned upwards of $70,000.00 in the past. Nothing in the evidence presented supports a conclusion that KA[Redacted] cannot return to her prior employment in order to support MA[Redacted] and herself. Indeed, KA[Redacted] testified that she plans to return to work at some point as the trauma caused by MB's[Redacted] premature death subsides. In this case, the ALJ finds the time that KA[Redacted] has taken away from work in order to recover from and adjust to the life altering events forced upon her reasonable. Nonetheless, she no longer bears any of the costs associated with IB's[Redacted] upbringing and IB[Redacted] needs the financial support that MB[Redacted] and by extension, she (KA[Redacted]) was providing.

I. Given IB's[Redacted] current need for additional support combined with

the fact that KA's[Redacted] financial circumstances have been aided by the generosity of her community, including the payoff of her outstanding mortgage[1], the ALJ is convinced that an even split of the death benefit between the claimant's in this case will disadvantage IB[Redacted]. After considering the individual circumstances of the claimants to this case and the foreseeable economic benefit that will inure to KA[Redacted] and MA[Redacted] when she returns to work, the ALJ is persuaded that an even split of MB's[Redacted] death benefit will leave IB[Redacted] with insufficient support. Given the totality of the evidence presented, the ALJ concludes that a "just and equitable" division of MB's[Redacted] stipulated death benefit weighs in favor of apportioning a slightly higher share to IB[Redacted] than KA[Redacted] and MA[Redacted].

ORDER

It is therefore ordered that:

1. MB's[Redacted] stipulated $1,073.54 death benefit is apportioned to the claimant's as follows: 37%, ($397.21) to IB[Redacted], 33% ($354.27) to KA[Redacted] and 30% ($322.06) to MA[Redacted]

2. Per the parties approved stipulation, all statutory offsets are reserved for future determination.

3. All other matters not determined herein are also reserved for future determination.

DATED: July 7, 2023

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

[1] The ALJ finds KA[Redacted] genuinely thankful for the financial assistance extended to the family by Tunnels to Towers in paying off the household mortgage.

service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-215-787-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable work injury on August 17, 2022.
II. Whether Claimant is entitled to medical benefits.
III. Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is a twenty-five-year-old[1] manufacturing engineer who worked for Respondent-Employer on August 17, 2022. Claimant's work was generally not physical and his duties primarily included desk work. At the time of injury, Claimant was earning a yearly salary of $70,000.00, plus bonuses.

2. On Wednesday, August 17, 2022, near the end of the workday, Claimant assisted some coworkers with lifting a 400-pound machine out of a track to help prevent it from rusting overnight. While going from a low squat to a more upright position, Claimant felt a sudden flash or tingling sensation in his low back.

3. Claimant finished out the workday. He felt something was a little off in his back, but it was nothing worth complaining about. When he went home that day, he felt a tension in his low back, but no pain. The sensation continued on that Thursday and Friday, as he finished out his work week. Up through that Friday, Claimant did not have any lost time or require any medical treatment. Claimant was also able to perform his normal activities of daily living and his work duties without difficulty during this period.

4. On Saturday, August 20, 2022, Claimant was at home doing laundry. He bent over to pick up laundry detergent and felt a shooting sensation and overwhelming pain in his low back. The pain began before Claimant was even able to touch the detergent.

5. Claimant had difficulty getting out of bed the next day, Sunday. He called the Kaiser Permanente advice line to report his symptoms. The record generated by Kaiser Permanente noted: "pt was bending over yesterday and developed a sharp pain in his back… works at a machine shop and 3 days prior to injury was lifting several heaving things at work but no other issues." The Court finds the meaning of "no other issues" to mean no issues other than those low back symptoms Claimant complained of to Kaiser Permanente.

6. Claimant returned to work on Monday, August 22, 2022, and reported the injury to his supervisor, [Redacted, hereinafter MI].

[1] Claimant was 25 years old at the time of injury, not at the time of this Order.

7. Claimant treated with a chiropractor, Dr. Fox, for his low back pain. Dr. Fox recommended three sessions of chiropractic care per week with the frequency dropping off over the next twelve weeks. Dr. Fox advised Claimant that the total episode of care would cost $1,560.00 if paid in full.

8. Claimant reported the injury to his employer on Thursday, August 25, 2022. Respondents filed an Employer's First Report of Injury that same day and a Notice of Contest on September 26, 2022.

9. Claimant provided a recorded statement to Respondents on August 30, 2022. Claimant told Respondents that he did not think anything was potentially wrong with his back on the date of injury, that he did not have any pain initially, and that he was able to work August 17 through August 19.

10. Claimant received a designated provider list. However, the list was for medical providers in the Colorado Springs area, which did not correspond with where Claimant lived. Claimant obtained a list of providers in the lunchroom at his Employer and sought treatment at Concentra.

11. On September 15, 2022, Claimant's treater, William Hazell, PA-C, at Kaiser Permanente, authored a letter on behalf of Claimant which stated in relevant part:

> Based on my recollection of the clinic exam and the patient is presentation in my opinion the heavy lifting at work several days prior to the significant exacerbation of the pain while lifting laundry detergent could have been a contributing factor to muscle spasms. While expressed to him that I feel it could have been a contributing factor I also expressed to him that I could not state for certain that it actually was a contributing factor.

12. Claimant obtained treatment with Dr. Gordon Arnott at Concentra beginning on August 31, 2022. Dr. Arnott noted that "the history stated that he works at a machine shop and that three days prior he was lifting several heavy things at work but at no time was there any pain or any symptoms at that time… NONE.. noted by record." Nevertheless, Dr. Arnott opined that the objective findings were consistent with a work-related mechanism of injury.

13. Respondents obtained a record review by Dr. John Burris on December 16, 2022. Dr. Burris authored a report in which he opined in relevant part:

> The provided records do not support the reported workplace lifting event on 8/17/2022 resulted in an injury. . . . Due to the 3-day delay in onset of low back pain, the low back pain he first experienced on 8/20/2022 cannot be causally related to the reported 8/17/2022 workplace event. . . . Based on the information provided, Mr. Hanson's report of experiencing low back pain beginning on 8/20/2022 appears independent and unrelated to the reported 8/17/2022 workplace event.

14. The Court does not find Dr. Burris's opinions in his report to be credible.

15. Dr. Burris testified at hearing based on his record review. Dr. Burris testified that patients are not necessarily always correct about the mechanism of injury. Dr. Burris testified that typically a patient will experience pain within hours of a muscle strain with inflammation that would have progressed within one hour to one day. And, although picking up detergent is a relatively trivial event, Dr. Burris testified that trivial events can cause injuries, such as disc herniations from sneezing. Dr. Burris felt that the onset of symptoms was most telling. Dr. Burris conceded on cross-examination that bending over is a pretty benign action and would not be highly likely to injure somebody.

16. The Court finds Dr. Burris's testimony generally credible, except insofar as he opined that the August 17, 2022, event was not a significant causal factor in Claimant's onset of symptoms on August 20, 2022.

17. Claimant obtained an independent medical examination (IME) with Dr. John Hughes on March 23, 2023. Dr. Hughes reviewed Claimant's medical history and opined that Claimant's account of events was consistent with medical records. Dr. Hughes noted that Claimant had no prior history of low back problems. He diagnosed Claimant with lumbosacral sprain or strain with right-sided sacroiliac joint dysfunction. He felt Claimant was injured at work on August 17, 2022. The Court finds Dr. Hughes' opinions credible.

18. Claimant testified at hearing as follows. On the date of injury, Claimant was lifting a four-hundred-pound machine out of a track to help prevent it from rusting overnight. While going from a low squat to a more upright position, he felt a sudden flash or tingling sensation in his low back. He went on to work the rest of the day. Claimant went home and felt tension in his back, but no pain. The symptoms persisted, but Claimant did not experience any pain in his back until Saturday, August 20, 2022. That Saturday, Claimant was bending over to pick up laundry detergent when he experienced pain in his low back. He experienced the pain before he was even able to touch the detergent. Claimant returned to work that following Monday. By that time, the pain was tolerable, but by Monday night, the pain had worsened. Claimant was unable to return to work that Tuesday and Wednesday due to pain.

19. Claimant also testified that upon Claimant's reporting of the injury, the Employer provided Claimant with a designated provider list. However, the list was for providers in Colorado Springs, which did not correspond with where Claimant lived. Claimant obtained a list of providers in the lunchroom at his Employer and sought treatment at Concentra, one of the designed providers.

20. Claimant also testified that he earned $70,000.00 per year as of his date of injury. He also testified that he received annual bonuses that varied between $3,000.00 and $5,000.00. Claimant testified that he also received a retention bonus of $3,393.00 shortly before his injury.

21. The Court finds Claimant's testimony credible. Claimant's wage records show that Claimant typically earned a biweekly salary of $2,692.31 at the time of his injury, which corresponds roughly with an annual salary of $70,000.00. The wage records also show that Claimant received a $3,000.00 annual bonus several months after his injury, which is consistent with his testimony.

22. The Court finds Claimant has proved that it is more likely than not that he sustained a compensable injury on August 17, 2022, arising out of and in the course of his employment with Employer, and that the condition became disabling and required medical treatment on August 20, 2022. The Court finds that the injury most likely left Claimant's low back in a weakened condition, which in turn proximately contributed to Claimant's worsening on August 20, 2022, while bending over at home to pick up laundry detergent. Thus, the Court finds that the August 17, 2022 incident caused the need for medical treatment.

23. The Court finds that Claimant proved that medical treatment is reasonably necessary to cure and relieve him of the effects of his industrial injury.

24. The Court also finds that an AWW of $1,346.15 most fairly represents Claimant's wage-earning capacity as of the date of injury. The Court finds that while Claimant proved that a reasonable, present-day, cash-equivalent value could be placed upon those bonuses—as those bonuses were real and definite—Claimant failed to prove that he potentially had reasonable access on a day-to-day basis to bonuses or an immediate interest in receiving a bonus under appropriate, reasonable circumstances. Therefore, the Court finds that it was a fringe benefit not included among those enumerated under § 8-40-201(19)(b), C.R.S. (2022), and are therefore not "wages" as defined by the Workers' Compensation Act.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo.App.2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo.App.2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Commission,* 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo.App.2000).

Compensability

Section 8-41-301(1)(c), C.R.S. (2022), requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment.

The industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Office*, 131 P.3d 1224 (Colo.App.2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). Thus, if an industrial injury leaves the body in a weakened condition and the weakened condition proximately causes a new injury, the new injury is a compensable consequence of the original industrial injury. *Price Mine Service, Inc. v. Indus. Claim Appeals Office*, 64 P.3d 936 (Colo. App. 2003); *Lanuto v. Amerigas Propane, Inc.*, W.C. No. 4-818-912, (July 20, 2011). The preceding principle constitutes the "chain of causation analysis" and provides that a subsequent injury is compensable if the "weakened condition played a causative role in the subsequent injury." *Fessler v. United Airlines*, W.C. No. 4-654-034 (Dec. 19, 2007). *See Martinez v. City of Colorado Springs*, W.C. No. 5-073-295 (Sept. 12, 2019) (an infection that resulted from claimant's weakened condition was compensable because it was a natural, although not necessarily a direct, result of the work-related injury).

As found above, Claimant has proved by a preponderance of the evidence that he sustained a compensable injury on August 17, 2022, arising out of and in the course of his employment with Employer, and that the condition worsened on August 20, 2022, so as to require medical treatment. But for the August 17, 2022 workplace injury, Claimant would not have experienced the onset of pain on August 20, 2022, and subsequently required medical treatment.

Medical Benefits

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2022). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found above, medical treatment is reasonably necessary to cure and relieve Claimant of the effects of his August 17, 2022 injury. Thus, the Court finds and concludes that Claimant established by a preponderance of the evidence the need for medical treatment.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo.App.1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82.

As found above, Claimant's annual salary was $70,000.00, which corresponds with an AWW of $1,346.15. However, the parties dispute whether Claimant's annual and retention bonuses should be included in the AWW calculation.

Section 8-40-201(19)(a), C.R.S., defines "wages" as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Subsection (b) clarifies that "fringe benefits" are specifically excluded from the definition of "wages" unless the fringe benefit is among those enumerated therein.

To determine if Claimant's bonuses were indeed an included wage and not an excluded fringe benefit, the Court must consider "whether a reasonable, present-day, cash equivalent value can be placed upon [the bonuses] and whether Claimant has reasonable access on a day-to-day basis, either actually or potentially, to [the bonuses], or an immediate expectation interest in receiving [the bonuses] under appropriate, reasonable circumstances." *Meeker v. Provenant Health Partners*, 929 P.2d 26, 28 (Colo.App.1996).

As found above, Claimant proved that a reasonable, present-day, cash-equivalent value could be placed upon those bonuses, as the bonuses he had received were definite. However, Claimant failed to prove that he potentially had reasonable access on a day-to-day basis to bonuses or an immediate interest in receiving a bonus under appropriate, reasonable circumstances. Therefore, the bonuses were a fringe benefit not included among those enumerated under § 8-40-201(19)(b), C.R.S. (2022), and are therefore not "wages" as defined by the Workers' Compensation Act. As such, the Court declines to include the bonuses in calculating Claimant's AWW.

Therefore, Claimant's AWW is $1,346.15.

ORDER

1. Claimant proved that it is more likely than not that he sustained a compensable injury on August 17, 2022. Respondents shall file an admission consistent with an August 17, 2022 injury.

2. Respondents shall authorize and pay for reasonable and necessary medical treatment.

3. Respondents shall admit for an AWW of $1,346.15.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 10, 2023

/s/ Stephen J. Abbott
Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-225-347-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable, necessary and related to his work injury?

- At the commencement of the hearing, the parties agreed that if Claimant has proven a compensable injury arising out of and in the course and scope of his employment with Employer that Claimant was entitled to an award to temporary total disability ("TTD") benefits beginning December 9, 2022, but the parties reserved the issues of average weekly wage ("AWW") and offsets.

FINDINGS OF FACT

1. Claimant was employed by Employer as lineman apprentice. Claimant testified he was hired on June 17, 2017 and was completing Employer's apprenticeship program which is a four year program involving two tests per year (eight tests total) in order to become a journeyman lineman. Claimant testified that he worked out of Employer's Rifle office and the area covered by the Rifle office included from Carbondale to Debeque, Colroado.

2. Claimant testified his job duties included providing construction and maintenance to power lines and help to get power lines up and running if there is a power outage. Claimant testified he would use trucks provided by Employer to travel to the job sites. Claimant testified that in order to arrive to work he would usually carpool with his boss or use his personal vehicle.

3. Claimant testified that in December 2022 he had one final break out test to complete in order to become a Journeyman Lineman. Claimant testified that the final test was performed at Employer's testing facility located near Brighton, Colorado. Claimant testified that the final test would take 40 hours to complete.

4. Claimant testified he was scheduled to begin his test on Monday December 12, 2022. Claimant testified that he had advised his supervisor that he was scheduled to take the test the week of December 12, 2022. Claimant testified that his supervisor authorized Claimant to obtain a rental car for travel to the testifying facility. Claimant testified that Employer allowed Claimant to obtain the rental car during the week of December 5, 2022. Claimant testified that he was authorized to rent the vehicle

on Wednesday of that week, but did not rent the vehicle until Thursday, December 8, 2022[1], when he obtained a ride from his co-worker to the Grand Junction airport and rented the vehicle. Claimant then drove the vehicle back to the Rifle office where he organized all of his tools needed for the breakout test and left the tools by his desk. Claimant testified he completed his work and then went home and packed for his trip to Denver.

5. According to the rental agreement entered into evidence at hearing, the rental car was leased to Claimant with a return date of December 16, 2022 on Employer's account.

6. Claimant's supervisor, [Redacted, hereinafter JD], confirmed in his testimony that Claimant was authorized to obtain a rental car on the Wednesday of the week prior to Claimant's testing taking place. JD[Redacted] testified that the reason for allowing employees to rent a vehicle several days prior to a planned trip was that Employer has experienced difficulty in having rental vehicles available if they are not picked up prior to when the vehicle is needed. JD[Redacted] testified that Claimant rented the vehicle pursuant to JD's[Redacted] instructions on Thursday, but JD[Redacted] testified that Claimant was not authorized to take the rental vehicle to Claimant's home after work. JD[Redacted] testified that Claimant should have left the rental vehicle at the service center.

7. Claimant testified that he had been in contact with two other employees who lived in the Denver area prior to his trip to Denver who had been in the Apprenticeship program with Claimant and had made plans to travel to Denver on Friday, December 9, 2022 and spend the weekend training with his two co-employees. Claimant testified that one of the co-employees, [Redacted, hereinafter SS], would be taking the breakout test with Claimant the week of December 12, 2022. Claimant testified that other co-employee, AP[Redacted], had already taken the test and was willing to help Claimant and SS[Redacted] study the weekend before the test. Claimant testified he was friends with SS[Redacted] and AP[Redacted] in addition to being co-workers.

8. AP[Redacted] and SS[Redacted] testified at hearing on behalf of Claimant. Both AP[Redacted] and SS[Redacted] confirmed that arrangements had been made for Claimant to travel to Denver early to study in preparation for the upcoming test.

9. Claimant testified he had made arrangements with his mother to have her watch his two children the weekend before the test as he was not going to be in town for the weekend. Claimant also had made arrangements for his mother to watch his dog and had left the dog at her house the weekend prior. Claimant's mother testified consistent with Claimant in this regard.

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[1] The ALJ notes that Respondents stated in their proposed Findings of Fact, Conclusions of Law and Order that it is undisputed that the vehicle that Claimant was in at the time of the accident was rented on Wednesday, December 8, 2022." The ALJ agrees that the parties agreed that the vehicle was rented on December 8, 2022, the day before the accident, but takes judicial notice that December 8, 2022 was a Thursday.

10. Claimant testified that he had planned to stay with friends over the weekend while doing the studying and had made arrangements with his mother to take care of his children that weekend while he was out of town. Claimant testified he has joint custody of his children with their mother. Claimant's mother testified at hearing and confirmed that Claimant had requested that she watch his kids the weekend of December 10th and 11th.

11. Claimant testified that on December 9, 2022 he woke up and headed to work to turn in his evaluations that were due the next week. Claimant testified that he intended to turn in the evaluations and pick the equipment he needed from work to complete the breakout test, including his helmet, climbing boots, climbing belt, rubber gloves, high voltage tester, etc. Claimant testified his intention was to stop by the Rifle facility and then continue on to Denver. Claimant testified that he would normally be wearing fire resistant clothing if he was going to work but since he was planning on continuing on to Denver, he was wearing jeans and camouflage clothes.

12. JD[Redacted] testified that if Claimant had indicated to him prior to December 9, 2022 that he intended to travel to Denver on Friday, JD[Redacted] would not have had an issue with Claimant making the drive to Denver on Friday. Claimant and JD[Redacted] both acknowledged that Claimant had not communicated his intention to travel to Denver prior to December 9, 2022.

13. Claimant was involved in a motor vehicle accident ("MVA") while driving in the rental car between his house and the Rifle facility. Claimant testified he took the West Rifle exit from the interstate and came cross a herd of elk crossing the road, which caused Claimant to stop the vehicle. Claimant was rear ended by a vehicle traveling at a high rate of speed while stopped in his vehicle.

14. Claimant was taken by ambulance to the Grand River Medical Center Emergency Room ("ER") following the MVA. Claimant complained of headache, neck pain, and a four-centimeter scalp laceration upon being admitted to the ER. The emergency room noted no thoracic or abdominal trauma on initial or secondary survey. Claimant's neck as noted to have full range of motion, and thoracic and lumbar spine were normal. Claimant underwent a cervical spine computed tomography ("CT") scan which showed no acute findings. Claimant also underwent a CT scan of the head which showed a small posterior right parietal scalp hematoma but no acute intracranial abnormality. Claimant was diagnosed with a concussion and head laceration which was repaired with staples. Claimant's concussion symptoms were noted to be improving on discharge.

15. Claimant was evaluated by Dr. Steven Brown at Work Partners Occupational Health on December 21, 2022. Dr. Brown noted Claimant presented with complaints of head, neck, upper and lower back pain, hip and right leg pain, right shoulder pain, vision problems, and bilateral numbness of his hands and feet. Dr. Brown noted that Claimant had a prior work injury to his neck, right shoulder, and back in 2013-2014. Dr. Brown diagnosed Claimant with sprain of joints and ligaments of other parts of the neck, a concussion with loss of consciousness of 30 minutes or less,

pain the right shoulder, pain in the left hip, headache, dizziness and giddiness and an abrasion of the right lower leg. Dr. Brown noted that Claimant had a laceration to the scalp overlying the occiput which was repaired with staples that had already been removed. Claimant was instructed to discontinue the Flexeril he had been given in the ER as this could also cause dizziness. Dr. Brown noted Claimant appeared to have some global tenderness throughout the spine that Dr. Brown surmised was more myofascial and consistent with the mechanism of being rear-ended at a high speed. Dr. Brown referred Claimant for six chiropractic treatments with Dr. Chris Angello, and released Claimant to modified duty work.

16. Claimant returned to Dr. Brown on December 28, 2022. Dr. Brown noted Claimant continued to complain of pain in the head and neck which he described as sharp and achy and severe. Claimant also reported headache, light sensitivity, lightheadedness, nausea and dizziness. Claimant also reported additional issues with his left hip, right shin and right shoulder blade. Claimant was referred for additional chiropractic treatment and six vestibular therapy sessions with Karri Mullany to address vestibular hypofunction as a result of concussion.

17. On January 11, 2023, Claimant returned to Dr. Brown, who noted that Claimant reported some numbness in his frontal forehead along with headaches that cause nausea, light sensitivity and vision changes. Claimant reported he was still unable to drive and experienced dizziness when he stood up. Claimant reported left hip and low back pain were at level 0, but noted he still had some mild aching depending on the activity level. Claimant also noted that his right calf and shin pain were barely noticeable. Claimant continued to complain of right shoulder pain. Dr. Brown recommended meclizine for vertigo.

18. Claimant returned to Dr. Brown on February 1, 2023, and continued to complain of concussion symptoms that were described by Claimant as severe. Claimant continued to report horrible nausea along with continued issues with his neck and head. Claimant reported his low back and hip issues were much better after he was able to get in for chiropractic visits. With regard to his right shoulder issues, Claimant reported he continued to have tight stiff symptoms that he reported were mild. Dr. Brown noted Claimant was scheduled to start vestibular therapy later this week.

19. Claimant testified he stopped receiving medical treatment after insurance denied his claim for workers' compensation benefits. Claimant testified he additionally received glasses based on the fact that he could not see properly after the accident. Claimant testified he did not wear glasses prior to the work injury.

20. Respondents referred Claimant for an Independent Medical Examination ("IME") with Dr. Tashof Bernton, on March 14, 2023. Dr. Bernton reviewed some of Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. According to the report, at the time of the examination, Dr. Bernton had the medical records from Work Partners through December 28, 2022 (in his cover letter, Dr. Bernton indicated that he only had records through December 21, 2022, but the report references the December 28, 2022

evaluation at Work Partners). Dr. Bernton testified that at hearing that he subsequently was able to review the additional medical records related to Claimant's MVA, including the treatment with Work Partners through February 1, 2023 and the chiropractic treatment along with the ER records and the ambulance report.

21. Dr. Bernton noted in his report that Claimant was involved in an MVA and reported a loss of consciousness. Dr. Bernton noted Claimant's examination revealed increased tone in the right rhomboid area with tender trigger points along some increased tone of the paraspinous musculature in the cervical region with associated tender trigger points. Dr. Bernton noted in his report that based on his limited information available, Claimant was three months out from an injury which involved a quite significant concussion with loss of consciousness and has persistent post- concussive deficits including some cognitive and memory deficits, visual difficulties and some balance difficulties as well as musculoskeletal symptoms which Dr. Bernton opined to be residual myofascial symptoms, and associated headache that was either myofascial or posttraumatic. Dr. Bernton opined that Claimant would likely be at maximum medical improvement ("MMI") as a result of the injury approximately six months post injury.

22. Dr. Bernton noted in his testimony at hearing that it was almost six months from the date of injury, and Claimant exhibited that he is cognitively intact and could potentially return to deskwork, potentially with restrictions. Dr. Bemton noted that while Claimant presented at the IME with the persistence of dizziness, double vision and some difficulty with tandem gait and word finding, Dr. Bernton noted Claimant did not appear to have difficulty with word finding during Claimant's testimony.

23. Dr. Bernton testified that a visual evaluation (5-6 more visits), prism glasses and transition out of them, 6 to 15 physical/vestibular therapy visits, and 5 to 10 chiropractic treatments would be reasonable and necessary medical treatment related to the MVA Dr. Bemton opined that Claimant's musculoskeletal complaints were diffuse strains that would resolve with time, and did not require additional medical care.

24. After JD[Redacted] picked up Clamant at the ER following the MVA, JD[Redacted] took Claimant to the rental vehicle that was in the salvage yard where it had been towed. JD[Redacted] testified that Claimant obtained a back pack, books, paperwork and a hat out of the rental car. JD[Redacted] testified that Claimant did not retrieve a suitcase out of the rental car. JD[Redacted] testified he did see items at Claimant's desk including his hard hat, boots, climbing gear, fire resistant clothing and additional books.

25. While JD[Redacted]testified that Claimant was not allowed to drive the rental vehicle home, Claimant presented the testimony of [Redacted, hereinafter MB], an employee for Employer who was the IBW president for six months for Employer, who testified at hearing that he would take the rental vehicles to his home when he was provided with a vehicle by Employer. MB[Redacted] testified at hearing that travel time would be considered compensated when an employee would travel to Denver. In this regard, MB[Redacted] testified that he would always charge at least five hours for his travel time for

trips to Denver, but if the trip took additional time, he would charge the additional travel time as well.[2]

26. Notably, there is insufficient evidence to establish that with regard to the car rental on December 8, 2022 that Claimant was under any instruction from Employer to not take the vehicle home. While there was some testimony from Claimant and JD[Redacted] that there was a discussion regarding a previously rented vehicle that Claimant was to leave at the Employer's premises, Claimant's testimony at hearing was that he was not instructed by Employer that he was no allowed to take the rental vehicle to his residence after it was rented on December 8, 2022. Moreover, MB[Redacted] testified that there was no company policy that would prohibit an employee from having a vehicle rented by Employer for travel at their home overnight. The AlJ finds Claimant's testimony credible in this regard.

27. The MVA in this case occurred while Claimant was traveling from his home to the Employer's premises. Claimant testified his intention was to pick up his gear from the office and continue to Denver for the planned weekend trip. JD[Redacted] testified that leaving on Friday for the planned trip to Denver would have been allowed by Employer. The AlJ finds Claimant's testimony with regard to his intentions to travel to Denver on Friday, December 9, 2022 after dropping his paperwork off at the office and picking up his work gear to be credible.

28. The parties agree that Claimant's travel to Denver was a necessary part of his employment and was authorized by Employer as evidenced by the fact that Employer arranged for Claimant's rental vehicle. The parties simply disagree as to whether Claimant was in travel status at the time of the MVA due to the fact that Claimant had not informed Employer of his intentions to leave on December 9, 2022 for the travel to Denver. However, as testified to by JD[Redacted], Employer would have allowed Claimant to leave early for Denver if he had requested this permission prior to December 9, 2022.

29. While the MVA occurred at approximately 6:39 a.m. and prior to Claimant's usual start time of 7:00 a.m., Claimant was traveling in a rental vehicle that was provided by Employer. Because Employer provided Claimant with the rental vehicle, and because the AlJ finds Claimant's testimony that his intention was to pick up his gear from the Employer's premises and continue on to Denver, the AlJ finds that Claimant has established that it is more probable than not that he was in travel status at the time of his injury. The AlJ finds, based on the testimony of Claimant at hearing, that Claimant's travel in this case was at the express or implied request of the Employer as Claimant's travel to Denver was necessary for Claimant to complete his testing to become a journeyman electrician. The mere fact that Claimant was intending to stop by the Employer's office on his way to Denver in order to study with co-workers does not

[2] The ALJ notes that MB[Redacted] was working in Employer's office in Grand Junction while Claimant was working in the office in Rifle and recognizes that the travel time "charged" by MB[Redacted] may not equally apply to Claimant's travel time. The relevance of MB's[Redacted] testimony is simply that travel time by employees for trips to Denver is compensated by Employer.

take Claimant out of travel status where the credible evidence establishes Claimant's intentions were to continue on to Denver after dropping off his paperwork.

30. The ALJ credits the testimony of Claimant at hearing along with the supporting medical records and finds that Claimant has established that the medical treatment he received from the ER and Work Partners represents reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the injury.

31. The ALJ notes that the parties agreed that Claimant would be entitled to temporary disability benefits, but reserved the issue involving offsets to the disability benefits based on Claimant's receipt of disability benefits from other sources.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S.

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2022. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo . App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. In general, claimants injured while going to or coming from work fail to qualify for recovery because such travel is not considered performance of services arising out of and in the course of employment. *Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967); *Madden v. Mountain West Fabricators,* 977 P.2d 864 (Colo. 1999). However, a travel status exception applies when the employer requires the Claimant to travel. The essence of the travel status exception is that when the employer requires the Claimant to travel beyond a fixed location established for the performance of his or her duties, the risks of such travel become the risks of employment. *Staff Administrators, Inc. v. Industrial Appeals Claims Office,* 958 P.2d 509 (Colo. App. 1997) *citing Martin K. Eby Construction Co. v. Industrial Commission,* 151 Colo. 320, 377 P.2d 745 (1963).

5. Colorado courts recognize exceptions to this general rule where circumstances create a causal connection between the employment and an injury occurring under special circumstances while an employee is going to or coming from work, such as:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Madden v. Mountain West Fabricators, id. Travel may be contemplated by the employment contract when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Industrial Commission,* 154 Colo. 491,391 P.2d 677 (1964).

6. In addressing the third variable, the *Madden* court determined the travel would be contemplated by the employment contract in the following examples (1) when a particular journey is assigned by the employer; (2) when the employee's travel is at the employer's expense or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work; or (3) when travel is singled out for special treatment as an inducement to employment. *Madden, supra.*

7. In this case, Claimant was required to travel to Denver to complete his testing to become a journeyman electrician. In order to accommodate Claimant's travel to Denver, Employer made arrangements to have Claimant obtain a rental vehicle on Thursday, December 8, 2022, including having a co-employee provide Claimant with a ride to the rental vehicle facility and allow the vehicle to be rented under the Employer's account.

8. The ALJ credits the testimony of the Claimant at hearing that he was intending to drop off paperwork with Employer on the morning of December 9, 2022 and then continue on to Denver for his final test at the time he was involved in the MVA. The ALJ finds that Claimant has proven by a preponderance of the evidence that he was engaged in travel that was contemplated by the employment contract when he was involved in the MVA on December 9, 2022 as he was effectively engaged in travel to Denver as contemplated by his employment with Employer.

9. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office,* 931 P.2d 570 (Colo. App. 1996).

10. As found, Claimant's medical treatment with the ER at Grand River Medical Center and his medical treatment with Work Partners was reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury, including the medical treatment provided by Grand River Medical Center and Work Partners.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. In **addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: July 11, 2023.

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-199-502-001

ISSUES

I. Whether [Redacted, hereinafter DM], [Redacted, hereinafter SH], and [Redacted, hereinafter EH] are dependents of the decedent and entitled to death benefits.

II. Apportionment of death benefits among the dependents.

III. Average Weekly Wage.

IV. Payment of funeral benefits.

V. Appointment of a guardian ad-litem.

STIPULATIONS

- The decedent, [Redacted, hereinafter EG], was employed by the respondent [Redacted, hereinafter IG] d/b/a [Redacted, hereinafter SG], , on the date of the accident and subsequent death. His death arose out of and occurred within the course and scope of his employment.
- SG[Redacted], was an uninsured subcontractor of [Redacted, hereinafter AR] on the date of the accident and subsequent death.
- AR[Redacted] is the statutory employer of the decedent and is insured by [Redacted, hereinafter PA].
- EH[Redacted] waived his right to claim any dependent benefits.
- DM[Redacted] and SH[Redacted], stipulated to have dependent benefits apportioned 50/50 – if each is entitled to dependent death benefits.

FINDINGS OF FACT

Based on the evidence and stipulations presented at hearing, the Judge enters the following specific findings of fact:

Accident- Statutory Employer

1. EG[Redacted], the decedent, was a 47-year-old gutter installer for IG[Redacted], d/b/a SG[Redacted].
2. On January 13, 2022, EG[Redacted] fell from a ladder while in the course and scope of his employment with SG[Redacted]. He suffered multiple injuries and died at the scene of the accident.
3. SG[Redacted] was uninsured and AR[Redacted] is the statutory employer of the decedent and is insured by PA[Redacted].

Wife and Children

4. On December 13, 1996, DM[Redacted], then age 21, and decedent, EG[Redacted], age 25, were married in Ciudad Valles, San Luis Potosi, Mexico.

5. DM[Redacted] and EG[Redacted] had two children while in Mexico:

   a. SH[Redacted], born on April 18, 2005. SH[Redacted] was 16 years old on the date of the decedent's death.

   b. EH[Redacted], born on November 10, 2000. EH[Redacted] was 21 years old on the decedent's date of death.

6. The decedent and his wife kept living together, with their children, in Mexico, until March 2014.

7. In March 2014, the decedent traveled to Colorado to work. While working in Colorado, the decedent rented a room in the house of [Redacted, hereinafter RH], his sister-in-law.

8. In 2015, the decedent returned to Mexico and stayed with his family for a few months. He then returned to Colorado where he kept working and continued renting a room in his sister-in-law's house.

9. After 2015, the decedent did not return to Mexico to stay with his family. The decedent did, however, remain married to his wife, DM[Redacted], and provided financial support to his wife and children on a consistent basis up until his death.

10. DM[Redacted] testified at the hearing and her testimony is found to be credible. Based on her testimony, the ALJ finds:

    - At the time his death, she and EG[Redacted] were married, and she resided in Mexico while EG[Redacted] was living and working in the United States to support his family.
    - She was married to EG[Redacted] on a continual basis since December 13, 1996.
    - Although they remained separated by geography, they remained married up until his death.
    - On a regular basis EG[Redacted] would contact her and send money to her for household expenses, including tuition for their children, food, utilities, and other family requirements. These payments were sent and documented by wire transfer.
    - Although he did not return back to Mexico after 2015 and stay with his family, he regularly communicated with her and his two children by phone.
    - She has not remarried since his death, and she has not been married to anyone else at any time.
    - She had two sons with the decedent. SH[Redacted] and EH[Redacted]. SH[Redacted] still lives with her at home in Mexico. He remains in preparatory school for which she continues to pay tuition and related expenses. EH[Redacted] is no longer in school and has a job.
    - Before EG[Redacted] death she remained dependent on the money that he would send to her in Mexico.

- She is unaware of any prior or subsequent marriages of EG[Redacted].
- She is unaware of any other children that EG[Redacted] may have ever had other than SH[Redacted] and EH[Redacted].

11. RH[Redacted] also testified at the hearing. Based on her testimony, which the ALJ credits, the ALJ finds:
    - She is the sister-in-law of EG[Redacted] and the sister of DM[Redacted].
    - The decedent rented a room from her in her house while he worked in Colorado.
    - Her sister, DM[Redacted], was married to EG[Redacted] at the time he died on January 13, 2022.
    - The decedent would call his wife and children almost every day.
    - The decedent would discuss with RH[Redacted] that he was sending money to his wife, DM[Redacted], in Mexico, on a regular basis.
    - DM[Redacted] would also discuss with RH[Redacted] that she was receiving money from the decedent on a regular basis.
12. Based on the testimony of DM[Redacted] and RH[Redacted], it is found that at the time of the decedent's death, DM[Redacted] and EG[Redacted] were married and were not legally separated, and DM[Redacted] and their children were being supported by the decedent.

Money Paid by IG[Redacted], d/b/a SG[Redacted].

13. Based on the testimony of IG[Redacted] and RH[Redacted], the ALJ finds that after the death of EG[Redacted], IG[Redacted], owner of SG[Redacted], paid various amounts of money to RH[Redacted], to provide to DM[Redacted] for living expenses and to pay funeral expenses-which she did. The amounts paid are as follows:
    - $1,600 for funeral benefits in Mexico.
    - $5,000 for the funeral costs in Colorado.
    - $500 per month from January 2022 through February 2023, to help support the family.
14. It is unclear from the record whether DM[Redacted] paid any funeral expenses in excess of the $6,600 dollars paid by IG[Redacted]. While DM[Redacted] testified as to the amount of funeral expenses that were incurred, she testified as to the amounts paid in pesos. Thus, the court cannot determine whether any funeral remain unpaid and whether DM[Redacted], or anyone else, paid funeral expenses in excess of the $6,600 paid by IG[Redacted].

Testimony of SH[Redacted]

15. SH[Redacted] is the son of the decedent and DM[Redacted] and he testified at the hearing. Based on his testimony, which the ALJ credits, the ALJ finds the following:
    - He is the son of the decedent.

- The decedent called him regularly.
- His parents were still married at the time of the accident and the death of the decedent.
- The decedent sent his mother money for the family on a regular basis.
- He was living with his mother at the time of the death of the decedent.
- He was depended on his father for his support at the time of his father's death.

16. SH[Redacted] also testified about the allocation of death benefits. He testified that the dependent benefits should be apportioned 50/50 between he and his mother.

Testimony of EH[Redacted]

17. EH[Redacted], who was 21 at the time of the decedent's death, also testified at the hearing. He testified that he is not claiming any dependent benefits. This testimony is consistent with the statements of his attorney, who said he was waiving any right to claim any dependent benefits.

Additional Testimony of IG[Redacted]

18. IG[Redacted] d/b/a SG[Redacted], also testified about the wages and bonuses he paid the decedent as well as the money he paid to the decedent's family after the accident. Based on his testimony, which the ALJ credits, the ALJ finds that:
    - The claimant was paid a fixed wage of $200 per day and was paid by check.
    - The decedent did not work every day. The decedent would work fewer days during the winter months since they could not work when the temperature was below 40 degrees.
    - He gave the decedent cash bonuses throughout the year and the cash bonuses averaged about $1,500 to $2,000 during 2021.

Average Weekly Wage

19. Based on the checks issued to claimant, the ALJ finds that the claimant earned $26,670 during the last six months, or 26 weeks of 2021. The ALJ finds that using the last six months of 2021 considers the variation of the claimant's working hours during the summer and winter months of 2021 and just before his accident. Dividing $26,670 by 26 weeks results in an average weekly wage of $1,025.77 and a death benefit rate of $683.85 per week.

20. Based on the testimony of IG[Redacted], it is found that the decedent was paid a bonus on a number of occasions throughout 2021 and that the total amount of the bonuses equaled approximately $1,500 to $2,000. However, it was not established that the bonuses paid to the decedent were guaranteed, that the decedent had access to a particular amount of a bonus during the year, or had an immediate interest in receiving a particular bonus at the time of his death. For example, the decedent did not get a set bonus based on the number of hours he worked each day, week, or month. Instead, each bonus was discretionary, sporadic, and provided whenever IG[Redacted] felt like giving the claimant a bonus. In other words, whether the claimant would have received similar

bonuses in 2022 was speculative. Thus, the court has not included any potential bonus in the determining the decedent's average weekly wage.

Continued to be Married and not Voluntarily Separated

21. Since being married in 1996, the decedent and DM[Redacted], remained married, and were married at the time of the accident.

22. There was no credible evidence submitted at hearing indicating the decedent and DM[Redacted] got divorced at any time.

23. Since 2015, the decedent did not travel back from Colorado to see his wife and children in Mexico. But despite the decedent not going back to Mexico to visit his wife and children since 2015, he talked to his wife and children on the telephone almost every day and supported them financially on a regular basis-by sending money via wire almost every week.

24. There was no credible evidence submitted at the hearing establishing that there was a pending divorce proceeding, or legal separation, or estrangement between the decedent and DM[Redacted] at the time of the decedent's death. Thus, the ALJ finds that there was no pending divorce proceeding, legal separation, or estrangement between the decedent and DM[Redacted] at the time of the decedent's death.

25. At the time of the decedent's death, the decedent was merely living and working in Colorado to support his wife and children who were living in Mexico.

Support of Wife

26. As found above, while the decedent was working and living in Colorado, he regularly sent money to his wife in Mexico to support her and their two children. In order to get money to his wife, he would have the money wired to his wife, DM[Redacted], in Mexico.

27. The decedent's wife, DM[Redacted], was not working in Mexico at the time of the decedent's death. She stayed at home, raised their children, and was financially supported by the decedent and therefore financially dependent on the decedent at the time of his death.

28. At the time of the decedent's death, his son, SH[Redacted], was also dependent upon the money the decedent sent to his mother for their support.

29. At the time of the decedent's death, both DM[Redacted] and SH[Redacted] were dependents of the decedent.

Guardian ad litem

30. At the time of the first two hearings regarding dependent benefits, the minor child, SH[Redacted], was 17 years old and represented by counsel.

31. At the time of the third hearing regarding this matter, SH[Redacted] was 18 years old, and still represented by counsel.

32. At no time during this matter has his mother, DM[Redacted], or the son, SH[Redacted], sought more than ½ of the dependent benefits and at no time did it appear that DM[Redacted] and SH[Redacted] were at odds regarding the apportionment of benefits and that a guardian ad litem had to be appointed to protect the interests of SH[Redacted].

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether DM[Redacted], S[Redacted], and EH[Redacted] are dependents of the decedent and entitled to death benefits.

a. DM[Redacted].

Section 8-42-114, C.R.S., provides for the payment of death benefits to dependents of a deceased worker. According to § 8-41-503, C.R.S., dependency shall be determined as of the date of the industrial injury and under § 8-41-501(1)(a), C.R.S. a widow is presumed to be wholly dependent unless it is shown that she was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support.

As found, DM[Redacted] and the decedent were legally married and remained married. They never divorced. As further found, she was wholly dependent upon the decedent for support at the time of his death. Moreover, at the time of death, she and the decedent were not estranged, legally separated, or divorced. The decedent was merely working in Colorado and sending money to his wife, who was living in Mexico at the family house, to support his family.

The respondents failed to overcome the presumption that DM[Redacted] was not wholly dependent upon the decedent. As a result, she is entitled to dependent death benefits.

b. SH[Redacted].

According to § 8-41-501(1)(b), C.R.S., minor children of the deceased under the age of eighteen years are presumed to be wholly dependent.

As found, SH[Redacted] is the minor child of the decedent and was 16 years old on the date of the decedent's death. As further found, SH[Redacted] was wholly dependent upon the decedent for his support. There was no credible evidence submitted demonstrating that he was not wholly dependent upon the decedent. As a result, he is entitled to dependent death benefits.

c. EH[Redacted].

EH[Redacted] was 21 years old on the date of the decedent's death. He has waived his right to claim any dependent benefits. As a result, he is not entitled to any dependent benefits.

II. Apportionment of death benefits among the dependents.

Section 8-42-121, C.R.S. provides that death benefits shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable. A just and equitable distribution will depend upon the facts of each case, and the ALJ may consider the "actual dependence" of the claimants as well as the relative incomes and circumstances of the claimants. *Spoo v. Spoo*, 145 Colo. 268, 358 P. 2d 870 (1961).

The ALJ finds and concludes that apportioning the decedent's death benefits equally (50/50) between each of the decedent's dependents who are claiming dependent benefits represents a just and equitable allocation of the benefits under the facts and

circumstances of this case. As a result, the dependent death benefits will be apportioned 50% to each dependent, i.e., DM[Redacted] and SH[Redacted].

III. **Average Weekly Wage.**

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's average weekly wage on his or her earnings at the time of injury. The ALJ must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. Indus. Claim Appeals Off.*, 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Id*.

Under §8-40-201(19)(a), C.R.S., the term "wage" is defined as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury…" When the Workers' Compensation Act was enacted in 1919, "wages" included "the reasonable value of board, rent, housing, lodging or any other similar advantage received from the employer." Colo. Sess. Laws 1919, ch. 210, 47 at 716. *See, Ganser v. Mountain Energy, Inc.*, WC 5-128-084-002 (ICAO, June 4, 2021). In 1989 the General Assembly narrowed the definition of "wages." It still included board, rent, housing and lodging, specifically added gratuities and certain costs of continuing or converting health insurance, but for the first time excluded "any similar advantage or fringe benefit not specifically enumerated." Colo. Sess. Laws 1989, ch. 67, 8-47-101(2) at 411*; Ganser v. Mountain Energy, Inc.*, WC 5-128-084-002 (ICAO, June 4, 2021). The preceding provision remains essentially unchanged. See §8-40-201(19)(b), C.R.S.

In *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996), the court of appeals reviewed the addition to the AWW of the claimant's accrual of paid time off. Specifically, the employer credited the claimant with 9.5 hours of paid leave for each pay period. The Court of Appeals applied the terms of §8-40-201(19)(a) and (b). Section 8-40-201(19)(a) defined 'wages' "to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Subparagraph (b), however, limited the definition to exclude "any similar advantage or fringe benefit not specifically enumerated in this subsection (19)." To determine if the claimant's accrued time off constituted an included "wage" or an excluded "fringe benefit," the decision applied criteria inquiring "whether a reasonable, present-day, cash equivalent value can be placed upon it and whether the employee has reasonable access on a day-to-day basis, either actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." *Meeker*, 929 P.2d at 28.

The *Meeker* Court determined the claimant's accrued time off qualified as "wages" to be included in the AWW. The hours credited to the claimant had an easily discernable,

immediate cash value derived by multiplying each hour accrued by the claimant's hourly rate of pay. Moreover, once earned, the time off was never forfeited and the claimant had reasonable access to the benefit. Notably, the claimant's weekly wage rate was increased by the hourly value of the number of time-off hours earned each week. *See, Burd v. Builder Services Group, Inc*., WC 5-058-572-001 (ICAO, July 9, 2019). Conversely, in *City of Lamar v. Koehn*, 968 P.2d 164 (Colo. App. 1998), the Court of Appeals affirmed the application of the *Meeker* test and concluded that vacation and sick leave earned by the claimant did not constitute "cash equivalents" for purposes of §8-40-201(19)(a) because the benefits were subject to forfeiture if the claimant accrued a specified maximum number of leave days.

In *Orrell v. Coors Porcelain*, WC 4-251-934 (ICAO, May 22, 1997) and *Yex v. ABC Supply Co*., WC 4-910-373-01 (ICAO, May 16, 2014), the Panel considered the addition of bonuses paid from employers' profit-sharing plans to a wage calculation. In both cases the prior receipt of the bonuses was excluded as fringe benefits rather than included as wages. Applying the *Meeker* test, the bonus was deemed contingent and without a present-day cash equivalent value. Importantly, the size of the bonus could be established only at the conclusion of the year or quarter. The claimant also had no access to the bonus on a day-to-day basis and had no immediate expectation of receiving the bonus.

As found, based on the checks issued to claimant, the ALJ finds that the claimant earned $26,670 during the last six months, or 26 weeks of 2021. The ALJ finds that using the last six months of the claimant's earnings of 2021 takes into consideration the variation of the claimant's working hours during the summer and winter months of 2021 and just before his accident and such calculation is a fair and reasonable manner to determine his average weekly wage under the facts and circumstances of this case. As a result, dividing $26,670 by 26 weeks results in an average weekly wage of $1,025.77 and a death benefit rate of $683.85 per week.

Based on the testimony of IG[Redacted], it is found that the decedent was paid a bonus on a number of occasions throughout 2021 and that the total amount of the bonuses equaled approximately $1,500 to $2,000. However, it was not established that the bonuses paid to the decedent were guaranteed, that the decedent had access to a particular amount of a possible bonus during the year, or had an immediate interest in receiving a particular bonus at the time of his death. For example, the decedent did not get a set bonus based on the number of hours he worked each day, week, or month. Instead, each bonus was discretionary, sporadic, and provided whenever IG[Redacted] felt like giving the claimant a bonus. In this matter, the bonuses were so speculative that even IG[Redacted] could not calculate the exact amount, or what those bonuses were based on. In other words, whether the claimant would have received similar bonuses in 2021 was speculative. Plus, it was an unenumerated, and speculative, fringe benefit. Thus, the court has not included any potential bonus in determining the decedents average weekly wage.

Therefore, the ALJ finds and concludes that the decedent's average weekly wage is $1,025.77, which equates to a death benefit rate of $683.85 per week.

IV. Payment of funeral benefits.

Based on the evidence presented at the hearing, the record was not fully developed regarding funeral benefits. For example, DM[Redacted] testified regarding the funeral expenses in pesos and not in American dollars. Moreover, IG[Redacted] paid $6,600 for funeral expenses, but it is not clear whether that covered all the funeral benefits, or whether there were additional funeral expenses that were either paid by someone else or remain outstanding. Therefore, the court specifically reserves the issue of funeral benefits.

V. **Appointment of a Guardian Ad-Litem.**

Counsel for the dependents requested that the court appoint DM[Redacted] as the guardian ad-litem of her son, SH[Redacted]. Section 8-43-207(1)(l), C.R.S. allows an ALJ to appoint guardian ad litem.

However, a guardian ad litem focuses specifically on representing the best interests of the individual during a legal proceeding, providing recommendations, and advocating for their well-being but without assuming full guardianship. *See Young v. C.A.H.* (*In re J.C.T.*), 176 P.3d 726, 734-35 (Colo. 2007). Thus, a guardian ad litem represents the legal interests of the individual during a hearing, but not after. In other words, a guardian ad litem is not appointed to manage the funds paid to or on behalf of a dependent minor child after a hearing as a conservator would.

In this case, all of the dependents were represented by the same attorney and the court did not find that their interests were adverse to one another based on the facts and circumstances of this case and their stipulations. Plus, at the time of the last hearing, SH[Redacted] was 18 years old. Therefore, the ALJ did not find that it was necessary to appoint a guardian ad litem in order for the case to proceed to an order. As a result, the request for a guardian ad litem is denied.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Both DM[Redacted] and SH[Redacted] are dependents of the decedent and entitled to death benefits.
2. The death benefits shall be apportioned 50/50 between DM[Redacted] and SH[Redacted].
3. The death benefits shall be payable to each dependent until modified or terminated by law.
4. The death benefits shall be based on an average weekly wage of $1,025.77 and payable at a death benefit rate of $683.85 per week.
5. The issue of funeral benefits is reserved for future determination.
6. The request for a guardian ad litem to be appointed is denied.
7. All other issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 13, 2023.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove she suffered a compensable injury on March 31, 2021?
- If Claimant proved a compensable injury, was treatment for her lumbar spine after March 31, 2021 reasonably needed and causally related to the injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a Freight Associate on the night shift. Her duties included unloading trucks and stocking product.

2. Claimant has a long history of psychogenic nonepileptic seizures. Claimant referred to them as "stress seizures" and testified they are typically triggered by emotional or physical stress.

3. Claimant previously underwent extensive workup for the seizure disorder, including EEG testing. She saw a neurologist who ultimately determined the seizures were non-epileptic and referred her to a psychiatrist for further treatment. No records from Claimant's psychiatrist were offered at hearing.

4. On March 31, 2021, Claimant was at work when a co-worker, [Redacted, hereinafter VI], flashed a barcode scanner at her eyes.[1] Shortly thereafter, Claimant developed vertigo, which is a common precursor to a seizure episode. Claimant texted her manager, [Redacted, hereinafter MS], that she was about to have a seizure. MS[Redacted] went to Claimant's location, arriving just as the seizure started. MS[Redacted] caught Claimant as she started to fall and laid her on the floor. He then called Claimant's husband, consistent with Claimant's established "seizure plan."

5. While Claimant was on the floor, another co-worker, [Redacted, hereinafter JH], approached the scene. MS[Redacted] told JH[Redacted] not to touch Claimant, per her seizure plan. However, JH[Redacted] ignored the instruction and turned Claimant onto her side. Claimant testified that she cannot control her movements during a seizure but remains aware of what is going on around her. Claimant testified JH[Redacted] moved her upper and lower halves at different times, which "twisted" her spine.

6. Claimant's husband arrived at the store after the seizure and took her home.

7. Claimant sought no immediate treatment. She testified that she typically feels lingering aftereffects for a day or two, and she assumed that would be the case after

[1] VI[Redacted] was apparently engaging in horseplay and had flashed the eyes of another co-worker before pointing the barcode scanner at Claimant. However, there is no persuasive indication Claimant invited or participated in the horseplay.

the seizure on March 31. However, she continued to experience vertigo and vomiting, so she went to the St. Francis Medical Center emergency department on April 3, 2021.

8. Claimant was evaluated by Dr. Tracy Maceachern in the emergency room. Claimant and her husband related the history of "stress-induced" non-epileptic seizures. They described the episode at work on March 31. Dr. Maceachern documented, "[Claimant's] boss reported that she did not incur any trauma and was laid on the floor." She had continued to experience worsening vertigo since that time. She was also feeling very weak and having difficulty moving around the house. Claimant reported tingling in her legs and a headache. There was no mention of a back injury or any symptoms involving her low back. Physical examination showed global weakness but no focal deficits. A head CT was normal. Claimant was given valium and Toradol in the ER, and by the end of the visit was feeling "entirely improved." Dr. Maceachern concluded, "given her reassuring exam and negative work-up for emergent abnormality, low suspicion for emergent cause of patient's symptoms, although exact etiology is unclear." Claimant was discharged with instructions to follow up with her personal physician.

9. Claimant saw her PCP, Dr. Philip Caterbone, on April 5, 2021. She reported ongoing lethargy and weakness. She also complained of acute low back pain and stated, "she was injured when lying prone during the seizure." Her pain was localized to the lumbar area with no radiating or radicular symptoms. On examination, strength was normal and SLR was negative. Claimant reported tenderness to palpation around the lumbar area, but Dr. Caterbone appreciated no spasm. Dr. Caterbone referred Claimant to neurology for the seizures and ordered x-rays of the lumbar spine.

10. Claimant followed up with Dr. Caterbone on April 12, 2021. Her fatigue and lethargy had resolved but she still complained of low back pain. Dr. Caterbone noted the lumbar x-rays were normal and referred Claimant to physical therapy.

11. A subsequent lumbar MRI showed post-surgical changes from a childhood procedure, and mild to moderate neuroforaminal narrowing, but no acute pathology.

12. PT was not helpful, so Dr. Caterbone referred Claimant to pain management. She ultimately underwent extensive treatment for her low back, including a lumbar ESI, medial branch blocks, and a spinal cord stimulator trial. She developed complications from the stimulator trial and had emergency surgery on April 5, 2022 to remove a hematoma. Claimant did not pursue a permanent stimulator implant because she became pregnant. Claimant reported no significant benefit from any treatment.

13. Dr. Allison Fall performed an IME for Respondents. Dr. Fall opined that Claimant's seizures are nonepileptic and instead are psychogenic in nature. She explained that psychogenic seizures are not associated with brain abnormalities and are therefore treated with psychotherapy rather than antiepileptic medications. Because Claimant's seizures are nonepileptic, the March 31, 2021 seizure was not physiologically caused by the flashing lights. Rather, it was the result of Claimant's personal subjective reaction to what she perceived as a stressful situation. Dr. Fall concluded Claimant's alleged injury is "like a mental stress claim."

14. Regarding the low back, Dr. Fall opined the "twisting" incident was no more impactful than simply rolling over in bed and would not reasonably cause a lumbar spine injury. Dr. Fall could identify no physiologic basis for Claimant's reported symptoms. The MRI showed no structural abnormality to account for Claimant's reported low back and leg symptoms, and physical examination showed no evidence of neurological or radicular issues. Dr. Fall also noted "nonorganic" findings such as giveway weakness and 4/5 positive Waddell's signs. Dr. Fall concluded Claimant suffered no low back injury from the March 31, 2021 incident.

15. Dr. Fall's opinions and conclusions are credible and persuasive.

16. Claimant's claim for workers' compensation benefits related to the seizure on March 31, 2021 is subject to the requirements of the "mental impairment statute."

17. Claimant failed to satisfy the statutory requirement to support her claim stress-induced seizures with evidence from a licensed psychiatrist or psychologist.

18. Claimant failed to prove she suffered a compensable back injury arising out of her employment. The alleged "assault" by JH[Redacted] was entirely personal to Claimant with no connection to the conditions and obligations of employment beyond the mere fact that it happened while she was at work. As such, any injury she may have suffered did not arise out of her employment. But even if the incident were deemed a "neutral" injurious force, Dr. Fall is persuasive that Claimant suffered no physical injury to her low back.

CONCLUSIONS OF LAW

A. Compensability of the seizure

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). There is no presumption that an injury occurring at work during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Workers' Compensation Act imposes additional conditions for compensability of a claim for "mental impairment." Among those conditions is a requirement that the claim

be "supported by the testimony of a licensed psychiatrist or psychologist." Section 8-41-301(2)(a).[2]

The term "mental impairment" means a disability resulting from an accidental injury "when the accidental injury involves no physical injury and consists of a psychologically traumatic event." Section 8-41-301(3)(a). The General Assembly adopted the mental impairment statute because it believed claims based purely on mental causes "are less subject to direct proof and more susceptible to being frivolous." *Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918, 920 (Colo. App. 1996). To that end, the physical injury requirement "differentiate[s] between cases in which physical injury causes mental impairment ('mental-physical') and those where mental impairment follows solely an emotional stimulus ('mental-mental')." The fact that a claimant's psychological response is accompanied by physical symptoms does not remove the claim from the aegis of the mental impairment statute. *E.g.*, *Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000) (panic attack caused elevated blood pressure, arm numbness, and severe chest pains mimicking a heart attack); *Tomsha v. City of Colorado Springs*, 856 P.2d 13 (Colo. App. 1992) (job stress caused TMJ dysfunction).

Claimant's case is analogous to the situation in *Nordman v. Lockheed Martin Corporation*, W.C. No. 4-889-647-005; 4-944-807-002 (March 29, 2021). In *Nordman*, the claimant became very upset and angry after an argument with her employer, which triggered a stroke. The Panel held that the mental impairment statute applied to the claim because "the cause for the claimant's stroke is . . . an 'emotional trauma' and not [] a physical injury."

Thus, Claimant must satisfy the requirements of the mental impairment statute to the extent she seeks compensation as a natural and proximate result of the seizure. As found, Claimant failed to prove a compensable mental impairment because the claim is not supported by evidence from a licensed psychiatrist or psychologist.

B. Compensability of the low back

Because the seizure is not compensable, the alleged back injury cannot be covered as a downstream consequence of the seizure. However, the question remains whether the alleged back injury is compensable in its own right as a separate injury.

Claimant characterizes her co-worker's actions in turning her onto her side as an "assault," and references a criminal statute that references "knowingly or recklessly" causing harm to another. Section 18-3-204. Although there is insufficient evidence to show intent or recklessness on the part of Claimant's co-worker, the law governing workplace assaults provides a useful framework to evaluate compensability in this case.

[2] The Court of Appeals invalidated the requirement to present sworn "testimony" as a violation of equal protection and held that medical reports are sufficient. *Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000). Nevertheless, the claim must be supported by evidence from a psychiatrist or psychologist.

Case law has identified three categories of workplace assaults for purposes of compensability. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001).[3] The first category covers assaults that have "an inherent connection with employment and emanate from the duties of the job." These include arguments over things such as work performance, work equipment, job tasks, delivery of a paycheck, or termination. But not all offensive or injurious interactions between co-workers are inherently related to employment merely because they happen at work. Otherwise, the causal nexus requirement "is eroded where the test is improperly framed as 'but for the bare existence of the employment' rather than 'but for the conditions and obligations of the employment." *Id*. at 476.

The second category encompasses inherently private assaults. Such conflicts originate in the private affairs of the claimant or the assailant and are unrelated to their work-related functions. These cases typically involve disputes over love interests or other purely private matters. But the category of private assaults also includes cases where the victim was specifically targeted or chosen, with the most common examples being sexual assaults or sexual harassment. *Id*. Injuries falling within this category are generally not compensable unless an exception applies, such as a "special hazard." *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014).

The third category of assaults are those related to a "neutral" source. This refers to "neutral and unexplained forces and are neither personal to either party nor distinctly associated with the employment." *Id.* at 477. Neutral forces include stray bullets, roving lunatics, drunks, lightning strikes. This type of assault is compensable if it is triggered by a neutral source not specifically targeted at the employee and "would not have occurred but for the fact that the conditions and obligations of employment placed [the] claimant in the position where he [or she] was injured." *City of Brighton, supra*, at 504.

Claimant argues the "assault" by JH[Redacted] falls in the category of neutral risks. But I agree with Respondents that the incident was inherently private, and therefore did not arise out of Claimant's employment. JH[Redacted] specifically "targeted" Claimant in an attempt to aid her because of her inherently private seizure condition. There was no connection to the conditions or obligations of Claimant's employment beyond the mere fact that she happened to be at work when the seizure occurred, and JH[Redacted] happened to be a co-worker. As such, the only nexus to Claimant's job is "the bare existence of the employment," which is insufficient per *Horodyskyj*.

Furthermore, even if the alleged assault were considered a neutral force, Claimant failed to prove the incident proximately caused an injury to her low back. Dr. Fall's opinions are credible and persuasive. The incident was not reasonably likely to cause a lumbar spine injury based on the positions, movements, and forces involved. The emergency room records contain no mention of low back pain or a back injury. Although Claimant reported back pain to Dr. Caterbone on April 5, the examination showed no spasm or other persuasive findings to substantiate an injury. Claimant thereafter received extensive treatment with no persuasively identified pain generator, and ultimately no

[3] These broad categories are consistent with the more generalized classification of employment risks outlined in *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014).

sustained benefit. As Dr. Fall explained, considering the minimal forces involved and the absence of any objective structural pathology, if Claimant had suffered an injury, she should have improved with time and treatment. The persuasive evidence fails to show Claimant's reported symptoms were proximately caused by the incident at work.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: July 13, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-209-733-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on July 2, 2022.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits, and specifically trigger point injections.

3. Whether Claimant established an entitlement to temporary total disability benefits for the period of July 3, 2022 to July 15, 2022.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage at the time of injury was $543.62. The parties also stipulated that if Claimant is entitled to temporary total disability benefits, such benefits would be for the period of July 3, 2022 to July 15, 2022.

FINDINGS OF FACT

1. Claimant is a 48-year-old woman who is employed in Employer's restaurant. Claimant's job duties included cleaning, helping in the kitchen, and performing various other tasks. On July 2, 2022, while working for Employer Claimant was retrieving ice from an ice machine, when a metal panel above the ice machine door became dislodged, striking the ice machine door, which struck claimant on the back of her head. (See photos, Ex. M) One of Claimant's co-workers witnessed the incident and indicated Claimant was incoherent and in a daze after being struck. (Ex. 10).

2. Claimant has a history of chronic, non-intractable migraine headaches, and seizure disorder. Since 2018, Claimant was seen at Denver health twice for treatment of migraine headaches, including complaints of fatigue, nausea, vomiting, and photophobia, phonophobia. (Ex. K). Claimant's last documented headache treatment prior to July 2, 2022 was on June 4, 2020, when she was seen at Denver Health. At that time, Claimant reported dizziness and finger numbness upon waking, in addition to the above-listed symptoms. Claimant attributed her symptoms to chronic migraine headaches. (Ex. K).

3. On October 19, 2021, Claimant was seen at Presbyterian/St. Lukes for a right shoulder injury she sustained in a fall. (Ex. J). Claimant continued to receive treatment for her right shoulder at Denver Health through January 20, 2022. (Ex. K).

4. Claimant reported her injury on July 2, 2022, and Employer sent Claimant for evaluation to AFC Urgent Care that day. Claimant reported blurry vision and photophobia, but denied additional symptoms including loss of consciousness, headaches, dizziness, nausea, vomiting, and other symptoms. Examination of Claimant's neck was normal, as

was a neurological examination. Claimant was diagnosed with a head injury, and given a total work restriction until July 4, 2022. (Ex. 1).

5. Later that evening, Claimant attended a gathering at a friend's home. Respondents' Exhibit T is a video of that gathering and shows Claimant sitting at a table with others, in no apparent distress. (Ex. T).

6. Claimant returned to AFC Urgent Care on July 4, 2022, reporting constant headaches, nausea, dizziness, and pain radiating down her neck. Claimant was referred for a head CT scan and to a neurologist. (Ex. 1). The CT scan, performed on July 6, 2022 was negative. (Ex. 3).

7. Claimant returned to AFC Urgent care on July 8, 2022, and was seen by Zeeshan Ahmed, M.D. On examination he noted mild paracervical tenderness, and diagnosed Claimant with a concussion without loss of consciousness, muscle spasm, and neck sprain. In addition, Dr. Ahmed extended Claimant's work restriction until July 16, 2022, advising that she should not return to work until then. (Ex. 1).

8. On July 21, 2022, Claimant saw Kate Kraus, NP, at Advanced Neurology, and reported experiencing daily headaches since July 2, 2022, with photophobia and nausea. Claimant also reported dizziness with changes in position, and denied neck pain. Claimant reported no prior history of migraine headaches. Ms. Kraus diagnosed Claimant with post-traumatic headache and cervicalgia. She recommended a brain MRI and VNG testing to assess dizziness. (Ex. 2).

9. On July 22, 2022, Claimant was referred from AFC Urgent Care to Dr. Yusuke Wakeshima, M.D., to assume Claimant's care. At that point, Dr. Wakeshima became Claimant's authorized treating physician (ATP). Claimant first saw Dr. Wakeshima on August 2, 2022, reporting headaches, neck pain, upper back pain, and mild cognitive issues, with pain at 10/10. Claimant denied any pre-existing conditions or similar prior symptoms, and specifically denied pre-existing migraine headaches. On examination, Claimant reported pain and tenderness with palpation in the upper trapezius and levator scapula, and pain with range of motion. Dr. Wakeshima recommended a brain MRI and cervical MRI, and noted that post-concussive symptoms typically resolve in 4-6 weeks without treatment. Dr. Wakeshima also prescribed an e-stim unit for Claimant's neck and upper back pain. (Ex. 3).

10. Claimant returned to Ms. Kraus on August 18, 2022, reporting improvement in her headaches, and neck pain, but continued dizziness. She was prescribed migraine medication. (Ex. 2).

11. On August 22, 2022, Claimant had cervical and brain MRIs. The cervical MRI showed very mild degenerative changes and a small disc bulge, without herniation or stenosis. Claimant's brain MRI was interpreted as showing calcifications in the medial left frontal lobe and left parietal lobe, which were later determined not to be related to her injury. (Ex. 4 and 6).

12. On August 24, 2022, Claimant returned to Dr. Wakeshima reporting pain down her left arm to her hand and fingers, in addition to headaches and neck pain. Dr. Wakeshima noted that Claimant's cervical MRI was not concerning and that he would consider cervical facet injections and an occipital nerve block for Claimant's reported headaches, and recommended an EMG study to evaluate Claimant's reports of left arm pain. (Ex. F).

13. Dr. Wakeshima performed the EMG testing on September 13, 2022, and indicated that the test was normal, with no evidence of neuropathy, radiculopathy, or other left-sided symptoms. On September 13, 2022, Claimant reported her pain at a level of 6/10. (Ex. F).

14. On October 18, 2022, Claimant saw Haley Burke, M.D., a neurologist on referral from Dr. Wakeshima. Dr. Burke reviewed Claimant's brain MRI and indicated that the findings were not related to her injury, and that there was no evidence of a hemorrhagic injury or diffuse axonal injury. She found Claimant's cervical range of motion minimally limited and a positive test on the left with facet joint loading. She diagnosed Claimant with cervical cranial syndrome, myofascial muscle pain, post-traumatic headache, and cervical facet joint syndrome. Claimant reported her pain level as 7/10 at best. Dr. Burke referred Claimant for physical therapy and requested authorization for cervical facet joint injections. (Ex. 6).

15. On November 9, 2022, Claimant saw Dr. Wakeshima with reports of right sided neck pain, right upper back pain, right clavicle pain and shoulder pain, and a pain level of 9/10. He ordered right shoulder and clavicle x-rays which were negative. Dr. Wakeshima offered no explanation as to how Claimant's shoulder and clavicle symptoms were related to the July 2, 2022 incident. (Ex. F).

16. On November 17, 2022, Claimant saw Dr. Burke, reporting her symptoms were unchanged, with a pain level of 9/10. Claimant reported her right shoulder pain began two weeks prior, and that she had not been able to start physical therapy. Dr. Burke indicated that Claimant appeared to have post-traumatic headaches with likely cervicocranial etiology, and that her history was consistent with an upper cervical spine sprain with mild head trauma, and was suggestive of the facet joints as the source of both her head and neck issues. She indicated that the request for facet joint injections was denied, and she again requested authorization for those injections. (Ex. D).

17. On November 26, 2022, Dr. Wakeshima authored a letter to Respondents' counsel regarding Claimant's treatment after being provided with Claimant's pre-July 2, 2022 records documenting her prior treatment for headaches and right shoulder complaints. Dr. Wakeshima reviewed Claimant's medical records and opined that as the result of the July 2, 2022 work incident, Claimant had diagnoses including neck and upper back pain, most likely myofascial with potential facetogenic components, cervicogenic headaches, and post-concussive syndrome. He indicated that while Claimant had a history of migraine headaches, the mechanism of injury could cause potential neck injury issues, and cervicogenic headaches. He indicated that any migraine headaches were not work related, but cervicogenic headaches were work-related. He also indicated Claimant was not at maximum medical improvement (MMI), and recommended 6-12 chiropractic

sessions with dry needling, and physical therapy to address myofascial pain. If those sessions did not adequately address her myofascial pain, then four sessions of trigger point injections, followed by myofascial release massage therapy would be appropriate. He indicated if Claimant's pain generator was facetogenic, he would recommend facet joint injections, as requested by Dr. Burke. Dr. Wakeshima indicated that myofascial pain nor facetogenic neck pain may not demonstrate as abnormalities on radiological tests. However, he offered no explanation as to how it would be determined that Claimant's pain complaints were facetogenic in origin. (Ex. F).

18. Dr. Wakeshima also recommended a neuropsychological evaluation to assess Claimant's post-concussive symptoms, and indicated he would refer Claimant for that evaluation with a Dr. Aylesworth. He indicated if there was no post-concussive syndrome and no associated depression issues, then no further treatment would be indicated. He further opined that Claimant would likely reach MMI upon completion of the recommended treatments, which he anticipated would take 2-3 months. (Ex. F).

19. On December 1, 2022, Claimant began chiropractic treatment with Jennifer Walker, D.C. Claimant attended 15 chiropractic visits and was discharged on February 28, 2023. Dr. Walker indicated Claimant's reported pain decreases with treatment, but the pain returned after treatment. Dr. Walker's records indicate that she found "clinical evidence" of trigger points in at least 13 different cervical muscles, the majority of which were documented to have "reproduced Claimant's hand symptoms." (No other provider documented the presence of trigger points in Claimant's cervical spine). She opined that Claimant would benefit from trigger point injections and additional chiropractic care. Over the course of her care, Dr. Walker performed dry needling of trigger points in the neck and upper shoulder/back, and massage therapy. She noted that Claimant reported less pain and more range of motion of the cervical spine with this treatment. Dr. Walker's records indicate that Claimant's initial pain levels were reported as 9/10 on December 1, 2022, and had decreased to 7/10 by February 29, 2023. (Ex. C).

20. Claimant returned to Dr. Burke on December 13, 2022 with reports of continued headaches rating 9/10 for pain. Claimant indicated that her headaches were more frequent since her last visit. Dr. Burke reiterated her recommendations for trigger point injections and an occipital nerve block. She again returned to Dr. Burke on January 10, 2023 with no reported change in symptoms. (Ex. D).

21. On January 25, 2023, Claimant had an IME with Allison Fall, M.D., at Respondent's request. At her visit with Dr. Fall, Claimant reported pain levels of 9/10. Based on her examination and review, Dr. Fall opined that Claimant sustained an uncomplicated head contusion that did not require medical treatment. She noted that imaging and electrodiagnostic studies performed were all negative and did not demonstrate objective evidence of injury. She noted that there have been no objective findings consistent with Claimant's symptoms, and that her subjective complaints are "greatly out of proportion" to her presentation. (Ex. A).

22. On February 6, 2023, Claimant returned to Dr. Burke's clinic and saw Rosalind Daninger, NP, APN. Claimant continued to report neck pain and right shoulder pain. On

examination of Claimant's cervical spine, she was noted to have decreased cervical flexion and extension with pain, and tenderness to palpation of the bilateral cervical paraspinal muscles. She also noted Claimant was able to rotate and laterally bend her neck without pain. The presence of trigger points was not documented. Claimant indicated she continued to see physical therapy twice per week, and that it was helpful. The record further notes that Insurer denied requests for cervical facet injections, trigger point injections, and occipital nerve blocks. Claimant was prescribed medication for cervical facet joint syndrome. (Ex. 6)

23. Claimant returned to Dr. Wakeshima on February 16, 2023, with right-sided neck pain, and right sided upper back pain. On examination, Dr. Wakeshima noted tenderness of the right cervical paraspinal musculature, right upper trapezius, and right levator scapula, with painful cervical flexion, extension, and side bending. Dr. Wakeshima did not document the presence of trigger points, although he noted that Claimant had benefited from dry needling during her chiropractic care with Dr. Walker. Dr. Wakeshima indicated that unless Dr. Burke had further intervention planned, he anticipated Claimant would be a maximum medical improvement within six to eight weeks. (Ex. 3).

24. On March 7, 2023, Claimant returned to Dr. Burke's office and saw Ms. Daninger. Claimant reported pain at a level of 8/10, and located at the top of her head, neck midline and right shoulder. On examination, Ms. Daninger noted decreased cervical range of motion with pain in flexion, extension, rotation, and lateral bending, with tenderness to palpation in the cervical paraspinal muscles. The presence of trigger points was not documented. (Ex. 6).

25. On April 6, 2023, Claimant saw Dr. Wakeshima. He noted that Claimant had completed chiropractic care, and continued to use an e-stim unit with some benefit. However, Claimant continued to report her pain at a level of 7/10. Dr. Wakeshima's cervical evaluation was similar to his February 16, 2023 visit, and did not document the presence of trigger points. Dr. Wakeshima indicated that because Claimant had not been able to see Dr. Burke he would request authorization to perform trigger point injections himself. He indicated that he was requesting 4 sessions of trigger point injections, followed by massage therapy through Dr. Walker's clinic. (Ex. 3).

26. Dr. Fall testified through a pre-hearing deposition and was admitted as an expert in physical medicine and rehabilitation. Dr. Fall characterized Claimant's initial examination on July 2, 2022 as normal, and testified that there had not been any diagnostic testing which would explain Claimant's reported symptoms. Dr. Fall testified, credibly, that except in unique situations, a physician cannot typically objectively measure headaches. Dr. Fall noted that Claimant's records do not document any noticeable external signs of trauma to her head after the incident, and that it was "very highly unlikely" that the incident on July 2, 2022 was continuing to cause Claimant's complaints. Dr. Fall opined that Claimant sustained a contusion on her head on July 2, 2022 that did not require medical treatment or any disability. She opined that Claimant likely did not have a concussion, although a concussion would not necessarily be visible on imaging studies. She also acknowledged that a neck injury can result from something falling on a person's

head, and that a neck strain would usually not appear on imaging studies. Although, Dr. Fall does not believe Claimant sustained an injury to her neck.

27. Dr. Fall testified that trigger point injections were not reasonable or necessary. Trigger points are nodules with "hyperintense focus with a twitch response and referred pain," and without those being present trigger point injections are not indicated. In support of this opinion, she noted that Dr. Wakeshima had not documented the presence of trigger points, and that Dr. Fall did not detect trigger points in her examination of Claimant.

28. Claimant testified that when she was struck on the back of her head, she "blacked out" momentarily. She testified that she was off work for two weeks, and returned to work on July 16, 2022. She indicated that following her injury she experienced pain in her neck and head, nausea, dizziness, and vomiting. She testified that she would like to have trigger point injections because her neck "gets inflamed" and because her physicians have recommended them.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

Claimant has established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on July 2, 2022. Specifically, Claimant sustained a neck strain and has experienced cervicogenic headaches. Although none of the diagnostic tests performed documented objective evidence of injury, the ALJ finds persuasive Dr. Wakeshima's opinion that Claimant likely sustained a myofascial neck injury and cervicogenic headaches. Claimant's complaints of right shoulder pain, clavicle pain, and left arm symptoms, are not causally related to her July 2, 2022 injury. Further, the ALJ finds that Claimant, more likely than not, did not sustain a concussion or closed head injury arising out of the course of her employment.

The ALJ does not find persuasive Dr. Fall's opinion that Claimant sustained only a minor head contusion that did not require medical treatment.

Medical Benefits (General & Specific)

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

As found, Claimant has established that she sustained compensable injuries consisting of a neck strain and cervicogenic headaches. Respondents shall pay for all authorized treatment that is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Treatment for Claimant's right shoulder, clavicle, and reported left arm radicular symptoms is not causally related to Claimant's industrial injury.

Claimant has failed to establish that trigger point injections are reasonable and necessary to cure or relieve the effects of her injuries. Neither Dr. Wakeshima, Dr. Burke, nor Ms. Daninger documented the presence of trigger points in Claimant's neck or upper back. Dr. Burke's recommendation for trigger point injections was apparently made only after authorization for facet joint injections was denied, without explanation of the medical reasonableness or necessity of trigger point injections. The ALJ finds credible Dr. Fall's opinion that in the absence of evidence of trigger points, such treatment is not reasonable or necessary. Although Dr. Walker documented "clinical evidence" or trigger points throughout Claimant's neck and upper back, the ALJ does not find this to be persuasive evidence, given that no other provider documented similar findings, which would be expected if trigger points to the extent documented by Dr. Walker were present. Moreover, Dr. Walker did perform trigger point dry needling over approximately three months, which only moderately decreased Claimant's subjective reports of pain. Claimant's request for authorization of trigger point injections is denied and dismissed.

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). TTD benefits continue until the first occurrence of any of the

following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

As found, Claimant's ATP AFC Urgent Care provided Claimant with work restrictions for the period of July 3, 2022 through July 15, 2022. Claimant returned to work on July 16, 2022, and continued to work after that date. The ALJ finds that Claimant sustained a temporary disability for the period of July 3, 2022 through July 15, 2022, resulting in an actual wage loss for that period. Respondents' shall pay Claimant TTD benefits for the period of July 3, 2022 through July 15, 2022, based on the stipulated average weekly wage of $543.62.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable neck strain and cervicogenic headaches arising out of the course of her employment with Employer on July 2, 2022.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's compensable industrial injury.

3. Claimant's request for authorization of trigger point injections is denied and dismissed.

4. Respondents shall pay Claimant temporary total disability benefits for the period of July 3, 2022 to July 15, 2022.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 13, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-196-773-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that right wrist surgery recommended by Joseph Noce, M.D., is reasonable and necessary to cure or relieve the effects of Claimant's December 7, 2021 industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a car wash manager. On December 7, 2021, while working for Employer, Claimant sustained an admitted injury when he fell into a three-foot-deep floor drain that was left uncovered. When Claimant fell, he landed on his right hip and shoulder with his arm outstretched. (Ex. 1) Claimant did not initially seek medical treatment, and returned to work the following day. Because his right shoulder pain had not resolved, he then sought medical treatment.

2. Claimant initially sought medical treatment at Banner Urgent Care on December 8, 2021, where he reported right shoulder pain and tingling in his right hand. Claimant had positive testing for shoulder impingement and decreased shoulder range of motion. Examination of Claimant's elbow and wrist was "unremarkable." Claimant was assessed with shoulder pain and advised to follow up with workers' compensation for a physical therapy referral. (Ex. 1)

3. On December 14, 2021, Claimant saw Jacqueline House, PA-C, at Banner Occ Health Clinic, and reported falling on his right shoulder and hip. Claimant reported right shoulder pain, aching, and tingling into his hand, right knee pain, and hip pain. He was diagnosed with right shoulder pain and contusions of the right hip and knee. PA. House referred Claimant to physical therapy. (Ex. 2).

4. Claimant attended physical therapy at North Colorado Medical Center from December 21, 2021 to January 10, 2022. During his initial session, Claimant reported that when he fell he felt immediate burning pain in his upper arm, forearm, hand, and fingers. He also reported paresthesia in the dorsal and palmar aspect of his right hand that occurred intermittently, but did not report these symptoms at later appointments. Claimant's physical therapy was focused on his right shoulder. (Ex. L).

5. On December 30, 2021, Ms. House noted Claimant had no new right-hand numbness or tingling, but noted Claimant was right hand dominant and primarily using his right hand. Because Claimant's right shoulder was not sufficiently improved, she ordered a right shoulder MRI. (Ex. 2). The right shoulder MRI performed on January 17, 2022 demonstrated a full-thickness tear of Claimant's rotator cuff. (Ex. 30).

6. On January 25, 2022, Claimant saw Inderjote Kathuria, M.D., at Banner Occ Health, reporting no improvement in his shoulder pain. Claimant did not report symptoms

in his right hand or wrist. After reviewing Claimant's MRI report, Dr. Kathuria referred Claimant for an orthopedic evaluation, and recommended no use of his right arm. (Ex. 4).

7. On February 1, 2022, Claimant saw orthopedist Daniel Heaston, M.D. Dr. Heaston diagnosed Claimant with a complete tear of the rotator cuff and recommended surgery. Claimant did not report issues with his right hand or wrist. (Ex. 5).

8. On March 3, 2022, Dr. Heaston performed an open rotator cuff repair surgery with biceps tenodesis. Claimant's post-surgical instructions included strict non-weightbearing of his right arm and being in a sling for six weeks. After surgery, Claimant continued to see Dr. Heaston and others in his clinic for follow-up, and did not report hand or wrist symptoms to them until July 2022. Claimant was initially placed in a sling for six weeks. (Ex. 2, 6, 5 and P).

9. Claimant started post-surgical physical therapy at Select PT on April 19, 2022. On May 10, 2022, Claimant reported swelling and issues with making a fist and bending his fingers of his right hand. Over the course of approximately five months of physical therapy, Claimant periodically reported symptoms in his right hand and forearm, and received treatment for his right hand and forearm, including massage, dry needling, and a wrist splint. At Claimant's final physical therapy visit on September 9, 2022, Claimant reported little to no progress on his hand/forearm discomfort. (Ex. 9).

10. On July 5, 2022, Claimant saw Dr. Heaston and reported that he continued to have some hand swelling and tightness, Dr. Heaston opined that Claimant's hand swelling and tightness should improve as his post-surgical motion improved. (Ex. 5).

11. On August 23, 2022, Claimant saw PA House, and reported continuing pain in his hands. (Ex. 2).

12. On September 13, 2022, Claimant saw PA House again, reporting continuing pain in his right hand and decreased grip strength. Claimant indicated he had attempted to tighten some bolts on his wife's car and the next day could barely move his hands. Claimant reported he did not have hand pain prior to surgery, and it had been present since surgery. House added a new diagnosis of pain in right hand, and referred Claimant for an evaluation with an orthopedic hand physician. (Ex. 2).

13. On September 22, 2022, Claimant saw Nicholas Noce, M.D., on referral from PA House. Claimant reported to Dr. Noce that when he initially fell, he landed on his right hand, but most of the pain was in the shoulder. Claimant reported developing pain in the dorsum of his hand after being in a sling following surgery, and that he continued to have pain and swelling in right hand and wrist, extending into the middle and ring finger. On examination, Dr. Noce noted that Claimant was tender over the scapholunate interval, although he could not determine if there was instability. He noted no obvious bony abnormality. Dr. Noce indicated that he was "not entirely certain what is causing his pain. I cannot think of anything that could have been done during surgery that would have caused him to have this amount of pain, swelling and stiffness in his hand and wrist. However, he could have had an injury during original fall onto his right upper extremity

that was initially missed due to the distracting pain in his shoulder and upper arm." He noted that Claimant's pain was centered around the scapholunate interval and his wrist, and the x-ray was "a little concerning" for possible scapholunate widening. Dr. Noce recommended an MRI of the wrist. (Ex. 8).

14. On September 29, 2022, Respondents submitted Dr. Noce's request for a wrist MRI for utilization review, and the reviewer determined that the MRI was medically necessary. (Ex. O).

15. Claimant then underwent a right wrist MRI on October 13, 2022, although no report of the MRI interpretation is contained in the record, on October 25, 2022, PA House included the following description of the MRI findings in her treatment note:

> "MRI of right wrist without contrast
>
> Impression:
>
> 1. Differential tearing of the scapholunate ligament as above with full-thickness tearing of the dorsal band and findings of dorsal intercalated segmental instability and early findings of scapholunate advanced collapse.
>
> 2. Mild tendinosis of the extensor carpal ulnar is without tearing.
>
> 3. Mild enlargement of the median nerve proximal to the flexor retinaculum. This is nonspecific but can be seen in the setting of carpal tunnel syndrome.
>
> 4. Mild triscaphe degenerative joint disease." (Ex. 2).

16. On October 25, 2022, Dr. Noce reviewed the MRI which he indicated showed a scapholunate ligament injury with small amount of widening and some extension of the lunate consistent with DISI (dorsal intercalated segment instability) deformity, and findings of wrist arthritis consistent with SLAC (scapholunate advanced collapse) wrist. Dr. Noce identified several treatment options, including a potential ligament reconstruction, which he indicated would not likely be successful. He also offered treatment with steroid injections, which could be repeated 2-3 times per year. He noted that if steroid injections stopped providing relief, he could consider salvage procedures such as a PRC (proximal row carpectomy) or scaphoidectomy and midcarpal fusion. Dr. Noce performed a steroid injection in Claimant's wrist on October 25, 2022. His records, however, do not document Claimant's response to the steroid injection. (Ex. 8).

17. On November 29, 2022, Dr. Noce's office submitted a request for authorization of surgery for Claimant's right wrist. Specifically, he requested authorization for a right scaphoidectomy and midcarpal fusion, and right carpal tunnel release, for a diagnosis of SLAC wrist. (Ex. 2). The ALJ infers that Dr. Noce saw Claimant on or about November 29, 2022, although no treatment note from that visit was offered or admitted into evidence.

18. On December 6, 2022, Respondents submitted Dr. Noce's request for authorization of surgery for utilization review. The reviewer recommended against

authorization, indicating Claimant's medical documentation did not contain objective findings to support carpal tunnel syndrome, or 6 months of conservative treatment for Claimant's right wrist. (Ex. O).

19. On January 12, 2023, Claimant saw Mark Paz, M.D., for an independent medical examination (IME) at Respondents' request. Dr. Paz issued a report dated February 7, 2023, and was admitted as an expert in internal medicine. Dr. Paz testified by deposition in lieu of live testimony. Dr. Paz opined that the treatment recommended by Dr. Noce is reasonable and necessary, but not causally related to Claimant's December 7, 2021 work injury. He testified that Claimant has pre-existing right wrist osteoarthritis that was not caused by or aggravated by Claimant's December 7, 2021 injury. Dr. Paz stated that Claimant's medical records did not contain any reports of right wrist pain until August 23, 2022. Instead, Dr. Paz testified that Claimant's right wrist issues were, more likely than not, related to the incident where Claimant tightened bolts on his wife's car. He further opined that if Claimant sustained an injury to his right wrist on December 7, 2021, it would have been addressed earlier by his physicians.

20. Claimant testified at hearing immediately following the December 7, 2021 incident at work, he felt a burning and numb sensation in his right shoulder extending to his fingertips. Claimant testified that the steroid injection Dr. Noce performed, and the dry needling performed by physical therapy did not relieve his symptoms. He testified that he had not had issues with or treatment for his right wrist, and had no physical work limitations from his wrist prior to the December 7, 2021 work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

MEDICAL BENEFITS (Right Wrist Surgery)

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). Whether the need for treatment is causally-related to an industrial injury is a question of fact for the ALJ. *Putnam v. Putnam and Assoc.*, W.C. No. 4-120-307 (Aug. 14, 2003), citing *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Consistent with Dr. Paz's testimony, Respondents do not contend the surgery recommended by Dr. Noce is not reasonable and necessary. The issue before the ALJ is whether the proposed surgery is causally-related to Claimant's December 7, 2021 work injury. The ALJ concludes Claimant has established by a preponderance of the evidence that the right wrist surgery recommended by Dr. Noce is causally-related to his December 7, 2021, work injury.

No credible evidence was admitted demonstrating Claimant had complained of or sought treatment for his right hand or wrist prior to his December 8, 2021 work injury. Although Claimant indicated to some providers that he had no wrist pain prior to his March 2022 shoulder surgery, Claimant's reported symptoms in his right hand to Banner Urgent Care on December 8, 2021, to Ms. House on December 14, 2021, and while in physical therapy at North Colorado Medical Center. During this time, Claimant was primarily using his non-dominant left hand, and his treatment was focused on his right shoulder. Following surgery, Claimant was placed in a sling for six weeks and had limited use of his right arm. After beginning physical therapy and increasing the use of his right arm through therapy, Claimant began reporting additional right wrist symptoms, including swelling and

issues with making a fist beginning on May 10, 2022 in physical therapy. Claimant continued to have these issues over the following months, and received therapy from Select PT for his wrist and arm, in addition to his shoulder. Claimant also reported to Dr. Heaston hand swelling, tightness, and pain on July 5, 2022 and August 23, 2022. No medical record or other credible evidence was admitted indicating Claimant experienced right hand or wrist symptoms prior to the December 7, 2021 work injury. Given that Claimant reported symptoms over a period of months following his injury, the ALJ does not find persuasive Dr. Paz's opinion that Claimant's wrist condition is more likely related to Claimant tightening bolts on his wife's car than his work injury. Considering the evidence in its totality, including the mechanism of injury (*i.e.*, falling on his right side with his arm outstretched), the lack of prior right hand or wrist issues, and Claimant's contemporaneous reports of symptoms in his right hand and wrist, the ALJ finds it more likely than not that Claimant's right wrist condition is causally related to his December 7, 2021 industrial injury. Claimant's request for authorization of the wrist/arm surgery recommended by Dr. Noce is granted.

ORDER

It is therefore ordered that:

1. The right wrist/arm surgery recommended and requested by Dr. Noce is reasonable and necessary to cure or relieve the effects of Claimant's December 7, 2021 industrial injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 13, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-213-543-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an arm injury while performing delivery services for Employer on July 11, 2022.

2. Whether Respondent has established by a preponderance of the evidence that Claimant was an independent contractor pursuant to §8-40-202(2) C.R.S. while performing delivery services for Employer on July 11, 2022.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 11, 2022 until terminated by statute.

FINDINGS OF FACT

1. Employer is a furniture delivery service. [Redacted, hereinafter JR] is the owner of Employer.

2. Claimant explained that on July 11, 2022 he was working at Employer's facility. While stepping between loading docks he fell and injured his arm. Claimant contacted Employer to report the injury and then visited an emergency room. On July 18, 2022 he underwent surgery to repair his separated triceps tendon.

3. Respondent did not dispute that Claimant injured his arm on July 11, 2022. However, Respondent contends that Claimant worked as an independent contractor and is thus not entitled to Workers' Compensation benefits.

4. JR[Redacted] remarked that he hired Claimant as an independent contractor to deliver furniture. He commented that Claimant operated his own business as an independent contractor for moving services. Notably, JR[Redacted] paid Claimant's business known as [Redacted, hereinafter ED] for moving services. He specifically issued a 1099-Form for Claimant to report non-employment income to the Internal Revenue Service (IRS). The record also includes a 1099-Form describing "non-employee compensation" issued by Employer to ED[Redacted] for the tax year 2022.

5. Although there was an expected schedule of work days, JR[Redacted] asked Claimant the days on which he was available. He explained that Claimant had the option of accepting or rejecting moving jobs. Specifically, Claimant could decide when and how long he worked. JR[Redacted] noted that, although Claimant used Employer's trucks, Claimant provided his own tools to perform furniture delivery jobs.

6. In contrast, Claimant testified that he does not have his own independent business and worked exclusively for Employer. He explained that he did not have discretion to choose furniture delivery jobs, but was required to accept work as dictated by Employer. Claimant remarked that Employer provided all tools and equipment necessary to complete his job duties. He summarized that the services he provided were integral to Employer's business.

7. Although Claimant contends he did not have an independent business and worked exclusively for Employer, the record belies his claim. The record includes a Form W-9 titled "Request for Taxpayer Identification Number and Certification" provided by the IRS. The purpose of IRS Form W-9 "is to report on an information return the amount paid to you, or other amount reportable on an information return." Examples of information returns include "Form 1099 Misc (various types of income, prizes, awards, or gross proceeds)."

8. Claimant listed his name on Form W-9, specified his business name ED[Redacted] and noted that the entity was an "individual/sole proprietor or single member LLC." Under Part I of the Form labelled "Taxpayer Identification Number (TIN)," Claimant provided his Employer Identification Number (EIN) of ED[Redacted]. He then certified that the information was correct by signing the Form. The date of filing was December 10, 2021 or approximately seven months prior to Claimant's July 11, 2022 arm injury.

9. Claimant has demonstrated it is more probably true than not that he suffered an arm injury while performing delivery services for Employer on July 11, 2022. He explained that on July 11, 2022, while working at Employer's facility, he stepped between loading docks, fell, and injured his arm. Claimant contacted Employer to report the injury and then visited an emergency room. On July 18, 2022 he underwent surgery to repair a separated triceps tendon. Respondent did not dispute that Claimant injured his arm on July 11, 2022.

10. Respondent has demonstrated it is more probably true than not that Claimant was an independent contractor while performing furniture delivery services on July 11, 2022. Applying the tests of §8-40-202(2) C.R.S. and *Softrock* in ascertaining whether Claimant was free from direction and control in the performance of services and was in fact customarily engaged in an independent business related to the services performed, the record reveals that Claimant was an independent contractor. Accordingly, Claimant is not entitled to receive Workers' Compensation benefits for the arm injury he sustained on July 11, 2022.

11. Initially, Claimant explained that he does not have his own independent business and worked exclusively for Employer. He commented that he lacked the discretion to choose furniture delivery jobs, but was required to accept work as dictated by Employer. Claimant remarked that Employer provided all tools and equipment necessary for him to complete his job duties. However, the evidence includes a Form W-9 in which Claimant listed his name, specified the business name ED[Redacted] and noted that the entity was an "individual/sole proprietor or single member LLC." Under Part

I of the Form Claimant provided his EIN of ED[Redacted]. He then certified that the information was correct by signing the Form. The date of filing was December 10, 2021 or approximately seven months prior to Claimant's July 11, 2022 arm injury.

12. The existence of Claimant's business entity ED[Redacted] undermines his credibility and is more consistent with the testimony of JR[Redacted]. JR[Redacted] remarked that he hired Claimant as an independent contractor. He commented that Claimant operated his own business as an independent contractor for moving services. JR[Redacted] paid ED[Redacted] under the EIN ED[Redacted]. Notably, he specifically issued a 1099-Form for Claimant to report non-employment income to the IRS. The preceding testimony is consistent with Claimant's operation of a business entity beginning about seven months prior to his arm injury. Significantly, Claimant did not simply create ED[Redacted] to work exclusively for Employer, but had an operating business when hired to perform moving services. The record thus demonstrates that it is more likely than not that Claimant was customarily engaged in an independent business related to the services performed when he was injured on July 11, 2022.

13. An employer may also establish that a worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. There is a balancing test to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The record reflects a significant conflict between Claimant and Employer regarding the nine factors and is devoid of evidence regarding some of the criteria. Nevertheless, on balance the factors suggest that Claimant was likely an independent contractor performing services for Employer.

14. Importantly, Claimant was not paid personally for his services while working for Employer. Instead, Employer paid ED[Redacted] under the EIN ED[Redacted] for delivery services. Employer also issued a 1099-Form for Claimant to report non-employment income to the IRS. In fact, the record includes a 1099-Form describing "non-employee compensation" issued by Employer to ED[Redacted] for the tax year 2022. Moreover, although there is some dispute about whether Claimant had the opportunity to decline moving jobs, the credible testimony of JR[Redacted] reflects that Claimant could choose moving jobs to accept and Claimant was not required to work exclusively for Employer. Specifically, JR[Redacted] remarked that Claimant could decide when and how long he worked. Although Employer provided Claimant with a truck for delivery services, the record is mixed about who supplied other tools to complete moving jobs. Finally, the record is devoid of evidence that Employer combined its business with ED[Redacted].

15. The balance of the totality of the circumstances and the nature of Claimant's working relationship with Employer suggests that he was not an employee. The record reveals that it is likely Claimant was engaged in an independent business and free from control and direction in the performance of his services for Employer. Accordingly, Claimant was an independent contractor when he suffered an arm injury while performing delivery services on July 11, 2022.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). Respondents

are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004).

6. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered an arm injury while performing delivery services for Employer on July 11, 2022. He explained that on July 11, 2022, while working at Employer's facility, he stepped between loading docks, fell, and injured his arm. Claimant contacted Employer to report the injury and then visited an emergency room. On July 18, 2022 he underwent surgery to repair a separated triceps tendon. Respondent did not dispute that Claimant injured his arm on July 11, 2022.

Independent Contractor

7. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document.

8. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAO, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

9. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAO, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-

202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

10. Section 8-40-202(2)(b)(IV), C.R.S. provides that if the parties use a written document specifying the existence of the nine factors referenced in §8-40-202 (2)(b)(II), C.R.S. the document can create a rebuttable presumption of an independent contractor relationship. The document must advise in larger or bold type that the individual is not entitled to Workers' Compensation benefits and must pay his own federal and state income tax on any moneys earned.

11. In *Indus. Claim Appeals Off. v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court expanded the analysis for determining whether a worker is an employee or an independent contractor beyond the factors enumerated in §8-70-115(1)(c), C.R.S. The *Softrock* decision addressed the evidence necessary to establish that a worker is customarily engaged in an independent trade or business in the context of unemployment insurance benefits. The Court reasoned that the nine factors listed both in §8-70-115(1)(c) and (2), C.R.S. (involving unemployment benefits) and §8-40-202(2)(a) and (b), C.R.S. (pertaining to Workers' Compensation), were relevant to the assessment of the maintenance of an independent business. However, the Court also determined none of the preceding criteria, by themselves, were exhaustive of the inquiry. The Court noted that the status of the claimant must include consideration of the totality of the circumstances and examination of "the nature of the working relationship." *Id*. at 565. The decision pointed to indicia that would normally accompany the performance of an ongoing separate business in the field. Considerations included whether the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Id*.

12. The question whether *Softrock* applied in the Workers' Compensation context was open until the Colorado Court of Appeals decision in *Pella Windows & Doors, Inc. v. Indus. Claim Appeals Off.*, 458 P.3d 128 (Colo. App. Div. 2 2020). In *Pella Windows* the court concluded that the factors articulated in *Softrock* also apply to Workers' Compensation cases. *See Id.* at 136 ("We therefore conclude that the [p]anel did not err when it determined that [the administrative law judge] . . . should have considered the *Softrock* factors in weighing whether claimant's business was independent of Pella.").

13. As found, Respondent has demonstrated by a preponderance of the evidence that Claimant was an independent contractor while performing furniture delivery services on July 11, 2022. Applying the tests of §8-40-202(2) C.R.S. and *Softrock* in ascertaining whether Claimant was free from direction and control in the performance of services and was in fact customarily engaged in an independent business related to the services performed, the record reveals that Claimant was an independent contractor. Accordingly, Claimant is not entitled to receive Workers' Compensation benefits for the arm injury he sustained on July 11, 2022.

14. As found, initially, Claimant explained that he does not have his own independent business and worked exclusively for Employer. He commented that he lacked the discretion to choose furniture delivery jobs, but was required to accept work as dictated by Employer. Claimant remarked that Employer provided all tools and equipment necessary for him to complete his job duties. However, the evidence includes a Form W-9 in which Claimant listed his name, specified the business name ED[Redacted]and noted that the entity was an "individual/sole proprietor or single member LLC." Under Part I of the Form Claimant provided his EIN of ED[Redacted]. He then certified that the information was correct by signing the Form. The date of filing was December 10, 2021 or approximately seven months prior to Claimant's July 11, 2022 arm injury.

15. As found, the existence of Claimant's business entity ED[Redacted] undermines his credibility and is more consistent with the testimony of Mr. Reyes. Mr. Reyes remarked that he hired Claimant as an independent contractor. He commented that Claimant operated his own business as an independent contractor for moving services. Mr. Reyes paid ED[Redacted] under the EIN ED[Redacted]. Notably, he specifically issued a 1099-Form for Claimant to report non-employment income to the IRS. The preceding testimony is consistent with Claimant's operation of a business entity beginning about seven months prior to his arm injury. Significantly, Claimant did not simply create ED[Redacted] to work exclusively for Employer, but had an operating business when hired to perform moving services. The record thus demonstrates that it is more likely than not that Claimant was customarily engaged in an independent business related to the services performed when he was injured on July 11, 2022.

16. As found, an employer may also establish that a worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. There is a balancing test to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The record reflects a significant conflict between Claimant and Employer regarding the nine factors and is devoid of evidence regarding some of the criteria. Nevertheless, on balance the factors suggest that Claimant was likely an independent contractor performing services for Employer.

17. As found, importantly, Claimant was not paid personally for his services while working for Employer. Instead, Employer paid ED[Redacted] under the EIN ED[Redacted] for delivery services. Employer also issued a 1099-Form for Claimant to report non-employment income to the IRS. In fact, the record includes a 1099-Form describing "non-employee compensation" issued by Employer to ED[Redacted] for the tax year 2022. Moreover, although there is some dispute about whether Claimant had the opportunity to decline moving jobs, the credible testimony of Mr. Reyes reflects that Claimant could choose moving jobs to accept and Claimant was not required to work exclusively for Employer. Specifically, Mr. Reyes remarked that Claimant could decide when and how long he worked. Although Employer provided Claimant with a truck for delivery services, the record is mixed about who supplied other tools to complete moving jobs. Finally, the record is devoid of evidence that Employer combined its business with ED[Redacted].

18. As found, the balance of the totality of the circumstances and the nature of Claimant's working relationship with Employer suggests that he was not an employee. The record reveals that it is likely Claimant was engaged in an independent business and free from control and direction in the performance of his services for Employer. Accordingly, Claimant was an independent contractor when he suffered an arm injury while performing delivery services on July 11, 2022.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Because Claimant was an independent contractor while performing services for Employer on July 11, 2022, his request for Workers' Compensation benefits is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 17, 2023.

DIGITAL SIGNATURE.

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-182-925-002

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a general award of maintenance medical treatment to relieve the ongoing effects of her August 27, 2021 industrial injury and/or to prevent deterioration of the her present condition.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time employee of the [Redacted, hereinafter DC] having worked for DC[Redacted] for approximately 18 years. She currently works as a Correctional Trade Supervisor in the laundry department at [Redacted, hereinafter LV].

2. Claimant's position requires her to collect the penitentiary's dirty laundry from various locations spread about the prison grounds. Collection of the soiled laundry involves the use of a box truck that Claimant drives to designated sites where she must load large carts full of wash into the back of the truck for return to the prison's laundry. The truck is equipped with a tri-fold mechanical lift to aid in the process. While the lifting mechanism on the truck is automated, the operator must manually unfold two base sections on the device to use it effectively. Heavy items are then placed on this platform and lifted by the motorized system, with the push of a button, to the height of the truck bed.

3. At the collection sites, Claimant would lower the lift to the ground by use of the pushbutton system. She would then unfold the lift platform and place the large wheeled carts full of dirty laundry onto the deck so they could be raised up to the back of the truck bed. Once the carts were lifted, Claimant would push them into the truck and secure them for transport. After the carts were safely in place, Claimant would reverse the lift process by collapsing the base sections onto one another. She would then fold these two sections onto the lift frame before pushing the system button to move the lift back into its fixed storage position. Claimant would then move to the next pick up site.

4. On August 27, 2021, at around 6:30 a.m., Claimant was injured while collecting dirty laundry. She had finished loading some laundry carts and was lifting the combined weight of the two sections of the lift deck in an effort to finish the folding process when she felt pain and a sharp pulling in her abdomen.

5. Claimant returned to Respondent-Employer's laundry facilities where she reported her injury. She continued to work in pain in the hopes that her condition would improve on its own. When her pain did not resolve by that afternoon, Claimant elected to participate in a telemedicine visit with Dr. Mariam Hasan. (CHE 7, pp. 60-63).

6. During her August 27, 2021 telemedicine visit, Claimant reported moderate abdominal aching/pain that was not improving. (CHE 7, p. 61). Dr. Hasan prescribed 500 milligram tablets of acetaminophen and instructed Claimant to take 2 capsules four times per day. Sixty tablets were dispensed. *Id*. at p. 60. Dr. Hasan also ordered imaging, to include an abdominal x-ray and ultrasound. *Id*.

7. An x-ray of the abdomen obtained September 7, 2021 was unremarkable; however, a focused ultrasound of the anterior abdominal wall revealed a 1.2 cm. fascial defect and umbilical hernia. (CHE 7, pp 70-71).

8. Claimant was referred to Dr. Frank Chae for a surgical consultation by Nurse Practitioner (NP) Brendon Madrid of Concentra Medical Centers (Concentra) on September 21, 2021. (CHE 7, p. 85). Claimant was familiar with Dr. Chae as he had previously performed a laparoscopic vertical sleeve gastrectomy with repair of a large diaphragm hernia on her on April 27, 2021. *Id*. at p. 84; See also CHE 5, p. 34.

9. Before Claimant was evaluated by Dr. Chae, she experienced severe and incessant abdominal pain prompting her visit to an emergency room (ER) on September 21, 2021. (CHE 5, pp. 33-34). Upon presentation to the ER, it was discovered that Claimant's hernia had become incarcerated. (CHE 8, p. 144). Reduction required "light" sedation. *Id.*

10. Claimant presented to Dr. Chae's office on October 13, 2021 with continued complaints of pain and abdominal bulging. (CHE 8, p. 144). Dr. Chae diagnosed Claimant with an "incisional hernia with obstruction but no gangrene (following incarceration). *Id*. at p. 146. Dr. Chae recommended surgical repair with mesh. *Id.*

11. Claimant was taken to the operating room on December 6, 2021, where Dr. Chae performed an "open" repair of Claimant's incisional hernia with placement of dual layered surgical mesh. (CHE 9, pp. 158-159).

12. Claimant experienced substantial post-surgical nausea/vomiting and dehydration. She presented to the ER at Saint Mary Corwin Medical Center on December 9, 2021, where she was treated with 2 liters of IV fluids for dehydration and Phenergan to control her nausea. (CHE 10).

13. Claimant returned to Concentra on December 15, 2021 where she was evaluated by NP Madrid. (CHE 7, p. 97). During this appointment, NP Madrid documented that Claimant was taking Tylenol for continued pain because she was unable to take NSAIDS secondary to her prior bariatric surgery. *Id.*

14. Claimant returned for a follow-up appointment with NP Madrid on April 5, 2022. During this appointment, Claimant reported continued sensitivity at the umbilicus. (CHE 7, p. 126). Nonetheless, it was noted that Dr. Chae had released Claimant to full duty work with a caveat that she was at increased risk for re-injury based upon her job demands. *Id.*; See also, CHE, 8, p. 155.

15. Claimant was evaluated by Dr. Daniel Peterson at Concentra on May 25, 2022. During this encounter, Claimant reported persistent sensitivity and bulging at the location of her incision. (CHE 7, p. 137). She also reported continued pain when turning fast. *Id.* Dr. Peterson placed Claimant at MMI without impairment and no need for permanent work restrictions (PWR) or maintenance medical treatment needs. *Id.* at p. 137,140.

16. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Brain Mathwich on November 14, 2022. During this encounter, Claimant reported minor pain and internal pulling/straining with lifting, pushing or pulling. (CHE 5, p. 36). She also reported pain when wearing jeans or leaning over the laundry carts to retrieve items as this activity caused pressure over the area surrounding her hernia. *Id.* Claimant reported that her job duties required her to push/pull laundry carts, and load and unload washers/dryers. Moreover, as described above, Claimant was required to pick up and deliver laundry to various locations around the prison. *Id*. at p. 33. Because Claimant's job duties require considerable amounts of lifting, pushing and pulling, the ALJ finds it reasonable to infer that Claimant probably experiences some level of daily pain, especially when she is engaged in her work activities.

17. Dr. Mathwich concurred with Dr. Peterson that Claimant had reached MMI on May 25, 2022, that she had no impairment and did not have maintenance treatment needs. (CHE 5, p. 37-38).

18. Respondent-Employer filed a Final Admission of Liability consistent with Dr. Mathwich's DIME opinions regarding MMI, impairment and maintenance medical treatment on December 22, 2022. (CHE 1). Claimant objected to the FAL and requested a hearing in an effort to overcome the DIME opinions of Dr. Mathwich regarding MMI and impairment. She also requested a determination regarding her entitlement to maintenance medical care. (CHE 2, 3). Claimant subsequently withdrew all hearing issues expect her request for maintenance medical benefits.

19. Claimant testified that there is a persistent bulge over the area surrounding the location of the hernia and that her surgical incision site remains sensitive. She reported that the labor intensive nature of her job, including her need to push and pull laundry carts weighing upwards of a 100 pounds, causes abdominal pain and pulling sensations. Bending into the laundry carts and lifting the facilities laundry also causes pain and an abnormal feeling in the abdomen. Claimant attributes these symptoms to the implanted surgical mesh used to remediate and strengthen the fascial defect in her abdominal wall. Claimant testified that she is apprehensive and fearful she

will suffer further injury given her condition. Accordingly, she testified that she is very cautious when performing her work duties. She takes Tylenol for pain.

20. Claimant denied that her persistent symptoms are related to her prior bariatric surgery. She also testified that Dr. Chae has not recommended additional treatment, including prescription medications to address her ongoing symptoms. Indeed, outside of over the counter Tylenol for pain, Claimant is not otherwise actively treating her hernia. Accordingly, Respondent argues that Claimant's request for maintenance treatment must be denied and dismissed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to Assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo.App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo.App. 1990). The weight and credibility to be assigned expert testimony is a

matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo.App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Claimant's Entitlement to Maintenance Medical Treatment

D. It is well settled that the need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Indeed, in *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established the now recognized two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra.* In announcing its decision in *Grover*, the Colorado Supreme Court stated that "before an order for future medical benefits may be entered, there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Subsequent courts have indicated that ongoing medical treatment can be ordered if a claimant's condition can be expected to deteriorate so that greater disability results in the absence of such care. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo.App. 1995). In *Milco,* the Court of Appeals refined the test for awarding maintenance medical benefits by noting that irrespective of its nature, maintenance treatment "must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." *Milco Construction v. Cowan, supra*; *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo.App. 1995). If the claimant reaches this threshold, the ALJ should then, as a second step, enter a "general order similar to that described in Grover." *Milco Construction v. Cowan, supra.*

E. While a claimant does not have to prove the need for a specific medical benefit, he/she must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra*. The question of whether the claimant met the burden of proof to establish his/her entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the evidence presented persuades the ALJ that the persistent abdominal pain/pulling Claimant is experiencing, especially when she is engaged in work activities, is likely causally related to some residual consequence of her August 27, 2021, hernia and subsequent surgery, perhaps the surgical mesh used to treat the fascial defect and strengthen the abdominal wall. Accordingly, the ALJ is persuaded that the Claimant has proven that there is a casual

connection between her industrial injury and her continued need for Tylenol, whether that be over the counter or not.

F. The ALJ credits Claimant's testimony that she is still taking Tylenol to relieve this ongoing pain. Claimant's use of Tylenol to alleviate the pain associated with her injury and subsequent surgery in not new. Indeed, while she is evidently using over the counter Tylenol currently, the evidence presented supports a conclusion that she was previously prescribed 500 mg Tylenol tablets for pain control. Moreover, the evidence presented supports a conclusion that Claimant's options to treat the pain connected to her work-related hernia are limited because of her previous bariatric surgery. She cannot take NSAIDS and the more potent pain killer, oxycodone makes her sick. (CHE 7, p. 97). Consequently, Claimant takes Tylenol for the persistent pain caused by her work-related hernia. Without continued access to over the counter Tylenol, the ALJ is persuaded that Claimant will likely suffer from persistent and possibly functionally altering pain that will probably result in a deterioration of her physical abilities and current condition. Contrary to Respondent's suggestion, the evidence presented supports a conclusion that Claimant needs some ongoing medical treatment to relieve the effects of her injury. Even if that "treatment" is in the form of an over the counter analgesic. Consequently, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that a general award of maintenance medical care is warranted in this case. Nonetheless, Respondents retain the right to dispute whether the need for specific future medical treatment was caused by the compensable injury or whether it is reasonable and necessary.[1] *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for reasonably necessary and related post-MMI medical treatment to relieve Claimant from the ongoing effects of her August 27, 2021 industrial injury and/or prevent deterioration of her current condition.

2. Respondents retain the right to challenge specific requests for maintenance treatment on the grounds that such care is not reasonable, necessary or related to Claimant's August 27, 2021 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995); *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003).

3. All matters not determined herein are reserved for future determination.

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[1] The question of whether Claimant's continued use of Tylenol is reasonable or necessary was not presented during the June 27, 2023 hearing. Rather, the sole question for determination at the June 27, 2023 hearing was whether Claimant established the probable need for some treatment after MMI due to her August 27, 2021 industrial injury.

DATED: July 17, 2023

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant established by a preponderance of the evidence that arthroscopic rotator cuff repair surgery recommended by Michael Hewitt, M.D., is reasonable, necessary, and causally-related to Claimant's November 24, 2021 work injury.

FINDINGS OF FACT

1. On November 24, 2021, Claimant sustained an admitted injury to her right shoulder arising out of the course of her employment with Employer. The injury occurred while Claimant was taking down a display unit. In the process, Claimant testified that her right arm gave out causing immediate pain to her shoulder.

2. Claimant has a history of right shoulder pain dating to an ATV accident in June 2017. Although Claimant testified that she did not sustain a right shoulder injury at that time, Claimant was evaluated and treated for right shoulder pain on several occasions following the ATV accident. Claimant was initially seen on June 25, 2017 noting pain in her both shoulders. X-rays were negative and the shoulder examination was negative. (Ex. F & H).

3. Claimant was then seen at Salud Health Clinic on June 29, 2017, and September 12, 2017. Claimant reported she had right shoulder pain that kept her awake at night. Provocative testing of the right shoulder was negative. The treating physician opined the origin of Claimant's right shoulder pain was likely muscle spasms, and not related to her right rotator cuff. (Ex. E). Claimant was referred to physical therapy, although no records of that treatment were offered or admitted into evidence.

4. Claimant's next documented medical treatment for her right shoulder was on October 15, 2018, when she returned to Salud. Claimant reported problems with her right hand and arm, and that she felt her right arm giving out when she was carrying trays in her job in a restaurant. She was diagnosed with a trigger point of the right shoulder region. (Ex. E). Claimant testified that she had no medical care to her right arm after October 2018.

5. Following her November 24, 2021 injury, Claimant was initially evaluated at AUC Brighton on November 27, 2021. She reported pain in her right arm, shoulder and neck, and tenderness on palpation of the bicipital groove. Claimant was diagnosed with a strain of the right shoulder and advised to follow up with her primary care provider in 7 days. (Ex. D).

6. Claimant was then seen by Scott Richardson, M.D., at Concentra on December 3, 2021. Dr. Richardson is an authorized treating physician (ATP). Claimant reported a

burning sensation in her right shoulder with associated right arm numbness and tingling. Dr. Richardson diagnosed Claimant with a right shoulder, neck, and forearm strain, and referred her for physical therapy. (Ex. C).

7. Claimant attended physical therapy at Concentra Physical Therapy for seven visits between December 3, 2021 and December 30, 2021. At discharge, Claimant continued to report constant pain in the right shoulder and arm. (Ex. 6).

8. On December 7, 2021, Claimant saw Brittany Lain, NP, at Concentra. Claimant's examination was positive for tenderness in the right shoulder musculature, but not the AC joint, and rotator cuff testing was negative. Claimant reported pain with gripping, lifting above shoulder level, and laying on her right side. Ms. Lain ordered an MRI of the cervical spine. (Ex. 6).

9. On December 15, 2021, Claimant saw Ruth Vanderkooi, M.D., at Concentra, reporting continued pain and burning in the right arm, and difficulty lifting overhead. Dr. Vanderkooi noted that Claimant's cervical MRI had not been completed, and that she would consider a shoulder MRI if Claimant did not improve. (Ex. 6).

10. Claimant's cervical MRI was completed on December 27, 2021. The MRI showed mild cervical spondyloses and neuroforaminal narrowing at C5-6, but no high-grade canal stenosis. (Ex. H).

11. On December 28, 2021, Dr. Vanderkooi referred Claimant to physiatrist, Nicholas Olsen, D.O. (Ex. 6). She saw Dr. Olsen on January 4, 2022. Dr. Olsen recommended a transforaminal epidural steroid injection (TESI) for Claimant's neck symptoms. (Ex. 8).

12. Claimant saw Dr. Vanderkooi again on January 26, 2021, reporting difficulty using her right arm, including weakness, and dropping things. Dr. Vanderkooi noted that Claimant's right arm pain was likely radicular pain from C6, and that a right shoulder MRI would be appropriate to rule out pathology which could be contributing to Claimant's right arm pain. (Ex. 6).

13. On February 17, 2022, Claimant had a right shoulder MRI. The MRI was interpreted as demonstrating a focal full-thickness or near full-thickness tear of the posterior supraspinatus tendon. (Ex. 7). Claimant was then referred to orthopedic surgeon, Mark Failinger, M.D. (Ex. 6).

14. On February 22, 2022, Dr. Olsen performed a right C5-6 TESI, which provided Claimant temporary relief of Claimant's axial neck pain and radiation to Claimant's right shoulder girdle. (Ex. 8).

15. Claimant saw Dr. Failinger on March 3, 2022, for evaluation. Dr. Failinger reviewed Claimant's MRI films, and opined that the MRI showed partial tearing of the biceps tendon, irregularity in the posterior supraspinatus and anterior infraspinatus, with tendinosis, and mild AC joint arthritis. He indicated that Claimant had multiple areas of pain and discomfort, and that not all of Claimant's pain was generated from the shoulder. He recommended a diagnostic/therapeutic injection of the subacromial space to determine if

pain was generated from the rotator cuff. He performed the injection and noted that it helped with Claimant's anterior discomfort, and improved her strength on abduction, although Claimant continued to experience neck pain, which he noted should be treated by others. (Ex. 9).

16. Claimant returned to Dr. Failinger on March 17, 2022, reporting that the injection provided significant relief for a few hours, and continued to provide pain relief for a few days. Claimant's pain had, however, returned to its previous levels. Dr. Failinger recommended that Claimant return to Dr. Olsen for consultation and treatment of her cervical pain, after which Dr. Failinger would consider a decompression of the right shoulder and possible biceps tenolysis. Based on his review of the MRI, he opined it was unlikely he would perform rotator cuff repair surgery due to the size of the tear. (Ex. 9).

17. Claimant returned to Dr. Olsen on March 30, 2022. He instructed Claimant on home exercises and therapy for her neck and shoulder, and recommended an EMG study to evaluate Claimant's reports of right arm radiculopathy. (Ex. 8)

18. On April 14, 2022, Claimant saw Dr. Failinger. He noted that he was waiting on clearance from Dr. Olsen for any neurologic pathology that could interfere with surgery prior to proceeding with surgery. He disagreed with the initial radiology reading of Claimant's right shoulder MRI, and opined that the MRI did not show a full-thickness tear of the rotator cuff, but the MRI did show high-grade degeneration of the supraspinatus, that could possibly be causing some of the pain in her shoulder, but not causing pain in the neck or pain down her arm. He did not recommend further injections in Claimant's shoulder. Dr. Failinger planned to see Claimant again after completion of an EMG study. (Ex. 9).

19. On April 25, 2022, Dr. Olsen performed the EMG study of Claimant's right upper extremity which was negative. He indicated that there were no signs of cervical radiculopathy, plexopathy or peripheral nerve entrapment. Thus, he opined that Claimant was cleared for shoulder surgery. He also noted that Claimant's previous C5-6 TESI, although initially deemed non-diagnostic, actually relieved Claimant's neck pain. (Ex. 8).

20. Claimant returned to Dr. Failinger on May 12, 2022 to discuss surgery. Dr. Failinger recommended a right shoulder arthroscopy to include shoulder decompression, possible rotator cuff repair, possible biceps tenolysis, and possible clavicle resection. Dr. Failinger opined there was little else to be done for Claimant's right shoulder other than proceed with surgery. On May 23, 2022, Dr. Failinger requested authorization for the recommended shoulder surgery. (Ex. 9)

21. On May 21, 2022, William Ciccone, M.D., performed a record review at Respondents' request. Based on his review of records, Dr. Ciccone opined that Claimant did not sustain a work-related injury to her right shoulder. He opined that Claimant's report of a sudden onset of pain following her injury was not reflective of an injury, only the occurrence of pain. He opined that her physical examinations were not reflective of a shoulder injury, and he disagreed with Dr. Failinger's assessment that surgery was the

only available treatment option. He opined that the requested surgery was not reasonable, necessary, or work-related. (Ex. A).

22. Ultimately, Claimant's ATP at Concentra referred her to orthopedic surgeon, Michael Hewitt, M.D. for a second opinion regarding her shoulder. (Ex. 6). Claimant saw Dr. Hewitt on March 8, 2023. Dr. Hewitt reviewed x-rays of Claimant's shoulder (but not her MRI) and indicated they were inconsistent with a chronic rotator cuff tear, but she did have a clinical examination consistent with rotator cuff weakness. He offered several potential treatment options including observation, activity modifications, medications, therapy, and potential surgery. He did not recommend additional shoulder injections. (Ex. 10).

23. Claimant returned to Dr. Hewitt on March 16, 2023, and he was able to review Claimant's MRI films. Dr. Hewitt interpreted Claimant's MRI as demonstrating a focal full-thickness, non-retracted, central supraspinatus tear, with moderate biceps tendinopathy. He noted that Claimant had only minimal improvement over the previous 18 months, and that surgery would be medically reasonable. He recommended an arthroscopic rotator cuff repair with subacromial decompression. (Ex. 10)..

24. On April 17, 2023, Dr. Ciccone performed a second record review. Again, Dr. Ciccone opined that Claimant did not sustain any work-related injury, and his previous opinion remained unchanged. He noted the differing interpretations of Claimant's right shoulder MRI and indicated "[e]ven if there is rotator cuff pathology noted on the MRI, it is likely that the findings are related to the ATV accident on 6/25/27 and not the work event." (Ex. A). Dr. Ciccone testified by deposition and was admitted as an expert in orthopedic surgery. He opined that the surgery recommended by Dr. Hewitt was reasonable and necessary to address the Claimant's right shoulder pathology, but he opined that the need for surgery was not related to Claimant's work injury. Dr. Ciccone's opinion that Claimant did not sustain a work-related injury to her right shoulder is not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

AUTHORIZATION OF SPECIFIC MEDICAL BENEFITS (Surgery)

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Hewitt is reasonable and necessary to cure or relieve the effects of her work injury of November 24, 2021. The credible evidence establishes that Claimant has pathology in her right shoulder that requires surgery. While Claimant's testimony that she did not have right shoulder issues following her ATV accident in 2017 was not supported by her medical records, no credible evidence was admitted indicating Claimant had symptoms in, or treatment for, her right shoulder for more than three years before her November 24, 2021 work injury. When evaluated in 2017, Claimant did not exhibit signs of a rotator cuff injury, and the treating physician opined that Claimant's right

shoulder symptoms were more likely the result of muscle spasms than rotator cuff pathology.

Following her November 24, 2021 injury, Claimant consistently reported right shoulder pain. Claimant's providers initially investigated her cervical spine as the cause of symptoms in her right arm. That, however, does not exclude an injury to Claimant's right shoulder. Dr. Failinger's opinion that Claimant's right shoulder pathology did not explain all of her symptoms indicates that Claimant's cervical symptoms may have a different source. In fact, it was ultimately determined that Claimant sustained a right rotator cuff tear. The ALJ credits Dr. Hewitt's interpretation of Claimant's MRI over Dr. Failinger's interpretation because Dr. Hewitt's is consistent with the reading radiologist. Moreover, although Dr. Failinger indicated that a rotator cuff repair was unlikely, he did request authorization for the procedure, which indicates that he did not definitively rule out rotator cuff pathology that may be amenable to surgery.

The ALJ does not find credible or persuasive Dr. Ciccone's opinions that Claimant sustained no injury and that her pain complaints are due to a 2017 ATV accident. Dr. Ciccone's opinion that an acute onset of sudden pain is not consistent with an injury is not credible. The ALJ finds and concludes that Claimant has established by a preponderance of the evidence that her right shoulder pathology is causally related to her November 24, 2021 work injury.

Claimant has also established that the surgery recommended by Dr. Hewitt is reasonable and necessary to treat her industrial injury. Two different orthopedic surgeons have recommended right shoulder surgery, and Dr. Ciccone agreed the surgery proposed by Dr. Hewitt is reasonable and necessary. Moreover, Claimant underwent a reasonable course of conservative treatment for her right shoulder which did not resolve her shoulder complaints. Claimant's request for authorization of the surgery recommended by Dr. Hewitt is granted.

ORDER

It is therefore ordered that:

1. The right shoulder surgery recommended by Michael Hewitt, M.D., is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Claimant's request for authorization of the recommended right shoulder surgery is granted.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 17, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-148-399-004

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment with Employer on August 27, 2020.

IF THE CLAIM IS FOUND COMPENSABLE, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 27, 2020.

III. Whether Claimant has proven what his average weekly wage is at the time of the incident in question.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 28, 2020 and continuing until terminated by law.

V. Whether Respondents have proven by a preponderance of the evidence that Clamant was terminated for cause.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, Clinica Family Health was the authorized treating provider with regard to the claim and that Claimant's average weekly wage was $103.85. The stipulations of the parties are approved and incorporated into this order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 74 years old at the time of the hearing. He worked for Employer as a dishwasher, one day a week, working the 2 p.m. to 9:30 p.m. shift. He would wash pots, pans, receptacles, platters, plastic containers that would be reused and other utensils. He had started working for Employer in approximately June 2020.

2. On August 27, 2020 Claimant injured himself at work while lifting a 10 lb. pot three quarters full of water and food debris, which weighed close to 50 lbs. total with contents. He lifted it up from the floor to the counter sink, and hurt his back in the process, though he was able to lift it all the way into the sink. Claimant continued working until the end of his shift, when he advised his supervisor and shift manager, M.M., who did not respond. Claimant left the restaurant and went home.

3. The following Monday he went to Clinica Campesina or Clinica Family Health to seek treatment. Claimant was advised that they were too busy with patients due to the COVID-19 pandemic. They instructed him to leave and return at a later time.

4. Claimant was due to return to work on Thursday, September 4, 2020. However, on September 1, 2020 Claimant received a call from Employer's representative, F.M. who terminated his employment.

5. Claimant returned to Employer's premises on September 4, 2020 in order to ask Ms. F.M. to send him to a doctor because of his back pain. He parked at the restaurant right next to Ms. F.M.'s car. He got out of his car and at that moment Ms. F.M. was coming out of the restaurant and got in her car. He tried to get her attention and she rolled up her car windows and did not respond to him, driving out of the parking lot.

6. Claimant returned to Clinica Family Health again on September 4, 2020. They could not see him again. However, on this occasions they provided him an appointment for September 16, 2020. He was attended at that time and provided prescriptions for medications. They gave him steroids, muscle relaxants, anti-inflammatories, Tylenol as well as injections into the back, which helped. But the pain would come back. He was also, eventually given work restrictions of 10 lbs. lifting. He explained that the doctors were in the process scheduling more injections.

7. At one point his back pain was very intense and he went to Clinica for medical care but they sent him on to the emergency room at Avista Adventist Hospital, where they charged him $9,800, which continued to remain unpaid. He noted that approximately two months before the hearing he had received his last injection into his back and was provided with continued 10 lbs. restrictions.

8. Claimant filed a Workers' Claim for Compensation on September 10, 2020 stating that he was lifting a few pan/pots on August 27, 2020 at approximately 5 p.m. and felt a pop and sharp pain in his back. He noted that he had numbness in his legs. He reported the incident to M.M.

9. On September 16, 2020 Claimant was evaluated at Clinica Family Health related to a reported August 27, 2020 incident where Claimant was lifting a heavy pot and strained his back, causing mid back, low back pain, hip pain, and bilateral leg pain. Nurse Practitioner Jennifer Manchester noted Claimant continued with symptoms that radiated to both legs causing difficulty ambulating and had an onset of urinary hesitancy.

10. On September 18, 2020 Nurse Manchester restricted Claimant from work as of his date of injury and continuing, though stated he could return to work as of October 2, 2020 with a 20 lbs. restrictions. She recommended an MRI and referral to an orthopedic spine specialist, which Claimant declined as he did not have insurance or means to pay for them.

11. Dr. Upasana Mohapatra at Clinica also evaluated Claimant on September 23, 2020 and continued Claimant off work. He noted that Claimant's pain persisted in the middle and low back as well as the bilateral legs, specifically radiating to the left and right thighs. He diagnosed acute midline thoracic back pain. He noted that Claimant previously had reported tenderness to palpation over the lumbar spine but it was most pronounced over the thoracic spine with a positive straight leg test. He prescribed oxycodone and

cyclobenzaprine, an antidepressant. He ordered a thoracic x-ray and continued to recommend further diagnostic testing, which Claimant declined due to the cost.

12. On October 23, 2020 Dr. Mohapatra stated that Claimant continued to be unable to work. He noted that Claimant had pain in the middle back, low back and gluteal area with pain radiating down the left thigh and calf. Dr. Mohapatra continued to keep Claimant off work on November 23, 2020 noting that Claimant continued to have low back pain with radiculopathy affecting the lower extremity. His work status continued on December 13, 2021. In January 2021 his Clinica providers noted Claimant now had depressed mood related to his inability to provide for his family due to his ongoing chronic low back pain. In February 2021 Claimant was noted to have continued chronic low back pain with continued urinary hesitancy. This patterned continued with assessments of lumbar back pain with radiculopathy affecting the lower extremity, continued medications for both pain and depression related to the trauma.

13. On April 13, 2021 Claimant was evaluated by physiatrist Greg Reichhardt, M.D. for an Independent Medical Evaluation (IME) at the request of Claimant's counsel. On exam Dr. Reichhardt noted tenderness to palpation from T8 to the S1 area with most tenderness at the L1 to L3 level. Claimant had moderate lumbar paraspinal muscle spasm from L1 to L5. Straight leg raising was positive for back and leg pain. Patrick's maneuver was positive. Iliac compression test was positive. Dr. Reichhardt diagnosed thoracolumbar pain with bilateral lower extremity pain from lifting a pot at work on August 27, 2020 while-working as a dishwasher. He assessed that Claimant's exam was concerning for possible radiculopathy or myelopathy. He also noted Claimant had depression, which was multi-factorial, and only partly related to his work-related injury, and partially to the stresses of COVID, with possible adjustment disorder. Dr. Reichhardt opined that based on the history provided by Claimant, as well as the medical records available, to a reasonable degree of medical probability, Claimant current thoracolumbar pain and lower extremity symptoms were related to his August 27, 2020 work-related injury.

14. Dr. Reichhardt recommended Claimant undergo thoracic and lumbar MRIs to evaluate for potential nerve root or spinal cord compression leading to myelopathy or radiculopathy. After the MRIs, it would be appropriate for him to undergo physical therapy, progressing to an independent active exercise program. Depending on the results of the MRIs there might be consideration for selective spine injections or surgical intervention. He further stated that appropriate restrictions for Claimant were 10 pound lifting, pushing, pulling and carrying, with limited standing and walking to 30 minutes at a time with a five minute rest break, no climbing at unprotected heights, and no bending or twisting at the waist.

15. Claimant received trigger point injections on January 19, 2022 at Clinica Family Health. On January 27, 2022, Claimant returned for a follow up with Dr. Mohapatra when Claimant reported improvement with trigger point injections and muscle relaxants.

16. Claimant was seen on April 14, 2022 by Dr. Alejandro Stella at Avista Adventist Hospital for low back and right lower extremity pain. He was diagnosed with back pain and lower extremity pain. The triage nurse noted that Claimant presented with a history of low back injury of approximately one and one half years now experiencing

right buttock pain that radiated down the right leg and left foot numbness that extended up to the left knee. Dr. Stella ordered an MRI, which was conducted on April 14, 2022. The radiologist, Kevin Woolley, M.D. reported Claimant had lumbar spine degenerative changes with grade 1 anterolisthesis at L4-5 level to the basis of facet arthropathy, spinal stenosis noted at L4-L5 with bilateral foraminal impingement on the basis of degenerative change and listhesis, and bilateral foraminal impingement at L5- S1 with no disc herniation. They also performed a lower extremity ultrasound to rule out DVT.[1] Claimant was released to follow up with his primary care provider.

17. On April 25, 2022, Claimant returned to Clinica Family Health. Claimant reported previous trigger point injection helped for about two months. He received a second trigger point injection at this time. On a follow up with Clinica on May 10, 2022, Claimant reported improvement with trigger point injections, steroid burst, cyclobenzaprine, and gabapentin. On August 10, 2022, Claimant returned to Clinica for more trigger point injections. Dr. Mohapatra noted Claimant reported a reduction in pain previously. Four trigger points were injected. Claimant reported mild improvement after the procedure.

18. Claimant was seen for an IME by Dr. Lloyd Thurston on August 19, 2022, at Respondents' request. Dr. Thurston questioned Claimant on the weight of the pot at the time of the alleged injury. He informed him that 10-15 gallons weighs 80-120 pounds without a pot. Claimant stated that he believed he could not lift more than 60 pounds. Claimant stated he lifted the pot from the ground tipped it over and poured the water out, and then cleaned it with a spatula. He then put the pot away overhead. It was Dr. Thurston's opinion claimant exaggerated the mechanism of injury. He noted that if Claimant incurred an injury, it was a minor myofascial strain and resolved within 4-6 weeks of the date of injury. He opined there were no radicular symptoms. He explained that the continued subjective complaints were not consistent with a physical injury. He opined that Claimant significantly embellished and exaggerated the mechanism of injury to Dr. Reichhardt.

19. On October 10, 2022, Claimant received his last round of trigger point injections. On the last recorded visit to Clinica Family Health before the hearing, on October 20, 2022, it is noted Claimant received numerous treatments and most helpful were ibuprofen 600mg tablets taken twice a day, acetaminophen 500mg twice a day, lidocaine patches, and Cyclobenzaprine, trigger point injections and steroid bursts.

20. Since his back injury of August 27, 2020 Claimant has not returned to work due to ongoing back pain related to the work injury.

21. Ms. F.M. stated that Claimant was initially hired without a position but was doing dishwashing one day a week. The restaurant was slower around 2 p.m. when Claimant started, and then would pick up around 5 p.m. She stated that several of the pots, one for chili and one for beans were used for cooking which would be filled to about four inches below the top of the pans. The deep square pans were used to serve food and were placed on steamers by the wait staff. Claimant would wash them when they

[1] Deep vein thrombosis.

were empty. The pots full of chili or beans are taken out to the platers to put the food and then brought back with some residue and food at the bottom of the pots.

22. Mr. T.M. is also a Respondent representative. He stated the chili and bean pans weighed approximately 5 lbs. empty, that the pots are given to the dishwasher after all the food is scraped out and put into smaller containers, and that there was only residue in the pots. He stated that the diner rush lasted about one hour from 5:30 to 6:30 p.m. and that most of the cooking had been done by the time Claimant was there at 2 p.m. It was not until after the rush the steam pans from were given to the dishwasher. What was not explained by any Employer witnesses was what was Claimant doing from 2 p.m. to 6:30 p.m. when the dinner crowd was done and Claimant had to start washing the trays.

23. The photographs showed a cooking pot (chili pot) that seems to be a 40 quart stock pot which is normally 12 to 14 inches wide at the mouth and approximately 15 inches tall. This ALJ deduces that it likely could hold up to 10 gallons of water. The second pot, behind the first, is a smaller, potentially a 32 quart stock pot (beans pot). Further in photograph 3 it shows Ms. F.M. rinsing the smaller pot (beans pot) by lifting it with one hand and using a hose. The pan already appeared to have been scrubbed and washed. Lastly, Ms. F.M. stated that they would wash the chili pot by submerging it in water then rinsing it as shown in the photo. Photograph 2 showed pans on the ground that appear to be the stated dimensions that Ms. F.M. testified of 12 by 14 inches. In the sink can also be seen a plastic container, which Ms. F.M. denied they reused.

24. Ms. F.M. stated that she had a conversation with Claimant by phone on September 1, 2020 to see if she could make arrangements with Claimant to change his schedule because the staff had complained he was taking too long to finish his job. She disclosed that Claimant became very upset. She denied that she terminated Claimant. However, in the responses to discovery she indicated she would testify that “when she informed him [Claimant] of his termination, he became quite agitated and threatened to call their corporate office and speak to individuals there who did not have connection with his termination.” This is also confirmed by discovery responses by Mr. T.M. Discovery responses also stated that Claimant was terminated for cause as he had been previously counseled that he worked very slow, and needed to improve the quality and speed of his work.

25. Dr. Thurston testified at the end of hearing and his testimony was concluded via deposition. He explained that the x-ray and MRI did not show an acute injury, and that this is corroborated by Dr. Mohapatra and Dr. Stella. He disagreed with the diagnosis of radiculopathy. He explained that Dr. Reichhardt’s conclusions were based on incorrect information. He opined that while a possible myofascial injury may have occurred, that it was not probable that it was a work injury.

26. While the clocked-in time shows seven or less hours worked per day, this does not count the time that Claimant was at the job site, including his breaks, which may be what Claimant was referencing and that is consistent with his testimony that he was at work seven to eight hours a day. The argument that co-workers were complaining and that he was not finishing on time is inconsistent with the time clock which has Claimant clocking out between 9:00 p.m. and 9:30 p.m. at the latest each night. Unless the clock

was not accurate or changed, Ms. F.M.'s testimony is found to be not credible or persuasive.

27. As found, Claimant has shown he was injured in the course and scope of his employment for Employer on August 27, 2020 injuring his back and causing radicular symptoms down his legs as well as urinary hesitancy and aggravation of his depression due to the chronic back pain. The opinions of providers at Clinica Family Health and Dr. Reichhardt are more credible and persuasive than the contrary opinions of Dr. Raschbacher.

28. Claimant has shown he was unable to work after his August 27, 2020 work injury and has shown he is entitled to temporary disability benefits. The records fail to show that Claimant has been placed at maximum medical improvement through the date of the hearing of April 12, 2023.

29. Respondents have failed to show that Claimant was terminated for cause. Claimant reported the injury to his supervisor. Further, Ms. F.M.'s testimony was unpersuasive as her discovery responses indicated she terminated Claimant.

30. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Claimant has proven that it was more likely than not he was injured in the course and scope of his employment with Employer on August 27, 2020 when lifted a pot with water and food debris off the floor and strained his thoracolumbar spine. He subsequently developed lower extremity radicular symptoms and depression related to the chronic low back and radicular pain and numbness. Claimant's claim is determined to be compensable.

Respondents argue that Claimant's version of events was illogical and there was no reason for anyone to take the empty pot, fill it with water and then place it on the ground to be cleaned as it did not make sense. However, this ALJ concludes that it makes a lot of sense. It is clear that dirty pans do get placed on the floor waiting to be washed as seen in the photos taken by Respondents. It is evident from the photos that there is limited area to place dirty items as the space was needed to take items from the sink onto the small counter in order to wash them. Claimant's testimony that the pot he lifted was full of water and food debris was credible. A pot that has been used to cook may have

had food stuck and water was placed in the pot in order to assist with cleaning the pot later. And while Claimant's assessment of weight may be imperfect, it does not change the fact that Claimant lifted items that he considered heavy, and at one of those events, injured his thoracolumbar spine. This is supported by the records from Clinica Family Health and Dr. Reichhardt as well as Claimant's testimony, which are found credible. This ALJ does not consider Claimant's being a poor historian, which was documented in various records, as being untruthful but a contribution of multiple factors, including use of interpreters instead of direct communication, his clear lack of education demonstrated by Claimant's word usage and patterns of speech at hearing, his demeanor and difficulty understanding simple questions, in addition to his age, memory, and documented depression. Claimant has shown that he was injured in the course and scope of his employment with Employer on August 27, 2020.

C. Medical benefits

Employer is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005). Here, the parties stipulated that Clinica Family Health were authorized treating providers for the work related conditions and the provider is accepted.

Claimant has shown he is entitled to medical benefits that are reasonably necessary and related. Following Claimant's lifting incident on August 27, 2022, Claimant immediately contacted his primary care provider at Clinica Family Health. Claimant has proven by a preponderance of the evidence that Claimant's medical care through Clinica and Avista Adventist was authorized, reasonably necessary medical treatment causally related to the August 27, 2020 accident.

23. Only those expenses related to Claimant's August 27, 2020 work related injuries for his mid and low back, bilateral radicular symptoms, urinary urgency and depression are related and not any hypertension or other unrelated medical care.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The parties stipulated to an average weekly wage of $103.85 which provides a temporary total disability rate of $69.23. This stipulation is accepted.

E. Temporary Total Disability Benefits and Interest

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant's testimony and the medical records from Clinica Family Health show that Claimant was either unable to work or under restrictions from the day of his injury of August 27, 2020. Claimant continues to be under medical care and has not been placed at maximum medical improvement pursuant to the records submitted by the parties. Claimant has shown that he is entitled to temporary disability benefits from August 28, 2020 until terminated by law.

Claimant is also due interest on all benefits which were not paid when due pursuant to statute in the amount of 8% per annum. Temporary total disability benefits and interest through the date of the hearing were calculated as follows:

[Redacted, hereinafter RA's Time Sheet Calculations]

F. Termination for Cause

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant was terminated by Employer's representative before his next scheduled day of work, on September 1, 2020 as shown by the discovery responses and Claimant's credible testimony. Claimant persuasively testified that he was unable to work after his injury. Further, this is supported by the credible medical records from Clinica Family Health providers who stated Claimant could not work or was under restrictions. Any testimony or evidence to the contrary is specifically found not credible or persuasive. Respondents have failed to show that Claimant was terminated for cause.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's August 27, 2020 work related injury is compensable, including his mid and low back injuries, his radicular symptoms, urinary urgency and the sequelae of depression related to the ongoing chronic pain.

2. Respondents shall pay the authorized, reasonably necessary and related medical benefits including his providers from Clinica Family Health and Avista Adventist Hospital for his hospitalization of April 14, 2022. Any non-related conditions are not Respondents' responsibility. All medical bills shall be paid in accordance with the Colorado Fee Schedule.

3. The stipulation of the parties regarding average weekly wage of $103.85 is accepted and incorporated as part of this order.

4. Respondents shall pay temporary disability benefits from August 28, 2020 through the present until terminated by law. TTD benefits at the rate of $69.23 per week through the date of the hearing of April 12, 2023 is $9,475.30.

5. Respondents shall pay interest at 8% per annum on all benefits not paid when due, for a total of $10,525.63 through the date of the hearing including temporary total disability benefits. Interests shall continue to be paid until indemnity benefits are paid pursuant to this order.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 19th day of July, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-230-803-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he injured his left shoulder in the course and scope of his employment with Employer on November 17, 2022.

II. If Claimant sustained a compensable work injury on November 17, 2022, then whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary, authorized and related medical benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant had been employed by Employer for approximately 12 years and worked the night production shift, operating equipment, pulling orders, cases, and bottles, all to be loaded for distribution, which involved a fair amount of lifting. Claimant had been on vacation but returned on November 14, 2022 and was able to perform is job without problems through the November 16, 2022 shift.

2. On November 17, 2022 Claimant arrived at Employers' parking lot at approximately 6:45 to 6:50 p.m. for the 7 p.m. shift. He parked his vehicle in the designated area where he had parked for the twelve years of his tenure with Employer. He exited his vehicle, lost his balance after closing the door and walking away from his vehicle, in the ice and snow covered parking lot, slipping and falling, attempting to catch himself with an extended left upper extremity, which could not hold him and was hyperextended. Claimant injured his left shoulder.

3. Claimant advised his manager J.G. that he had fallen in the parking lot and injured his shoulder. He requested pain blockers, which he was provided. His manager did not provide Claimant with any incident report form or a designated medical provider list.

4. Claimant had experienced a prior work-related injury with this employer in 2016. At that time, when he initially reported the injury, his manager instructed Claimant to file a report and provided a referral to a medical provider. This time his manager made no comments and did not give instructions to Claimant on how to proceed.

5. Claimant, incorrectly, assumed that, since his manager did not direct him to contact anyone or send him to the Employer's medical provider, the parking lot incident was not a covered accident.

6. Claimant proceeded to file for disability benefits under Family Medical Leave (FML).

7. Claimant obtained a medical evaluation at Advanced Urgent Care on Saturday, November 19, 2022, with Kristin Kruszewski, PA-C. He was diagnosed with left shoulder pain for an unspecified injury of the left shoulder. He was provided restrictions of return to work with right-handed duty only and no use of the left arm until evaluated and cleared by orthopedics.

8. A text message was sent by Claimant on an indeterminate date that stated "What do you need me doing?" with a response by his manager stating "Go ahead do returns thanks."

9. Then, on November 20, 2022, Claimant stated "Tried to start a claim with [Redacted, hereinafter HD] for leave but was unable to complete it online. I'll have to call them tomorrow…" The response was "OK just keep us posted and get better." This ALJ infers from this conversation that Employer knew Claimant was injured when he slipped and fell in the parking lot.

10. On November 21, 2022 the conversation continued as follows:

> Q-Did you get it all taken care off (sic.) and you ok
> A-I did get everything done with HD[Redacted]. I have to see an Ortho on Monday…
> Q-Nice hope everything goes okay
> A-Yeah, me too

11. Also on the same day, the Human Resources (HR) Director, R.M., sent an email to the Night Warehouse Manager, J.G., who no longer worked for Employer, asking whether Claimant went on leave as of November 20, 2022, with a last day worked on November 17, 2022. She further asked whether the leave was for personal medical reasons. Mr. J.G. responded, "Yes that is correct." It is presumed that Mr. J.G. was answering both questions in the affirmative.

12. There is an undated letter or email stating that HD[Redacted] had created a Short-Term Disability Claim and Leave of Absence claim for Claimant on November 21, 2022.

13. On November 22, 2022 the Corporate Leave Administrator advised the HR Director that Claimant had been placed on STD/FML status effective November 20, 2022 and had entered PTO for period November 20-22, 2022.

14. On November 28, 2022 Claimant was evaluated by Dr. Michael Hewitt of Orthopedic Centers of Colorado, the orthopedist that had seen Claimant previously for his 2016 work related injury. Dr. Hewitt documented as follows:

> [Claimant] is a 47-year-old left-hand-dominant male presenting for evaluation of his left shoulder. Patient is well-known to this office after undergoing left shoulder subacromial decompression in 2016. He return (sic.) to full activities without restriction.
>
> He was injured on 11/17/2022 exiting his vehicle at work. He slipped on ice in a parking lot and fell onto an outstretched left upper extremity. His arm went overhead, he noted sudden pain but did not feel his shoulder dislocate. Patient did not strike his head or lose consciousness. Treatment has included rest, activity modification, ice, heat and anti-inflammatories. He is having difficulty sleeping.

> Pain is felt in the posterior and lateral shoulder as well as scapula. He currently has minimal neck pain and denies radicular symptoms or numbness.

15. Dr. Hewitt examined Claimant finding mild to moderate glenohumeral arthritis and a current history and exam consistent with rotator cuff tendon injury. Dr. Hewitt proceeded with injecting the left shoulder with steroids and further discussed the possibility of proceeding with imaging if the left shoulder symptoms did not resolve with ice, NSAIDs, therapy and rest.

16. Claimant filed a Workers' Claim for Compensation on February 26, 2023. Claimant stated that he injured his left shoulder on November 17, 2022 at approximately 6:45 p.m. Claimant reported to his supervisor J.G. He specifically reported that:

> After arriving to the office for work during a snow storm I slipped on the ice that was underneath the snow after exiting my vehicle and turning to close the vehicle door. While falling I attempted to catch myself with my left arm when my hand touched the ice it slid out as well, injuring my shoulder.

17. Respondents filed an Employer's First Report of Injury on March 2, 2023. The Safety and Asset Protection Specialist, G.F., completed the report specifically stating that Claimant, after just arriving to work before his shift, and exiting his personal vehicle, slipped and fell injuring his left shoulder. No medical provider was identified.

18. A Notice of Contest was filed on March 7, 2023.

19. Claimant filed an Application for Expedited Hearing on March 20, 2023 on the issues of compensability and medical benefits.

20. Respondents filed a Response to Application for Hearing on March 21, 2023.

21. Claimant testified that after the November 17, 2022 slip and fall, injuring his left shoulder, he was unable to perform his job.

22. Review of the video showed that it was speeded up, was very low resolution and pixilated, distorted and overall poor quality. However, an individual's form could be seen leaving a vehicle, slipping and falling and immediately getting up and walking away from the vehicle. The individual's face could not be seen clearly, however, Claimant believed that he was the individual in the video. This ALJ deduces and infers that the individual seen on the video is Claimant.

23. Mr. G.F., the Safety Specialist, testified that employees were instructed to go to their manager to report injuries. Mr. J.G. was Claimant's manager. Mr. G.F. stated that he heavily relied on the supervisors (managers) to make the reports of injury and complete the written forms, but if the supervisor did not encourage it, there would be no report.

24. This ALJ took administrative notice that the CDLE posters do not specifically indicated that accidents in the parking lots were potentially work related pursuant to the request of the parties.

25. Ms. R.M., the HR Director for Employer in Colorado, testified she was advised by HD[Redacted] that Claimant had filed a short term disability claim on November 21, 2022.

26. Mr. J.G., the night shift manager, testified that he did not know that work place injuries extended to the company parking lots, and further stated that many people asked him for ibuprofen each day but he did not specifically recall if Claimant did on November 17, 2022. Mr. J.G. specifically stated that he did not receive any specific training on if someone slipped and fell in the parking lot, whether or not to report that as short-term disability or as a worker's compensation claim. Any other testimony offered by this witness was neither found persuasive nor credible.

27. As found, Claimant has proven he was injured in the course and scope of his employment with Employer when he slipped and fell in the Employer's parking lot while reporting to work on November 17, 2022, injuring his left shoulder.

28. As found, Employer failed to provide any designation of medical provider either when Claimant reported the accident to his manager, or after Claimant filed a Workers' Claim for Compensation in February, 2023.

29. As found, Employer never referred Claimant to a medical provider to treat the injuries. Accordingly, the right of selection passed to Claimant.

30. As found, Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers.

31. As found, Claimant was entitled to select his own medical provider and he selected Dr. Michael Hewitt, who had been his prior authorized workers' compensation physician for his 2016 work injury. As found, Claimant's authorized treating physician in this matter is Dr. Hewitt.

32. As found, Claimant has established that his left shoulder injury was directly and proximately caused by the November 17, 2022 slip and fall accident at work. This is support by Claimant's credible testimony. It is further supported by Dr. Hewitt's November 28, 2022 report stating that Claimant injured his shoulder when he slipped and fell at work. Claimant has proven he is entitled to medical benefits to cure and relieve the left shoulder injury sustained on November 17, 2022.

33. Testimony and evidence inconsistent with the above findings is determined to be not relevant, not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

The claimant is required to prove by a preponderance of the evidence that, at the time of the injury, both he and the employer were subject to the provisions of the Act, he was performing a service arising out of, and in the course of, his employment and the

injury was proximately caused by the performance of such service. Sec. 8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The claimant must also prove by a preponderance of the evidence that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office*, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). Accidents on employer premises or parking lots are compensable. See *State Compensation Ins. Fund v. Walter*, 354 P.2d 591 (Colo. 19600; *Woodruff World Travel, Inc. v. Industrial Commission*, 38 Colo. App. 92, 554 P.2d 705 (1976); *Azaltovic V. Crop Production Services*, ICAO, WC No. 4-846-566 (January 31, 2012)

Based on the totality of the evidence, including hearing testimony and a full review of the exhibits presented at hearing, it is found that Claimant was injured in the course and scope of his employment with Employer on November 17 2022. As found, Claimant slipped and fell in Employer's parking lot, while reporting for his regular shift, and injured his left shoulder. He reported the accident and injury to his manager. Claimant is found credible.

As found, Claimant has established that his left shoulder injury was directly and proximately caused by the November 17, 2022 slip and fall accident at work. This is supported by Claimant's credible testimony. It is further supported by Dr. Hewitt's November 28, 2022 report stating that Claimant injured his shoulder when he slipped and fell at work. The video footage provided was grainy, significantly sped up, and not very clear. Despite this, it showed a man that had just closed his car door, turned and slipped and fell, quickly getting up and continuing to walk. Claimant has proven he was within the course and scope of his employment when he was injured and is entitled to medical benefits to cure and relieve the left shoulder injury sustained on November 17, 2022.

C. Authorized Reasonably Necessary and Related Medical Benefits

Respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve an employee from the effects of a work-related injury.

Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774- 720 (January 12, 2010). As found, Claimant was seen as an emergency on Saturday, November 19, 2022, by Advanced Urgent Care and they are authorized as an emergent care facility for the one time evaluation.

An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381*,* 383 (Colo. App. 2006). As found, Claimant reported to his manager/supervisor that he had a slip and fall injury in Employer's parking lot. As further found, from the text conversation between Claimant and his manager, Employer knew Claimant was injured when he slipped and fell in the parking lot on November 17, 2022, by no later than November 20, 2022. As found, Claimant's manager knew or should have known that Claimant's report of the slip and fall on company property, as well as the complaints of left shoulder pain, which triggered the request and supply of ibuprofen, was sufficient to connect the facts and to acknowledge that the accident should be classified as a potential workers' compensation injury and made the appropriate referrals.

As found, Employer failed to provide any designation of medical provider either when Claimant reported the accident to his manager, or after Claimant filed a Workers' Claim for Compensation in February, 2023. As found, Employer never referred Claimant to a medical provider to treat the injuries. Accordingly, the right of selection passed to Claimant. As found, Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of Sec. 8-43-404(5), C.R.S. and WCRP Rule 8-2. *Tidwell v. Spencer Technologies*, WC 4-917-514 (ICAO, Mar. 2, 2015). As found, Claimant was entitled to select his own medical provider and he selected Dr. Michael Hewitt, who had been his prior authorized workers' compensation physician for his 2016 work injury. As found, Claimant's authorized treating physician in this matter is Dr. Hewitt.

Lastly, as found, Claimant requires medical treatment for the compensable left shoulder injury as recommended by Dr. Hewitt. Claimant has shown that it was more

likely than not that Claimant requires medical benefits that are reasonably necessary to treat the work injuries sustained on November 17, 2022.

ORDER

IT IS THEREFORE ORDERED:

A. Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment on November 17, 2022.

B. Respondents shall pay for all authorized, reasonably necessary and related medical benefits under the care of Dr. Michael Hewitt and his referrals for the left shoulder injury. Respondents shall also pay for the emergency care Claimant received at Advanced Urgent Care. All medical care shall be paid pursuant to the Colorado Medical Fee Schedule.

C. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 19th day of July, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIONS

At the commencement of hearing, the parties reached the following stipulations:

1. Claimant's Average Weekly Wage ("AWW") is 927.78.

2. The right of selection passed to Claimant, who selected her primary care provider, Sherri Turner-Lloyd, P.A., with Centura, to be her Authorized Treating Provider ("ATP").

3. In the event the claim is found compensable and the surgery determined to be reasonably necessary and related, Respondents have agreed to pay all wage loss benefits owed to Claimant. However, if the surgery is found to be not reasonably necessary and/or related, Respondents challenge Claimant's entitlement to wage loss benefits beginning once Claimant started missing work for her January 25, 2023 surgery. Temporary Total Disability (TTD) dates extend from November 15, 2022 to March 31, 2023.

These stipulations are approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable injury to her right shoulder while engaged in her work duties as a medical tech/phlebotomist for Employer on November 10, 2022?

II. Whether Claimant established, by a preponderance of the evidence, that her need for right shoulder surgery was causally related to her alleged November 10, 2022 work injury?

III. If the answer to questions 1 and 2 is yes, did Claimant also prove that the right shoulder surgery performed by Dr. Sean Kelly on January 15, 2023 was reasonably necessary to cure and relieve her from the effects of her November 10, 2022 industrial injury?

IV. If the answer to question 1 is yes, did Claimant prove that she suffered a wage loss as a direct and proximate result of the November 10, 2022 industrial injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as a medical tech/phlebotomist for Employer. In addition to her customary work for Employer, Claimant is frequently assigned by Employer to work as a contract employee at [Redacted, hereinafter VH] medical facilities to draw blood from patients in their care.

2. Claimant testified that she was attempting to draw a patient's blood on November 10, 2022, when she injured her right shoulder. Claimant explained that the patient's veins were difficult to see and feel making the draw particularly challenging. (Hrg. Trans., p. 19, ll. 9-11). Because no veins were "popping" up despite the use of a tourniquet on the upper arm, the patient suggested that Claimant place a hot pack on her hand and try to take the blood sample from there. *Id*. at ll. 18-19. Accordingly, the tourniquet was moved to the patient's wrist and Claimant got up from her work station to retrieve the hot pack. (Hrg. Trans., p. 19, ll. 21-22; p. 20, ll. 5-6).

3. Upon returning to her work station, Claimant placed the hot pack toward her right side on the desk directly in front of her. She then sat down and turned slightly to her left to face the patient. While taking to her patient, Claimant flexed her right elbow and raised her arm up and outward from her body in preparation of striking the hot pack to activate it. (Hrg. Trans., p. 34, ll. 13-25 – p. 37, ll.1-9). Based upon Claimant's testimony and her in-court demonstration, the ALJ finds that her right shoulder was only marginally abducted away from the body during the incident in question. Nonetheless, the shoulder was flexed sufficiently to place her right hand/fist at about the level of her chin.[1] (Hrg. Trans., p. 39, ll. 6-22).

4. With her arm raised, Claimant made a fist with her right hand and forcefully[2] brought her arm straight down, striking the hot pack with a "hammer punch" to initiate the chemical reaction between the substances inside. (Hrg. Trans., p. 21, ll. 21-25). Claimant testified that after striking the pack, she "felt a sharp pain and heard a pop". (Hrg. Trans., p. 22, ll. 1-3). She described the initial pain feeling like a "tetanus shot" on the side of the arm, which subsequently gave way to soreness "inside" the shoulder joint with tingling down the arm. *Id*. at p. 22, ll. 4-23. Claimant testified that she was initially unable to rate her pain on a scale of 1 to 10 because it "surprised" her and she was absorbed in patient care. *Id*. at p. 22, ll. 24-25; p. 23, ll. 1-3.

5. Claimant has a remote history of injury to the right shoulder as a consequence of a motor vehicle accident (MVA) occurring approximately 10-15 years

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[1] During her demonstration Claimant was only able to raise (flex) the arm to the level of the shoulder because it was "still sore" following surgery. (Hrg. Trans., p. 39, ll. 6-12).

[2] Dr. Miguel Castrejon estimated that a moderate amount of force was involved in striking the hot pack based upon the amount of noise elicited by Claimant when she "thump[ed]" the examination table when demonstrating how hard she hit the hot pack. (Claimant's Hearing Exhibit (CHE) 13, p. 127).

ago. (Respondents' Hearing Exhibit (RHE) I, p. 35).[3] Following this MVA, Claimant developed shoulder pain necessitating physical therapy and injections. *Id.* Conservative care failed to relieve her pain. Consequently, Claimant was taken to the operating room where she reported that a "spur" was removed by Dr. Jenkins. *Id.* Claimant did well postoperatively with physical therapy. *Id.* Indeed, Claimant reportedly made a full recovery following this injury. (CHE 13, p. 129). She testified that she had no physical restrictions following her 2005 injury and was not experiencing any pain/dysfunction in her right arm/shoulder until the alleged November 10, 2022 incident. (Hrg. Trans., p. 17, ll. 3-10).

6. Claimant attempted to draw the patients' blood two times. She missed the vein each time and failed on both attempts. Pursuant to company policy, she was not allowed to make a third attempt. Consequently, the patient had to wait for different technician draw to her blood. The second tech, ([Redacted, hereinafter LE]) arrived between 1:00 and 1:30 p.m. to finish the draw. Claimant reported the incident and her injury to LE [Redacted] at that time. Despite her alleged injury, Claimant was able to complete her shift at 4:00pm that day. She returned home and notified her supervisor, "[Redacted, hereinafter HK]," via email that evening that she "hurt [her] shoulder and [she] needed to know what he wanted [her] to do". (Hrg. Trans., p. 23, ll. 4-25, p. 24, ll. 1-25).

7. Claimant testified that HK[Redacted] gave her a phone number for "Occupational Health" and instructed her to call the clinic for treatment. Claimant testified that she called the clinic "immediately" to make an appointment. Claimant's attempt to schedule an appointment failed as she was unable to reach anyone at the designated phone number. Accordingly, she left a voice mail message with the clinic and emailed HK[Redacted] advising him of the same. HK[Redacted] acknowledged the email by indicating that he hoped she heard back from the clinic soon. (Hrg. Trans., p. 25, ll. 1-7).

8. After a day off for the Veteran's Day Holiday on Friday, November 11, 2022, Claimant worked her entire shift on Saturday, November 12, 2022. (Hrg. Trans., p. 25, ll. 8-16). She testified that she was able to complete her November 12th work shift in pain at a reduced work pace. *Id*. at ll. 22-24. Claimant does not work Sundays and was thus off work on November 13, 2022. (Hrg. Trans., p. 26, ll. 5-10).

9. Because the Occupational Health Clinic had not called Claimant back as of Monday morning, November 14, 2022, she testified that she approached her supervisor at VH[Redacted], "[Redacted, hereinafter ME]" and informed her that her shoulder was getting worse. (Hrg. Trans. p. 26, ll. 11-19). Claimant also informed "ME[Redacted]" that she had still not heard back from the clinic. *Id*. at ll. 19-20. Claimant's was later able to get in touch with HK[Redacted] and after speaking with him, her work shift was cut short so she could attend a medical appointment at

[3] Both Dr. Mark Kelly and Dr. Castrejon acknowledge a history of prior injury and surgery to the right shoulder in 2005 due to an MVA wherein Claimant was rear-ended by a drunk driver. (RHE G, p. 24; CHE 13, p. 129).

VH[Redacted] in Denver. (Hrg. Trans., p. 27, ll. 4-10). Although she did not know who, Claimant testified that either HK[Redacted] or ME[Redacted] was able to set the appointment to have her shoulder evaluated at the VH[Redacted] Hospital in Denver. *Id*. at ll. 11-13.

10. Claimant proceeded to VH[Redacted] in Denver where she saw a provider identified as C.L. Reiminis, whose medical qualifications are unclear. (RHE B, p. 7; CHE 9, p. 67). The "Report of Employee's Emergency Treatment" completed during this encounter documents that Claimant was there for an "on the job injury occurring November 10, 2022. *Id.* Claimant was instructed to return to modified duty (limited mobility) with restrictions of no lifting greater than two pounds with her right arm on November 17, 2022. *Id.* Claimant has not returned to work since starting her shift on November 14, 2022.

11. Because Claimant's alleged November 10, 2022 injury occurred in one of the VH's[Redacted] medical treatment facilities[4], there was confusion surrounding her ability to treat through the VH[Redacted] system. Claimant testified that while she was in the waiting room at the VH[Redacted] Hospital in Denver on November 14, 2022, she was provided with a pamphlet containing information about the federal workers' compensation system. Claimant was instructed to call the telephone number provided in the pamphlet. (Hrg. Trans., p. 27, ll. 16-24). She did so while waiting to be seen. As part of this telephone call, Claimant confirmed that she was not a federal employee. She then advised the clinic staff at the hospital that because she was not a federal employee, treatment through the VH[Redacted] system was not valid for her. *Id*. Claimant testified that she was then advised to contact her primary care provider (PCP) for treatment.

12. Claimant made an appointment with her PCP, Sherri Turner-Lloyd for November 15, 2022 from the waiting room at the VH[Redacted] Hospital. Ms. Turner-Lloyd is a Physician Assistant (PA) working for the Centura Health System.

13. Claimant's November 15, 2022 appointment was "conducted using two-way real time video conferencing between [PA Turner-Lloyd's] location and [Claimant's] location. (RHE C, p. 8; CHE 10, p. 68). PA Turner-Lloyd obtained the following history from Claimant:

> [Claimant] presents via telemed video for shoulder pain. [Claimant] works at the lab at VH[Redacted]. She went to get a warm pack and slammed the ice (sic) pack with her R (right) hand and felt a pop and burning sensation in her shoulder. . . . She can't raise her shoulder or internally rotate without pain. She did get a call from Reiminis at VH[Redacted], the PA there. She was seen by them and had x-rays done. Her x-ray was negative. The VH[Redacted]

[4] According to the Employer's First Report of Injury, the injury occurred at the [Redacted, hereinafter PC]. (CHE 5, p. 12).

> referred her to her PCP. She was started on Ibuprofen 800 mg 3x a day and capsaicin cream TID prn.
>
> The pain is in the posterior shoulder and to lateral outer shoulder. She is having more pain in the posterior upper arm and proximal bicep. Very limited internal rotation and no pain with adduction. Pain with extension and abduction. Some tinging in her fingers, 1st 3 digits.

(RHE C, p. 9). PA Turner-Lloyd suspected internal derangement of the right shoulder. Id. at p. 8. She ordered an MRI. *Id.*

14. Claimant returned to PA Turner-Lloyd for an in-person examination on November 18, 2022. (RHE D, p. 11). The note from this encounter details that Claimant was "dismissed/released" from care through VH[Redacted] and that she "does not have [a] Workmen's Comp. provider available to her". *Id.* It was further noted that Claimant was scheduled for an MRI the following week and that paperwork was completed keeping Claimant out of work until her MRI was complete, a diagnostic impression was made and treatment completed. *Id.* (See also, RHE D, pp. 14-15). However, a note from seemingly the same date stated that Claimant could first return from leave on April 1, 2023. *Id.* at pp. 16-17. Regardless, the evidence presented supports a finding that Claimant was restricted from working in any capacity by her PCP beginning November 18, 2022, through at least April 1, 2023. *Id.* Finally, PA Turner-Lloyd's November 18, 2022 report indicates that she referred Claimant to an orthopedist for further evaluation. (RHE D, p. 11).

15. The aforementioned MRI was performed on November 26, 2022, 16 days after the alleged injury. (RHE E, pp. 18-19). MR imaging demonstrated the following findings:

- A Type II curved acromial morphology.
- Smooth acromial undersurface scalloping consistent with previous acromioplasty.
- An anterior acromial spur at the coracoacrominal ligament attachment.
- Mild hypertrophic osteoarthritic changes within the right AC joint with inferiorly directed spurring and effusion.
- A small volume of fluid within the subacromial-subdeltoid bursa.
- Age related tendinosis and delamination within the supraspinatus tendon.
- Mild bursal surface relation within the proximal supraspinatus tendon below the lateral acromion.
- No evidence of full or partial thickness tearing.
- Normal appearing infraspinatus, teres minor and subscapularis tendons.
- Normal rotator cuff muscle belly volume and signal.

- A physiologic volume of fluid within the glenohumeral joint.
- Normal appearing glenohumeral articular cartilage.
- No evidence of synovitis.
- Intact biceps anchor and superior labrum.
- Probable chronic attritional changes within a diminutive posterior labrum.
- A probable small spur along the inferior aspect of the posterior glenoid.

(RHE E, p. 18). The above referenced findings were interpreted by radiologist, Dr. John Campbell. *Id*. at p. 19. Upon review of the above referenced findings, Dr. Campbell reached the following impressions:

- Probable postoperative changes of previous acromioplasty within the right shoulder. Mild osteoarthritic changes within the right AC joint with inferiorly directed spurring.
- Trace fluid within the subacrominal bursa which can be a source of pain.
- Negative for partial or full thickness tear within the rotator cuff tendons. Normal muscle belly volume.
- The posterior labrum is diminutive likely reflecting chronic attritional changes. The findings can be seen in association with repetitive overhead abduction activities related to occupational or recreational activities. Small spur is also seen along the inferior aspect of the posterior glenoid.

Id.

16. Claimant returned for a follow-up visit with PA Turner-Lloyd on December 1, 2022. PA Turner-Lloyd commented on the results of Claimant's November 26, 2022 MRI as follows: "MRI did confirm labral degeneration but no acute tear. No partial or full thickness rotator cuff tear. Did note some mild bursitis. Follow-up with orthopedics as planned". (RHE F, p.21). PA Turner-Lloyd "suspected" that Claimant "triggered an inflammatory response at work". *Id*. PA Turner-Lloyd continued Claimant's "out of work" status until she could be seen by orthopedics and further treatment recommendations outlined. *Id*.

17. Claimant underwent evaluation with orthopedist, Dr. Sean Kelly, on December 5, 2022. (RHE. Ex. G). Dr. Kelly documented the following history of injury: "[Claimant] states that she was trying to break a heating pad with her fist and felt pain". *Id*. at p. 24. Dr. Kelly disagreed with the reading of Claimant's right shoulder MRI reporting that it showed "some partial bursal-sided tearing". *Id*. Dr. Kelly ordered a set of x-rays which did not show any "focal bony abnormalities or obvious osseous defects, but did demonstrate "[m]oderate AC Joint arthrosis . . ." Id at pp. 28-29. Following his physical examination, Dr. Kelly opined that Claimant had a right rotator cuff tear. (RHE G, p. 24). He was unsure of the extent of tearing or whether the tear was traumatic in

nature. *Id.* He also felt that Claimant was suffering from right biceps tendinitis, adhesive capsulitis and arthrosis of the right AC joint. *Id*. He recommended surgical intervention as the "next step". *Id.* In the interim, Dr. Kelly "initiated" a physician guided physical therapy (PT) program as of the date of this appointment. *Id*. He then scheduled Claimant's surgery for Wednesday, January 25, 2023. (RHE G, p. 30).

18. Claimant returned for an appointment with PA Turner-Lloyd on December 23, 2022. PA Tuner-Lloyd noted that Claimant had been seen by orthopedics and surgery was recommended for what PA Turner-Lloyd noted was a "labral tear of the right shoulder confirmed by orthopedics and MRI". (RHE H, p. 31). PA Turner-Lloyd noted that injections and PT were discussed as well. *Id.* Finally, PA Turner-Lloyd indicated that Claimant was to "remain out of work until surgery and for an additional 4 to 6 weeks after surgery for recovery" and that "paperwork" was completed for Claimant's "tentative return to work on April 1". *Id.*

19. Claimant underwent an Independent Medical Examination (IME) with Dr. Mark Failinger at the request of Respondents on January 16, 2023. (RHE I, pp. 34-42). Dr. Failing documented the following history of present illness:

> [Claimant] states that when she hit the heating pad with some force, she felt a sharp pain that went 'up my arm' and she heard a pop. She was not able to tell where the pop occurred. She states that she noted pain in her right hand that radiated all the way up her arm to her shoulder. She describes the pain as aching and discomfort, and initially rated the pain as only being mild".

(RHE I, p. 35).

20. Claimant also reported that despite a prior injury and surgery to the right shoulder, she was not having "subsequent problems (with the shoulder) until the incident of November 10, 2022". (RHE I, p. 35). Physical examination, including strength and provocative maneuver (Hawkins, O'Brien's, and Speed's) testing was limited due to pain behaviors.[5] *Id.* at p. 38. Following his physical examination and records review, Dr. Failinger answered the one question posed to him, specifically whether Claimant's described mechanism of injury (MOI) could cause labral degeneration with no acute tearing noted. *Id*. at p. 41.

21. Dr. Failinger opined that the MOI could not have caused labral degeneration and would not reasonably cause any acute labral tear. He found Claimant's report of pain in the shoulder after striking the hot pack with mild to moderate force "most unusual", opining that "[t]he development of such pain would not reasonably be due to any pathology created in the shoulder by hitting a heat pack". (RHE I, p. 41). He concluded that the "forces of activating a heat pack, unless the pack was hit by a fist with tremendous force, could not create any pathology in the shoulder of any

[5] PA Turner-Lloyd was also unable to perform provocative maneuver testing secondary to complaints of pain when evaluating Claimant on November 18, 2022. (RHE D, p. 12).

significance". *Id.* Given that Claimant's reported pain levels were "so out of proportion to any pathology that could have . . . remotely been created", Dr. Failinger raised concern for the presence of non-organic factors. *Id*.

22. Dr. Failinger opined that Claimant's MRI findings failed to support a conclusion that she sustained an acute injury to the right shoulder. (RHE I, p. 41). Moreover, he concluded that the findings on the November 26, 2022 MRI did not "reasonably explain [Claimant's] severe symptoms". *Id.* Dr. Failinger found Dr. Kelly's interpretation of the November 26, 2022 MRI and his decision to proceed with surgery in a patient whose pain complaints were so out of proportion to the MOI and MRI findings "puzzling". *Id*. Given the possible neurologic symptoms, e.g. numbness/tingling Claimant was reporting, Dr. Failinger noted that it would not be advisable to proceed with surgery without first determining whether Claimant's symptoms were emanating from her shoulder or her neck, especially in a case where the reported pain levels were "dramatically" out of proportion to the findings on MRI. *Id* at p. 42.

23. Claimant returned to Dr. Kelly the day after her IME with Dr. Failinger. (RHE J, pp. 43-48). Dr. Kelly again noted that he disagreed with the findings of the radiologist, because he could "appreciate some partial bursal sided tearing of the supraspinatus. *Id.* at 44. He also noted that Claimant had "failed conservative treatment with physical therapy and injections". *Id.* Accordingly, he asserted that Claimant wanted to proceed with surgery. *Id.*

24. Claimant testified that Dr. Kelly's indication that she failed conservative care with physical therapy and injections as written in his January 17, 2023 report was inaccurate since she did not undergo any conservative treatment prior to surgery. (Hrg. Trans., p. 42, ll. 17-25, p. 43, ll. 1-17).

25. Claimant underwent a right arthroscopic rotator cuff repair with a BioInductive Implant, a right arthroscopic biceps tenodesis, a right distal clavicle resection, and extensive debridement of the right shoulder, including the labrum with Dr. Kelly at the Audubon Surgery Center on January 26, 2023. (RHE K, pp. 49-50). Pictures of Claimant's arthroscopy were obtained during the procedure and included in the exhibits admitted into evidence. (CHE 10, pp. 103).

26. Claimant underwent an IME with Dr. Miguel Castrejon on April 26, 2023 at the request of Claimant's counsel. (CHE 13, pp. 126-136). Dr. Castrejon took a detailed history from Claimant, including a description of her pre-injury job duties. *Id.* at 126. He noted this particular job required occasional lifting of up to 50 pounds. *Id.* As referenced above, Claimant demonstrated the MOI for Dr. Castrejon, which he concluded directed moderate force to the right shoulder. *Id.* at 127.

27. Dr. Castrejon reviewed the November 26, 2022 MRI report. He concluded that the degenerative changes and pathologic findings explained in the report pre-existed Claimant's alleged November 10, 2022 injury. *Id.* at p. 131. Nonetheless, he opined that the MOI described by Claimant "aggravated" these pre-existing changes

and “led to the development of impingement and rotator cuff pathology that required treatment at the time of surgery”. *Id.* Dr. Castrejon restated his commitment to this opinion later in his IME report as evidenced by his remark that when the moderate force associated with the MOI in this case was directed to a shoulder with preexisting surgery and degenerative changes, Claimant’s underlying preexisting condition was, in all medical probability, aggravated and this MOI caused the rotator cuff tear that was found and repaired by Dr. Kelly at the time of surgery. *Id.* at p. 133. In support of his opinion, Dr. Castrejon notes that during the approximate seven year period that Claimant worked as a medical assistant prior to November 10, 2022, “there is no documentation available that would support any ongoing shoulder symptoms, need for medical treatment or limitation in work or non-work activities as a result of the 2005 shoulder surgery”. *Id.*

28. Dr. Failinger testified at hearing as a Board Certified, Level II accredited orthopedic and sports medicine surgeon. (Hrg. Trans., p. 47, ll. 16-25, p. 47, ll. 14-18). He has extensive experience in treating disorders of the shoulder having examined between 50,000 to 60,000 patients for shoulder problems over the course of his career. *Id.* at p. 47, ll. 5-7.

29. Dr. Failinger testified that when he examined Claimant, she complained of pain so diffuse that he was unable to “localize an area that was probably the source of [her] pain” nor could Claimant identify the primary location of her pain. (Hrg. Trans., p. 49, ll. 18-25). Dr. Failinger testified that the MOI Claimant described could not have caused tearing of the supraspinatus. Id. at p. 53, ll. 17-20. Dr. Failinger explained that the rotator cuff consists of a collection of four muscles and their tendons that work together, as a unit to raise, lower and rotate the arm about the shoulder joint. *Id*. at p. 54, ll. 19-25. These muscles include the supraspinatus, infraspinatus, teres minor and the subscapularis. *Id.* Dr. Failinger testified that the supraspinatus is the upper most muscle of the four on top of the shoulder and when it is firing (contracting) it helps raise the arm up and away from the body. *Id.* at p. 57, ll. 6-19. Conversely, there are muscles that assist in lowering the arm from a raised position. These “humeral depressors” and include the latissimus and the pectoralis major primarily. *Id*. at p. 55, ll. 20-25, p. 56, ll. 1-4. In order to lower the arm in a striking motion, the supraspinatus must relax as the humeral depressors fire to bring the arm downwards with force. If the supraspinatus does not relax, the arm can come down. *Id*. at p. 57, ll. 6-14. Dr. Failinger testified that it would be “impossible” for the supraspinatus tendon to be contracted during the act of striking the hot pack. *Id.* at p. 57, ll. 20-21. Because the supraspinatus muscle is not activated in the downward motion of striking the hot pack as described by Claimant, Dr. Failinger implied that no forces were transferred to the muscle tendon. Therefore, Dr. Failinger testified that the MOI is not one which would cause tearing or an aggravation of a pre-existing tear in the supraspinatus tendon. *Id.* at p. 57, ll. 20-25, pp. 58-59, ll. 1-7, p. 63, ll. 1-14. Dr. Failinger testified that Dr. Kelly’s surgical report supports a conclusion that the small tearing (fraying) in the supraspinatus was probably the result of the tendon rubbing against the bone spurring visualized during surgery as Claimant raised and lowered her arm. *Id*. at p. 68, ll. 9-22.

30. Dr. Failinger testified that there was no evidence on the MRI or in Dr. Kelly's surgical report of biceps pathology. (Hrg. Trans., p. 61, ll. 1-3). Accordingly, he testified that there was no explanation for the surgery directed to the biceps. *Id.* at ll. 3-4.

31. Dr. Failinger testified the surgery was not reasonable, necessary, and related, to the alleged incident nor did it follow the medical treatment guidelines. (Hrg. Trans., p. 76, ll. 15-25, p. 77, 1-8, p. 80, ll. 9-25, p. 81, ll. 1-15).

32. WCRP, Rule 17, Exhibit 4: Shoulder Injury Medical Treatment Guidelines provide the following regarding the surgical indications for bicipital tendon disorders and rotator cuff syndrome:

> Bicipital Tendinitis: Conservative care prior to potential surgery must address flexibility and strength imbalances. Surgery may be considered when functional deficits interfere with activities of daily living and/or job duties after 12 weeks of active patient participation in non-operative therapy. (See, WCRP Rule 17, Exhibit 4 (E) (3)).
>
> Rotator Cuff Tear:
>
> Rule 17, Exhibit 4 (E) (10) (e) (i-vi): Non-operative Treatment Procedures:
>
> > i. Medications, such as nonsteroidal anti-inflammatories and analgesics, may be indicated. Acute rotator cuff tear may indicate the need for limited opioids use.
> >
> > ii. There is some evidence that intra-articular triamcinolone provides pain relief for up to 3 months in elderly patients with full thickness rotator cuff tears, and that a single injection is likely to be as beneficial as two injections.
> >
> > iii. There is some evidence that in the setting of supraspinatus tendinosis or partial thickness tears less than 1 cm in size, either dry needling or an injection of 3 ml of platelet-rich plasma (PRP) have clinical benefits lasting up to 6 months, and that the benefits of PRP appear to be greater than those for dry needling. Dry needling has not been proven to be an efficacious therapy for supraspinatus tendinitis. There is good evidence that in the setting of rotator cuff tendinopathy, a single dose of PRP provides no additional benefit over saline injection when the patients are enrolled in a program of active physical therapy. There is strong evidence that platelet rich therapy does not show a clinically important treatment effect for shoulder pain or function when given as an adjunct to arthroscopic rotator cuff repair. However, at present, there is also a lack of standardization of platelet

preparation methods, which precludes clear conclusions about the effect of platelet-rich therapies for musculoskeletal soft tissue injuries. Therefore, PRP is not generally recommended except under specific circumstances. Refer to Section F. 4, b., Platelet-Rich Plasma.

iv. Relative rest initially and procedures outlined in Section F. Therapeutic Procedures - Non-operative. Therapeutic rehabilitation interventions may include ROM and use of a home exercise program and passive modalities for pain control. Therapy should progress to strengthening and independent home exercise programs targeted to ongoing ROM and neuromuscular re-education of shoulder girdle musculature. Maladaptive compensatory strain patterns should always be addressed. There is some evidence that in patients over 55 with nontraumatic small tears of the supraspinatus tendon, an intervention of home exercise supervised by a shoulder-trained physiotherapist, may be as beneficial at one year as the same physiotherapy program initiated after acromioplasty or acromioplasty with repair of the rotator cuff.

v. Return to work with appropriate restrictions should be considered early in the course of treatment. Refer to Section F.13. Return to Work. The injured worker should adhere to the written work restrictions not only in the workplace, but at home and for 24 hours per day.

vi. Other therapies outlined in Section F. Therapeutic Procedures - Non-operative, may be employed in individual cases.

f. Surgical Indications:

Goals of surgical intervention are to restore functional anatomy by re-establishing continuity of the rotator cuff, addressing associated pathology and reducing the potential for repeated impingement. If no increase in function for a partial tear is observed after 6 to 12 weeks, a surgical consultation is indicated. For full-thickness tears, it is thought that early surgical intervention produces better surgical outcome due to healthier tissues and often less limitation of movement prior to and after surgery. Patients may need pre-operative therapy to increase ROM.

33. Based upon the evidence presented, the ALJ finds that Dr. Kelly failed to follow the non-operative treatment guidelines before recommending and proceeding with surgical intervention on January 26, 2023.

34. During cross-examination, Dr. Failinger testified that he was unaware of what caused Claimant to develop pain because her pain was so diffuse. (Hrg. Trans., P. 90, ll. 17-19. He also testified that it was reasonable to infer that a muscle in the lower rotator cuff (infraspinatus) or the pectoralis or latissimus or even the distal triceps could have been strained resulting in symptoms. *Id*. at p. 91, ll. 10-20.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the Claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Compensability

C. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l) (b), C.R.S.*

D. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted*

by U.S. Court of Appeals, 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). In this case, there is little question that Claimant has established that her alleged right shoulder injury occurred within the time and place limits of her employment and during an activity connected to her job-related duties as a phlebotomist for Employer. Nonetheless, the question of whether Claimant's alleged shoulder injury arose out of the alleged MOI on November 10, 2022, must also be answered affirmatively before the claimed injury can be determined to be compensable.

E. The existence of a causal relationship between Claimant's MOI and her right shoulder/arm condition is a question of fact. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985).* The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). In this case, the evidence presented fails to convince the ALJ that Claimant has established a causal relationship between her November 10, 2022 work duties and her right supraspinatus tearing, biceps tendinitis, adhesive capsulitis and/or right AC joint arthrosis. Based upon the evidence presented, the ALJ is not persuaded that Claimant's right shoulder symptoms and need for surgery are related to the November 10, 2022 incident involving the hot pack. Here, the evidence presented supports a finding that Claimant's right shoulder rotator cuff tear, AC joint arthrosis and labral tearing were pre-existing and chronic in nature. With respect to Claimant's right shoulder symptoms and need for treatment, the ALJ credits the testimony of Dr. Failinger to find that record does not describe any activity, which would likely result in an acute injury to or aggravation of a pre-existing condition involving the upper rotator cuff, specifically the supraspinatus, the biceps, or the labrum giving rise to Claimant's symptoms. While it is possible that Claimant's right shoulder symptoms could be caused by strain of the lower potions of the rotator cuff, i.e. the infraspinatus or the pectoralis or latissimus, Claimant failed to establish with a reasonable degree of medical probability that any of these anatomical structures were injured and therefore, are the probable source of her pain. Rather, the evidence presented supports a conclusion that Claimant's right shoulder symptoms probably represent the natural progression of the underlying pre-existing pathology revealed on her MRI.

F. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d

999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

G. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as eluded to by Respondents, the occurrence of symptoms following an incident at work may represent the natural progression of a pre-existing condition that is unrelated to Claimant's employment related duties. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found here, the ALJ credits the opinions of Dr. Failinger to conclude that Claimant's right shoulder symptoms and need for treatment, including surgery, is probably related to and emanating from the natural progression of her pre-existing right shoulder condition, i.e. supraspinatus fraying, bicipital tendonitis AC joint arthrosis and labral tearing/degeneration rather than an acute injury/or aggravation experiencing while activating a hot pack. While Claimant's belief that her right shoulder symptoms were caused by the incident involving the hot pack is sincere, there simply is insufficient forensic evidence to connect her MOI to her current right shoulder symptoms and need for surgical intervention. Consequently, the ALJ concludes that Claimant has failed to prove, to a reasonable degree of medical probability, that her alleged right shoulder injury arose out of the November 10, 2022 incident involving the activation of a hot pack. Because Claimant has failed to establish the requisite causal connection between her employment and her alleged injury, her claims for benefits, including medical treatment and lost wages, must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove, by a preponderance of the evidence, that she sustained compensable injuries to her right shoulder as a consequence of her November 10, 2022 work duties. Accordingly, Claimant's claim for medical benefits, including the January 26, 2023, right shoulder surgery performed by Dr. Kelly is denied and dismissed.

2. Claimant's request for TTD benefits is denied and dismissed.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 31, 2023

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-199-142-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the situs of claimant's left upper extremity's functional impairment causally related to this claim's injury is above claimant's left arm at the shoulder, and that claimant's impairment rating should be converted from the scheduled 25% impairment of the left arm at the shoulder as found by the ATP to 15% of claimant's whole-person.

2. Whether Claimant, as a result of his July 13, 2022 injury, has been seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view, so as to entitle him to a disfigurement award.

FINDINGS OF FACT

1. Claimant was a rocker framer for Respondent-Employer who injured his left shoulder on January 13, 2022, when he tripped on a raised concrete curb and landed on his left shoulder.

2. Claimant sought treatment at Midtown Occupational Health Services with Dr. Kirk Holmboe, on January 26, 2022. Dr. Holmboe referred Claimant for a left shoulder MRI.

3. On February 4, 2022, Claimant underwent an MRI of his left shoulder. The MRI showed "full-thickness partial supraspinatus and infraspinatus tendon tearing with medial retraction of the tendons," among other pathologies. Based on the results of the MRI, Claimant was referred to Dr. Douglas Foulk at Panorama Orthopedics and Spine Center.

4. Dr. Foulk recommended a left shoulder arthroscopy with rotator cuff repair, subacromial decompression, and debridement, which Claimant underwent with Dr. Foulk on March 3, 2022.

5. Claimant began physical therapy for his left shoulder on April 7, 2022, at Midtown. At that appointment, Claimant reported pain in the anterior shoulder and in the distal biceps. Claimant also complained of pain with palpitation on the anterior deltoid, pectoralis minor, and upper trapezius. On cervical side-bending and rotation, Claimant exhibited tightness. The therapist also noted that Claimant exhibited poor eccentric control of the scapula, a tight pectoralis minor, and a tight subscapularis. The therapist performed soft tissue mobilization of the upper trapezius, the levator scapulae, pectoralis minor, and biceps. Claimant also

performed stretches of the upper trapezius and levator scapulae as well as "scap squeezes."

6. Throughout Claimant's treatment, Claimant's complaints included left elbow tingling and numbness and weakness in his fingers and hand. Claimant also continued to receive treatment for his pectoralis, upper trapezius, and scapula over the course of his physical therapy.

7. On August 26, 2022, Claimant underwent electrodiagnostic testing of the left arm. The results were "[e]ssentially normal."

8. At Claimant's September 16, 2022 visit with Dr. Lon Noel at Midtown, Dr. Noel observed limited range of motion of Claimant's cervical spine. Dr. Noel also found tenderness to palpitation on the midline of Claimant's cervical spine, as well as tenderness and tightness of his left sided paracervical musculature extending into his trapezius ridge area. Dr. Noel again noted limited range of motion with tenderness to palpitation in the midline and tightness in the left trapezius area at the September 26, 2022 appointment.

9. On November 22, 2022, Dr. Noel determined Claimant had reached maximum medical improvement with a 25% upper extremity impairment rating. The impairment consisted of 21% for loss of active range of motion at the shoulder and 5% for acromial coplaning. He noted that the scheduled rating, if converted to a whole-person impairment rating, would be 15% of the whole person. Dr. Noel also recommended some maintenance medical care and provided Claimant with permanent work restrictions of no lifting or carrying more than ten pounds and no overhead work.

10. Respondents filed a Final Admission of Liability (FAL) on December 7, 2022, consistent with Dr. Noel's MMI determination, impairment rating, and maintenance recommendation. Claimant filed an AFH requesting conversion of the scheduled impairment rating to a whole-person rating.

11. Dr. John Burris performed an independent medical examination (IME) and issued a report on April 25, 2023, at Respondents' request. Claimant described his mechanism of injury and history of treatment to Dr. Burris. Claimant reported to Dr. Burris that he would primarily use his right hand for routine household chores and that he had some difficulty showering and dressing due to pain in his left shoulder with reaching. Claimant also reported to Dr. Burris that as of the date of the IME Claimant was experiencing pain diffusely from the left side of his neck, through the left posterior shoulder and shoulder blade, and along the left side of his spine to his left low back region. Claimant rated the pain at seven out of ten. The Court finds that Claimant's statements made to Dr. Burris were credible, as was Dr. Burris's account of Claimant's statements.

12. In his report, Dr. Burris opined that Claimant's functional impairment was "limited to at or below the left arm at the shoulder." Dr. Burris reasoned that "objective diagnostic testing, including a cervical spine MRI and left upper extremity EMG do not identify any work-related pathology proximal to the left shoulder." This was despite the MRI showing rotator cuff tears. Dr. Burris also felt that Claimant exhibited a nonphysiologic presentation, opining that Claimant's pain complaints were "out of proportion to the nature of his . . . condition and the documentation in the records." He felt that the examination was impeded by "extreme somatic focus, pain behaviors, and numerous inconsistencies." Based on this, Dr. Burris felt that Claimant's subjective complaints were unreliable. Having excluded subjective complaints, Dr. Burris opined that the objective testing did not reveal any functional impairment of the shoulder proximal to the arm. Based on the totality of the evidence, the Court does not find Dr. Burris's opinions credible or persuasive.

13. At hearing, Claimant credibly testified his shoulder caused pain that ran up his neck, the side of his head, and down to the scapula, and that his injury affects his ability to sleep, do grocery shopping, clothe himself, and clean himself. He also credibly testified that his inability to work overhead prevents him from working as a carpenter like he had prior to the injury. The Court finds that Claimant's functional impairment manifests in inhibiting Claimant's ability to meet some of his personal needs and to pursue the profession as a carpenter.

14. Claimant also revealed at hearing that he had been working a new job for his brother's towing business since the fall of 2022. As part of the job, Claimant would drive a flatbed tow truck that he kept parked at his home and he would tow disabled vehicles. Claimant would respond to calls at all hours and would sometimes work alone.

15. Claimant also testified at hearing that he had a shoulder slump as a result of the injury, which he showed to the Court. The Court observed a left shoulder slump of about one inch. Claimant also showed the Court four arthroscopic scars on the left shoulder. The top one was about 0.5 x 0.25 inches and somewhat discolored. Another scar was 0.5 x 0.25 inches, and another on the back of the shoulder was 0.25x 0.25 inches. On top of the shoulder was a very light scar that was 0.625 x 0.25 inches.

16. The Court finds Claimant's testimony credible.

17. Dr. Burris also testified at hearing. Dr. Burris testified that Claimant's range of motion and responses to palpation were vastly different and inconsistent when Claimant's was actively being examined and when he was not being formerly examined by Dr. Burris. He explained during his hearing testimony that Claimant would flex his neck to look down at Dr. Burris who was seated below Claimant without difficulty or limitation and he would fluidly and easily turn his head to the left and right when talking with Dr. Burris and the interpreter during the examination. However, Dr. Burris testified that during formal range of motion

testing, Claimant would not flex his cervical spine downwards, and his right and left turning motion were markedly reduced as compared to his movements when talking with the interpreter and Dr. Burris.

18. In response to Claimant's testimony about his new job operating a tow truck, Dr. Burris testified that Claimant did not disclose that job to him at the IME. Dr. Burris felt that Claimant would not be able to perform the tasks associated with that work if Claimant's limitations, symptoms, and complaints voiced at the IME were true.

19. The Court does not find Dr. Burris's testimony or opinions expressed in his IME report credible.

20. Because of his work injury, Claimant has functional impairment that is not fully enumerated on the schedule of injuries involving the loss of an arm at the shoulder. Claimant proved by a preponderance of the evidence that he suffered functional impairment to his left shoulder not listed on the schedule of disabilities.

21. Based on Claimant's testimony and the records submitted at hearing, Claimant underwent surgery to his left shoulder. That surgery caused visible disfigurement to his body consisting of four arthroscopic portal scars as described above. Claimant also has a disfigurement consisting of a one-inch left shoulder slump arising from his injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Whole-person Conversion

The ALJ is the finder of fact on the question of whether the Claimant sustained a "loss of an arm" within the meaning of schedule of disabilities in § 8-42-107(2)(a), C.R.S., or a whole person rating under § 8-42-107(8)(c), C.R.S. *Strauch v. PSL Swedish Healthcare System,* 917 P. 2d 366, 369 (Colo.App.1996). In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883, 884 (Colo.App.1996)*; Strauch* at 368-369.

Injury is the manifestation in part or parts of the body which been impaired or disabled as a result of the industrial accident. *Mountain City Meat v. ICAO,* 904 P.2d 1333 (Colo. App. 1995). The part of the body that sustains the ultimate loss is not necessarily the particular part of the body where the injury occurred. *McKinley v. Bronco Billy's,* 903 P.2d 1239, 1242 (Colo.App.1995). When evaluating functional impairment the ALJ shall look at the alteration of the claimant's functional abilities by medical means and by non-medical means, as well as the claimant's capacity to meet personal, social, and occupational demands. *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333, 1337 (Colo. 1996).

In this case, Claimant's situs of impairment is proximal to the glenohumeral joint or on the body. As found above, even early in his treatment, Claimant exhibited tenderness in his cervical spine and left trapezius. Claimant received treatment for his injury directed at his pectoralis, upper trapezius, and scapula over the course of his physical therapy, all parts of the body not contained within the schedule of disabilities set forth at § 8-42-107(2)(a), C.R.S. Furthermore, part of Claimant's permanent impairment rating is 5% for acromial coplaning. That is, a portion of Claimant's rating was based upon surgery Claimant received to his acromion, a portion of the scapula, which lies proximal to the shoulder joint and is not part of the arm.

Aside from the anatomy of Claimant's symptoms, treatment, and impairment rating, Claimant's functional ability to meet his personal and occupational demands has been substantially altered. Claimant credibly testified that his injury affects his ability to sleep, do grocery shopping, clothe himself, and clean himself. This is consistent with Claimant's permanent work restrictions of no lifting or carrying more than ten pounds and no working overhead.

Although Respondents presented the testimony and opinions of Dr. Burris that Claimant's function working his new job driving a tow truck would exceed Claimant's demonstrated level of function at the IME with Dr. Burris, the Court does not find Dr. Burris's testimony credible or persuasive when considering the totality of the evidence. Even if the Court were to find that Claimant exhibited symptom magnification, the quality of Claimant's symptoms and functional impairment, as found by the Court, are such that they are not limited to Claimant's arm at the shoulder.

Claimant has therefore met his burden of proving by a preponderance of the evidence that his functional impairment is not contained within the schedule set forth at § 8-42-107(2)(a), C.R.S., and that the scheduled impairment rating Claimant received should more appropriately be a whole-person impairment rating.

Disfigurement

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

Based on Claimant's testimony and the records submitted at hearing, the surgery Claimant underwent caused visible disfigurement to his body consisting of four arthroscopic surgical port scars on his left shoulder of varying pigmentation, as well as a shoulder slump on the left.

As a result, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to § 8-42-108(1), C.R.S. As a result, the ALJ awards Claimant $1,157.00 in disfigurement benefits.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant permanent partial disability benefits based on a 15% whole-person impairment rating, subject to any applicable cap, credits, or offsets.

2. Respondents shall pay Claimant $1,157.00 in disfigurement benefits.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 19, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are reasonably necessary and related to the admitted May 12, 2018 injury, including physical therapy, massage therapy, chiropractic treatment and injections for the right knee and the left shoulder.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

Generally

1. Claimant sustained admitted work related injuries to her right knee, left hip, left shoulder, cervical spine, and lumbar spine in the course and scope of her employment with Employer on May 12, 2018 in a motor vehicle accident (MVA) when driving between two of Employer's locations.

Pertinent Medical Records

2. Over a thousand pages of records were submitted in this matter. This ALJ only summarizes those records that were pertinent to the decision in this matter and disregarded the multiple duplicate records submitted by both parties.

3. On June 18, 2019 Dr. Russell Swann of Advanced Orthopedic recommended a medial unicompartmental arthroplasty of the right knee (UKA) as she had exhausted all conservative care options. He opined that the MVA impact caused a loose osteochondral fragment which had progressed over the year to full thickness cartilage loss. He diagnosed osteonecrosis of the right femur, chondromalacia of the right knee, and osteoarthritis of the knee. He sent a Surgery Request Form on June 20, 2019. Peer review on June 29, 2019 stated that the surgery was reasonably necessary. Surgery took place on November 4, 2019.[1] Dr. Swann's PA, Mr. Jennings, referred Claimant to physical therapy on November 19, 2019.

4. The MRI of the right knee on July 29, 2020 showed mild edema in the soleus muscle and hemiarthroplasty hardware in the medial aspect of the knee with small knee joint effusion and a small amount of subchondral bone marrow edema in the lateral patella, as read by Dr. Brian Cox.

5. On August 26, 2020 Claimant's MRI of the lumbar spine showed L1-2, L2-3 mild disk bulge, mild bilateral L3-4 neuroforaminal narrowing without spinal canal

[1] It is not clear from the record why the significant delay.

stenosis, L4-5 diffuse disk bulge with mild facet arthropathy resulting in moderate bilateral neuroforaminal narrowing without spinal canal stenosis and L5-S1 mild-to-moderate bilateral facet arthropathy.

6. Claimant was seen by a second opinion physician regarding the right knee and possible total knee arthroplasty. On December 4, 2020 Dr. Jared Michalson opined that the UKA was stable without clinical or radiographic abnormality at the site of her prior surgery, other than swelling of the right knee and medial joint line and anserine bursal area exquisite tenderness. He did recommend an anserine bursal corticosteroid injection and recommended that Claimant be seen by one of the physiatrist on his team regarding the findings on the most recent MRI.

7. Respondents had Claimant examined by independent medical examiner (IME) Dr. John Raschbacher on January 8, 2021. He took a history from Claimant and reviewed medical records as well as examined Claimant. At that time he opined that Claimant was at MMI as of March 13, 2020 with regard to all work related injuries, including the cervical spine, thoracic spine, lumbar spine, right knee and left shoulder. He opined that all massage, chiropractic and other therapies were no longer needed and only should continue with her home exercise program (HEP), orthopedic annual exam per protocol, and maintenance medications.

8. On July 12, 2021 Dr. Brian Shea, the designated Division of Workers' Compensation Independent Medical Examination (DIME) physician, issued a report regarding Claimant noting that he opined that Claimant was not at maximum medical improvement regarding the left shoulder, as Claimant required further evaluation to determine if she was a surgical candidate. He also recommended Claimant have a follow up surgical evaluation for the right knee. Dr. Shea made a causation determination that the cervical spine, lumbar spine, the right knee, the left shoulder were injuries related to the May 12, 2018 MVA. He also opined that everything except for the left shoulder was at MMI. Dr. Shea reviewed the medical records including Dr. Raschbacher's evaluation, which stated that Claimant was at MMI as of March 13, 2020 for the right knee injury approximately six months after the knee surgery. He noted that Dr. Raschbacher declined to rate the left shoulder, cervical spine or lumbar spine problems. Dr. Shea provided preliminary impairment ratings for all four areas.

9. In a review of systems, Dr. Shea noted that Claimant walked with a mild limp favoring her right knee. Claimant reported that the knee popped and was swollen on occasion, but hurt every day as did the low back, the left shoulder and the cervical spine. Claimant reported to Dr. Shea that the nerve block performed by Dr. Sasha gave her significant relief and would be open to another set of injections. On exam he noted mild edema around the knee and distally, loss of range of motion of the knee and tenderness on the medial joint aspect. He also documented loss of range of motion (ROM) of the left shoulder, a positive Neer's and Hawkins', giveaway strength on resistance, and tenderness over the left AC joint. He noted loss of ROM of the cervical spine, hypertonicity of the trapezius, rhomboid and levator scapula muscles, left greater than right. He also documented loss of ROM of the lumbar spine.

10. On July 29, 2021 Dr. Shea issued an Addendum report in response to a letter from Division on an Incomplete Notice. He corrected his preliminary impairment rating at that time.

11. Dr. Shea provided a Second Addendum on August 8, 2021 in response to further notice from Division. He corrected his prior report pursuant to Division's definition of MMI. He noted that "[Per the letter, it is stated that a patient reaches MMI when all areas being treated as a result of a work-related injury are stable. The patient is considered not to be at MMI until all areas being treated are stable." Dr. Shea then opined that Claimant was not at MMI.

12. On August 26, 2021 Claimant followed up with Dr. Mark Failinger regarding her left shoulder. Dr. Failinger recommended a new MRI as the prior one was dated. Claimant requested consideration of further surgery. Dr. Failinger stated that following MRI results he would determine if there was any further pathology present and would consider if either further injections or surgery were appropriate. On the same day, Kelsie McManus of Concentra ordered the MRI.

13. The MRI conducted on September 14, 2021 of the left shoulder showed moderately severe tendinosis, an interstitial type tear of the distal supraspinatus tendon, mild subscapularis tendinosis, mild degeneration intraarticular segment with fluid within the biceps tendon sheath suggesting tenosynovitis, degenerated posterior and superior labrum, though no full thickness tear was identified, moderately severe degenerative changes of the acromioclavicular joint, small distal acromial and clavicular spurs and extrinsic compression of the supraspinatus complex compatible with the presence of impingement. There was also fluid in the glenohumeral joint.

14. On September 16, 2021 MA Illiana Garcia of Concentra ordered physical therapy and massage therapy as well as follow up with Dr. Failinger and Dr. Sacha. Dr. Failinger noted that proceeding with surgery had to be delayed until Claimant recovered from a left ankle surgery.

15. On December 30, 2021 Dr. Failinger attended Claimant with regard to her left shoulder. Claimant inquired about the possibility of proceeding with surgery. On examination Dr. Failinger noted mild levator scapulae and trapezial discomfort with palpation. There was significant tenderness in the greater tuberosity and some mild-to-moderate biceps tenderness. There was loss of range of motion (ROM), positive Hawkins, positive Speed and positive O' Brien tests. Dr. Failinger stated that they went over the risks, alternatives and benefits and the 4-6 month recovery time. They discussed that there were no guarantees but that she had lived with this for so long and she had focal identifiers of pain and therefore it was reasonable to proceed with the surgery. He stated he would see if the surgery was approved.

16. On January 26, 2022 Dr. Failinger sent a Surgery Authorization request form regarding a left shoulder scope, decompression, distal clavicle resection and possible biceps tenolysis.

17. On March 22, 2022 Dr. Robert L. Messenbaugh issued an opinion and responded to inquiries by Respondents. At that time, Dr. Messenbaugh opined that the treatment recommended by Dr. Failinger for authorization to treat the left shoulder with a

scope, decompression, distal clavicle resection and possible biceps tenolysis was reasonable necessary and related to the injury she sustained on May 12, 2018. He also opined that it would be reasonable to proceed with injections into the left shoulder.

18. On May 18, 2022 Respondents filed a General Admission of Liability pursuant to the Division Independent Medical Examination physician's opinion that Claimant had not reached maximum medical improvement.[2]

19. Dr. Failinger noted on May 23, 2022 that the surgery he proposed had originally been denied by Respondent and Claimant's case closed. He further stated that now the claim had been reopened and the surgery authorized.

20. On May 27, 2022 Brittany Lain, NP, of Concentra, indicated that the left shoulder surgery was approved. She documented that Claimant had ongoing chronic pain in the left shoulder that was achy and dull, described as constant and increased with movement. The pain was worsened by overhead movements, internal rotation, and symptoms were associated with decreased ROM and occasional tingling.

21. On June 14, 2022 Ms. Lain noted that the left shoulder surgery was delayed due to a heart murmur and was awaiting cardiology clearance to proceed with the rescheduled surgery.

22. Claimant was examined by Dr. Nicholas Olson, a pain management physician, on June 28, 2022, for opioid review post-surgery. Dr. Olson reviewed the chart noting that Claimant had genicular nerve blocks on two occasions, which provided good relief and a diagnostic response to the procedure.

23. On July 12, 2022 Claimant proceeded with a left shoulder examination under anesthesia, left biceps tenolysis, subacromial decompression, distal clavicle resection, and os acromiale shell resection. He diagnosed her with a left shoulder os acromiale, biceps tendinosis and left shoulder impingement. During surgery he noted that the os acromiale was unstable. Dr. Failinger prescribed physical therapy before the surgery for 18 visits on June 6, 2022 and again for an additional 12 weeks post-surgery.

24. On July 18, 2022 Bradley Schoonveld, P.T. performed an initial physical therapy evaluation noting significant pain complaints following surgery. He recommended starting with pendulum exercises and range of motion. By July 27, 2022 he noted that Claimant was progressing well but slowly due to stiffness and soreness related to the surgery. She had passive ROM (PROM) of 130° flexion and abduction, and 30-40° for external rotation (ER) and internal rotation (IR). On August 3, 2022 he stated that Claimant was progressing and doing well with PT and had started on table slides in both flexion and abduction as well as stretching behind the back. On August 10, 2022 Mr. Schoonveld indicated that, while Claimant had some additional soreness related to the PT, she had demonstrated a PROM of flexion to 160-170°, 180° abduction, and about 60° of IR/ER, which was increased from prior measurements.[3]

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[2] Neither party offered an explanation as to why it took over nine months to file the GAL pursuant to the DIME physician's report. This ALJ infers from the evidence that the delay was caused by Claimant's left ankle fracture and that Respondents were awaiting Dr. Messenbaugh's report.

[3] This ALJ determined that a change from 130° to 180° PROM flexion is a significant functional gain.

25. Dr. Darla Draper of Concentra issued a report on August 8, 2022 documenting Claimant's medical history since 2018. She noted that an injection performed by Dr. Failinger on October 4, 2018 helped Claimant's symptoms in the right knee. She also noted that chiropractic and massage treatments had been helping. She noted that the note of January 20, 2020 documented that the steroid injection into the left shoulder also helped. She noted that on March 13, 2020 Claimant was using a cane and that it was making her left shoulder worse but that the massage treatment was helping. Dr. Draper documented that on September 18, 2020 Claimant was receiving benefit from chiropractic and massage therapy for the back and neck. She noted that the records from October 16, 2020 and December 18, 2020 showed Claimant was benefiting from physical therapy and dry needling as well as massage therapy and chiropractic care for her back, left shoulder and right leg. She documented that the right knee genicular injection performed by Dr. Sacha on January 7, 2021 also helped a lot.

26. On August 23, 2022 Claimant was seen by Dr. Nicholas Olsen who documented increased knee pain. He noted that Claimant had a previously radiofrequency neurotomy by Dr. Sacha with a report of 8 months of relief following the procedure. Claimant was interested in the possibility of repeating the procedure. To determine if Claimant was candidate for radiofrequency neurotomy, repeat genicular nerve block was required. Dr. Olsen indicated he would request for bilateral femoral genicular nerve block and a medial tibial genicular nerve block for the right knee.

27. On August 23, 2022 Dr. Olsen sent a referral prescription to insurance for bilateral femoral genicular nerve block.

28. Mr. Schoonveld specified on August 24, 2022 that Claimant's left shoulder stiffness continued to improve, that she had good ROM with full elevation and IR. By August 31, 2022 Claimant started rotator cuff (RC) strengthening, including stretches with pulleys and wall slides.

29. On August 30, 2022 Dr. Olsen sent an authorization request to the insurance for right knee genicular block at Belmar ASC.[4]

30. On September 6, 2022 Dr. Draper referred Claimant for massage therapy and chiropractic care for her low back and neck and refilled medication. She noted Claimant was awaiting authorization for the genicular injection for the right knee with Dr. Olsen and a steroid injection for the left shoulder with Dr. Failinger.

31. On September 9, 2022 Dr. Olsen sent a second request for authorization to the insurance for right knee genicular block at Belmar ASC

32. Dr. Olsen noted on October 5, 2022 that the genicular nerve injection had been denied by Respondent and that they had requested a RIME with Dr. Raschbacher.

33. Dr. Raschbacher performed a follow-up Independent Medical Evaluation on October 7, 2022. Dr. Raschbacher stated that Claimant had very good results from the knee surgery and that there was no clear objective basis or psychological reason for Claimant's continued complaints of the degree of discomfort Claimant had at the knee. Dr. Raschbacher opined that Claimant was at MMI for all body parts except for her

[4] This ALJ infers that ASC means "Ambulatory Surgery Center."

shoulder due to her surgery and that MMI for Claimant's shoulder was expected 4-6 months from the date of the surgery.

34. While Claimant continued to have pain and difficulties with the left shoulder, on October 17, 2022 Mr. Schoonveld point out that Claimant should request a steroid injection so that she could get past the shoulder pain and further progress with strengthening therapy.

35. Dr. Draper attended Claimant on October 21, 2022 noting the denial of the genicular injections for the right knee. She also noted that Dr. Failinger ordered 3-4 weeks of physical therapy for the left shoulder and that he was considering another steroid injection. She also noted that chiropractic treatment and massage therapy for the back and neck had been denied. She noted that Claimant was approximately 25% of the way towards meeting the physical requirements of her job. She continued to diagnose contusion of the left shoulder, internal impingement of the left shoulder, lumbosacral strain, contusion of the right knee and cervical strain. She recommended continued therapy and noted that Claimant was not at MMI but she anticipated MMI approximately 6-9 months post op.

36. On November 7, 2022, Dr. Failinger found on exam that Claimant had loss of ROM of the left shoulder, a positive impingement test. Dr. Failinger administered a cortisone injection into Claimant's left shoulder. Claimant had been participating in physical therapy and was recommended to continue this treatment.

37. On November 15, 2022 Dr. Olsen continued to recommend the genicular nerve block for the right knee.

38. Mr. Schoonveld documented on November 22, 2022, December 5, 2022 and December 12, 2022 that Claimant continued to progress with her strengthening.

39. On December 29, 2022 Dr. Patrick Antonio of Concentra documented that Claimant had been attending physical therapy at Colorado Rehabilitation but had not gone for two weeks and needed a new referral for continued care. He noted that the October left shoulder steroid injection by Dr. Failinger helped the left shoulder but did continue with stiffness and problems with overhead reach. He noted that he would order further physical therapy to improve strength and ROM.

40. On February 6, 2023, Dr. Failinger again found that Claimant had a positive impingement test and administered another cortisone injection into Claimant's left shoulder.

41. On February 8, 2023 Dr. Viola-Lewis noted that Claimant was still not at MMI. Dr. Viola-Lewis noted that Claimant was 75% of the way towards meeting the physical requirements of her job. She made a referral to Dr. Failinger to evaluate the right knee. She referred Claimant for physiatry evaluation of the back, left shoulder and right knee. She also made another referral for physical therapy. She continued to state that Claimant was not at MMI.

42. Dr. Viola-Lewis noted on March 17, 2023 as follows:

> She has seen Dr. Failinger who wants her to get another opinion from a joint specialist about her knee. He feels she would benefit from injection but cannot get one approved, and she has not had sufficient improvement with PT. She has also had issues getting PT

> approved through WC. There is significant psychosocial impact on her with the left shoulder dysfunction as well as the knee pain and dysfunction. She has not been back to PT despite it being ordered as it was not approved. Will order it again with the goal of returning her left shoulder to full ROM within 4 weeks, and improving strength in her knee within the same timeframe. She will be seeing Dr. Mikalson (sic.) next week. Will have her follow up a few days after that so that we can discuss the results. The delay in getting tests and treatments approved is delaying her care significantly and contributing to a backslide of physical function. She is not at MMI at this time.

43. On exam, Dr. Viola-Lewis noted Claimant had limited range of motion of the left shoulder with pain in all planes. She also noted edema in the medial aspect of the right knee consistent with lymphedema and a slight limp. Claimant continued to be only 75% towards meeting the physical requirements of her job. At that time she ordered chiropractic care for her lower and upper (thoracic) back and physical therapy for another 4 weeks, 3 times a week, for her left shoulder, lower back and left knee, which she stated were medically necessary to address objective impairment and functional loss and to expedite return to full activity. She continued to state that Claimant was not at MMI.

44. Dr. Michelle Viola-Lewis noted on April 6, 2023 as follows:

> This has been a very prolonged case and there has been efforts to continue appropriate care for this patient. She did see Dr. Mikalson (sic.) and got an injection in her knee, and sees Dr. Failinger in his private office again next week for her shoulder. She continues to have pain in her left shoulder, but the right knee is better following the injection. She has been going to the gym and doing her HEP on her own. At this point there has been no further therapies approved through WC…

45. On exam, Dr. Viola-Lewis noted that Claimant had limited ROM in all planes of the left shoulder with pain, but she could extend it to just above shoulder height. Her tone and strength were normal. She noted right knee edema distal to the medial aspect of the knee consistent with lymphedema. The surgical scar was well healed, but Claimant had a slight limp on the right. Dr. Viola-Lewis stated that Claimant was not at MMI but was anticipated to be at MMI in 6-9 months post-op. She continued to provide work restrictions, and Claimant was to return for consult in two weeks.

46. Claimant was attended by authorized treating provider, Dr. Jared Michalson on April 11, 2023. Dr. Michalson noted that it was a telemedicine visit to discuss laboratory results after evaluation of a painful previously performed partial knee arthroplasty of the medial compartment. He recommended claimant follow up for an intra-articular right knee corticosteroidal injection for both diagnostic and therapeutic purposes. He noted that, if Claimant obtained benefit from the injection, then he would proceed with a conversion from partial knee arthroplasty to a total knee arthroplasty.

47. Dr. Raschbacher issued an addendum report on April 19, 2023, opining that Claimant was at functional standstill for her left shoulder and therefore at MMI. Dr. Raschbacher made comments regarding his record review of the rehabilitation notes which stated “She had continued achiness. She is seen through December 12, 2022. On December 12, 2022, the shoulder was felt to be doing well, and she had progressed with her strengthening. However, it continued to ache all the time.” Nothing in this review is persuasive that Dr. Raschbacher pointed to specifics in the record that might indicate that Claimant was not continuing to obtaining functional benefits from the prescribed physical therapy.

48. From the records provided, none stated that Claimant had completed the recommended treatment, nor did an authorized treating provider place Claimant at MMI. Nor was there a follow up DIME report placing Claimant at MMI.

Claimant's testimony

49. Claimant stated that after she underwent the left shoulder surgery by Dr. Mark Failinger on July 12, 2022, she was prescribed physical therapy, which continued through December 23, 2022, at which time no further therapy for the left shoulder was approved. She had undergone approximately 23 sessions of therapy and she was advised that she was only approximately 50% of where she should be.

50. Claimant stated that the surgery was not initially helpful but was in physical therapy, which was helpful and provided significant benefit, including easier movement, less sharp shooting pains or numbness and performing activities of daily living such as grooming and getting dressed. Since the therapy was stopped, Dr. Failinger provided multiple injections to assist with the pain. Further, Claimant had decreased range of motion and strength since stopping the physical therapy. She stated that both her authorized providers at Concentra as well as Dr. Failinger recommended ongoing physical therapy for her left shoulder.

51. Claimant also stated that Dr. Draper of Concentra had recommended ongoing massage therapy and chiropractic treatment for her neck and low back in August of 2022, which was not approved. Claimant had recently attended a chiropractic and massage visit on her own because she was having difficulty walking, which she paid out of her own pocket. She received significant benefit for her neck and low back from the chiropractic treatment. The treatment loosened up the scar tissue and allowed for more range of motion, including for the left shoulder. The massage also helped with the pain in her left knee. Her level of function improved with better movement overall. Claimant would like to continue with the chiropractic and massage for her neck and low back, as well as the prescribed physical therapy for the left shoulder and right knee.

52. Claimant had a partial knee arthroplasty on November 4, 2019. Following which she had a genicular block and ablation procedure. She was under the care of Dr. Nicholas Olsen after that procedure. The first procedure took place approximately nine months following her knee surgery because she was unable to mobilize her knee. Within a week of the procedure, she was able to rotate the knee on a bike compared to being almost immobilized before. Dr. Olson has recommended another genicular block as a diagnostic tool to determine if another ablation would be beneficial. The procedure was also denied by Respondent. Claimant would like to continue to pursue this injection.

Dr. Failinger's testimony

53. Dr. Mark Failinger, an ATP, was called by Claimant as an expert and was accepted as an expert in orthopedics, specializing in knees and shoulders, and as a Level II accredited physician by the Division of Workers' Compensation. He stated that he performed the surgery of July 2022 and he had seen Claimant as recently as April 2023, noting that Claimant was still struggling, having problems at that point in time. He explained that Claimant had a very unique problem called oseo acromelia in the left

shoulder, which caused her to have immobility of the limb, and is a very difficult problem. He also explained that Claimant continued to have knee problems, which is load bearing joints, and take priority over non-weight bearing joints like a shoulder.

54. Dr. Failinger opined that it was inappropriate to close out Claimant's case at this time. She requires an MRI to determine the status of the shoulder joint and determine what are the next steps for Claimant. He recommended a follow up evaluation to reevaluate her home program and the repeat MRI to determine Claimant's current status. He explained that significant pain is inhibiting her progress and he needed to figure out what factors are causing that and address the pain before there can be any further functional improvement. He did state that Claimant would benefit from physical therapy for strengthening of her shoulder.

55. Dr. Failinger also stated that since the genicular block had been beneficial in the past, that it was reasonable for her to have the procedure to eliminate pain that is not amenable to other measures and were shown to be more beneficial than cortisone injections. Dr. Failinger explained that surgery, such as the arthroplasty in this case, does not resolve the problems with the patient's pain, genicular nerve blocks can provide significant relief from that pain. The genicular nerves are the nerves that surround the knee and there are superior, inferior, medial and lateral to the knee. The block acts to block the nerve signals to the brain so that the patient can increase function.

56. While Dr. Failinger explained that he had not been the primary provider to treat Claimant's knee condition for several years. However, he does know what complaints Claimant has as those are discussed when he sees her. He treated her for her knee in 2018 and after that until he made a referral to Dr. Michalson and she later had the arthroplasty with Dr. Russell Swann. He explained that the genicular block is similar to the medial branch block as it is used as a diagnostic tool to determine if an ablation would be reasonably necessary.

57. Dr. Failinger continued to recommend physical therapy for the shoulder but acknowledged that she had slow progress and limited results with therapy as she continues with significant pain.

Dr. Raschbacher's testimony

58. Dr. John Raschbacher was called by Respondent as an expert in occupational medicine and as a Level II accredited physician. He performed an independent medical evaluation in 2021 and again on October 7, 2022. He opined in both evaluations that Claimant had reached maximum medical improvement for all body parts, except with the left shoulder. He stated that it was unlikely that further application of the medical resources was going to change Claimant's subjective reports and that there was nothing objective that is new or different to treat.

59. Dr. Raschbacher noted that the Medical Treatment Guidelines' General Guidelines Principles espouse that if there is no positive response to treatment, then the patient is at MMI. He explained that by December 29, 2022 Claimant was no longer showing positive objective response to therapy and she was 5 months post-surgery, effectively noting that Claimant's left shoulder condition had plateaued. He explained that

normally, people with pathology like rotator cuff tears, usually by six months, barring some type of complication, they are at MMI and can transition to a home exercise program.

Ultimate Findings of Fact

60. As found, Claimant has shown that the chiropractic treatment for the low back and neck is reasonably necessary to treat Claimant's work related injuries of May 12, 2018. Claimant has been deemed to be not at MMI and her authorized treating providers, Drs. Viola-Lewis and other Concentra providers have continued to prescribed the treatment to cure and relieve Claimant from the effects of the injuries. The Concentra providers have stated that the treatment is medically necessary to address objective impairment and functional loss and to expedite return to full activity. To the contrary, Dr. Raschbacher has been stating that Claimant has been at MMI since March 13, 2020. However, the DIME physician on August 8, 2021 stated that Claimant was not at MMI. Respondents have failed to show that Claimant is, in fact, at MMI or overcome the DIME's opinion to that effect. This is confirmed by the opinion of Dr. Draper that noted that Claimant had improvement and benefit from the prescribed treatments. The Concentra providers are more persuasive than contrary opinions of Dr. Raschbacher. Claimant has proven by a preponderance of the evidence that she is entitled to the chiropractic and massage therapy for the work related lumbar spine and cervical spine conditions.

61. As found, Claimant has shown that the Claimant requires further physical therapy, injections and further diagnostic testing for the left shoulder. Contrary to the opinions of Dr. Raschbacher, Claimant did not have a simple rotator cuff repair that should have healed normally within the six month period that he predicted. Clearly, Claimant's left shoulder condition is more complex. Dr. Failinger clearly explained that Claimant continues to have pathology that requires further treatment for her range of motion and strengthening. Dr. Failinger's opinion in this regard are more credible and persuasive than the contrary opinions of Dr. Raschbacher. Further, Dr. Raschbacher's opinion that Claimant plateaued in physical therapy is not credible. The physical therapy notes indicated to the last documented therapy on December 12, 2022 that Claimant continued to progress with strengthening. Further, Claimant's testimony as well as Dr. Viola-Lewis' opinion that Claimant's function has slid back due to lack of continuing therapy is credible and persuasive. Dr. Failinger also persuasively stated that a new MRI was required to determine how Claimant's shoulder is progressing following the complicated July 2022 surgery. Dr. Failinger opined that the shoulder steroid injections have helped with Claimant's function as well, which is credible and persuasive. Claimant has proven by a preponderance of the evidence that Claimant requires continuing physical therapy for the left shoulder, an MRI, further orthopedic evaluation as well as injections.

62. As found, Claimant has shown that she requires further evaluation and treatment for the right knee injury caused by the May 12, 2018 work related injury. Dr. Failinger opined that the genicular nerve block given by Dr. Sacha helped significantly in the past, providing approximately 8 months of relief. He credibly opined that this would be a good course of treatment for Claimant so that she may progress with further range of motion and in her function. He also credibly opined that steroid injections and or further orthopedic evaluation was appropriate in this matter. Dr. Michalson has requested further diagnostic testing to determine if a revision of the UKA to a TKA would be appropriate.

He credibly noted that the block may assist in that determination. Claimant has proven by a preponderance of the evidence, that it is more likely than not, she requires further treatment for her right knee, including the genicular nerve block as prescribed by Dr. Olsen, physical therapy as prescribed by Dr. Viola-Lewis, and further orthopedic evaluations with Dr. Michalson.

63. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay

witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of*

Denver v. Industrial Commission, 682 P.2d 513 (Colo.App. 1984). The question of whether the need for treatment is causally related to an industrial injury is also one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo.App. 1999).

However, before applying the facts to address whether any particular medical benefit requested was reasonably necessary and related to the injury, in this case the issue of maximum medical improvement should be discussed. MMI is defined as that point in time when any medically determinable physical or medical impairment resulting from an injury has become stable and when no further treatment is reasonably expected to improve the condition. Sec. 8-40-201(11.5), C.R.S.; *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001, 1005 (Colo.App.2002). It represents the optimal point at which the permanency of a disability can be discerned and the extent of any resulting impairment can be measured. *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo.App.1998). It also marks the point when permanent disability benefits become available and temporary disability benefits become unavailable. *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246, 254 n. 1 (Colo.1996); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637, 639 (Colo.App.1997) (once a claimant reaches MMI, any temporary wage loss ceases and the continuing wage loss becomes permanent and is to be compensated by permanent benefits under Section 8-42-107, C.R.S., not by the continued payment of temporary benefits).

In *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010) the Court of Appeal relied on the Nebraska Supreme Court opinion in *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232, 238 (2005). They addressed the issue of whether MMI was to be determined by reference to the date of healing for each injury resulting from an accident, or by reference to the date on which all of the claimant's injuries from the accident have reached maximum recovery. The court observed that a given condition cannot be both temporary and permanent at the same time and that allowing partial MMI creates the possibility of simultaneous permanent and temporary disability awards for the same accident, a result inconsistent with the workers' compensation scheme and established precedent. *Rodriguez,* 707 N.W.2d at 238. The court concluded that, even if the medical evidence establishes that a claimant's different injuries have different dates of maximum medical recovery, the legally significant date, that is, the date of MMI for purposes of ending a claimant's temporary disability, is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident. Rodriguez, 707 N.W.2d at 239, as cited in *Paint Connection Plus, supra.*

The Court in *Paint Connection Plus* agreed with the reasoning in *Rodriguez* and found it consistent with various Panel decisions holding that MMI is not “divisible and cannot be parceled out among the various components of a multi-faceted industrial injury.” *Parra v. Haake Farms,* W.C. No. 4-396-744 (ICAO Mar. 8, 2001*); Bernard v. Current, Inc.*, W.C. No. 4-213-664 (ICAO Oct. 6, 1997); *Carrillo v. Farmington PM Group,* W.C. No. 3-111-178 (ICAO Aug. 26, 1997); *Powell v. L & D Electric*, W.C. No. 4-150-716 (ICAO Mar. 21, 1997). The Colorado Workers' Compensation Act contains no provision for “partial maximum medical improvement” either. *Bernard v. Current, Inc., supra*; *Carrillo v. Farmington PM Group, supra*; *Powell v. L and D Electric*, *supra*. The rationale for these decisions is that calculation of permanent disability benefits is contingent on the

attainment of MMI. Thus, a gap in benefits could occur if the claimant's temporary benefits were terminated but entitlement to permanent benefits could not be determined since the claimant is not at MMI for all aspects of the injury. Thus, where a single industrial injury has multiple components, the claimant's entitlement to temporary disability benefits is not terminated by operation of Sec. 8-42-105(3)(a) until the claimant has reached MMI for all components of the injury. *Paint Connection Plus v. I.C.A.O., supra* at 433.

Respondents have a remedy. They may have been able to utilize the procedure of Sec. 8-42-107(8)(b)(II), C.R.S., which permits an employer or insurer to request an independent medical examination (IME) if no MMI determination has been made and at least twenty four months have passed since the date of the injury." *Paint Connection Plus v. Indus. Claim Appeals Office, supra.* And while in this matter, a DIME has already happened, a follow-up DIME may be requested pursuant to W.C.R.P. Rule 11-7(A).

Under Sec. 8-42-107(8)(b)(I), C.R.S., the initial determination of MMI is to be made by an authorized treating physician, and neither party may dispute the accuracy of the treating physician's MMI determination in the absence of a Division-sponsored independent medical examination (DIME). *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996); *Aren Design, Inc. v. Becerra*, 897 P.2d 902 (Colo. App. 1995). However, a physician has not determined MMI unless the physician opines that all compensable components of the injury are stable. Here, the evidence presented at hearing including exhibits and testimony, fails to show that any authorized treating physician has placed Claimant at MMI for all injuries and the DIME physician found Claimant not at MMI on August 8, 2021, following correcting his report pursuant to an inquiry from Division. Therefore, as found, Claimant has not been determined to be at MMI for her May 12, 2018 work related injury as of the date of the hearing.

As found, Claimant has established that she is entitled to further medical benefits to cure and relieve her of the work related injuries from her May 12, 2018 MVA. Those benefits are found to be, more likely than not, reasonably necessary and related to the injury, including the chiropractic, massage and physical therapy treatment recommended by Dr. Viola-Lewis, the MRI of the left shoulder and steroid injections recommended by Dr. Failinger; and the genicular nerve blocks recommended by both Dr. Olsen and Dr. Failinger. Further, Claimant has proven by a preponderance of the evidence that the treatment that is found to be reasonably necessary is also causally related to the original work related injuries. Dr. Shea' opinion that the cervical spine, lumbar spine, left shoulder and right knee injuries are causally related to the May 12, 2018 work related MVA was credible and persuasive over the contrary opinions of Dr. Raschbacher. Claimant has proven that Claimant is entitled to these benefits.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for the reasonably necessary and related medical benefits including:

a. The physical therapy for the left shoulder and right knee as prescribed by Dr. Viola-Lewis;

b. The steroid injections for the left shoulder as prescribed by Dr. Failinger;

c. The chiropractic treatment and massage therapy treatment for the cervical spine and the lumbar spine as prescribed by Dr. Viola-Lewis;

d. The left shoulder MRI recommended by Dr. Failinger, followed by a follow up evaluation with Dr. Failinger for reevaluation of the status of the left shoulder;

e. The genicular nerve block for the right knee prescribed by Dr. Olsen and recommended Dr. Failinger;

f. The follow up orthopedic evaluation for the right knee prescribed by Dr. Failinger and Dr. Nichalson for consideration of the revision and TKA;

2. All payments of medical benefits are subject to the Colorado Fee Schedule.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 21st day of July, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-217-323-001

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $834.59.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on September 20, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his September 20, 2022 industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant chose the Concentra Medical Centers clinic at Chambers Road and I-70 as his ATP.

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period November 3, 2022 through December 19, 2022.

6. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his November 2, 2022 termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

FINDINGS OF FACT

1. Employer is a warehouse distribution chain. Claimant worked for Employer as a forklift operator.

2. Claimant testified that on September 20, 2022 he sustained an injury to his lower back while at work breaking down freight. He was specifically transferring product from one pallet to another when he felt a pop in his lower back. Claimant also experienced a sharp pain when bending. He verbally reported the injury to his supervisor [Redacted, hereinafter EE] and spoke to two managers about his injury.

3. On September 21, 2022 Employer completed an "Incident Reporting System" form. Employer filed a First Report of Injury on the same date.

4. On September 21, 2022 Claimant spoke to Employer's Operations Manager [Redacted, hereinafter MM] about seeking medical attention. Claimant remarked that MM[Redacted] pulled up the Concentra Medical Centers clinic at Chambers Road and I-70 on his telephone and told Claimant to go there because the facility was close. Claimant understood that he was being directed to a specific Concentra clinic. The record reveals that Claimant did not receive a list of at least four designated medical providers.

5. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation. Claimant reported he was lifting boxes when he injured his lower back. He noted sharp pain with movements and constant pressure/compression. Nurse Practitioner Susan Bradshaw determined her objective findings were consistent with a work-related mechanism of injury. She mentioned tenderness in the entire left paraspinal and left sacroiliac joint, left-sided muscle spasms, and limited range of motion. NP Bradshaw assessed Claimant with a lumbar strain.

6. After receiving work restrictions from Concentra, Employer offered Claimant modified duty employment. Claimant had been working eight-hour shifts prior to his injury, but Employer reduced Claimant's schedule to four-hour shifts.

7. From September 21, 2022 through April 3, 2023, Claimant regularly received treatment with Eric Chau, M.D. at the Concentra Medical Center, Denver-Aurora North facility, at Chambers Road and I-70. Claimant did not express any concerns about his treatment. He acknowledged he did not have any issues about the way Dr. Chau treated him.

8. Concentra providers continued to note that their objective findings were consistent with a work-related mechanism of injury on September 23, October 6, and October 21, 2022. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy.

9. On October 7, 2022 Dr. Chau added an addendum to Claimant's medical records. He stated "Unable to tolerate mod duties. WR updated." Dr. Chau specifically decreased Claimant's maximum lifting restriction from 20 to 15 pounds, decreased his pushing and pulling ability from 30 to 20 pounds, and limited him to sitting 50% of the time. His restrictions also included limited bending at the waist and frequently changing positions. There was no provision about only working four hours per day.

10. On October 11, 2022 MM[Redacted] authored an e-mail regarding the status of Claimant's case. He recounted that on October 6, 2022 Claimant provided him with a doctor's note regarding work restrictions. MM[Redacted] explained that Claimant could return to full duty work and his only restrictions were no lifting in excess of 20 pounds and no pushing/pulling in excess of 30 pounds. Claimant responded that his physician would send an updated note stating that he could not work more than four hours per day. Although MM[Redacted] commented that medical providers did not limit Claimant

to working four hours per day, Claimant responded that it was not about the medical note, but about how his body was feeling. MM[Redacted] concluded that he would await an updated doctor's note.

11. On October 21, 2022 Concentra Nurse Practitioner Maryna Halushka decreased Claimant's lifting maximum to 15 pounds. She also noted that Claimant could not bend at the waist.

12. On October 28, 2022 Employer had a meeting with Claimant. Employer notified Claimant they would abide by his work restrictions of no lifting in excess of 15 pounds and no bending at the waist. Effective Monday October 31, 2022, Claimant would be required to work eight hours each day. Employer noted they would work with Claimant as best as possible to enable breaks when necessary. Claimant was to continue his housekeeping duties for four hours per day but would engage in other tasks if housekeeping was not needed for the rest of his shift.

13. Claimant did not respond positively to returning to an eight-hour shift by stating he was treated like "trash." He never communicated to Employer that Dr. Chau limited him to a four-hour shift or was uncomfortable performing housekeeping tasks within a 15-pound lifting restriction with no bending at the waist.

14. Claimant testified at hearing he did not feel safe working full duty and/or eight-hour shifts. When asked directly whether Dr. Chau limited him to work only four-hour shifts, Claimant responded that he could not recall.

15. The medical records from Dr. Chau never documented a four-hour work restriction. Claimant was cleared to work an eight-hour shift throughout his medical treatment. The four-hour limitation was an added accommodation provided by Employer.

16. MM[Redacted] testified that he believed the last day of accommodating four-hour shifts for Claimant was October 28, 2022. Claimant then worked four-hour days on October 31, 2022 and November 1, 2022. He received his final occurrence point for failing to adhere to the work schedule on November 1, 2022 because he did not inform a manager he was leaving work after four hours. Claimant was thus terminated from employment on November 2, 2022.

17. MM[Redacted] explained that Employer used an occurrence point system to track Claimant's disciplinary violations. He testified the point system provided that failing to call-in or show-up for work was worth six points, a call-out with insufficient time to cover the absence cost two points, tardiness over six minutes was valued at one point, and failing to adhere to the schedule was worth one point.

18. Claimant accumulated 10 occurrence points prior to his September 20, 2022 date of injury. MM[Redacted] detailed that Claimant specifically accrued two points on July 12, 2022, August 11, 2022, August 16, 2022, August 25, of 2022 and September 19, of 2022 for a total of 10 points. He remarked that Claimant was informed of his point total on the day of his lower back injury or September 20, 2022.

19. Claimant obtained his eleventh occurrence point on October 19, 2022 for tardiness of eight minutes. His final point accrued on November 1, 2022 for failure to adhere to the eight hours per day work schedule. After accumulating 12 occurrence points, Claimant was aware that he could be terminated. Claimant was then released by Employer on November 2, 2022.

20. Claimant has been unable to return to any employment since November 2, 2022. He remarked that he continues to suffer from dull lower back pain. His mobility and functionally remain limited.

21. Claimant continued to receive treatment with Concentra through the spring of 2023. Concentra referred him for a lumbar MRI on March 24, 2023.

22. On March 4, 2023 Claimant underwent an independent medical examination with Alicia Feldman, M.D. Claimant recounted that on September 20, 2022 he was picking up a product at work, felt a pop in his lower back and had the acute onset of back pain. Dr. Feldman reviewed Claimant's medical records and conducted a physical examination. She determined "[i]t appears that [Claimant] sustained a lumbar sprain/strain injury while at work on September 20, 2022." Dr. Feldman reasoned that the natural history of his injury is that it should resolve within weeks to months. She attributed "100%" of Claimant's care between September and December 2022 to his September 20, 2022 industrial injury. However, Dr. Feldman explained that Claimant's lower back symptoms as of the date of the independent medical examination were not related to his work injury on September 20, 2022. She reasoned that Claimant had reached Maximum Medical Improvement (MMI) at his December 19, 2022 follow-up appointment with Dr. Chau.

23. On April 10, 2023 Dr. Chau reviewed Dr. Feldman's independent medical examination. Based upon the report, Dr. Chau back-dated Claimant's MMI date to December 19, 2022. Nevertheless, Claimant commented he would like additional medical care, but does not want to return to Concentra. He would like to visit a doctor in Aurora, Colorado and is requesting a change of physician to David Reinhardt, M.D.

24. Claimant has established it is more probably true than not that he suffered a lower back injury during the course and scope of his employment with Employer on September 20, 2022. Claimant's testimony and the persuasive medical records reveal that Claimant injured his lower back while at work. Initially, Claimant credibly testified that he was transferring product from one pallet to another when he felt a pop in his lower back. Claimant also experienced a sharp pain when bending. He verbally reported the injury to his supervisor EE[Redacted] and spoke to two managers about his injury. On September 21, 2022 Employer completed an "Incident Reporting System" form and filed a First Report of Injury.

25. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation. Claimant reported he was lifting boxes when he injured his lower back. NP Bradshaw determined her objective findings were consistent with a work-related mechanism of injury. She assessed Claimant with a lumbar strain.

Concentra providers continued to note their objective findings were consistent with a work-related mechanism of injury on September 23, October 6, and October 21, 2022. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy.

26. Independent medical examination physician Dr. Feldman reviewed Claimant's medical records and conducted a physical examination. Claimant recounted that on September 20, 2022 he was picking up a product at work, felt a pop in his lower back and had the acute onset of pain. Dr. Feldman determined "[i]t appears that [Claimant] sustained a lumbar sprain/strain injury while at work on September 20, 2022.

27. Based on Claimant's credible testimony and a review of the medical records, Claimant suffered a lower back injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury on September 20, 2022.

28. Claimant has demonstrated it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his September 20, 2022 industrial injury. Claimant obtained authorized medical treatment for his injury through Concentra. Providers continually noted that their objective findings were consistent with a work-related mechanism of injury. They referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy. Moreover, independent medical examination physician Dr. Feldman attributed "100%" of Claimant's care between September and December 2022 to his September 20, 2022 industrial injury. Accordingly, the record reveals that Claimant's employment activities on September 20, 2022 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

29. Claimant has proven it is more probably true than not that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

30. Because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose the Chambers Road Concentra location for treatment. Respondents have demonstrated it is more probably true than not that Claimant chose the Chambers Road Concentra facility as his ATP through his conduct. Initially, Claimant remarked that on September 21, 2022 MM[Redacted] pulled up the Concentra clinic at Chambers Road and I-70 on his telephone and told Claimant to go there because the facility was close. Claimant

understood that he was being directed to a specific Concentra clinic. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation with NP Bradshaw.

31. From September 21, 2022 through the date of MMI on December 19, 2022 and afterwards through April 3, 2023, Claimant regularly followed-up with Dr. Chau at the Concentra Medical Center, Denver-Aurora North facility, at Chambers Road and I-70. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy. Claimant acknowledged that he did not have any issues about the way Dr. Chau treated him. He scheduled his own appointments, provided transportation and voluntarily presented for care. Claimant did not express any dissatisfaction with his care, raise any concerns with the designation or request a change of physician.

32. In contradiction to Claimant's position, even after he endorsed the issue of change of physician in his Application for Hearing filed on January 5, 2023, he nevertheless continued to treat with Dr. Chau. Although Claimant testified he requested David Reinhard, M.D. as his new physician, he never provided the request to Respondents. He did not schedule an initial consultation with Dr. Reinhardt or receive treatment with him through the date of this Order.

33. In the days after the September 20, 2022 work accident Claimant signified through his conduct that he selected Concentra at Chambers Road and I-70 for treatment. Claimant obtained a variety of medical treatment through Concentra on numerous occasions between September 21, 2022 through the date of MMI on December 19, 2022, and afterwards through April 3, 2023. Accordingly, by continuing to obtain treatment for several months at the Chambers Road and I-70 Concentra facility without concerns, Claimant exercised his right of selection and chose his ATP.

34. Respondents have proven it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on November 2, 2022 Claimant was terminated from employment after accumulating 12 occurrence points. He specifically received his final occurrence point for failing to adhere to the work schedule on November 1, 2022 because he did not inform a manager he was leaving work after four hours.

35. On October 28, 2022 Employer notified Claimant they would abide by his work restrictions of not lifting more than 15 pounds and no bending at the waist. Effective Monday October 31, 2022, Claimant would be required to work eight hours a day. MM[Redacted] testified that he believed the last day of accommodating four-hour shifts for Claimant was October 28, 2022. The medical records from Dr. Chau never documented a four-hour work restriction. Claimant was cleared to work an eight-hour shift throughout his medical treatment. The four-hour limitation was an added accommodation provided by Employer. The record reveals that, although Employer offered to work with Claimant to provide necessary breaks, he had a negative reaction

about returning to an eight-hour modified shift.

36. MM[Redacted] credibly explained that Employer used an occurrence point system to track Claimant's disciplinary violations. He testified the point system provided that failing to call-in or show-up for work was worth six points, a call-out with insufficient time to cover the absence cost two points, tardiness over six minutes was valued at one point, and failing to adhere to the schedule was worth one point. Claimant accrued 10 occurrence points prior to his September 20, 2022 date of injury. MM[Redacted] detailed that Claimant specifically accrued two points on July 12, 2022, August 11, 2022, August 16, 2022, August 25, of 2022 and September 19, 2022 for a total of 10 points. He remarked that Claimant was informed of his point total on the day of his lower back injury or September 20, 2022. Claimant obtained his eleventh occurrence point on October 19, 2022 for tardiness.

37. Despite knowledge that he had accumulated 11 occurrence points, Claimant nevertheless decided to work four-hour shifts on October 31, 2022 and November 1, 2022 in defiance of Employer's request. Claimant worked four hour days on October 31, 2022 and November 1, 2022, but failed to inform a manager before departing. On November 1, 2022, due to the volitional acts of failing to work an eight-hour shift and not checking with a manager before his shift ended, Claimant accrued his twelfth occurrence point and became eligible for termination.

38. Claimant failed to complete his scheduled shifts on October 31, 2022 and November 1, 2022. The record reflects that he was aware termination could result. To the extent Claimant argues that his attendance issues were related to his work injury, his contention is not credible. The weight of the evidence establishes that Claimant simply violated known and well-communicated attendance policies. He thus precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Because Claimant was responsible for his termination, he is not entitled to receive TTD benefits for the period November 3, 2022 through his date of MMI on December 19, 2022.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with

Employer on September 20, 2022. Claimant's testimony and the persuasive medical records reveal that Claimant injured his lower back while at work. Initially, Claimant credibly testified that he was transferring product from one pallet to another when he felt a pop in his lower back. Claimant also experienced a sharp pain when bending. He verbally reported the injury to his supervisor EE[Redacted] and spoke to two managers about his injury. On September 21, 2022 Employer completed an "Incident Reporting System" form and filed a First Report of Injury.

8. As found, on September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation. Claimant reported he was lifting boxes when he injured his lower back. NP Bradshaw determined her objective findings were consistent with a work-related mechanism of injury. She assessed Claimant with a lumbar strain. Concentra providers continued to note their objective findings were consistent with a work-related mechanism of injury on September 23, October 6, and October 21, 2022. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy.

9. As found, independent medical examination physician Dr. Feldman reviewed Claimant's medical records and conducted a physical examination. Claimant recounted that on September 20, 2022 he was picking up a product at work, felt a pop in his lower back and had the acute onset of pain. Dr. Feldman determined "[i]t appears that [Claimant] sustained a lumbar sprain/strain injury while at work on September 20, 2022."

10. As found, based on Claimant's credible testimony and a review of the medical records, Claimant suffered a lower back injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury on September 20, 2022.

Medical Benefits

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

12. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his September 20, 2022 industrial injury. Claimant obtained authorized medical treatment for his injury through Concentra. Providers continually noted that their objective findings were consistent with a work-related mechanism of injury. They referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy. Moreover, independent medical examination physician Dr. Feldman attributed "100%" of Claimant's care between September and December 2022 to his September 20, 2022 industrial injury. Accordingly, the record reveals that Claimant's employment activities on September 20, 2022 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

Right of Selection

14. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck,* 996 P.2d at 229. However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

15. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO,

Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

16. As found, Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

17. As found, because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose the Chambers Road Concentra location for treatment. Respondents have demonstrated by a preponderance of the evidence that Claimant chose the Chambers Road Concentra facility as his ATP through his conduct. Initially, Claimant remarked that on September 21, 2022 MM[Redacted] pulled up the Concentra clinic at Chambers Road and I-70 on his telephone and told Claimant to go there because the facility was close. Claimant understood that he was being directed to a specific Concentra clinic. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation with NP Bradshaw.

18. As found, from September 21, 2022 through the date of MMI on December 19, 2022 and afterwards through April 3, 2023, Claimant regularly followed-up with Dr. Chau at the Concentra Medical Center, Denver-Aurora North facility, at Chambers Road and I-70. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy. Claimant acknowledged that he did not have any issues about the way Dr. Chau treated him. He scheduled his own appointments, provided transportation and voluntarily presented for care. Claimant did not express any dissatisfaction with his care, raise any concerns with the designation or request a change of physician.

19. As found, in contradiction to Claimant's position, even after he endorsed the issue of change of physician in his Application for Hearing filed on January 5, 2023, he nevertheless continued to treat with Dr. Chau. Although Claimant testified he requested David Reinhard, M.D. as his new physician, he never provided the request to Respondents. He did not schedule an initial consultation with Dr. Reinhardt or receive treatment with him through the date of this Order.

20. As found, in the days after the September 20, 2022 work accident Claimant signified through his conduct that he selected Concentra at Chambers Road and I-70 for treatment. Claimant obtained a variety of medical treatment through Concentra on numerous occasions between September 21, 2022 through the date of MMI on December 19, 2022, and afterwards through April 3, 2023. Accordingly, by continuing to obtain

treatment for several months at the Chambers Road and I-70 Concentra facility without concerns, Claimant exercised his right of selection and chose his ATP. *See Murphy-Tafoya v. Safeway, Inc.*, WC 5-153-600 (ICAO, Sept. 1, 2021) (where right of selection passed to the claimant, six months of treatment with personal provider following her work injury demonstrated that the claimant had exercised her right of selection); *Rivas v. Cemex Inc*, WC 4-975-918 (ICAO, Mar. 15, 2016) (through his words and conduct in obtaining treatment from Workwell for five weeks the claimant selected Workwell as his authorized provider); *Pavelko v. Southwest Heating and Cooling*, WC 4-897-489 (ICAO, Sept. 4, 2015) (the claimant exercised his right of selection when he obtained treatment for two years from provider recommended by the employer); *Tidwell v. Spencer Technologies*, WC 4-917- 514 (ICAO, Mar. 2, 2015) (where the employer failed to designate an authorized medical provider and claimant obtained treatment from personal physician Kaiser for his industrial injury, the claimant selected Kaiser as his authorized treating physician through his words or conduct).

Temporary Total Disability Benefits/Responsible for Termination

21. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

22. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the

resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

23. As found, Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on November 2, 2022 Claimant was terminated from employment after accumulating 12 occurrence points. He specifically received his final occurrence point for failing to adhere to the work schedule on November 1, 2022 because he did not inform a manager he was leaving work after four hours.

24. As found, on October 28, 2022 Employer notified Claimant they would abide by his work restrictions of not lifting more than 15 pounds and no bending at the waist. Effective Monday October 31, 2022, Claimant would be required to work eight hours a day. MM[Redacted] testified that he believed the last day of accommodating four-hour shifts for Claimant was October 28, 2022. The medical records from Dr. Chau never documented a four-hour work restriction. Claimant was cleared to work an eight-hour shift throughout his medical treatment. The four-hour limitation was an added accommodation provided by Employer. The record reveals that, although Employer offered to work with Claimant to provide necessary breaks, he had a negative reaction about returning to an eight-hour modified shift.

25. As found, MM[Redacted] credibly explained that Employer used an occurrence point system to track Claimant's disciplinary violations. He testified the point system provided that failing to call-in or show-up for work was worth six points, a call-out with insufficient time to cover the absence cost two points, tardiness over six minutes was valued at one point, and failing to adhere to the schedule was worth one point. Claimant accrued 10 occurrence points prior to his September 20, 2022 date of injury. MM[Redacted] detailed that Claimant specifically accrued two points on July 12, 2022, August 11, 2022, August 16, 2022, August 25, of 2022 and September 19, 2022 for a total of 10 points. He remarked that Claimant was informed of his point total on the day of his lower back injury or September 20, 2022. Claimant obtained his eleventh occurrence point on October 19, 2022 for tardiness.

26. As found, despite knowledge that he had accumulated 11 occurrence points, Claimant nevertheless decided to work four-hour shifts on October 31, 2022 and

November 1, 2022 in defiance of Employer's request. Claimant worked four hour days on October 31, 2022 and November 1, 2022, but failed to inform a manager before departing. On November 1, 2022, due to the volitional acts of failing to work an eight-hour shift and not checking with a manager before his shift ended, Claimant accrued his twelfth occurrence point and became eligible for termination.

27. As found, Claimant failed to complete his scheduled shifts on October 31, 2022 and November 1, 2022. The record reflects that he was aware termination could result. To the extent Claimant argues that his attendance issues were related to his work injury, his contention is not credible. The weight of the evidence establishes that Claimant simply violated known and well-communicated attendance policies. He thus precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Because Claimant was responsible for his termination, he is not entitled to receive TTD benefits for the period November 3, 2022 through his date of MMI on December 19, 2022.

ORDER

1. Claimant suffered a compensable lower back injury at work on September 20, 2022.during the course and scope of his employment with Employer.

2. Respondents are financially responsible for payment of Claimant's reasonable and necessary medical expenses for the treatment of his lower back injury.

3. The right to select an ATP passed to Claimant through Respondents' failure to provide a written list of at least four designated medical providers

4. Claimant selected the Chambers Road and I-70 Concentra facility as his ATP.

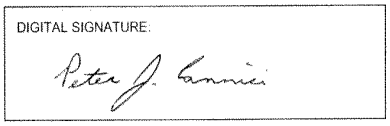
5. Claimant's request for TTD benefits for the period November 3, 2022 through his date of MMI on December 19, 2022 is denied and dismissed because he was responsible for his November 2, 2022 termination from employment.

6. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For*

further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: July 25, 2023.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-177-827-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that his scheduled eye impairment should be converted to a whole-person impairment.

2. Whether Respondents are liable for penalties for filing the final admission of liability beyond the period set forth in § 8-42-107.2(4)(c), C.R.S.

3. Whether Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his right eye on July 8, 2021, while he was re-treading a tire. A strap broke and struck his safety goggles, causing the safety goggles to strike his right eye, causing a full-thickness laceration of his cornea.

2. Claimant was taken to the emergency department at Denver Health that same day and underwent eye surgery, consisting of a peritomy and globe exploration of the right eye.

3. On October 11, 2021, Claimant underwent a second right eye surgery with Dr. Jesse Smith. The procedure was a "[c]omplex [p]hacoemulsification and cataract extraction with intraocular lens implantation, CTR, no kenalog."

4. On October 19, 2021, Claimant saw his authorized treating physician, Dr. Jay Reinsma at Concentra. Dr. Reinsma noted that Claimant had one more follow-up scheduled with a retinal specialist, at which point he anticipated Claimant would be released from care and returned to work at full duty. Dr. Reinsma referred Claimant for an impairment evaluation in anticipation of maximum medical improvement (MMI).

5. Claimant underwent an impairment rating evaluation[1] with Dr. Chester Roe on January 25, 2022. Dr. Roe opined that Claimant had reached MMI with a 99% impairment to his right eye based on Table 2, page 163 of the *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, which given the absence of impairment of the left eye, resulted in a total visual system impairment

[1] The record is ambiguous as to whether this evaluation was at the referral of Dr. Reinsma or whether it was an independent medical examination sponsored by Respondents pursuant to 8-43-404(3), C.R.S. The distinction does not affect the Court's analysis in this case, and so the Court does not make any findings in this regard.

of 25%. Dr. Roe noted that "one entirely blind eye with no visual field can only at worst be a 25% visual system impairment, if the other eye is normal, according to the Guides."

6. Dr. Roe later testified at hearing that Claimant would be legally blind if both eyes were as bad as his right eye. Regarding depth perception, Dr. Roe testified that stereo vision—or vision with two eyes—provides better depth perception than one eye alone. Regarding the impairment, Dr. Roe testified that the visual system chapter of the AMA Guides, the calculations were 99% vision impairment in the right eye, which is a 25% visual system impairment, or 24% whole-person impairment. He clarified that he chose not to assign a whole person impairment for cosmetic disfigurement because he could not perceive much of a pupil abnormality from several feet away. The Court finds Dr. Roe's testimony credible and persuasive.

7. Claimant obtained a Division independent medical examination (DIME) with Dr. James McLaughlin on August 2, 2022, a level II accredited physician under the Workers' Compensation Act.[2] Dr. McLaughlin examined Claimant and noted that Claimant was able to drive his seven-minute commute to work. However, Dr. McLaughlin noted that Claimant had difficulty getting in and out of the vehicle because he has to feel around for the handle, would have to hold onto the railing while ascending or descending stairs, and would sometimes miss his mouth while eating. The Court infers that these difficulties are related to his loss of depth perception resulting from his loss of vision in his right eye.

8. Dr. McLaughlin agreed that Claimant was at MMI, and he determined that date to be January 25, 2022. He assigned a 98% impairment to Claimant's right eye, and therefore a 25% visual impairment. Dr. McLaughlin clarified that this would convert to a whole-person impairment of 24%. Regarding permanent work restrictions, Dr. McLaughlin recommended Claimant not work at exposed heights and not operate heavy equipment, power tools, or sharp tools due to loss of depth perception and decreased stereo acuity.

9. The Court finds Dr. McLaughlin's opinion regarding permanent impairment to equate to total loss of use of the eye.

10. Claimant testified at hearing that he cannot see movement in his right eye and that he sees lots of rays of different colors. Claimant also reported left eye fatigue and headaches. In his testimony, Claimant also recounted his difficulties with depth perception, including difficulty putting paste on his dentures in the morning, difficulty preparing food, and difficulty driving.

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[2] Rule 11-1, W.C.R.P. (2022), requires that a DIME physician be level II accredited, have sufficient recency of experience treating patients, and be board-certified in Colorado. Because Dr. McLaughlin performed the DIME, the Court infers that he met these criteria.

11. The Court finds Claimant's testimony credible. The Court also finds that Claimant's left eye fatigue and headaches are the result of overuse of his left eye to compensate for his right eye's loss of vision. Therefore, those symptoms lead the Court to find that Claimant's right eye impairment is beyond that which is set forth on the schedule of injuries at § 8-42-107(2), C.R.S.

12. The Court finds, based on Dr. McLaughlin's DIME report, Dr. Roe's testimony, and Claimant's testimony, that Claimant's loss of vision in his right eye for which he received an impairment rating from DIME Dr. McLaughlin constitutes a total loss of use of his right eye.

13. Dr. McLaughlin sent a copy of his DIME report to the Division as well as to counsel for the parties at some point in time between August 2 and September 7, 2022. Claimant and Respondents had a copy of the report for review by September 7, 2022 at the latest.

14. On September 7, 2022, The Division of Workers' Compensation issued a notice to the parties that the DIME process had concluded. The notice was sent by e-mail, and a copy was sent to Respondents' counsel. Respondents had actual notice as of September 7, 2022, that the DIME process had concluded.

15. On October 4, 2022, the Division issued a notice to Respondent-Insurer that "[t]he period for filing an application for hearing [pursuant to § 8-42-107.2(4)(c), C.R.S.] has expired and a final admission of liability is required." The Court finds that Respondent-Insurer received a copy of this letter.[3]

16. That same day, [Redacted, hereinafter RO], a representative of Claimant's counsel's office, e-mailed Respondents' counsel advising that the DIME process had concluded on September 7, 2022, and asking whether Respondents would be filing a FAL.

17. Respondents' counsel contacted Claimant's counsel via e-mail on October 10, 2022, regarding the possibility of settlement. Claimant's counsel responded on October 14, stating:

    a. *I have discussed the possibility with the client, and there is a possibility of settlement. However, I would like to receive the FA before evaluating this with the Client. If I'm not mistaken, this was due by September 27, and remains outstanding. Please advise on its status*.

18. On Wednesday, October 19, 2022, [Redacted, hereinafter BS], claims management supervisor for the Division, sent an e-mail to [Redacted, hereinafter JH] of Respondent-Insurer indicating that a "DIME conclusion notice" was sent to Respondent-Insurer on September 7, and that a FAL was due on September 27,

[3] Respondents' counsel, however, did not receive a copy of the letter until October 19, 2022, after learning about the existence of the letter and requesting a copy from the Division.

2022. BS[Redacted] also made reference to the October 4, 2022 letter sent by [Redacted, hereinafter DC]. BS[Redacted] requested that a FAL be filed by that Friday.

19. Respondents filed a FAL on November 7, 2022, admitting for a 25% scheduled impairment rating of the eye based on DIME Dr. McLaughlin's report and corresponding PPD benefits in the amount of $9,456.20. Respondents reserved the right to credit an overpayment of $715.35 toward PPD. The FAL was filed 61 days after the notice of conclusion of the DIME process, and 41 days after the FAL was due pursuant to § 8-42-107.2(4)(c), C.R.S. Based on the multiple notices Respondents received regarding the need to file an FAL, there is clear and convincing evidence that Respondents should have known that an FAL was due by no later than September 27, 2022, and that they were in continuing violation of the Workers' Compensation Act. The Court finds that Respondents' delay in filing the FAL was unreasonable and was the result of negligence. The Court also finds that with each successive notice, the delay in filing of the FAL became more unreasonable.

20. Four days prior to filing the FAL, Respondents had voluntarily issued a lump sum PPD payment to Claimant without discount in the amount of $8,740.85, the value of the admitted PPD minus an asserted overpayment of $715.35. The Court finds this to be a mitigating factor with regard to the issue of penalties. Though, the Court does also observe that Claimant would have been entitled to the same lump sum upon request pursuant to Rule 5-10, W.C.R.P., and § 8-43-203(2)(b)(II).

21. On December 7, 2022, exactly thirty days after the FAL was filed, Claimant filed an Application for Hearing (AFH) to challenge the FAL on the issues of average weekly wage, disfigurement, temporary disability benefits, permanent disability benefits, and penalties. December 7, 2022, was the latest date Claimant could file an AFH challenging the FAL pursuant to § 8-43-203(2)(b)(II), C.R.S.

22. The Court finds that Claimant's choice to wait thirty days from the date of the FAL before filing an AFH, notwithstanding having a copy of the DIME report since at least September 7, 2022, is evidence that Claimant perceived minimal ongoing harm resulting from delay of resolution of the issues endorsed in Claimant's AFH. The Court finds that the harm Claimant sustained as a result of Respondents' late filing of the FAL consisted of a delay in receipt of PPD benefits and a delay in resolution of the hearing issues. The former was somewhat mitigated by Respondents' voluntary payment of a lump sum PPD award without discount. The latter was of little harm, as evidenced by Claimant's own lack of urgency in seeking to challenge the FAL.

23. The harm resulting from the late filing of the FAL was slightly greater than *de minimus*, and the delay resulted from the negligence of Respondents. However, with each successive notice that Respondents received regarding their late FAL, the degree of culpability increased. Therefore, the Court finds that the following

daily penalties during the 41-day delay in filing of the FAL would be fairest and within Respondents' ability to pay:

a. From September 27 through October 4, 2022, daily penalties of $8 per day;
b. From October 5 through October 10, 2022, daily penalties of $10 per day;
c. From October 11 through October 19, 2022, daily penalties of $15 per day; and
d. From October 20 through November 6, 2022, daily penalties of $20 per day.

24. At the time of hearing, Claimant allowed the Court to observe his right eye for a disfigurement award. The Court observed that Claimant's right eye was slightly more dilated than the left and slightly redder. The Court finds that the disparities in pupil dilation and eye redness are related to Claimant's July 8, 2021 injury, and that Claimant has proved by a preponderance of the evidence that he has been seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view, as described, so as to entitle him to a disfigurement award. While the disfigurements are not particularly stark, their location in Claimant's right eye contributes to their prominence. The Court finds that a $700 disfigurement award is appropriate.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*,

183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Whole-Person Conversion

The ALJ is the finder of fact on the question of whether the Claimant sustained a "loss of an arm" within the meaning of schedule of disabilities in § 8-42-107(2)(a), C.R.S., or a whole person rating under § 8-42-107(8)(c), C.R.S. *Strauch v. PSL Swedish Healthcare System,* 917 P. 2d 366, 369 (Colo.App.1996). In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883, 884 (Colo.App.1996)*; Strauch* at 368-369.

Injury is the manifestation in part or parts of the body which been impaired or disabled as a result of the industrial accident. *Mountain City Meat v. ICAO,* 904 P.2d 1333 (Colo. App. 1995). The part of the body that sustains the ultimate loss is not necessarily the particular part of the body where the injury occurred. *McKinley v. Bronco Billy's,* 903 P.2d 1239, 1242 (Colo.App.1995). When evaluating functional impairment the ALJ shall look at the alteration of the claimant's functional abilities by medical means and by non-medical means, as well as the claimant's capacity to meet personal, social, and occupational demands. *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333, 1337 (Colo. 1996).

Section 8-42-107(1), C.R.S., provides that a claimant is limited to a scheduled disability award if the claimant suffers an "injury or injuries" described in subsection (2) of that provision. *Strauch*, 917 P.2d 366. The schedule of impairments includes "[t]otal blindness of one eye." § 8-42-107(2)(gg), C.R.S. However, the Act also provides that "[w]hen an injury results in the total loss or total loss of use of . . . an eye . . . the benefits for such loss shall be determined pursuant to this subsection (8),[4] except as provided in subsection (7)(b)(IV)[5] of this subsection." § 8-42-107(8)(c.5), C.R.S.

The only distinction between these two provisions appears to be between total blindness and total loss of use of an eye. Although the distinction is not obvious at first glance, the Colorado Court of Appeals clarified the distinction in *McKinley v. Bronco*

[4] Whole-person.
[5] Where it provides that you must admit for the scheduled rating if it results in greater compensation.

Billy's, 903 P.2d 1239 (Colo.App.1995). The court in *McKinley v. Bronco Billy's* held that "[i]f the loss of use was partial, then . . . the amount of compensation was to be the proportionate share of the amount stated in the schedule for the total loss of a member." However, if the loss was total, then the permanent partial disability award was to be calculated based on the scheme for whole-person impairments set forth at § 8-42-107(8), C.R.S.

Claimant points to the case of *Parra v. Spectrum Retirement Communities*, W.C. No. 5-052-120-005 (May 6, 2021), as a case analogous to the present one. The panel in *Parra* upheld the ALJ's finding that the claimant's impairment of the eye was not limited to the schedule. The claimant in *Parra* suffered a full-thickness corneal laceration. As a result, he did not have a cornea or lens in his right eye and experienced headaches. Nevertheless, he was able to distinguish between lightness and darkness with his injured eye, as well as perceive motion if within several inches of his eye. The DIME physician declined to assign the claimant a whole-person impairment rating because the claimant still had some vision and still had his eyeball. The ALJ concluded that the claimant sustained a total loss of use of the eye and converted the scheduled rating to a whole-person rating.

The respondents in *Parra* appealed, arguing in part that the ALJ's finding that the claimant had "total loss of use" of his affected eye was not supported by the evidence, and that the loss of use was only partial because the claimant could still distinguish between lightness and darkness and perceive some motion. The ICAO panel, however, upheld the ALJ's finding, citing *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 199 P. 482 (1921), for the proposition that an award for total blindness is correct where the vision remaining is of no value for working. The panel further upheld the finding that the impairment was not contained on the schedule in light of the facts that the claimant's "entire life has been altered by this injury" and the claimant experienced "continual headaches."

Here, just as in *Parra*, Claimant has not sustained enucleation of his right eye. Claimant retains some vision, just like the claimant in *Parra*, but the vision is of no value for Claimant's work. He cannot see movement in his right eye, but can see rays of different colors. Claimant's loss of vision has also caused Claimant continual headaches and altered Claimant's activities of daily living in substantial ways.

Parra is sufficiently analogous to the facts in this case such that the Court concludes, based on *Parra*, that it has the discretion to convert the scheduled eye impairment rating if the Court finds that Claimant sustained a total loss of use of his eye for all practical purposes. *See Mut. Ins. Co.*, 199 P. 482.

As found above, Claimant's loss of vision in his right eye for which he received an impairment rating from DIME Dr. McLaughlin constitutes a total loss of use of his right eye. Additionally, given Claimant's decreased ability to meet his personal needs in his activities of daily living, the strain placed on his contralateral eye, and his recurring

headaches, the Court concludes that Claimant's impairment is beyond that which is set forth on the schedule at § 8-42-107(2), C.R.S.

Therefore, Claimant has proved by a preponderance of the evidence that he is entitled to a conversion of his right eye impairment to a whole-person impairment of 24%.

Penalties

Section 8-43-304(1), C.R.S., provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S., is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005).

Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital*, 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Section 8-42-107.2, C.R.S., provides that Respondents shall, within twenty days after the date of mailing of the Division's notice that hit has received the DIME report, either file a FAL or request a hearing to contest the DIME's findings. As found above, the Division issued its notice on September 7, 2022. Respondents had until September 27, 2022, to either file a FAL or request a hearing challenging the DIME. Respondents did neither. Respondents were therefore in violation of the Act.

The Court also considers whether Respondents' violation of § 8-42-107.2, C.R.S., was reasonable. As found above, it was not. Respondents had notice that they were to file a FAL or request a hearing by no later than September 27, 2022, yet did not.

Section 8-43-304(4), C.R.S. permits an alleged violator twenty days to cure the violation. If the violator cures the violation within the twenty-day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003). Section 8-43-304(4), C.R.S., modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo.App.1997); *see Tadlock v. Gold Mine Casino*, W.C. No. 4-200-716 (May 16, 2007).

Respondents came into compliance with the Act upon filing the November 7, 2022 FAL. However, in so doing, Respondents did not cure the daily violations of the Act already accrued for the period between September 27 and November 6, 2022. Even had it done so, as found above, Claimant has proved by clear and convincing evidence that Respondents should have known they were in violation of the Act. Therefore, penalties are appropriate.

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hosp.*, W.C. No. 4-619-954 (May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005); *Espinoza v. Baker Concrete Construction*, W.C. No. 5-066-313 (Jan. 31, 2020).

When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc.*, W.C. 4-981-806 (July 1, 2019).

As found above, the harm resulting from the late filing of the FAL was slightly greater than *de minimus*. Respondents took measures to mitigate the late filing of the FAL by promptly issuing a lump sum payment without discount of all PPD admitted. The mitigation is partial, as Claimant would have been entitled to the same lump sum upon request pursuant to Rule 5-10, W.C.R.P., and § 8-43-203(2)(b)(II).

As found above, the harm Claimant sustained as a result of Respondents' late filing of the FAL consisted of a delay in receipt of PPD benefits and a delay in resolution of the hearing issues. The former was somewhat mitigated by Respondents' voluntary payment of a lump sum PPD award without discount. The latter was of little harm, as evidenced by Claimant's own lack of urgency in seeking to challenge the FAL.

As for reprehensibility, as found above, Respondents' violation is the result of negligence. Nevertheless, the degree of culpability increased with each successive notice Respondents received that their FAL was untimely. Therefore, the Court concludes that daily penalties should be imposed proportional to the unreasonableness of Respondents' failure to file the FAL during each period during which Respondents had additional notice. Penalties should be imposed as follows:

- From September 27 through October 4, 2022, daily penalties of $8 per day;
- From October 5 through October 10, 2022, daily penalties of $10 per day;
- From October 11 through October 19, 2022, daily penalties of $15 per day; and
- From October 20 through November 6, 2022, daily penalties of $20 per day.

Based on the above findings, the penalties payments should be apportioned equally between Claimant and the Colorado Uninsured Employer Fund.

Disfigurement

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

Based on Claimant's testimony and the records submitted at hearing, Claimant's injury caused a visible disfigurement to his body consisting of slight redness in the right eye and slightly more pupil dilation in the right eye than the left. Claimant has proved entitlement to a disfigurement award. As found above, and as the Court here concludes, a disfigurement award of $700.00 is most appropriate for a disfigurement that is not salient in appearance but located in the prominent location of Claimant's eye.

ORDER

It is therefore ordered that:

1. Respondents shall file an amended FAL admitting for a 24% whole-person impairment.

2. Respondents shall pay daily penalties as follow:

   a. From September 27 through October 4, 2022, daily penalties of $8 per day;
   b. From October 5 through October 10, 2022, daily penalties of $10 per day;
   c. From October 11 through October 19, 2022, daily penalties of $15 per day; and
   d. From October 20 through November 6, 2022, daily penalties of $20 per day.

   The penalties shall be paid 50% to Claimant and 50% to the Colorado Uninsured Employer Fund.

3. Respondents shall pay Claimant a disfigurement award of $700.00.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 25, 2023

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Did Claimant prove by a preponderance of the evidence that she sustained a compensable work injury?

2. If Claimant sustained a compensable work injury, is she entitled to medical benefits?

3. If Claimant sustained a compensable work injury, is Claimant entitled to temporary disability benefits?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 34 year-old woman who worked for Employer. She began working for Employer on December 16, 2019, as a container delivery driver. In February 2021, Claimant was a promoted to roll-off driver and drove a cabover truck. In January 2022, Claimant was assigned a newer model truck, an International. (Tr. 21:12-22:2). Claimant worked full-time, anywhere from 10-12 hours a day, Monday through Friday, and five to eight hours on Saturdays. (Tr. 24:19-23).

2. Claimant credibly testified that the seat in the new truck hung low to the left, and she would compensate the tilt as best she could by using her work gloves to lift the left side up. She estimated the tilt to be at an approximately 35 degree angle. (Tr. 22:14-23:15).

3. Claimant credibly testified that the seat was always uncomfortable and she noticed pain building in her right rear hip area. On or around March 15, 2022, the pain was sharp and she felt a pinching pressure, with random spasms in her right buttocks. Claimant credibly testified she told her supervisor, "Ricky", about the seat. (Tr. 26:12-26).

4. On March 21, 2022, Claimant wrote on the Driver's Daily Vehicle Inspection Report under the section entitled Defect Description, "Driver seat leans to left – causing sciatic pain." (Ex. 5). Claimant credibly testified that Employer replaced the seat cushion, but this did not help with the pain. (Tr. 30:16-20).

5. There is no contrary evidence in the record regarding the driver's seat in Claimant's truck. Claimant's testimony was credible, and the ALJ finds that the driver's seat in Claimant's assigned work truck was tilted, and hung to the left.

6. On April 11, 2022, Claimant went to the emergency room at North Suburban Medical Center. She reported sitting on a lopsided seat for several months, and having a significant increase in right hip pain over the last three weeks. The pain had been intolerable over the previous seven days. Claimant described the pain as a deep burning sensation and a feeling like there was a bubble inside her right hip that radiated down the side of her leg. The pain was substantially worse when sitting. The CT scan and MRI revealed Claimant had a disc extrusion at the L4-L5 level, among other findings. (Ex. 12).

7. On Thursday, April 14, 2022, Claimant emailed [Redacted, hereinafter MA], a regional HR business partner with Employer. Claimant reported that she started experiencing low back pain on March 15, 2022, and she wrote up her truck on March 21, 2022. Claimant explained that her seat was uneven, and she used her work gloves to elevate the left side of the seat, but the pain was becoming increasingly worse. Claimant told MA[Redacted] that she had a bulging disc in her L4-L5 vertebrae, and it was causing severe pain in her sciatic nerve, down to her foot. Claimant explained that she went to the Hospital on April 11, 2022, and they advised her to rest three days. Claimant noted this was her third day of rest, but she was still in "pretty bad shape." Claimant inquired if there was any light work for her to do while the doctors determined how to proceed with her spine. (Ex. 4).

8. MA[Redacted[testified that Claimant filled out paper work on April 14, 2022 regarding her alleged injury. According to MA[Redacted], Claimant wanted to see how she did at home over the weekend, and then she would let Employer know if she wanted to see an Authorized Treating Provider (ATP). On the following Tuesday, Claimant decided to see an ATP. (Tr. 85:15-86:6).

9. On April 19, 2022, Claimant saw, ATP, Nazia Javed M.D. Claimant reported experiencing low back pain that began on or about March 15, 2022. Claimant told Dr. Javed that her truck seat was uneven, and it started affecting her back. She reported the pain was worse with prolonged sitting or bending. Claimant had pain radiating down her right leg. She told Dr. Javed that about two years prior she went to a chiropractor who took x-rays of her spine, and told her she had lumbar degenerative discs. Dr. Javed diagnosed Claimant with lumbar discogenic pain, lumbar disc bulge and RLE radiculitis. (Ex. 9).

10. Dr. Javed referred Claimant to Joseph Fuller, M.D., at Mountain Spine and Pain Physicians. Dr. Fuller examined Claimant on April 21, 2023. Dr. Fuller performed epidural steroid injections on Claimant. (Ex. 8). On or about May 25, 2022, ATP, Dr. Javed, referred Claimant to Yusuke Wakeshima, M.D., for oral pain management since the trial of steroid injections was not successful. (Ex. 9).

11. On June 13, 2022, Claimant was evaluated by Dr. Wakeshima. He diagnosed Claimant with right-sided low back pain with right-sided sciatica, lumbar radiculopathy - right, lumbar degenerative disc disease, sacroiliac joint dysfunction of right side, piriformis syndrome of right side, and pain in right lower extremity. With respect to Claimant's lumbar radiculopathy, Dr. Wakeshima opined "[t]he patient's clinical presentation is also

consistent with sacroiliac joint dysfunction today, which would also be more consistent with her mechanism of injury of being [sic] an unbalanced seat." (Ex. 7).

12. Dr. Javed also referred Claimant to Andrew Castro, M.D., a spine surgeon, who evaluated Claimant on June 29, 2022. Dr. Castro's assessment was lumbar radiculopathy secondary to a disc herniation L4-5 right-sided. He opined that Claimant was reasonably indicated for a right-sided, L4-5 microdiscectomy, as Claimant failed conservative therapy. Surgery was scheduled for July 28, 2022. (Ex. 11)

13. Claimant had a pre-operative appointment with Dr. Castro's office on July 22, 2022. At the appointment, Claimant reported that she was "still having work comp issues and has a court date set for October 5. She did not want to wait until the court date and is planning surgery under her commercial insurance." (Ex. 11).

14. On July 28, 2022, Dr. Castro operated on Claimant and performed a partial laminectomy L4-5, and a lumbar decompression at L4-5. (Ex. 11). At her August 10, 2022, follow-up appointment, Claimant reported she was doing well and the record notes she "is much improved from surgery." Similarly, at her August 24, 2022 appointment, Claimant reported being "a lot better than she was preop." (Ex. C)

15. Claimant testified that the surgery temporarily alleviated her pain, but once the medication and epidural wore off, the pain came back about a month later. (Tr. 36:24-37:8 and 38:3-9).

16. On August 5, 2022, Claimant was evaluated by Dr. Wakeshima. Claimant reported that the surgery went extremely well, and she was not having any significant pain issues. (Ex. 7). She continued to follow-up with Dr. Wakeshima every few weeks. At her September 14, 2022 appointment, Claimant reported experiencing bilateral low back pain with intermittent severe muscle spasms bilaterally. Dr. Wakeshima saw Claimant again on September 23, 2022. He noted that she had "tenderness over the sacroiliac joint region and positive provocative maneuvers sacroiliac joint dysfunction including positive Patrick's, Yeoman's and Gaenslen's maneuvers." Dr. Wakeshima recommended fluoroscopically guided sacroiliac joint injections. (Ex. 7).

17. On October 26, 2022, Claimant was evaluated by Michael Shen, M.D., who took over her care due to the retirement of Dr. Castro. Claimant reported she still had some surgical lower back pain when rolling over in bed or getting out of chairs that did not last long. She was not having any radicular symptoms. (Ex. C).

18. Claimant saw Dr. Wakeshima later that day, on October 26, 2022. She reported that the surgery helped with her leg pain, but she still had pain in her low back region. Claimant's pain was 5 out of 10. Dr. Wakeshima specifically noted that driving a truck with a crooked seat may cause a pelvic obliquity situation and may potentially cause a strain to the sacroiliac joint. He opined that if her pain generator remained consistent with a SI joint dysfunction, he would submit a request for SI joint injections. (Ex. 7). There is no objective evidence in the record that Dr. Wakeshima submitted such a request.

19. Claimant testified that she is still experiencing pain in her right buttocks, but it is different that the pain she experienced previously. Claimant testified that it hurts when she lays down and it hurts to get up. (Tr. 54:19-55:4).

20. The ALJ finds, based on the totality of the evidence, that Claimant's July 28, 2022 surgery for her herniated discs, resolved her leg symptoms, but did not completely alleviate the pain in her back.

21. At the request of Respondents, John Burris, M.D., performed an Independent Medical Examination (IME) on Claimant on August 16, 2022. Dr. Burris reviewed Claimant's medical records and he examined Claimant. Claimant reported that her recent surgery was beneficial and decreased her low back pain, and resolved her leg symptoms. Dr. Burris opined that Claimant developed an atraumatic lumbar L4-5 disc herniation on or about March 15, 2022. He further opined that the vast majority of lumbar disc herniations are due to the natural degenerative process. He concluded that Claimant's "lumbar condition cannot, within a reasonable degree of medical probability, be causally related to the activity of riding in a crooked seat." He also concluded Claimant's herniated disc and July 28, 2022 surgery were not work-related conditions. Dr. Burris prepared a report outlining his opinions (Ex. A).

22. Dr. Wakeshima reviewed Dr. Burris's IME report. He agreed with Dr. Burris's opinion that sitting on a crooked seat would not cause the disc pathology appreciated on the MRI. He also agreed that Claimant's herniated disc and related surgery were not work-related. Dr. Wakeshima noted, however, that Dr. Burris did not specifically comment on whether the sacroiliac dysfunction was work related. He disagreed with Dr. Burris's opinion that that the disc pathology was the cause of Claimant's symptoms. Instead, Dr. Wakeshima opined that Claimant's symptoms were related to her SI joint dysfunction. He reiterated that he had previously suspected Claimant's problem was a SI joint dysfunction, but the patient had "opted to go forth with lumbar microdiscectomy at the L4-5 disc by Dr. Castro." (Exs. 6 and B).

23. Dr. Burris testified via a pre-hearing deposition on November 23, 2022. He credibly testified that Claimant's disc herniation was not causally related to mechanism of injury of riding in a crooked seat. (Dep. Tr. 7:11-24). Dr. Burris further testified that SI joint dysfunction is a soft tissue imbalance across the pelvis involving the sacroiliac joint, which is the joint between the sacrum and the iliac bone in the back of the pelvis. (Dep. Tr. 9:7-18). Dr. Burris disagreed with Dr. Wakeshima's opinion that Claimant's SI joint dysfunction was Claimant's pain generator. He felt that Claimant's disc herniation was the major pathology. (Dep. Tr. 11:1-19). Dr. Burris opined that there are many things that can cause a soft tissue imbalance, including a disc herniation, and in his opinion, Claimant had a "classic presentation of an evolving disc herniation." (Dep. Tr. 10:3-25). Dr. Burris credibly testified that Claimant's SI joint dysfunction could be related to the crooked seat, but it could also be related to the herniated disc. He testified that it was equally probable that Claimant's SI joint dysfunction was related to the crooked seat as it was to her herniated disc. Dr. Burris ultimately opined that he thought the herniated disc was more likely. (Dep. Tr. 15:4-13). He maintained his opinion that Claimant's overall

presentation was most consistent with an evolving disc herniation, which was not work-related. (Dep. Tr. at 11:1-19).

24. The ALJ finds the opinions of Drs. Wakeshima and Burris to be credible and persuasive. Both doctors agree that Claimant's herniated disc and related surgery are not work-related. The ALJ finds that Claimant's herniated disc and her related surgery are not work-related, and not compensable.

25. Dr. Wakeshima diagnosed Claimant with an SI joint dysfunction on June 13, 2022, and she continues to have this diagnosis. Dr. Wakeshima opined that Claimant's SI joint dysfunction is causally related to her alleged mechanism of injury – sitting in a crooked seat for multiple hours. Dr. Burris credibly testified while he thought Claimant's disc herniation caused the SI joint dysfunction, he credibly testified that it was equally probable that the crooked seat caused that SI joint dysfunction. While both physicians are credible and persuasive, the ALJ assigns more weight to Dr. Wakeshima's opinion, particularly since he treated Claimant for several months. Based on the totality of the evidence, the ALJ finds that Claimant's SI joint dysfunction is causally related to sitting on a crooked seat.

26. In October 2022, Dr. Wakeshima recommended that Claimant receive SI joint injections. The ALJ finds that in October 2022 this recommended treatment was reasonable, necessary and related, but there is no objective evidence in the record that SI joint injections are currently reasonable and necessary to treat Claimant's SI joint dysfunction.

Claimant's Work Restrictions

27. At Claimant's first appointment with her ATP on April 19, 2022, Dr. Javed gave Claimant restrictions with respect to lifting, pushing/pulling and specifically noted she was to avoid repetitive bending, and needed to alternate sitting and standing every 20 minutes to stretch her back. (Ex. E). Based on this restriction, Employer provided Claimant a "Return to Work" offer (RWO) that accommodated Claimant's work restrictions, which she accepted. (Ex. G). Dr. Javed continued to provide these same general restrictions from April 19, 2022 through May 26, 2022. Claimant accepted another RWO on May 2, 2022 that accommodated the work restrictions set forth by Dr. Javed. (Ex. G).

28. On June 1, 2022, Dr. Javed updated Claimant's work restrictions to include "no driving." At that appointment, Claimant told Dr. Javed that driving was difficult because her right leg felt weak and was in constant pain. (Ex. 9). Employer provided Claimant a new RWO on June 2, 2022 that specifically noted Claimant would be unable to drive herself to work and suggested that Claimant use [Redacted, hereinafter UR] or ask others for a ride. (Ex. G).

29. Claimant credibly testified that she informed Employer she lived 25 minutes away from work and did not have the funds for UR[Redacted], nor did she have anyone she could ask for a ride. (Tr. 62:1-25). On June 2, 2022, Claimant emailed MA[Redacted] and explained her inability to pay for UR[Redacted] or get a ride to work. Claimant also

stated she "tried to request that Dr. Javed allow me to remain out of work until I can get relief as the pain has only grown increasingly more severe as time passes. . . I have tried to express this to Dr. Javed but she wouldn't help me on that front but picked that I couldn't drive stating your employer won't pay for UR[Redacted] so you will have to go on leave." She also noted that Dr. Javed requested that Claimant file for FMLA. (Ex. G).

30. Claimant's June 1, 2022 medical records do not reflect a conversation between Claimant and Dr. Javed regarding FMLA. At hearing, Claimant testified she went on FMLA ***prior*** to June 2022, and went on leave to take care of her son who dislocated his knee. Claimant testified "I took FMLA specifically to care for him, after his surgery, and yes, this is when I was – in the same time that I was having my own physical pain." (Tr. 45:24-46:14). The record is unclear as to what specific dates Claimant was out on FMLA.

31. On June 16, 2022, Dr. Javed removed the "no driving" restriction from Claimant's work restrictions. Claimant continued to follow up with Dr. Javed through October 18, 2022. At each visit from June 16, 2022 through October 22, 2022, Dr. Javed noted that Claimant's work restrictions generally included avoiding bending, and alternating sitting and standing to stretch her back muscles. They also included varying restrictions with respect to lifting, pushing, and pulling. Other than the two week period between June 1, 2022 and June 16, 2022, Claimant was not restricted from driving.

32. MA[Redacted] testified that Claimant emailed her on August 8, 2022, and inquired about her eligibility for light duty.[1] MA[Redacted] replied "GFL has no modified duty available, based on your restrictions." (Tr. 105:15-22).

33. From April 19, 2022 through July 15, 2022 the work-related medical diagnoses on the WC 164 forms, supporting work restrictions, included lumbar discogenic pain, lumbar disc bulge, and RLE radiculitis.[2] From August 5, 2022 through October 18, 2022, the work-related medical diagnoses on the WC164 forms, supporting work instructions, included, lumbar disc bulge s/p microdisectomy, lumbar discogenic pain, and lower back pain. (Ex. E).

34. Based on the totality of the evidence, the ALJ finds that Claimant's work restrictions were related to her disc herniation, which is not work-related, and not her SI joint dysfunction.

35. The ALJ finds that Claimant failed to prove by a preponderance of the evidence, that she is entitled to temporary disability benefits.

CONCLUSIONS OF LAW

Generally

[1] The email was not offered into evidence, but was read into the record by MA[Redacted]. (Tr. 104:3-105:7).

[2] The diagnosis of RLE pain is added on June 1, 2022, but it does not carry over in subsequent WC 164 forms.

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S.; *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related

injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics,* WC 4-960-513-01, (ICAO, Oct. 2, 2015).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo. App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *Colo. Springs v. Indus. Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla,* WC 4-606-563 (ICAO Aug. 18, 2005).

As found, Claimant worked full-time as a driver anywhere from 50-60 hours during the week, and another five to eight hours on Saturday. (Findings of fact ¶ 1). Claimant credibly testified that the crooked seat in her truck was always uncomfortable, and she noticed pain building in her right hip area, but it was on or around March 15, 2022 that the pain was sharp with random spasms in her buttocks, so she notified her supervisor. (*Id.* at ¶ 3). While Claimant was diagnosed with a herniated disc, Dr. Wakeshima also diagnosed Claimant with SI joint dysfunction on June 28, 2022. Claimant's July 28, 2022 surgery helped alleviate the symptoms in Claimant's right leg, but her lower back pain continued. Dr. Wakeshima credibly and persuasively opined that Claimant's pain generator is her SI joint dysfunction, and this is causally related to her mechanism of injury. Dr. Burris credibly testified that he believed it was more likely that Claimant's SI joint dysfunction was caused by her disc herniation, but it was equally probable that it was caused by sitting in a crooked seat. Based on the totality of the evidence, the ALJ found Dr. Wakeshima's opinion to be more persuasive. As found, Claimant suffered an SI joint dysfunction from sitting on a crooked seat between January and April of 2022. Claimant proved by a preponderance of the evidence that she suffered a compensable injury.

Medical Benefits

For an insurer to be liable for the payment of medical bills, the employee must have suffered a compensable injury arising out of and in the course of employment. § 8-42-101, C.R.S. If the injury is compensable and the medical services are reasonable and necessary, then the insurer is responsible for the expenses incurred by the employee for the treatment of the injury. *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Claimant proved by a preponderance of the evidence that a compensable injury occurred between January 2022 and April 2022. As found, there is no objective evidence in the record that the SI joint injections recommended by Dr. Wakeshima in October 2022 are still reasonable, necessary, and related. (Findings of fact ¶ 26). Claimant needs to be evaluated by an ATP, so recommendations can be made as to what medical benefits are reasonable and necessary to treat Claimant's SI joint dysfunction.

Temporary Disability Benefits

From April 20, 2022 thought October 18, 2022, Claimant's ATP placed her on modified duty with various work restrictions. As found, Claimant's work restrictions were related to her herniated disc, which is not a work-related injury. As found, Claimant's work restrictions were not related to her SI joint dysfunction. (Findings of fact ¶ 34). Claimant failed to prove by a preponderance of the evidence that she is entitled to temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury, while in the course and scope of her employment.

2. Claimant shall be evaluated by an ATP to determine what treatment is reasonable and necessary to treat Claimant's SI joint dysfunction.

3. Claimant is not entitled to TPD or TTD benefits.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment with Employer on September 14, 2021.

IF CLAIMANT HAS PROVEN COMPENSABILITY, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are authorized, reasonably necessary and related to the injury of September 14, 2021.

III. Whether Claimant has proven what her average weekly wage is at the time of the incident in question.

IV. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 15, 2021 to October 22, 2021 and July 28, 2022 until September 13, 2022.

V. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability benefits from October 23, 2021 to July 27, 2022.

VI. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination of employment with Employer.

STIPULATION

The parties stipulated to strike the testimony of Ms. N.A. as the testimony began during hearing but was not completed at hearing or by deposition.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Generally:

1. Claimant was hired by Employer on August 14, 2021 as a housekeeper for the hotel, to clean guest rooms. The rooms she was assigned were large suite type rooms.

2. On September 14, 2021 she was cleaning a room, making a bed when she felt a twinge in her low back. She paid no attention to it and completed the cleaning of that room. She then pushed her cart, which was very heavy, to the elevator. The cart contained sheets, bedding, towels, cleaning materials and supplies. The elevator was a

small one, and she had to lift the cart into the elevator. She then proceeded to the second floor room. She was in the process of making the bed, and while lifting the mattress to make the bed, she felt a very strong pain in her low back. She tried to move but it hurt too much. She attempted to continue cleaning but was unable to. She went to her cart to retrieve her telephone.

3. Claimant called J.G., a co-worker that worked in the laundry room. Earlier that morning, he had told Claimant that the supervisor, N.A., had advised that she would be cleaning rooms until 11:00 a.m. and requested not to be bothered or interrupted. J.G. reported to the room and saw Claimant. He attempted to call the supervisor, N.A., but she did not respond to the phone call. Mr. J.G. went to look for the supervisor and then assisted Claimant going downstairs, holding her up. They went to the laundry room. At that point she was in a lot of pain and crying from the symptoms. As they were getting out to the elevator, another co-worker, daughter of Respondents' Representative, L.P., a non-testifying advisory witness, asked what was going on. The daughter then advised Respondents' Representative what had happened.

4. Claimant then proceeded to the laundry room, where J.G. attempted to assist Claimant to sit but she was unable to do so due to the pain. Her supervisor, N.A., found her in the laundry room and asked what had happened. Claimant reported her injury to her supervisor, explaining that she had injured herself while making a bed, when she had to lift the mattress to tuck the sheet in. She explained everything in her native language as her supervisor spoke it as well.

5. Claimant did not fill out any paperwork on that day. Mr. J.G. offered her three pain pills to take while in the laundry room, but her supervisor, N.A., failed to offer to send her for medical care. Her husband went to pick her up to take her for medical care. Her supervisor was aware that she was going to seek medical attention at Rockies emergency in Loveland. She explained to the medical staff that she had been lifting a mattress to tuck in the sheet when she felt the severe low back pain.

6. On September 15, 2021 Employer's Representative completed an Employer's First Report of Injury noting that Claimant had an injury on September 14, 2021 while making a bed, injuring her lower back. The form specifically noted that Employer was notified on September 14, 2021 and that Claimant was earning $13.00 per hour at the time of her injury. It specified Claimant was not paid for the day of the injury. A second typed FROI was completed on September 17, 2021 which was substantially similar to the first.

B. Medical Records:

7. The M-164 form completed by UCHealth Medical Center of the Rockies - Loveland noted that Claimant injured her low back lifting a mattress on September 14, 2021. Dr. Danielle Mianzo prescribed lidocaine patches and Flexeril and referred her to her primary care provider.

8. Claimant followed up at Concentra on September 20, 2021. PA-C Douglas Drake noted that Claimant's chief complaint was that she was making a bed when she felt back pain. She had been lifting a mattress to make the bed and felt a very sharp pain.

She reported pain in the low back, radiating into the left buttocks, which was relieved by OTC medication and rest. She denied prior injuries to the low back just prior to the incident. On exam, PA Drake noted left sided muscle spasm upon palpation in the paraspinal muscles, with limited range of motion (ROM) and a positive straight leg test (SLT). PA Drake made a referral to a chiropractor and physical therapy, stating that it was medically necessary to address objective impairment and functional loss and to expedite return to work. He provided work restrictions of 5 lbs. maximum lifting, carrying, pushing and pulling, no crawling, kneeling, squatting, or climbing. He stated that objective findings were consistent with the history and work-related mechanism of injury.

9. Physical therapy with Concentra started on September 20, 2021. Claimant reported that she was making a bed, lifting a mattress to tuck in the sheet when she experienced immediate pain in her low back and then symptoms started referring down her lateral left thigh. Mr. Brian Busey, P.T. noted that Claimant had tenderness to palpation of the lower thoracic and lumbar spine. He documented loss of range of motion of both the thoracic and lumbar spine. In addition to instructing Claimant with regard to exercises, the therapist performed dry needling to the myofascial trigger points, as well as muscular and connective tissues massage on September 22, 2021. She was directed to continue with the McKenzie roll for sitting and driving throughout the day.

10. Claimant returned to consult on September 22, 2021 with reports of burning pain in the left calf while driving, with pain in the low back, left greater than right side, with pain radiating from the left buttocks and left thigh. The pain was a burning sensation with the intensity of the pain waxing and waning. Dr. Jeffrey Baker, on exam noted left sided muscle spasms and limited range of motion though no longer a positive SLT. He continued to recommend the same restrictions, and instructed Claimant to use Naproxen and provided Claimant with cold packs.

11. On September 30, 2021 Claimant reported to Dr. Baker that her lower back pain was still continuing, ran down her left leg, was constant and burning and was irritated with sitting. He noted on exam that she continued to have tenderness and left-sided spasms, limited range of motion with pain. He noted that Claimant did appear to be healing slowly, but unfortunately her employer would not allow her to work light duty. He continued the same restrictions.

12. On October 11, 2021 Mr. Busey noted that Claimant was not making progress in physical therapy and returned Claimant for consult with her treater.

13. Claimant reported a worsened condition by October 14, 2021. Dr. Baker noted Claimant had tenderness at the L4-5 level and in the bilateral sacroiliac joints, with left-sided muscle spasms of the paraspinal muscles, limited ROM, but otherwise, a normal exam. Claimant continued to complain of radiating pain down her left leg. Claimant was approximately 50% of the way toward meeting the physical requirements of her job related to her low back strain. He stated that objective findings were consistent with history and work-related mechanism of injury, continued the work restrictions and ordered an MRI of the lumbar spine.

14. Dr. John Raschbacher conducted an independent medical examination on March 29, 2022 at Respondents' request. Dr. Raschbacher noted that Claimant first had

symptoms when she started working at the hotel but then on September 14, 2021 the pain worsened. He noted that before this she had no symptoms. He noted Claimant was given larger rooms to clean than she had previously done when she worked for Employer in 2018.

15. Claimant reported that her symptoms were worsening, with complains of left low back pain, left buttock pain, and pain that goes to the left knee. She sometimes had pain on the right side, although that was rare. He opined that since there was no clear injury, he did not recommend accepting liability for the lumbar spine pain, strain or symptomology related to the September 14, 2021 work injury. He stated that even if a lumbar strain had occurred, at this point, about six months later and after treatment, one would not anticipate this degree of symptomatology or diminished range of motion.

C. Employment and other records:

16. Claimant's pay check stub from Employer dated September 3, 2021 showed she earned $14.00 per hour and earned $847.00 for the 60.5 hours worked for the period of beginning on August 16, 2021 and ending on August 31, 2021. The check dated September 20, 2021 showed a payment of $671.72, for pay period of September 1 through September 15, 2021. However, Claimant began work on September 14, 2021 at 8:54 a.m. and her injury occurred at approximately 10:00 a.m. She left immediately after the injury, and was not paid for her date of injury according to the FROI. Therefore, Claimant earned a total of $1,518.72 for the period of August 16, 2021 through September 13, 2021, which is a four week period. This provides an average weekly wage of $379.68.

17. Respondent Insurer conducted an investigation and produced a summary of the recorded statement of Claimant's interview on October 5, 2021, which noted that it was not a quote of the person interviewed. The summary indicated that Claimant was making a bed when she felt pain in her low back. Prior to this, she indicated that she was feeling well. She then pushed a heavy cart down the hall and into the small elevator, which was difficult. When she started making the bed in the next room, she could not continue due to the severe pain.

18. Respondents filed a Notice of Contest on October 6, 2021 noting that an investigation was ongoing.

D. Claimant's testimony:

19. On September 21, 2021 Claimant took the paperwork from the medical facility, which showed that Claimant had restrictions, to Employer. However, N.A., Claimant's supervisor, did not wish her to go back to work with those restrictions. Ms. N.A. took her statement and completed the paperwork on Claimant's behalf as she did not read or write in English. Ms. N.A. then asked Claimant to sign a document. She could not explain why Employer's Representative had completed the paperwork as Claimant had never spoken with her directly.

20. Claimant earned $14.00 per hour and worked approximately 35 hours per week while working for Employer. She did not return to work for Employer because her supervisor, N.A., did not give a job to go back to. She simply stopped sending her a schedule, which was the custom prior to her injury. When she saw her supervisor in

person she asked why that was and N.A. told her that she would no longer be working for Employer. She specifically asked if she could work in the laundry room and was advised that was not available but did not receive an explanation why.

21. While working for Employer she had a discussion with a co-worker, Ms. J.A., about the job and feeling back soreness. Ms. J.A. recommended she use a girdle belt the same way she did, to protect her back. She was not wearing the girdle the day she was injured.

22. Claimant stated that this was not the only time she had worked for Employer. She had worked for them previously in 2018 for approximately four months and had no problems with her back. It was a different job before, because she was not responsible for cleaning the suites or using the small elevator that caused her to lift the cart to force it into the elevator.

23. Claimant obtained another job at [Redacted, hereinafter SC], a restaurant, where she was working within her restrictions. She started on October 23, 2021 and worked there through December 3, 2021. She earned $13.50 per hour and worked 35 hours a week. She worked preparing beverages. She left this employer in order to look for a job that paid better.

24. She then went to work for another restaurant called [Redacted, hereinafter BH] on December 27, 2022. She worked there through July 27, 2022. She left BH[Redacted] because of her back injury as the work hurt her too much. She was earning $18.00 per hour working twenty five hours a week. She was working as a food prep in the kitchen. She would prepare salsas and sauces as well as preparing portions of food.

25. Before working for Employer, she worked for another restaurant called [Redacted, hereinafter PO]. She worked there from 2018 to 2021. She earned $16.00 per hour through March 20, 2021 and then started earning $16.50 per hour from March 21, 2021. She did not have any accidents or injuries while working for PO[Redacted].

26. The last time she was seen by a medical provider was September 14, 2022 because she was pregnant and was released from care due to her pregnancy.

27. Claimant explained that she had not had any injuries to her back prior to September 14, 2021 while working for Employer or any prior employers.

E. Co-Worker's testimony:

28. Ms. J.A. a co-worker also worked for Employer during the month of September 2021 but September 14, 2021 was her regularly scheduled day off. She stated that Claimant called Ms. J.A. at some point and told her that she had fallen and had told Mr. J.G. about the fall. Ms. J.A. stated that claimant had been taking pain pills and was using a girdle because of back pain. She was under the impression that Claimant had slipped and fallen while working at the PO[Redacted] restaurant, while carrying something. She believed Claimant was working as a dishwasher there. She was never asked to become involved with any claim against PO[Redacted].

29. Ms. J.A. stated that she was no longer friends with Claimant.

30. Ms. J.A. did not recall being interviewed by an investigator or that the conversation was recorded.

31. A copy of a recording was introduced and admitted as Claimant's Exhibit 6 and this ALJ recognized Ms. J.A.'s voice. The interviewer advised her that the interview was not going to be disclosed. She stated that she worked for Employer as a housekeeper. She stated that she had worked there for two years and her supervisor was N.A. She confirmed that she worked with Claimant for about a month. She knew Claimant before that time, for approximately seven years. She stated that she was not aware Claimant was hurt because she was not at work on the day she was hurt. She found out because Claimant called her the same day in the afternoon. Claimant told her that she hurt herself while making a bed and that she could not move. Claimant had already gone to the hospital by the time she spoke with J.A. and that she had been given medication for the pain.

32. Ms. J.A. had worked at PO[Redacted] and [Redacted, hereinafter CI] together with Claimant previously. She did not know why Claimant had left PO[Redacted] and did not know if Claimant had ever been hurt there. Ms. J.A stated that Claimant had told her she fell while working for Employer, she saw her wearing a brace and Claimant told her she had been taking pain pills. She was not aware of any other injuries that Claimant may have sustained in the seven years she had known her. As found, Ms. J.A. is not found credible as she contradicted her own testimony at multiple times, including that she worked for PO[Redacted] and then stated she did not, as well as stating first that Claimant had fallen and then that she was hurt lifting a mattress. She is also not found credible because of unsubstantiated reports that Claimant may have been injured at PO[Redacted].

F. Dr. Raschbacher's testimony:

33. Dr. John Raschbacher testified on behalf of Respondents. He stated he had performed an independent medical examination (IME) of Claimant on March 29, 2022. He took a history, including employment history, and reviewed the records. He stated that Claimant had reported a specific injury while working for Employer. Dr. Raschbacher opined that, even if there was an acute episode, it would be a strain and would have resolved. He stated that none of his opinions had changed since producing his IME report. In fact, he opined that there was no evidence that Claimant had sustained any injuries while working for Employer. However, he was not aware that Claimant had visited the emergency room (ER) on the date of the claimed injury and his opinion might have changed if he had reviewed the ER records.

34. He stated that it was possible that a worker could have injured their back if with bending, lifting and twisting. He agreed that a patient could have an acute on chronic injury. He based his opinion that Claimant had not incurred an acute episode on two different factors. The first being that Claimant had continued to worsen, though had not made a claim against her new employer. The second that Claimant was a younger individual and there was no indication that she had anything other than a sprain. Lastly, he stated that her range of motion and pain behavior were notable six and a half months after the incident.

G. Ultimate Findings:

35. As found, Claimant has shown that she was injured in the course and scope of her employment with Employer on September 14, 2021 when she was bent over to lift a mattress while making a bed and felt a severe pain in her back. While Claimant may have had some symptoms when she first started her employment with Employer, the traumatic event of September 14, 2021 caused Claimant injury. The injury caused immediate severe pain, triggering her need to go to the emergency. Claimant was found to be credible. Both the ER record and the Concentra records document the mechanism of injury. PA Drake and Dr. Baker specifically noted that objective findings were consistent with the history and work-related mechanism of injury and support the causation analysis and finding of compensability. While Claimant had some limited treatment between September 20, 2021 and October 11, 2021, the ultimate determination was that she was not getting better and required an MRI pursuant to Dr. Baker's opinion. Claimant consistently reported how she was injured to all of her providers. Respondents' IME failed to flesh out what the mechanism of injury was simply relying on the account that she had had some diffuse discomfort at the beginning of her employment with Employer. Claimant also reported the mechanism of injury to her employer, which was also consistent with her hearing testimony as well as her recorded statement. Even Dr. Raschbacher admitted that she could have suffered a minor back strain from making the bed. Over the contrary opinion of Dr. Raschbacher and the contradictory testimony by Ms. J.A., who is specifically found not credible, Claimant has proven that it was more likely than not that she had a specific incident causing injury to her low back as supported by Dr. Baker's opinion,

36. As found, Dr. Raschbacher's opinion and testimony are neither credible nor persuasive. It is clear from both his report and his testimony that he did not have all the information necessary to make a full and credible determination regarding Claimant's injury, including the Emergency Room report of September 14, 2021. Further, Dr. Raschbacher failed to obtain the facts of the incident that happened on September 14, 2021 when taking a history. Despite this, he did explain that a person could suffer an acute injury to the low back from lifting a mattress to make a bed.

37. As found, Claimant's treatment as provided by the emergency room and Concentra was reasonably necessary and related to the injury. Claimant was placed at MMI on September 14, 2022 due to her pregnancy based on the Claimant's testimony. As such, any further medical treatment may not be awarded until Claimant proceeds with the DIME process, unless her ATP provided recommendations for maintenance care.[1]

38. As found, Claimant credibly testified that she was advised by her supervisor that no work was available for her when she turned in her work restrictions. Further, Claimant asking whether she could work in the laundry room and her supervisor decline to provide her a job. Claimant has proven that she is entitled to temporary disability benefits.

[1] Medical records with a finding of MMI and maintenance medical care were not in evidence.

39. As found, Claimant started a light duty job on October 23, 2021 at SC[Redacted], and then moved to work with BH[Redacted] through July 27, 2022. Both jobs were light duty and within her work restrictions. Claimant was unable to continue her job at BH[Redacted] because of continuing low back pain despite the work restrictions. Claimant is owed temporary partial disability benefits from October 23, 2021 through July 27, 2022 and temporary total disability benefits from September 15, 2021 through October 22, 2021 and from July 28, 2022 until terminated by law. No payroll records were provided and exact payments cannot be calculated at this time.

40. Respondents failed to show that Claimant was terminated for cause. Claimant was credible in that she requested modified work and was advised by her supervisor that no work was available. No offer of employment was made by Employer and it was not Claimant's volitional act that caused loss of employment but Employer's acts in failing to offer a position within her work restrictions.

41. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See

Bodensieck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S. (2022); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury is "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

The claimant must also prove by a preponderance of the evidence that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

A pre-existing condition does not preclude a claim for compensation and an injury is compensable if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

A claimant's testimony, if credited, may alone constitute substantial evidence to support a determination concerning the cause of the claimant's condition. *See Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that his employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); see also *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) (lay testimony sufficient to establish disability). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Claimant has proven that it was more likely than not she was injured in the course and scope of her employment with Employer on September 14, 2021 when she lifted a mattress while making a bed and strained her lumbar spine. Claimant was carrying out her duties as a housekeeper for Employer when she was injured. She subsequently developed lower extremity radicular symptoms, in the left lower extremity, as a consequence of the lumbar strain. Claimant was credible in her account that she did not have any symptoms prior to working for Employer and that she had no prior injuries, contrary to the testimony of Ms. J.A., who was specifically not found credible or persuasive. Claimant's mechanism of injury was documented in both the emergency room record immediately following the injury, as well as the Concentra records shortly after the injury. These medical records were persuasive that Claimant's account of the mechanism of injury was more likely than not the cause of Claimant's lumbar spine injury. Claimant has proven that the incident of September 14, 2021 was the proximate cause of her work related injury to her low back and radicular symptoms. While Claimant may have had some low back symptoms caused by working as a housekeeper for Employer, those symptoms were not of the caliber to require medical attention and no medical records were in evidence to establish that Claimant had a medical condition which required medical attention prior to her injury. The September 14, 2021 incident was the

proximate cause of Claimant's injury and need for medical treatment. Claimant has proven by a preponderance of the evidence that she was injured on September 14, 2021 while in Employer's employment as a housekeeper. Claimant's claim is determined to be compensable.

C. Authorized Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

As found, Claimant has shown she was injured while working for Employer and required medical care as a consequence of that work related injury. Claimant persuasively explained that the pain was so intense that she required immediate attention at the emergency room, following which she was attended by the providers at Concentra Medical Center for her lumbar spine and radicular lower extremity injuries. Claimant was persuasive in her description of the symptoms. As found the medical care was reasonably necessary and related to the specific mechanism of injury caused by lifting the mattress at work. Claimant has proven by a preponderance of the evidence that she required medical care caused by the September 14, 2021 work related injury. As Claimant met her burden of establishing she sustained a compensable work related injury to her lumbar spine and lower extremity, Claimant is entitled to reasonably necessary treatment to cure and relieve her of the effects of her injury.

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, at 383 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *see also* W.C.R.P. Rule 8-2. An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch, supra,* at 383. As found, Claimant reported to her supervisor that she had been injured while lifting a mattress in the course of making a bed. As further found, Employer conceded to having notice by completing the September 15, 2021 Employer's First Report of Injury, noting that they had notice of the injury on the day that it occurred. Further, Claimant advised her supervisor that she would have her husband take her for medical attention. The record is devoid of any designation of provider in this matter. As found, Claimant's supervisor knew or should have known that Claimant's report of the injury triggered a deadline to designate a provider. There was no designation, therefore, Claimant's choice of provider, Concentra, is authorized.

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v.*

Industrial Claim Appeals Office, *supra*. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774- 720 (January 12, 2010). As found, Claimant was seen as an emergency on September 14, 2021 at UCHealth Medical Center of the Rockies-Loveland and they are authorized as an emergent care facility for the one time evaluation.

Based on the Claimant's testimony that she was released from care, medical benefits terminate as of the date of MMI, unless an authorized medical provider has recommended maintenance care after MMI. Any determination for future medical care is reserved for later determination as this ALJ has insufficient information with regard to what kind of release Claimant was provided.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007); *Campbell v. IBM Corp*., *supra*.

Claimant was hired by Employer on August 14, 2021. Claimant's pay check stub from Employer dated September 3, 2021 showed she earned $14.00 per hour and earned $847.00 for the period of beginning on August 16, 2021 and ending on August 31, 2021. The year to date was the same as the wages so it is presumed that she started working on August 16 and not on August 14, 2021. The check dated September 20, 2021 showed a payment of $671.72, for pay period of September 1 through September 15, 2021. However, Claimant began work at 8:54 a.m. on September 14, 2021 and her injury occurred at approximately 10:00 a.m. She left immediately after the injury, and was not paid for her date of injury according to the FROI. Therefore, Claimant earned a total of $1,518.72 for the period of August 16, 2021 through September 13, 2021, which is 4 week period. While Claimant asserted that she earned $14.00 working approximately 35 hours per week, the payroll records are more reliable than Claimant's memory in this regard. Her earnings provide an average weekly wage of $379.68 and a temporary total disability rate of $253.12.

E. Temporary Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic, supra*, at 833.

As found, Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits. Claimant was initially provided with work restrictions and she provided the paperwork to her supervisor the day following her back injury. Claimant was persuasive in the account that her supervisor, after being given the work restrictions, stated that Employer had no work for her. No offer of employment was provided to Claimant. Claimant has shown by a preponderance of the evidence that she was unable to return to her employment on September 15, 2021. As found, Claimant started a light duty job on October 23, 2021 at SC[Redacted], and then moved to work with BH[Redacted] through July 27, 2022. Both jobs were light duty and within her work restrictions. Claimant was unable to continue her job at BH[Redacted] because of continuing and persistent low back pain despite the work restrictions. Was persuasive that her disability caused her to have to leave her employment at BH[Redacted]. Claimant has shown she is owed temporary partial disability benefits from October 23, 2021 through July 27, 2022 and temporary total disability benefits from September 15, 2021 through October 22, 2021 and from July 28, 2022 until terminated by law.

F. Termination for cause

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the

termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant was informed by her supervisor on September 15, 2021 that Employer had no employment for her within her work restrictions. The records submitted for hearing showed that Claimant continued with work restrictions after that date. Claimant credibly testified that she was unable continue working at BH[Redacted] due to her low back pain and disability. Respondents have failed to show that Claimant was terminated for cause or that her wage loss involved any volitional but was a caused by her inability to work due to her September 14, 2021 work related injury and subsequent disability.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work-related injury to her low back with consequent radicular symptoms on September 14, 2021 in the course and scope of her employment.

2. Respondents shall pay for all authorized, reasonably necessary, and related medical benefits including but not limited to treatment at UCHealth Medical Center of the Rockies-Loveland and Concentra Medical Center as well as any other provider within the chain of referral to treat the lumbar spine injury and radicular lower extremity pain, and in accordance with the Colorado Medical Fee Schedule.

3. Claimant's average weekly wage is $379.68 and her temporary disability rate is $253.12.

4. Respondents shall pay temporary total disability benefits beginning September 15, 2021 through October 22, 2021 and from July 28, 2022 until terminated by law.

5. Respondents shall pay temporary partial disability benefits from October 23, 2021 through July 27, 2022.

6. Respondents failed to prove that Claimant's loss of employment was from any volitional act of Claimant but was caused by the Claimant's impairment and disabilities resulting from the September 14, 2021 work related injuries.

7. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 28th day of July, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

I. Whether the blood pressure medications are reasonable, necessary, and causally related to the claimant's industrial injury.

II. Whether the ketamine infusions are reasonable, necessary, and causally related to the claimant's industrial injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. This is an admitted claim and involves a November 17, 2020, injury to multiple body parts, including Claimant's neck and lower back. *See Claimant's Exhibit 1, page 1; Respondents' Exhibit 1, page 1*. That same day, Claimant treated at Concentra with Lori Long-Miller, M.D., and reported the nature of her injury. Dr. Long-Miller placed Claimant on work restrictions and recommended medications and physical therapy. *Claimant's Exhibit 4, pages 7-11*.

2. On February 17, 2021, Claimant started treating with Melinda Gehrs, M.D., who noted the nature of Claimant's injury and persistent pain/symptoms. Dr. Gehrs noted Claimant was not taking any medications other than those prescribed through her workers' compensation claim. *Claimant's Exhibit 5, pages 189-197*.

3. On July 14, 2021, Dr. Gehrs diagnosed Claimant with complex regional pain syndrome (CRPS). *Claimant's Exhibit 5, pages 209-213*.

4. On July 26, 2021, Dr. Long-Miller referred Claimant to Giancarlo Barolat, M.D., for her CRPS diagnosis. *Claimant's Exhibit 4, pages 105-113.*

5. On or about August 17, 2021, Dr. Gehrs prescribed Claimant a compound cream, which contained ketamine. *Claimant's Exhibit 5, pages 223-231.*

6. On August 25, 2021, Claimant treated with Dr. Barolat and reported the nature of her injury and persistent CRPS pain and other symptoms. Dr. Barolot concluded that Claimant should be treated with a spinal cord stimulator to treat her CRPS.

7. In order to determine whether Claimant was a good candidate for the spinal cord stimulator, Dr. Barolot referred Claimant to John Mark Disorbio, Ed. D, for a psychological evaluation. *Claimant's Exhibit 6, pages 239-243*.

8. On September 9, 2021, Claimant underwent a psychological evaluation with Dr. Disorbio. Dr. Disorbio concluded that the spinal cord stimulator was not contraindicated. Thus, he cleared Claimant, psychologically, for the spinal cord stimulator. *Claimant's Exhibit 8, pages 283-290*.

9. On September 13, 2021, Claimant was evaluated by Dr. Masri for treatment of her CRPS. At this appointment, Dr. Masri noted Claimant has bilateral CRPS of her upper extremities that is more intense on the on the left side than her right side. He also noted the progression of the CRPS from her left side to her right side during the last month. He was concerned about the rapid progression of her CRPS. As part of his evaluation, he also reviewed the medications Claimant was taking as well as medications she had not tried. Dr. Masri concluded that Claimant should have the spinal cord stimulator sooner rather than later. In addition to recommending the spinal cord stimulator, he also discussed with Claimant the use of ketamine infusions to help mitigate her CRPS symptoms. *Claimant's Exhibit 7, pages 262-267*.

10. On October 4, 2021, William Barreto, M.D., performed a utilization review for the request to refill Claimant's ketamine prescription. Dr. Barreto concluded that the request for the ketamine should be denied. He based his denial primarily on his contention that there was no documentation regarding the dosage and route of administration. In addition, he also concluded that there was no clear indication that the ketamine was improving Claimant's function. *Respondents' Exhibit G, pages 161-165*.

11. On October 7, 2021, Dr. Barolat requested authorization to perform a spinal cord stimulator trial. *Claimant's Exhibit 6, page 244*.

12. On October 27, 2021, Claimant followed up with Dr. Gehrs. At this appointment, it was noted that both of her hands were often turning blue and white, with the left side being worse than the right side. It was also noted that she had pain, which she described as pins and needles, throughout her entire left arm. Just about any activity bothered her left arm and aggravated it, so she tried not to use it for day-to-day activities and did not lift more than five pounds. It was further noted that Claimant had swelling in her left arm and also had left and right sided neck pain. Lastly, her left arm was hypersensitive to temperature and touch and cold aggravated everything. *Claimant's Exhibit 5, pages 231-234*.

13. At the October 27th visit, Claimant also went over her medications. At this time, she was using gabapentin three times a day, tramadol twice a day, cyclobenzaprine at night, baclofen three times a day and Percocet as needed. She also noted what did not work or appeared to cause her problems. She stated that she could not tolerate Topamax so she stopped using it and she also stopped using the Cymbalta since it made her tired. She also discussed a recent trial of a topical medicine that had ketamine in it, and that it caused her to wake up with a feeling of imminent doom. *Claimant's Exhibit 5, pages 231-234*.

14. On November 29, 2021, Claimant saw Dr. Gehrs, who noted that she was starting Claimant on a new topical compound cream that did not contain ketamine. *Claimant's Exhibit 5, pages 235-238*.

15. Although Claimant stopped using the ketamine cream due perceived side effects, she resumed using the cream after discussing the matter with Dr. Gehrs. And after she restarted using the ketamine cream, she did not have any recurrent side effects and the cream provided pain and symptom relief.

16. On January 4, 2022, Claimant underwent the spinal cord stimulator implantation with Drs. Basri and Barolat. During the procedure, she was administered ketamine. *Claimant's Exhibit 6, pages 245-247 and Exhibit 7, pages 270-274*.

17. On January 10, 2022, Claimant returned to Dr. Masri to determine the amount of pain relief she was obtaining from the spinal cord stimulator and the ketamine. Claimant had good relief from the placement of the spinal cord stimulator as well as the ketamine. Dr. Masri noted that:

> Patient has significant response for bilateral upper extremity complex regional pain syndrome and chronic neuropathic pain. She was pain free for approximately 2 days after her initial stimulator placement and this has subsided somewhat, but is still significantly better. She did receive intra-operative ketamine during stimulator closure. This indicates the ketamine most likely did provide additional relief. We have discussed ketamine infusions in an attempt to help manage her ongoing symptoms. She would like to consider these after stage 2 of her trial has been completed.

Claimant's Exhibit 7, page 273.

18. On January 11, 2022, and based on Claimant's positive response to the ketamine administered during the placement of her stimulator, Dr. Masri requested authorization to perform six ketamine infusions. He concluded that in his opinion, the ketamine infusions were medically necessary to treat Claimant's CRPS and chronic neuropathic pain. Lastly, he stated that the injections would be billed under the Colorado WC Fee Schedule at a cost of $1,050 per infusion. *Claimant's Exhibit 7, page 275*.

19. On January 18, 2022, the Claimant underwent the permanent spinal cord stimulator implementation. It is unclear whether Claimant was administered ketamine during this procedure – as was done during the trial placement of the stimulator. *Claimant's Exhibit 6, pages 258-259*.

20. Despite not knowing if ketamine was used during both procedures, Claimant credibly testified that when she did have the ketamine infusion, she did not have any CRPS pain/symptoms and that it was the first time she felt no CRPS symptoms since her diagnosis and that the ketamine infusion provided more pain/symptom relief than any other treatment.

21. On February 3, 2022, Claimant underwent an independent medical examination with Respondents' retained expert N. Neil Brown, M.D. Dr. Brown concluded that Claimant has CRPS, that the spinal cord stimulator was reasonable and necessary, that Claimant was not at MMI, that Claimant was unable to work, and that Claimant had a 72% whole person impairment rating. But, despite these findings, he concluded that the ketamine infusions are not reasonably necessary to treat Claimant from the effects of her work injury. Dr. Brown stated that the ketamine infusions were not reasonably necessary because even though Claimant said she got good relief from the ketamine used during the surgical procedure to install the spinal cord stimulator, there are merely anecdotal reports of significant success with the use of ketamine in chronic

pain patients and that there are no good quality scientific peer reviewed studies that demonstrate the efficacy of ketamine infusions. Thus, he considered the use of ketamine to be "investigational" and not acceptable treatment for CRPS. *Respondents' Exhibit C, pages 8-27*.

22. On March 9, 2022, Claimant was again evaluated by Dr. Barolat. Claimant was six weeks post the spinal cord stimulator implantation and she was doing extremely well. It was noted that a few days earlier, Claimant's pain came back to very high levels, but she realized that the stimulator had been turned off. Thus, this was further proof that the stimulator was working. But despite the stimulator working for her upper extremities, the CRPS had started spreading to Claimant's lower extremities in August of last year, but her symptoms in her lower extremities were definitely getting worse. As a result of the CRPS spreading to her lower extremities, Dr. Barolat concluded that either lumbar sympathetic blocks and/or ketamine infusions might be able to reverse the spread of the CRPS to her lower extremities. *Claimant's Exhibit 6, page 261*.

23. On March 15, 2022, Claimant was seen by Dr. Masri. At this appointment, it is noted that the stimulator was still providing Claimant good relief for her upper extremities. But it was also noted that she was developing signs and symptoms of CRPS in both of her lower extremities, predominately at the feet. Dr. Masri again recommended Claimant undergo ketamine infusions to aid with her overall neuropathic pain. He also noted that he went over with Claimant the potential risks, side effects, adverse reactions, and possible complications-and despite the possible risks-Claimant wanted to proceed with the ketamine infusions. *Claimant's Exhibit 7, pages 276-280*.

24. On March 20, 2022, Dr. Masri again requested authorization to perform six ketamine infusions. At this time, the infusions were noted to cost $1,200 for each infusion under the Colorado Workers' Compensation Fee Schedule. *Claimant's Exhibit 7, pages 281-282*.

25. On March 22, 2022, Dr. Brown issued a supplemental report. Dr. Brown maintained his opinion that the ketamine treatment is not reasonable, necessary, or related to Claimant's injury. Again, he stated that there are anecdotal reports of significant success using ketamine to treat chronic pain patients, but yet there were no good quality scientific peer reviewed studies that demonstrate the efficacy of ketamine infusions. *Respondents' Exhibit C, pages 28-29*.

26. On April 8, 2022, Claimant returned to see Dr. Long-Miller. During this visit, Claimant told the doctor that at the onset of her CRPS she developed HTN (hypertension). Dr. Long-Miller stated that Dr. Barolot stated that there is strong evidence that CRPS can cause hypertension. Dr. Long-Miller ultimately concluded that Claimant's hypertension was more than likely caused by her CRPS. Thus, Dr. Long-Miller prescribed Claimant Losartan Potassium and Hydrochlorothiazide for her hypertension. *Claimant's Exhibit 4, pages 170-182.*

27. On July 18, 2022, Dr. Brown issued a second supplemental report. *Respondents' Exhibit 6, pages 30-31*. Regarding Claimant's hypertension, Dr. Brown concluded that:

> CRPS may cause intermittent vasoconstriction due to sympathetic discharge not unlike the "fight or flight" response to stress which can cause systolic hypertension. It is not uncommon for people suffering from CRPS to have problems like orthostatic hypotension (low blood pressure on standing) or Postural Orthostatic Tachycardia Syndrome (POTS) (tachycardia on standing) can be caused by CRPS. The claimant has no evidence of any postural change of her blood pressure or her pulse rate with standing which would support CRPS as a contributor to her hypertension so this is most likely a pre-existing untreated condition related to her obesity and possibly genetic predisposition or essential hypertension.
>
> *Respondents' Exhibit 6, pages 30-31*.

28. On June 9, 2023, Dr. Brown testified by deposition. Dr. Brown testified as an expert in neurosurgery. *Dr. Brown's June 9, 2023, Deposition Transcript, page 7, lines 10-12; page 10, lines 16-18 (hereinafter Depo. Tr. 7:10-12; 10:16-18)*. Dr. Brown testified he does not treat patients for hypertension other than in the operating room. *Depo. Tr. 5:18-25; 6:1-12*. Dr. Brown also testified he is familiar with ketamine anecdotally in pain management. *Depo. Tr. 6:17-25; 7:1-9*. Dr. Brown testified ketamine may be helpful in pain management, but yet there are a lot of potential side effects. *Depo. Tr. 13:18-25; 14:1-7*. Dr. Brown testified that the Colorado Medical Treatment Guidelines do not recommend ketamine as treatment for CRPS. Dr. Brown testified CRPS is a rare disorder and something he has not treated or see in "some years." *Depo. Tr. 18:10-16*. Dr. Brown testified he recommended denying the ketamine treatment based on the [medical treatment] guidelines. *Depo. Tr. 18:19-23*. Dr. Brown testified that if Claimant was having functional improvement with the ketamine treatment, then he "could see why one would proceed forward." *Depo. Tr. 26: 4-10*. As for the blood pressure medications, Dr. Brown testified "it's certainly understandable…if people have severe pain that you're going to have episodic increase in your blood pressure." *Depo. Tr. 27: 13-16*. But, despite indicating that he does not treat patients for hypertension, other than during surgery, Dr. Brown relates Claimant's hypertension to her obesity or essential hypertension that is common in the population. *Depo. Tr. 28:5-8*.

29. On cross-examination, Dr. Brown testified Claimant was not taking blood pressure medications before her work injury. *Depo. Tr. 35:19-24*. Dr. Brown testified Claimant's workers' compensation treating providers prescribed the blood pressure medications in conjunction with her CRPS diagnosis. *Depo. Tr. 36:6-15*. Dr. Brown testified there's no indication Claimant had high blood pressure before her work injury or that the other potential causes for hypertension (obesity, essential hypertensions, etc.) caused Claimant's need for blood pressure medications. *Depo. Tr. 36:19-25*. Dr. Brown testified that if Claimant has no history of hypertension before her work injury and that the onset of her hypertension coincides with her CRPS diagnosis, then he would relate her hypertension to her CRPS diagnosis. *Depo. Tr. 37:15-22*.

30. As for the ketamine, Dr. Brown testified the Medial Treatment Guidelines are simply guidelines and a medical provider is not obligated or required to follow them. *Depo.*

Tr. 41:11-16; 42:2-9. Dr. Brown testified all patients are different and that medical providers are trying to tailor a treatment plan to decrease the patient's pain and increase the patient's function. *Depo. Tr. 42: 10-20*. Dr. Brown testified Drs. Barolat and Masri are following this same plan. *Depo. Tr. 42:21-25*.

31. Before her CRPS diagnosis (and her work injury), Claimant had never been diagnosed with hypertension and had never been prescribed or taken blood pressure medications.

32. Claimant credibly testified she has no history of hypertension and has never been prescribed blood pressure medications (nor have they been recommended). Claimant credibly testified she was not diagnosed with high blood pressure until after her work injury and CRPS diagnosis. Thus, the ALJ finds that Claimant had no history of hypertension and has never been prescribed blood pressure medications (nor have they been recommended) before her work injury. The ALJ further finds that Claimant was not diagnosed with hypertension until after her work injury and development of CRPS.

33. While Dr. Brown first recommended denying the blood pressure medications on the ground they are unrelated to her work injury, Dr. Brown concluded that if Claimant has no history of high blood pressure, then he would relate the onset of her high blood pressure (hypertension) to her work injury.

34. Based on the totality of the evidence, the ALJ finds that Claimant's high blood pressure was caused by her work injury and the development of her CRPS. Thus, the ALJ finds that the blood pressure medications Losartan Potassium and hydrochlorothiazide are reasonable, necessary, and related to her industrial injury.

35. Drs. Masri and Barolot have recommended ketamine infusions along with Claimant's permanent spinal cord stimulator. Previously, Claimant used a ketamine-based pain cream. After using the pain cream for the first time, Claimant awoke with a sense of doom, a known side-effect to ketamine. Claimant then stopped the ketamine cream. This is detailed in Dr. Gehr's October 2021 report. After discussing the ketamine cream again in detail with Dr. Gehrs, Claimant resumed using the cream and it and did not subsequently have any side effects. Dr. Gehrs refilled the ketamine cream prescription, but Respondents denied it. During the implementation of her spinal cord stimulator, Claimant received ketamine intravenously. This was the first time she had been pain/symptoms free since her injury. Based on the pain relief Claimant received from the ketamine, Drs. Masri and Barolot recommended ketamine infusions, which Respondents denied. Respondents denied the ketamine infusions on the ground the Colorado Medical Treatment Guidelines do not recommend ketamine.

36. The purpose of medical treatment is to decrease pain and increase function. Dr. Brown agrees. Additionally, Dr. Brown testified that this is what Claimant's treating providers, including Drs. Masri and Barolot, are trying to accomplish. The ketamine infusions further this objective.

37. Regardless of what the treatment guidelines contemplate, Claimant received pain/symptom relief and increased function following the intravenous ketamine infusion at the time of her spinal cord stimulator implementation.

38. Claimant's medical records document that she has discussed with her treating providers regarding the risks, side effects, etc. of ketamine treatment. Knowing these risks/side effects, Claimant wants to proceed with the recommended treatment to achieve decreased pain and increased function.

39. The ketamine infusions are reasonable and necessary to treat Claimant's CRPS, and associated symptoms, and are causally related to her industrial injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the blood pressure medications are reasonable, necessary, and causally related to the claimant's industrial injury.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

When determining whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted under an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Medical Treatment Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather, the ALJ may give evidence regarding compliance with the Guidelines such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). See also: Section 8-43-201(3), C.R.S.

A. Blood Pressure Medication

Claimant credibly testified she has no history of hypertension and has never been prescribed blood pressure medications (nor have they been recommended). Claimant credibly testified she was not diagnosed with high blood pressure until after her work injury and CRPS diagnosis. While Dr. Brown first recommended denying the blood pressure medications on the ground they are unrelated to her work injury, Dr. Brown concluded during his deposition that if Claimant has no history of high blood pressure, then he would relate the onset of her high blood pressure (hypertension) to her work injury. Moreover, Drs. Barolot and Long-Miller concluded that Claimant's hypertension was most likely caused by her CRPS-and the ALJ credits their opinions.

Thus, based on the totality of the evidence, the ALJ finds and concludes that Claimant proved by a preponderance of the evidence that her high blood pressure was caused by her CRPS - work injury - and that the blood pressure medications Losartan Potassium and hydrochlorothiazide are reasonable and necessary to treat her high blood pressure.

B. Ketamine Infusions

Claimant's treating providers, Drs. Masri and Barolot, have recommended ketamine infusions along with Claimant's permanent spinal cord stimulator. Claimant did use a ketamine-based pain cream and after using the pain cream for the first time, Claimant awoke with a sense of doom, a known side-effect to ketamine, and stopped the ketamine cream. However, after discussing using the ketamine cream again with Dr. Gehrs, Claimant resumed using the ketamine cream and did not subsequently have any side effects.

During the implementation of her spinal cord stimulator, Claimant received ketamine intravenously. Claimant credibly testified this was the first time she had been pain/symptoms free since her injury. Then Drs. Masri and Barolot recommended ketamine infusions. Respondents denied the ketamine infusions on the ground the Colorado Medical Treatment Guidelines do not recommend ketamine.

As found, the purpose of medical treatment is to decrease pain and increase function. Dr. Brown agrees. Additionally, Dr. Brown testified that this is what Claimant's treating providers, including Drs. Masri and Barolot, are trying to accomplish. The ketamine infusions further this objective.

Regardless of what the Medical Treatment Guidelines contemplate, Claimant received pain/symptom relief and increased function following the intravenous ketamine infusion at the time of her spinal cord stimulator implementation. Claimant discussed with her treating providers about the risks, side effects, etc. of ketamine treatment. Knowing these risks/side effects, Claimant wants to proceed with the recommended treatment to achieve decreased pain and increased function.

Thus, the ALJ finds and concludes that the Claimant proved by a preponderance of the evidence that the ketamine infusions are reasonable, necessary to treat her from the effects of her work injury. As a result, the infusions are also causally related to her industrial injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The Respondents shall pay for the medication to treat Claimant's high blood pressure that was caused by her industrial injury.

2. The Respondents shall pay for the Claimant's ketamine infusions prescribed by her treating physician.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 28, 2023

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stanley Ginsburg, M.D. that Claimant is entitled to receive a 15% whole person permanent impairment rating for an episodic neurological disorder as a result of his April 22, 2020 admitted industrial injuries.

2. If Respondents failed to present clear and convincing evidence to overcome the DIME opinion, whether Dr. Ginsburg erred by failing to apportion Claimant's pre-existing seizure condition because it was independently disabling.

3. Whether Claimant has presented substantial evidence to support a determination that medical maintenance treatment will be reasonably necessary to relieve the effects of his April 22, 2020 admitted industrial injuries or prevent further deterioration of his condition.

FINDINGS OF FACT

1. On April 22, 2020 Claimant suffered admitted industrial injuries during the course and scope of his employment with Employer. Claimant's resulting medical treatment involved the cervical spine, right wrist, right knee and pre-existing epilepsy condition.

2. The record reveals that Claimant has suffered from epilepsy for a number of years prior to his April 22, 2020 industrial injuries. Specifically, Claimant had an extensive history of seizures related to epilepsy that began when he was an infant. As a result of his epilepsy and seizures, Claimant has experienced numerous falls, head injuries, headaches and neck pain throughout his life.

3. In November 2015, after it was determined that Claimant's response to several medications had failed, Claimant underwent a surgical procedure to Implant a vagal nerve stimulator (VNS) to control his seizures. Following the placement of the VNS, Claimant initially responded very positively. However, by June 30, 2016, Claimant reported having "nearly daily seizures" for a period of two weeks. He testified that the VNS helped control his seizures approximately fifty percent of the time and gave him the ability to anticipate oncoming seizures.

4. Claimant continued to receive treatment for his epilepsy from 2015 through 2019. He detailed the symptoms of his nocturnal and daytime seizures. Claimant stated his nocturnal seizures caused him to suffer dreams of seeing things, loss of awareness, falling out of bed, and tongue and cheek biting. He also described two types of typical daytime seizures. The first type would begin with an aura of dizziness followed by speech

arrest and loss of awareness. The second type would cause him to fall and suffer shaking of the extremities.

5. Medical records for the period 2015 through 2019 reflect discussion of a deep brain stimulator (DBS) as surgical treatment for Claimant's seizure disorder. At a neurology evaluation with Monica Petluru, M.D. on January 14, 2019 Claimant there was a tentative plan to complete the DBS surgery in February or March 2019 after surgical protocols had been addressed. However, Claimant ultimately pursued less aggressive treatments prior to his work injuries including the VNS device and medication management.

6. On January 3, 2020 Claimant was admitted to Kit Carson County Memorial Hospital for a cluster of seizures over the past three days. Specifically, he reported a total of 30 seizures over a 3-day period.

7. Claimant testified that in February 2020 he was placed on Epidiolex to control his seizures. Epidiolex is a pharmaceutical-grade CBD that is effective for patients who are refractory to treatments. In the four months leading up to the injury, Claimant stated treatment with Epidiolex had "completely stopped all my seizures . . . which no other medication had." Additionally, Claimant's treatment was effective to the point his "ability to work was actually really good" preceding his April 22, 2020 work accident because his seizure disorder was under control.

8. On March 19, 2020 Claimant applied to work with Employer. He began working for Employer on April 16, 2020.

9. On April 22, 2020 Claimant sustained admitted work injuries. A large pig slammed Claimant into a steel beam. He struck his head, lost consciousness and landed on his right knee and wrist.

10. Following his injuries, Claimant immediately presented to the Kit Carson Memorial Hospital Room on April 22, 2020. He reported a low-grade headache with low-grade neck muscle pain and tightness. Claimant denied any seizure activity. He was admitted overnight as a seizure precaution and was discharged home after an unremarkable night.

11. On April 28, 2020 Claimant visited Authorized Treating Physician (ATP) Sacramento Pimentel, M.D. for an evaluation. He reported no additional seizure activity. Claimant's concussion symptoms had resolved and he was released to work full duty.

12. Claimant explained that upon returning to work, he began having abnormal seizures that were more frequent and severe than the seizures he had experienced prior to the injury. Employer eventually asked Claimant to resign due to his worsening condition and inability to work.

13. On January 6, 2021 Claimant had a telephone encounter with neurological specialist Sarah Sparr, RN. Claimant reported he was suffering anywhere from three to twenty convulsive events per day. He was concerned his VNS was not working correctly following his industrial injury because he was no longer receiving transmissions from the device to detect oncoming auras preceding convulsions. Claimant was also suffering falls and additional injuries due to the increased frequency of seizures and lack of warning. He requested a helmet to protect his head during seizure activity and prevent further injuries.

14. On February 15, 2021 Claimant had a follow-up appointment with Dr. Pimental. Claimant was experiencing more daytime seizures despite previously suffering primarily nighttime seizures. He also had good seizure control since beginning Epidiolex prior to his work injury. The increased frequency in seizures rendered Claimant unable to work and affected his overall functioning. Dr. Pimental again documented Claimant's pre-existing seizure disorder, but noted the seizures had worsened since his April 22, 2020 work injury. He referred Claimant to neurosurgery.

15. On March 29, 2021 Claimant returned to Dr. Pimental for an evaluation. Claimant now had a helmet for protection from seizure injuries. Dr. Pimental commented that Claimant had been suffering almost daily seizures.

16. On May 3, 2021 Claimant had a follow-up appointment with Dr. Pimental. Dr. Pimental again noted Claimant's history of a severe seizure disorder. He remarked Claimant was no longer at his previous job but was actively looking for work. Dr. Pimental also commented that Claimant was unable to have the ideal follow-up plan during the preceding year due to the COVID pandemic.

17. On June 9, 2021 Claimant again visited Dr. Pimental for an examination. He believed Claimant had reached Maximum Medical Improvement (MMI) due to his plateau in progress. Dr. Pimental referred Claimant to a level two physician for an impairment rating.

18. On July 21, 2021 David L. Reinhard, M.D. determined that Claimant had reached MMI. He reviewed Claimant's medical records after the April 22, 2020 industrial injuries and conducted a physical examination. Although Dr. Reinhard discussed Claimant's lifelong seizure disorder under the "history" section in his report and was aware of Claimant's VNS, he did not specifically assign any permanent impairment for an aggravation of Claimant's epileptic condition. He instead found that Claimant's primary complaints were related to a concussion and cervical spine injury. Dr. Reinhard thus assigned an 18% whole person impairment for Claimant's cervical spine condition. He also assigned a 10% rating for Claimant's episodic neurologic disorder based on posttraumatic migraine headaches under Table 53 of the *Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). Combining the ratings yields a 26% whole person impairment.

19. In December 2021 Claimant had a DBS placed. Adjustments were made on December 17, 2021, but Claimant continued to suffer seizures. By December 2022 Claimant had his DBS removed due to a central nervous system infection.

20. Respondents challenged Dr. Reinhard's impairment rating and sought a Division Independent Medical Examination (DIME). On February 17, 2022 Claimant underwent a DIME with neurologist Stanley H. Ginsburg, M.D. He reviewed Claimant's medical records subsequent to his April 22, 2020 industrial injuries and conducted a physical examination. He agreed that Claimant had reached MMI on July 21, 2021. Dr. Ginsburg assigned a 14% whole person rating for Claimant's cervical spine and a 15% whole person rating for an episodic neurological disorder pursuant to the *AMA Guides*. The ratings combined for a 29% whole person impairment. Regarding Claimant's pre-existing seizure disorder, Dr. Ginsburg stated, "there is some evidence that the injury aggravated this and played a role in the necessity of brain stimulation but this is not certain, although it is an important concept to consider." He remarked that although Claimant had "a convulsive disorder prior to the injury, there was evidence strongly suggestive of more problems with a convulsive disorder." Dr. Ginsburg noted that a 15% rating for an episodic neurological disorder was appropriate because this "was the most serious problem interfering with his life." He determined that apportionment was not appropriate. Dr. Ginsburg recommended medical maintenance care in the form of medications for seizures, under the care of an epileptologist, as well as physical therapy for the following year.

21. On July 25, 2022 Kathy F. McCranie, M.D. conducted a medical records review of Claimant's claim. Dr. McCranie explained that both Drs. Reinhard and Ginsburg erred in finding that Claimant's work injury caused permanent impairment for an episodic neurologic disorder because neither physician reviewed Claimant's medical records preceding his April 22, 2020 industrial injury. She emphasized that "[w]ithout a full review of the prior medical records, it is not possible to make a reasonable assessment of impairment."

22. Ultimately, based on her review of Claimant's medical records, Dr. McCranie determined there was no acceleration or permanent aggravation of Claimant's seizure activity or headaches. Therefore, a permanent impairment for an episodic neurologic disorder was not warranted. She explained that Drs. Reinhard and Ginsburg should have at least apportioned the rating based on Claimant's documented pre-existing independently disabling condition with work restrictions. Finally, regarding the cervical impairment rating, Dr. McCranie observed that a 4% impairment was more appropriate.

23. At the hearing on January 5, 2023 Dr. McCranie maintained that Claimant did not warrant an impairment rating for an episodic neurologic disorder. She reasoned that Dr. Ginsburg erred when he assigned an impairment rating for Claimant's seizure disorder because "[t]hey were not accelerated by the accident because there [are] substantial records after the accident to show that his seizures returned to baseline." Dr. McCranie believed Claimant reached baseline by November 2020 but at the latest prior to reaching MMI on July 21, 2021. By relying on just a few post-injury medical records and Claimant's subjective reports, Dr. Ginsburg committed error and could not fully appreciate the extent of Claimant's pre-existing seizure disorder. Dr. McCranie emphasized that Dr. Ginsburg would not have known the full severity of Claimant's condition. She determined that Claimant did not require any maintenance medical care

for an episodic neurologic disorder because the condition was not related to the work accident.

24. Finally, Dr. McCranie also determined that Dr. Ginsburg should have apportioned Claimant's pre-existing, independently disabling seizure condition. In particular, she noted that Claimant had a prior impairment as documented by his substantial pre-existing medical records and work restrictions related to his epilepsy. Essentially, due to Claimant's significant impairment before the accident, there should have been a 15% apportionment for Claimant's pre-existing seizure disorder. Claimant's impairment rating for an episodic neurologic disorder would thus be reduced to 0%.

25. Edward Maa, M.D., a board-certified neurologist specializing in epilepsy, testified at the hearing in this matter. He explained that he had been treating Claimant's epilepsy since at least 2007. Dr. Maa remarked that Claimant had a history of medically refractory epilepsy likely originating from a post-birth stroke in his left hemisphere. He explained that, although the VNS placed in 2015 did not stop all of Claimant's seizures, it dramatically improved daytime convulsions and benefitted Claimant continuing into 2020. Dr. Maa remarked that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able to work again following treatment with Epidiolex. He commented that, because Claimant was doing well with Epidiolex, he did not want to pursue more aggressive treatment prior to the industrial injury. Notably, Epidiolex was an effective treatment for patients who were refractory to existing epilepsy treatments. Dr. Maa emphasized that Epidiolex "was definitely controlling [Claimant's] seizure activity." However, Dr. Maa explained that a stretch injury to Claimant's vagus nerve from the trauma of the April 22, 2020 work accident likely impacted the functioning of the VNS within his body. He summarized that the traumatic work injury more likely than not caused, aggravated, or accelerated Claimant's seizure disorder and the medical necessity of DBS surgery.

26. Claimant testified at the hearing in this matter. He recounted that, prior to his work injury, 90% of his seizures were nocturnal and only 10% occurred during the daytime. He described how the VNS gave him the ability to swipe a magnet over the device upon feeling an aura. The device stimulated his brain to stop the seizure. Claimant commented the VNS allowed him "have more control of my seizures" and "helped me about fifty percent of the time." However, Claimant "was no longer feeling any stimulation into my brain" from the VNS following his industrial injury.

27. On June 3, 2023 Dr. McCranie testified through an evidentiary deposition in this matter. Dr. McCranie explained that reviewing the testimony of Claimant and Dr. Maa did not change her opinion. She maintained that Claimant did not warrant an impairment rating for an episodic neurologic disorder. Dr. McCranie specified that Dr. Maa only addressed a temporary increase in Claimant's condition and offered no opinion on permanent acceleration or aggravation. Further, she noted that the timing of the return of the seizures was not linked to Claimant's work injury because, between May 15, 2020 and July 24, 2020, there were no medical notes reflecting any seizures.

28. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that Claimant was entitled to receive a 15% whole person impairment rating for an episodic neurological disorder as a result of his April 22, 2020 admitted industrial injuries. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Ginsburg's 15% impairment determination for an episodic neurological disorder was incorrect. Initially, the record reveals that Claimant suffered from epilepsy for a number of years prior to his April 22, 2020 industrial injuries. Claimant had an extensive history of seizures related to epilepsy that began when he was an infant. In November 2015, after it was determined that Claimant's response to several medications had failed, he underwent a surgical procedure to Implant a VNS to control his seizures. Following the placement of the VNS, Claimant initially responded very positively. However, in the years between 2015 and 2019 Claimant continued to suffer repeated seizures. Medical records for the period 2015 through 2019 reflect discussion of a DBS as surgical treatment for Claimant's continuing disorder. However, Claimant ultimately pursued less aggressive treatments prior to his work injury and began taking Epidiolex to treat his symptoms. In the four months leading up to his work injury, Claimant stated treatment with Epidiolex had "completely stopped all my seizures . . . which no other medication had." Claimant explained that his treatment with Epidiolex was effective to the point his "ability to work was actually really good" preceding his April 22, 2020 industrial injury.

29. On April 22, 2022 Claimant suffered admitted industrial injuries. Claimant's resulting medical treatment involved the cervical spine, right wrist, right knee and pre-existing epilepsy condition. He received care from ATP Dr. Pimental for his work injuries. Claimant explained that, upon returning to work, he began having abnormal seizures that were more frequent and severe than the seizures he had previously experienced. When Claimant reached MMI on July 21, 2021 Dr. Reinhard assigned an 18% whole person impairment for Claimant's cervical spine condition. He also assigned a 10% rating for Claimant's episodic neurologic disorder based on posttraumatic migraine headaches. Combining the ratings yields a 26% whole person impairment.

30. On February 17, 2022 Claimant underwent a DIME with neurologist Dr. Ginsburg. He reviewed Claimant's medical records subsequent to his April 22, 2020 industrial injuries and conducted a physical examination. He agreed that Claimant had reached MMI on July 21, 2021. Dr. Ginsburg assigned a 14% whole person rating for Claimant's cervical spine and a 15% whole person rating for an episodic neurological disorder based on Claimant's seizures pursuant to the *AMA Guides*. The ratings combined for a 29% whole person impairment. Regarding Claimant's pre-existing seizure disorder, Dr. Ginsburg stated, "there is some evidence that the injury aggravated this and played a role in the necessity of brain stimulation but this is not certain, although it is an important concept to consider." He remarked that, although Claimant had "a convulsive disorder prior to the injury, there was evidence "strongly suggestive of more problems with a convulsive disorder." Dr. Ginsburg noted that a 15% rating for an episodic neurological disorder was appropriate because this "was the most serious problem interfering with his life."

31. Dr. McCranie performed a records review and testified at the hearing in this matter. She explained that both Drs. Reinhard and Ginsburg erred in finding that Claimant's work injury caused a permanent impairment for an episodic neurologic disorder. Initially, she noted that neither physician reviewed Claimant's medical records preceding his April 22, 2020 industrial injury. Dr. McCranie reasoned that Dr. Ginsburg erred when he assigned an impairment rating for Claimant's seizure disorder because "[t]hey were not accelerated by the accident because there [are] substantial records after the accident to show that his seizures returned to baseline." She explained that, by relying on just a few post-injury medical records and Claimant's subjective reports, Dr. Ginsburg committed error. Dr. McCranie emphasized that Dr. Ginsburg could not fully appreciate the extent of Claimant's pre-existing seizure disorder.

32. Despite Dr. McCranie's opinion, the record reflects that Dr. Ginsberg did not erroneously assign Claimant a 15% impairment rating for an episodic neurologic disorder. Dr. Ginsburg had knowledge from Claimant's history, a physical examination, review of medical reports subsequent to Claimant's work injury, and neurological expertise regarding the nature and severity of Claimant's seizure disorder. Specifically, Dr. Ginsburg emphasized that, although Claimant had a seizure disorder prior to his April 22, 2020 work injury, there was evidence "strongly suggestive" of an aggravation of the condition. Moreover, the persuasive opinion of Dr. Maa supports Dr. Ginsburg's DIME opinion. Dr. Maa has been treating Claimant's epilepsy since at least 2007. He explained that, although the VNS placed in 2015 did not stop all of Claimant's seizures, it dramatically improved daytime convulsions and was beneficial into 2020. Dr. Maa remarked that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able to work again following treatment with Epidiolex. He commented that, because Claimant was doing well with Epidiolex, he did not want to pursue more aggressive treatment prior to the industrial injury. Dr. Maa emphasized that Epidiolex "was definitely controlling [Claimant's] seizure activity." However, Dr. Maa explained that a stretch injury to Claimant's vagus nerve from the trauma of the April 22, 2020 work accident likely impacted the functioning of the VNS within his body. He summarized that the traumatic work injury more likely than not caused, aggravated, or accelerated Claimant's seizure disorder and the medical necessity of DBS surgery.

33. Dr. McCranie testified through an evidentiary deposition that her opinion had not changed after reviewing the testimony of Claimant and Dr. Maa. She maintained that Claimant did not warrant an impairment rating for an episodic neurologic disorder. Dr. McCranie specified that Dr. Maa only addressed a temporary increase in Claimant's symptoms and offered no opinion on a permanent acceleration or aggravation of Claimant's condition. Further, she noted that the timing of the return of the seizures was not linked to Claimant's work accident because, between May 15, 2020 and July 24, 2020, there were no medical notes indicating any seizures. However, Dr. McCranie's deposition testimony largely focused on Dr. Maa's opinion. Importantly, Dr. Maa has treated Claimant for his seizure disorder since 2007 as has significant experience with Claimant's condition. Dr. McCranie also did not detail the clearly erroneous nature of Dr. Ginsburg's opinion assigning Claimant a 15% whole person rating for an episodic neurological disorder.

34. Based on the medical records and persuasive opinion of Dr. Maa, Dr. Ginsburg correctly assigned an impairment rating for Claimant's episodic neurological disorder. The contrary determination of Dr. McCranie is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's determination assigning Claimant a 15% whole person impairment for an episodic neurological disorder was incorrect.

35. Respondents have failed to present clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion not to apportion Claimant's pre-existing seizure condition. Relying on Dr. McCranie's opinion, Respondents assert that apportionment is appropriate because Claimant's seizure condition was independently disabling prior to his April 22, 2020 industrial injuries. Essentially, due to Claimant's significant impairment before the accident, there should have been a 15% apportionment for Claimant's pre-existing seizure disorder. Claimant's impairment rating for an episodic neurologic disorder would thus be reduced to 0%.

36. Despite Dr. McCranie's contrary opinion, the record reveals that Dr. Ginsburg's apportionment determination was not clearly erroneous. Claimant credibly testified that his seizure condition was under control at the time of his industrial injury. He was able to perform his full job duties without missing time from work due to his seizure for about 3-4 months prior to his work injury. Dr. Maa also explained that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able to work following treatment with Epidiolex. While Claimant had a pre-existing seizure disorder, the medical records reflect that his condition was under control with Epidiolex in the months preceding April 22, 2020. Respondents have not demonstrated that Claimant's seizure disorder was symptomatic and independently disabling at the time of his work injury. Respondents have thus failed to establish it is highly probable Dr. Ginsberg erred in not apportioning Claimant's permanent impairment rating as a result of his pre-existing seizure activity.

37. Claimant has presented substantial evidence to support a determination that medical maintenance treatment will be reasonably necessary to relieve the effects of his April 22, 2020 admitted industrial injuries or prevent further deterioration of his condition. Initially, Dr. Ginsburg recommended medical maintenance care in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year. In contrast, Dr. McCranie determined that Claimant did not require any maintenance medical care for an episodic neurologic disorder because the condition was not related to the work accident. Despite Dr. McCranie's determination, the medical records and persuasive opinion of Dr. Ginsburg reflect that additional medical benefits are reasonable, necessary and causally related to Claimant's April 20, 2022 work accident. Accordingly, Claimant is entitled to receive medical maintenance benefits in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487

P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that Claimant was entitled to receive a 15% whole person impairment rating for an episodic neurological disorder as a result of his April 22, 2020 admitted industrial injuries. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Ginsburg's 15% impairment determination for an episodic neurological disorder was incorrect. Initially, the record reveals that Claimant suffered from epilepsy for a number of years prior to his April 22, 2020 industrial injuries. Claimant had an extensive history of seizures related to epilepsy that began when he was an infant. In November 2015, after it was determined that Claimant's response to several medications had failed, he underwent a surgical procedure to Implant a VNS to control his seizures. Following the placement of the VNS, Claimant initially responded very positively. However, in the years between 2015 and 2019 Claimant continued to suffer repeated seizures. Medical records for the period 2015 through 2019 reflect discussion of a DBS as surgical treatment for Claimant's continuing disorder. However, Claimant ultimately pursued less aggressive treatments prior to his work injury and began taking Epidiolex to treat his symptoms. In the four months leading up to his work injury, Claimant stated treatment with Epidiolex had "completely stopped all my seizures . . . which no other medication had." Claimant explained that his treatment with Epidiolex was effective to the point his "ability to work was actually really good" preceding his April 22, 2020 industrial injury.

9. As found, on April 22, 2022 Claimant suffered admitted industrial injuries. Claimant's resulting medical treatment involved the cervical spine, right wrist, right knee and pre-existing epilepsy condition. He received care from ATP Dr. Pimental for his work injuries. Claimant explained that, upon returning to work, he began having abnormal

seizures that were more frequent and severe than the seizures he had previously experienced. When Claimant reached MMI on July 21, 2021 Dr. Reinhard assigned an 18% whole person impairment for Claimant's cervical spine condition. He also assigned a 10% rating for Claimant's episodic neurologic disorder based on posttraumatic migraine headaches. Combining the ratings yields a 26% whole person impairment.

10. As found, on February 17, 2022 Claimant underwent a DIME with neurologist Dr. Ginsburg. He reviewed Claimant's medical records subsequent to his April 22, 2020 industrial injuries and conducted a physical examination. He agreed that Claimant had reached MMI on July 21, 2021. Dr. Ginsburg assigned a 14% whole person rating for Claimant's cervical spine and a 15% whole person rating for an episodic neurological disorder based on Claimant's seizures pursuant to the *AMA Guides*. The ratings combined for a 29% whole person impairment. Regarding Claimant's pre-existing seizure disorder, Dr. Ginsburg stated, "there is some evidence that the injury aggravated this and played a role in the necessity of brain stimulation but this is not certain, although it is an important concept to consider." He remarked that, although Claimant had "a convulsive disorder prior to the injury, there was evidence "strongly suggestive of more problems with a convulsive disorder." Dr. Ginsburg noted that a 15% rating for an episodic neurological disorder was appropriate because this "was the most serious problem interfering with his life."

11. As found, Dr. McCranie performed a records review and testified at the hearing in this matter. She explained that both Drs. Reinhard and Ginsburg erred in finding that Claimant's work injury caused a permanent impairment for an episodic neurologic disorder. Initially, she noted that neither physician reviewed Claimant's medical records preceding his April 22, 2020 industrial injury. Dr. McCranie reasoned that Dr. Ginsburg erred when he assigned an impairment rating for Claimant's seizure disorder because "[t]hey were not accelerated by the accident because there [are] substantial records after the accident to show that his seizures returned to baseline." She explained that, by relying on just a few post-injury medical records and Claimant's subjective reports, Dr. Ginsburg committed error. Dr. McCranie emphasized that Dr. Ginsburg could not fully appreciate the extent of Claimant's pre-existing seizure disorder.

12. As found, despite Dr. McCranie's opinion, the record reflects that Dr. Ginsberg did not erroneously assign Claimant a 15% impairment rating for an episodic neurologic disorder. Dr. Ginsburg had knowledge from Claimant's history, a physical examination, review of medical reports subsequent to Claimant's work injury, and neurological expertise regarding the nature and severity of Claimant's seizure disorder. Specifically, Dr. Ginsburg emphasized that, although Claimant had a seizure disorder prior to his April 22, 2020 work injury, there was evidence "strongly suggestive" of an aggravation of the condition. Moreover, the persuasive opinion of Dr. Maa supports Dr. Ginsburg's DIME opinion. Dr. Maa has been treating Claimant's epilepsy since at least 2007. He explained that, although the VNS placed in 2015 did not stop all of Claimant's seizures, it dramatically improved daytime convulsions and was beneficial into 2020. Dr. Maa remarked that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able to work again following treatment with Epidiolex. He

commented that, because Claimant was doing well with Epidiolex, he did not want to pursue more aggressive treatment prior to the industrial injury. Dr. Maa emphasized that Epidiolex "was definitely controlling [Claimant's] seizure activity." However, Dr. Maa explained that a stretch injury to Claimant's vagus nerve from the trauma of the April 22, 2020 work accident likely impacted the functioning of the VNS within his body. He summarized that the traumatic work injury more likely than not caused, aggravated, or accelerated Claimant's seizure disorder and the medical necessity of DBS surgery.

13. As found, Dr. McCranie testified through an evidentiary deposition that her opinion had not changed after reviewing the testimony of Claimant and Dr. Maa. She maintained that Claimant did not warrant an impairment rating for an episodic neurologic disorder. Dr. McCranie specified that Dr. Maa only addressed a temporary increase in Claimant's symptoms and offered no opinion on a permanent acceleration or aggravation of Claimant's condition. Further, she noted that the timing of the return of the seizures was not linked to Claimant's work accident because, between May 15, 2020 and July 24, 2020, there were no medical notes indicating any seizures. However, Dr. McCranie's deposition testimony largely focused on Dr. Maa's opinion. Importantly, Dr. Maa has treated Claimant for his seizure disorder since 2007 as has significant experience with Claimant's condition. Dr. McCranie also did not detail the clearly erroneous nature of Dr. Ginsburg's opinion assigning Claimant a 15% whole person rating for an episodic neurological disorder.

14. As found, based on the medical records and persuasive opinion of Dr. Maa, Dr. Ginsburg correctly assigned an impairment rating for Claimant's episodic neurological disorder. The contrary determination of Dr. McCranie is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's determination assigning Claimant a 15% whole person impairment for an episodic neurological disorder was incorrect.

Apportionment

15. Respondents contend that Dr. Ginsburg erred by failing to apportion Claimant's pre-existing seizure condition because it was independently disabling. Section 8-42-104(5)(b), C.R.S. governs apportionment of medical impairment for a prior nonwork-related condition. The statute specifies that in cases of permanent medical impairment an employee's award shall not be reduced except:

> When an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling. The percentage of the nonwork-related permanent medical impairment existing at the time of the subsequent injury to the same body part shall be deducted from the permanent medical impairment rating for the subsequent compensable injury.

Moreover, the Division of Workers' Compensation has adopted WCRP 12 to implement the statutory provisions for impairment rating determinations. WCRP 12-3(B) provides, in pertinent part:

> the Physician may provide an opinion on apportionment for any preexisting work related or nonwork-related permanent impairment to the same body part using the [*AMA Guides*] where medical records or other objective evidence substantiate a preexisting impairment. Any such apportionment shall be made by subtracting from the injured worker's impairment the preexisting impairment as it existed at the time of the subsequent injury or occupational disease. The Physician shall explain in their written report the basis of any apportionment. If there is insufficient information to measure the change accurately, the Physician shall not apportion. If the Physician apportions based on a prior nonwork-related impairment, the Physician must provide an opinion as to whether the previous medical impairment was identified, treated and independently disabling at the time of the work-related injury that is being rated.

16. Apportionment allows an injured worker's award or settlement to be reduced if the worker "has a non-work related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling." §8-42-104(5)(b), C.R.S. Apportionment is not appropriate when the previous condition is asymptomatic and not disabling at the time of the subsequent injury. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.*, 984 P.2d 656, 659 (Colo. App. 1998); *see also Askew v. Indus. Claim Appeals Off.*, 927 P.2d 1333, 1338 (Colo. 1996). The goal of apportionment is to ensure both that employers are only liable for impairment resulting from the specific work injury and injured workers are not barred from recovery due to pre-existing injuries. *See Browne v. Indus. Claim Appeals Off.*, 495 P.3d 974, 980 (Colo. App. 2021).

17. As found, Respondents have failed to present clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion not to apportion Claimant's pre-existing seizure condition. Relying on Dr. McCranie's opinion, Respondents assert that apportionment is appropriate because Claimant's seizure condition was independently disabling prior to his April 22, 2020 industrial injuries. Essentially, due to Claimant's significant impairment before the accident, there should have been a 15% apportionment for Claimant's pre-existing seizure disorder. Claimant's impairment rating for an episodic neurologic disorder would thus be reduced to 0%.

18. As found, despite Dr. McCranie's contrary opinion, the record reveals that Dr. Ginsburg's apportionment determination was not clearly erroneous. Claimant credibly testified that his seizure condition was under control at the time of his industrial injury. He was able to perform his full job duties without missing time from work due to his seizure for about 3-4 months prior to his work injury. Dr. Maa also explained that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able

to work following treatment with Epidiolex. While Claimant had a pre-existing seizure disorder, the medical records reflect that his condition was under control with Epidiolex in the months preceding April 22, 2020. Respondents have not demonstrated that Claimant's seizure disorder was symptomatic and independently disabling at the time of his work injury. Respondents have thus failed to establish it is highly probable Dr. Ginsberg erred in not apportioning Claimant's permanent impairment rating as a result of his pre-existing seizure activity.

Medical Maintenance Benefits

19. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of her condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988).

20. As found, Claimant has presented substantial evidence to support a determination that medical maintenance treatment will be reasonably necessary to relieve the effects of his April 22, 2020 admitted industrial injuries or prevent further deterioration of his condition. Initially, Dr. Ginsburg recommended medical maintenance care in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year. In contrast, Dr. McCranie determined that Claimant did not require any maintenance medical care for an episodic neurologic disorder because the condition was not related to the work accident. Despite Dr. McCranie's determination, the medical records and persuasive opinion of Dr. Ginsburg reflect that additional medical benefits are reasonable, necessary and causally related to Claimant's April 20, 2022 work accident. Accordingly, Claimant is entitled to receive medical maintenance benefits in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's DIME determination assigning Claimant a 15% whole person impairment for an episodic neurological disorder was incorrect.

2. Respondents have failed to present clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion not to apportion Claimant's pre-existing seizure condition.

3. Claimant shall receive medical maintenance benefits in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year.

4. Any other issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: July 28, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents established by a preponderance of the evidence grounds to reopen Claimant's claim to permit Respondents to file an amended Final Admission of Liability to correct errors in the original Final Admission of Liability.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury to her left shoulder on November 16, 2021.

2. On June 10, 2022, Claimant's authorized treating physician (ATP) James McLaughlin, M.D., placed Claimant at maximum medical improvement (MMI) and assigned Claimant a 6% upper extremity permanent impairment rating, which corresponds to a 4% whole person impairment. (Ex. A).

3. Claimant's 6% upper extremity rating entitled Claimant to $4,538.98 in permanent partial disability (PPD) benefits.

4. On July 8, 2022, Respondents filed a Final Admission of Liability (FAL), in which Respondents mistakenly admitted for a 6% *whole* person permanent impairment rating in the "permanent partial disability" section of the FAL instead of a 6% left upper extremity impairment. Respondents also admitted to $4,538.98 in PPD benefits. (Ex. D).

5. Respondents paid Claimant $4,538.98 in PPD benefits.

6. At hearing, Insurer's adjuster, [Redacted, hereinafter AD], credibly testified that Insurer's intent was to admit for a 6% upper extremity impairment rating, and not a 6% whole person impairment rating. AD[Redacted] testified that, due to an internal error on the part of Insurer, the FAL was not correctly completed, resulting in Respondents mistakenly admitting for a 6% whole person impairment.

7. Claimant testified at hearing that she received $4,538.98 in PPD benefits from Respondents, is not seeking additional PPD benefits, and agrees that it is appropriate to permit Respondents to correct the errors in the July 8, 2022 FAL.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits

by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

REOPENING TO CORRECT ERRORS IN THE FAL

Once a case has been closed by a final admission, section 8-43-303(1) C.R.S., allows an ALJ to reopen an award within six years of the date of injury on a several grounds, including error or mistake. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). Reopening of a closed claim may be granted based on any mistake of fact that calls into question the propriety of a prior award. Section 8-43-303(1), C.R.S.; *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). The power to reopen is permissive, and is therefore committed to the ALJ's discretion.

Respondents have established grounds for reopening for the sole purpose of filing an Amended FAL to correct the clerical errors contained on the July 8, 2022 FAL. It is

undisputed that Claimant was assigned a scheduled upper extremity impairment of 6%. It is also undisputed that Claimant is entitled to, and has received, PPD benefits in the amount of $4,538.98 for her scheduled impairment rating. The FAL contains errors that do not reflect the appropriate impairment rating, and should be corrected to do so. Respondents shall file an Amended Final Admission of Liability which properly reflects Claimant's impairment rating and PPD benefits. Respondents have not established grounds for otherwise amending or altering the July 8, 2022 FAL.

ORDER

It is therefore ordered that:

1. Claimant's claim is reopened for the sole purpose of permitting Respondents to file an Amended FAL which properly reflects Claimant's admitted and agreed upon impairment rating and PPD benefits based upon a 6% schedule upper extremity permanent impairment rating. Respondents shall file an Amended FAL within thirty days of the date of this Order.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 31, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a 36% scheduled impairment to his left knee?

FINDINGS OF FACT

1. Claimant worked 14 years for Employer, initially as a volunteer firefighter and eventually ascending to the position of Fire Chief. He sustained admitted injuries on December 14, 2017 when a ladder on which he was working collapsed unexpectedly.

2. Claimant's most impactful injuries involved multiple displaced fractures of the right foot. He underwent several surgeries on the right foot and developed serious complications related to infections. Eventually, he had a below-the-knee amputation (BKA) in August 2020. Claimant was assigned a 90% lower extremity rating for the right BKA, which was admitted and not disputed by Respondents.

3. Claimant also injured his left knee in the work accident. He saw Dr. Michael Feign, an orthopedic surgeon, on January 3, 2018, and reported 8/10 "constant" left knee pain since the injury. He was having difficulty weightbearing and was using a wheelchair. Examination of the left knee showed pain mostly along the proximal fibula and lateral tibial plateau. Dr. Feign reviewed left knee x-rays taken at the emergency department immediately after the accident, which showed no fracture. However, because "[the] patient did have a fall from 10 feet," he ordered an MRI to rule out a nondisplaced tibial plateau or fibular fracture.

4. The left knee MRI was completed on January 5, 2018. In terms of acute pathology, the MRI showed a nondisplaced intra-articular fibular head fracture, a bone marrow contusion of the lateral tibial plateau with surrounding microtrabecular fracture, and a medial gastrocnemius strain. It also showed pre-existing tricompartmental osteoarthritis.

5. Claimant followed up with Dr. Feign to review the MRI on January 11, 2018. Dr. Feign opined Claimant sustained an acute gastrocnemius strain "as well as direct trauma to the lateral side of his knee causing a nondisplaced fracture of the proximal fibula and irritation of an arthritic proximal tibia-fibula joint." He did not believe surgery was necessary and recommended conservative treatment.

6. Thereafter, Claimant's treatment was primarily focused on his right foot. However, he continued to see Dr. Feign periodically for left knee pain. On February 28, 2018, Dr. Feign documented Claimant's knee had not improved because he was "completely non-weightbearing on his right foot and even tho[ugh he has] been using crutches and a walker he has been putting much more strain on his left knee." Dr. Feign

opined, “is understandable with his arthritic change and his acute trauma to have more pain since he is putting all of his weight on his left knee.” Dr. Feign encouraged Claimant to use his wheeled scooter or iWalk “which can help decrease some of the stress on his left knee.”

7. Dr. Nicholas Olsen performed an IME for Respondents on January 28, 2019. Claimant reported continued left knee pain with ambulation “despite adequate time to heal a stress fracture of the fibula.” Examination of the left knee showed significant tenderness around the fibular head and the peroneal nerve. There was a positive Tinel’s sign and some findings in the L4 distribution, which suggested injury to the peroneal nerve at the knee. Dr. Olsen opined “[Claimant’s] left knee complaints are work-related.” Dr. Olsen thought a peroneal nerve neuropraxia or contusion probably explained his symptoms of numbness and tingling.

8. Claimant was referred to Dr. Thomas Centi in January 2020 for an evaluation of MMI and impairment. Dr. Centi determined Claimant was not at MMI, in part because of issues related to the left knee. Dr. Centi recommended an updated left knee MRI and possible orthopedic referral depending on the results.

9. Dr. David Hahn performed a right BKA on August 4, 2020. After the BKA, Claimant’s physicians turned their attention more specifically to the persistent left knee symptoms.

10. Claimant started seeing Dr. Kareem Sobky for the left knee on September 2, 2020. He described chronic lateral left knee pain “since the injury.” He reported lateral sided locking and catching, swelling, and giving way. He was also having more pain in the patellofemoral articulation and episodic “large effusions.” Dr. Sobky noted Claimant’s left knee injury had been largely untreated because of the predominant focus on the right leg. Dr. Sobky opined, “[Claimant] has definitely [been] stressing the left knee as he has been putting all of his weight on that side. It is also likely that he has worsened problems in the left knee as the patellofemoral chondromalacia as he has really been unable to bear weight on the right lower extremity for years now.” Dr. Sobky ordered an MRI and administered a steroid injection to the left knee.

11. At a follow-up appointment on December 4, 2020, Dr. Sobky noted Claimant had received his right left prosthesis “but is bearing significant weight on his left side so his left knee is very irritated. He is working diligently with the prosthesis and fitting but unfortunately the left knee is just taking the brunt of the weight and is really aggravated.” The previous injection had only lasted two weeks, so Dr. Sobky injected the left knee with different medication “to see if we can give him longer-lasting symptomatic relief.” Dr. Sobky opined Claimant would probably need a total knee replacement for his “post-traumatic osteoarthritis,” although the high risk of infection was a major concern.

12. Dr. Sobky has continued to treat Claimant’s left knee symptomatically, primarily with periodic injections and bracing.

13. Dr. Olsen performed another IME for Respondents on October 18, 2021. Dr. Olsen acknowledged Claimant suffered a nondisplaced intraarticular fracture of the left fibular head and a bone marrow contusion of the lateral tibial plateau from the work accident. But he opined the fibular head fracture had fully healed and Claimant's ongoing left knee symptoms were solely related to "end-stage" osteoarthritis. Dr. Olsen stated the accident did not aggravate Claimant's underlying arthritis and his ongoing symptoms reflected the natural progression of his pre-existing condition. Dr. Olsen determined Claimant was at MMI with no impairment related to the left knee. He assigned a 90% lower extremity rating for the right BKA.

14. On December 9, 2021, Dr. Hahn agreed that Claimant reached MMI as of October 18, 2021. Dr. Hahn did not address impairment, as he is not Level II accredited.

15. Respondents referred Claimant to Dr. Douglas Scott for an impairment rating on May 21, 2022. Dr. Scott opined the left fibular head fracture and bone bruise had "healed and resolved." He agreed with Dr. Olsen that Claimant's ongoing left knee complaints were related to osteoarthritis and were not injury-related. As a result, he assigned no impairment for the left knee. Like Dr. Olsen, he provided a 90% lower extremity rating for the right BKA.

16. Respondents filed a Final Admission of Liability (FAL) admitting for the 90% right lower extremity rating. Claimant timely objected and requested a DIME.

17. Claimant saw Dr. John Bissell for the DIME on December 6, 2022. Dr. Bissell agreed Claimant's condition had stabilized and he was at MMI as of October 28, 2021. He also agreed with Dr. Olsen and Dr. Scott that Claimant has a 90% lower extremity impairment for the right BKA. However, he opined Claimant has injury-related permanent impairment to his left knee. Dr. Bissell noted Claimant suffered a left knee fibular head fracture and lateral tibial plateau microfracture. Although those conditions eventually healed, he believed the injury permanently aggravated Claimant's pre-existing osteoarthritis. He pointed to consistent treatment for left knee symptoms since the accident. He emphasized that the accident subjected Claimant's knee to sufficient trauma "to fracture the knee in two places (and strain his gastrocnemius muscle)." Dr. Bissell further noted Claimant was working full duty with no knee-related limitations immediately before the accident despite the pre-existing arthritis. Applying a "but for" analysis, Dr. Bissell determined Claimant would probably still be working full duty, as he had done up until December 2017, had the accident not occurred. Dr. Bissell believed a left total knee arthroplasty would be causally related to the injury, but "it is not clear surgery will ever be possible for him as it poses such a high risk of infection." Therefore, Claimant was at MMI with permanent impairment. Dr. Bissell assigned a 36% lower extremity rating for the left knee. The rating was based on "aggravated osteoarthritis" under Table 40 combined with range of motion deficits.

18. Dr. Olsen testified at hearing consistent with his reports. He emphasized that the fibular head fracture was "outside the knee joint proper," and therefore had no structural impact on the pre-existing osteoarthritis. He noted Claimant had left knee surgery 37 years ago, including repairs to the ACL, MCL, and probably the meniscus. The

prior surgery set the stage for future development of osteoarthritis. Given the pre-existing degenerative changes shown on the initial MRI, Dr. Olsen opined it was inevitable Claimant would eventually develop increasing pain and range of motion deficits, unrelated to the accident. He did not believe the work accident aggravated or accelerated the underlying osteoarthritis. Dr. Olsen offered no critique of Dr. Bissell's rating methodology; he simply disagrees that the ongoing knee symptoms are injury-related.

19. Claimant performed physically demanding work for Employer for 14 years, initially as a volunteer firefighter and then as a Fire Chief. He completed quarterly physical performance tests to evaluate his ability to perform tasks including carrying, crawling, operating the Jaws of Life, climbing ladders, and lifting up to 150 pounds. There is no persuasive evidence Claimant's ability to perform his job was limited in any way by left knee symptoms before the work accident. Although Claimant injured his left knee and had surgery in the 1980s, he recovered well and had no problems for more than 30 years before the 2017 injury. Claimant had not previously been diagnosed with osteoarthritis, chondromalacia, or knee instability, and the persuasive evidence shows Claimant's left knee was probably asymptomatic before the work accident.

20. Claimant's testimony regarding his pre-injury functional capacity and lack of left knee symptoms is credible and persuasive.

21. Dr. Bissell's conclusions are consistent with and supported by the opinions of Dr. Sobky and Claimant's credible testimony. Dr. Bissell's opinions regarding Claimant's left knee impairment are credible and more persuasive than the contrary opinions offered by Dr. Olsen and Dr. Scott.

22. Claimant proved by a preponderance of the evidence he suffered a 36% lower extremity impairment to his left knee.

CONCLUSIONS OF LAW

If an injury results in permanent medical impairment, the claimant is entitled to PPD benefits pursuant to §§ 8-42-107(2) and/or 8-42-107(8). The Workers' Compensation Act applies different formulas for calculating PPD depending on whether the body part in question is listed on the "schedule of disabilities." In this case, the parties agree that Claimant suffered purely "scheduled" impairments, which are addressed under § 8-42-107(2). Although the DIME process applies to MMI determinations in all cases, the DIME procedure does not apply to scheduled impairment ratings. *See* § 8-42-107(8)(a); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000). The claimant has the burden to establish scheduled impairment by a preponderance of the evidence. *E.g., Burciaga v. AMB Janitorial Services, Inc.*, W.C. No. 4-777-882 (November 5, 2010). A DIME's determination regarding scheduled impairment is not entitled to special weight but is simply another opinion to consider when evaluating the preponderance of persuasive evidence. *Sanchez de Bailon v. Final Order Pinnacle Foods Corp.*, W.C. No. 5-080-057 (November 10, 2020).

A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved he has a 36% scheduled lower extremity rating to the left knee, as determined by Dr. Bissell. Claimant developed significant left knee pain immediately after the accident, which continued unabated to the time of MMI. As Dr. Bissell pointed out, Claimant's experienced direct trauma to his left knee sufficient to fracture the fibular head and cause a microfracture of the tibial plateau. Although the fibular head is not part of the "knee joint proper," the same cannot be said of the tibial plateau. Moreover, Claimant's left knee has endured several years of unusual stress because of overcompensating for the right foot injury. Dr. Sobky is persuasive that the lengthy period of altered gait mechanics probably aggravated Claimant's underlying osteoarthritis. Although Claimant had advanced osteoarthritis in his left knee immediately before the industrial accident, it was asymptomatic and nondisabling despite engaging in physically demanding work. The opinions of Dr. Bissell and Dr. Sobky are credible and more persuasive than the contrary opinions offered by Dr. Olsen and Dr. Scott. No physician has pointed to any flaw in Dr. Bissell's rating methodology, aside from the causation determination. Dr. Bissell's rating is consistent with the AMA Guides and appropriately quantifies the permanent left knee impairment caused by the work accident.

ORDER

It is therefore ordered that:

1. Insurer shall play Claimant PPD benefits based on a 36% left knee scheduled rating.

2. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 2, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-201-695-005

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he is permitted to recover penalties against Respondent for wrongfully withholding benefits pursuant to §8-43-304(1), C.R.S. or §8-43-401(2)(a), C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-207(1)(p), C.R.S. for Respondent's failure to obey ALJ Lovato's December 6, 2022 Order requiring reimbursement of medical expenses.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of disfigurement benefits.

FINDINGS OF FACT

1. Claimant is a 32-year-old male who began working for Employer as an installation technician in October 2019. [Redacted, hereinafter RS] is the sole owner of Employer. Claimant and RS[Redacted] were Employer's only employees in March 2022.

2. On March 3, 2022 Claimant was repairing a surveillance camera on the side of a house at a residential property in Franktown, Colorado. Claimant fell from a ladder, landed on his heels and shattered both heel bones.

3. Claimant underwent an open reduction internal fixation of the bilateral calcaneus fractures on March 5, 2022. Jeremy Christensen, DPM, of Rock Canyon Foot & Ankle, performed the surgery.

4. On December 6, 2022 ALJ Lovato issued Findings of Fact, Conclusions of Law and Order (Order) in this matter. She determined that Claimant's March 3, 2022 injuries were compensable and he was entitled to receive reasonable, necessary and related medical treatment. The Order specifically required Respondent to "reimburse Claimant for any medical expenses related to his March 3, 2022, injury." However, ALJ Lovato noted that, although multiple invoices and bills were admitted into evidence, it was unclear "what amounts have been paid, and what amounts are outstanding." The Order explained that, because ALJ Lovato was unable to determine Claimant's outstanding medical expenses, "[c]ounsel for Claimant and Respondent shall confer regarding the medical expenses. If the parties are unable to reach an agreement, either Claimant or Respondent may file an Application for Hearing on this issue."

5. RS[Redacted] testified at the hearing in this matter. He admitted to the contents of several email communications with Claimant's counsel regarding satisfaction of ALJ Lovato's December 6, 2022 Order. RS[Redacted] also acknowledged receiving all the medical bills and the itemized ledger of medical expenses from Claimant's counsel. He did not dispute

the amount of medical benefits. Finally, RS[Redacted] recognized that, despite the attempts of Claimant's counsel to confer, he has not paid any of the outstanding medical bills.

6. The record reveals the following itemized list of Claimant's medical expenses as a result of his March 3, 2022 injury:

Dane Raggio - Medical Bills		
DOS	Provider	Amount
3/7/22	TraumaOne, PC	$221.00
4/29/22	Marrington Medical Consultants, LLC	$964.04
3/4/22-3/8/22	Colorado Surgical & Critical Care Assoc.	$2,598.00
3/4/22-3/8/22	Physican Pain Consultants	$1,586.00
3/8/22-3/11/22	Westminster Rehab	$4,350.00
3/3/22-3/8/22	Castle Rock Adventist Hospital	$49,597.02
3/14/22/4/21/22	Rock Canyon Foot & Ankle Clinic, LLC	$3,282.00
11/15/22	John S. Hughes, MD	$2,750.00
	Total:	**$65,348.06**

As reflected in the preceding chart, Claimant's uncontroverted medical expenses total $65,348.06.

7. In her December 6, 2022 Order, ALJ Lovato also found that "Employer does not currently maintain a workers' compensation insurance policy, nor did Employer have workers' compensation insurance on March 3, 2022." ALJ Lovato thus determined that Respondent "shall pay $1,048.80 in penalties for failure to admit or deny liability." She noted that 50% of the penalties were to be paid to Claimant and 50% to the Subsequent Injury Fund. Respondent admitted that he has not paid any penalties either to Claimant or to the Subsequent Injury Fund.

8. Claimant testified at the hearing in this matter. He explained that, as a result of his March 5, 2022 surgery, he has approximately five-inch-long scars on the outside of both feet. Claimant remarked that the scars are painful, discolored, thick, and raised from the surface of the skin.

9. Claimant has demonstrated it is more probably true than not that he is permitted to recover penalties against Respondent for wrongfully withholding benefits pursuant to §8-43-401(2)(a), C.R.S. On January 4-5, 2023 Claimant's counsel conferred with RS[Redacted] regarding the outstanding amounts owed and provided a detailed list of outstanding medical expenses. RS[Redacted] testified that he received all of Claimant's medical records, bills and an itemized ledger of medical expenses. He did not dispute the amount or authenticity of Claimant's outstanding medical bills, and otherwise made no attempt to confer about the amount of reimbursement. RS[Redacted] also testified that he understood ALJ Lovato's Order required him to pay Claimant's outstanding medical expenses. Finally, RS[Redacted]acknowledged he has not paid any of Claimant's outstanding medical bills.

10. Because over six months have elapsed since ALJ Lovato's order, Respondent's failure to reimburse Claimant has surpassed the 30-day time limit by over five months. A

reasonable Respondent would neither fail to pay penalties and benefits lawfully imposed by an ALJ nor ignore Claimant's attempts to confer regarding compliance with a court order.

11. Respondent admittedly failed to pay Claimant's medical expenses. RS[Redacted] detailed that he has not paid Claimant's medical expenses because he was waiting until he received additional funding from a bank or other source. However, the convenience or ability of a respondent to pay benefits is not dispositive. Notably, if Respondent required additional time to seek funding, RS[Redacted] could have sought assistance from the court by filing an application for hearing on the issue of Claimant's medical expenses or simply conferred with undersigned counsel. However, Respondent, chose to ignore counsel and failed to take any action to comply with ALJ Lovato's order.

12. Based on a review of the record, penalties pursuant to §8-43-401(2)(a), C.R.S. are appropriate. The preceding statute provides for penalties of eight percent of the amount of wrongfully withheld benefits. Employer failed to act as a reasonable respondent in neglecting to comply with ALJ Lovato's December 6, 2022 Order. Specifically, the record reveals that RS[Redacted] knowingly did not confer or make any attempt to reimburse Claimant for his medical expenses. Claimant's outstanding medical expenses total $65,348.06. Eight percent of $65,348.06 yields a statutory penalty of $5,227.84.

13. The court is further empowered to order any "sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge." §8-43-207(1)(p), C.R.S. Furthermore, under C.R.C.P. 37(b)(2), if a party "fails to obey an order" the court may order that party "to pay the reasonable expenses, including attorney's fees, caused by the failure," unless "the failure was substantially justified." Although there is little dispute that Respondent failed to obey ALJ Lovato's December 6, 2022 order, additional penalties are not warranted at this time. The penalty of $5,227.84 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

14. Claimant has proven it is more probably true than not that he is entitled to an award of disfigurement benefits. As a result of his work injury, Claimant sustained serious, permanent scarring on parts of his body normally exposed to public view. He exhibited approximately five-inch-long scars on the lateral aspects of both feet because of the surgery performed by Dr. Christensen as necessitated by his work injuries. Claimant credibly testified that the scars are painful, discolored, thick, and raised off the surface of the skin. Because Claimant has sustained serious permanent disfigurement to areas of the body normally exposed to public view, he is entitled to additional compensation. Insurer shall pay Claimant $2,500.00 for the disfigurement.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is

that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Penalties

4. In cases where penalties are premised on an order requiring payment of medical benefits, the ALJ may impose penalties based on either §8-43-401(2)(a), C.R.S. or §8-43-304(1), C.R.S.; *Giddings v. Indus. Claim Appeals Off.*, 39 P.3d 1211, 1213 (Colo. App. 2001). In the present matter, ALJ Lovato ordered Respondent to pay Claimant's medical benefits pursuant to §8-42-101(6)(a)-(b), C.R.S. The preceding statute provides that if a respondent fails to furnish medical benefits for a claim that is admitted or found to be compensable, "the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided." Because ALJ Lovato's Order was premised on the payment of Claimant's outstanding medical expenses for a compensable claim, penalties may be imposed under either §8-43-401(2)(a) or §8-43-304(1), C.R.S.

5. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

6. Pursuant to §8-43-401(2)(a), C.R.S. all insurers and self-insured employers "shall pay benefits within thirty days after any benefits are due." If a respondent "knowingly delays payment of medical benefits for more than thirty days or knowingly stops payments, such insurer or self-insured employer shall pay a penalty of eight percent of the amount of wrongfully withheld benefits." *Id*. The imposition of penalties is governed by an objective standard of negligence. As such, it is measured by the reasonableness of the respondent's actions "and does not require knowledge that conduct was unreasonable or in bad faith."

Pueblo School Dist. No. 70 v. Toth, 924 P.2d 1094 (Colo. App. 1996). Penalties may thus be assessed against a respondent for neglecting to take action that a reasonable respondent would take to comply with a lawful order. *Id*.

7. An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. No. 4-619-954 (ICAO. May 5, 2006). However, any penalty assessed should not be excessive or grossly disproportionate to the conduct in question. When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the other party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Indus. Claim Appeals Off.,* 126 P.3d 323 (Colo. App. 2005).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is permitted to recover penalties against Respondent for wrongfully withholding benefits pursuant to §8-43-401(2)(a), C.R.S. On January 4-5, 2023 Claimant's counsel conferred with RS[Redacted] regarding the outstanding amounts owed and provided a detailed list of outstanding medical expenses. RS[Redacted] testified that he received all of Claimant's medical records, bills and an itemized ledger of medical expenses. He did not dispute the amount or authenticity of Claimant's outstanding medical bills, and otherwise made no attempt to confer about the amount of reimbursement. RS[Redacted] also testified that he understood ALJ Lovato's Order required him to pay Claimant's outstanding medical expenses. Finally, RS[Redacted] acknowledged he has not paid any of Claimant's outstanding medical bills.

9. As found, because over six months have elapsed since ALJ Lovato's order, Respondent's failure to reimburse Claimant has surpassed the 30-day time limit by over five months. A reasonable Respondent would neither fail to pay penalties and benefits lawfully imposed by an ALJ nor ignore Claimant's attempts to confer regarding compliance with a court order.

10. As found, Respondent admittedly failed to pay Claimant's medical expenses. RS[Redacted] detailed that he has not paid Claimant's medical expenses because he was waiting until he received additional funding from a bank or other source. However, the convenience or ability of a respondent to pay benefits is not dispositive. Notably, if Respondent required additional time to seek funding, RS[Redacted] could have sought assistance from the court by filing an application for hearing on the issue of Claimant's medical expenses or simply conferred with undersigned counsel. However, Respondent, chose to ignore counsel and failed to take any action to comply with ALJ Lovato's order.

11. As found, based on a review of the record, penalties pursuant to §8-43-401(2)(a), C.R.S. are appropriate. The preceding statute provides for penalties of eight percent of the amount of wrongfully withheld benefits. Employer failed to act as a reasonable respondent in neglecting to comply with ALJ Lovato's December 6, 2022 Order. Specifically, the record reveals that RS[Redacted] knowingly did not confer or make any attempt to reimburse Claimant for his medical expenses. Claimant's outstanding medical expenses total $65,348.06. Eight percent of $65,348.06 yields a statutory penalty of $5,227.84.

12. As found, the court is further empowered to order any "sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge." §8-43-207(1)(p), C.R.S. Furthermore, under C.R.C.P. 37(b)(2), if a party "fails to obey an order" the court may order that party "to pay the reasonable expenses, including attorney's fees, caused by the failure," unless "the failure was substantially justified." Although there is little dispute that Respondent failed to obey ALJ Lovato's December 6, 2022 order, additional penalties are not warranted at this time. The penalty of $5,227.84 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

Disfigurement

13. Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." A disfigurement, for Workers' Compensation purposes, is "an observable impairment of the natural appearance of a person." *Arkin v. Indus. Com'n of Colo.*, 358 P.2d 879, 884 (Colo. 1961). If scars are apparent in swimming attire a disfigurement award is appropriate. *See Twilight Jones Lounge v. Showers,* 732 P.2d 1230, at1232 (Colo. App. 1986).

14. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of disfigurement benefits. As a result of his work injury, Claimant sustained serious, permanent scarring on parts of his body normally exposed to public view. He exhibited approximately five-inch-long scars on the lateral aspects of both feet because of the surgery performed by Dr. Christensen as necessitated by his work injuries. Claimant credibly testified that the scars are painful, discolored, thick, and raised off the surface of the skin. Because Claimant has sustained serious permanent disfigurement to areas of the body normally exposed to public view, he is entitled to additional compensation. Insurer shall pay Claimant $2,500.00 for the disfigurement.

Payment to Trustee or Posting of Bond

15. Under §8-43-408(2), C.R.S. an employer must pay to the trustee of the Division of Workers' Compensation (Division) an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado."

16. This Order awards no ongoing benefits, so the present value equals the total benefits awarded. The Order awards medical benefits of $65,348.06, penalties of $5,227.84 and disfigurement benefits of $2,500.00 for total compensation of $73,075.90. Respondent is thus required to pay the trustee of the Division a total amount of $73,075.90. In the alternative, Respondent may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The

Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to mariya.cassin@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondent shall reimburse Claimant for reasonable and necessary medical benefits totaling $65,348.06.

2. Respondent shall pay $5,227.84 in penalties. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

3. Respondent shall pay Claimant $2,500.00 in disfigurement benefits.

4. In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $73,075.90, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, c/o Mariya Cassin, 633 17th St. Suite 400, Denver, CO 80202; or

b. File a bond in the sum of $73,075.90 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation, or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

5. Respondent shall pay statutory interest at the rate of 8% per annum on benefits not paid when due.

6. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

7. Pursuant to §8-42-101(4), C.R.S. any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Respondent is solely liable and responsible for the payment of all medical costs related to Claimant's work injuries.

8. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 2, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-197-307-004

ISSUES

I. Whether the claimant has proven by a preponderance of the evidence she is entitled to temporary disability benefits.

II. Whether the claimant is responsible for her termination and not entitled to temporary disability benefits.

III. The claimant's average weekly wage.

STIPULATIONS

- The parties stipulated that if the claimant is awarded temporary disability benefits, they will work together to determine the amount of TTD and TPD that is payable.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. The claimant worked for the employer as an overnight supervisor for a women's shelter.
2. Despite her supervisory role, the claimant also performed physical tasks as a shelter aid, including lifting up to 50 pounds. Examples of her lifting tasks include assisting with food deliveries, such as carrying 6-gallon boxes of milk weighing about 50 pounds, cleaning the facility (including mopping and sweeping), packing residents' belongings into totes (some weighing over 25 pounds), and setting up and taking down cots. These tasks required the use of both upper extremities.
3. On February 4, 2022, while working at the women's shelter, the claimant began implementing the shelter's new policy that required all shelter residents, and potential residents, to have their belongings searched for the safety of everyone in the shelter. At about 8:30 a.m., a potential resident named [Redacted, hereinafter NM] arrived. NM[Redacted] is a man, that identifies as a woman. NM[Redacted] was informed by the claimant that her belongings needed to be searched before being admitted to the shelter. NM[Redacted] refused. Therefore, the claimant told NM[Redacted] that she could not stay at the shelter.
4. After telling her that she could not stay at the shelter, NM[Redacted] launched an unprovoked assault against the claimant. Without warning NM[Redacted] threw a right-hand punch at the claimant. The first punch narrowly missed the claimant's head.

Subsequently, NM[Redacted] forcefully grabbed hold of the claimant's long braided hair with her left hand to gain control of the claimant's head, and then threw another right hand punch that struck the left side of the claimant's head. In response to this vicious assault, the claimant moved backwards through a doorway that was behind her, while NM[Redacted] kept advancing, and maintained her grasp of the claimant's hair. While being assaulted, the claimant started fighting back. The claimant tried to hit NM[Redacted], but NM[Redacted] lost her balance and started falling towards the ground. While NM[Redacted] was still falling towards the ground, the claimant tried to hit her one more time, and then tried once again the instant NM[Redacted] landed on the ground. The time the claimant spent trying stop the attack by hitting NM[Redacted] was about 2 seconds. Throughout the assault, the claimant reasonably believed her safety was at risk and had no reason to believe that NM[Redacted] intended to cease the attack – even while NM[Redacted] was falling to the ground and was on the ground for a moment.

5. As NM[Redacted] fell to the floor, a female coworker intervened, placing herself between NM[Redacted] and the claimant. Right after falling, NM[Redacted] swiftly rose and lunged towards both the coworker and the claimant, attempting to resume the assault.
6. After lunging towards the co-worker and the claimant, the co-worker attempted to take control of the situation by yelling at the assailant and motioning her to leave. About a second later, both the co-worker and the claimant attempted to pull NM[Redacted] out of the room and through the doorway so she would leave the shelter. This attempt lasted about a second. While NM[Redacted] started walking away, it appears the claimant tried to take control of the situation by yelling at NM[Redacted] to get out of the shelter. Based on the claimant's actions, NM[Redacted] stopped assaulting her and began to leave the shelter.
7. Throughout the violent assault, the claimant's actions focused on self-defense and thwarting the assailant's intentions. The assailant's actions, including forcefully grabbing the claimant's hair and striking her head with a closed fist showed an intent to cause severe bodily harm. Had the claimant not defended herself and effectively persuaded the assailant to cease the attack through her fighting back, vocalizations, and body language, the extent of the claimant's injuries could have been far more severe.
8. Moreover, the fact that the claimant defended herself and attempted to stop the assault by trying to hit NM[Redacted], even when NM[Redacted] landed on the floor, during an approximate 2-second period, was reasonable and appropriate as demonstrated by NM[Redacted] standing up and then lunging at the claimant - in an attempt to continue the assault.
9. At no time did the claimant become the aggressor. All actions taken by the claimant were reasonable and necessary to defend herself from the vicious assault.
10. [Redacted, hereinafter NL], representing the employer's HR department, provided testimony on behalf of the employer. She stated that comprehensive new hire training was provided to employees, encompassing de-escalation techniques, establishing

boundaries, personal safety measures, and thorough review of the employee handbook.

11. The employer's Codes of Conduct, as outlined in section 3.11, explicitly prohibits threats or acts of violence from employees towards fellow employees, clients, volunteers, vendors, and others acting on behalf of the agency. Workplace violence encompasses verbal or physical threats, intimidation, and aggressive physical contact that may result in injury or harm to an individual's life, well-being, family, or property. NL[Redacted] testified that violations of the code of conduct could lead to termination and emphasized the gravity of such decisions, which are only reached after a comprehensive investigation. She also stated that she personally reviewed video footage of the altercation and conducted interviews with staff before the claimant's termination. NL[Redacted] did not, however, discuss the matter with the claimant.

12. NL[Redacted] also stated during her testimony that she believed that at some point the claimant became the aggressor in the altercation. She cited the claimant's continued striking of NM[Redacted], even when NM[Redacted] was on the ground. Additionally, NL[Redacted] pointed out various factors, such as the claimant's failure to retreat to a larger room after the participant started walking away, her persistent verbal confrontation, her pursuit of the participant despite physical restraint by another employee, and her body language suggesting aggressiveness. She also stated that no evidence suggested that the claimant sought to protect other employees from the assailant through her body language.

13. Upon determining that the claimant had violated the Codes of Conduct, the employer immediately terminated the claimant’s employment on the day the claimant was assaulted and injured.

14. In essence, the employer contends that once NM[Redacted] fell to the ground, she no longer posed a threat, thereby rendering the claimant's continued defensive actions, including attempts to hit her to defend herself within a brief two-second timeframe, unjustifiable. The employer also contends that the claimant transitioned from a victim to an aggressor by orally confronting the assailant and persuading the assailant to stop the attack and leave the shelter.

15. The court’s view of the assault against the claimant, and her actions of defending herself, differs significantly from the employer's. The ALJ does not perceive the assault in the same context as the employer. Instead, the ALJ finds that the claimant responded reasonably by fighting back, attempting to strike the assailant, and vocalizing commands to halt the assault. It was precisely the claimant's active resistance, body language, and vocal intervention that effectively stopped the assault and prevented the assailant from inflicting further harm upon the claimant and possibly others.

16. The employer argues that they consistently instruct employees in de-escalation techniques. That said, these techniques address verbal confrontations rather than physical violent assaults against employees.

17. NL[Redacted] conceded during cross-examination, that they do not provide their employees any training on how an employee is to defend themselves during a physical

assault. Nor do they have a specific policy outlining exactly what to do when assaulted by someone – let alone what to do when the assailant intends to cause great bodily harm.

18. In addition, during her cross-examination, NL[Redacted] was asked whether she agreed that NM[Redacted], who is a man that identifies as a woman, appeared much taller and bigger than the claimant. Despite the video evidence, which shows NM[Redacted] is much taller than the claimant, NL[Redacted] would not admit that the assailant was taller than the claimant. Instead, she said the camera angle made it hard to tell. Her evasiveness and refusal to agree that the video clearly shows that NM[Redacted] is much taller than the claimant greatly diminishes NL's[Redacted] credibility as it relates to the employer's policies, enforcement of their policies, her interpretation of the video, and the basis for terminating the claimant.

19. The claimant testified that following the punch to the head, she experienced disorientation and received no immediate assistance. Recognizing the need to safeguard herself, she engaged in self-defense. While falling and being separated from the assailant, she threw some punches to defend herself. The perception of the claimant was that the assailant exhibited no signs of surrender and did not express any intention to cease the assault-even when he fell to the ground. The ALJ finds the claimant's perceptions and actions to be reasonable and appropriate under the circumstances. The ALJ also finds the claimant's testimony to be credible.

20. The claimant had never received instructions or protocols from the employer to refrain from protecting oneself if being physically assaulted. Nor was any guidance or training provided for self-defense techniques.

21. The first person the claimant spoke to after the assault was [Redacted, hereinafter SK], the director. The first thing SK[Redacted] said was "please tell me you did not hit him back."

22. The ALJ finds that the claimant's actions actually de-escalated the situation. In other words, given the circumstances, the claimant's defensive actions, body language, and vocalizations neutralized the threat posed by the assailant. And although the claimant sustained substantial injuries, the claimant's resistance, body language, and vocalizations likely minimized the extent of her injuries.

23. At no point did the claimant assume the role of an aggressor. She reacted to an assault and attempted to protect herself the best way she knew how, and such actions were completely reasonable under the circumstances.

24. Claimant testified about her job duties. As found above, the claimant worked for the employer as an overnight supervisor for a women's shelter. But, despite her supervisory role, the claimant also performed physical tasks as a shelter aid, including lifting up to 50 pounds. Examples of such tasks included assisting with food deliveries, such as carrying 6-gallon boxes of milk weighing about 50 pounds, cleaning the facility (including mopping and sweeping), packing residents' belongings into totes (some weighing over 25 pounds), and setting up and taking down cots.

25. On February 4, 2022, the day of the assault, the claimant presented to Denver Health with primary complaints of pain involving her right forearm, wrist, and hand. The

Claimant was evaluated and underwent x-rays, which were normal. Claimant was given a splint to wear and provided restrictions. The claimant was restricted from lifting anything with her right arm until February 7, 2022. Claimant was also advised to return to the ER or urgent care if her symptoms worsened.

26. The day after the assault, the claimant's condition worsened so she returned to Denver Health. At this visit, the claimant complained of headaches, blurred vision, nausea, and right sided pain in her shoulder, arm, and hand.

27. On February 7, 2022, the claimant presented to Concentra. At this visit, the claimant complained of a headache, dizziness, blurred vision, neck pain, and right arm pain. After being evaluated, the assessment included a right shoulder strain, right forearm strain, right wrist strain, cervical strain, head contusion, face contusion, migraine, and right scapula pain. The claimant was prescribed various medications, physical therapy, and referred to a psychologist due to the assault. The claimant was restricted to performing modified duty from February 5, 2022, to her next follow up appointment. Her restrictions included no lifting.

28. On February 11, 2022, the claimant returned to Concentra with similar complaints that included severe pain in her neck, upper back, and right arm. She was also suffering from a lot of anxiety due to the assault. It was also noted that the Claimant had not been working since the assault. After assessing the claimant, her work restrictions were continued. The claimant was limited to modified duty and no lifting greater than 2 pounds with her right upper extremity.

29. On February 18, 2022, the claimant returned to Concentra. At this visit, it was noted that the claimant was adhering to the work restrictions as prescribed. At this visit, the claimant still complained of headaches, neck pain, right shoulder and scapula pain, right wrist, as well as stress and adjustment reaction resulting in not sleeping due to stress. The report also indicates that the claimant had also been working as a hairstylist, braiding hair, but that she had to cancel appointments because she cannot use her right wrist. Her work restrictions of no lifting or carrying anything greater than 2 pounds and no reaching overhead were continued.

30. On March 11, 2022, another referral was made for the claimant to see a psychologist.

31. As of March 18, 2022, the claimant had been working for the [Redacted, hereinafter SA] for the past weeks and had also been working at a Covid testing center, and both jobs, at that time, allowed her to work within her restrictions. Her restrictions were increased, and she could lift up to 5 pounds with her right upper extremity.

32. As a result of her injuries, and after the assault, the claimant could not perform her regular job duties at the shelter that required lifting up to 50 pounds and her inability to perform her regular job duties exceeded three days.

33. On the day of the assault, and shortly after the claimant's discharge from the hospital, the employer terminated claimant. The employer terminated the claimant for being in a "physically violent altercation with a participant" because the employer thought that the claimant's actions were "inappropriate, unprofessional, and do not condone how we treat participants at [Redacted, hereinafter CC]." According to the employer, the

Claimant's actions of defending herself violated their code of conduct and workplace policies.

34. The employer submitted portions of their code of conduct and workplace policies. The portions they provided set forth the expectations for each employee as well as a section about preventing violence in the workplace. The conduct policy provides the following:

> *Conduct Expectations*:
>
> Certain standards are necessary for efficient operation of the Agency, for the benefit and protection of the rights and safety of Agency employees, and to reflect respect for those individuals and families coming to the Agency for services. Conduct that interferes with operations or brings discredit to the Agency will not be tolerated whether it occurs on or off Agency time or Agency property. CC[Redacted] expects from its employees the highest standards of competence, loyalty and service. In all dealings with clients, the general public and with each other, employees must respect the dignity of each individual. All employees are expected to engage in mutual and cooperative actions in relation to one another. It is vital that clients, visitors, and fellow employees are treated with unfailing courtesy and understanding at all times, regardless of the situation. Employees are expected to conduct themselves professionally and behave in a manner that is respectful of the Vision, Mission and Core Values of CC[Redacted].

35. The policy about violence provides:

> Preventing Violence in the Workplace.
>
> The Agency is committed to providing employees with a safe work environment. Threatened or actual violence by or toward our employees is strictly prohibited on our premises or on a work site. Threats or actual violence by employees is prohibited towards other employees, clients, volunteers, vendors and other people acting on behalf of the Agency. Violence in the workplace may be described as verbal or physical threats, intimidation, and/or aggressive physical contact. Prohibited conduct includes, but is not limited, to the following:
>
> - Inflicting or threatening injury or damage to another person's life, health, wellbeing, family or property;
> - Possessing a firearm, explosive or other dangerous weapon on Agency premises or using an object as a weapon;
> - Throwing objects;
> - Slamming items such as doors, drawers, desks, etc.;
> - Abusing or damaging Agency or employee property;
> - Using obscene or abusive language or gestures in a threatening manner; or,

- Raising voices in a threatening manner.

36. As found above, the claimant was terminated for how she defended herself. Moreover, the act of defending herself from a violent assault, in the manner she did, would not reasonably be expected to cause the loss of employment. In other words, defending yourself against a violent assault by fighting back and yelling at the assailant would not be expected to cost you your job.

37. The ALJ finds that the policies submitted by the employer do not apply to the circumstances of this case, defending oneself during an assault, and how the claimant defended herself.

38. The ALJ is mindful that in some cases, an assault victim can cross the line and become the aggressor. But in this case, the ALJ finds that the claimant did not come close to that line and did not cross that line.

39. Thus, the ALJ finds that the termination was neither reasonable nor warranted under the circumstances. Thus, the claimant is not at-fault for her termination and subsequent wage loss.

40. At the time of her injury, the claimant was working four jobs. The claimant was working for the employer, [Redacted, hereinafter ES], and the SA[Redacted]. The claimant also worked at home braiding hair. The claimant did not, however, seek to have her income from braiding hair included in her average weekly wage.

41. The employer's wage records, that were submitted at the hearing, are from June 19, 2021 through January 28, 2022-which is 223 days. The records show that the Claimant started at an hourly rate of $16.87 per hour, but then got a raise around July 17, 2021, to $19.00 per hour. Therefore, in calculating the claimant's average weekly wage, the ALJ has taken the hours worked from June 19, 2021 through January 28, 2022, and determined the claimant's average weekly wage, based on the higher wage of $19.00 per hour. Between June 19, 2021, and January 28, 2022, the Claimant earned $33,694.51. But based on an hourly rate of $19.00, she would have earned $34,038.50. Therefore, the ALJ has used the higher figure and finds that the claimant's average weekly wage at the employer is $1,068.48.[1]

42. The claimant had concurrent employment at ES[Redacted] at the time of her work injury. In order to determine her average weekly wage from her concurrent employment at the time of the jury, the ALJ will use her gross earnings from 2021. During 2021, the claimant earned $22,374.60 at ES[Redacted]. Dividing her gross earnings by 52 weeks results in an average weekly wage from ES[Redacted] of $430.28.

43. The claimant also worked at the SA[Redacted]. There are wage records that show the claimant earned $855.00, for 42.75 hours of work, at $20.00 per hour, from

[1] $34,038.50/223 days = $152.64 per day. $152.64 x 7 days = $1,068.48 per week. The ALJ also did not include the $350 bonus the claimant received in 2021 since there was no indication that the bonus, and the amount of the bonus, was regularly expected.

January 16, 2022, through January 29, 2022.[2] Therefore, this results in an average weekly wage from the SA[Redacted] of $427.50.

44. While the claimant did not submit wage records from ES[Redacted] that shows the amount she earned from January 1, 2022, through February 4, 2022, the ALJ still finds that the 2021 wages from ES[Redacted] represent a portion of the claimant's earning capacity at the time of the accident. Therefore, based on the three jobs the claimant was working at the time of her injury, the claimant's average weekly wage is found to be $1,926.26.[3]

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim must be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197

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[2] The ALJ did not include bereavement or public health payments from the SA[Redacted] since those do not appear to be based on hours worked and do not assist in determining loss of earning capacity under the facts and circumstances of this case.

[3] Archdiocese of Denver of $1,068.48, plus ES[Redacted] of $430.28, plus the SA[Redacted] of $427.50, equals $1,926.26.

P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence she is entitled to temporary disability benefits.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

The claimant's testimony and statements to her medical providers is found to be credible. As found, the claimant worked for the employer as an overnight supervisor for a women's shelter. But despite her supervisory role, the claimant also performed physical tasks as a shelter aid, including lifting weights up to 50 pounds. Examples of such tasks included assisting with food deliveries, such as carrying 6-gallon boxes of milk weighing about 50 pounds, cleaning the facility (including mopping and sweeping), packing residents' belongings into totes (some weighing over 25 pounds), and setting up and taking down cots.

As further found, the claimant was injured on February 4, 2022. Due to her work injury, the claimant was restricted from performing her regular job duties.

- For example, on February 4, 2022, the day of the assault, the claimant presented to Denver Health with primary complaints pain involving her right forearm, wrist, and hand. Based on her injuries, the claimant was restricted from lifting anything with her right arm.
- On February 7, 2022, the claimant presented for additional medical treatment. At this visit, the claimant complained of a headache, dizziness, blurred vision, neck pain, and right arm pain. After being evaluated, the assessment included a right

shoulder strain, right forearm strain, right wrist strain, cervical strain, head contusion, face contusion, migraine, and right scapula pain. The claimant was prescribed various medications, physical therapy, and referred to a psychologist due to the assault. Lastly, the claimant was restricted to performing modified duty from February 5, 2022, to her next follow up appointment and her restrictions included no lifting.

- On February 11, 2022, the claimant returned to Concentra with similar complaints that included severe pain in her neck, upper back, and right arm. She was also suffering from a lot of anxiety due to the assault. It was also noted that the claimant had not been working since the assault. After assessing the claimant, her work restrictions were continued. The claimant was limited to modified duty and no lifting greater than 2 pounds with her right upper extremity.
- Then, on February 18, 2022, the claimant returned to Concentra. At this visit, it was noted that the claimant was adhering to the work restrictions as prescribed. At this visit, the claimant still complained of headaches, neck pain, right shoulder and scapula strain, right wrist, as well as stress and adjustment reaction resulting in not sleeping due to stress. The report also indicates that the claimant had also been working as a hairstylist, braiding hair, but that she had to cancel appointments because she cannot use her right wrist. Her work restrictions of no lifting or carrying anything greater than 2 pounds and no reaching overhead were continued.

Based on the claimant's testimony and the medical records, the ALJ finds and concludes that the claimant has established by a preponderance of the evidence that she is entitled to temporary disability benefits as of February 5, 2022.

II. Whether Claimant was responsible for her termination and not entitled to any temporary disability benefits.

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, the claimant was violently assaulted by a patron of the shelter. In order to defend herself, the claimant fought back and hit the assailant and yelled at the assailant.

The employer contends that the claimant violated company policies by volitionally hitting and attempting to hit the assailant in self-defense and by yelling at the assailant in an attempt to get the assailant to stop assaulting her and to leave the facility.

The ALJ has watched the surveillance video several times and found that the claimant acted reasonably under the circumstances. The ALJ further found that the claimant's actions would not reasonably be expected to result in someone being terminated – for defending themselves from a violent assault.

The ALJ further found that the policies implemented by the employer to de-escalate situations only pertains to verbal situations and not physical assaults. Moreover, the ALJ further found that the employer did not provide any training for what an employee should do if they are physically and violently assaulted. In fact, the ALJ finds and concludes that it was the claimant's actions of fighting back and yelling at the assailant that de-escalated the situation and caused the assailant to stop assaulting the claimant and begin to leave the facility.

Based on the totality of the evidence, the ALJ finds and concludes that the respondents failed to establish by a preponderance of the evidence that claimant's volitional actions of defending herself make her at-fault for her termination and subsequent wage loss. As a result, the claimant is entitled to temporary disability benefits.

III. The claimant's average weekly wage.

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*,

867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As found, at the time of her injury, the claimant had four jobs. The claimant worked for the employer, the SA[Redacted], ES[Redacted], and braided hair at home. The claimant did not, however, request that her earnings from braiding hair be considered in determining her average weekly wage.

As found, the wage records from the employer that were submitted at the hearing, are from June 19, 2021 through January 28, 2022-which is 223 days. The records show that the claimant started at an hourly rate of $16.87 per hour, but then got a raise around July 17, 2021, to $19.00 per hour. Therefore, in calculating the claimant's average weekly wage, the ALJ took the hours worked from June 19, 2021 through January 28, 2022, and determined the claimant's average weekly wage, based on the higher wage of $19.00 per hour. Thus, between June 19, 2021, and January 28, 2022, the claimant earned $33,694.51. But based on an hourly rate of $19.00, she would have earned $34,038.50. Therefore, the ALJ used $34,038.50 to determine her average weekly wage and finds and concludes that the claimant's average weekly wage at the employer is $1,068.48.

As also found, the claimant had concurrent employment at ES[Redacted]. As set forth in the W-2 submitted by the claimant for 2021, the claimant earned $22,374.60. Dividing her yearly earnings by 52 weeks results in an average weekly wage from ES[Redacted] of $430.28. While the documents from ES[Redacted] cover only 2021, the ALJ still finds and concludes that the claimant was working for ES[Redacted] in 2022 and that earnings from such employer should be included in calculating her average weekly wage.

Lastly, as also found, the claimant concurrently worked at the SA[Redacted]. The wage records from the SA[Redacted] show the claimant earned $855.00, for 42.75 hours of work, at $20.00 per hour, from January 16, 2021 through January 29, 2022. Therefore, this results in an average weekly wage from the SA[Redacted] of $427.50.

The ALJ finds and concludes that the fairest and most equitable way to determine the claimant's average weekly wage based on the evidence submitted at the hearing is to add the average weekly wage from each of the three employers together. As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that she was working three jobs at the time of her accident and that her average weekly wage is $1,926.26.[4]

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

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[4] Claimant, in her proposed order, contends that the maximum AWW for this claim is $1,738.38. It is, however, up to the parties to determine how the maximum AWW cap applies in calculating the claimant's TTD and TPD benefits since that issue is not before the ALJ.

1. The claimant is entitled to temporary disability benefits from February 5, 2022, until terminated by law.
2. The claimant is not responsible for her termination and is not at fault for her wage loss.
3. The claimant's average weekly wage is $1,926.26.
4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 5, 2023

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-203-709-002

ISSUES

I. Whether the respondents established by a preponderance of the evidence that the claimant violated a safety rule and are entitled to reduce his indemnity benefits by 50%.

II. Whether the claimant established that the need for treatment of his left knee is reasonably necessary and related to his work injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

Date of Compensable Accident

1. The claimant sustained a compensable injury on April 20, 2022.

Hiring and Training of Claimant.

2. The Claimant was hired by the employer on January 31, 2022, to work as a forklift driver. Claimant's job duties as a forklift driver included transporting freight, pulling merchandise, replacing freight, filing orders, and controlling freight flow in an indoor warehouse. **RHE J, 171; Hearing Tr. 29, ll. 20-25, Tr. 30, ll. 1-6.**

3. On January 31, 2022, the claimant completed the employer's "Daily Onboarding Quiz- Day One". On February 1, 2022, the claimant completed the employer's "Daily Onboarding Quiz- Day 2". On February 3, 2022, the claimant completed the employer's "Daily Onboarding Quiz- Day 3". **RHE J, 165-170.** Daily Quiz 1 and 3 both outline the importance of a clear workplace and keeping the workplace and floors clean of debris. However, the claimant's job did not involve cleaning debris off the floors. The claimant also acknowledged receipt and understanding of the essential functions of, and an ability to perform, the employer's forklift operator position. **RHE J, 174.**

4. [Redacted, hereinafter KR], the employer's Operations' Manager Over Environmental Health, and Safety testified at the hearing. As the Environment Health and Safety Manager, KR[Redacted] is familiar with the safety training provided to the employer's associates, including the employer's lift operators. **Tr. 68, ll. 23-25, Tr. 69, ll.1-6.** KR[Redacted] credibly testified the employer has a forklift training program complied of Crown[1] videos, subsequent testing, followed by four hours of training on use of the forklift, and additional training for the associate's first 90 days of employment. **Tr. 71, ll. 6-16.** According to KR[Redacted], together with when the employee completes the

[1] Crown is the manufacturer of the forklift involved in the Claimant's accident.

first portion of their forklift training, they are also required to read through the training with the trainer and sign off on it. **Tr. 73, ll. 20-23.** The employer also requires their forklift operators to be certified, which involves watching a manufacturer-specific video, passing a test, completing four additional hours of training with a trainer, with a checklist and training guide, and finally completing a practical exam. **Tr. 74, ll. 1-25, Tr. 75, ll. 1-15.**

Safety Rules

5. The employer did submit into evidence a document titled "General Safe Work Practices." The document contains a few rules that govern the operation of forklifts. But there is not a written rule that says driving a forklift above a certain speed is unsafe and not allowed. It does not appear that the claimant was told such either. In addition, although the document has a place for the claimant's signature, the copy submitted by the employer is not signed by anyone. Therefore, it is not clear that this document was provided to the claimant.
6. The employer failed to submit sufficient and credible evidence to establish that they have any safety rules, whether verbal or in writing, that govern the proper speed the forklift drivers should drive while working in the warehouse.
7. But the claimant did admit during his testimony that going full speed on his forklift down an aisle would violate a safety rule. **Tr. 48, ll. 8-10**.
8. [Redacted, hereinafter AL] testified at the hearing and on behalf of the employer. He testified that about two hours before the accident, he noticed that some pallets looked like they had been "bulldozed." Bulldozing is when a forklift driver pushes empty pallets out of the way with the forks of the forklift. He credibly testified that about two hours before the accident he advised the claimant to not bulldoze any pallets. Thus, the claimant was advised to not bulldoze pallets.

Write-ups - Coaching Events - Enforcement

9. Based on KR'S[Redacted] testimony, on February 10, 2022, the claimant received a coaching for "Failure to follow power equipment operating rules not otherwise covered specifically within this guideline". **RHE J, 201.** The specific incident in which the Claimant was involved was striking a fixed object, in this case, a bollard. **Tr. 67, ll. 21-25.** Following the February 10, 2022, incident, the claimant received additional training relating to the operation of a forklift, going over the employer's safety rules, completing a "safety observation," and spending additional time with a trainer. **Hearing Tr. 82, ll. 11-22.**
10. On March 31, 2022, the claimant again received a coaching for "Failure to follow power equipment operating rules not otherwise covered specifically within this guideline". **RHE J, 200.** According to KR's[Redacted] testimony the March 31, 2022, coaching involved the claimant's improper placement of pallets on the rack. **Tr. 83, ll14-25.** After the claimant received this coaching, his manager asked a driver from a different shift to give the claimant additional safety training on the operation of the forklift. **Tr. 84, ll. 20-25, Tr. 85, ll. 1-4.**
11. On April 13, 2022, the claimant received a Safety Accountability, Step One Safety

Rule Violation, a more severe safety violation than the two occurrences previously received, for careless operation of equipment. **Tr. 85, ll. 2-24, RHE J, 199.** This safety rule violation occurred due to the claimant hitting a sprinkler head while placing a pallet on a shelf. **Tr. 76**. KR[Redacted] testified that accountability is given to the employee, and the training is given after. In this case, after the claimant received the Step One Safety Rule Violation, he "open doored" it with his manager, [Redacted, hereinafter MR]. The open-door process took place the morning of his April 20, 2022, accident. **Tr. 86, ll. 12-22.** The claimant was unhappy or disgruntled about receiving the Safety Rule Violation. **Tr. 109, ll. 10-14.** During their open-door discussion the morning of April 20, 2022, MR[Redacted] emphasized to the claimant the expectation for any lift driver who works for the Employer to hold themselves accountable to a safety-first mindset. **Tr. 111, ll. 4-10.**

12. KR[Redacted] also stated that the claimant has also been coached on his need to meet production requirements or his quota. **Tr. 77, ll. 20-25**. In other words, the employer told the claimant that he had to work faster. Since the claimant's job required him to drive a forklift, the only way for him to improve his production would be to work faster by lifting and placing products on the shelves faster and driving faster.

13. None of the prior write-ups, or coaching, involve the claimant driving too fast. On the contrary, the claimant was coached for not meeting production—working too slow.

14. The employer has surveillance cameras in the warehouse. There was no credible evidence submitted demonstrating the employer attempted to enforce any type of speed limit in the warehouse by reviewing the surveillance tape regularly and advising employees to keep their speed down.

15. Based on KR's[Redacted] testimony, each forklift has a governor that limits its speed to 9 miles per hour. **Tr. 67, ll. 2-3**. Thus, if the employer wanted to make sure that each forklift was always driven slower, no matter how it impacted each driver's production, they could have set the governor at a lower speed. In other words, if 9 miles per hour is too fast, then it would appear the employer had the means to limit the speed - but chose not to. In essence, the employer allowed forklifts to drive up to 9 miles per hour – apparently to assist each driver meet their production quota.

16. None of the claimant's prior write-ups or coaching are found to be willful violations of any of the employer's safety rules. Instead, they merely represent the claimant's lack of experience and skill as an indoor forklift driver and the requirement that he work faster to meet his production or quota.

Accident

17. On April 20, 2022, the claimant, after completing his break, was working in "Module 9" operating a forklift, replenishing freight. After slotting a rack of freight, the claimant brought the forks of his lift down, facing away from him, while making his way to grab the next freight, he came across some type of floor debris, which resulted in a loss of control of the forklift, preventing his forklift from stopping, and causing him to impale his left thigh on a pallet. **Hearing Tr. 34, ll. 13-25, Tr. 35, ll. 1-25, Tr. 36, ll. 1-7.**

18. At the time of the accident, the claimant was driving approximately 4 miles per hour. **Hearing Tr. 55, ll. 19-21.**

19. KR[Redacted] testified that following the claimant's accident, she inspected the accident scene. She also reviewed CCTV footage of the accident, which is included in the record as Exhibits K and L. Based on her observations, KR[Redacted] noted markings on the rack of the module indicating it had been struck by a pallet, she also noticed that paint was removed and there were scratches. Plus, the top pallet was missing a board, which KR[Redacted] believed was the board that impaled the claimant's leg. All the nails and boards on the pallet were shifted as if it occurred on impact. The entire side of the pallet was bent, and every board on the pallet was bent, and the nails pulled as if from a hard direct blow. **Tr. 79, ll. 12-25, Tr. 80, ll. 1-2.** Based on her review of the CCTV video, KR[Redacted] offered her lay opinion that the accident occurred when the claimant pulled replenishment product from the other side of the rack, had a full load of product on his forks, went through the breezeway, traveled 90 feet in five seconds, going full speed, and made contact with a stack of pallets on the ground, and then drove the pallets into the rack of the module. Because the module rack is immobile, the pallet was driven into the claimant's left leg. **Tr. 95, ll. 12-25.** Following the claimant's accident, KR[Redacted] inspected the accident scene. Based on her inspection, she stated that there was some debris covering the floor - which is consistent with the claimant's testimony that the accident might have resulted from debris on the floor. **Tr. 87, ll. 3-8.**

20. The surveillance or CCTV video admitted into evidence and relied on KR[Redacted] to conclude the claimant was driving carelessly and at an excessive speed is of very poor quality. The video appears to be a video taken of the video being played on a monitor. When viewing the video, you can see the timestamp on the video as well as the playback speed. For example, on one video, at about 6:45.37, the video shows a forklift, which is allegedly being driven by the claimant, driving quickly past the end of an aisle. But upon closer inspection of the video, the video is being played back at 4 times the normal speed. Thus, this misrepresents the speed of the forklift seen on the video. The court has also reviewed the video to try to determine the portion of the video that allegedly shows the claimant traveling 90 feet in 5 seconds. However, the ALJ cannot find that portion of the video that arguably shows the claimant traveling very fast and allegedly covering 90 feet in five seconds. For example, there is a section of the video that shows a forklift going down an aisle – and it appears to be going quickly. This is at around 7:03.30 through 7:04.03. But again, a review of the playback speed of this portion of the video shows that it is being played back at 8 times its normal speed. There is also another video which is of better quality, but does not appear to show the claimant speeding or going too fast. As a result, the ALJ does not find the video to be reliable evidence of the speed the claimant was driving at the time of the accident or just before the accident. Thus, because KR[Redacted] relied on the video, which the ALJ does not find persuasive, the ALJ also does not find KR's[Redacted] testimony regarding her contention that the accident was caused by the claimant driving too fast to be reliable or persuasive.

21. There was some testimony about the possibility that the claimant might have been injured while "bulldozing" pallets. Bulldozing is when a forklift driver uses his forklift to push or "bulldoze" empty pallets out of the way. There was, however, a lack of credible evidence that the claimant was injured due to bulldozing pallets.

22. Moreover, there was also testimony from [Redacted, hereinafter CN]. He testified that he visited the claimant in the hospital after the accident. He further testified that the claimant told him that the accident occurred while trying to retrieve a replenishment pallet, he tried to back out and in doing so, struck a stack of empty pallets. **Hearing Tr. 110, ll. 1-8.**

23. The ALJ credits the claimant's testimony that he lost control of the forklift due to debris on the floor and not due to excessive speed or bulldozing pallets. This is supported by the testimony of [Redacted, hereinafter ML] who also testified that there was some debris on the floor after the accident. As a result, the ALJ finds it was an accident - and was not caused by the claimant's willful violation of a safety rule such as speeding or bulldozing.

Medical Treatment after Accident and Knee Complaints

24. After the accident, the claimant was transported by Emergency Medical Services to Kaiser Permanente Hospital where he was diagnosed with a penetrating injury just above the left knee by a wood pallet, with damage to the popliteal artery and vein. **RHE B.** The claimant subsequently underwent removal of the impaled wood from the left popliteal fossa, repair of the popliteal artery and popliteal vein transections with interposition reversed autogenous saphenous vein grafts, irrigation and debridement of wound, closure of muscle fascia, application of negative pressure wound VAC, and lateral closure. **RHE C, 9.**

25. On the day of the accident, and while in the hospital, the claimant also complained of left knee pain. As a result, they took x-rays of his left knee. The x-rays demonstrated small joint effusion, surgical clips, skin staples, and gas within the soft tissues. **RHE C, 28.**

26. While in the hospital, the claimant also noticed knee pain when he started to become mobile. **Tr. 34, ll. 3-6.**

27. The claimant subsequently underwent an extensive course of treatment, including multiple surgeries with skin grafting, and physical therapy, including physical therapy to the left knee, massage therapy, and psychological counseling.

28. On June 7, 2022, the claimant was evaluated by Christopher Amaral, PA-C. At this time, the claimant still had left knee pain and a feeling of instability. As a result of ongoing knee pain and instability, the claimant was referred for physical therapy.

29. On June 20, 2022, the claimant was seen by Oscar Sanders, M.D. for his thigh injury, the wound from the impaling injury, and his symptoms that included knee pain and a feeling of instability in his knee. As for his knee, Dr. Sanders discussed with the claimant the possibility of intra-articular pathology and an MRI to help determine the cause of his knee pain and instability. Dr. Sanders, however, decided to hold off on getting an MRI until after the claimant underwent reconstructive wound care treatments with the plastic surgeon for the thigh wound, but yet directed the claimant to continue with physical therapy for his knee symptoms. **CHE 145-147**.

30. On July 13, 2022, the claimant was again seen by Dr. Sanders. At the appointment, the claimant still had ongoing knee symptoms. After the appointment, Dr. Sanders

completed WC164 form and stated that the work-related diagnosis included a left knee sprain. **CHE 162**.

31. On August 22, 2022, the claimant was seen by Dr. Sanders and his primary complaints involved his left knee. At this appointment, he described an incident where his knee gave out and also indicated that although he has tried to increase his walking, he has to stop about every 10 minutes due to knee pain and that he is using a cane to help him walk. Thus, Dr. Sanders ordered an MRI. **CHE 165-166**.

32. In September 2022, the claimant underwent the left knee MRI ordered by Dr. Sanders. The MRI showed the following:

    a. Chronic grade 2 sprain of the proximal MCL.

    b. A focal full-thickness defect between the proximal MCL and an adjacent medial retinaculum.

    c. Areas of high-grade cartilage loss within the patellofemoral compartment.

    d. Strains of the vastus medialis, vastus lateralis, and biceps femoris.

    e. Small joint effusion.

33. Based on the findings on the MRI, and the claimant's concerns about having a full recovery, he was referred to Dr. Javernick, an orthopedic surgeon, for an evaluation. **CHE 174-175**.

34. Orthopedic surgeon, Dr. Matthew Javernick, evaluated the Claimant on September 21, 2022. In connection with his evaluation, Dr. Javernick reviewed the Claimant's left knee MRI. According to Dr. Javernick, the left knee MRI showed only a small amount of chondromalacia patella, with a focal defect in the MCL, but this was focal did not involve the entirety of the MCL, and clinically was completely stable. Dr. Javernick diagnosed the Claimant with chondromalacia patella with a stable medial collateral ligament, opining the majority of the claimant's complaints are unrelated to the knee, but related to the significant trauma that occurred upstream of the knee. From an orthopedic standpoint regarding the knee, Dr. Javernick's only recommendations were low impact activity and strengthening activities. **RHE F, 111.** It is not clear whether the strengthening activities were to be provided via physical therapy since it does not appear that he wrote the claimant a prescription for physical therapy.

35. On October 4, 2022, the claimant was again seen by Dr. Sanders. At this appointment, Dr. Sander's revised the claimant's diagnosis regarding his knee by including a tear of the medial collateral ligament and chondromalacia of the left patellofemoral joint. He also noted that the claimant was seen by Dr. Javernick and Dr. Javernick did not think the claimant was a surgical candidate. Dr. Javernick thought that the claimant's knee was stable and that the majority, but not all, of the claimant's knee complaints related to the significant trauma that is affecting both the vascular and lymphatic return from the lower leg. Therefore, Dr. Sanders referred the claimant to Dr. Reichhardt for a physiatry consultation to assess the claimant's symptoms, which included his left knee. **CHE 180-181.**

36. On November 16, 2022, Dr. Bernton issued a report setting forth his opinion about the cause of the claimant's knee pain. In his report, Dr. Bernton discussed the findings on examination and on the MRI. Dr. Bernton concluded that the claimant has some chondromalacia in his left knee, but that it is unrelated to the work accident. Thus, he concluded that the claimant's left knee problems are unrelated to his work injury and therefore any need for treatment is not work related. In his report, however, Dr. Berton failed to adequately address any aggravation of the claimant's chondromalacia and also failed to address the possible cause of the claimant's knee pain as Dr. Reichhardt explained in his December 20, 2022, report. Moreover, Dr. Bernton failed to explain the cause of the claimant's knee pain, when his knee pain did not exist before the work accident, and then developed right after the accident. As found, the immediate development of the claimant's knee pain after the accident is documented in the medical records that show the claimant complained of left knee pain on the day of the accident and had x-rays taken of his knee that same day. Dr. Bernton also failed to address whether the effusion in the claimant's knee joint is or is not evidence of an injury. As a result, the ALJ does not find Dr. Berton's opinions and conclusions to be persuasive.

37. On December 20, 2022, the claimant was seen by Dr. Reichhardt. At this appointment Dr. Reichhardt addressed the cause of the claimant's knee pain and the need for medical treatment. Dr. Reichhardt concluded that the claimant's knee pain and need for treatment relates to the work accident. Dr. Reichhardt stated that:

> It is, however, medically probable that his left knee was injured as a result of the accident. Certainly, the force of the blunt penetrating injury could have put sufficient force on his knee to tear the MCL. In addition, his reaction to the trauma potentially could have caused additional injury to the patellofemoral compartment and/or aggravated underlying patellofemoral degenerative changes. In addition, the damage to the quadriceps could have caused worsening of patellofemoral tracking, aggravating any underlying patellofemoral degenerative changes. It is medically probable that his knee pain relates to his work-related injury.

38. The ALJ finds Dr. Reichhardt's opinions and conclusions to be persuasive. His conclusions about the cause of the claimant's knee pain and need for medical treatment considered the force of the accident and the torn MCL demonstrated on the MRI. He also provided additional opinions as to the possible cause of the claimant's knee pain such as the possible aggravation of the patellofemoral compartment or tracking changes caused by the damage to the claimant's quadriceps. Although Dr. Reichhardt cannot provide a definitive cause of the claimant's knee pain, or the pain generator, his thought process is logical and consistent with the underlying medical records and the information available to him at the time of his assessment. Thus, the ALJ finds Dr. Reichhardt's opinion that the work accident caused the claimant's left knee pain and caused the need for medical treatment to be credible and highly persuasive.

39. As a result, the work accident injured the claimant's left knee and caused his knee pain and feeling of instability. Thus, the accident caused the need for medical

treatment to cure and relieve the claimant from the effects of his work-related left knee injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the respondents established that the claimant violated a safety rule and are entitled to reduce his indemnity benefits by 50%.

Section 8-42-112(1)(b), C.R.S. provides for a fifty percent reduction in compensation "where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The burden of proof is on the respondents to establish that the claimant willfully violated the safety rule, and resolution of this issue is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc., v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). An employee's violation of a safety rule need not be considered willful if the employee had some "plausible purpose to explain his violation a rule." *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1995).

A violation which is the product of mere negligence, forgetfulness or inadvertence is not willful. *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946). Conduct which might otherwise constitute a safety rule violation may not be willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). Thus, a violation of a safety rule may not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Moreover, in order to establish a safety rule violation, the employer must establish that the adopted safety rule was enforced. *See Lori's Family Dining, Inc., v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo. App. 1995):

The employer contends that the claimant was driving the forklift at an excessive rate of speed, which violated a safety rule, and that driving too fast resulted in a loss of control and collision with a wooden pallet. To support this contention, the employer has provided various employment records, testimony, and surveillance footage. The ultimate determination of whether the claimant's actions violated a safety rule and whether this violation was the cause of the accident and injuries rests on the weight and credibility attributed to the evidence presented.

After a comprehensive review and analysis of the evidence presented, the ALJ finds and concludes that the employer did not meet their burden of proof by establishing, by a preponderance of the evidence, that there was a safety rule about driving too fast, that the rule was enforced, that the claimant willfully violated the rule, that the claimant was driving too fast, and that the violation caused the accident and the claimant’s injuries.

The ALJ’s opinion is based on several factors. First, there is a lack of credible and persuasive evidence to support a finding that there is a specific rule against driving too fast. Although the claimant agreed that driving full speed down an aisle would violate a safety rule, there is a lack of credible evidence establishing that the employer had such a rule, adopted such a rule, and enforced such a rule. As a result, all that is left is some evidence that driving full speed down an aisle would violate a safety rule.

Second, there is a lack of credible evidence that any rule about driving too fast was enforced. To the contrary, the claimant was coached on his production. In other words, he was coached to increase the speed at which he performed his job. Thus, even if the claimant were driving too fast and the speed of the forklift contributed to the accident, the claimant was coached, encouraged, and directed to work faster – which must have meant he had to drive faster to move more product in a given period of time. As a result, demanding more production would eviscerate or nullify any safety rule about driving speed that could have existed. Thus, the employer's desire for the claimant to work faster not only reveals a lack of any type of rule against driving too fast, but also demonstrates a lack of enforcement of any rule about the speed at which the drivers drive.

Third, each forklift was governed so that it could not be driven over 9 miles per hour. If driving up to 9 miles per hour was too fast to drive in the warehouse, then the employer probably had the ability to govern the speed of each forklift to a speed they determined was safe. Thus, their decision to not limit or govern the speed of each forklift to a lower speed also tends to show the lack of a rule, as well as a lack of enforcement, of any rule that precluded driving 9 miles per hour.

Fourth, the employer relies heavily on the surveillance video and KR's[Redacted] contention that the video shows the claimant driving too fast – or full speed – while performing his job. As found by the ALJ, the surveillance video was not found to be persuasive evidence regarding the speed the claimant was driving at the time of the accident. As found above, the video provided to the court is being played at different speeds at various times. For example, some portions of the video are being played back at 4 times the normal speed and sometimes it is being played back at 8 times the normal speed. The video is also very grainy and of poor quality. Thus, the ALJ did not find the video and KR's[Redacted] interpretation of the video to be persuasive. As a result, the ALJ did not find that the accident was caused by the claimant driving too fast.

Fifth, the ALJ found that the accident was not caused by the claimant driving full speed or driving too fast. The ALJ found that the accident was caused by debris on the floor, which was not left by the claimant.

There was also a contention that the claimant might have been injured while bulldozing pallets, which the employer advised the claimant not to do shortly before the accident. The ALJ, however, has also considered this argument and found that there is a lack of credible evidence to support a finding that the claimant's accident and injuries were caused by him bulldozing pallets.

The ALJ does acknowledge that the employer tries to have a safe working environment and attempts to correct the behavior of its employees in a manner that prevents accidents from happening, and from happening again.

That said, based on the facts and circumstance here, the court finds and concludes that the employer failed to establish by a preponderance of the evidence that the accident was caused by the claimant willfully violating a safety rule.

II. Whether the claimant established that the need for treatment of his left knee is reasonably necessary and related to the work injury.

The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In this case, the claimant suffered a severe injury to his leg. As found, the claimant was driving a forklift and crashed into a wooden pallet. Crashing into the pallet resulted in a large piece of wood impaling and going through the claimant's left leg - just above his left knee.

Dr. Reichhardt credibly and persuasively concluded that the accident injured the claimant's left knee and necessitated the need for medical treatment. As found, Dr. Reichhardt concluded that:

> It is, however, medically probable that his left knee was injured as a result of the accident. Certainly, the force of the blunt penetrating injury could have put sufficient force on his knee to tear the MCL. In addition, his reaction to the trauma potentially could have caused additional injury to the patellofemoral compartment and/or aggravated underlying patellofemoral degenerative changes. In addition, the damage to the quadriceps could have caused worsening of patellofemoral tracking, aggravating any underlying patellofemoral degenerative changes. It is medically probable that his knee pain relates to his work-related injury.

On the other hand, Dr. Bernton gave the opinion that the claimant's knee complaints are unrelated to the industrial injury. The ALJ, however, did not find Dr. Bernton's opinions on causation to be persuasive for several reasons. First, Dr. Bernton failed to take into consideration and explain how the contemporaneous onset of the claimant's knee pain following the severe accident and injury is inconsistent with a finding that the accident injured the claimant's knee. As found above, the claimant complained of knee pain immediately after the accident and while in the hospital. Moreover, his complaints resulted in x-rays being taken of his knee. Second, Dr. Bernton also failed to consider that the claimant complained of left knee pain when he started putting more weight on his left leg after his numerous surgeries. Third, Dr. Bernton failed to address the fact that the claimant did not have any knee pain or symptoms before the accident and then did have knee pain immediately after the accident.

As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that the accident caused an injury to the claimant's left knee and caused the need for medical treatment involving his left knee. Thus, the ALJ finds and concludes that the claimant is entitled to reasonably necessary medical treatment to cure and relieve him from the effects of the work accident involving his left knee.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The employer failed to establish by a preponderance of the evidence that the claimant violated a safety rule and that his indemnity benefits should be reduced by 50%.
2. The employer shall provide reasonable and necessary medical treatment to cure and relieve the claimant from the effects of the work accident which resulted in an injury to his left knee.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 9, 2023.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-182-400-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment on September 10, 2021.

2. Whether Claimant established an entitlement to reasonable and necessary medical benefits to cure or relieve the effects of an industrial injury.

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is an 85 -year-old woman who worked part-time for Employer distributing food samples to customers at [Redacted, hereinafter SC]. Claimant had performed this type of work for various companies for approximately eight years.

2. Claimant's job duties required her to prepare food, push a wheeled cart weighing approximately 100 pounds from the back of the store into the shopping area, and stand on her feet for approximately six hours per shift.

3. On September 10, 2021, Claimant was working for Employer. During her lunch break, Claimant went to the cafeteria, gave herself an insulin shot, then ate her lunch. After she ate, she went into the restroom. While in a stall in the bathroom Claimant started to sit on a toilet when she fell to the floor onto her left side. Claimant testified at hearing that she did not know what caused her to fall on September 10, 2021.

4. On September 10, 2021, Claimant was taken by ambulance to North Colorado Medical Center (NCMC) where she was examined in the emergency department. Claimant reported she "was at the store in the restroom and her left leg gave out on her." (Ex. 8) Imaging studies demonstrated that Claimant sustained a comminuted intertrochanteric fracture of the left hip requiring surgery. Claimant remained hospitalized until September 25, 2021. (Ex. 8).

5. During her hospitalization, on September 11, 2021, Claimant was examined by Costa Alimonos, D.O., and also reported her leg gave out suddenly when she was injured on September 10, 2021. (Ex. 8).

6. On September 12, 2021, while hospitalized at NCMC, Claimant underwent an occupational therapy evaluation with Mary Swain, OT. Under the heading "Function Prior

to Admission," the occupational therapy report states: "Pt. lives in a Ranch Level house. Pt. reporting independence w/ADL's and IADL's. Pt. ambulates w/SPC [single point cane]." (Ex. 8).

7. Claimant has a history of issues with pain and weakness in her left leg dating to 2019. In October 2019, Claimant was seen at North Colorado Medical Center for left hip pain radiating to her mid-thigh, not associated with any known injury. (Ex. E). Imaging studies demonstrated mild to moderate degenerative changes in the left hip and knee, and lower back. (Ex. E). On October 29, 2019, The nurse practitioner Claimant saw, Maribeth Taylor, NP, indicated these findings could explain Claimant's left leg weakness symptoms, and recommended Claimant consider a cane or walker "if it gets worse." (Ex. F). From this, the ALJ infers Claimant had previously reported left leg weakness.

8. On November 21, 2019, Claimant saw Kelly Sanderford, M.D., at Banner, reporting intermittent stabbing pain in the left thigh, mild pain radiating from her back to her lower leg and thigh. Dr. Sanderford also documented that Claimant had a history of syncope and collapse, without further detail. (Ex. G & J). She reported feeling as if her leg was "going to give out," and pain in her thigh at random times. Dr. Sanderford reviewed Claimant's imaging studies and noted Claimant had minimal arthritis in her hips, but severe degenerative lumbar disease. She suspected Claimant's reported left thigh pain was radicular pain from her back, and recommended an MRI and physical therapy. Dr. Sanderford's diagnosis was lumbago with sciatica on the left side, and pain in the left thigh. (Ex. G & I).

9. An MRI of Claimant's lumbar spine was performed on December 2, 2019, for a diagnosis of left leg pain. The MRI demonstrated "[m]oderate to severe spinal canal stenosis and associated subarticular zone narrowing asymmetric to the left side at L3-4 which could cause irritation/impingement of adjacent descending nerve roots asymmetric to the left side;" and "[m]oderate left L4-5 subarticular zone narrowing which could potentially cause adjacent descending nerve irritation." (Ex. H).

10. At Claimant's physical therapy appointment on December 4, 2019, she reported having pain in the left thigh and buttocks, which began in August 2019. The physical therapist noted Claimant "ambulates into therapy using a SPC [single point cane]. The cane is not adjustable and is too tall for her." The physical therapist recommended Claimant find "a cane that is more appropriate for her height." (Ex. K). Claimant reported pain in her left thigh and buttocks which she indicated began in August 2019, and was not associated with any known event. (Ex. J).

11. On December 20, 2019, Claimant reported to physical therapy that "she doesn't have much pain, just the left leg gives out sometimes." Claimant's stated physical therapy goal was to be able to walk without pain. Claimant also reported she was scheduled to see a back specialist -- Dr. Blatt -- at the end of January 2020. (Ex. L). On January 10, 2020, Claimant reported increasing pain and that she did not feel therapy was helping beyond providing temporary relief that did not last. (Ex. P).

12. On or about January 23, 2020, Claimant saw David Blatt, M.D., a neurologist at the Banner Health Clinic. Dr. Blatt diagnosed Claimant with left lateral thigh pain, IT band/trochanteric bursitis. Dr. Blatt referred Claimant for additional physical therapy. (Ex. O). On January 31, 2020, Claimant reported to physical therapy that she had seen a neurologist who thought her pain was due to bursitis and her IT band, and indicated that the neurologist wanted Claimant to continue physical therapy. (Other than the referral from Dr. Blatt - Ex. O - no records of his evaluation or treatment were offered or admitted into evidence).

13. At hearing, Claimant testified that she did not know the reason she fell on September 10, 2021. Claimant testified she did not report to the NCMC ER physician that her leg “gave out,” when she fell on September 10, 2021, and that she never reported that her leg was “giving out” in 2019. Claimant further testified that prior to her September 9, 2021 injury, she had not owned, borrowed, or used a cane. Claimant’s testimony on these issues is inconsistent with her medical records and is not reliable or credible.

14. Claimant’s medical records indicate Claimant reported her left leg giving out to the ER physician on September 10, 2021. On September 11, 2021, Claimant also reported that her leg "gave out" the following day to a different physician. (Ex. B). Claimant’s testimony that she had never reported her leg giving out in 2019 is also contrary to her medical records. Claimant reported to Dr. Sanderford in November 2019 that she felt that her leg was going to give out; and reported to physical therapy on December 10, 2019 that her “left leg gives out sometimes.” (Ex. G & K). The ALJ finds the contemporaneous medical records from multiple providers more credible and persuasive than Claimant's testimony to the contrary.

15. Claimant’s testimony that she had not used a cane prior to her fall is also inconsistent with her medical records. Specifically, physical therapy records from December 4, 2019 indicate Claimant was using a non-adjustable single point cane that was too tall for her, and the therapist recommended Claimant find an appropriately-sized cane. (Ex. K). After her September 10, 2021 injury, Claimant reported to occupational therapy that she was using a single point cane prior to her injury. (Ex. 8). Given that Claimant’s use of a cane prior to her accident is documented by two different providers, and the level of detail in the physical therapy records related to Claimant’s usage of a cane, the ALJ finds the records more reliable and credible than Claimant’s testimony that she had not previously used a cane.

16. Claimant has not worked since her injury due to continuing issues related to her left hip fracture.

17. Allison Fall, M.D., was admitted as an expert in physical medicine and rehabilitation. Dr. Fall performed an independent medical examination of Claimant at Respondents’ request, and testified by deposition in lieu of live testimony. Dr. Fall opined that the cause of Claimant’s injury was likely due to weakness in supporting her body. Dr. Fall also testified that Claimant’s MRI findings were consistent with an L3-4 nerve irritation that could cause weakness in Claimant’s thigh muscles.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his

employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The evidence establishes that Claimant's injury occurred "in the course" of his employment. That is, it occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The issue before the ALJ is whether Claimant's injury "arose out of" his employment.

The "arising out of" element requires a claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

As the Colorado Supreme Court explained in *City of Brighton*, "All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks, which are inherently personal or private to the employee him- or herself; and (3) neutral risks, which are neither employment related nor personal." *City of Brighton*, 318 P.3d at 502.

Employment risks are "risks inherent to the work environment itself." *City of Brighton*, 318 P.3d at 502. Typically, the causal connection between employment risks and employment are obvious. *Id*. The evidence in this case does not establish that Claimant's injury was the result of an "employment risk." No evidence was admitted credibly establishing that the physical condition of the bathroom where Claimant was injured contributed to her injury, or that some action associated with her employment caused her to fall. Claimant's injury does not constitute an "employment risk" because neither the physical condition of the location Claimant was injured, nor a specific work-related activity caused her injury.

Consequently, the compensability of Claimant's September 10, 2021 injury rests on whether it was the result of a personal risk, or a neutral risk. Personal risks are entirely personal or private to the employee herself, such as an employee's preexisting idiopathic medical conditions unrelated to employment. *City of Brighton*, 318 P.3d at 503. Personal risks are generally not compensable unless an exception applies, such as when a "special hazard" of employment contributes to an injury that is primarily caused by a preexisting condition. *Id*.

Neutral risks are those risks that are neither employment nor personal risks, and includes "unexplained falls" (*i.e.*, falls with a truly unknown cause or mechanism). City of Brighton, *supra*. Neutral risks are analyzed under a "but-for" test. That is, an "unexplained fall 'arises out' the employment if the fall would not have occurred but for the fact that the

conditions and obligations of employment placed the employee in the position where he or she was injured." *Id*.

Claimant has failed to establish by a preponderance of the evidence that the fall she sustained on September 10, 2021 was "unexplained," or the result of a "neutral risk." Claimant asserts that the cause of her fall is "unexplained" primarily based on Claimant's testimony that she did not know why she fell. However, the evidence demonstrates it is more likely than not that Claimant fell on September 10, 2021 because of weakness in her left leg, consistent with Claimant's two separate reports to physicians at NCMC that her left leg gave out. As found, Claimant's testimony that she did not report her leg giving out was not credible and was inconsistent with her medical records. Given Claimant's history of left leg weakness, and reports of her leg previously "giving out," the cause of Claimant's fall is more likely than not due to her preexisting idiopathic conditions, that is, a condition personal to Claimant. Thus, the ALJ concludes that Claimant's injury was the result of a personal risk, unrelated to her employment. Claimant has failed to establish that she sustained an injury arising out of the course of her employment with Employer.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant's claim for medical benefits is denied and dismissed.

TEMPORARY TOTAL DISABILITY

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

Because Claimant has failed to establish a compensable injury, Clamant has not established an entitlement to temporary disability benefits. Claimant's request for determination of her average weekly wage is denied as moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she sustained a compensable injury arising out of the course of her employment with Employer on September 10, 2021. Claimant's claim is denied and dismissed.

2. Claimant's request for medical benefits is denied and dismissed.

3. Claimant's request for temporary disability benefits is denied and dismissed.

4. All issues are dismissed as moot.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 6, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-210-972-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that Respondents violated § 8-43-203, C.R.S. by failing to file a position statement within 20 days of receiving notice of Claimant's Worker's Claim for Compensation, and if so, is Claimant entitled to a penalty?

2. Did Claimant prove by a preponderance of the evidence that Respondents violated the October 18, 2022, Director's Order by failing to file a position statement within 15 days of the date of the Order, and if so, is Claimant entitled to a penalty?

3. Did Claimant prove by a preponderance of the evidence that Respondents failed to timely provide Claimant with a designated provider list pursuant to WCRP 8-2, and if so, is Claimant entitled to a penalty?

4. If Claimant successfully demonstrated that Respondents were in violation of the Rules, Statues or an Order, have Respondents shown by a preponderance of the evidence that Claimant failed to set forth the alleged penalties with specificity by not including the dates the alleged violations began and ended on the Application for Hearing (AFH)?

5. If Respondents successfully demonstrated that any violations have been cured, did Claimant prove by clear and convincing evidence that Respondents knew or should have known that they were in violation of the Rules, Statutes or Orders?

6. If Claimant proved she is entitled to penalties, what are the applicable penalty periods and amounts?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant suffered a work-related injury on June 24, 2022. Claimant credibly testified that on June 24, 2022, she was in her [Redacted, hereinafter PL] returning from a site when a deer came out of nowhere and hit her car.

2. Claimant credibly testified that she injured her neck and lower back in the accident. She further testified that she was diagnosed with multiple sclerosis (MS) in 2010, and that the 2022 motor vehicle accident caused her MS to flare up.

3. A few days after the accident, on June 29, 2022, Claimant went to the Emergency Room (ER) at UC Health in Broomfield. The following day, June 30, 2022, Claimant

returned to the ER at UC Health. Claimant testified she subsequently went to her PCP at Broomfield Family Practice.

4. Prior to the accident, Claimant had been involved in two other motor vehicle accidents within the two prior years. Claimant credibly testified that the pain she experienced from the June 24, 2022 accident, was similar to her pain and injuries from the previous motor vehicle accidents. At the time of the June 24, 2022 accident, Claimant was treating for her injuries from the other two accidents. Claimant testified that unlike the previous accidents, the 2022 accident escalated her MS, and she experienced vertigo.

5. On July 17, 2022, Claimant filed a Worker's Claim for Compensation. Claimant noted on the form that she injured her neck, upper back and lower back on June 24, 2022 when a deer jumped in front of her moving vehicle. She left the section "[d]ate employer notified" blank. (Ex. A). The ALJ infers that as of July 17, 2022, Claimant had not reported her injury to Employer.

6. On July 21, 2022, the Division of Workers' Compensation (Division) wrote to Insurer at [Redacted, hereinafter AS]. The Division sent Insurer a copy of Claimant's Workers' Claim for Compensation, and informed Insurer that pursuant to § 8-43-203, C.R.S. and WCRP 5-2, it had 20 days, or until August 10, 2022, to either admit or deny liability. (Ex. 1).

7. On September 6, 2022, the Division sent Insurer another letter, again addressed to AS[Redacted]. This letter was fashioned as an "**URGENT NOTICE REQUIRING IMMEDIATE RESPONSE."** The Division notified Insurer that it had failed to admit or deny liability within 20 days and that **"[t]he period for filing a position statement has expired and you are now in a potential penalty situation."** Failure to respond immediately "could result in issuance of a Director's order and imposition of penalties." (Ex. 9). Insurer did not respond to the Division by September 26, 2022.

8. On September 6, 2022, Insurer's third-party administrator (TPA), [Redacted, hereinafter ES], wrote to Claimant. The communication is from [Redacted, hereinafter CS], Sr. Claims Representative at ES[Redacted]. According to the "cover page," the enclosures included a self-addressed envelope, authorization to disclose health information, and a medical treatment provider list. (Ex. 9).[1] The ALJ infers that the stated enclosures, including but not limited to, a medical treatment provider list, were sent to Claimant.

9. The ALJ finds that Insurer was aware of Claimant's Worker's Compensation Claim, as of September 6, 2022.

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[1] Claimant's Exhibit 9, which was admitted into evidence over Respondents' counsel's objection, contains the September 6, 2022 "Cover Page for Mailing" from ES[Redacted] to Claimant, a one page communication from ES[Redacted] to Claimant regarding opting out of medical document exchange, and the September 6, 2022, **"URGENT NOTICE"** to Insurer from the Division. The cover page, is page 1 of 12, but the exhibit does not contain 12 pages. While the September 6, 2022, "**URGENT NOTICE"** to Insurer was attached as part of Exhibit 9, there is no objective evidence in the record that this Notice was sent to Claimant, or that it was a part of the materials CS[Redacted] sent to Claimant.

10. On October 18, 2022, the Director issued an Order, whereby Insurer was ordered to submit an admission of liability or notice of contest within 15 days, or by November 2, 2022. The Order specifically read "**[f]ailure to respond as ordered will result in imposition of penalties of up to $1,000 per day as permitted by § 8-43-304 for failure to comply with an order of the director."** (Ex. 2). Insurer had until November 2, 2022 to respond to the Director's Order. The Order was sent to Insurer at AS[Redacted]. The Order also informed Insurer that it had the responsibility of informing the TPA of the claim and informing the Division if the claim had been assigned to a TPA.

11. There is no objective evidence in the record that Insurer notified the Division that the claim had been assigned to Insurer's TPA, ES[Redacted].

12. On November 17, 2022, Respondents filed a General Admission of Liability (GAL), admitting liability, specifically for medical benefits. (Ex. B).

13. The ALJ finds that Respondents filed the GAL more than 20 days after the Division sent Insurer a copy of Claimant's Worker's Claim for Compensation. The ALJ finds that the GAL was filed more than 15 days after the deadline to respond to the Director's Order. Respondents offered no evidence as to why they failed to respond to the letters from the Division, or to the Director's Order prior to November 17, 2022. The ALJ finds that Respondents violated the Act and failed to timely respond to a Director's Order, but cured such violations on November 17, 2022.

14. Respondents presented no objective evidence to address their failure to timely respond to the Division and the Director's Order. The ALJ finds that Respondents' conduct was not objectively reasonable.

15. On November 23, 2022, CS[Redacted] sent a facsimile to [Redacted, hereinafter NR] that included a list of four physicians for Claimant "as requested." (Ex. 4). This number is Claimant's counsel's fax number. He subsequently wrote to CS[Redacted] and told her Claimant selected Injury Care Associates & Occupational Medicine as her authorized treatment provider. (Ex. 5).

16. On December 5, 2022, Claimant filed an AFH, endorsing multiple penalty allegations.[2] The penalty allegations relevant to this matter include:

a. "Respondent's failure to file a position statement either admitting or contesting liability within 20 days after a workers' compensation claim is filed – C.R.S. § 8-43-203."

b. "Respondents failure to comply with a Director's Order dated October 18, 2022 requiring an admission of liability or a notice of contest within 15 days."

[2] At hearing, Claimant withdrew the penalty alleged pursuant to § 8-43-203(4), C.R.S. for failure to produce a copy of the claim file.

c. “Respondents failure to designate an ATP or provide Claimant with a four-doctor panel – WCRP 8-2.”

(Ex. C).

17. The “penalties” section of the OAC’s AFH states “[d]escribe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended.”

18. The ALJ finds that even though Claimant did not specify the dates the violations allegedly began and ended, Claimant described her penalty claims with specificity as required by § 8-43-304(4), C.R.S.

19. Claimant testified that Insurer’s delay in filing a GAL and providing her with a list of designated providers, caused her stress, uncertainty and hardship. Claimant also testified that she sought, and received medical care from her primary care physicians following her June 24, 2022 accident.

20. The ALJ finds that Insurer’s delay in responding to the Division and the Director, by not taking a position with respect to Claimant’s Worker’s Claim for compensation did not delay Claimant receiving medical treatment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

General Penalties

Section 8-43-304(4) of the Colorado Revised Statutes provides that an application for hearing on penalties shall "state with specificity the grounds on which the penalty is being asserted." The specificity requirement serves two functions. First, it provides notice of the basis of the claim so that the putative violator may exercise its right to cure the violation. Second, it ensures the alleged violator receives notice of the legal and factual bases for the penalty claim so that their rights to present evidence, confront adverse evidence, and present argument in support of their position are protected. *Matthys v. Colo. Springs*, W.C. 4-662-890 (2007) (citing *Major Medical Insur. Fund v. Indus. Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003)). Failure to state with specificity the grounds on which a penalty is being asserted subjects the claim to dismissal. *See Young v. Bobby Brown Bail Bonds, Inc*., W.C. No. 4-632-376 (Apr. 7, 2010); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010); *Gonzales v. Denver Public School*, W. C. Nos. 4-437-328, 4-441-546 (Dec. 27, 2001); *Brown v. Durango Transportation Inc.,* W. C. No. 4-255-485 (Oct. 2, 1996).

Respondents argue that Claimant failed to assert her penalty claims with specificity because she did not set forth the dates on which the alleged violations began and ended. While this language is listed on the OAC's AFH form, this language is not required by the statute. *See* § 8-43-304(4), C.R.S. Respondents cured the violations by filing a GAL on November 17, 2022. Further, Claimant's penalty claims gave Respondents notice of the legal and factual basis of the claims. As found Claimant's penalty claims were plead with specificity. (Findings of fact ¶ 18).

The general penalty provision sets forth four categories of conduct and authorizes the imposition of the described penalties when an employer or insurer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, *for which no penalty has been specifically provided,* or (4) fails, neglects or refuses to obey any lawful order of the director or the panel. § 8-43-304(1) C.R.S.; *see Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001). The purpose of the penalty provision in Section 8-43-304(1) of the Colorado Revised Statutes is to deter misconduct. *McManus v. Indus. Claim Appeals Office,* 81 P.3d 1074 (Colo. App. 2003).

The imposition of penalties under the general penalty provision is a two-step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a

violation, she may impose penalties if she also finds that the actions were not objectively reasonable. *Pioneers Hosp. of Rio Blanco v. Indus. Claims Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (court required to determine whether insurer's conduct was reasonable).

As found, Respondents violated § 8-43-304(1), C.R.S., by failing to file a position statement within 20 days after receiving Notice from the Division that Claimant filed a Worker's Compensation Claim. (Findings of fact ¶ 13). Respondents also violated this statute by failing to comply with a Director's Order requiring an admission of liability or a notice of contest within 15 days of October 18, 2022. (*Id.*). Respondents did not offer any evidence as to why they did not file a position statement with the Division or comply with the Director's Order. As found, Insurer knew by September 6, 2022 that Claimant had filed a Worker's Claim for Compensation. (Findings of fact ¶ 9). Respondents failed to establish that not timely filing a position statement with the Division when Respondents received notice that Claimant filed a Worker's Claim for Compensation is reasonable. Similarly, Respondents failed to establish that the failure to timely respond to the Director's Order was reasonable. As found, Respondents' violations were not objectively reasonable. (Findings of fact ¶ 14).

Section 8-43-304(4) of the Colorado Revised Statutes provides that even if the facts warrant the imposition of a penalty, the violator has a grace period to "cure" the violation. If, within 20 days of the filing of the AFH, the violator or noncomplying person, cures the violation, no penalty can be assessed unless the aggrieved party shows by clear and convincing evidence that the violator knew or should have known of the violation. There is no presumption that curing the problem within the 20-day period establishes that the violator knew or should have known of the violation. A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo.App. 1995).

Respondents cured their violations on November 17, 2022, when they filed a GAL. (Findings of fact ¶ 13). This was before Claimant filed her AFH on December 5, 2022, so arguably within the 20-day cure period. As found, Insurer's TPA corresponded with Claimant regarding the claim on September 6, 2022. (Findings of fact ¶ 8). A reasonable Insurer knows that it is required to timely respond to a Worker's Claim for Compensation. A reasonable Insurer also know it must reply to all communications from the Division, including, but not limited to, a Director's Order. It is highly probable and free from substantial doubt that Respondents knew, or should have known, at least by September 6, 2022, that Claimant filed a Worker's Claim for Compensation, and Respondents were required to comply with the requirements of the Act. Thus, Claimant has proven by clear and convincing evidence that by September 6, 2022, Insurer knew Claimant filed a Worker's Claim for Compensation, and Respondents knew, or reasonably should have known that they were in violation of the Act and the Director's Order. Claimant demonstrated by a preponderance of the evidence that penalties should be assessed against the Respondents.

The amount of the penalty may be based on several factors including the extent of

harm to the claimant, the duration and type of violation, the insurer's motivation for the violation, the insurer's mitigation, and whether or not the misconduct is representative of a pattern of misconduct. *Anderton v. Hewlett Packard*, W.C. No. 4-344-781 (Nov. 23, 2004): *Grant v. Prof'l Contract Servs*, W.C. No. 4-531-613 (Sept. 16, 2005). Claimant testified her harm from the Insurer's violations was uncertainty and stress. Claimant did not testify as to the medical treatments she was allegedly forced to forego or how the delay specifically stalled her healing process. There is no objective evidence in the record that Insurer's actions constituted part of a pattern of misconduct, or that there was any malicious motivation by the Respondents. There was minimal harm to Claimant. Further, Respondents' actions were negligent because they did not involve a pattern of misconduct, and there is no evidence of any malicious motivation.

The ALJ finds that from September 6, 2022 to November 17, 2022, Respondents did not file a position statement in relation to Claimant's Worker's Claim for Compensation. The ALJ finds that Respondents did not timely respond to the Director's Order by November 2, 2022. Respondents filed a GAL on November 17, 2022. Respondents committed two separate violations, albeit for similar conduct. The ALJ fines Respondents $10.00/day for failing to respond to the Division regarding Claimant's Worker's Claim for Compensation, from September 6, 2022 to November 17, 2022. This is a total penalty of $730.00. The ALJ finds that the appropriate penalty for violating the Director's Order is $50.00/day, and this occurred from November 2, 2022 until November 17, 2022, for a penalty of $750.00. The total penalty of $1,480.00 is sufficient to penalize Respondents' violation of the law and encourage future compliance without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Colorado Uninsured Employers Fund.

Penalties Pursuant to W.C.R.P. 8-2

Section 8-43-404 of the Colorado Revised Statutes provides the employer or insurer the statutory right, in the first instance, to select a physician to treat the industrial injury. If Respondents fail to comply with WCRP 8, the right of selection passes to the claimant, with the result being that the physician selected by the claimant is authorized to treat the injury. *See Ruybal v. Univ. Health Sciences Ctr.*, 768 P.2d 1259 (Colo. App. 1988)*.; Tellez v. Teledyne Waterpik*, W.C. No. 3-990-062 (March 24, 1992); *Buhrmann v. Univ. of Colo. Health Sciences Ctr.*, W.C. No. 4- 253-689 (Nov. 4, 1996); *In the Matter of the Claim of Matthew Bolerjack, Claimant*, W.C. No. 4-905-434-02, 2014 WL 3886660, at *3 (July 29, 2014). The ALJ finds and concludes that the penalty for Respondents' failure to provide an injured employee a designated provider list, is set forth in the Rule itself, *i.e.* the right of selection passes from the Respondents to Claimant. Pursuant to WCRP 8(E), the right to select the authorized treating physician passed to the Claimant seven business days after Respondents had notice of the injury and allegedly failed to provide a designated provider list.

Claimant failed to prove by a preponderance of the evidence that Claimant is entitled to penalties for failing to designate an ATP or provide Claimant with a designated provider list within seven business day of receiving notice of the injury.

ORDER

It is therefore ordered that:

1. Penalties are assessed against Respondents for a violation of § 8-43-203(1), C.R.S. for failing to file a position statement as requested by the Division on July 21, 2022. Penalties are awarded from September 6, 2022 to November 17, 2022 in the amount of $730.00. Fifty percent of the penalty shall by paid to Claimant, and fifty percent of the penalty shall be paid to the Colorado Uninsured Employer's Fund. The check for the Colorado Uninsured Employer's Fund shall be payable to and sent to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, Colorado 80202.

2. Penalties are assessed against Respondents for a violation of § 8-43-203(1), C.R.S. for failing to respond to the October 18, 2022, Director's Order. Penalties are awarded from November 2, 2022 to November 17, 2022 in the amount of $750.00. Fifty percent of the penalty shall by paid to Claimant, and fifty percent of the penalty shall be paid to the Colorado Uninsured Employer's Fund. The check for the Colorado Uninsured Employer's Fund shall be payable to and sent to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, Colorado 80202.

3. Claimant's request for penalties pursuant to W.C.R.P 8-2 is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 6, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-218-288-001

ISSUES

- Did Claimant prove he suffered a compensable injury to his right shoulder on July 21, 2022?

- If Claimant proved a compensable injury, did he prove a January 31, 2023 MRI was reasonably needed and causally related to the injury?

- The parties stipulated to an average weekly wage of $1,110.29.

FINDINGS OF FACT

1. Claimant has an extensive history of nonwork-related right shoulder problems. He saw Dr. Andrew Parker in July 2020 for approximately two months of right shoulder pain. Dr. Parker diagnosed a non-traumatic right rotator cuff tear and performed an arthroscopy on September 24, 2020. Claimant reinjured the shoulder in December 2020 and underwent a revision rotator cuff repair. Claimant's right shoulder remained symptomatic, and he had a third rotator cuff surgery on March 10, 2021. He reinjured the shoulder and had a fourth surgery on May 12, 2021.

2. Claimant continued to have problems with his right shoulder and ultimately had a reverse total shoulder arthroplasty on September 23, 2021. The arthroplasty was successful. At a post-surgery evaluation on December 20, 2021 the surgeon noted Claimant was "doing very well" with minimal pain and good range of motion. He was participating in PT and wanted to return to work. No additional pre-claim records were submitted at the hearing.

3. Claimant works for Employer as a technician, monitoring robotic sandwich-processing machines.

4. On July 21, 2022, Claimant developed pain in his right shoulder while shoveling "[Redacted, hereinafter UE]" sandwiches that were spilling out of a packaging machine. Claimant was using a lightweight plastic shovel to scoop the sandwiches into a tote for disposal. The combined weight of the shovel and sandwiches was approximately 5 pounds. Claimant scooped a batch of sandwiches, twisted to the right, and tossed them into the tote. While doing so, he felt pain and a "tearing" sensation in his right shoulder. Claimant reported the symptoms to his supervisor but was able to finish his shift by limiting use of his right arm. Claimant was scheduled off the next three days for the weekend, and he and his supervisor decided the best course of action was to rest and ice the shoulder and see if it improved with time. Claimant requested no treatment.

5. Claimant's shoulder continued to bother him the rest of that day and the next day. Two days later, on July 23, 2022, Claimant dislocated his right shoulder while

reaching overhead to don a shirt. His arm became "stuck," and he pulled it down forcefully with the left arm, causing a loud "pop."

6. Claimant went to work on Monday, July 25 and completed an accident report. The report states Claimant was shoveling sandwiches into a tote when he "felt a tear and or a pop in his right shoulder." Claimant was evaluated by Employer's on-site nurse, but no corresponding records from the evaluation were submitted at the hearing.

7. Claimant saw PA-C John Hundley at the UCHealth Occupational Medicine Clinic on July 29, 2022. Claimant stated he developed severe pain in his right shoulder while shoveling sandwiches into a tote. Claimant had since rested his shoulder but his symptoms continued to worsen, to the point that "now he has extremely limited range of motion and sometimes has a feeling that his shoulder is spontaneously dislocating."[1] Claimant's shoulder range of motion was severely limited in all planes. Because of Claimant's high level of reported symptoms and complex surgical history, Mr. Hundley referred Claimant for an orthopedic evaluation. He also assigned work restrictions of "no forceful lifting, pushing or pulling with the right arm. No reaching overhead with the right arm. Must wear arm sling when active." Mr. Hundley opined Claimant's symptoms and clinical presentation were consistent with a work-related injury.

8. Claimant saw PA-C Mark Cuthbertson at Panorama Orthopedics on August 9, 2022. Claimant described the sandwich-shoveling incident and said his shoulder pain had been worse with pushing and pulling "since that time." Mr. Cuthbertson also documented that "[Claimant] dislocated the shoulder with forward flexion and overhead activity two days after the shoveling injury. It had gotten stuck in an overhead position, so he forced the joint back into reduction and experienced a significant pop when trying to bring his arm down." Claimant's right shoulder flexion was significantly reduced. X-rays showed intact arthroplasty hardware with no sign of loosening, although Mr. Cuthbertson thought Claimant may need a metal suppression MRI to fully evaluate the condition of the shoulder. Mr. Cuthbertson ordered PT and recommended Claimant follow up with Dr. John Caldwell.

9. Dr. Caldwell evaluated Claimant on August 19, 2022. Claimant described his history of shoulder problems culminating in the reverse total shoulder arthroplasty. He said his shoulder "was performing well until recently . . . he was shoveling some objects off the floor and then felt a tearing sensation in his shoulder." Claimant also reported, "he was taking his shirt off overhead with his arm extended over his head, it got stuck in that position. He had to manually relocate the shoulder using his other arm . . . he felt a large clunk followed by an immediate onset of pain." Claimant was tender to palpation over the anterior shoulder and right biceps. Dr. Caldwell reviewed imaging and saw no clear evidence of hardware complications. He opined Claimant's symptoms were probably related to "a muscular-type injury that he sustained while he had the subluxation." Dr. Caldwell recommended additional PT.

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[1] Claimant credibly testified he told Mr. Hundley about the July 23 dislocation event, but had no control over the specific way Mr. Hundley chose to write his report.

10. Claimant followed up with Dr. Caldwell on September 28, 2022. He had made minor progress in PT, but "his shoulder is still nowhere near where it was before this event in July." Dr. Caldwell was concerned Claimant may have dislodged his prosthesis and recommended a metal suppression MRI.

11. Respondents filed a Notice of Contest denying the claim on October 12, 2022.

12. Claimant returned to Dr. Caldwell on January 20, 2023. His symptoms were unchanged. The MRI had not been completed because of insurance authorization issues. Dr. Caldwell noted the x-rays showed no apparent problems with the prosthesis, "however, his physical exam today . . . does bring up suspicion of a possible acromial stress fracture versus a muscular tear or sprain." Dr. Caldwell reiterated his request for an MRI.

13. Claimant had the MRI on January 31, 2023. It showed an area of increased signal and lucency along the humeral stem "suspicious for loosening" of the prosthesis. There was muscle atrophy and fatty infiltration and a possible low-grade teres minor strain, but no tears. Claimant paid $350 out-of-pocket for the MRI.

14. Dr. Mark Failinger performed an IME for Respondents on February 25, 2023. Claimant reported ongoing shoulder pain, largely unchanged since the incidents in July 2022. Claimant was working his regular job with self-modifications to reduce the strain on his right shoulder. Dr. Failinger opined it was not medically probable that the act of shoveling sandwiches described by Claimant caused new pathology in the shoulder. Instead, he opined the dislocation on July 23 was the cause of Claimant's ongoing symptoms. Dr. Failinger concluded, "the only diagnosis possibly related to the work accident would be a mild shoulder strain, with the dislocation event not reasonably related to the patient's work activities."

15. Dr. Failinger testified at the hearing to elaborate on the opinions expressed in his report. Although Claimant reported feeling a tear while shoveling the sandwiches, Dr. Failinger testified patients frequently perceive a tearing sensation even though no actual tear has occurred. The MRI shows no tear of any structure in the shoulder, and Dr. Failinger explained that the nature of a reverse total shoulder arthroplasty means "there is really no rotator cuff to tear." He opined the potential hardware loosening shown on the MRI was unrelated to the shoveling incident but could have been caused by the dislocation. However, he agreed with Mr. Hundley that Claimant probably suffered a minor "strain" on July 21. Dr. Failinger conceded, "the patient noticed something that was new or different, and I don't think you can just say nothing happened." He further testified the teres minor strain shown on the MRI was probably caused by the shoveling incident. He agreed it was reasonable for Mr. Hundley to diagnose a minor shoulder strain and give Claimant temporary work restrictions at the initial evaluation. He also agreed it was reasonable to order an MRI to investigate the possible strain vs. loosening of the hardware. However, he reiterated the minor strain could not have contributed to the subsequent dislocation, and concluded Claimant's ongoing shoulder symptoms are related to the dislocation and not the shoveling incident.

16. Claimant proved he suffered a compensable injury to his right shoulder on July 21, 2022. Claimant's descriptions of the work accident and the subsequent development and progression of symptoms are generally credible. The persuasive evidence shows he probably suffered a minor soft-tissue strain, which reasonably required evaluation, conservative treatment, and temporary work restrictions. Claimant's shoulder strain had not resolved and remained symptomatic when he suffered the dislocation on July 23, 2022. Claimant's symptoms immediately thereafter reflected a combination of the work injury and the nonwork-related dislocation. Even though the work injury was not the sole cause of Claimant's symptoms, it was a "significant factor" in his need for evaluations and treatment in late July and early August 2022.

17. Claimant proved the evaluations and treatment received from Mr. Hundley and Panorama Orthopedics were reasonably needed to cure and relieve the effects of his compensable injury. The MRI was a reasonable diagnostic test to investigate the nature of the underlying injury and determine a course of treatment. Claimant is entitled to reimbursement of the $350 he paid out-of-pocket for the MRI.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). An industrial injury need not be the "sole cause" of a need for medical treatment to be deemed a "proximate cause." Rather, it is sufficient if the injury is a "significant factor" in the sense that there is a "direct causal relationship" between the injuy and the need for treatment. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

Even a minor "strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only available if an accident results in a compensable "injury." The mere fact that an incident occurred at work that elicited symptoms does not establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

As found, Claimant proved he suffered a compensable injury at work on July 21, 2022. He probably suffered a minor soft-tissue strain, which reasonably required evaluation, treatment, and temporary work restrictions. Claimant's shoulder strain had not resolved and remained symptomatic when he suffered the dislocation on July 23, 2022. His symptoms immediately thereafter reflected a combination of the work injury and the nonwork-related shoulder dislocation. Even though the work injury was not the sole cause of Claimant's symptoms, it was a "significant factor" in his need for evaluations and treatment in late July and early August 2022. Dr. Failinger may be correct that Claimant's mild shoulder strain resolved, and his current symptoms are solely related to the subsequent dislocation. However, the ALJ has no authority to make such a finding at this juncture, which would be tantamount to a determination of MMI.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved the evaluations and treatment received from Mr. Hundley and Panorama Orthopedics were reasonably needed to cure and relieve the effects of his compensable injury. The MRI was a reasonable diagnostic test to investigate the nature of the underlying injury and determine a course of treatment. Claimant is entitled to reimbursement of the $350 he paid out-of-pocket for the MRI. Section 8-42-101(6)(a); WCRP 16-10(H).

ORDER

It is therefore ordered that:

1. Claimant's claim for a July 21, 2022 right shoulder injury is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including the July 29, 2022 evaluation with Mr. Hudley, and the appointments at Panorama Orthopedics on August 9, August 19, and September 28, 2022, and January 20, 2023.

3. Insurer shall reimburse Claimant $350 he paid out-of-pocket for the January 31, 2023 right shoulder MRI.

4. Claimant's average weekly wage is $1,110.29.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 8, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-214-450-001

ISSUES

1. Whether the respondent has demonstrated, by a preponderance of the evidence, that on July 12, 2022, the claimant was not an employee of the employer, but rather an independent contractor.

2. If the claimant is deemed an employee of the employer, whether the claimant has demonstrated, by a preponderance of the evidence, that she sustained an injury arising out of and in the course and scope of her employment.

3. If the claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that the medical treatment she received was authorized.

4. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she received was reasonable and necessary to cure and relieve her from the effects of the injury.

5. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits.

6. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that penalties shall be assessed pursuant to Section 8-43-408, C.R.S. for the respondent's alleged failure to obtain and maintain worker's compensation insurance.

FINDINGS OF FACT

The parties provided conflicting versions of events in this matter. The ALJ has considered the evidence and testimony presented at hearing and makes the following findings of fact:

1. The respondent operates a funeral and cremation business. The claimant previously worked for the employer and returned in May 2022. [Redacted, hereinafter MG] asserts that the claimant was an independent contractor when she returned to work for the respondent in May 2022.

2. Upon her return the claimant worked as the general manager and funeral director. The claimant's business cards identified these as the claimant's titles. The claimant's job duties included all facets of operating the respondent's business. The

claimant was paid $20.00 per hour. The claimant was paid via check. These checks were issued to the claimant in her own name.

3. On July 7, 2022, MG[Redacted] authored a letter stating that the claimant was paid $2,500.00 per month. The purpose of this letter was to assist the claimant with obtaining a mortgage. The ALJ calculates that this would be equal to $576.92 per week ($2,500.00 times 12 months in a year is $30,000.00; divided by 52 weeks is $576.92.)

4. On July 12, 2022[1], the respondent's workforce met at a local cemetery to engage in upkeep of the cemetery. This included painting a sign and cutting grass around headstones. On that date, the claimant operated a riding lawnmower at the cemetery. This specific piece of equipment has a mechanism that allows the driver to raise and lower the blade while in operation. This is done by pressing down a foot pedal with one's right foot.

5. Typically as the respondent's general manager and funeral director the claimant would not have been engaged in mowing activities. However, on July 12, 2022 it was necessary for the claimant to mow, because the respondent was short-handed and the claimant had absorbed a number of job duties, including mowing.

6. On July 12, 2022, the claimant used the pedal mechanism on the mower to raise and lower the blade while mowing around headstones and sprinklers. While operating the mower in this manner and pushing down on the foot lever, the claimant felt a pop in her right knee and experienced pain symptoms.

7. Other workers were present when the claimant felt this pop and pain in her knee, including MG[Redacted]. The claimant was allowed to stop working and sat in a vehicle while the others continued working.

8. After July 12, 2022, the claimant continued to perform all of her normal job duties, despite ongoing pain and swelling in her right knee. The claimant utilized a knee brace and crutches. The claimant asked MG[Redacted] to provide her with information for filing a workers' compensation claim. MG[Redacted] repeatedly assured the claimant that the company did have workers' compensation insurance and promised to provide her with the relevant information. MG[Redacted] did not provide the claimant with the requested workers' compensation information.

9. Initially, the claimant believed that her knee was simply sprained and she attempted to self-treat her symptoms. However, the claimant's right knee symptoms did not improve and she sought medical treatment.

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[1] The date of July 13, 2022 appears in the medical records and on the claimant's Application for Hearing. The ALJ is persuaded by the claimant's testimony that this was a typographical error, and the incident at Issue occurred on July 12, 2022. Click to Open Sidebar

10. On August 11, 2022, the claimant again requested the insurance information from MG[Redacted] via text message. MG[Redacted] responded "Progressive Insurance and some other company. I can get numbers etc tomorrow."

11. On August 12, 2022, the claimant was seen by her primary care provider {PCP) Dr. Tarek Arja with Grand Valley Family Medicine. The claimant did not see Dr. Arja prior to that date for three primary reasons: 1) she hoped her knee would improve without medical treatment; 2) she was busy working for the respondent; and 3) MG[Redacted] was not providing workers' compensation insurance information to her.

12. On August 12, 2022, the claimant's appointment with Dr. Arja was via "telehealth" and no examination was performed. On that date, the claimant reported to Dr. Arja that she had injured her right knee one month prior while operating a riding lawn mower for her employer. The claimant reported that her right knee symptoms included pain, swelling, decreased range of motion, and instability. Dr. Arja recommended the claimant rest and elevate her right knee. He also recommended the use of a knee brace, ice, and heat. Finally, Dr. Arja ordered x-rays[2] of the claimant's right knee.

13. On August 12, 2022, MG[Redacted] texted the claimant and stated that the parties "should go other routes ... I don't like the lack of respect for each other. Not good. I appreciate all you have done I really do". When the claimant asked if she was being terminated, MG[Redacted] responded "Yes I'm sorry". Thereafter, the claimant was provided a letter dated August 12, 2022 in which the respondent notified the claimant that her employment was terminated as of that date. The letter did not provide a reason for the termination. MG[Redacted] testified that the claimant was terminated due to poor performance.

14. On August 18, 2022, the claimant was examined by Dr. Arja. On that date, Dr. Arja listed the claimant's right knee symptoms as pain, swelling, locking, instability, decreased range of motion, and decreased weight bearing. In addition, Dr. Arja noted that the claimant experienced a popping sound in her right knee at the time of the injury. On examination, Dr. Arja noted that the claimant had moderate right knee tenderness on palpation "about the anterior aspect, over the lateral joint line, over the medial joint line and over the patella". Dr. Arja recommended the continued use of the knee brace and over-the-counter pain medications. Dr. Arja also referred the claimant to physical therapy. The claimant was restricted from all work on August 18, 2022.

15. The claimant began physical therapy on August 23, 2022. The claimant continued to be restricted from all work.

16. The claimant had a telehealth visit with Dr. Arja on August 27, 2022. Dr. Arja continued to recommend physical therapy and use of a knee brace.

[2] It is unclear from the records entered into evidence whether the x-rays recommended by Dr. Arja were ever taken.

17. A letter dated September 2, 2022[3] was admitted into evidence at the hearing. The respondent stated that the claimant's employment was terminated "due to the lack of not following the vision we have set forth as a company." The letter further stated that the claimant's "business and leadership practices were not to our standards, expectations and processes that weren't being followed. You had total supervision and management over the staff and some things weren't handled properly." In that letter the respondent also stated that the company does have workers' compensation insurance.

18. On January 5, 2023, Dr. Arja authored a letter in which he stated that the claimant was released to full work duty as of December 20, 2022.

19. While working for the respondent, the claimant worked a varied schedule depending upon the company workload. At times the claimant would report to work as early as 7:00 a.m. At other times, the claimant would arrive by 9:00 a.m. The claimant's workday typically ended between 3:00 p.m. and 3:30 p.m. A time sheet for a two week period in May 2022 demonstrates that the claimant worked 61 hours during that time.

20. Based upon the time sheet entered into evidence, the ALJ calculates that the claimant typically worked 6 hours per day, five days per week for a total of 30 hours per week. At $20.00 per hour this is equal to $600.00 per week. The ALJ determines that $600.00 per week was the claimant's average weekly wage {AWW) with the respondent as of the date of her work injury.

21. While working for the respondent, the claimant had two other part time jobs as a home health worker. The claimant worked for [Redacted, hereinafter CK] and was paid $15.25 per hour. In the 12-week period leading up to July 12, 2023 the claimant had earnings with CK[Redacted] of $3,685.92. The claimant also worked for [Redacted, hereinafter KU] providing care for her mother. That employer paid the claimant $15.00 per hour. Based upon the claimant's testimony, the ALJ infers that the claimant worked approximately 15 hours per week while working for KU[Redacted].

22. As a result of the work restrictions placed by Dr. Arja on August 18, 2022, the claimant was unable to perform her job duties for CK[Redacted] and KU[Redacted]. The claimant retired to work with CK[Redacted] on January 17, 2023. She returned to work for KU[Redacted] on January 22, 2023.

23. With regard to her concurrent employment with CK[Redacted] and KU[Redacted], the ALJ makes the following calculations. The claimant's AWW with CK[Redacted] was $307.16; {$3,685.92 divided by 12 weeks is equal to $307.16 per week). The claimant's AWW with KU[Redacted] was $225.00; ($15.00 per hour at 15 hours per week equals $225.00).

24. The claimant asserts that the employer does not have workers' compensation insurance, as evidenced by the employer's failure to provide her with that

[3] The claimant testified that she did not receive the September 2, 2022 letter until she was provided with the exhibits of this hearing.

information. MG[Redacted] testified that the respondent does carry workers' compensation insurance for their employees. However, no evidence was provided of the respondent's workers' compensation policy and/or related coverage. In addition, no insurance company has been identified in this matter.

25. With regard to whether the claimant was an independent contractor, the ALJ credits the claimant's testimony and the various documents entered into evidence. The ALJ finds that the respondent has failed to demonstrate that it is more likely than not that the claimant was an independent contractor. In reaching this finding, the ALJ notes that the claimant was paid an hourly rate and was paid in her own name. The claimant's business cards identified her as a general manager and funeral director. The respondent stated that the claimant "had total supervision and management over the staff'. The ALJ finds that such oversight and management would not be delegated to a contractor. In addition, the respondent provided the claimant with instruction, training, and tools. These facts indicate that the respondent exercised direction and control over the claimant in the performance of the work. The ALJ finds that the claimant did not engage in an independent trade or business providing similar services to others, nor did she intend to do so at the time of the injury. For all of the foregoing reasons, the ALJ concludes that the claimant was an employee of the respondent and was not an independent contractor.

26. The ALJ further credits the claimant's testimony and the medical reports entered into evidence. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that on July 12, 2022, the claimant suffered a right knee injury while working for the employer.

27. The ALJ credits the claimant's testimony and the medical reports entered into evidence and finds that the claimant has demonstrated that it is more likely than not that the treatment she received for her right knee from Dr. Arja and the recommended physical therapy was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the July 12, 2023 work injury.

28. The ALJ credits the claimant's testimony, the medical records, and wage records entered into evidence and finds that the claimant has demonstrated that it is more likely than not that for the period of August 18, 2022 through January 5, 2023 the claimant suffered a wage loss due to her work restrictions.

29. The ALJ calculates that as of July 12, 2022, the claimant's AWW from all employers was $1,132.16; (the total of $600.00, $307.16, and $225.00). The claimant's rate for temporary total disability (TTD) benefits is $754.77; (two-thirds of the AWW of $1,132.16).

30. The ALJ is not persuaded that the claimant was at fault for the termination of her employment with the respondent.

31. The ALJ finds that the claimant has demonstrated that it is more likely than not that as of July 12, 2022, the respondent did not obtain and/or maintain workers' compensation insurance.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, *C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation... under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

6. As found, the claimant provided services to the respondent and was paid for her services. Therefore, the claimant is presumed to be an employee of the respondent.

7. The respondent has the burden of proving that the claimant was an independent contractor rather than an employee. Section 8-40-202{2){b){II), C.R.S., sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver; Inc. v. Industrial Claim Appeals Office,* 859 P.2d 278 (Colo. App. 1993). Those nine factors are whether the person for whom services are provided:

- required the individual to work exclusively for the person for whom services are performed; (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);

- established a quality standard for the individual; (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed);

- paid a salary or hourly rate but rather a fixed or contract rate;

- may terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce results that meet the specifications of the contract;

- provided more than minimal training for the individual;

- provided tools or benefits to the individual; (except that materials and equipment may be supplied);

- dictated the time of performance; (except the completion schedule and range of mutually agreeable work hours may be established);

- paid the individual personally, instead of making checks payable to the trade or business name of the individual; and,

- combined their business operations in any way with the individual's business, or maintained such operations as separate and distinct.

8. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), C.R.S, provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(11) in order to prove by a preponderance of the evidence that the individual is not an employee. See *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1999).

9. In *Industrial Claim Appeals Office v. Softrock Geological Services,* 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court stated "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in Section 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors,* W.C. No. 4-950-181, May 4, 2015.

10. The *Softrock* Court pointed to *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008) in which the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the emptoyer. See *Pierce v. Pella Windows & Doors,* W.C. No. 4-950-181, May 4, 2015.

11. Section 8-40-202(b)(IV), C.R.S., provides that a written document may create a rebuttable presumption of an independent contractor relationship if it meets the nine criteria listed in Section 8-40-202(b)(II), C.R.S. and includes language in boldface font or underlined typed that the worker is not entitled to workers' compensation benefits and is obligated to pay all necessary taxes. Additionally, the document must be signed by both parties. Here there was no written contract.

12. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(11), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that the claimant was an employee of the respondent. The respondent has failed, by a preponderance of the evidence, to overcome the presumption of an employee-employer relationship. In reaching this conclusion the ALJ notes that the claimant was paid an hourly rate and was paid in her own name. The claimant's business cards identified her as a general manager and funeral director. The respondent stated that the claimant "had total supervision and management over the staff'. As found, such oversight and management would not be delegated to an independent contractor. In addition, the respondent provided the claimant with

instruction, training, and tools. These facts indicate that the respondent exercised direction and control over the claimant in the performance of the work. The ALJ finds that the claimant did not engage in an independent trade or business providing similar services to others, nor did she intend to do so at the time of the injury.

13. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

14. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered an injury that arose out of and in the course and scope of her employment with the respondent on July 12, 2022. As found, the claimant's testimony and the medical records are credible and persuasive.

15. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.,* W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission,* 701P.2d 168 (Colo. App. 1985), *citing,* 2 A. Larson, *Workers' Compensation Law* Section 61.12(9)(1983).

16. There is no persuasive evidence in the record to indicate that the respondent provided the claimant with a list of designated medical providers, upon learning of the claimant's work injury. In the absence of a selection of physician by the respondent, the claimant has demonstrated by a preponderance of the evidence that choice of medical provider passed to the claimant. Therefore, the medical treatment the claimant received as a result of the July 12, 2022 work injury is authorized medical treatment.

17. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

18. As found, the claimant has demonstrated by a preponderance of the evidence that the medical treatment she received following the July 12, 2022 injury was reasonable and necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the testimony of the claimant are credible and persuasive.

19. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and
(2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymbum v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 P.2d 595 (Colo. App. 1998).

20. As found, the claimant has demonstrated, by a preponderance of the evidence, that the July 12, 2022 work injury caused disability that resulted in a wage loss from August 18, 2022 through January 5, 2023. Therefore, the claimant is entitled to TTD benefits during that period of time. As found, the medical records and the testimony of the claimant are credible and persuasive.

21. The ALJ must determine a claimant's AWW by calculating the monetary rate at which services are paid to the claimant under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon her AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food* & *Commercial Workers Local No.* 7, W.C. No. 4-240-475 (ICAO, May 7, 2007).

22. As found, the claimant's AWW is $1,132.16 and her TTD rate is $754.77. The ALJ calculates that the claimant is owed unpaid TTD benefits totalling $15,203.22.

23. Sections 8-43-408(1) and (2) C.R.S., provide that in cases in which a claimant suffers a compensable injury and the employer failed to comply with the insurance provisions of the Colorado Workers' Compensation Act, the employer shall pay the Colorado uninsured employer fund an amount equal to the present value of all unpaid compensation or benefits.

24. Section 8-43-408(1)(5), C.R.S., provides that in cases in which a claimant suffers a compensable injury and the employer failed to comply with the insurance provisions of the Colorado Workers' Compensation Act, the employer shall also pay the Colorado uninsured employer fund an amount equal to twenty five percent (25%) of the compensation or benefits due to the claimant. Based upon the calculations above, 25 percent of the TTD owed is $4,332.93.

ORDER

It is therefore ordered:

1. On July 12, 2023, the claimant was an employee of the respondent.

2. The claimant suffered a compensable injury on July 12, 2022.

3. The respondent is responsible for the medical treatment the claimant received for her right knee including treatment with Dr. Arja beginning August 12, 2022 and physical therapy.

4. The claimant's average weekly wage (AWW) is $1,132.16.

5. The claimant is entitled to temporary total disability (TTD) benefits for the period of August 18, 2022 through January 5, 2023, totaling $15,203.22.

6. The respondent shall pay interest to claimant at the statutory rate of 8% per annum on all amounts of compensation not paid when due.

7. For failing to maintain workers' compensation insurance, the respondent shall pay the Colorado uninsured employer fund $15,203.22. The respondent shall also pay to the Colorado uninsured employer fund an amount equal to 25% of the TTD benefits due to the claimant for the period of August 18, 2022 through January 5, 2023, which is $3,823.31. The employer shall send such payment to the Colorado Uninsured Employer Fund to the Division of Workers' Compensation, 633 17th St., Suite 400, Denver, CO 80202.

8. The respondent shall pay Interest to the Colorado uninsured employer fund at the statutory rate of 4% per annum on all amounts of compensation not paid when due.

9. In lieu of payment of the above compensation and benefits to the claimant, the respondent shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $19,026.31 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation Division Trustee, c/o Mariya Cassin. The check shall be mailed to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th St., Suite 400, Denver, CO 80202. OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $19,026.31 with the Division of Workers' Compensation within ten (10) days of the date of this order:

i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

ii. Issued by a surety company authorized to do business in Colorado.

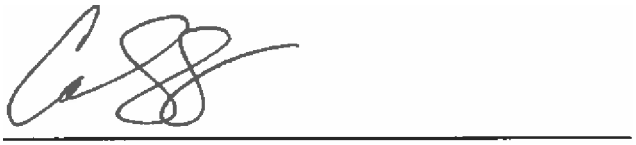
iii. The bond shall guarantee payment of the compensation and benefits awarded.

10. The respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

11. The filing of any appeal, including a petition to review, shall not relieve the respondent of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

12. All matters not determined here are reserved for future determination.

Dated June 13, 2023.



Cassandra M. Sidanycz
Administrative Law Judge

Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A} and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-201-119-001

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that the December 23, 2022 facsimile from the office of Authorized Treating Provider (ATP) Paul Stanton, D.O. to Respondents requesting authorization for a C4-7 anterior cervical discectomy constituted a completed request pursuant to W.C.R.P. Rule 16-7.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to the penalty of automatic authorization for the surgery requested by Dr. Stanton because Respondents failed to respond to the request within 10 days pursuant to W.C.R.P. Rule 16-7(B)(2).

3. Whether Claimant has demonstrated by a preponderance of the evidence that the C4-7 anterior cervical discectomy performed by Dr. Stanton on March 10, 2023 was reasonable, necessary and causally related to his March 4, 2022 industrial injury.

FINDINGS OF FACT

1. Claimant is a 63-year-old male who has worked for Employer for 26½ years as a Delivery Driver.

2. On March 14, 2022 Claimant was delivering [Redacted, hereinafter OT] bread with 12 loaves per tray and 15 trays in a cart. The 12 loaves on 15 trays weighed approximately 250 to 300 pounds. While pushing the cart, a wheel became caught in a crack on the floor and the cart started to fall. Claimant grabbed the cart with his left arm and stopped it from falling, but twisted his left shoulder.

3. On March 16, 2022 Claimant completed a Statement of Injury or Illness. In the report, he noted that he injured his left shoulder while catching a falling stack of product.

4. Claimant initially attempted to treat his left shoulder pain with ice. However, when his symptoms did not resolve he visited Authorized Treating Provider (ATP) Concentra Medical Centers (Concentra) in Pueblo, Colorado on March 18, 2022 for treatment. Brendon Madrid, N.P. recorded that, while Claimant was moving a stack of product he hit a crack in the floor and the stack started to tip over. Claimant caught the stack and felt a pull in his left shoulder. Claimant reported persistent left shoulder pain that radiated into the neck, back, and left arm. NP Madrid diagnosed Claimant with a left shoulder strain and referred him for physical therapy.

5. Claimant was eventually diagnosed with a left shoulder rotator cuff tear. On February 25, 2022 he underwent surgical repair with ATP David Walden, M.D.

6. On March 25, 2022 Claimant visited St. Thomas More Hospital Outpatient Rehabilitation Department for physical therapy. He completed an intake form with a pain diagram and noted symptoms in the left shoulder. Claimant's description of functional issues was also limited to the left shoulder. The physical therapist assessed Claimant with a strain of unspecified muscles, fascia and tendon at the shoulder and upper left arm. Notably, Claimant's symptoms were consistent with a rotator cuff injury.

7. On April 1, 2022 Claimant returned to Concentra in Pueblo and was evaluated by Debra Anshutz, N.P. Claimant reported persistent pain in the shoulder that radiated into his back, neck, and left arm. He also exhibited numbness in the fingers. NP Anshutz noted that Claimant had completed two physical therapy visits and undergone a CT of the left shoulder on March 29, 2022. NP Anshutz assigned work restrictions.

8. Claimant transferred medical care from the Concentra in Pueblo to the Concentra in Cañon City. On April 5, 2022 he had his first visit with ATP Steven Walter Quakenbush, PA-C. PA-C Quakenbush examined Claimant and recorded there were no pain complaints in the head, neck, left elbow, wrist or hand. There was also no numbness of the extremity. PA-C Quakenbush diagnosed Claimant with a "left shoulder sprain with suspected right RTC tears."

9. On April 7, 2022 Claimant visited Dr. Walden for an examination. Dr. Walden remarked that all of Claimant's pain was located in the rotator cuff distribution.

10. On April 26, 2022 Claimant returned to PA-C Quakenbush and had no neck pain with full range of motion. Review of systems was also negative for neck pain and stiffness.

11. Claimant's first mention of neck pain to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work incident. PA-C Quakenbush noted radiating pain from the left lateral neck into Claimant's shoulder. Claimant also had progressive weakness involving his left upper extremity. PA-C Quakenbush noted Dr. Walden had requested an EMG to assess whether Claimant's left shoulder symptoms involved scapulothoracic pain or radicular pain from the cervical spine.

12. The record reveals that Claimant suffered from significant underlying cervical spine degeneration. A December 20, 2022 cervical spine MRI showed cervical disc disease at C4-5 and C5-6 with "severe" collapse of the disc space, facet spondylosis, and "severe" foraminal stenosis. The imaging also showed spondylolisthesis at C4-5 that was "reduced when lying supine indicating instability."

13. On December 22, 2022 Claimant visited ATP Paul Stanton, D.O. for an evaluation. Dr. Stanton commented that Claimant still had left-sided shoulder pain and some weakness with overhead activities. He diagnosed Claimant with cervical disc disorders at C4-7 with radiculopathy. Dr. Stanton concluded that "[a]t this point, I think [Claimant] will require a reconstruction of his C4-7 levels to stabilize his spondylolisthesis."

14. On December 23, 2022 Dr. Stanton's office faxed to the correct number for Respondents a 22-page document requesting a C4-7 anterior cervical discectomy/fusion. The transmission was admitted as Exhibit 10 at the hearing. The request had the wrong claim number but the correct date of birth and date of injury,

15. Claims representative [Redacted, hereinafter MF] testified at hearing in this matter. He commented that he never received a request for cervical surgery via fax on December 23, 2022 or at any subsequent time. MF[Redacted] showed his fax in-box and explained how this confirmed he never received the transmission. On December 23, 2022 the only fax he received was another medical record from Dr. Walden. MF[Redacted] revealed his fax cue and explained that documents are organized by claim number. Exhibit 10 is a fax cover sheet with the letterhead of Colorado Springs Orthopaedic Group, dated December 23, 2022 that has no information identifying Claimant. The second page of Exhibit 10, with the letterhead of The Spine Center, is the Request for Pre-Authorization for Surgery Procedure. The document has an incorrect claim number of 1E01E01189371.

16. When the December 23, 2022 surgical request from Dr. Stanton's office was not timely addressed, the office contacted MF[Redacted]. He requested resubmission of the documents. Dr. Stanton's office then sent the surgical request on January 9, 2023. MF[Redacted] explained that that he received the prior authorization documents by email on January 9, 2023. He immediately took action and scheduled an appointment with Dr. Rauzzino for an independent medical examination. He also sent a denial of the prior authorization request to Dr. Stanton and Claimant on January 11, 2023.

17. MF[Redacted]acknowledged that there were other medical records in the file that reflected the incorrect claim number. He specifically could not explain why the MRI submission of Dr. Stanton on December 3, 2022 found at Exhibit 9, which had the wrong claim number, made it into his electronic file.

18. On January 24, 2023 Claimant returned to PA-C Quakenbush for an evaluation. PA-C Quakenbush recounted that Claimant continued to experience pain down the left lateral neck into the shoulder and upper arm. He also had some transient numbness into his left fourth and fifth fingers. PA-C Quakenbush noted that on December 20, 2022 Dr. Stanton had diagnosed Claimant with multilevel degenerative changes of cervical spine and severe right neuroforaminal stenosis at C5-6 and C6-7. Claimant had been recommended for surgical intervention of his cervical condition.

19. On March 6, 2023 Claimant underwent an independent medical examination with Michael J. Rauzzino, M.D. Dr. Rauzzino reviewed Claimant's medical records and performed a physical examination. On April 24, 2023 the parties conducted the pre-hearing evidentiary deposition of Dr. Rauzzino. He maintained that, although Claimant injured his left shoulder while attempting to prevent a rack of bread from falling at work on March 14, 2022, the medical records do not reflect that he injured his neck or cervical spine during the incident. Dr. Rauzzino specified that the mechanism of injury was consistent with the medical records and Claimant suffered immediate left shoulder pain. However, Claimant did not suffer neck pain during the incident.

20. Notably, Dr. Rauzzino explained that the temporal proximity of an event must be in closely associated with the development of symptoms. He remarked that the records revealed “there was no neck pain, there was no injury to the cervical spine for many, many months after the injury.” If Claimant had suffered an injury to his cervical spine while attempting to prevent a rack of bread from falling, his symptoms would have presented immediately. However, the record reflects that Claimant’s first mention of neck symptoms to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work incident.

21. Dr. Rauzzino explained that Claimant suffers from degenerative changes to his cervical spine that are unrelated to the March 14, 2022 accident. He noted that he had reviewed the plain films of the cervical spine from November 10, 2022 and an MRI of the cervical spine dated December 20, 2022. The plain films did not demonstrate any traumatic instability at C4-5, but only physiologic motion from degeneration. The cervical spine MRI revealed the absence of any acute injury such as a left-sided disc extrusion. Dr. Rauzzino summarized that the “findings are all chronic, degenerative, and pre-existing.” He testified in his deposition that there were several levels where the space for the nerves had been narrowed. However, the key finding “was that there was no acute structural injury to the neck.” The MRI reflected chronic, degenerative changes that developed over a number of years and were not caused by trauma. Importantly, Dr. Rauzzino reasoned that the pathology reflected on the December 20, 2022 MRI was not caused or accelerated by the workplace event of March 14, 2022. There was also no aggravation of Claimant’s pre-existing, degenerative condition leading to a permanent change in his condition as a result of attempting to prevent a rack of bread from falling at work. Dr. Rauzzino remarked that the natural history of Claimant’s degenerative arthritis and foraminal stenosis is that it will progress over time.

22. Based on the EMG results, Dr. Rauzzino reasoned that Claimant likely experienced an injury to the suprascapular nerve at the time he caught the bread rack. An injury to the suprascapular nerve is the reason Claimant continued to have symptoms after the shoulder surgery was completed. Dr. Rauzzino summarized that the records were very clear that Claimant did not suffer an injury to the cervical spine based on the mechanism of injury and reporting of symptoms. He emphasized that the pathology in Claimant’s cervical spine was “100 percent not caused by the injury at work.” There was simply no acute disk herniation that could be attributed to the March 14, 2022 work incident.

23. On March 10, 2022 Claimant underwent the C4-7 anterior cervical discectomy fusion surgery proposed by Dr. Stanton under private insurance. Claimant continues to remain off work following the surgery, has not been released from care, and has not been returned to modified duty. He testified the surgery has provided pain relief and significantly improved his range of motion. Claimant summarized that the rotator cuff surgery performed by Dr. Walden did not relieve his symptoms, but the cervical surgery with Dr. Stanton has had a good outcome with expected continued progress.

24. Claimant has failed to prove it is more probably true than not that the December 23, 2022 facsimile from the office of ATP Dr. Stanton to Respondents

requesting authorization for a C4-7 anterior cervical discectomy constituted a completed request pursuant to W.C.R.P. Rule 16-7. Initially, on December 23, 2022 Dr. Stanton's office faxed to the correct number for Respondents a 22-page document requesting a C4-7 anterior cervical discectomy/fusion. The request had the wrong claim number but the correct date of birth and date of injury, Respondents assert that, because of an incorrect claim number, Claimant failed to submit a completed request to trigger Rule 16.

25. MF[Redacted] showed his fax in-box and explained how this confirmed he never received the transmission. Exhibit 10 reveals a fax cover sheet with the letterhead of Colorado Springs Orthopaedic Group, dated December 23, 2022 that has no claim or information identifying Claimant. The second page of Exhibit 10, with the letterhead of The Spine Center, is the Request for Pre-Authorization for Surgery Procedure with an incorrect claim number. Because of the incorrect claim number, it is likely the fax was never routed to the correct location. Although Dr. Stanton's office submitted a 22-page document seeking surgical authorization, information including procedure codes and date of birth are not helpful when not connected to the correct claim. The consequences of a failure to timely respond to a prior authorization request are significant. Because of the time-sensitive nature of acting on a request for prior authorization, it is imperative for the request to be delivered to the individual responsible for adjusting the claim. Respondents were not culpable for an incorrect claim number and do not carry the burden of researching and identifying the claim under which a request is being made. Accordingly, the December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 did not constitute a completed request for prior authorization. The 10-day requirement to respond in Rule 16-7(B)(2) thus was not triggered on December 23, 2022.

26. Claimant has failed to establish it is more probably true than not that he is entitled to the penalty of automatic authorization for the surgery requested by Dr. Stanton because Respondents failed to respond to the request within 10 days pursuant to W.C.R.P. Rule 16-7(B)(2). Specifically, even if the December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 constituted a completed request and the 10-day requirement to respond in Rule 16-7(B)(2) was triggered, the penalty of automatic authorization was not warranted. Initially, because Respondents did not timely respond to the surgical request, they violated Rule 16-7(B)(2). However, the record reflects that Respondents' conduct was not objectively unreasonable because it was predicated on a rational argument based in law or fact.

27. MF[Redacted] showed his fax in-box at the hearing and explained how this confirmed that he never received the transmission from Dr. Stanton's office. On December 23, 2022 the only fax he received was another medical record from Dr. Walden. MF[Redacted] also explained his fax cue in which documents are organized by claim number. Respondents' procedure for distributing incoming fax documents was a reasonable approach. When the December 23, 2022 surgical request from Dr. Stanton's office was not timely addressed, the office contacted MF[Redacted]. He requested resubmission of the surgical request. Dr. Stanton's office then resubmitted the documentation on January 9, 2023. MF[Redacted] verified that he received the prior authorization request by email on January 9, 2023. He immediately took action and scheduled an appointment with Dr. Rauzzino for an independent medical examination.

He also sent a denial of the prior authorization to Dr. Stanton and to Claimant on January 11, 2023. MF's[Redacted] actions constituted a genuine effort to comply with the 10-day requirement to respond in Rule 16-7(B)(2). Because Respondents efforts in addressing the December 23, 2022 request for surgical authorization were predicated on a rational argument based in law or fact, their actions were not objectively unreasonable. Accordingly, Claimant's request for automatic authorization of the surgery requested by Dr. Stanton on December 23, 2022 is denied and dismissed.

28. Claimant has failed to demonstrate it is more probably true than not that the C4-7 anterior cervical discectomy fusion surgery performed by Dr. Stanton on March 10, 2023 was reasonable, necessary and causally related to his March 4, 2022 industrial injury. Initially, on March 14, 2022 Claimant injured his left shoulder at work while attempting to prevent a rack of bread from falling. Claimant was eventually diagnosed with a left shoulder rotator cuff tear. On February 25, 2022 he underwent surgical repair with Dr. Walden.

29. Following Claimant's left shoulder surgery he had reduced pain complaints in his armpit and chest area. Although Claimant attended several physical therapy visits, his left shoulder and trapezius area remained painful. Claimant's first mention of neck pain to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work accident. PA-C Quakenbush noted radiating pain from the left lateral neck into Claimant's shoulder. On December 22, 2022 Dr. Stanton commented that Claimant still had left-sided shoulder pain and some weakness with overhead activities. He diagnosed Claimant with cervical disc disorders at C4-7 with radiculopathy. Dr. Stanton concluded that "[a]t this point, I think [Claimant] will require a reconstruction of his C4-7 levels to stabilize his spondylolisthesis." Respondents subsequently denied the proposed surgery. Nevertheless, Claimant underwent the procedure through his personal insurance on March 10, 2023.

30. Despite the surgical request from Dr. Stanton, the persuasive opinion and testimony of Dr. Rauzzino reflects that the proposed surgery was not reasonable, necessary and causally related to Claimant's March 4, 2022 industrial injury. Dr. Rauzzino explained that the medical records reflect that "there was no neck pain, there was no injury to the cervical spine for many, many months after the injury." If Claimant had suffered an injury to his cervical spine while attempting to prevent a rack of bread from falling, his symptoms would have presented immediately. However, the record reflects that Claimant's first mention of neck symptoms to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work incident. Furthermore, Dr. Rauzzino explained that Claimant's cervical MRI reflected chronic, degenerative changes that developed over a number of years and were not caused by trauma. Importantly, Dr. Rauzzino reasoned that the pathology reflected on the December 20, 2022 MRI was not caused or accelerated by the March 14, 2022 work incident. There was also no aggravation of Claimant's pre-existing, degenerative condition leading to a permanent change in his condition after attempting to prevent a rack of bread from falling at work. Dr. Rauzzino remarked that the natural history of Claimant's degenerative arthritis and foraminal stenosis is that it will progress over time. He summarized that the records were very clear in demonstrating that Claimant did not

sustain a cervical spine injury based on the mechanism of injury or reporting of symptoms. Dr. Rauzzino emphasized that the pathology in Claimant's cervical spine was "100 percent not caused by the injury at work."

31. Based on the extensive medical records and persuasive opinion of Dr. Rauzzino, the surgery performed by Dr. Stanton on March 10, 2023 was not reasonable, necessary and causally related to Claimant's March 14, 2022 work activities. The record reveals that Claimant injured his left shoulder while attempting to prevent a rack of bread from falling at work on March 14, 2022. However, the medical records do not reflect that he injured his neck or cervical spine during the incident. He instead suffered from a pre-existing, degenerative spinal condition unrelated to his work activities. Claimant's employment thus did not aggravate, accelerate or combine with his pre-existing condition to produce the need for surgical intervention. Accordingly, Claimant's C4-7 anterior cervical discectomy fusion surgery performed on March 10, 2023 was not reasonable, necessary and causally related to his March 14, 2022 work accident.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Completed Request for Prior Authorization

4. Claimant seeks a determination with regard to authorization of the C4-7 anterior cervical discectomy fusion surgery recommended by Dr. Stanton. He asserts that

the proposed surgery was automatically authorized under Rule 16-7 in effect at the time of the request for prior authorization on December 23, 2022. Notably, Respondents failure to deny or authorize the proposed surgery within 10 days under Rule 16-7-I(B)(I) deemed the surgery authorized pursuant to Rule 16-7-2(E). Claimant plead "[p]enalty period begins 12/23/22 and continues until carrier authorizes treatment."

5. Rule 16-7-2(E) specifies:

> Failure of the payer to timely comply in full with all Prior Authorization requirements outlined in this rule shall be deemed authorization for payment of the requested treatment unless the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding.

6. Rule 16-7(B)(2) specifically pertains to denials for medical reasons. The Rule provides that "the payer shall respond to all Prior Authorization requests in writing within 10 days from receipt of a completed request as defined per this Rule." Therefore, for Rule 16-7(B)(2) to apply, the medical provider must submit a completed prior authorization request.

7. To complete a prior authorization request under Rule 16-7(C), the provider "shall concurrently explain the reasonableness and medical necessity of the treatment requested and shall provide relevant supporting documentation (documentation used in the provider's decision-making process to substantiate need for the requested treatment)." A completed request under Rule 16-7(C) includes "[a]n adequate definition or description of the nature, extent and necessity for the treatment;" an identification of the applicable MTG; and a final diagnosis. The issue of whether a provider has submitted a completed request is a question of fact to be determined by the ALJ. *See Aguirre v. Nortrack*, W.C. No. 4-742-953 (ICAO, Oct. 5, 2011). It is Claimant's burden to prove that a completed request was sent to respondents in order for Rule 16's penalty of automatic approval to apply. *Murray v. Tristate Generation and Transmission Ass'n,* W.C. No. 4-997-086-02 (ICAO, Dec. 22, 2017). A respondent is not required to plead insufficiency of a request for authorization as an affirmative defense. *McDaniel v. Vail Associates, Inc.*, W.C. No. 3-111-363 (ICAO, July 18, 2011).

8. As found, Claimant has failed to prove by a preponderance of the evidence that the December 23, 2022 facsimile from the office of ATP Dr. Stanton to Respondents requesting authorization for a C4-7 anterior cervical discectomy constituted a completed request pursuant to W.C.R.P. Rule 16-7. Initially, on December 23, 2022 Dr. Stanton's office faxed to the correct number for Respondents a 22-page document requesting a C4-7 anterior cervical discectomy/fusion. The request had the wrong claim number but the correct date of birth and date of injury, Respondents assert that, because of an incorrect claim number, Claimant failed to submit a completed request to trigger Rule 16.

9. As found, MF[Redacted] showed his fax in-box and explained how this confirmed he never received the transmission. Exhibit 10 reveals a fax cover sheet with the letterhead of Colorado Springs Orthopaedic Group, dated December 23, 2022 that

has no claim or information identifying Claimant. The second page of Exhibit 10, with the letterhead of The Spine Center, is the Request for Pre-Authorization for Surgery Procedure with an incorrect claim number. Because of the incorrect claim number, it is likely the fax was never routed to the correct location. Although Dr. Stanton's office submitted a 22-page document seeking surgical authorization, information including procedure codes and date of birth are not helpful when not connected to the correct claim. The consequences of a failure to timely respond to a prior authorization request are significant. Because of the time-sensitive nature of acting on a request for prior authorization, it is imperative for the request to be delivered to the individual responsible for adjusting the claim. Respondents were not culpable for an incorrect claim number and do not carry the burden of researching and identifying the claim under which a request is being made. Accordingly, the December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 did not constitute a completed request for prior authorization. The 10-day requirement to respond in Rule 16-7(B)(2) thus was not triggered on December 23, 2022.

Penalty of Automatic Authorization pursuant to Rule 16-7

10. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001). The failure to comply with a procedural rule has been determined to be a failure to obey an "order" and failure to perform a "duty lawfully enjoined" within the meaning of §8-43-304(1), C.R.S.; *Pioneers Hospital v. Indus. Claim Appeals Off.*, 114 P.3d 97, 98 (Colo. App. 2005).

11. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.") *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

12. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to the penalty of automatic authorization for the surgery requested by Dr. Stanton because Respondents failed to respond to the request within 10 days pursuant to W.C.R.P. Rule 16-7(B)(2). Specifically, even if the December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 constituted a completed request and the 10-day requirement to respond in Rule 16-7(B)(2) was triggered, the penalty of automatic authorization was not warranted. Initially, because Respondents did not timely respond to the surgical request, they violated Rule 16-7(B)(2). However, the record reflects that Respondents' conduct was not objectively unreasonable because it was predicated on a rational argument based in law or fact.

13. As found, MF[Redacted] showed his fax in-box at the hearing and explained how this confirmed that he never received the transmission from Dr. Stanton's office. On December 23, 2022 the only fax he received was another medical record from Dr. Walden. MF[Redacted] also explained his fax cue in which documents are organized by claim number. Respondents' procedure for distributing incoming fax documents was a reasonable approach. When the December 23, 2022 surgical request from Dr. Stanton's office was not timely addressed, the office contacted MF[Redacted]. He requested resubmission of the surgical request. Dr. Stanton's office then resubmitted the documentation on January 9, 2023. MF[Redacted] verified that he received the prior authorization request by email on January 9, 2023. He immediately took action and scheduled an appointment with Dr. Rauzzino for an independent medical examination. He also sent a denial of the prior authorization to Dr. Stanton and to Claimant on January 11, 2023. MF's[Redacted] actions constituted a genuine effort to comply with the 10-day requirement to respond in Rule 16-7(B)(2). Because Respondents efforts in addressing the December 23, 2022 request for surgical authorization were predicated on a rational argument based in law or fact, their actions were not objectively unreasonable. Accordingly, Claimant's request for automatic authorization of the surgery requested by Dr. Stanton on December 23, 2022 is denied and dismissed.

Reasonable, Necessary and Causally Related

14. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*,

W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

15. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

16. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the C4-7 anterior cervical discectomy fusion surgery performed by Dr. Stanton on March 10, 2023 was reasonable, necessary and causally related to his March 4, 2022 industrial injury. Initially, on March 14, 2022 Claimant injured his left shoulder at work while attempting to prevent a rack of bread from falling. Claimant was eventually diagnosed with a left shoulder rotator cuff tear. On February 25, 2022 he underwent surgical repair with Dr. Walden.

17. As found, following Claimant's left shoulder surgery he had reduced pain complaints in his armpit and chest area. Although Claimant attended several physical therapy visits, his left shoulder and trapezius area remained painful. Claimant's first mention of neck pain to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work accident. PA-C Quakenbush noted radiating pain from the left lateral neck into Claimant's shoulder. On December 22, 2022 Dr. Stanton commented that Claimant still had left-sided shoulder pain and some weakness with overhead activities. He diagnosed Claimant with cervical disc disorders at C4-7 with radiculopathy. Dr. Stanton concluded that "[a]t this point, I think [Claimant] will require a reconstruction of his C4-7 levels to stabilize his spondylolisthesis." Respondents subsequently denied the proposed surgery. Nevertheless, Claimant underwent the procedure through his personal insurance on March 10, 2023.

18. As found, despite the surgical request from Dr. Stanton, the persuasive opinion and testimony of Dr. Rauzzino reflects that the proposed surgery was not reasonable, necessary and causally related to Claimant's March 4, 2022 industrial injury. Dr. Rauzzino explained that the medical records reflect that "there was no neck pain, there was no injury to the cervical spine for many, many months after the injury." If Claimant had suffered an injury to his cervical spine while attempting to prevent a rack of bread from falling, his symptoms would have presented immediately. However, the record reflects that Claimant's first mention of neck symptoms to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work incident. Furthermore, Dr. Rauzzino explained that Claimant's cervical MRI reflected chronic, degenerative changes that developed over a number of years and were not caused by trauma. Importantly, Dr. Rauzzino reasoned that the pathology reflected on the December 20, 2022 MRI was not caused or accelerated by the March 14, 2022

work incident. There was also no aggravation of Claimant's pre-existing, degenerative condition leading to a permanent change in his condition after attempting to prevent a rack of bread from falling at work. Dr. Rauzzino remarked that the natural history of Claimant's degenerative arthritis and foraminal stenosis is that it will progress over time. He summarized that the records were very clear in demonstrating that Claimant did not sustain a cervical spine injury based on the mechanism of injury or reporting of symptoms. Dr. Rauzzino emphasized that the pathology in Claimant's cervical spine was "100 percent not caused by the injury at work."

19. As found, based on the extensive medical records and persuasive opinion of Dr. Rauzzino, the surgery performed by Dr. Stanton on March 10, 2023 was not reasonable, necessary and causally related to Claimant's March 14, 2022 work activities. The record reveals that Claimant injured his left shoulder while attempting to prevent a rack of bread from falling at work on March 14, 2022. However, the medical records do not reflect that he injured his neck or cervical spine during the incident. He instead suffered from a pre-existing, degenerative spinal condition unrelated to his work activities. Claimant's employment thus did not aggravate, accelerate or combine with his pre-existing condition to produce the need for surgical intervention. Accordingly, Claimant's C4-7 anterior cervical discectomy fusion surgery performed on March 10, 2023 was not reasonable, necessary and causally related to his March 14, 2022 work accident.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. The December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 did not constitute a completed request for prior authorization.

2. Claimant's request for the penalty of automatic authorization of the surgery requested by Dr. Stanton on December 23, 2022 is denied and dismissed.

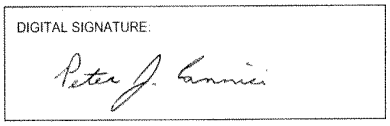
3. Claimant's C4-7 anterior cervical discectomy fusion surgery performed on March 10, 2023 was not reasonable, necessary and causally related to his March 14, 2022 work accident.

4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For*

further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 13, 2023.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that her claim should be reopened based on a worsening of condition since she was placed at maximum medical improvement (MMI) on June 22, 2021.

II. If the claim is reopened, whether Claimant has proven by a preponderance of the evidence that the ulnar nerve transposition surgery recommended by Dr. Larsen is reasonable, necessary, and related to the work injury?

III. If the claim is reopened, whether Claimant established by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits?

IV. Does the evidence presented support Respondents' contention that Claimant is attempting to circumvent the DIME to obtain a surgery that was previously recommended and not performed?

V. Does the evidence presented support Claimant's contention that Respondents are estopped from challenging the recommendation for ulnar nerve transposition surgery?

Because this ALJ finds Claimant's claim for TTD benefits premature, this order does not address her entitlement to TTD.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Larsen, the ALJ enters the following findings of fact:

Claimant's January 20, 2020 Injury and Subsequent Treatment

1. This matter previously was before this ALJ on April 6, 2022, on Claimant's Application for Hearing to convert her scheduled impairment to impairment of the whole person. By Summary Order of May 5, 2022, this ALJ found that while Claimant had sustained injuries to both her wrist and ulnar nerve at the elbow, the impairment caused by these injuries would remain on the schedule of injuries. Accordingly, the claim for conversion to whole person impairment was denied and dismissed. (Clmt's Hrg. Ex. 3).

2. Claimant works as a police officer for Employer. She injured her left wrist/forearm/elbow while trying to effectuate the arrest of an intoxicated and combative suspect on January 20, 2020. (Resp. Hrg. Ex. A, p. 1).

3. Following her injury, Claimant underwent significant medical care,

including physical therapy and subsequent referral to Dr. Karl Larsen at the Colorado Center for Orthopedic Excellence. Early diagnostic testing to include MRI of the left wrist demonstrated no occult fractures or triangular fibrocartilage complex (TFCC) disruption. (Resp. Hrg. Ex. A, p. 2).

4. During an appointment with Physician Assistant (PA) Stephanie Noble at the Colorado Center for Orthopedic Excellence on February 14, 2020, Claimant's physical examination was suggestive of and consistent with a TFCC tear which was not "clearly delineated" on the previously obtained MRI. (Clmt's Hrg. Ex. 6, p. 33). PA Noble recommended a cortisone injection to the extensor carpi ulnaris (ECU) tendon sheath followed by long arm casting to "fully immobilize" the wrist and forearm to prevent "pronosupination" as she felt that this may help the soft tissue and TFCC tear heal. *Id*. at p. 34. Regarding the condition of Claimant's left elbow, PA Noble noted: "If [Claimant] *continues* to have elbow pain, she may benefit from obtaining an MRI of the elbow as well, but at this point the majority of her symptoms appear to be at the wrist". *Id.* at p. 34 (emphasis added). Dr. Larsen agreed with PA Noble's treatment plan. *Id.* Accordingly, Claimant was administered a corticosteroid injection and placed in a long arm cast.

5. Based upon the content of PA Noble's 2/14/2020 record, including the statement that should Claimant "continue" to have elbow pain, the ALJ finds it reasonable to infer that Claimant was probably experiencing elbow symptoms shortly after her January 20, 2020 injury and before she was placed in a long arm cast.

6. Claimant returned to the Colorado Center for Orthopedic Excellence on March 23, 2020 where she was evaluated by Dr. Larsen. (Clmt's Hrg. Ex. 6, p. 35). Claimant reported little improvement from the previously administered injection. *Id.* Her cast was removed and an examination attempted. *Id*. Noting that the examination was of limited value due to Claimant's stiffness from immobilization, Dr. Larsen placed Claimant's wrist in a brace and referred her to Occupational Therapy to work on "gentle range of motion and desensitization". *Id*. A return appointment was set for approximately one month. *Id.* If Claimant was not doing well at this appointment, Dr. Larsen noted that decisions would need to be made about proceeding to surgery. *Id*.

7. During a follow-up visit on April 22, 2020, Claimant reported continued "snapping" on the ulnar side of the wrist and pain with rotation and ulnar deviation. (Clmt's Hrg. Ex. 6, pp. 36-39). Physical examination revealed continued instability of the distal ulna and "mild" synovitis about the ECU tendon. *Id*. Claimant expressed a desire to proceed with a repair surgery but it was noted that she was 8 weeks pregnant which complicated surgical scheduling. *Id.*

8. After consulting with Claimant's obstetrician, Dr. Larsen took her to the operating room on June 11, 2020 for completion of a left wrist arthroscopy with debridement of triangular fibrocartilage tear, a left distal radioulnar joint (DRUJ) stabilization and left ECU tendon sheath reconstruction procedure. (Clmt's Hrg. Ex. 6, p. 44).

9. Claimant experienced persistent post-surgical pain around the DRUJ with range of motion. (Clmt's Hrg. Ex. 6, p. 57). On September 4, 2020, a steroid injection was administered to help her "cope" with the rigors of therapy and provide pain relief. *Id*. It was also noted during this follow-up appointment, that Claimant had been unable to wean herself from her brace. *Id*.

10. During an October 20, 2020 appointment with PA Noble, Claimant reported that the previously administered steroid injection gave her approximately two weeks of relief but her pain had returned and she had a recurrence of the clicking in her left wrist. (Clmt's Hrg. Ex. 6, p. 59). She also complained of a new burning sensation into the ring and small finger as well as the underneath (volar) aspect of the left wrist. *Id.* Physical examination, including provocative testing, i.e. a thumb grind and Tinel's over the ulnar nerve were positive for pain, laxity and burning in the ring and small finger. *Id.* In addition to having left ulnar-sided wrist pain, Claimant was diagnosed with thumb CMC laxity and cubital tunnel syndrome. *Id*.

11. At a December 7, 2020, follow-up appointment, Claimant reported persistent left wrist pain and recurrent clicking. (Clmt's Hrg. Ex. 6, p. 60). Physical examination revealed that the ECU tendon was tender and "somewhat mobile" indicating that Claimant had possibly stretched out her June 11, 2020 surgical reconstruction. *Id*. Dr. Larsen was able to produce wrist clicking with a "midcarpal load and shift maneuver" suggesting the presence of midcarpal instability. *Id.* Claimant was noted to be nearly 9 months pregnant by this appointment, which Dr. Larsen felt was contributing to her ligamentous laxity. *Id*. Outside of an injection into the ECU tendon sheath, Dr. Larsen recommended "taking a long period of time to let [Claimant's] body recover from the hormonal effects of her pregnancy before [considering] anything else". *Id*.

12. Claimant underwent electrodiagnostic testing on March 31, 2021 with Dr. Katharine Leppard. Testing demonstrated objective evidence of "left ulnar mononeuropathy at the elbow, mild in severity." (Resp. Hrg. Ex. J, p. 50). Motor nerve conduction across the Guyon's canal was reportedly "normal" and there was no evidence of median nerve mononeuropathy at the wrist or electrodiagnostic evidence a radiculopathy, brachial plexopathy, neurogenic thoracic outlet or radial mononeuropathy in the left upper extremity. *Id*.

13. By April 16, 2021, Claimant's wrist was noted to be doing "relatively well with just some aching discomfort". (Clmt's Hrg. Ex. 6, p. 64). Claimant had returned to "regular duty work by this date; however, Claimant experienced a worsening of the radiating pain from her medial left elbow into the hand with numbness and tingling into the ring and small fingers after a session of target practice at the firing range. *Id*. It was noted that Claimant had felt similar symptoms, albeit with less numbness and tingling since coming out of her long arm cast on March 23, 2020. (See ¶ 5 above). Dr. Larsen noted the possibility that Claimant's prior long arm casting had somehow aggravated the condition of Claimant's elbow but he added that her elbow had "not been particularly symptomatic until we tried to return her to normal duty". *Id*. at p. 65. Because

Claimant's elbow symptoms were worsening and because she had a "somewhat" subluxable ulnar nerve at the elbow with a positive Tinel's sign and elbow flexion compression test along with prior electrodiagnostic evidence of ulnar neuropathy, Dr. Larsen recommended a return to therapy to "work on specific nerve gliding exercises". *Id*. Barring symptomatic improvement with these exercises, Dr. Larsen noted that Claimant may require an ulnar nerve transposition surgery. *Id*.

14. Respondents sent Claimant for a second opinion with Dr. Jeffrey Watson. (Clmt's Hrg. Ex. 5). Dr. Watson, by report of June 9, 2021, noted Claimant's previous history of surgery by Dr. Larsen, her persistent left wrist and elbow pain, including *both lateral* and *medial* elbow pain along with occasional numbness over the ulnar border of the right hand. (Clmt's Hrg. Ex. 5, p. 26). Physical examination revealed "slight hypermobility of the right ulnar nerve with flexion and extension, but it does not firmly subluxate over the medial upper condyle".[1] *Id*. at p. 27. Percussion testing revealed a "mildly positive Tinel's sign along the ulnar nerve at the cubital tunnel", left slightly greater than right. *Id*. Moreover, Claimant demonstrated marked tenderness with palpation of the ulnar fovea as well as the ECU tendon. She also had ECU subluxation with provocative maneuvers, which was caused additional pain. *Id.* Dr. Watson concluded that Claimant's presentation was a "difficult" one as she had pain at her elbow, forearm and wrist following a "complex" wrist reconstruction effort. *Id*. He was not confident that Claimant's pain was emanating from her ulnar nerve because she had "more focal pain around the ulnar part of the wrist as opposed to the ulnar nerve distribution" and "minimal changes on her electrodiagnostic evaluation. *Id*. at p. 28. Instead, Dr. Watson felt that Claimant's problems were more likely coming from persistent instability of the extensor carpi ulnaris tendon. *Id.* While he had no confidence in a revision stabilization procedure of the TFCC or DRUJ, Dr. Watson noted that a revision stabilization of the ECU tendon "may be worthwhile", although he described this surgery as a "big commitment". *Id.*

15. The ALJ credits the October 20, 2020 and April 16, 2021 of PA Noble and Dr. Larsen respectively to find that Claimant probably has cubital tunnel syndrome related to her January 20, 2020 work injury.

16. Claimant was seen by Dr. Nicholas Kurz on June 22, 2021. (Clmt's Hrg. Ex. 4, p. 21). Dr. Kurz had previously released Claimant to full duty on her last visit to the City of Colorado Springs Occupational Medicine Clinic in March of 2021. Claimant had not returned to full duty but instead had taken vacation and then went on light duty pending the opinions by Dr. Larsen and the second opinion by Dr. Watson. According to Dr. Kurz' examination at that time, Claimant had a normal exam with full range of motion, strength and sensation. *Id*. at pp. 21-22. Dr. Kurz also noted that Dr. Larsen

[1] The ALJ finds Dr. Watson's reference to occasional numbness over the ulnar border of the right hand and slight hypermobility of the right ulnar nerve perplexing as Claimant has never reported any symptoms associated with the right elbow. Accordingly, the ALJ has given consideration to the possibility that Dr. Watson's reference to right hand pain and hypermobility or the ulnar nerve may be a typographical error. Nonetheless, Dr. Watson's examination revealed a positive ulnar nerve Tinel's sign over the left elbow, which is consistent with Dr. Larsen's finding on examination.

was of the opinion that some of Claimant's ligamentous wrist laxity was due to her pregnancy and he would expect that to improve with the passage of time and "to recover from the hormonal effects of her pregnancy." *Id*. at p. 22. Accordingly, Dr. Kurz placed Claimant at MMI without impairment and while his report indicated that maintenance treatment may be warranted, the Final Admission of Liability (FAL) filed by Respondents on July 16, 2021, stated that no medical maintenance was required. (Clmt's Hrg. Ex. 4, p. 22; see also Resp. Hrg. Ex. W, p. 112).

17. Claimant requested a Division Independent Medical Examination (DIME) to assess her left wrist and elbow following the filing of Respondents' July 16, 2021 FAL. Dr. John Bissell was selected as the physician to complete the requested DIME. Shortly before she saw Dr. Bissell on November 4, 2021, Claimant returned to full duty work.

Dr. Bissell's DIME

18. Dr. Bissell completed his DIME on November 4, 2021. (Clmt's Hrg. Ex. 8). During the DIME, Claimant reported "chronic aching, stabbing and burning in her left elbow and *medial* forearm with numbness and pins and needles in her left medial hand particularly in the fourth and fifth digits".[2] *Id*. at p. 105. Concerning the condition of Claimant's left elbow, Dr. Bissell documented the following:

> Dr. Larsen recommended ulnar nerve transposition but Dr. Kurz referred her for [a] second opinion [with] Dr. Watson. Dr. Watson told her the nerve injury was not significant enough but he found that she had persistent instability and recommended another stabilization surgery. Surgery was not approved and Dr. Kurz released her to full duty, which she started this week.

(Clmt's Hrg. Ex. 8, p. 103).

19. Although the physical examination section of Dr. Bissell's DIME report is devoid of any suggestion that he tested the left ulnar nerve for hypermobility, Dr. Bissell did perform a Tinel's test of the left ulnar nerve at the elbow. (Clmt's Hrg. Ex. 8, p. 106). Dr. Bissell documented a positive Tinel's test at the elbow, which caused "paresthesia extending into [Claimant's] fingers". *Id.* In reaching his clinical diagnosis of "left ulnar neuropathy, probably at the elbow, mild-claim related", Dr. Bissell cited the results of Claimant's nerve conduction study completed by Dr. Leppard on March 31, 2021. *Id*. at pp. 106-107. Indeed, Dr. Bissell noted: "Left upper limb EMG/NCV testing was complex and in summary showed *probable* left ulnar neuropathy at the elbow and mild sensory only left median neuropathy at the wrist. She saw hand surgeon Dr. Larsen who opined she might benefit from ulnar nerve transposition surgery and she had a second opinion

[2] The ALJ finds Dr. Bissell's reference to symptoms emanating from the left "medial" portion of the hand a likely error as the fourth and fifth digits are located on the lateral, i.e. outside aspect of the hand rather than on the medial (inside) aspect of the hand.

with hand surgeon Dr. Watson who opined she might benefit from revision extensor carpi ulnaris tendon stabilization". *Id*. at p. 107 (emphasis added).

20. Dr. Bissell concluded that Claimant was at MMI and assigned a total of 14% upper extremity impairment rating, 2% of which was given for Claimant's claim related left ulnar neuropathy above mid forearm. (Clmt's Hrg. Ex. 8, p. 107). Dr. Bissell recommended that Claimant follow-up with Dr. Kurz over the next year to assess her progress, noting that her symptoms should abate with ergonomic adjustment, bracing, resolution of the hormonal effects of pregnancy (ligamentous laxity) and time. *Id*. at p. 108. He did not recommend additional surgery, noting that multiple surgeries were unlikely to result in an improvement in pain or function. *Id*.

21. The ALJ finds that when Claimant was placed at MMI in June of 2021, differing opinions were given by examining experts as to what type of surgery may be of benefit to her at that time. Given the ongoing possibility that the laxity in her wrist could improve following the delivery of her child combined with the disparate opinions regarding the location of her pain generator, and the fact that she had been placed at MMI without impairment, the ALJ finds it reasonable that Claimant would be content to try to live with the state of her elbow condition as of June 22, 2021.

22. On December 1, 2021, Respondents filed an FAL consistent with the MMI and impairment rating opinions expressed by Dr. Bissell in his November 4, 2021 DIME report. (Clmt's Hrg. Ex. 9, p. 116). While Respondents admitted to the MMI and impairment rating determinations of Dr. Bissell, they denied maintenance care benefits pursuant to Dr. Kurz' June 22, 2021 report. *Id.*

23. Claimant subsequently filed an Application for Hearing seeking to convert her 14% scheduled rating to impairment of the whole person. As noted above, a hearing concerning conversion of Claimant's scheduled impairment commenced April 6, 2022. (Clmt's Hrg. Ex. 3). At this hearing, neither Claimant nor Respondents sought to overcome Dr. Bissell's DIME opinions as to MMI, or impairment nor did Claimant seek future maintenance medical care. *Id*. After Claimant's conversion request was denied and dismissed, she filed the current Application for Hearing seeking to reopen her claim for additional medical benefits, specifically surgery directed to the left elbow along with temporary total disability (TTD) benefits commencing October 10, 2022 and ongoing. (Clmt's Hrg. Ex. 1).

24. In support of their position that Claimant's request for conversion of her scheduled impairment should be denied and dismissed, Respondent presented a records review report authored by Dr. Thomas Mordick at the April 6, 2022 hearing. This same January 22, 2022 report is included in Respondents current Exhibit packet. (See Resp. Hrg. Ex. B). The ALJ has carefully reviewed this report a second time. In his January 22, 2022 report, Dr. Mordick notes:

> On 11-04-21 a Division IME was performed by Dr. Bissell. He stated his opinion that the claimant was at MMI. In (sic) awarded a

> 14% upper extremity rating. Of note 2% was for the ulnar nerve. [Redacted, hereinafter MC] did not complain of ulnar nerve issues for 10 months after her injury and 4 months after her surgery. In medical probability, immobilization in a cast does not result in cubital tunnel syndrome, and if somehow a cast should irritate the ulnar nerve it would happen while the cast was on and not months later. Therefore, in medical probability, the ulnar nerve complaints are not related to the injury of 01-20-2020."

(Resp. Hrg. Ex. B, p.14).

25. While it is clear that Dr. Mordick disagreed with Dr. Bissell's conclusion that Claimant's left elbow symptoms/complaints were causally related to her January 20, 2020 work injury as of January 22, 2022, Respondents did not raise any objection to Dr. Bissell's DIME determination regarding the cause of Claimant's left ulnar nerve/cubital tunnel symptoms at the time of the April 6, 2022 hearing.

26. Claimant returned for a follow-up appointment with Dr. Larsen on October 10, 2022. (Resp. Hrg. Ex. T). During this encounter, Dr. Larsen noted that he had not seen Claimant since May 2021, at which time it had been determined that Claimant had "ulnar neuritis of the left elbow with ulnar nerve subluxation as well as some persistent pain about her ulnar wrist". *Id*. at p. 83. Dr. Larsen also indicated that his recommendation to proceed with an ulnar nerve transposition surgery had been denied with Respondents' request for a second opinion with Dr. Watson. *Id.* Since the denial of the request for elbow surgery, Dr. Larsen noted that Claimant was experiencing "*significant worsening* pain localized to [Claimant's] elbow radiating out to her hand". *Id*. (emphasis added). Examination directed to the left *medial* elbow revealed tenderness over the ulnar nerve which was "palpably subluxable". *Id*. at p. 84. Claimant was careful to note that subluxation of the ulnar nerve reproduces the symptoms that she is having in her elbow and radiating into her hand. *Id*. Claimant also had a "painfully positive" Tinel's sign at the elbow, a palpably unstable ECU tendon and pain with an ulnocarpal grinding test at the wrist. *Id*. Dr. Larsen opined that Claimant had both an elbow problem and ongoing issues with her wrist. (See generally, Resp. Hrg. Ex. T, p. 85). He concluded that her "most symptomatic problem was ulnar neuritis at the medial elbow with ulnar nerve subluxation, noting that this was "electrodiagnostically associated with ulnar neuropathy at the elbow that was mild but her symptoms are more of pain and radiating symptoms when the nerve subluxate" (sic). *Id*. Dr. Larsen felt that Claimant remained a good candidate for an ulnar nerve transposition surgery and Claimant expressed a desire to proceed. *Id.*

27. Claimant was evaluated by Dr. Mordick for a WCRP, Rule 16 opinion on December 6, 2022. During this appointment, Claimant purportedly reported "constant pain in the *lateral* aspect of the left elbow. (Resp. Hrg. Ex. C, p. 16)(emphasis added). According to Dr. Mordick's independent medical examination (IME) report, Claimant described her pain as extending from the lateral aspect of the elbow to the ulnar side of the wrist. *Id.* at p. 17. Dr. Mordick did not appreciate any ulnar nerve subluxation on

examination and according to his report, Claimant did not complain of tenderness over the medial epicondyle. *Id*. Dr. Mordick found Claimant's examination to be atypical for cubital tunnel syndrome and because her elbow pain was lateral rather than medial, he recommended against ulnar nerve transposition surgery. *Id*. at p. 18.

28. Claimant returned to Dr. Larsen following Dr. Mordick's IME. She was reevaluated by Dr. Larsen on January 16, 2023, because Dr. Mordick's examination was in complete opposition to what he (Dr. Larsen) found on exam during Claimant's October 10, 2022 appointment. (Resp. Hrg. Ex. U, p. 87; see also, Clmt's Hrg. Ex. 6, p. 90).

29. During a January 16, 2023 appointment, Claimant reported to Dr. Larsen that Dr. Mordick spent approximately 5 minutes on his examination and that she was still having ongoing symptoms, that her ulnar nerve was subluxing at the elbow and that with pressure on the area of the ulnar nerve, she experiences "numbness in the ulnar digits of the hand". (Resp. Hrg. Ex. U, p. 87). Claimant localized her pain over the posterior and posteromedial aspect of the elbow. *Id.* at p. 88. She specifically denied any "*lateral* elbow pain". *Id*. (emphasis added). Physical examination noted a complete absence of tenderness over the lateral epicondyle; however, Claimant complained of tenderness over the ulnar nerve and demonstrated a positive elbow flexion compression test. *Id*. According to Dr. Larsen, he and Claimant could both appreciate the ulnar nerve subluxing over the medial epicondyle during his physical examination. *Id*.

30. Dr. Larsen concluded that Claimant had "very clear evidence of ulnar nerve subluxation and ulnar neuritis with a low degree of ulnar neuropathy on electrodiagnostic test. (Resp. Hrg. Ex. U, p. 88). He was unable to reconcile the differences between his examinations and the examination of Dr. Mordick. *Id.*

31. Dr. Mordick recorded the December 6, 2022, IME appointment with Claimant and the audio recording has been moved into evidence. (Clmt's Hrg. Ex. 10). The ALJ has carefully listened to the entire audio recording of this appointment. The recording is 15 minutes and 38 seconds in length. The first minute and 13 seconds of the recording consists of introductory statements made by "[Redacted, hereinafter NA]", an employee of Dr. Mordick's office followed by Claimant's consent to audio record the examination. Dr. Mordick introduces himself at 1:14 into the audio and proceeds to gather a history from Claimant for the next 4 minutes and 16 seconds, i.e. approximately to the 5 minute and 30 second mark of the audio when he asks Claimant to show him where she is having pain. Claimant confirms that the pain is difficult locate but concedes she has worsening pain on the outside of the left forearm/elbow. Dr. Mordick obtains additional history up to the 7 minute and 57 second mark of the recording when the actual physical examination begins. During the physical examination, Claimant reports having numbness in the ring and pinkie finger along with ½ of the middle finger. Following a basic sensory assessment, Dr. Mordick completes a palpatory examination of the left extremity. Dr. Mordick provides no verbal description of the areas palpated which reportedly cause/reproduce Claimant's pain. The palpatory examination proceeds to the 15 minute and 35 second mark of the audio recording,

making the complete examination approximately 7 minutes and 38 seconds in length. During the examination, Claimant reported that palpation to the area of the elbow caused soreness/pain in essentially the entire left forearm and a shooting sensation into the pinkie.

32. In a letter directed to Respondents' attorney dated January 20, 2023, Dr. Mordick reiterated his recommendation against proceeding with left ulnar nerve decompression with transposition surgery. (Resp. Hrg. Ex. D, p. 22). Dr. Mordick repeated his concerns that the cause of Claimant's elbow problems did not appear related to Claimant's January 20, 2020 injury. *Id*. Moreover, he cited Claimant's atypical and inconsistent examination findings, lateral rather than medial elbow pain, and weak EMG findings as additional evidence that the requested cubital tunnel surgery was not reasonable or necessary. *Id.*

33. Following Dr. Mordick's IME, Respondents requested a medical records review opinion from Dr. Lawrence Lesnak. Dr. Lesnak issued a report on February 6, 2023, outlining his opinions regarding Claimant's candidacy for left ulnar nerve transposition surgery at the elbow. (Resp. Hrg. Ex. E, pp. 26-29). In addition to the reasons cited by Dr. Mordick as support for denying Dr. Larsen's request for elbow surgery, Dr. Lesnak opined that the nerve conduction velocity study performed by Dr. Leppard did not meet the criteria for a diagnosis of mild ulnar motor neuropathy across the elbow. *Id.* at pp. 28-29. According to Dr. Lesnak, the 13 m/sec decrease in Claimant's ulnar nerve conduction was below the 15 m/sec or greater decrease "*required*" for the aforementioned diagnosis. Id. at p. 28 (emphasis in original). Dr. Lesnak did not recommend repeat EMG/NCV testing to determine whether there had been any interim change in Claimant's nerve conduction velocities between the time of Dr. Leppard's testing and his records review.

The Deposition Testimony of Dr. Larsen

34. Dr. Larsen is a Board-certified, fellowship trained orthopedic hand and upper extremity surgeon. He graduated from the Uniformed Services University of the Health Sciences Medical School and did a year of general surgical training in the Air Force where he served as a flight surgeon. He thereafter did an orthopedic residency and then a subspecialty fellowship in hand and microvascular surgery and then served as an upper extremity surgeon at the Air Force Academy before going into private practice in 2008. He is Level II certified with the Division of Workers' Compensation (DOWC) and serves on the DIME panel of the DOWC. (Depo. Tr. Dr. Larsen, pp. 4-6, ll. 1-23).

35. Dr. Larsen testified that he recommended ulnar nerve transposition surgery because Claimant's clinical presentation included positive provocative testing (tenderness and instability of the ulnar nerve) supporting his conclusion that she had ulnar neuritis in combination with a low degree of ulnar neuropathy. (Depo. Tr. Dr. Larsen, pp. 11-12, ll. 1-8). So, he testified that he "offered [Claimant] a surgery that

would manage both, but the driving force was the ulnar neuritis" causing worsening pain around the ulnar nerve. *Id*. at ll. 8-10.

36. Dr. Larsen testified that after he received Dr. Mordick's December 6, 2022 report, he had Claimant brought back on January 16, 2023 to reexamine her yet again to "verify" what he was seeing because Dr. Mordick's examination results were in complete opposition to what he was seeing. (Depo. Tr. Dr. Larsen, p. 17-18, l. 1). According to Dr. Larsen, his examination findings from January 16, 2023, were consistent to what he had seen in October 2020 and May 24, 2021 and it appeared that Claimant's symptoms associated with left wrist/elbow were becoming more painful to her. *Id*. at p. 18-19, ll.1-4.

37. Dr. Larsen disagreed with the conclusions of Dr. Mordick as set out in his January 20, 2023 report (Resp. Ex. D, p. 22-23) when he suggested that the proposed ulnar nerve transposition surgery be denied on the basis that Claimant reported lateral not medial elbow pain and did not demonstrate ulnar nerve instability. (Depo. Tr. Dr. Larsen, p. 21, ll. 3-17). According to Dr. Larsen, Claimant's lateral elbow pain has not been a prominent part of her complaints or treatment over the years and he conspicuously felt the nerve sublux on examination. *Id.* When questioned as to whether the recommendation presently for the surgery on the elbow was based simply on Claimant's complaints of pain, Dr. Larsen testified that it is based not only on the Claimant's complaints of pain but also the provocative examination and the subluxation of the ulnar nerve eliciting pain behavior. *Id*. at p. 25, ll. 14-24.

38. Dr. Larsen opined that as of Claimant's October 10, 2022 examination, her left upper extremity symptoms appeared to render her unable to perform the full range of duties associated with her position as a police officer. (Depo. Tr. Dr. Larsen, p. 15, ll. 5-10).

Claimant's Hearing Testimony

39. Claimant testified that at the time of her initial injury she injured her wrist, had a burning sensation in her forearm and had pain and discomfort in her elbow. Claimant testified that with the passage of time, her elbow pain has gotten worse. She acknowledged that as of May 24, 2021, Dr. Larsen thought that surgery should be done on the elbow, but that Dr. Kurz had her get a second opinion with Dr. Watson who recommended that she proceed with additional wrist surgery. With two different opinions from two well-known doctors, as to the suspected pain generator, Claimant testified that she did not know what to do.

40. The evidence presented supports a finding that Claimant did not have any treatment between the time Dr. Kurz placed her at MMI on June 22, 2021 and October 10, 2022, when she returned to Dr. Larsen with complaints of worsening pain localized to the elbow and radiating out to the hand. By this time, Claimant's case would have been closed to additional medical benefits for approximately 10 month, i.e. since

December 31, 2021 by virtue of the fact that she did not object to Respondents 12/1/2021 FAL denying maintenance medical benefits.

41. Claimant testified that by October 10, 2022 this date her elbow pain had become constant and that she had shooting pains inside the left elbow and constant pain and numbness and tingling in her hand. Claimant described the pain as being on the inside or medial side of her elbow and thought that the difference in opinions/documentation of the physicians regarding the location of her pain may be related to the different way that the doctors performed their examinations and whether she had her elbow flexed or extended. Regardless, Claimant testified that the elbow pain she is enduring currently is in the same location as it was in May of 2021. According to Claimant, this pain and the other associated symptoms, including numbness and tingling in the pinky, ring, and one half of the middle figure are now constant in nature and more intense than she felt previously. Indeed, Claimant testified that when she went back to patrol duty in September of 2022 she noticed a significant worsening of her elbow pain/symptoms which progressively became more and more bothersome until it was constant. Claimant also testified that she could feel the ulnar nerve slipping out during her examinations with Dr. Larsen.

42. During cross-examination, Claimant admitted that she was off work for 12 weeks with whiplash following a motor vehicle accident on September 20, 2022. She also admitted that she is off work presently due to high risk pregnancy and symptoms consistent with supraventricular tachycardia.

The Testimony of Dr. Thomas Mordick

43. Dr. Thomas Mordick testified as a Board-certified, fellowship trained hand surgeon. Regarding Claimant's reported symptoms, Dr. Mordick testified that when he evaluated Claimant, she unmistakably indicated that she had lateral, not medial elbow pain and numbness in the left middle finger, ring and small fingers. The other notes indicate the left ring and small finger, which ·Dr. Mordick agreed would be more consistent with cubital tunnel syndrome, but Dr. Mordick testified that Claimant very specifically reported that she had numbness in her middle finger when he evaluated her. According to Dr. Mordick, such middle finger numbness would be an atypical distribution for an ulnar nerve problem. Dr. Mordick did not appreciate any ulnar nerve subluxation on examination and he testified that Dr. Lesnak reported that the EMG/NCV testing did not support a diagnosis of cubital tunnel syndrome. For these reasons, Dr. Mordick testified that the recommended ulnar nerve transposition surgery is not indicated.

44. Concerning Claimant's reported worsening of condition, Dr. Mordick testified that Claimant told him that her pain and numbness were unchanged for a long period of time. Accordingly, Dr. Mordick testified: "So, there does not appear to be any worsening of numbness, which would be indicative of cubital tunnel syndrome. As noted, this ALJ has listened carefully to the entire audio recording of Dr. Mordick's IME examination. That review would indicate that during the palpatory examination of Claimant's left wrist/elbow, Dr. Mordick never asked Claimant whether the pain he was

eliciting was worse than she had experienced previously. Moreover, on at least three occasions, Claimant told Dr. Mordick that her symptoms were worsening with time. Indeed, in reference to the shooting pain that Claimant reported travels from her elbow down her forearm, Claimant stated it has gotten "worse" as time has gone on. (Clmt's Hrg. Ex. 10, audio recording 4:14). She also reported that her symptoms were "getting worse and worse" and she now has "constant" pain at the elbow to the wrist. *Id*. at 5:19. Finally when asked pointedly whether her pain was different or the same as before, Claimant responded, "I would say it is getting worse at this point. *Id*. at 6:24.

45. The ALJ finds Claimant's testimony that her elbow pain and other associated symptoms, including paresthesia (numbness) have worsened since being placed at MMI on June 22, 2021, credible and more persuasive than the contrary statements of Dr. Mordick that she reported her pain and numbness were unchanged.

46. Based upon the evidence presented, the ALJ finds the medical situation surrounding the condition of Claimant's left elbow and wrist to be complicated. The ALJ is persuaded that Claimant likely suffered two separate injuries to her left upper extremity during the January 20, 2020 incident, one related to the TFCC and ECU tendon, i.e. the lateral aspect of the wrist and the other involving the elbow. Based upon the evidence presented, the ALJ is convinced that these injuries/conditions are probably causing pain and other associated symptoms in the entire left forearm, including the wrist and both the lateral and medial side of the elbow. Indeed, the ALJ is convinced that Claimant does have lateral forearm and elbow pain that is probably emanating from the injury to her ECU tendon and perhaps her TFCC injury. Moreover, there is electrodiagnostic evidence of ulnar nerve irritation/neuropathy at the elbow which is probably causing the reported medial elbow pain and associated symptoms (numbness/tingling) that are reproducible with provocative testing (Tinel's/grind test/ulnar nerve subluxation). Although mild in nature, Claimant's abnormal EMG/NCV testing results constitute some "objective" evidence that her ulnar nerve is not completely healthy. Based upon the evidence presented, the ALJ finds that Claimant's ulnar nerve irritation/neuropathy represents the probable source of her persistent and worsening elbow pain.

47. Dr. Lesnak's suggestion that Claimant's reported worsening ulnar nerve pain and associated cubital tunnel syndrome symptoms are not explained by the results of her EMG testing is not persuasive. Indeed, Dr. Leppard concluded that Claimant's testing yielded an abnormal result and that Claimant had mild ulnar neuropathy at the elbow. Moreover, Dr. Bissell seemingly adopted Dr. Leppard's EMG testing results when he concluded that Claimant had "left ulnar neuropathy, probably at the elbow, mild-claim related". (Clmt's Hrg. Ex. 8, pp. 106-107). As noted, Respondent's did not challenge Dr. Bissell's DIME finding concerning the cause of Claimant's ulnar neuropathy. Consequently, the ALJ finds any suggestion that Claimant does not have an ulnar neuropathy in direct contradiction to Dr. Bissell's diagnostic opinion concerning Claimant's elbow and his determination that Claimant's ulnar neuropathy is "claim related". Nevertheless, the evidence presented persuades the ALJ that Claimant's ulnar nerve irritation and cubital tunnel symptoms are probably related to the January

20, 2020, incident and that the condition of Claimant's elbow is deteriorating. As presented, the evidence also supports a finding that the proposed ulnar nerve transposition surgery is reasonable and necessary to treat the advancing symptoms associated with Claimant's ulnar nerve/elbow injury. Accordingly, the ALJ finds that Claimant has proven that she is entitled to a reopening of her case to seek this otherwise reasonable, necessary and claim related medical care.

48. As to the Claimant's request for temporary disability benefits, Dr. Larsen has indicated that he does not believe that she can perform the full range of duties required of a police officer. Claimant testified she is presently on extended leave due to special circumstances surrounding a high risk pregnancy that precludes her from doing any work. The disability associated with Claimant's pregnancy will cease upon the delivery of her child in early July. Nonetheless, Claimant is unsure as to whether she has been cleared to proceed with the recommended ulnar nerve transposition surgery by her ob-gyn doctor. Accordingly, Claimant may have to wait until the delivery of her child before she can proceed with surgery. Based upon the evidence presented, the ALJ is convinced that Claimant is entitled to temporary disability benefits commencing when her disability from the pregnancy ceases and until such time as she is placed at MMI following the ulnar nerve transposition surgery. Regardless, the ALJ finds an Order concerning the payment of TTD to be premature until the special circumstances surrounding Claimant's high risk pregnancy are no longer precluding her employment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado (Act) §§8-40-101, *et seq*. C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section* 8-40-102(1), C.R.S. The claimant bears the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-43-301(1), C.R.S.; *Faulker v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of a claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. A workers' compensation claim is decided on its merits. Section 8-43-201, *supra*.

B. In accordance with §8-43-215, C.R.S., this decision contains specific findings of fact, conclusions of law and an order. In rendering this decision, the ALJ

has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice, or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found here, Claimant's testimony regarding the alleged worsening of her condition is credible and persuasive. Based upon the evidence presented, the ALJ is convinced that Claimant has a serious medical condition in the left elbow/forearm caused by an injury to the ulnar nerve during the January 20, 2020 work incident. As noted above, the ALJ is also persuaded that the condition of Claimant's left elbow is worsening with the passage of time and that the proposed ulnar nerve transposition surgery is a reasonable, necessary treatment option to cure and relieve her of the ongoing symptoms/dysfunction caused by this claim related condition.

D. The weight and credibility to be assigned expert testimony is also matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). As found, the testimony/opinions of PA Noble and Dr. Larsen regarding the cause of Claimant's left wrist/elbow condition and her need for surgery are more convincing than the contrary opinions of Drs. Mordick and Lesnak. Here, the evidence presented substantially supports a conclusion that Claimant's left elbow symptoms came on shortly after an inciting event related to Claimant's work activity, specifically tussling with a drunken combative suspect. As found, this condition has been deemed to be related to this January 20, 2020 incident by PA Noble and Drs. Larsen and Bissell. Moreover, the evidence presented, including the audio recording of Claimant's IME with Dr. Mordick supports a conclusion that the overall condition of Claimant's the left forearm is worsening.

Claimant's Request to Reopen Based on a Change of Condition

E. A request for continuing medical treatment must be presented at the time of MMI, *Hanna v. Print Expediters Inc.*, 77 P. 3d 863 (Colo.App., 2003). Furthermore, the issue of medical benefits is closed if the respondents file an uncontested final admission that denies liability for future medical benefits. *Burke v. Industrial Claim*

Appeals Office, 905 P. 2d 1 (Colo. App. 1994). Indeed, C.R.S. § 8-43-203(2)(b)(II) provides that a case will be "automatically closed as to the issues admitted in the [FAL] if the claimant does not, within thirty days after the date of the [FAL], contest the [FAL] in writing and request a hearing on *any disputed issues that are ripe for hearing*." . . . (emphasis added). *Olivas-Soto v. Indust. Claim Appeals Office*, 143 P.3d 1178 (Colo.App. 2006). "Once issues are closed, they may only be reopened on the grounds stated in C.R.S. § 8-43-303. C.R.S. § 8-43-203(2) (d). Among those grounds is a change in the claimant's condition. C.R.S. Section 8-43-303(1); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo.App. 2004); *See also, Milco Construction v. Cowan*, 860 P. 2d 539 (Colo.App. 1992) (a claim may reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Industrial Claim Appeals Office*, 833 P. 2d 780 (Colo.App. 1991).

F. Based upon the evidence presented, the ALJ is persuaded that Claimant objected to and filed an Application for Hearing contesting Respondents' December 1, 2021 FAL. Nonetheless, Claimant did not include an objection to Respondents denial of liability for future medical care, i.e. maintenance treatment benefits in her Application for Hearing. Indeed, the only issue for determination at hearing following Claimant's DIME was whether she was entitled to have her scheduled impairment of the left upper extremity converted to whole person impairment. Accordingly, the ALJ is convinced that the issue of medical benefits, including post-MMI treatment closed because it was not endorsed within thirty days of the FAL as required by § 8-43-203(2)(b)(II).

G. Nevertheless, § 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based upon a change in condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo.App. 1993). In seeking to reopen a claim, the claimant shoulders the burden of proving his/her condition has changed and he/she is entitled to additional benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo.App. 2005).

H. A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo.App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo.App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (Oct. 25, 2006). The question of whether a claimant established a change in the condition of a physical or mental condition causally connected to the original compensable injury, is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo.App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004). Where the claimant alleges a change in condition, as here, the ALJ may credit the claimant's testimony as to the worsening of symptoms/problems as sufficient to order a reopening of the case. *See, Savio House v. Dennis,* 665 P.2d 141 (Colo.App. 1983).

Nonetheless, reopening is only appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo.App. 2000); *Jefferson County School District v. Goldsmith,* 878 P. 2d 116 (Colo. App.1994); *Dorman v. B & W. Construction Co.,* 765 P.2d 1033 (Colo.App. 1988); and *Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo.App. 1990).

I. Here, the evidence presented supports a conclusion that Claimant has proven that her left elbow condition was caused by an injury traceable to the January 20, 2020 work incident and that the condition of her elbow has worsened with the passage of time as evidenced by the manifestation of constant symptoms, including paresthesia since being placed at MMI by Dr. Kurz on June 22, 2021. Indeed, the record evidence persuades the ALJ to find and conclude that Claimant's persistent and worsening elbow pain and associated symptoms warrants additional treatment, including surgery which the ALJ is convinced is reasonably necessary and designed to cure and relieve her ongoing symptoms and functional decline. While not unanticipated, the recommendation for ulnar nerve transposition surgery nevertheless resulted from a fundamental change in Claimant's condition over time as evidenced by her now "constant symptoms" and her inability to perform the full range of duties associated with her work as a police officer. Accordingly, Claimant's request to reopen her claim is granted.

Respondents' Assertions Regarding Circumventing the DIME

J. Citing the decision announced by the Court of Appeals in *Justiniano v. Industrial Claim Appeals Office*, 410 P.3d 659 (Colo.App. 2016), Respondents contend that Claimant's request to reopen her claim for additional medical treatment amounts to an impermissible attempt to circumvent the higher standard of clear and convincing evidence required to challenge Dr. Bissell's DIME. Based upon the evidence presented, the ALJ is not convinced. In *Justiniano,* Claimant proceeded through a DIME and the DIME doctor determined that she had reached MMI. Thereafter, Ms. Justiniano's employer and its workers' compensation insurance carrier filed a FAL advising her that she had 30 days to file an objection. Claimant did not file an objection. Instead, she filed a petition to reopen her claim within two weeks after the filing of the FAL, while the claim was still open. As part of her petition to reopen, Ms. Justiniano used medical information that post-dated the DIME. The ALJ denied and dismissed the petition to reopen concluding that Ms. Justiniano was "actually attempting to challenge the DIME regarding the MMI determination by suggesting that [she] required additional medical care, specifically the wrist surgery performed [in September 2013] in order to reach MMI". In concluding that Claimant's petition to reopen was a constructive challenge to MMI, the ALJ determined that Ms. Justiniano's petition to reopen constituted an attempt to avoid the higher clear and convincing burden of proof required to challenge the determination that she had reached MMI. Claimant appealed the ALJ's decision and the Panel affirmed.

K. In affirming the Panel, the Court noted that the statutory authority to reopen a claim is "permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ". *Justiniano, supra* (quoting *Cordova v. Indust. Claim Appeals Office*, 197 P.3d 220, 222 (Colo.App 2008). Although the Court did not reach the question as to the validity of the petition to reopen in the face of an open FAL, the Court did note that claimant's petition to reopen was premature because the claim had not yet closed. Moreover, the Court cited claimant's counsel's admission that the decision to file a petition to reopen rather than contest the DIME opinion regarding MMI was in part "strategic" because he did not believe that claimant could overcome the DIME. In light of these factors, the Court concluded that the ALJ did not abuse her discretion in dismissing claimant's petition to reopen nor did the panel err in upholding the ALJ. *Justiniano, supra* at p. 662.

L. In the instant case, the ALJ notes that Claimant made no attempt to challenge the DIME and that her case had been closed for many months before she petitioned to reopen for additional medical treatment on the basis that she experienced a change in her condition during that time period. As found here, there is ample evidence to support a conclusion that Claimant suffered a change in condition caused by her industrial injury. Undeniably, Claimant has reported a post-MMI increase in her symptoms and per Dr. Larsen, there is evidence of greater functional loss, including Claimant's inability to carry out the full range of essential duties associated with her job due to the industrial injury. Accordingly, the ALJ is not convinced that Claimant is attempting an end run around the DIME in order to take advantage of a lower burden of proof to obtain additional medical benefits, including surgery for a condition that she tried to live with post MMI. Notably, the DIME process does not control whether the claimant's condition has worsened following the date of MMI or whether the worsening is causally related to the industrial injury. In fact, MMI represents a point in time where a claimant's condition becomes stable and where any permanent impairment associated with the injury is determinable. *Cordova, supra* at p. 190.

M. In concluding that Claimant is entitled to a reopening of her claim, the ALJ finds the claim for *Debra Hague v. Duckwall-Alco Stores Inc*. W.C. 4-522-932 (April 19, 2005) instructive. Similar to the situation here, the ALJ found that Ms. Hague had proven that she suffered a worsened condition caused by her industrial injury. Accordingly, he reopened the claim for additional medical treatment, including a "transposition/decompression of the ulnar nerve". *Id*. Akin to the situation presented in Hague, this ALJ finds that Dr. Kurz' and Dr. Bissell's MMI determination merely fixed a single point in time when Claimant's condition had become stable and this point in time did not "legally or factually rule out the possibility that the Claimant's condition could not subsequently worsen as evidenced by [her] additional symptoms and diagnoses and the need for additional treatment". Just as in *Hague*, the instant case involves a worsening of condition many months after MMI rather than a challenge to MMI. Thus, the ALJ is convinced, as was the ALJ in Hague, that Claimant is not attempting to circumvent the DIME process but rather exercise her "statutory right to reopen based on worsened condition". *Id.* (See also, Gomez *v. University of Colorado*, WC's 4-945-122-04, 4-929-679 & 4-936-273 (ICAO, Apr. 17, 2020).

Claimant's Contentions Concerning Estopple

N. Although developed in the context of judicial proceedings, the doctrines of *res judicata* (claim preclusion) and collateral estopple (issue preclusion) may be applied to administrative proceedings in Workers Compensation Claims to bind the parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001); see *Holnam v. Industrial Claim Appeals Office,* 159 P.3d 795 (Colo.App. 2006*)*. Claim and issue preclusion are affirmative defenses that must be pled and proven by the party seeking to apply the doctrines. *Bristol Bay Prods., LLC v. Lampack*, 312 P.3d 1155, 1164 (Colo. 2013).

O. *Res Judicata* or claim preclusion bars relitigation of previously decided matters and matters that could have been raised in a prior proceeding but were not. *Foster v. Plock,* 411 P.3d 1008, 1014 (Colo.App.2016). The elements of claim preclusion are: "(1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, (4) identity or privity of parties to the actions." *Camus v. State Farm Insurance*, 151 P.3d 678, 680 (Colo.App. 2006). Claim preclusion blocks litigation of claims that were or might have been decided only if the claims are tied by the same injury. *Layton Construction Co. v. Shaw Contract Flooring Servs., Inc.*, 409 P.3d 602 (Colo.App. 2016); *Loveland Essential Grp. v. Grommon Farms, Inc*., 318 P.3d 6 (Colo.App.2012). As noted, claim preclusion is an affirmative defense which must be plead and proven by the party seeking to apply the doctrines, i.e. the Claimant in this particular case. Although cited in her position statement, Claimant did not specifically plead claim preclusion as an affirmative defense to be applied in the instant matter. Moreover, application of the principle of *res judicata* has been rejected in cases involving reopening, based upon the broad discretion afforded in the area, which favors a just result over the interest of the litigants in a final resolution of the claim. See, *Hernandez v. Cattle King Beef Company*, 3-714-045 (February 26, 1988) (noting that the ALJ had the discretion to reopen *sua sponte* in the absence of a petition to reopen.); *Padilla v. Industrial Commission*, 696 P.2d 273 (Colo. 1985).

P. Issue preclusion is broader than claim preclusion in that it applies to a cause of action different from that involved in the original proceeding. However, issue preclusion is narrower than claim preclusion because it does not apply to matters that could have been litigated in the prior proceeding but were not. *Pomeroy v. Waitkus*, 183 Colo. 244, 517 P.2d 396 (1974). Issue preclusion bars relitigation of an issue if:

> (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom [issue preclusion] is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Youngs v. Indus. Claim Appeals Office, 297 P.3d 964, 974 (Colo.App. 2012); *Feeley v. Indus. Claim Appeals Office*, 195 P.3d 1154, 1156 (Colo.App. 2008). An issue can be identical for issue preclusion purposes if either the facts or the legal matter raised is the same. *Carpenter v. Young*, 773 P.2d 561, 565 n. 5 (Colo.1989).

Q. In this case, Claimant argues that Respondents should be estopped from asserting that Claimant does not suffer from claim related ulnar neuropathy based upon Respondent's failure to raise any objection to Dr. Bissell's DIME determination regarding the cause of Claimant's left ulnar nerve/cubital tunnel symptoms at the time of the April 6, 2022 hearing. Respondents counter Claimant's contention by asserting that prongs 1 and 4 of the above referenced legal test have not been met. Based upon the evidence presented, the ALJ agrees. Nonetheless, even assuming that issue preclusion does not prohibit the re-litigation of the compensability of the ulnar nerve injury, the evidence presented supports a conclusion that Claimant sustained an injury to her ulnar nerve in the compensable January 20, 2020 on the job injury and based upon the testimony of Dr. Larsen and the Claimant this injury has worsened since the date of MMI and that the proposed surgery by Dr. Larsen is reasonably necessary to cure and relieve Claimant of her injuries.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is granted.

2. The proposed ulnar nerve transposition surgery is reasonably necessary and causally related to the claimant's compensable injury of January 20, 2020.

3. Claimant's claim for temporary disability benefits is reserved and held in abeyance as her current inability to work is related to a non-industrial related cause, i.e. her high risk pregnancy. Once this non-work related disability ceases, Claimant will be entitled to temporary disability benefits as provided for in C.R.S. §§ 8-42-105 and 106, until terminated as provided therein.

4. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in

Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 13, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-195-272-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the L3-L4, L4-L5 laminectomy recommended by Dr. Rauzzino is reasonably necessary to cure and relieve him of the effects of his January 28, 2022 injury.

II. Whether Claimant proved by a preponderance of the evidence that Respondent failed to timely deny a complete prior authorization request and consequently deemed the requested surgery authorized.

FINDINGS OF FACT

1. This is an admitted claim involving a January 28, 2022 injury. Claimant was a truck driver. He injured his low back during a home delivery while unloading 800 pounds of furniture.

2. On April 4, 2022, Claimant reported "right anterior thigh cramping pain with prolonged sitting." Nathan Adams, PA noted Claimant's weight as 230 pounds in December 2022. He also noted that Claimant was a smoker and discussed with him the importance of cessation to improve recovery and reduce associated risks. PA Adams added that Dr. Castro had "said he wouldn't do surgery unless [Claimant] quit smoking."

3. On April 27, 2022, Claimant saw Dr. Mechelle Viola-Lewis. Claimant reported that he noticed "no change" resulting from taking Medrol Dosepak.

4. On August 31, 2022, Claimant saw Dr. Vanderkool and told him that he could walk only one to two minutes before getting severe nerve pain in his right hip, radiating down his whole right leg.

5. Dr. Michael Rauzzino saw Claimant on November 22, 2022. Dr. Rauzzino noted in that report: "I reviewed the MRI of his lumbar spine done on April 7, 2022 at SimonMed, which shows severe spinal stenosis at L4-L5 and L3-L4, L4-L5 is the worst level. There is also little bit of stenosis at L2-L3 and L5-S1. He has degenerative disc disease at L5-S1. He has had injections with Dr. Olsen, which has not been curative for him. He says they help temporarily then his symptoms get back." Dr. Rauzzino noted that Claimant had severe spinal stenosis at L4-L5 and to a lesser extent at L3-L4. He noted that Claimant had signs and symptoms classic of neurogenic claudication. Dr. Rauzzino made no mention of referring Claimant for any other tests and did not comment upon Claimant's smoking or obesity. Nevertheless, he recommended a two-level decompression without

fusion. The report was faxed to Respondent on November 30, 2022, with a Rule 16-7, WCRP, request for prior authorization included on the fax cover sheet for an L3-L4 laminectomy. Dr. Rauzzino did not include the L4-L5 level in his request.

6. On January 4, 2023, Respondent issued a denial of prior authorization of the L3-L4 laminectomy requested by Dr. Rauzzino. Attached to the denial was an undated[1] record review report by Dr. Aaron Morgenstein, an orthopaedic surgeon board certified in Colorado. Dr. Morgenstein opined that the requested bilateral L3-L4 laminectomy was not medically necessary. He reasoned that Claimant's most severe level of spinal stenosis was at L4-L5, not L3-L4. Dr. Morgenstein appeared to imply that the L4-L5 level should be prioritized.

7. On January 17, 2023, Dr. Rauzzino submitted a request for prior authorization for L3-L5 laminectomy. Attached was a copy of Dr. Rauzzino's November 22, 2022 report and an April 7, 2022 MRI of the lumbar spine without contrast showing "[m]ultilevel chronic degenerative disc disease and degenerative central canal and neural foraminal narrowing . . . [and] central canal stenosis involving L4-L5 level." Respondent neither authorized nor denied the request.

8. On January 26, 2023, Claimant saw PA Adams and reported experiencing radicular symptoms.

9. On April 19, 2023, Dr. Rauzzino submitted another request for prior authorization for an L3-4, L4-L5 laminectomy. Dr. Rauzzino attached his November 22, 2022 report and a copy of the April 7, 2022 MRI.

10. Claimant was examined by Dr. Viola-Lewis on April 20, 2023. The history portion of the corresponding report noted some improvement after Dr. Olson's injections.

11. On May 3, 2023, Respondent issued a denial of prior authorization of the L3-L4 and L4-L5 levels. Attached to the denial was an undated[2] record review report by Dr. Morgenstein. Dr. Morgenstein opined that the requested procedure was "not medically necessary," reasoning that "there are vague and conflicting symptoms of neurogenic claudication, the lumbar MRI is greater than one year old, the surgeon's last office visit is greater than 5 months old, and there is lack of documentation of the claimant having failure of a trial of 6 weeks of active therapy."

12. At hearing, Claimant testified that he received physical therapy of about 12 weeks. The physical therapy was not beneficial. He also testified that he received three injections. He testified that the injections did not help at all, nor did chiropractic care, of which he had about three or four visits. Claimant testified that he refused prescriptions for pain medications.

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[1] Though, the referral date was noted as December 30, 2022.

[2] Though, the referral date was noted as May 2, 2023.

13. During cross examination, Claimant admitted that he is a smoker. He smokes less than a pack a day but has been a smoker for thirty years. Claimant also testified that he is six feet tall, weighs about 215 to 220 pounds. Claimant acknowledged that no provider sent him for psychological testing.

14. The Court finds Claimant's testimony credible, except insofar as he testified that he declined pain medications, as the medical records document him taking a trial of Medrol Dosepak.

15. The Court also credits the opinions of Dr. Rauzzino over those of Dr. Morgenstein insofar as Dr. Rauzzino recommends a an L3-4, L4-L5 laminectomy. Dr. Morgenstein's rationale in his original peer review was that the most severe level of spinal stenosis was at L4-L5, not L3-L4, yet Dr. Rauzzino requested prior authorization for a laminectomy only at the L3-L4 level. Dr. Rauzzino resubmitted his request two more times, revising his request to include the L4-L5 level. By the time Dr. Morgenstein completed a follow-up peer review five months later, Dr. Morgenstein recommended against the procedure on four bases: "there are vague and conflicting symptoms of neurogenic claudication, the lumbar MRI is greater than one year old, the surgeon's last office visit is greater than 5 months old, and there is lack of documentation of the claimant having failure of a trial of 6 weeks of active therapy." Notably the second and third rationales would not have applied to Dr. Rauzzino's original November 22, 2022 recommendation and arose only because of the delay in treatment. Regarding the first rationale, the Court notes that there is sufficient medical documentation of Claimant experiencing radicular symptoms arising from his low back condition. Regarding the last rationale, the Court credits Claimant's testimony that he underwent physical therapy and injections without relief.

16. The Court finds that the L3-L4, L4L-5 laminectomy recommended by Dr. Rauzzino to be reasonably necessary to cure and relieve Claimant of the effects of his January 28, 2022 injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be

interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo.App.2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo.App.2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Commission,* 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo.App.2000).

Medical Benefits

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S.

Although respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

As found above, the L3-L4, L4-L5 laminectomy recommended by Dr. Rauzzino is reasonably necessary to cure and relieve Claimant of the symptoms of his injury.

Aside from Dr. Morgenstein's rationale for recommending against the procedure, Respondent argues that the recommendations of the Medical Treatment Guidelines (MTGs) weigh against authorization of the procedure.

The Colorado Division of Workers' Compensation has issued medical treatment guidelines under Rule 17, WCRP, as evidence of professional standards for treatment of high-cost or high-frequency medical procedures. *See* Rule 17-1(A), W.C.R.P. An ALJ is not bound to the treatment guidelines in his or her determination of whether a particular treatment is reasonable and necessary. *See Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006)(it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive). However, it is appropriate for an ALJ to consider the treatment guidelines in determining the reasonableness and medical necessity of a particular treatment. *Stamey v. C2 Utility Contractors, Inc.*, W.C. Nos. 4-503-974 and 4-669-250 at *2 (August 21, 2008).

Respondent specifically argues that Dr. Rauzzino failed to consider Claimant's smoking and obesity and the absence of psychological screening in this case prior to surgery.

Regarding smoking, the MTGs note only that there is strong evidence that smoking is a non-occupational risk factor for lumbar radicular pain. Rule 17, WCRP, Exhibit 1, p. 13. Although the MTGs also note that there is some evidence that "[p]atients who smoke respond less favorably to non-operative spine care than nonsmokers," Rule 17, WCRP, Exhibit 1, p. 111, that portion of the MTGs does not address the impact of smoking on surgical outcomes. The Court acknowledges that, intuitively, it seems logical that smoking *could* have a negative impact on a surgical outcome. However, the Court finds insufficient evidence in the case to lead it to find that smoking is *likely* to result in a negative surgical outcome.

Respondent also pointed to Claimant's obesity as a risk factor for low back pain. However, the MTGs associate obesity with negative surgical outcomes only when the obesity is morbid:

> Functional improvement and relief of back pain from most back surgery is similar between patients with a body mass index (BMI) under 25 and overweight or mildly obese patients with a BMI between 25 and 35. Mild obesity does not appear to have an adverse effect on the responsiveness to surgery for these clinical outcomes.

Rule 17, WCRP, Exhibit 1, p. 68.

Respondent points out that Claimant's weight has fluctuated, insinuating that it is possible that his BMI may now be above 35 kg/m^2. Claimant testified that he is six feet tall and 220 pounds. The Court found this testimony credible and takes judicial notice that this corresponds with a BMI of 30 kg/m^2. Based on the MTGs, there is good evidence that Claimant's mild obesity is unlikely to have a negative impact on the

outcome of the two-level laminectomy recommended by Dr. Rauzzino. Therefore, the Court finds Claimant's obesity to be unlikely to affect a surgical outcome.

Respondent also points to the absence of psychological screening in this case, despite the MTGs' recommendation for psychological screening prior to surgery. Specifically, the MTGs note undiagnosed depression to be contraindications to decompressive surgery. The MTGs state, "A psychological screen with a follow-up psychological evaluation, if indicated, is required prior to proceeding with decompressive surgery." Rule 17, Exhibit 1, p. 72. Respondent directs the Court's attention to various other provisions of the MTGs that observe the importance of a psychological screening prior to proceeding with surgery so as to ensure psychological factors will not interfere with the outcome of surgery.

The Court recognizes the absence of a psychological screen in this case as concerning. However, the evidence of the record does not lead the Court to suspect that Claimant in fact suffers from depression or any other mental condition that would impede his recovery. In light of the totality of the facts of this case, the Court finds the absence of a psychological screen to be relevant, but not dispositive, on the question of whether the two-level laminectomy recommended by Dr. Rauzzino is reasonable and necessary to cure and relieve Claimant of the effects of his injury.

Claimant also presented arguments that Respondent failed to provide a timely authorization or denial of Dr. Rauzzino's first two requests for prior authorization, and that the procedure is deemed authorized pursuant to Rule 16-7-2, WCRP. Respondent presented arguments that the requests were not complete requests for prior authorization pursuant to Rule 16-7(C), WCRP, and therefore Respondent was not required to comply with the requirements of Rule 16-7-1, WCRP, regarding prior authorization denials. Because the Court finds the L3-L4, L4-L5 laminectomy to be reasonably necessary to cure and relieve Claimant of the effects of his work injury, the Court need not address the question of whether Respondent inadvertently authorized the surgery by virtue of a failure to provide a timely denial of a complete prior authorization request.

ORDER

1. Claimant has proved by a preponderance of the evidence that the L3-L4, L4-L5 laminectomy recommended by Dr. Rauzzino is reasonably necessary to cure and relieve him of the effects of his January 28, 2022 injury.

2. Respondent shall pay for an L3-L4, L4-L5 laminectomy with Dr. Rauzzino.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 13, 2023.

/s/ Stephen J. Abbott
Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-118-442-002

ISSUES[1]

1. Whether Claimant established by a preponderance of the evidence grounds for reopening her claim based on a change of her condition.

2. If Claimant establishes grounds for reopening, whether Claimant established by a preponderance of the evidence that surgery recommended by Lily Daniali, M.D. is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

3. Whether Claimant established by a preponderance of the evidence that medications recommended by Dr. Sanders for maintenance care and admitted by Respondents should be authorized.

4. If Claimant's claim is reopened, whether she established by a preponderance of the evidence an entitlement to temporary total disability benefits.

FINDINGS OF FACT

1. On September 6, 2019, Claimant sustained an admitted injury to her right forearm when she sustained a dry ice burn arising out of the course of her employment with Employer.

2. Claimant was initially seen at North Colorado Medical Center and treated in the burn unit for a 2% total body skin area (TBSA) partial thickness burn/frostbite injury of the volar aspect of her right forearm. She was admitted for wound care on September 13, 2019 and discharged on September 16, 2019. (Ex. H).

3. Over the next several years, Claimant's care was directed by authorized treating physician (ATP) Oscar Sanders, at the UC Health Occupational Medicine Clinic. During this time, Claimant was referred to various providers for evaluation and treatment of her wound, and associated pain. Throughout, Claimant reported hypersensitivity and pain in the area of her burn scar that did not extend beyond the scarred area to other areas of her arm or body. Claimant's scar covers an area of approximately 1 ½ inches by 2 ½ inches on the right forearm. (Ex. D). The area of hypersensitivity was described by providers as approximately 2 ½ inches by 1 ½ inches or approximately 3 cm in diameter. (Ex. N & D).

[1] In her position statement, Claimant endorsed as an issue "Should Claimant be entitled to have a nurse case manager appointed to her case as recommended by her authorized treating physician?" This issue was not endorsed in Claimant's Application for Hearing, nor was it identified at hearing as an issue for consideration. As such, the ALJ lacks authority to determine this issue.

4. Claimant treated with the NCMC Burn Unit from September 2019 until January 12, 2021 when she was discharged from their care with a well-healed wound and mature scar. (Ex. H).

5. Over the course of her care, Dr. Sanders referred Claimant to additional providers for evaluation of her ongoing pain.

6. On February 4, 2020, Dr. Sanders referred Claimant for a plastic surgery consult for potential scar revision treatments, and continued care. Claimant reported persistent hypersensitivity that was improving. He also referred Claimant for psychotherapy counseling due to her injury-related adjustment disorder. (Ex. I).

7. On February 17, 2020, Claimant saw Lily Daniali, M.D., a plastic surgeon at Swedish Medical Center. Claimant reported hypersensitivity and increasing pain in her right forearm. Dr. Daniali noted Claimant's burn injury was well-healed, but extremely sensitive to touch. She was diagnosed with a second-degree burn injury to her right forearm with allodynia. Claimant was recommended to see a hand therapist to begin work on desensitization of her injury, and started on gabapentin for nerve pain. (Ex. K).

8. Claimant returned to Dr. Daniali on June 15, 2020. Dr. Daniali found a positive Tinel's sign over the medial and antebrachial sensory area, and noted significant hypersensitivity in that area. Claimant's reported pain level was 8/10, and she reported Dr. Daniali discussed possible surgical options, and recommended a diagnostic lidocaine injection to determine if Claimant had nerve scarring and pain. (Ex. K).

9. On July 13, 2020, Dr. Daniali performed the "a diagnostic block of the area of maximal hypersensitivity within [Claimant's] burn scare where she had the maximally positive Tinel's sign (*i.e.*, the centralized portion of her scar and her antebrachial sensory area). Claimant received no relief from the injection, and Dr. Daniali determined Claimant was "a poor candidate for surgical exploration to locate a specific neuroma for surgical intervention." She recommended continued non-surgical symptom management and that Claimant see a pain specialist. She also noted that due to the significant allodynia, Claimant was not a good candidate for laser scar treatment. (Ex. K).

10. On July 13, 2020, Dr. Sanders opined that Claimant was not a candidate for scar revision or reconstruction, and recommended Claimant complete pain management. (Ex. I).

11. On July 14, 2020, Claimant underwent an independent medical examination (IME) with Marc Steinmetz, M.D., at Respondents' request. Dr. Steinmetz opined that Claimant was physically at maximum medical improvement (MMI). As part of his examination, Dr. Steinmetz noted Claimant had a negative Tinel's "at the wrist" and diagnosed Claimant with residual forearm scar from a frost-bite type burn with secondary residual pain. Dr. Steinmetz agreed that Claimant should see a pain specialist if Dr. Sanders concurred. (Ex. D).

12. On September 30, 2020, Dr. Sanders responded to a letter from Respondents' counsel indicating Claimant was not at MMI, and recommended Claimant have an initial

evaluation with pain management to formulate a treatment plan for maintenance care. He further noted "I anticipate she will be at MMI shortly after this appointment." (Ex. J).

13. On October 8, 2020, Claimant began treatment at Colorado Pain Care, for pain management. Over the following two years, she was under the care of various providers at Colorado Pain Care for medication management of her pain, including opioid medications, and gabapentin. Claimant consistently reported her pain levels as between 7/10 and 10/10. At her initial visit, the treating provider, Hortense Ngoe, N.P., suspected Claimant may have had complex regional pain syndrome (CRPS) of her right arm, noting her pain was out of proportion to the inciting incident. (Ex. M).

14. Claimant returned to Dr. Sanders and discussed potential diagnostic and therapeutic options for her potential CPRS, including stellate ganglion blocks. Dr. Sanders noted that if Claimant elected not to pursue invasive procedures, she would be approaching MMI. (Ex. I).

15. Claimant returned to Colorado Pain Care on January 7, 2021. Ms. Ngoe recommended Claimant undergo two ulnar nerve blocks to determine if a potential radiofrequency nerve ablation (RFA) procedure would be beneficial. (Ex. M).

16. On February 15, 2021 and March 8, 2021, Robert Moghim, M.D., at Colorado Pain Care, performed right ulnar nerve blocks. After the February 15, 2021 injection, Claimant reported an initial 80% reduction in pain intensity, and a 60% reduction that remained until March 8, 2021. She reported the second block, performed on March 8, 2021, provided almost complete resolution of pain. However, this reduction in pain was temporary. Dr. Moghim opined that Claimant could have a potential entrapment of the medial antebrachial cutaneous (MABC) nerve and the ulnar nerve, related to Claimant's scarring. Dr. Moghim recommended that Claimant consult with Dr. Daniali to consider possible surgical options. (Ex. M).

17. At Claimant's March 22, 2021 visit with Dr. Sanders, he noted Claimant did not have a diagnostic response to the March 8, 2021 ulnar nerve block, opined that Claimant did not demonstrate evidence of an ulnar neuropathy at the elbow, and agreed it was reasonable to be evaluated by Dr. Daniali for potential surgical treatment of any nerve entrapment caused by her burn scarring. He also recommended that Claimant continue pain management. Dr. Sanders opined that if Dr. Daniali did not recommend surgical intervention, Claimant would be at MMI. (Ex. I).

18. On April 20, 2021, Claimant saw Ryan Endress, M.D., a physician in Dr. Daniali's practice at Swedish. Dr. Endress recommended a diagnostic nerve block of the more proximal MABC to simulate the effects of a neurectomy. (Ex. K).

19. On June 7, 2021, Claimant then underwent an ultrasound of the right arm, which was interpreted as unremarkable. (Ex. U). Dr. Sanders reviewed the ultrasound on June 9, 2021, and indicated it was normal without evidence of nerve entrapment. He also indicated that if Dr. Daniali did not recommend surgery, it would be reasonable to proceed with a CRPS evaluation. (Ex. I).

20. On June 29, 2021, Dr. Endress reviewed Claimant's ultrasound and indicated there were no signs of a neuroma, and performed the MABC block. Claimant indicated she had an anesthesia effect in the appropriate nerve distribution (*i.e.*, MABC), but did not have significant relief of the pain. Dr. Endress opined that the lack of pain relief indicated it was unlikely that MABC surgery would improve her symptoms. (Ex. K).

21. Dr. Sanders then referred Claimant to Gregory Reichhardt, M.D., to evaluate Claimant for CRPS. Claimant saw Dr. Reichhardt on July 21, 2021. Dr. Reichhardt noted that Claimant's pain was limited to the area of her scarring and that she did not have sensory changes in a specific peripheral nerve or dermatome distribution. He diagnosed Claimant with allodynia, etiology unclear, and referred Claimant to George Schakaraschwili, M.D., to conduct further testing for CRPS. (Ex. N).

22. On August 21, 2021, Claimant saw Kathie McCranie, M.D., for an independent medical examination at Respondents' request. Dr. McCranie opined that Claimant had reached MMI. She found that Claimant likely did not have CRPS because Claimant did not meet the Budapest criteria and did not have signs and symptoms consistent with CRPS. She further opined that Claimant would be a poor surgical candidate

23. On October 7, 2021, Dr. Schakaraschwili performed QSART, thermogram and autonomic testing to evaluate Claimant for potential CRPS. Based on the results of the testing, he opined that Claimant did not likely have CRPS, and that she likely had neuropathic pain potentially due to damage to the cutaneous nerve in the forearm. He noted that Claimant may have entrapment of a nerve, but no EMG testing had been performed. (Ex. O).

24. In December 2021, Dr. Reichhardt and Dr. Sanders referred Claimant to Timo Quickert, M.D., to perform a stellate ganglion block of her right arm. (Ex. N).

25. In January 2021, Dr. Sanders indicated Claimant would not be at MMI until after the stellate ganglion block was performed. (Ex. I). Similarly, on March 1, 2022, Dr. Reichhardt indicated that if Claimant did not have improvement with the stellate ganglion blocks, she would likely be approaching MMI. (Ex. N).

26. On March 28, 2022, Dr. Quickert performed the stellate ganglion block. (Ex. P). At a follow up with Dr. Reichhardt on March 31, 2022, Claimant reported that her pain initially increased following the injection, then decreased to her baseline pain. Dr. Reichhardt characterized Claimant's response to the injection as non-diagnostic and non-therapeutic. He recommended Claimant focus on an independent exercise program, desensitization and medical management, and discharged Claimant from his care. (Ex. N)

27. On April 7, 2022, Claimant attended a 24-month Division-sponsored independent medical examination (DIME) with Stanley Ginsburg, M.D., at Respondent's request. He noted that Claimant was hypersensitive in the right arm to her shoulder, but had no evidence of weakness. He also indicated that Claimant was tender to touch over the ulnar area at the elbow but not he could not elicit a Tinel's sign. Dr. Ginsburg placed Claimant

at MMI effective April 7, 2022, and assigned Claimant a 15% right upper extremity impairment rating and 6% psychological impairment rating. The ratings combine to a whole person rating of 20%. (Ex. C).

28. On May 24, 2022, Claimant saw Dr. Sanders who opened that Claimant was stable and additional treatment was unlikely to improve her condition. He placed Claimant at MMI, and noted that Claimant was not taking pain medications at that time. Dr. Sanders recommended maintenance care to include periodic follow up with occupational health and pain management for two years, and coverage of medications and labs for two years. (Ex. I).

29. On June 14, 2022, Respondents filed a final admission of liability (FAL) consistent with Dr. Ginsburg's DIME report. Respondents also admitted for maintenance care recommended by Dr. Sanders on May 24, 2022, temporary total disability benefits in the amount of $88,994.92 and permanent partial disability in the amount of $5,335.27. The FAL further noted that Claimant had reached the statutory benefits cap for ratings under 25%. (Ex. 12).

30. Approximately one month later, on July 19, 2022, Claimant returned to Dr. Sanders reporting increased pain in the central area of her scar (*i.e.*, the same location where her pain and hypersensitivity had been previously reported). Claimant denied neck pain or numbness in the right arm, and had no additional allodynia to the right arm. He noted that her motion was limited by pain, as opposed to true weakness. Dr. Sanders opined that Claimant had likely experienced an exacerbation of her pain after discontinuation of her medications. He recommended she continue taking her pain medications, and start a short course of physical therapy. He opined that she was no longer at MMI. Dr. Sanders did not document any change in Claimant's physical condition, other than her subjective reports of increased pain. (Ex. J).

31. Over the next few months, Claimant attended physical therapy, and followed up with Colorado Pain Care and Dr. Sanders. During this time, Claimant reported no substantial improvement in her symptoms. Ultimately, on September 6, 2022, Dr. Sanders referred Claimant back to Dr. Daniali for evaluation.

32. Claimant saw Dr. Daniali on October 10, 2022. Dr. Daniali noted that Claimant was reporting increased pain, indicating her pain was exacerbated by any movement or even the slightest touch (consistent with Claimant's reports to health care providers since her date of injury). On examination, Dr. Daniali found a positive Tinel's throughout the right upper extremity and opined that Claimant had a "sensitive nerve that appears encased in scar." Based on her examination, Dr. Daniali recommended Claimant undergo surgical "exploration of the right upper extremity with neurolysis vs TMR vs nerve burial." Dr. Daniali did not order any further diagnostic studies, or document any change in Claimant's physical condition. Dr. Daniali offered no cogent explanation for the rational for her opinion that Claimant has a nerve encased in scar, the significance of Claimant's positive Tinel's sign, or why her previously-expressed opinion that Claimant was not a surgical candidate was no longer valid.

33. Dr. McCranie was admitted as an expert in occupational medicine and testified at hearing. She opined that Dr. Sanders' evaluations of the Claimant after MMI did not document examinations which showed an objective change in Claimant's physical condition, or function. Dr. McCranie further testified that the medial antebrachial cutaneous (MABC) nerve is the nerve that provides sensation to the forearm, and that the injection performed by Dr. Endress demonstrated that surgery for that nerve would not be helpful. She also credibly opined that no other diagnostic tests have been performed to indicate that surgery would be helpful. Thus, she opined that there is no indication for exploratory surgery. Dr. McCranie's testimony was credible.

34. Claimant testified at hearing that over the past nine to ten months, she has been having a lot of pain in her right arm which has prevented her from performing activities of daily living. She also testified that her sleep is affected by her right arm pain. While Claimant's testimony is credible, her contemporaneous medical records document the same pain and limitations she described in her testimony. Claimant testified that the surgery recommended by Dr. Daniali is to address a problem with a vein in her arm, which is inconsistent with the recommended surgery. Claimant testified that she wishes to have the surgery recommended by Dr. Daniali because she believes it will help her. Claimant also testified that she has had difficulty obtaining medications prescribed for her injury when she attempts to obtain them from the pharmacy, although it was not clear that Respondents have denied authorization for Claimant's medications. Claimant has not worked or earned income since her date of injury.

35. Claimant's brother, [Redacted, hereinafter SI] testified at hearing. SI[Redacted] testified that he sees Claimant every day, and that she does not sleep much, and often wakes up crying and in pain. He testified that he assists Claimant with activities of daily living and when possible, attends her medical appointments with her. SI[Redacted] testified that he has attempted to help obtain Claimant's medications prescribed by Colorado Pain Care, and at times has had to pay co-pays for medications, or been informed that medications are not authorized.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

REOPENING FOR CHANGE IN CONDITION

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Indus. Comm'n*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Constr. Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004).

Claimant has failed to establish by a preponderance of the evidence that she sustained a post-MMI change in condition causally connected to her original work injury. Claimant's claim was closed pursuant to the FAL filed on June 14, 2022. Approximately five weeks after the FAL was filed, Claimant returned to Dr. Sanders reporting increased pain in the location of her burn scar. Although Claimant reported increased pain, no

physician credibly opined that Claimant's physical condition had changed, or credibly identified any objective basis for the increase in pain. The fact that Claimant has experienced an increase or exacerbation of symptoms is not credible evidence that Claimant's physical condition changed after being placed at MMI on April 7, 2022.

Claimant has also failed to establish that her claim should be opened to obtain the surgery recommended by Dr. Daniali. The record contains no credible evidence to explain the reasonableness and necessity of Dr. Daniali's surgical recommendation. Dr. Daniali examined Claimant in July 2020. At that examination, Claimant had a positive Tinel's sign in her right upper extremity, and reported significant hypersensitivity in the area of her scar. Dr. Daniali evaluated Claimant for potential surgery at that time by performing a lidocaine block which proved non-diagnostic. Based on that, Dr. Daniali opined that Claimant was a poor candidate for surgery. Subsequently, Claimant received additional diagnostic injections from Dr. Endress, Dr. Moghim, and Dr. Quickert, each of which were non-diagnostic. None of Claimant's ATPs recommended surgery.

Dr. Daniali's October 10, 2022 examination of Claimant was substantively identical to her examination in July 2020. At both visits, Claimant had a positive Tinel's sign in her right upper extremity, and reported significant hypersensitivity in the area of her scar. In October 2022, Dr. Daniali commented that Claimant had a "sensitive nerve that appears encased in scar," but offered no further explanation for this opinion. Unlike July 2020, Dr. Daniali did not order or perform any diagnostic tests in October 2022 to evaluate Claimant for an encased nerve or to determine the potential efficacy of surgery. Despite the lack of diagnostic testing or new objective findings, Dr. Daniali recommended exploratory surgery. Dr. Daniali's records contain no cogent, credible explanation for the new surgical recommendation and do not credibly explain how Claimant's physical condition changed since MMI, such that surgery is now warranted. The ALJ finds more persuasive Dr. McCranie's opinion that Claimant has not had a change in her physical condition, and that no diagnostic tests have indicated that the requested surgery would be helpful to Claimant.

AUTHORIZATION OF SPECIFIC MEDICAL BENEFITS

Surgery

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish

entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

As discussed above, Claimant has failed to establish that the surgery recommended by Dr. Daniali is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Claimant's request for authorization of the exploratory surgery recommended by Dr. Daniali is denied and dismissed.

Medications

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Fin. Serv.,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In the June 14, 2022 FAL, Respondents admitted for maintenance medical care including the recommendations set forth in Dr. Sanders' May 24, 2022 report. Dr. Sanders' recommendations included coverage of medications for two years. Respondents do not contend and have not offered credible evidence indicating that Claimant's maintenance medications are no longer reasonable, necessary or related to her admitted work injury. Claimant and SI[Redacted] credibly testified that Claimant has had difficulty obtaining her medications due to co-pays and delayed authorizations, although the evidence is unclear that Claimant's medications prescribed by any of her ATPs have been denied by Respondents. Because Respondents have admitted for maintenance medical care, including medications, and have not challenged the request for authorization of medications recommended by Dr. Sanders, Respondents are liable for such medications.

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage

loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). TTD benefits continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant was placed at MMI effective April 7, 2022, and remains at MMI. Because Claimant has failed to establish grounds to reopen her claim, and remains at MMI, Claimant has failed to establish an entitlement to temporary total disability benefits. Claimant's request for reinstatement of TTD benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim for change in condition is denied and dismissed.

2. Claimant's request for authorization of the surgery recommended by Dr. Daniali is denied and dismissed.

3. Claimant's request for reinstatement of temporary total disability benefits is denied and dismissed.

4. Respondents shall pay for all authorized, reasonable and necessary medications related to Claimant's industrial injury.
5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 13, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-161-225-002

ISSUES

I. Whether the claimant established by a preponderance of the evidence that he is permanently and totally disabled.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On December 30, 2020, the claimant was working for the employer and suffered a compensable back injury.
2. The claimant testified that he was working on an older Mercury Mountaineer to change the inner seals on the rear drive shaft. To do so, the outside "knuckles" need to be removed which are affixed with big bolts. The bolts proved difficult to remove, leading the claimant to heat the bolt with a torch and then pull on the bolt to loosen it. In doing so, the bolt suddenly released while the claimant had his full weight pulling down on the bolt. The claimant also testified that he immediately felt pain and dropped to his knees in agony and screamed. Transcript. p.18, ll. 3-p.19, l.9.
3. The claimant also testified that after the injury, he crawled to the bay next to where he was working and rolled around in pain. Transcript p.20, ll.2-9.
4. The claimant added that his supervisor, [Redacted, hereinafter TD], responded to the claimant's screams. Transcript p.19 l. 22-p. 20, l.1.
5. The claimant's testimony in this regard is corroborated by the video clips played by the claimant in his rebuttal presentation (Exhibit 15) and the audio recording of the employer's manager, TD[Redacted] (Exhibit 16). The claimant's testimony describing the work-related injury is considered to be credible and accurate.
6. The claimant went to Good Samaritan Hospital on the day of the incident, December 30, 2020. He complained of back pain which began suddenly while working with a breaker bar at work. His pain was described as localized to right low lumbar back, non-radiating and severe. Exhibit R, p.327.
7. The Good Samaritan emergency room physician noted: "Suspect bulging disc causing pain". Exhibit R, p.328.
8. The Good Samaritan emergency room physician recommended the claimant follow up with his PCP/pain specialist as soon as possible for advanced imaging and further pain relief. Exhibit R, p.329.
9. The claimant saw Dr. Tracey following his December 30, 2020, work-related injury on January 5, 2021. The claimant was concerned about the nature of his low back symptoms which Dr. Tracey recorded as:

> The patient rates his pain at a 7 out of 10 located to his low back and bending to radiation down both his legs but primarily his right also with episodes of weakness, stating that his pain and radicular symptoms worsen significantly after his visit to Good Samaritan Hospital on 12/30. He states his pain as aching and squeezing in nature stating that is improved with medication, muscle relaxers, and reset while worsened with any activity. The patient is very concerned about his pain stating he has not experienced pain and weakness like this before and is very concerned. Exhibit 4, p.40.

10. On October 6, 2020 (about 7 weeks before the work-related injury) the claimant established medical care with Dr. Tracey at Integrated Sport and Spine. Dr. Tracey noted that the claimant had been on a narcotic pain treatment program for failed neck syndrome associated with an injury that occurred 13 years before. He was seeking a transfer of care to Dr. Tracey's office since he had recently moved to Colorado from North Carolina. Exhibit 4, p.23.

11. The claimant saw Dr. Tracey on January 5, 2021, complaining of work-related low back pain. Dr. Tracey ordered an MRI of the claimant's lumbar spine, noting the suggestion in the Good Samaritan records of possible bulging disc. He also prescribed the claimant additional oxycodone. Exhibit 4, p.39.

12. The claimant underwent an MRI on January 11, 2021, which revealed: 1) a right paracentral disc protrusion and annular fissure at L5-S1, 2) facet arthropathy producing mild-to-moderate neural foraminal narrowing and 3) multilevel disc degeneration. Exhibit 1, p.27-28.

13. On January 14, 2021, the claimant returned to Dr. Tracey to go over the MRI results. At this appointment the claimant rated his back pain at 7/10 and with occasional radiation down his right leg. Based on the claimant's symptoms and the MRI findings, Dr. Tracey referred the claimant to Dr. Feldman for bilateral L5-S1 TF epidural steroid injections. Exhibit 4, p. 43.

14. On March 3, 2021, the claimant returned to Dr. Tracey. At this appointment, the claimant indicated that his low back pain was 6/10. But he also indicated that his pain medication regimen allowed him to be 90% functional. Exhibit 4, p. 50.

15. On October 9, 2021, the claimant underwent right sided L4-5 and L5-S1 facet joint injections. Exhibit 4, p. 79. The injections reduced the claimant's pain by about 50% for about three days, but then his back pain returned. Exhibit 4, p. 82. Based on the return of his back pain, Dr. Tracey recommended the claimant undergo right sided L4-5 and L5-S1 medial branch blocks to help diagnose the claimant's pain generator. Exhibit 4, p. 82. The claimant underwent the medial branch blocks on December 10, 2021. Ex. 4, p. 88.

16. On December 21, 2021, the claimant returned to Dr. Tracey and indicated that the medial branch blocks did not provide any pain relief to the posterior elements of his spine. Exhibit 4, p. 90. Thus, Dr. Tracey thought the pain was coming from the musculature of the claimant's back. Other than prescribing additional medication, he

did not have any more treatment recommendations. But, based on his assessment, he did not think the claimant could return to full duty and work in the heavy-duty category. Instead, he thought the claimant might be able to work in the moderate work category. But to help determine the claimant's work capacity and final restrictions, he ordered a functional capacity evaluation (FCE). Exhibit 4, p. 90.

17. The FCE was performed by Sherry Young. Ms. Young testified at the hearing and was accepted as an expert in occupational therapy and functional capacity evaluations.

18. Ms. Young testified that Dr. Tracey referred the claimant to her for an FCE. Transcript p. 69, ll.13-16. Exhibit 5 is a prescription from Dr. Tracey for an FCE. That said, Ms. Young's report indicates that the referral came from the claimant's attorney. In any event, Ms. Young conducted an FCE of the claimant on May 18, 2022, and set forth her findings and conclusions in a detailed report dated June 20, 2022. Exhibit 7.

19. The FCE included testing to determine the claimant's level of effort. As set forth in her report, the claimant scored 20 out of 20, which is indicative of full effort. Exhibit 7, p.109 and Exhibit 7, pp.117-118.

20. The FCE also included testing to determine whether the claimant was engaging in symptom exaggeration. According to Ms. Young, the claimant did not demonstrate any behaviors suggestive of symptom magnification. Exhibit 7, p.109 and Exhibit 7, pp.119-122.

21. Following a 3.5-hour evaluation, Ms. Young concluded, in part:

> [Redacted, hereinafter MP] demonstrated the ability to safely lift 20 pounds from floor to waist, 20 pounds from waist to shoulder, and 20 pounds overhead on an "occasional" basis. MP[Redacted] should avoid frequent or repetitive lifting as much as possible due to the quick and severe elevation in pain with all lifting activities, especially lifting from floor level and to overhead. These abilities best suit the light work category as defined by the U.S. Department of Labor with restrictions of no frequent lifting. While MP[Redacted] may be able to lift more weight in isolated instances, it would be at the cost of elevated symptoms that would impact functional abilities during subsequent activities. Please refer to Appendix D for more information. Positional tolerances were poor throughout the FCE. As with most people with chronic spinal pain, tolerances fluctuate from day to day and hour to hour. MP[Redacted] is most comfortable when he can switch between sitting and standing/walking frequently. Sitting can be performed on a frequent basis in 20-30-minute increments (on average). Standing can be performed on an occasional basis in 10-20-minute increments (on average). Walking can be performed on an occasional basis in 10-20-minute increments (on average). Low-level positional tolerances such as squatting, kneeling, bending, and crouching are very

> limited. MP[Redacted] could sustain low- level work for 4-minute intervals and is limited to the low end of the "occasional" definition…. His lifting abilities meet the light work category, but future employment will require limitations including the ability to change positions every 10-30 minutes which could prove very challenging given his lack of skilled work experience…. He required frequent rest breaks during this 3.5-hour FCE for an average of 6 minutes totaling 21% of testing time. Exhibit 7, p.109.

22. Ms. Young also concluded that:

> MP[Redacted] demonstrated the ability to safely lift 20 pounds from floor to waist, 20 pounds from waist to shoulder, and 20 pounds overhead on an "occasional" basis. MP[Redacted] should avoid frequent or repetitive lifting as much as possible due to the quick and severe elevation in pain with all lifting activities, especially lifting from floor level and to overhead. 7, 109. This lifting is limited to an "occasional" basis which is defined as being from 1-33% of the day and involving reps of 1-12 times per hour. Exhibit 7, p.125.

23. Ms. Young clarified in her testimony that this does not mean that the claimant can always lift 12 times per hour but that it can vary. Transcript, p.56, ll.8-10. She concluded that the claimant would most likely be able to engage in such lifting a maximum of two-five reps per hour. Transcript, p.56, ll.17-20.
24. Ms. Young also stated that her restriction of no frequent or repetitive lifting was for weights above five pounds, not all weights. Transcript, p.56, l.21- p. 57, l.6.
25. Ms. Young's report does indicate that the claimant may be able to lift more weight in isolated instances, but it would be at the cost of elevated symptoms that would impact functional abilities during other activities. Exhibit 7, p.109.
26. Her report also concluded that the claimant is most comfortable when he can switch between sitting and standing/walking frequently. Sitting can be performed on a frequent basis in 20–30-minute increments (on average). Standing can be performed on an occasional basis in 10-20-minute increments (on average). Walking can be performed on an occasional basis in 10-20-minute increments (on average). Low-level positional tolerances such as squatting, kneeling, bending, and crouching are very limited. Moreover, the claimant could sustain low-level work for four-minute intervals and is limited to the low end of the "occasional" definition. Exhibit 7, pp.109-110.
27. Ms. Young explained that there is a difference between sitting while engaged in work activities and sitting when one is simply relaxing, such as when one is watching a movie at home. Her sitting limitations are based on observations of the claimant sitting and engaged in work-like activity such writing or using his arms or hands. Transcript, p.59, l.18- p.60, l.13.

28. Future employment will require limitations including the ability to change positions every 10-30 minutes. Exhibit 7, p.110.

29. Ms. Young testified that she always gives a range for limitations because people's pain tends to increase as the course of the day proceeds. Transcript, p.58, ll.9-12.

30. She also stated that the claimant required frequent rest breaks during the 3.5-hour FCE for an average of six minutes totaling 21% of testing time. Exhibit 7, p.110.

31. She also performed "Inclinometry and Balance" testing. She stated that the results of that testing led her to conclude that "This client's abilities indicate a moderate balance deficit when standing on each leg individually." Exhibit 7, p.123. Ms. Young explained that the claimant's "Inclinometry and Balance" testing indicates that when he must balance on one leg, he becomes a moderate risk for falls. As a result, he should not be on ladders. Another example of one leg balancing occurs when one is in an environment with obstacles where you must walk around such quickly or stop over objects. Transcript, p.63, l.16- p.64, l.3.

32. Ms. Young noted that the hazard of navigating objects would be present in an automotive repair shop or different types of production jobs. Transcript, p.64, ll.17-21.

33. Ms. Young also noted that he should avoid uneven walking surfaces such as lawns that are not even. Transcript, p.64, ll.12-16.

34. Ms. Young testified that the claimant was slow and cautious when he was observed climbing stairs, relying on the handrail, making sure each foot was fully on the step. Transcript, p.65, ll.2-11.

35. Ms. Young testified that it is her recommendation that the claimant is restricted to using a handrail when climbing stairs and should only carry items on stairs with one hand, not bilaterally. Weight bearing on stairs should be limited to 1-10 lbs. Transcript, p.65, ll.18-25.

36. Ms. Young's report set forth more detailed opinions about lifting restrictions to which the claimant should adhere. These are documented in "Appendix D: Functional Lift Test", Exhibit 7, p.125. Such section expands on Ms. Young's opinions on "Frequent Lifting" stating in relevant part:

> Due to the quick and severe onset of back pain during lifting activities, MP[Redacted] should avoid frequent or repetitive lifting (bilaterally or unilaterally) entirely. It will greatly increase symptoms and decrease his ability to perform any type of subsequent activity, even sedentary activities. Exhibit 7, p.125.

37. Ms. Young's report set forth more detailed opinions about postural and positional tolerance to which the claimant should adhere. These are documented in "Appendix E: Postural and Positional Tolerances". Exhibit 7, p.126-128. Such section provided more detailed information of the claimant's postural and positional restrictions.

38. With regard to sitting (20-30 minutes), standing (10-20 minutes) and walking (10-20 minutes) restrictions, Ms. Young also noted: “Tolerance may be unpredictable and fluctuate”. Exhibit 7, p.126.

39. Ms. Young also noted that the claimant is “most comfortable when he can change positions frequently: sitting and then standing and/or walking combined. He reports that he lies down once a day for an hour or more to control pain.” Exhibit 7, p.126.

40. Ms. Young recommended that the claimant limit bending (full as in reaching downward toward one knee), crouching, squatting, kneeling, crawling, climbing stairs, twisting of trunk, reaching above shoulders to “minimal” which the report defines as “limited to 1–3-minute increments, less than 10% of a workday.” Exhibit 7, pp.126-127.

41. Ms. Young limited slight bending (slight as in when reaching forward) and reaching to chest level to occasionally which his defined as 1-33% of the day. Exhibit 7, pp.126-127.

42. Ms. Young testified that the claimant required aggregate resting of 44 minutes during 3.5 hours of testing which was 21% of the time. Transcript, p.67, ll.11-24. This is also documented in Ms. Young’s report, Exhibit 7, pp.113-116.

43. Ms. Young’s report set forth climbing ladders, poles and scaffolding was described as activities to “Avoid, Safety Issues”. Exhibit 7, p.127.

44. Ms. Young testified that her recommended and observed limitations of the claimant’s activities should be considered the maximum that he would be capable of performing. Transcript, p.76, l.23 – p.77, l.2.

45. Overall, the ALJ finds Ms. Young’s report and testimony to be credible and persuasive. Her report is supported by both the claimant’s testimony and his medical records. Plus, her findings and conclusions were adopted by the claimant’s treating physician, Dr. Tracey, and the Division Examiner, Dr. Green.

46. On June 28, 2022, Dr. Tracey noted that he had reviewed the FCE results, specifically reciting the limitations set forth therein as being:

> The patient demonstrated the ability to safely lift 20 pounds from floor to waist, 20 pounds from waist to shoulder and 20 pounds overhead on an occasional basis. Frequent lifting and repetitive lifting should be avoided as much as possible due to the quick and severe elevation in pain with all lifting activities…. Sitting can be performed on a frequent basis in 20–30-minute increments. Standing can be performed on an occasional basis in 10–20-minute increments. Walking can be performed on an occasional basis in 10–20-minute increments. Low level positional tolerances such as squatting kneeling bending and crouching are very limited. The patient could sustain a level work for 4-minute intervals and is limited to the low end of the occasional definition. Exhibit 4, p.94.

47. On June 28, 2022, Dr. Tracy adopted the limitations and restrictions identified by Ms. Young. Most importantly, Dr. Tracy specifically noted that he reviewed the entire 27-page Functional Capacity Evaluation performed by Ms. Sherry Young. Thus, he did not blindly adopt the restrictions and limitations found by Ms. Young. Dr. Tracy stated that MP[Redacted] was putting forth full effort and that the FCE should be considered a valid representation of [the claimant's] functional limits and abilities. Dr. Tracy stated that it was his interpretation that [the claimant] could do light duty and potentially part-time employment based on his position changes. Exhibit 4, p. 94-95.

48. Dr. Tracey ultimately provided an impairment rating based, in part, upon his finding that the claimant qualified for a rating under Table 53, II B of the Impairment Guidelines which assigns impairment for an unoperated disc with 6 months or more of pain and rigidity. Exhibit 6, p.103. He rendered a specific diagnosis of "protrusion of lumbar intervertebral disc". Exhibit 6, p.104.

49. While treating the claimant, Dr. Tracey did not suggest there were signs and symptoms of symptom magnification or that the claimant's underlying back condition did not support his pain complaints and the restrictions set forth by Ms. Young and adopted by him.

50. On November 8, 2022, the claimant underwent a Division Independent Medical Examination with Dr. Justin Green. Dr. Green reviewed the claimant's medical records and conducted a physical exam. Dr. Green's clinical diagnosis was "Status post, reported 12/30/2020 acute L5-S1 discogenic pain syndrome/protrusion, more likely than not work-related." Exhibit 3, pp.14-19.

51. Dr. Green noted that "… there is a notation of lumbar diagnoses and symptomatology documented prior to the 12/30/2020 reported work-related date of injury. Nonetheless, based upon the Division Guidelines, regarding apportionment, I do not have enough information to establish or believe, at this time, that I can determine that the presence of prior low back pain complaints and/or impairment was independently disabling at the time of the 12/30/20 date of injury." Exhibit 3, p.18.

52. Dr. Green concurred with Dr. Tracey's restrictions and the FCE's assignment of restrictions. Exhibit 3, p.19.

53. Dr. Green assigned the claimant an impairment rating of 10% whole person, assigning 5% for a specific disorder of the lumbar spine and 5% for loss of range of motion. Exhibit 3, p.22.

54. Thus, the restrictions set forth in the FCE have been reviewed and adopted by the claimant's treating physician as well as the DIME physician.

55. Respondents filed a Final Admission of Liability and accepted the impairment rating provided by Dr. Green. Exhibit C, pp.5-15.

56. The claimant testified that he is only able to sit for about 20-30 minutes at a time before he starts experiencing a "jammed" feeling, a sensation of pressure, in his low back which is painful which he feels he cannot escape. The pain requires him to get up and "move around and stretch." Transcript, p.23, ll.6-15.

57. The claimant stated that he likes to stretch by laying on his back and drawing his knees up to his chest, but that is not always practical. He will typically do this for three to five

minutes. Transcript, p.24, l.22 – p.25, l.15. If possible, like when he is at home, he will do this three to four times per day. Transcript, p.32, ll.17-22.

58. In addition to laying down to stretch, the claimant indicated that he would lay down every day, usually around noon for 20-30 minutes. Transcript, p.33, ll.5-16.

59. The claimant indicated that he now is prescribed more pain medication than before the December 30, 2020, injury at work and his contention is consistent with the medical record. Transcript, p.24, ll.1-7; Exhibit 4.

60. The claimant testified that he is limited when walking to 10-15 minutes of walking, after which he experiences increased sensation of weakness in his left leg. Transcript, p.25, ll.16-20. The claimant stated that the sensation of weakness affects his walking and makes him walk very systematically. Transcript, p.26, l.20- p.26, l.5. He also indicated that he has difficulty with stairs and uses a handrail if one is present. Transcript, p.27, ll.8-13. He also stated that he experiences increased pain in his lower back and exhaustion after 10-15 minutes of walking. Transcript, p.27, ll.20-24.

61. The claimant also stated that he has issues bending. He can bend forward but has trouble getting back up. He alleges that he has trouble bending backwards and trouble bending side to side. He described his level of discomfort as “huge”. Transcript, p.28, ll.11-17.

62. The claimant also testified that he has exacerbated his back engaging in simple activities. For example, he stated that on one occasion he was attempting to get a pizza out of the oven and that resulted in his back “going out” and incapacitating him for two weeks. Transcript, p.29, ll.8-15. He also contends that he has had similar experiences with vacuuming for as little as five minutes. Transcript, p.29, l.16- p 30, l. 12

63. The claimant also testified that twisting is extremely painful and that he tries to avoid it whenever possible. Transcript, p.31- p.32, l.6.

64. The claimant also indicated that he can only stand for 15-20 minutes at a time before he needs to sit down because he gets a weak feeling and pain. Transcript, p.32, ll.9-12.

65. The ALJ finds that the claimant’s testimony about his physical restrictions and his ongoing symptomology to be consistent with the findings of the functional capacity evaluator, Ms. Young, as well as the findings and conclusions of Drs. Tracey and Green. Thus, the ALJ finds the claimant’s testimony about his limitations at this time to be credible.

66. Based on his testimony, the ALJ finds that the claimant has these restrictions:

    a. He can stand for 15-20 minutes before he needs to sit down due to pain and develops a weak feeling.

    b. He can walk for 10-15 minutes before he becomes weak and exhausted, which then makes him walk very systematically.

    c. He can sit for 20-30 minutes at a time until the pain requires him to get up and move around and stretch.

    d. He struggles with stairs and will use a handrail if one is present.

67. The claimant has a chronic neck condition that dates back to 2006. Transcript, p.21. ll.5-12. The claimant treats his chronic neck pain with pain medication. Transcript, p.21, ll.11-

19. The claimant had no limitation to his activities from his neck condition while taking his pain medications. He managed to work in various positions, including driving a truck and auto mechanics. Transcript, p.21, l.23- p.22, l.11.

68. The claimant did have intermittent low back issues in the years before the December 30, 2020, work injury, but did not remember specifically when it started. That said, his prior low back issues did not keep him from working and he was not told to restrict his activities by any medical professional for his prior back issues. Transcript, p.22, ll.12-24.

69. The claimant described his prior work duties as a Catastrophic Insurance Adjustor requiring him to carry a ladder and to climb a ladder to inspect siding and roofs. Transcript, p.44, l.23-p.45, l.4.

70. Surveillance video of the claimant was obtained. The video shows the claimant sweeping up some debris in front of his house and placing it in a large trash bin. The video also shows the claimant walking, moving the trash bin, and driving. The claimant does not appear to have any physical limitations during the surveillance video. That said, the video is only about 11 minutes long, and he does not appear to be working in excess of his restrictions.

71. Ms. Young reviewed the surveillance video taken of the claimant. She testified that the video revealed no activity that was inconsistent with her observations during the FCE. Transcript, p.68, ll.7-15.

72. The claimant was also evaluated by Ms. Cynthia Bartmann, a vocational expert. After interviewing the claimant, reviewing his medical records, and the FCE, Ms. Bartmann concluded that the claimant is limited to work in the sedentary work category. She also concluded that positions in the sedentary work category such as customer service, telemarketer, front desk, receptionist, and other types of office work would require the ability to sit for long periods of time. She also concluded that the claimant's need to constantly change positions could not be accommodated in the workplace. Ex. 8, p. 144. This portion of her report is supported by the evidence contained in the record, which includes the claimant's testimony, the FCE and Drs. Tracey and Green adoption of such FCE and is therefore found to be persuasive.

73. In her report, Ms. Bartmann also concluded that the claimant would also be precluded from performing the sedentary jobs outlined above because the claimant lacked computer experience and could not use a keyboard. Ex. 8, p. 145. However, as noted by the claimant, and Ms. Montoya, he did have prior computer and keyboard experience and the ALJ finds it hard to believe that the claimant cannot use a keyboard. Therefore, this portion of her report is not found to be supported by the evidence and is not found to be persuasive.

74. Ms. Bartmann also testified at the hearing. She was accepted as an expert in vocational evaluations. Following her initial report, Ms. Bartmann reviewed additional material consisting of the report of the respondents' vocation evaluator, Katie Montoya (Exhibit H), surveillance video (Exhibit J) and Dr. Green's DIME report (Exhibit 3). Ms. Bartmann's review of the additional material did not change her opinions set forth in her report. Transcript, p.81, ll.4-12.

75. Ms. Bartmann recounted the job history provided to her by the claimant. She began by acknowledging that the claimant had trouble recalling his remote job history. In the remote past, the claimant engaged in work that Mr. Bartmann generally described as "production worker", construction and utility-line labor positions. She also stated that the claimant's more recent work history consisted of truck driving and auto mechanics. Transcript, p.81, l. 22- p.82, l.7.

76. Ms. Bartmann indicated that the claimant had not told her of his brief work as a Catastrophic Insurance Adjustor but learned of such from Ms. Montoya's report and from the claimant's hearing testimony. Transcript, p.82, ll.8-11. Based on such, Ms. Bartmann said that such work was about 18 years earlier, that the claimant apparently struggled learning the computer program required by the job and that the claimant worked at such position for only a short time. Thus, she concluded that the claimant did not appear to have gained the skills necessary to succeed in this field of employment. Transcript, p.82 ll. 11-16.

77. Having considered the restrictions outlined in Ms. Young's report and reiterated in her testimony, Ms. Bartmann said that the claimant could not perform any of his past work. Transcript, p.83, ll.l3-14, Exhibit 8, p.144. Ms. Bartmann also indicated that the claimant did not acquire any skills in his past employment that are transferable to work in the light or sedentary categories. Exhibit 8, p.144, Transcript, p.84, ll.4-6.

78. In light of his physical restrictions and his lack of transferable skills, she concluded that the claimant is only vocationally qualified to work in jobs that are unskilled. Transcript, p.84, ll.10-13.

79. Ms. Bartmann stated that due to the claimant's restrictions - as set forth by the FCE and adopted by Drs. Tracy and Green - there are no unskilled jobs that the claimant can perform. Transcript, p.84, l.23- p.85, l.4.

80. Ms. Bartmann did indicate that the claimant's 20 lb. lifting restriction would allow access to the "light work" category of jobs, but that this category also requires the ability to stand or walk six out of eight hours each day or work at an assembly pace. Transcript, p.85, ll.14-19. However, she also noted that the inability to lift more than five pounds frequently or repetitively would relegate the claimant to the "sedentary" work category. Transcript, p.102, l.23- p.103, l.8.

81. Ms. Bartmann also explained that the claimant's need to change positions, as outlined by Ms. Young, would prohibit work in the "light" category. She noted that some "production work" allows for occasionally changing positions, but that a worker is still required to maintain production pace. It is the standard in the industry to have to maintain a position for 30-45 minutes to keep working at production pace. Ms. Bartmann does not believe that there are any production-type jobs that exist which would allow the claimant to change positions as frequently as outlined by the FCE. Transcript, p.86, ll.5-19.

82. Ms. Bartmann also noted that jobs not requiring the stand/walk requirement of light duty would fall under the "sedentary work" category, but that such category required the claimant to sit six out of eight hours per day. Because of his need to change positions, Ms. Bartmann stated that it would be impossible for the claimant to work in this category. Transcript, p.85, l.20- p.86, l.1.

83. Ms. Bartmann explained that the lifting restrictions and the need to change positions frequently, when combined with the lack of transferrable job skills, render the claimant unable to do any work. Transcript, p.86, ll.20-25.

84. Ms. Bartmann testified that in 30 years of doing vocational market research, she has never found a manufacturing plant that will allow someone to change positions as often as needed by the claimant. Transcript, p.98, ll.15-20.

85. Ms. Bartmann also noted that the FCE revealed that the claimant required rest 21% of the time. Ms. Bartmann said that no employer could accommodate such. Transcript, p.87, ll.11-16.

86. Ms. Bartmann also testified that the claimant's need to lay down and stretch would not be tolerated by most employers. Transcript, p.88, l.24.

87. Ms. Bartmann said that the claimant's need to lay down for 30 minutes during the workday would be tolerated only if such could be done during the regularly scheduled 30-minute lunch break, and if the employer had a break room. The need to lay down for 30 minutes would not be tolerated if it occurred outside the scheduled lunch break. Transcript, p.88, ll.13-20.

88. Ms. Bartmann addressed Ms. Montoya's suggestion that the claimant may be able to work in the food delivery industry. She noted that the need to climb stairs and carry with only one extremity would not be possible. Transcript, p.89, ll.20-25. Ms. Bartmann also noted that Dr. Raschbacher did not believe the claimant should drive given the claimant's use of prescription narcotics, which would also independently prevent access to any delivery job. Transcript, p.89, ll.15-18. Finally, Ms. Bartmann expressed doubt that a food delivery position would allow for the required frequency to change positions needed by the claimant. Nor did she believe that claimant's restrictions would allow him to work at an acceptable production pace in this industry. Transcript, p.90, ll.1-9.

89. Ms. Bartmann stated that employers generally will only tolerate absences of one day per month or 12 days per year. If a worker misses more than that on average, they will be unable to maintain employment. She added that an "absence" does not mean missing an entire workday. Missing two hours in a day will be considered an absence. Transcript, p.90, l.18- p.93, l.17.

90. Ms. Bartmann's testimony is found to be credible and her opinions, as stated in her report and testimony, are considered to be persuasive, since they are supported the underlying medical records and the claimant's testimony.

91. The respondents called Dr. John Raschbacher as an expert witness. It was stipulated that he is an expert in occupational medicine.

92. On March 23, 2021, the claimant attended an IME with Dr. Raschbacher. Exhibit 9, p.147. During the IME with Dr. Raschbacher, the claimant provided a description of the event of the injury which Dr. Raschbacher recorded as follows:

> Specifically, the mechanism of injury or purported injury, was reviewed. It was in the morning at about 8:15 a.m. or 8:30 a.m., and he was under a truck changing the differential seals. To do this, he had to break loose the knuckle and was using

> a torch to heat the bolts and then he used a 22 mm piece that was on a breaker bar. He was straining at this, and he felt that he had discomfort at the lower back. He states that he was "screaming in agony." He crawled for a while. He states there were others in the shop, but nobody attended him. He states everything is on video. The shop is covered with CC TV. The vehicle he was working on was on a lift, overhead. It was a Mercury Mountaineer. The breaker bar was about 36 inches long. He was standing with the piece at his neck or head level and pulling towards him with the bar when the injury occurred. He states that he never felt anything like that. He states that his legs went out and he collapsed. Exhibit 9, p.149.

93. As part of the March 23, 2021, IME, Dr. Raschbacher reviewed video of the workplace. Dr. Raschbacher described two video clips of the interior workplace that he viewed as follows:

> There is a second video clip, in which the workplace is shown. MP[Redacted] appears to be working at the left side of the video, walking around the Bay with a vehicle on a lift. Shop noises can be heard. He puts the lift down a little bit and then works on the vehicle using what appears to be an impact wrench or some similar tool. It appears that about five minutes into the video that there is an exclamation, which very short, which sounds like "oh." MP[Redacted] continues to work on the vehicle. One is able to hear voices of other workers in the shop. In one short clip, MP[Redacted] is seen to be working under a vehicle, which is on a lift. There is a short verbal outburst and then he walks off screen and then after a few seconds reappears. Other workers, next to the bay in which he was working, do not seem to notice this occurrence. Exhibit 9, p.155.

94. Dr. Raschbacher noted that the video clips he reviewed were inconsistent with the claimant's description of events. Dr. Raschbacher's report stated:

> At the time of the IME, with this Examiner, MP[Redacted] described a mechanism of injury as per the body of the report. He stated that his legs went out and that he collapsed. He stated that he was "**screaming in agony**," and that he crawled for a while. This does not appear to be an accurate description of the events recorded on the video tape or CC TV. There is no evidence of him screaming in agony or crawling or having his legs go out or collapsing. It, therefore, appears that he has not provided an accurate medical history and, therefore, there is no reason to assume that further history that he provides will be any more accurate. If he did have an episode in which he had discomfort temporarily from pulling on cheater bar or the wrench, it appears that resolved

> quite quickly and was not nearly as severe as the fairly dramatic presentation he described as having in his history. His coworkers did not even notice that anything had happened, and they were in reasonably close proximity. MP[Redacted] returned to work almost immediately. (Emphasis in original) Exhibit 9, p.157.

95. A portion of Exhibit 15, a video clip entitled "Clip of possible injury" was played during the hearing and viewed by Dr. Raschbacher.

96. Dr. Raschbacher could not state that this was the video of the incident he had previously viewed but acknowledged that the video clip was consistent with his description of the video clip set forth in his report of March 23, 2021. Transcript, p.147, l.8- p.151, l.13, Exhibit 9, p.155.

97. Based on Dr. Raschbacher's perception that the claimant had grossly exaggerated the events of the work incident, Dr. Raschbacher stated that "It is not clear that he (Claimant) actually suffered an injury on December 30, 2020…. There is no objective support for such and his subjective reports do not appear to be reliable…." Exhibit 9, p.156.

98. Dr. Raschbacher stopped believing the claimant because the video of the alleged incident he reviewed did not comport with the claimant's description of the incident. Transcript, p.147, ll.1 -6.

99. Dr. Raschbacher did not receive from the respondents any audio tape to consider. Transcript, p.151, ll.18-20.

100. Dr. Raschbacher is unaware of any preexisting issues to the lumber spine specifically. Transcript, p.121, ll.5-7.

101. Dr. Raschbacher does not believe that there is any basis for limiting the claimant's physical activity based on his lumber spine. Transcript, p.129, ll.14-16.

102. Dr. Raschbacher testified that it is his opinion that a disc protrusion not impinging on a nerve root is unlikely to cause pain but cannot absolutely be discounted as a source of pain. Transcript, p.136, ll.11-17.

103. On the other hand, Dr. Raschbacher acknowledged that annular tears can be symptomatic. Transcript, p.143, ll.23-25. The symptoms generally include difficulty with forward flexion bending and low back pain. Transcript, p.144, ll.13-19.

104. Dr. Raschbacher disagrees with Dr. Tracey, the claimant's treating physician, that there was a ratable impairment and does not believe any of the medical treatment provided by Dr. Tracey was supported by a good basis. Transcript, p.151, l.21- p.153, ll.17.

105. Dr. Raschbacher disagrees with DIME physician, Dr. Green, that there was a ratable impairment or that the claimant needs restrictions. Transcript, p.153, ll.21-23.

106. Dr. Raschbacher does not believe that the FCE performed by Ms. Young has much merit. Transcript, p.154, ll.7-10. He did not, however, sufficiently explain why the FCE did not have much merit – in his opinion.

107. Based on Dr. Raschbacher's perception that the claimant had grossly exaggerated the events of the work incident, Dr. Raschbacher stated that: "It is not clear that he (Claimant) actually suffered an injury on December 30, 2020…. There is no objective support for such and his subjective reports do not appear to be reliable…." Exhibit 9, p.156.

108. As part of the March 23, 2021, IME, Dr. Raschbacher also concluded that the claimant was taking significant doses of narcotics and that it is inappropriate for him to drive. Exhibit 9, pp.157-158.

109. On February 28, 2023, the claimant was once again required to attend a IME with Dr. Raschbacher.

110. Dr. Raschbacher summarized his prior IME by stating:

> April 5, 2021: This is an IME done for [Redacted, hereinafter MK] by this examiner. Inconsistencies in MP's[Redacted] history were described, particularly one in which MP[Redacted] did not apparently show any evidence of his report that he was **screaming in agony.** There was no evidence on the video of him crawling." (Emphasis in original) Exhibit U, p.358.

111. In the report of the February 28, 2023, IME, Dr. Raschbacher once again reiterated his opinion that it is unclear that there ever was an injury:

> I am in agreement that he has reached MMI, as per Dr. Tracy and as per Dr. Green. More likely than not, he reached MMI quite some time before that, if one makes the assumption that there has actually been an injury, and it is not clear that there ever was an injury, particularly given the reports he gave during the IME done in 2021 with this examiner in which he did not appear to give a truthful or likely truthful history. Exhibit U, p.359, ¶#3.

112. Similarly, Dr. Raschbacher stated that he would not assign the claimant any impairment rating stating:

> There are difficulties, however, with using the diagnosis of annular ligament tear as a pain generator, particularly after this much time has passed and with the consideration of the history he gave to this examiner in 2021, it is not clear that there is any ratable impairment. In any event, Dr. Green's opinion was that there was impairment, was based on annular ligament tear, and he pursued the correct methodology. This examiner would not assign any impairment, no. Table 53 diagnosis, to MP[Redacted]. Exhibit U, p.359, ¶#4.

113. Dr. Raschbacher further concluded that the claimant had no work restrictions that he did not have before the December 30, 2020, event. Exhibit U, p.360, ¶#6.

114. The claimant testified in rebuttal. The claimant testified that the video clip of the alleged injury played during the hearing testimony of Dr. Raschbacher was not a video recording of the moment of injury but that there was instead different video footage of the actual moment of injury. Portions of Exhibit 15 video clips were then displayed. The first was a video clip labeled December 30, 2020 6:55 am from 28 minute, 38 second mark until 31 minute, 10-second mark. The claimant identified himself in the video and stated this clip was the moment of injury. Transcript, p.182, l.23- p.183, l.5. Similarly, a second video clip was played labeled December 30, 2020 6:53 am from 31 minute, 38-second mark until 37 minute, 46-second mark. This video showed the same scene from a different camera angle. Generally, these videos show the claimant pulling down with a bar on the wheel of a car. The bar drops suddenly, the claimant appears to shout out in pain, and ultimately drops to the floor. The claimant moves to the bay next to where he was working and lays on the ground for several minutes. The claimant is ultimately approached by another person, who the claimant identified as his supervisor TD[Redacted]. Transcript, p.183, ll.8-10.

115. The ALJ finds that these two video clips are fairly consistent with the description of events that the claimant provided to Dr. Raschbacher and with the claimant's testimony at hearing. Thus, the ALJ finds that this video corroborates the claimant's version of events surrounding his injury and demonstrates that he did suffer an injury.

116. The ALJ finds that Dr. Raschbacher did not have (or did not acknowledge having viewed) either of these clips. It appears he relied on an irrelevant video clip which he incorrectly represented to be of the moment of injury. The ALJ further finds that Dr. Raschbacher based the majority of his opinions and conclusions regarding whether the claimant sustained an injury and whether he has any restrictions that flow from his work injury on the wrong video. Moreover, the ALJ finds that such a critical error formed the foundation of his opinions and conclusions and that his reliance on such video calls into question all of his opinions and conclusions. As a result, the ALJ does not find his opinions and conclusions regarding the extent of the claimant's injuries and his restrictions, or lack thereof, to be reliable or persuasive. That being said, the only opinion of Dr. Raschbacher that the ALJ does credit, is that the claimant should not be driving while using narcotics.

117. The claimant testified on rebuttal that he has listened to an audio tape, Exhibit 16. The claimant identified the male voice as belong to his supervisor TD[Redacted]. Counsel for the respondents objected to the admissibility of Exhibit 16 as being hearsay. The ALJ could not hear the recording when played remotely so deferred ruling on the admissibility of the exhibit until the ALJ had the opportunity to play the recording directly on a local device.

118. Having listened to Exhibit 16, the ALJ finds that such is admissible. The claimant identified the voice of his supervisor, TD[Redacted]. The ALJ notes that TD[Redacted] is a representative of the employer and his statement about the events would not constitute hearsay as such are the admission of a party opponent. Having listened to the tape, the ALJ concludes that the recording is relevant and admissible.

119. TD[Redacted] recites the events of the day of the injury. The interview was acknowledged as having occurred on January 11, 2021, 12 days after the injury.

TD[Redacted] acknowledges that he is a service manager of the Employer's business. He states that he was aware of the claimant's injury on December 30, 2020. He heard the claimant yelp. TD[Redacted] looked over and saw the claimant squat and then lay down on the ground. TD[Redacted] relayed that he approached the claimant and asked him if he was hurt. The claimant told him he experienced pain like an electrical bolt going down his back. The claimant told him that he would attempt to keep working but eventually came back to TD[Redacted] and told him he would need to go to the doctor. Exhibit 16.

120. The ALJ finds that TD's[Redacted] statements in Exhibit 16 are substantially similar to the description the claimant provided at the hearing as well as the history the claimant provided to Dr. Raschbacher.

121. Katie Montoya testified on behalf of the respondents. She was accepted by the ALJ as a vocational expert. She generated a report dated March 13, 2023. (Exhibit H).

122. Ms. Montoya stated that the claimant can use a computer, but he is not a skilled computer user and is not capable of working as an administrative assistant or other work requiring a skilled computer user. Transcript, p.161, ll.4-12.

123. Ms. Montoya acknowledged that the claimant would not have access to a full range of light duty jobs because he cannot tolerate prolonged standing or walking. Transcript, p.163, ll.10-14.

124. Ms. Montoya testified that when she did her report, she pulled postings of employers that might have sedentary jobs that would allow sitting and standing options. She believes that she reviewed postings of Advantage Security and Park 'N Fly but did not testify in detail as to any other details. Transcript, p.167, l.25- p168, l.6. Ms. Montoya did not relate the specific nature of the jobs offered by these two employers, the physical requirements of each job, and how such positions could accommodate the claimant's restrictions.

125. Ms. Montoya suggested in her testimony that being off task for three to five minutes every 30 minutes could affect the ability to maintain employment but stated that "it would depend on the work if that became a hindrance". Transcript, p.171, l.19- p.172, l.2. Ms. Montoya did not identify any jobs that would allow an employee to be off task for the described amount of time as shown by the FCE.

126. Ms. Montoya reported that the claimant has limited transferable skills, though her report does not state with specificity the claimant's transferable skills. Exhibit H, p.32.

127. Ms. Montoya set forth in her report that the claimant is relegated to unskilled work and "possibly" semi-skilled work. Exhibit H, p.32. Ms. Montoya did not, however, explain in detail what constitutes "semi-skilled work" or if the claimant possessed such skills.

128. Ms. Montoya concluded in her report that the claimant would "continue to have the opportunity to perform some driving positions (most food delivery where he has the chance to vary positions more often). Exhibit H, p. 32. On the other hand, she also acknowledged that his medications may impact his ability to hold such positions. Exhibit H, p.32.

129. Ms. Montoya concluded in her report that the claimant can perform customer service type work and cashier type alternatives, though she noted that he cannot stand and walk to the degree needed for all light work. She also stated that he could perform some production-type work. Exhibit H, pp.32-33.

130. Ms. Montoya's report does not set forth any specific employers or detailed contact with potential employers. Ms. Montoya's report does not address having considered the claimant's balance issues as stated in the FCE. Ms. Montoya's report does not refer to having considered the effects of the claimant resting or being off-task up to 21% of the day as outlined in the FCE. Exhibit H, generally.

131. In her report, Ms. Montoya did consider the claimant's potential absenteeism and its effect on his employability. She noted that his absentee rate (as described by the claimant) would be "an issue with maintaining employment". Exhibit H, p.33. She did not make or provide any standards of the amount of absenteeism that would generally tolerated by employers and did not dispute Ms. Bartmann's testimony that: employers generally will only tolerate absences of one day per month or 12 days per year; that an "absence" does not mean missing an entire workday but that missing two hours in a day will be considered an absence; and that if a worker misses more than on average, they will be unable to maintain employment.

132. The claimant has established that it is more true than not that his restrictions regarding weight, balance, and positional tolerances, which includes severe limitations on sitting and standing, render him unable to find and maintain employment.

133. The claimant has established that it is more true than not that his being off task to a degree of up to 21% of the day or more also renders him unable to find and maintain employment.

134. The claimant has established that it is more true than not that his anticipated level of absenteeism also renders him unable to find and maintain employment.

135. The claimant did have a preexisting neck condition and was on medication for his neck pain. However, his prior neck condition did not preclude the claimant from working – as demonstrated by his work history after his neck injury.

136. The claimant has established that his work related back injury – which caused his physical restrictions and limitations - is a significant causative factor of his inability to obtain and maintain employment and earn any wages. Therefore, based on his current restrictions, his work injury is the direct cause of his permanent and total disability.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The

claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the claimant established by a preponderance of the evidence that he is permanently and totally disabled.

To prove permanent total disability, the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. §§8-40-201(16.5)(a) and 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 ¶ 26. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Grant v. WalMart Associates, Inc.,* WC 4-905-009 (ICAO, Mar. 18, 2019). In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter* 2019 COA 53 ¶ 26. The ALJ can also

consider whether the claimant is physically able to sustain or maintain employment. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Blocker v. Express Personnel* WC 4-622-069-04 (ICAO, July 1, 2013.).

The question of whether the claimant proved the inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995); *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 (reasoning that DIME opinion held no special weight in a subsequent hearing where claimant sought permanent total disability benefits).

The ALJ has evaluated the entire record. In this case, after the claimant was placed at MMI, and due to the claimant's ongoing pain complaints, his ATP, Dr. Tracey, requested an FCE to help determine the claimant's work restrictions. Thereafter, Ms. Young performed an FCE and set forth her opinion on the claimant's work restrictions. After the FCE was completed Dr. Tracey reviewed the FCE and adopted the restrictions set forth by Ms. Young. At no time did Dr. Tracey state that the claimant's pain complaints and work restrictions were inconsistent with the claimant's underlying work injury.

After Dr. Tracey adopted the findings of the FCE and set forth the claimant's work restrictions, the claimant underwent a Division IME with Dr. Green. Dr. Green evaluated the claimant, provided an impairment rating, and agreed with the restrictions set forth by Ms. Young and Dr. Tracey.

The claimant then underwent two vocational evaluations. Each vocational expert based their opinions on the restrictions set forth in the FCE which were adopted by Dr. Tracey. Ms. Bartmann issued a report on behalf of the claimant. She concluded that based on the claimant's restrictions, he would be unable to obtain and maintain any employment. The ALJ credited her opinion since it was consistent with the claimant's testimony as well as the restrictions set forth by Ms. Young and adopted by Dr. Tracey.

The second evaluation was performed by Ms. Montoya. While Ms. Montoya did not think the claimant was unable to earn any wages, she admitted that the claimant may have problems obtaining and maintaining employment when considering all of the claimant's restrictions and limitations, including those described by the claimant. She also indicated that his ability to obtain and maintain employment delivering food would also be difficult due to his narcotic use, as indicated by Dr. Raschbacher, which may prohibit him from obtaining such jobs.

The respondents provided the opinion of Dr. Raschbacher regarding the extent of the claimant's work injury and the restrictions which flow from the injury. In essence, Dr. Raschbacher did not credit the claimant's contention as to how he got injured based on his review of some of the employer's surveillance video of the workplace that allegedly covered the time the claimant was injured at work. The video he watched did not show the claimant getting injured. Since he did not credit the claimant's contention as to how he got hurt, he

did not believe the claimant's ongoing pain complaints and the extent of his claimed disability and restrictions.

However, during the hearing, the claimant presented additional surveillance video from the employer that covered the time the claimant was injured. This video showed the claimant getting injured and reacting in a similar way to the manner in which the claimant described to the doctors involved here as well as his testimony.

Therefore, since Dr. Raschbacher's opinions were based on the wrong surveillance video, the ALJ did not find his opinions to be persuasive regarding the extent of the claimant's injury and the restrictions that flow from the injury.

The ALJ has considered the reliability of the FCE and while Ms. Young provided opinions about the claimant's effort, and lack of symptom magnification, the ALJ believes that evaluating the claimant's effort, and possible symptom magnification, with a high degree of confidence is not possible. But, on the other hand, there was a lack of credible and persuasive evidence presented that negated her findings and conclusions, as well as those of Dr. Tracey.

While there was some surveillance of the claimant, it did not appear that the claimant was exceeding the restrictions set forth by Ms. Young and Dr. Tracey. In the end, the ALJ has credited the claimant's testimony regarding the effects of his work injury and his resulting disability. As a result, the ALJ finds and concludes that the claimant has proven by a preponderance of the evidence that he is unable to obtain and maintain employment and earn any wages because of his low back injury and his physical restrictions that flow from such injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The claimant is permanently and totally disabled. The respondents shall pay claimant permanent total disability benefits-less any offsets and/or credits.
2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to

Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 16, 2023.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-186-177-002

ISSUES

- Did Respondents overcome the DIME's determination that Claimant is not at MMI?
- If Respondents overcame the DIME, the following issues will be addressed:
- What is Claimant's scheduled impairment rating?
- Did Respondents prove apportionment is applicable?
- Overpayment.
- If Respondents failed to overcome the DIME, did Claimant prove entitlement to reinstatement of TTD benefits commencing March 31, 2022?
- The parties stipulated to an increased average weekly wage (AWW) of $957.21, effective February 1, 2022.

FINDINGS OF FACT

1. Claimant worked for Employer as an HVAC sheet metal fabricator and installer. The job was physically demanding and required lifting and carrying heavy materials, frequent crawling, ascending and descending ladders and stairs, and walking on pitched roofs. Claimant had no limitations or difficulty performing any work tasks before his admitted injury on October 25, 2021.

2. Claimant injured his left knee on October 25, 2021 when he fell in an uncovered sump pump hole. Claimant's right leg went into the hole and his left leg bent awkwardly behind him. Claimant felt immediate, severe pain in his left knee and leg. He remained stuck in that position for approximately 15-20 minutes, until a plumber working on the project pulled him out of the hole. Claimant had difficulty bearing weight on the left knee, so the plumber helped him to his vehicle. Claimant returned to Employer's office and reported the injury to his supervisor.

3. Claimant has a lengthy pre-injury medical history regarding his left knee. He suffered a work-related injury in 1996 when he was kicked in the left knee while breaking up a fight among patrons at the [Redacted, hereinafter CF]. He had surgery on October 5, 1996 to repair the ACL, MCL, and meniscus. Claimant continued to have problems with the left knee and underwent two additional surgeries, first to revise the initial procedure and later to remove scar tissue. Claimant was eventually put at MMI on January 6, 1998, with a 22% lower extremity impairment rating. He was released to full duty with no permanent restrictions.

4. Claimant continued to have left knee symptoms and periodic flares thereafter. X-rays of the left knee were taken in 2009, although no corresponding report is in evidence. A treatment record in April 2015 for a back strain after lifting a 100-pound piece of concrete contains an incidental reference to "chronic left knee issues and limited range of motion from 0-90 degrees after multiple surgeries." No treatment for the left knee was recommended and Claimant was cleared for full duty at work. A left knee x-ray on August 3, 2015 showed severe tricompartmental osteoarthritis.

5. Claimant saw PA-C Franklin Sloan on March 3, 2016 for left knee pain. Claimant recounted his surgical history and described gradually increasing pain over the years with weightbearing and range of motion. He had previously received cortisone injections and seen a couple of orthopedists. Claimant was observed to walk with a "mild" limp. ACL testing was positive, and the knee was "slightly" unstable. Mr. Sloan diagnosed advanced posttraumatic arthritis and opined Claimant was a candidate for a knee replacement. He advised Claimant to follow up with Dr. Danylchuk to further discuss his surgical options. There is no persuasive evidence Claimant ever saw Dr. Danylchuk or sought any additional treatment for his left knee around that time.

6. Claimant credibly testified to periods of "working excessively" on construction projects, during which time he worked several months with no days off. Those activities aggravated his knee pain, but he "never missed a day of work." His knee pain subsequently improved when his workload reduced. Although Claimant could not recall exact dates of projects he worked on, he believes the March 3, 2016 evaluation with Mr. Sloan probably coincided with a period when he "overworked" his knee. No persuasive evidence was presented to contradict Claimant's testimony in this regard.

7. There is no persuasive evidence Claimant received any additional evaluations for treatment for his left knee for five years, between March 2016 and March 2021. The only record in that interval is a June 23, 2019 general health checkup, which makes no mention of any knee issues.

8. Claimant saw his PCP, Dr. Aaron Fields, on March 14, 2021 for a general primary care evaluation. Among other things, he reported "continuous" bilateral knee and foot pain. The report states Claimant reported "12/10" pain in the left knee and 6/10 in the right knee.[1] Dr. Fields administered steroid injections to both of Claimant's knees and referred Claimant for an orthopedic evaluation. The injections helped for only "about two weeks." Claimant continued working and did not pursue the orthopedic evaluation. Claimant knew he would probably need a knee replacement at some point but planned to delay the procedure as long as possible.

[1] The notation of "12/10" pain is puzzling, because there are no other instances of exaggerated "off the chart" pain reports, including immediately after Claimant's October 2021 work accident when he reported 7/10 pain despite being "unable to bear weight" on the knee. Claimant credibly testified he did not recall reporting his pain was 12 out of 10.

9. Claimant followed up with Dr. Fields two additional times before the October 25, 2021 accident regarding general health issues. Neither report contains any mention of left knee issues.

10. Claimant worked two periods for Employer, from approximately September 2018 through December 2020, and from July 2021 until the work accident on October 25, 2021. Claimant also performed more than 20 years of physically demanding work in the construction trades. There is no persuasive evidence Claimant's left knee limited his ability to work before October 2021.

11. Employer referred Claimant to Dr. Thomas Centi for the October 25, 2021 work accident. At the initial evaluation, Dr. Centi documented moderate edema, moderate effusion, tenderness to palpation, and severely reduced range of motion. Claimant reported 7/10 left knee pain. Dr. Centi ordered a hinged knee brace and an MRI. He gave Claimant work restrictions of no lifting more than five pounds and only seated work 95% of each shift.

12. The MRI was completed on October 30, 2021. It showed a large joint effusion, consistent with Dr. Centi's post-injury clinical exam findings. It also showed chronic severe degenerative osteoarthritis, a tear of the previously repaired ACL, and a large loose body.

13. Claimant saw Dr. David Walden for an orthopedic evaluation on November 9, 2021. He was still non-weightbearing and using crutches. Claimant described the work accident and his pre-injury history of left knee problems. Dr. Walden reviewed the MRI and obtained x-rays in the office, which showed "end-stage tricompartmental osteoarthritis." Dr. Walden noted it was "difficult to know exactly" what, if any, pathology shown on the imaging was caused by the work accident. He opined an ACL repair was not indicated given the severe degenerative changes, and the only reasonable surgical option would be a total knee arthroplasty. His assessment included "left knee acute irritation of underlying end-stage osteoarthritis." Dr. Walden injected Claimant's knee, referred him to physical therapy, and recommended he start weaning off the crutches.

14. Claimant followed up with Dr. Walden on December 7, 2021. He still could not bear weight on the left leg. Dr. Walden documented, "I explained to the patient that a good deal of his pathology is not due to a work-related injury, however, it does seem as though the function of his knee has changed significantly. He was able to do a vigorous job doing HVAC for his company and now is on crutches and barely able to bear weight." Dr. Walden opined the injury may have caused the pre-existing loose body to become symptomatic, either by changing its position or setting off a reaction in the joint. He acknowledged the procedure would not fix all of Claimant's problems with the knee but thought it could provide some relief.

15. Dr. Walden performed arthroscopic surgery on December 20, 2021. He removed multiple large loose bodies, debrided the remaining medial meniscus, and performed a synovectomy.

16. Claimant's pain improved somewhat with post-surgical therapy, but the knee remained symptomatic and disabling.

17. Dr. Centi put Claimant at MMI on March 31, 2022. He noted Claimant had completed his post-surgical therapy and the only remaining option was a knee replacement. Because Dr. Centi did not believe a knee replacement was related to the work injury, he concluded Claimant was at MMI. Dr. Centi assigned a 23% lower extremity scheduled rating, including 5% under Table 40 for degenerative arthritis, combined with range of motion. He gave Claimant permanent work restrictions of no lifting more than 10 pounds, no ladders, minimal stairs, no kneeling or squatting, and must be sitting 50% of a shift. The permanent restrictions are incompatible with Claimant's pre-injury job for Employer, or his past work in the construction trades.

18. Insurer filed a Final Admission of Liability based on Dr. Centi's rating. Claimant objected and requested a DIME.

19. Dr. Mark Failinger performed an IME for Respondents on June 17, 2022. Dr. Failinger noted Claimant's left knee was severely arthritic before the October 25, 2021 accident. He saw no objective evidence in imaging studies or other medical data that the work injury caused any new pathology in Claimant's left knee. Despite acknowledging that Claimant suffered a significant sprain when he fell in the sump pump hole, Dr. Failinger opined the accident did not aggravate or accelerate the pre-existing condition. He agreed a knee replacement is reasonable given Claimant's severe, end-stage degenerative osteoarthritis. However, he believes a knee replacement is solely related to the pre-existing condition, and not to treat address any pathology created by the injury. Therefore, he agreed with Dr. Centi's determination of MMI.

20. Dr. John Bissell performed the DIME on November 7, 2022. Dr. Bissell was provided a voluminous packet of records. Although he reviewed the records, he considered it unnecessary to discuss each record individually in his report. He also reviewed Dr. Failinger's IME report, including the "comprehensive history . . . and record review" documented therein. Dr. Bissell noted Claimant's 1996 knee injury required three surgeries and resulted in a 22% lower extremity impairment rating. He experienced episodic knee pain thereafter. Dr. Bissell acknowledged that Claimant "was not asymptomatic" before the October 25, 2021 work accident and had received steroid injections in both knees in March 2021. He noted imaging studies after the October 25, 2021 injury confirmed severe degenerative changes. Nevertheless, Dr. Bissell emphasized that Claimant "was working full duty . . . had no permanent restrictions and was not independently disabled at the time of his October 25, 2021 work injury." Dr. Bissell concluded Claimant would probably still be working full duty "but for" the work accident. Dr. Bissell concluded the October 25, 2021 accident "resulted in permanent aggravation of his known pre-existing severe left knee osteoarthritis, and the only remaining remedy for this condition is total knee replacement. Therefore, the work injury is the proximate cause of his need for a total knee replacement." Accordingly, Dr. Bissell determined Claimant is not at MMI.

21. Dr. Failinger testified at hearing to elaborate on the opinions expressed in his report. He thoroughly explained the basis for his conclusion that the October 2021 injury caused no "new pathology" or identifiable structural change in Claimant's underlying anatomy. He reiterated that a knee replacement is reasonable to address Claimant's end-stage osteoarthritis but is not causally related to the work accident. He disagreed with Dr. Bissell's determination regarding MMI, because "everything that was claim-related has been treated."

22. Respondents failed to overcome Dr. Bissell's determination of MMI by clear and convincing evidence. Everyone agrees Claimant had severe, pre-existing degenerative arthritis and a knee replacement is reasonable. The fundamental disagreement involves causation. Dr. Failinger's opinions, while well-reasoned and eloquently presented, do not prove that Dr. Bissell's causation determination was highly probably incorrect.

23. Insurer was paying Claimant admitted TTD benefits immediately before Dr. Centi placed him at MMI. Insurer terminated Claimant's TTD benefits effective March 31, based on the determination of MMI. The record establishes no other basis for termination of TTD benefits, such as a full-duty release or return to work. Because Claimant has been determined not at MMI, he is entitled to reinstatement of TTD benefits as of March 31, 2022.

24. The endorsed issues of PPD, apportionment, and overpayment are premature and rendered moot by the failure to overcome the DIME.

CONCLUSIONS OF LAW

A. Respondents failed to overcome the DIME regarding MMI

A DIME's determination of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging the DIME's conclusions must show it is "highly probable" the determination of MMI is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

The existence of a pre-existing condition does not disqualify a claim for compensation or medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The assessment of MMI "inherently" includes a determination what conditions, if any, are causally related to the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Therefore, in this context, Respondents must overcome Dr. Bissell's conclusion that the injury aggravated Claimant's condition by clear and convincing evidence.

As found, Respondents failed to overcome the DIME's MMI determination by clear and convincing evidence. Dr. Bissell's conclusion that the work accident aggravated Claimant's pre-existing condition and proximately caused the current need for a knee replacement is a reasonable interpretation of the available evidence. The argument that Dr. Bissell performed an inadequate review of medical records and failed to appreciate the extent of Claimant's underlying pre-existing condition is not persuasive. Dr. Bissell knew Claimant had advanced osteoarthritis affecting his knee before the work accident. He knew Claimant's knee was "not asymptomatic" and required episodic treatment, including injections seven months before the injury. However, Dr. Bissell concluded the symptoms became worse and Claimant's functional status declined significantly after the work accident. Those were the critical factors informing Dr. Bissell's determination that the injury aggravated and combined with Claimant's pre-existing condition to accelerate his need for a knee replacement. There is no clear and convincing evidence that these determinations were incorrect.

Dr. Failinger and Dr. Bissell are looking at this case from fundamentally different perspectives. Dr. Failinger considered "aggravation" from a pathologic and anatomical perspective, whereas Dr. Bissell focused on the alteration of Claimant's symptomology and functional status. These competing approaches produce very different conclusions, because even if the injury caused no objective structural change to Claimant's knee, it dramatically altered his level of symptoms and, more important, his functional capacity. Claimant had a severely degenerated left knee immediately before October 25, 2021, but performed physically demanding work without difficulty and required only infrequent treatment. Dr. Bissell's characterization of Claimant's pre-injury flares as "episodic" is consistent with the sporadic nature of treatment before the work accident. Although reasonable physicians may disagree about the meaning of the term "aggravation" from a medical standpoint, Dr. Bissell's analysis is consistent with applicable legal standards. An injury need not cause any identifiable structural change to a claimant's underlying anatomy to cause a compensable aggravation. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Id*. Dr. Bissell was reasonably persuaded those criteria were met, and the evidence to the contrary does not rise to the level of clear and convincing.

B. Reinstatement of TTD effective March 31, 2022

Once commenced, TTD benefits "shall continue" until the occurrence of a terminating event enumerated in § 8-42-105(3)(a)-(d). Insurer was paying admitted TTD benefits when Dr. Centi placed Claimant at MMI on March 31, 2021. Although Insurer was entitled to terminate TTD at that time under Rule 6-1(A)(1), the determination that Claimant is not at MMI entitles him to reinstatement of TTD benefits.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME regarding MMI is denied and dismissed.

2. As stipulated by the parties, Claimant's average weekly wage is $957.21, with a corresponding TTD rate of $638.14, effective February 1, 2022.

3. Insurer shall pay Claimant TTD benefits, at the rate of $638.14 per week, commencing March 31, 2022 and continuing until terminated by law.

4. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 16, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-228-965-001

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that she suffered an occupational disease arising out of and in the course and scope of her employment with Respondent?

FINDINGS OF FACT

1. Claimant is a registered nurse (RN). She has most recently been employed with Respondent since 2017. At the time she returned to employment with Respondent in 2017, Claimant was hired as Valve Clinic Coordinator. In that position, Claimant oversaw the creation and development of the valve clinic portion of the Cardiovascular Department.

2. Claimant's job duties included all aspects of starting the clinic, including undergoing training and marketing the clinic. Once the clinic began seeing patients, Claimant's job duties included reviewing charts, determining if a patient meets specific criteria, reviewing imaging such as echocardiograms, meeting with patients, educating patients, preparing and giving presentations to the clinical staff, doing rounds, and performing research.

3. Claimant testified that she began to notice pain in her hands in August 2022. At that time, she believed she was experiencing general body aches or pain caused by a ganglion cyst on her wrist. Claimant further testified that her pain symptoms worsened and began to include numbness and tingling. These symptoms occurred both at work and at home. However, at work the symptoms became more severe. Claimant began using a brace on her right wrist while at work.

4. Claimant testified that overtime her pain continued to worsen and ultimately she sought treatment at an urgent care practice. Claimant testified that the provider she saw at that facility believed Claimant was suffering a stroke and did not provide treatment modalities for Claimant's hands and wrists.

5. Thereafter, Claimant elected to seek treatment with an orthopedic specialist. On December 5, 2022, Claimant was seen by orthopedic surgeon, Dr. James Treadwell. At that time, Clamant reported symptoms that included numbness in her bilateral hands, with radiation into her forearm and elbow, and occasional tingling into her shoulder. Claimant also reported wrist pain and swelling. On December 5, 2022, x-rays of Claimant's bilateral wrists showed mild degenerative changes at the basilar joints of both thumbs, and mild degenerative changes between the scapholunate

interval. Based on his examination and the x-ray findings, Dr. Treadwell ordered electromyography nerve conduction studies {EMG/NCS).

6. On January 23, 2023, Dr. Robert Frahzo performed bilateral EMG/NCS. Dr. Frahzo's report of that date notes that the studies showed evidence of bilateral carpal tunnel syndrome. He noted that it is moderate to severe on the right, and moderate on the left.

7. On February 6, 2023, Claimant returned to Dr. Treadwell. At that time, Dr Treadwell discussed treatment options, including surgical intervention. In the medical record of that date Dr. Treadwell noted "[p]atient having difficulty with quality of life this is work related." Claimant elected to proceed with bilateral endoscopic carpal tunnel release surgery.

8. On January 26, 2023, Claimant notified her supervisor of Dr. Treadwell's recommendations. Claimant's supervisor referred Claimant to human resources. On January 26, 2023, Claimant was instructed to complete an Injury or Illness Recap Report. In that report, Claimant was quoted as stating "I started having pain to both wrists about 6 months ago. I have already been to Urgent Care and the [emergency department], a [doctor] at Rocky Mountain Ortho on 12/5/22, and a nerve [doctor] on 1/23/23. I got diagnosed with carpal tunnel to bilat[eral] wrists but continue to have pain to both wrists while I work (Repetitive movements causing pain)." At that same time, a Workers' Compensation - First Report of Injury or Illness was prepared by Respondent.

9. On January 26, 2023, Claimant was seen by Dr. Spencer Olsen as her authorized treating physician (ATP) for this claim. At that time, Claimant reported a date of injury of August 1, 2022. Dr. Olsen noted that Claimant had several months of bilateral hand pain and numbness, with numbness and tingling into the whole arm. Dr. Olsen opined that Claimant's condition is not work related. Specifically, Dr. Olsen noted "[e]vidence is weak for relatively light, repetitive tasks as a cause of carpal tunnel syndrome. Whereas there is strong evidence for age, gender and diabetes." Dr. Olsen recommended that Claimant pursue treatment through her private insurance. Claimant has not returned to Dr. Olsen.

10. On March 10, 2023, Torrey Beil, Vocational Consultant, authored a Job Demands Analysis and Risk Factors Analysis. Although Ms. Beil was unable to observe Claimant in the performance of her job duties, she was able to gather information regarding Claimant's position. In her report, Ms. Beil noted that Claimants work activity was sedentary, with computer based activity of approximately one half of any shift. In addition, Claimant was estimated to attend meetings approximately four times per week. Ms. Beil opined that Claimant's job functions do not include any risk factors for carpal tunnel.

11. Dr. Olsen testified via deposition and was accepted as an expert in occupational medicine. Dr. Olsen testified that Claimant presented to him with severe bilateral hand pain and numbness. Dr. Olsen further testified that Claimant attributed the cause of her symptoms to repetitive work activities. Dr. Olsen reiterated his opinion that

Claimant's diagnosis of carpal tunnel is not work related. In support of this opinion, Dr. Olsen noted that Claimant does not have workplace risk factors for carpal tunnel syndrome. In addition, Claimant has other risk factors that are stronger; including her age, gender, and Type 2 diabetes.

12. Claimant testified that her diabetes is well controlled and her A1C level is under 6. Claimant testified that Dr. Treadwell performed the right carpal tunnel release in early March 2023, and the left carpal tunnel release in late March 2023.

13. Claimant also testified that she disagrees with Ms. Beil's report, as it does not accurately reflect her job duties. Claimant testified that she spends approximately 80 percent of any shift performing computer work. This includes research, reviewing patient charts, and writing letters summarizing her conversations with patients. In addition, Claimant would use her computer to ensure necessary testing was being completed. Claimant further testified that her job duties included interviewing patients via telephone, entering data, and and at times she wrote things down. Claimant testified that she varied her activities between typing and mousing and she took breaks throughout the day.

14. The ALJ takes administrative notice of the Colorado Medical Treatment Guidelines (MTG), specifically WCRP 17 Exhibit 5 which addresses the guidelines for cumulative trauma. WCRP 17 Exhibit 5(0)(3) sets forth the General Principles of Medical Causation assessment. That rule states that legal causation is based on the totality of medical and non-medical evidence, which may include, age, gender, pregnancy, BMI, diabetes, wrist depth/ratios, and other factors based on epidemiologic literature. Regarding keyboarding, the MTG notes that most of the studies rely on self-report, which appears to approximately double the actual time spent using the keyboard. The MTG also notes that group studies provide good evidence that keyboarding in a reasonable ergonomic posture[1], up to 7 hours per day under usual conditions is very unlikely to cause carpal tunnel syndrome. The MTG lists risk factors for carpal tunnel syndrome as: combination of repetition and force for six hours; combination repetition and forceful tool use with awkward posture for six hours; combination of two pound pinch or ten pound hand force three times or more per minute for three hours.

15. The ALJ credits the Claimant's testimony regarding her work duties. The ALJ finds that although Claimant did perform computer work throughout her work day, those activities were varied and not continuous data entry for seven straight hours without a break. The ALJ also credits the medical records, the MTG regarding cumulative trauma, the opinions of Ms. Beil, and the testimony and opinions of Dr. Olsen. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that she suffered an occupational disease while employed with Respondent.

[1] Wrist with 30 degrees or less of extension, and 15 degrees or less of radial deviation.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. **App.** 2000).

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove, by a preponderance of the evidence, that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with thevocation must

be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Gotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

7. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

8. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois,* Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); see *also Burchard v. Preferred Machining,* W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTO); see a/so Stamey *v. C2 Utility Contractors* et *al,* W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease while working for Respondent. As found, Claimant's testimony regarding her job duties, the medical records, the MTG, and the opinions of Dr. Olsen and Ms. Beil are credible and persuasive.

ORDER

It is therefore ordered that Claimant's workers' compensation claim is denied and dismissed.

Dated June 20, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301{2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to attendant care companion services and/or a long term care facility or an independent living facility.

STIPULATIONS OF THE PARTIES

Claimant stipulated that the attendant/companion care services they are requesting do not include essential services such as cleaning, cooking, or personal care as Claimant is able to take care of her activities of daily living.

The parties also stipulated that Exhibits 10 and 11 no longer required a foundation and could be admitted into evidence.

This ALJ approves the stipulations of the parties, and the stipulations are incorporated into this Order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. This matter involves an adjudicated permanently and totally disabled worker who was injured in the course and scope of her employment. She was held up at gunpoint two different times. Claimant was able to recover and return to work after the April 18, 2007 robbery where she was held up by four men while working alone at a gas station on the 10 p.m. to 7 a.m. shift at a gas station, though she experienced some anxiety, and became more vigilant. On March 8, 2008 Claimant was held up at gunpoint to the head by two men that accosted her. Claimant became more angry and frightened by this event. Claimant was unable to recover from the diagnosed post-traumatic stress disorder (PTSD), due to the resultant anxiety, panic attacks, chronic fear, and depression.

2. Claimant was evaluated by Dr. Gutterman at Respondent's request and he issued a report dated February 20, 2009.[1] He took a history and noted that Claimant suffered from post-traumatic stress disorder (PTSD) as a result of the March 8, 2008 robbery. Dr. Gutterman believe Claimant was at Maximum Medical Improvement from a psychiatric perspective, had persisting PTSD symptoms that "may gradually lessen both with continuing supportive treatment by Dr. Kenneally, as well as the tincture of time." He noted that Claimant had clearly .improved from a psychiatric/psychological perspective;

[1] Claimant had been previously evaluated by Dr. Gutterman, who recommended an impairment rating related to the April, 2007 claim.

however, many of her symptoms persisted. He provided an impairment rating and recommended Claimant return to work but not as a cashier. He stated that she should continue on medication for another 12 months and with Dr. Kenneally in outpatient therapy for another six months to a year.

3. Claimant was seen for a psychological evaluation by Dr. Walter J. Torres at Claimant's request on August 15, 2009. He disagreed with Dr. Gutterman's recommendations finding as follows:

> The degree of posttraumatic symptomatology that [Redacted, hereinafter MM] manifests, especially as registered by the nonnegotiable concreteness of her belief in the reality of the dangers that afflict her, strongly signals that with reasonable probability, her Posttraumatic Stress Disorder can be expected to be of a chronic nature. Accordingly, it is psychologically reasonable to expect that her condition will linger beyond a year and that she will be in need of psychopharmacological treatment significantly beyond one year. Given the kind of particularly malignant forms of trauma that she underwent, i.e. repealed traumas of a malicious nature, it would not be at all surprising that her need for treatment will be of indeterminate duration.

4. Dr. Torres recommended increasing her Lexapro, and providing her with medication to assist with her sleep disruptions related to nightmares. He stated that since her medication regimen had not stabilized that she was not at MMI. He also provided an impairment rating.

5. On December 23, 2010 Dr. Ann Sartori, Psy.D., recommended desensitization involving the workplace, having her children drive her by the workplace with her and going in with her if possible. Her providers were recommending accompaniment all the way back then, while Claimant had not yet reached MMI and was still under active psychological treatment. Dr. Sartori noted that Claimant had avoidance behaviors and was limiting her social interactions.

6. Authorized treating physician, Dr. Howard J. Entin, M.D. a Medical Director for Colorado PsychCare, attended Claimant on March 6, 2012, noting residual PTSD, agoraphobia, nightmares, avoidance of triggers, decreased interest, hyperarousal, insomnia, and hypervigilance. He noted that despite the years of treatment and time, claimant had no change of symptoms and stated that it was unlikely further treatment will have any effect.

7. Dr. Entin placed Claimant at MMI from psychiatric standpoint on October 15, 2012**,** stating that psychosocial status did not appear to have changed. He reported she was spending all her days with various friends, never alone, she never drives because she was too anxious, though she could go to public places, but was still fearful. She was still obsessed and ruminated at times.

8. Dr. Gutterman issued a follow up IME on December 11, 2012. He documented that Claimant's "problems have become her children's problem." He documented that her three children got frustrated with her and noted that Claimant called her son frequently and he would tell her, "Momma, you call all of the time." Dr. Gutterman also documented that she felt like the nightmares would not leave her alone.

9. On January 23, 2013 Dr. Sartori noted that her children were concerned that Claimant would become easily agitated and angry. She was too dependent upon them. The children reported that they had lost their mother as they knew her. On February 23, 2013 Dr. Sartori noted that Claimant continued to suffer from severe PTSD though had parts of her days where she was less afraid. She did not stay in the house alone, day or night, she was not driving, she saw shadows of people that terrified her, she continued to experience nightmares of the trauma with the gun at her head, was easily startled, experienced helplessness and anxious states with severe depression, anxiety and mood instability.

10. Dr. Robert Kleinman performed a Division of Workers' Compensation IME on February 5, 2013. He documented review of Dr. Sartori's treatment records which included struggles with family, health and continued insomnia, exaggerated startle, hypervigilance, depression, and hopelessness, continued PTSD and major depression, and noted that Claimant would have anxiety attacks that would prevent her from working. Dr. Kleinman provided an apportioned impairment of 9% whole person.[2]

11. On April 29, 2014 ALJ Margot W. Jones issued a Summary Order granting permanent total disability benefits.

12. Respondents filed a Final Admission of Liability on June 19, 2014 noting that they were authorizing continuing maintenance care that was reasonably necessary and related to the injury by an authorized treating physician. The also admitted to Claimant's permanent total disability beginning as of her MMI date of October 15, 2012. This was based on ALJ Jones' Summary Order

13. Dr. Entin issued a report on June 20, 2022. He noted that he had first seen Claimant on April 14, 2009, about a year after her injury for purposes of determining maximum medical improvement (MMI) and assigning a permanent impairment rating. Dr. Entin noted that he had been treating Claimant for the last 13+ years to provide maintenance care. He noted that Claimant still had PTSD symptoms, was avoidant and vigilant in public, and relied on the presence of others to make her feel safe. He opined that, within a reasonable degree of medical probability that part of her need to be with others was as a result of these two robberies. He also opined that Claimant would continue to require her current medications for an indefinite period of time and would need visits with him every 4-6 months for refills. He stated she no longer required further counselling.

14. Dr. Torres issued a report on August 22, 2022. Dr. Torres took a history that Claimant was Ethiopian, divorced, had three children in their 30s and that her youngest daughter stayed with her and could not move out because Claimant could not stay by herself, and that when the last robbery happened all three children lived with her. He noted that medication usage was as follows:

> She reported using Lunesta 3 mg on a nightly basis and Lexapro 20 mg on a daily basis. When she gets more acutely depressed or anxious she takes two Lexapro. She believes that she does that about twice per month. (She acknowledges that Dr. Entin has advised against this practice.) She takes Klonopin, as needed for

[2] Dr. Kleinman noted that 5% whole person impairment was provided for PTSD resulting from the first assault of April 18, 2007.

> panic symptoms. She almost always, if not always, lakes half the Klonopin tablet when she goes out. If she goes to the mall and she sees someone wearing a hoodie "that is the worst ... or scary things, a lot of things scare me"--she takes a whole tablet.

15. Dr. Torres noted that she felt restricted with respect to independent action and intolerance of aloneness was understood as a primary concern. He noted that Claimant could not tolerate being home alone greater than two hours. If her children were unavailable, then she would rely on friends to pick her up as aloneness was plainly intolerable. She also relies on other family members, like her nephew to keep her company. She has physical limitations due to an unrelated cancer, a hip replacement that caused limited motion and she has family come clean the bathroom, twice per week, and to other activities for which they are paid as home health care aids.

16. Dr. Torres explained he administered the gold standard testing pursuant to the DSM-5 for PTSD, which required Claimant meet specific criteria in five domains, which include A) experience of an event that meets criteria as a traumatic stressor; B) intrusive ideation (e.g. intrusive thoughts, memories, and nightmares), C) avoidance of reminders of traumatic incidents (whether emotional, physical, or interpersonal), D) marked alterations in cognitions or mood (loss of memory of aspects of the traumatic event, negative beliefs or expectations about oneself and the world, diminished interest or pleasure), and E) physiological hyper-arousal (e.g. poor sleep, hypervigilance, and overly reactive startle response).

17. Dr. Torres noted that the incidents in Claimant's case clearly meet criteria as traumatic event. She has intrusive thoughts about the woman that requested to use of the bathroom as well as the man that pointed the gun at her head and the gun clicking. She frequently remembers these events either triggered by events or in her dreams, specifically the clicking of the gun and visions of the man in the hoodie that are triggered by the sight of any man in a hoodie. She reacts with increasing stress and attempts to ameliorate the symptoms by taking additional medications. The intrusive memories also generate a feeling of panic. These intrusive and unwanted recollections occur four to five times per week. Claimant has disturbing dreams associated with the trauma about three times per week and sometimes stays up for long periods and others she sleep the remainder of the night with her daughter. Dr. Torres documented that Claimant has acute reaction to reminders of the trauma which occur once or twice per week. He also noted that Claimant has a physiological response, panic attacks, when she sees someone in a hoodie, scarf or if she is startled by someone.

18. Dr. Torres documented that Claimant consciously avoids being quiet or alone for too long because she is prone to become immersed in thoughts or feelings associated with the traumatic event and she begins to cry. She also avoids going out. She engages in avoidance efforts on a daily basis.

19. She has developed a distrust of the world, with the exception of family and close friends. She frequently has bad feelings about the world and frequently ruminates about them. She engages in self-recrimination, she has persistent negative emotions like discouragement, demoralization, irritability, anger, with loss of quality of life and marked diminished interest in engaging in socializing independently or being independent. Dr. Torres opined that this loss of ability is extreme and disabling.

20. Dr. Torres noted that Claimant is frequently irritable, has an exaggerated startle reaction that occurs on a regular basis, even to an unexpected knock on the door. This occurs approximately twice a week. She has problems with concentration, hypervigilance, and sleep disturbance including nightmares, which cause her to frequently cry at night or disrupt her daughters slumber, though she had none of these problems prior to the traumatic event. Claimant has been suffering from these problems for over 13 years and she continues to suffer from them. She is no longer able to drive as it causes un-elicited panic, she does not socialize or go to movies and is unable to tolerate aloneness.

21. Finally, Dr. Torres opined that Claimant has a diagnosis of chronic PTSD and adjustment disorder with depressed mood. The findings of the interviews convincingly depicted Claimant as presently suffering from severe and disabling Posttraumatic Stress Disorder. The rigors that her family must engage in to manage her impairments, especially her intolerance of aloneness and her periods of overwhelming distress, attest to this. Further, and important to note in this context, is that by pre-injury history, Claimant was far from dependent or needy in temperament. She never had been a dependent personality. She very much enjoyed a highly independent, social, and assertive disposition. Accordingly, she presently hates and laments that she cannot engage in the routinely rewarding actions and way of life of her former (pre-injury) self. Dr. Torres opined that Claimant requires a companion for at least seven to nine hours a day and ongoing maintenance medications that may be need indefinitely.

22. Claimant's daughter, R.N., provided a statement describing her relationship with her mother on August 27, 2022. She stated that she had to accommodate her mother's increasing need caused by her fears and limitations, including in providing her assistance with shopping by driving her, providing company and verbal support by calls and video chats. She frequently would accompany her mother after work due to her fear of being alone. When she and her siblings were not available, she would take her mother to a friend's house for company throughout the day, which occurred most days. She stated that her mother was fearful of being alone. She stated Claimant was uncomfortable handling money following her trauma and must assist with her finances. She assists with handling bank matters and transactions at the stores. She stated she received a large amount of calls during the day, which were difficult to always answer because she was at work but would because her mother was always fearful and anxious. She stated that she spent approximately 20 or more hours during any week providing care to her mother with different tasks and companionship as she has a consistent need for people around her at all times due to the trauma of being robbed at gunpoint.

23. On August 28, 2022, her other daughter, I.N., noted that she had helped her mother due to her PTSD. She has had to take her to appointments, dropping her off at a friend's house, getting her out of the house, for walks at the mall of the park, taking her to doctor appointments and spending time with her when she feels anxious and nervous. She stated "[S]ince my mother battles with PTSD, I have seen it take a toll on her everyday life. She can't be alone for too long because she gets scared and is worried that something might happen." She stated that when she works, her mother is with friends or other family. I.N. stated that she spends approximately 40 to 50 hours with her mother a week. She stated that "Overall my mother's trauma is still present and affects her

everyday life. We as a family and friends try to help her with her depression and try to understand her emotions to the best of our ability."

24. F.N., Claimant's son wrote a statement on August 31, 2022. He said that he is always with his mother when his sisters, family or friends were not available. He stated that his mother asks him to stay until someone else is there. He stated that he is there to assist her and so she does not feel alone, going on walks with her, run errands and accompanies her to get out of the house. He stated that he spent between 40 to 60 hours making sure her needs are met. He stated that his mother never travelled alone and that she does not drive due to the possibility that she might experience a panic attack while driving. He stated that, as a family, they coordinated their schedules and made arrangements so that Claimant was never alone. He stated that Monday through Wednesdays are his days to take care of his mother at night from 6 p.m. to 6 a.m., when he goes to work.

25. On September 14, 2022 Dr. Torres wrote an addendum report after reviewing Claimant's children's affidavits. He noted that their descriptions of Claimant's inability to tolerate aloneness, to drive, to be out alone on her own, to be quiet and disengaged for too long or to engage in financial transactions were fully consistent with Dr. Torres' findings in the psychological evaluation as well as his belief that the Claimant's deficits are entirely caused by the work injury related PTSD. Dr. Torres opined that Claimant required unskilled essential services as her children had been devoting extraordinary time allotments that "grossly strain their work and independent lives." He specifically stated:

> Tending to [Claimant]'s needs seriously restricts her youngest daughter's ability to tend to essential developmental needs of her own life. Further, even when available to be with her and able to accommodate her need for accompaniment, [Claimant] needs specific assistance with engagement and conversation, transportation for errands, socialization, financial transactions, and company to simply be able to be outdoors.

26. Dr. Torres revised the amount of time Claimant currently requires a companion or unskilled essential services to ten to twelve hours a day for an indefinite amount of time. Dr. Torres further stated that while age is not a factor as Claimant is unlikely to change, he stated that without the needed essential services Claimant's daughter is "on route to deeply sacrificing her own personal development" as well as her two other children to a lesser degree. He stated that as they continue to tend to their personal lives, relationships, vocations and families, Claimant will require the provision of more essential services.

27. On October 26, 2022 Dr. Entin authored a report stating his agreement that Claimant needs essential services in order to unburden her children but that they would still be responsible for the other 12 hours, which is not sustainable or reasonable in the long term. He stated that given Claimant's ongoing needs he opined that "she would be much better served moving into an Independent Living Facility where she could have daily meals prepared and people available and around her 24 hours a day." Dr. Entin also opined that "were it not for these robberies, and the development of her current emotional state and behaviors, it is unlikely she would have needed this level of care and intervention that she currently claims she needs."

28. Claimant was evaluated by Dr. Timothy Shea, a clinical psychologist and neuropsychologist on January 17, 2023 and produced an independent medical evaluation (IME) at Respondents' request dated January 30, 2023. He reviewed the medical records listed in his report, summarizing what he thought pertinent to his evaluation. He summarized Claimant's background, educational history, work history, family history, current home life, activities of daily living (ADLs), acculturation, social environment, substance use as well as medical history, sleep, treatments, psychiatric functioning, and stated that Claimant's appropriate diagnosis was post-traumatic stress disorder (PTSD). He noted that the two incidents of robbery that occurred in 2007 and 2008 negatively impacted Claimant. However, he did not recommend attendant care services in the form of a companion as Claimant needed to become less dependent. He recommended Claimant be more active, less isolationist and dependent on her children. That companionship was a preference and not a necessity, and not clinically indicated.

29. On February 10, 2023 Dr. Torres issued a letter noting that Claimant's current condition cannot be apportioned and are solely the result cause by the robbery events though other factors have been identified, they are still as a consequence of these events on Claimant. He also noted that Claimant and her family should seriously consider the Independent Living Facility option.

30. Claimant credibly testified she never had problems going out on her own, going to medical appointments, going to work, shopping or doing other activities of daily living prior to the assaults. Neither was she afraid of people, nor did she require having someone with her at all times.

31. Since the March 8, 2008 traumatic event she has problems being alone. Her daughter, who is about 31 years of age, lives with her. Claimant frequently gets panic attacks when she is alone, as well as anxiety. She cannot live by herself. When she is left by herself, she has anxiety at the highest level, especially if someone knocks on the door, or if someone refers to guns, when she hears sirens, or if she simply hears any violent words or noises.

32. Claimant also suffers from depression especially if she is alone in the house, and sometimes just being alone in her bedroom. She suffers from panic attacks when she is alone in the house, when she sees somebody with a hoodies, from violent things that she hears on the television, like the news, or if she hears someone was robbed, which are the worst things. People with hoodies or scarves remind her of the robbers when she was attacked.

33. When Claimant is alone she gets panic attacks, becomes depressed, will cry, be very sad and she will frequently stay in bed. However, she does her best to never be alone. When she is alone, maybe for two or three hours, but only during the day, she will become depressed, cry and get panic attacks. She will constantly call her kids or friends during the time when she is alone because of the panic attacks or her kids will call her to make sure she is okay. She never feels safe when she is alone. She is never alone during the night. When there is no one to be with her, she will go to a friend's house so that she is not alone at night.

34. Even when she goes out in public she is never alone. Since her traumatic event she has tried going out alone but is unable to do it because she becomes very

scared and panicky. She needs someone to stay with her every day during the day. If her daughter cannot be there during the night, then she simply goes to a friend's house. When another person is with her, her anxiety, fear, panic attacks and depression seem to be less controlled. Every Friday night, she will normally go to a friend's house because her children want to go out, and afterwards they pick her up.

35. A long time ago Claimant attempted to travel to California alone, and she became panicky, scared and uncomfortable. She has also travelled back home to Africa. She travelled once with two of her daughters for one of her daughter's wedding. She stayed for about a month or a little longer. She flew from Denver, to Chicago and then to Djibouti, West Africa. She did not go out after the wedding. The wedding was mostly family, though there were some people on the groom's side that she did not know. Otherwise, she stayed at her mother-in-law's house. The other time she travelled to Africa she travelled to Ethiopia for her uncle's funeral. She travelled with her friend and stayed there for about two and one half to three months. She stayed there so long because she was sick, she needed family, and she was very depressed. She stated that she would have been unable to attend the events if she had not travelled with someone she trusted. When she was there, a family member or a friend she trusted was with her at all times. She only recalled going out when she was accompanied by her cousins.

36. Claimant stated that Dr. Howard Entin was her provider to treat her for her ongoing conditions and he is the one who prescribes her all of the medication. She takes her medications regularly, every day as he prescribes them. She is willing to follow the recommendations that Dr. Entin made, for the short term for someone to stay with her, and in the long run to go into an assisted living situation.

37. Claimant admitted that she walked with a cane due to cancer of her leg, which caused her to have a hip replacement and surgery on part of her thigh.

38. Her children do help her with some chores around the house, such as cleaning, cooking and laundry. They do not help her with feeding, dressing or with her self-care like bathroom, bathing/showering. For the most part, her children are there to keep her company and to go out with her when needed.

39. Claimant's daughter, R.N., also testified at hearing. She is a case manager for a health care center. She identified Exhibit 9 as a true and correct statement she made in August 2022. She testified that she supported her mother with companionship either in person or by phone. While she does not live with her mother, she only lives 5 minutes away. She generally has to devote at least 20 hours or more a week typically, especially if her siblings are not available. If it were not for Claimant's current status, she would not be likely to spend as much time with her. She does it because her mother gets scared of being alone and she does not wish her mother to have so many panic attacks. When she and her siblings are not available, she relies on her friends to stay with her or they will pick her up. She stated that her mother has a good community of friends. She stated that otherwise, there are a lot of phone calls and they support her mother that way. She often drives her to her friends, especially if she and her siblings have things to do, they will drop her mom off at friends and pick her up when they are done. She stated that her mother no longer drives.

40. Ms. R.N. stated that her mother is scared all the time. Chores that seem mundane to her and her siblings, her mother can just not do, for example, going to collect the mail. She cannot do it by herself because she gets too scared. She stated Claimant does not go anywhere by herself, not even the grocery store. She is always accompanied by someone. She stated that at night she gets very, very scared and that it was not possible to leave her on her own. She noticed that, so long as her mother is with someone, she is less fearful, less depressed, less anxious and overall calmer. Ms. R.N. stated that she prefers that her mother never be alone because her mother is better when accompanied. However, when they have no choice but to leave her alone, she is constantly calling one of them, Claimant's children, or finding a friend.

41. Claimant's daughter, R.N., stated that she and her siblings do their best to always have a schedule that prevents her mother from being alone, always covering for each other. She and her siblings have been managing this kind of schedule for approximately thirteen years.

42. Claimant's other daughter, Y.N., also testified at hearing. She is a banker. She is 31 years old. She lives with her mother and has done so her whole life but it became crucial since her traumatic event happened. She helps her mother cope with her PTSD symptoms by talking to her when she gets anxious or nervous, takes her on outings to distract her, or keeps her company while watching TV or a movie. Sometimes Claimant gets so stuck in her head that the distractions are needed. She works varied days, though mostly weekdays, but when she is not working, she keeps her mother company. She makes arrangements for her cousins or friends to stay with her mother when she is working and her siblings are not available. Ms. Y.N. stated that her mother needed the help most during the nighttime, after the sun starts setting, as her anxiety starts going up then, and she sees a shift in her mother's mood. It doesn't happen daily but it is the majority of the time.

43. Ms. Y.N. stated that, if it had not been for the fact that Claimant has PTSD, she would likely not live with her mother at this stage in her life, since she really needs her own space. She only lives with her because her mother needs her help. She is with her mother over 40 hours a week, not counting when she is sleeping. Sometimes they are getting ready to go somewhere, then her mother will all of a sudden become more depressed, she will not go out and will go to bed and lie down all day long. When she is in a better mood, she will joke around, laughing, especially if Y.N. is with her, Claimant is able to relax and express herself, be more herself. On the other hand, sometimes when Y.N. is with Claimant and Claimant hears some noise outside, she becomes very fearful and "freaks out." But most of the time Y.N. is with Claimant, she seems to keep calm, less anxious, panicky and fearful. She specifically stated as follows:

> Q. I know this is just for the record: Why does she live with you? Or why do you live with her?
>
> A. Because my mom needs someone. She is dependent on us. Like she can't do things for herself. Like she is the not the same. Like she used to be able to drive before all of this happened. She used to like (sic.) take care of herself. But she can't do any of that anymore. She gets too freaked out. ...

44. Claimant's son, Mr. F.N., also testified. He was 34 years old at the time of the hearing and was working in construction. He also provides help and support for his mother as it relates to her PTSD, taking her places she needs to go, any chores she needs help with, and overall to keep her company when no one else is available. The times are variable but some weeks it is 40 to 60 hours a week, sometimes less. He will typically take over on the weekends because he works during the week. The siblings make a schedule to make sure that Claimant has someone available, including friends and cousins. They are continuously in communication about who is available and can keep her company. This has been the case for over ten years. If they have to drop her off at someone's house, then they schedule who is to pick her up, including himself. Sometimes he does grocery shopping with Claimant and sometimes Claimant will give him a list for him to pick up groceries for her. It is pretty typical that Mr. F.N. is with his mother most weekends, taking his mother to run errands.

45. Mr. F.N. stated that the PTSD has taken a toll on his mother's life, because she easily gets stressed, especially when she is not directly with someone else. It prevents her from having an independent life, as she is constantly needing somebody around that she can trust. Mr. F.N. believed that being present with his mother helped her with her symptoms, to calm down and be happy and less focused on her depression. She has less panic attacks, less stress, less depression. In fact, if she has people she trusts around and keeping her busy, she rarely has a full blown panic attack.

46. Dr. Walter J. Torres testified at hearing as Claimant's witness. Dr. Torres has a Ph.D. in clinical psychology and in forensic psychology, and has been treating patients since 1980. He was treating post-traumatic stress disorder (PTSD) since before the condition was recognized as such in the later 1980s, which was around the time it was written into the DSM III. Claimant was first referred to Dr. Torres in August 2009 and he diagnosed Claimant with PTSD. He also issued a report in August 2022 after having evaluated her, and after having reviewed Dr. Entin's notes as well as the statements of Claimant's children. Dr. Torres' current diagnosis is posttraumatic stress disorder, chronic, and adjustment disorder with depressed mood. He diagnosed PTSD after administering a clinician administered PTSD scale for DSM-V which is the gold standard for the assessment of PTSD. This was based on her re-experiencing that was severe, avoidance, negative changes in feelings and in cognition, beliefs regarding the world, high arousal in various forms, increase startle, increase re-activity to stimuli associated with the trauma, and nightmares.

47. Dr. Torres stated that he generally agreed with Dr. Entin's letter dated June 20, 2022, wherein he stated that Claimant continued to be anxious, especially when in public, that she did not like to be alone and was usually accompanied by family or friends. Dr. Torres stated that the word "like" suggested a preference. In Claimant's case, it is a "need" to not be alone, a profound intolerance of being alone. One of the key factors of PTSD is re-experiencing, and Claimant's re-experiencing comes with terror. And when she is with someone she trusts, she does not re-experience the terror, which is consistent with the testimony of Claimant and her family, that Claimant is experiencing less fear, has less anxiety and depression when not alone. One of the triggers of Claimant's re-experience is that she was alone when the trauma occurred. So removing that trigger

takes away the terror to a certain degree. The presence of the other trusted person, takes her out of the sphere of the trauma and away from the terror of the re-experience.

48. When questioned about the source of the need for the recommendation for companion care services, Dr. Torres stated that the driver for the referral and need for companion care services was the work-related PTSD, which was the only source because the work-related injury was the source of her intolerance of aloneness. Dr. Torres recommended that Claimant be provided company, because companionship relieved her of her aloneness, as being alone triggers her increased symptoms of PTSD, specifically terror in the re-experiencing. Further, Claimant's children's statements supported his initial assessment that Claimant was experiencing an intolerance of aloneness and the recommendation that Claimant requires companion care. He specifically noted that she required companion care for 10-12 hours as he did not think it was feasible to have another person during the night. But during the night she experiences nightmares and she frequently migrates to her daughter's bed to the extent that they had been discussing getting another bed for the daughter's bedroom. In the alternative, he would recommend 24 hour companion care. Dr. Torres concurred with Dr. Entin that Claimant continued to require maintenance care visit and medication refills.

49. Dr. Torres also reviewed Dr. Entin's recommendation for a 24 hour facility, where there would be staff attending to Claimant either during the day or during the night. As Dr. Torres explained, Claimant's current schedule of companion care being provided by her children is not sustainable. He stated that Claimant's children will develop lives of their own and it is unlikely that Claimant will be able to continue to sleep with her daughter if her daughter moves on with her life. Dr. Torres agreed that the 24 hour care was the answer to Claimant's long term needs, which he stated was reasonably necessary care that is solely related to the occupational trauma.

50. Dr. Torres opined that the companionship provided by her children has continued to prevent her deterioration and maintained her at MMI, as would the recommended 24 hour facility that both he and Dr. Entin are recommending for the long term, which would keep claimant from worsening. Dr. Torres explained that if Claimant is not provided with the reasonably necessary attendant care or company, she will continue to experience terror, decompensate, become disorganized and overwhelmed, all of which are stressful emotionally and physically.

51. Claimant is also not able to drive herself, because she will develop panic when driving, which was evident in the record since at least 2012 or 2013 when she was under Dr. Sartori's care. Dr. Sartori gave a very good description of her condition, her needs, and the attempt that Dr. Sartori made to activate her and to get her desensitized to some circumstances. At that time, they had Claimant attempt to drive but the resulting circumstances were untenable because Claimant would develop panic and then swerve in reaction to something that she would perceive as overwhelmingly dangerous, so she was not a safe driver after the second trauma. She needs someone driving her to where she needs to go as she cannot drive herself.

52. Dr. Torres also reviewed Dr. Timothy Shea's report, which endorses the diagnosis of PTSD but stated that essential services were not necessary by way of criticizing Dr. Torres' recommendations. But Dr. Torres never made a recommendation

for someone to clean, cook and bathe Claimant, but to provide companionship and take her to perform her chores and attend medical appointments because those are all things that the traumatic effect of the attach caused her to need, in order to fight the aloneness and panic attacks, and only due to the effects of the psychological work related condition and not for her physical needs caused by any physical disability.

53. While Claimant is behaviorally limiting herself, she has no other options. The core symptom of PTSD is avoidance and when a person chooses to avoid something they are making a choice not to participate in a domain. Dr. Torres explained though, that Claimant's choices were taken away from her by the PTSD causing trauma, which caused her unavoidable dread and fear therefore causing the unavoidable limiting behavior. Dr. Torres stated that he disagreed with Dr. Shea's opinion and rationale that Claimant does not need companion attendant care services.

54. Dr. Torres explained that it was just not feasible to provide Claimant with care that would make her less avoidant as no one has identified that kind of care or that the condition would not be responsive to any such care. He explained that the intolerance of aloneness and avoidance behavior has existed since Claimant's traumatic event. These symptoms were not generated by an overly solicitous family but by the trauma itself. Dr. Torres explained that Dr. Sartori and the prior psychologist tried to establish some limits. But at the time, the family was very young and the adolescent children could not manage their mother. Dr. Sartori tried but it just did not work as the anxiety became too high, her terror was too high and her avoidance was very strong. He further stated that the children are not professional therapists and have done their best for their mother. And none of her providers prescribed a therapist to work with them to try to deal with the situation and extend the hours she could tolerate alone.

55. Considering that Claimant has suffered with these symptoms for over 13 years, Dr. Torres opined that it was very likely that she would continue to suffer with the symptoms for the rest of her life. He stated that as far back as 2009 the profile suggested that her condition would likely be chronic. This is also supported by Dr. Entin's opinion that Claimant would continue to need care indefinitely. Dr. Torres opined that the kind of attendant care services that he was recommending need not be provided by skilled professionals as the record demonstrated that none of Claimant's children were skilled in nursing but that they have been providing the services, nonetheless.

56. Dr. Torres noted that he only initially recommended up to 12 hours of companion care because Claimant does have family. However, had she not had family, she would require 24 hour attendant care because she is not safe on her own. It is but for the significant sacrifice of her family that she has been able to handle her PTSD.

57. Dr. Torres explained that prior to the traumatic event, Claimant was a highly functioning independent, vital and assertive woman, who took care of her family and frequently took on two jobs. The proof being that Claimant was working a night job at a gas station when she was attacked and threatened with a gun. That kind of job demonstrated that she was independent and tolerant of aloneness prior to her injury.

58. He also discussed what may or may not be available in the market in terms of 24 hour companion care, discussing that he was not aware of 24 hour at home attendant care but was aware that there was independent care living facility available for

her. Despite what may or not be available or feasible, what he did absolutely know is that she requires access to company, whether at home or an independent living facility.

59. Dr. Timothy P. Shea testified at the second hearing on May 5, 2023. He is an expert in clinical psychology and a practicing neuropsychologist for the last 10 years. Dr. Shea issued a report on January 30, 2023. Dr. Shea agreed with the diagnosis of chronic PTSD as diagnosed by Claimant's medical team. He disagreed that Claimant required an assisted living facility because Claimant does not require any help with her activities of daily living (ADLs) as a result of the work related claim, and if she did need ADLs assistance, it is not due to the PTSD. The company Claimant requires does not need special training or medical experience. He explained that Claimant has required company since the initial trauma but definitely the second trauma and well over 15 years.

60. He explained that the

> …core belief of someone who has PTSD is that the world is an unsafe place. And so because of that it is very common for them to then isolate at home and not go out. And so the challenge is kind of the longer this goes on it becomes more reinforcing because they don't have stimuli to then challenge that held belief. So if they only stay inside they are going to reinforce the believe that the world is an unsafe place which can then increase symptom response and cause greater distress because there isn't any other information to challenge to say, oh, maybe the world isn't so unsafe. And that is a core part of the treatment in counseling and therapy for PTSD is that in vivo exposure. Is that going out into the community and having experiences and challenging kind of the disordered thought that occur because of the trauma.

61. The symptoms of chronic PTSD include panicking when reminded of the trauma, panic attacks, anxiety, being easily upset or angered, being short with emotion, disturbed sleep or lack of sleep, irritability or aggressive behavior, jumpy or easily startled, vivid flashbacks, nightmares, self-isolation, depression, emotional avoidance or scary situations, and insomnia. Dr. Shea agreed that Claimant has had and continues to have each one of these conditions either as evaluated by Dr. Shea or reported to him. Further, he stated that being alone does or can exacerbate her PTSD symptoms. He also stated that the majority of these problems are either relieved or helped with not being alone but cause increased symptoms by being alone.

62. Dr. Shea noted that Claimant has practiced and reinforced behavior avoidance for the last 15 years since the last trauma of March 8, 2008. He stated that talk therapy was recommended and that more aggressive types of treatment were recommended. Part of her avoidance is actually avoiding being alone or going outside without someone present, which is an aspect of her PTSD. Part of that is also Claimant's thoughts and beliefs that the world is a dangerous place, which is one of the main reasons being alone is so hard for her.

63. Dr. Shea opined that due to unresolved symptoms of anxiety that continue to be present in her day-to-day life, it makes sense that her preference is to be around her family. He stated that she currently needed assistance to drive places, including to shops, medical appointments, grocery stores and to friend's houses.

64. Dr. Shea recommended another try at therapy to treat Claimant's PTSD and differed from Dr. Entin's opinion that Claimant had chronic untreatable PTSD. He further continued to opine that having a companion for Claimant was not clinically indicated despite Claimant's symptoms. He felt that Claimant having a companion would reinforce her belief that the world is not safe and therapy would give Claimant an opportunity for improvement. By not treating the PTSD there was risk of things getting worse with untreated stressors and also reinforcing believes because she would not be able to challenge them sufficiently.

65. Dr. Shea also agreed that Claimant continued to have all the symptoms of PTSD and that a companion would relieve her symptoms of PTSD including panic attacks, anxiety, being jumpy and easily startled, nightmares, depression and emotional avoidance, and possibly her disturbed sleep, vivid flashbacks, and insomnia.

66. This ALJ reviewed the video surveillance submitted as part of the Exhibit packet for Claimant. They revealed a person that was busy going places, but considering that there were less than an hour and a half of video and over one hundred sixteen hours of surveillance, this is not particularly indicative of a busy person. However, nothing on the video indicates violation of her work restrictions or contrary to testimony or other statements. They also reveal that Claimant has almost constant company from someone. It was clear that individuals visiting Claimant's home called by phone before knocking on the door, which was also consistent with testimony at hearing. Lastly, medical records indicated that surveillance taken prior to MMI where one person which was originally identified as Claimant turned out not to be Claimant. This also indicated that there was more than the surveillance documented at this hearing.

67. As found, Claimant clearly continues with significant symptoms of PTSD, anxiety, startle response, panic attacks, disturbed sleep and nightmares, self-isolation, which providers tried to treat without success for many years, emotional and situational avoidance and depression. Dr. Torres was persuasive in his testimony that Claimant is unable to be left alone for long periods of time and requires a companion in order for her PTSD not to be exacerbated or aggravated, including increasing the symptoms as mentioned above. Dr. Torres and Entin's opinions are more credible over the contrary opinion of Dr. Shea. Claimant's children served in this role while they were younger an able to do so but are now adults and can no longer act in that role without significant sacrifices. Claimant's children's testimony were credible in this matter as well as in the fact that Claimant cannot be left alone for significant periods of time without significant exacerbation of her symptoms.

68. Claimant has proven by a preponderance of the evidence that she is entitled to attendant care services as recommended by Dr. Torres for companion care in order for Claimant's PTSD symptoms to be controlled and kept at MMI. Claimant is entitled to up to 12 hours of companion services to be provided by Respondents either through medical providers, the community or through Claimant's family and friends, if available.

69. While both Dr. Torres and Dr. Entin indicated that the long term goal may be a 24 hour care facility, it is premature to address this at this time, while Claimant continues to live with a family member who would be able to attend to Claimant during nighttime hours.

70. Testimony and evidence inconsistent with the above findings is not relevant, credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Authorized Medical Benefits

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Therefore, in a dispute over medical benefits that arises after the filing of an admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the work injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A panel of the ICAO also addressed these issues in *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012). The panel stated:

> [The *Snyder*] principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.

As found, Claimant has proven that it is more probable than not the attendant care services of a companion as recommended by Dr. Torres is reasonably necessary and causally related medical treatment to prevent further exacerbations and flare up from Claimant's continuing chronic severe PTSD. This care is clearly part of her maintenance treatment in order to maintain maximum medical improvement and prevent flare-ups or aggravation of her PTSD.

Respondents' rely on medical opinions from a decade ago and Dr. Shea to support a denial of attendant care companion services. These opinions are not persuasive in this matter. The medical records show a significant effort to desensitize Claimant to the traumatic events for approximately five years without success, and Claimant continues to have significant symptoms of anxiety, distress and re-trauma when hearing noises, hearing news of violence and being in public, seeing shadows, individuals with hoodies and the like. Claimant continues to have nightmares that continue to affect and disrupt both Claimant and the daughter that lives with her. Claimant's children and friends have continued to have to provide Claimant with companion care to prevent panic attacks and increased anxiety.

Respondents cite to *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995), for the proposition that the Court of Appeals put weight on the severity of the Claimant's injuries and the extent the injuries limited the scope of the Claimant's ability to undertake ADLs. However, Claimant is not requesting attendant care to address non-work related ADLs. In this case, Claimant has significant PTSD which has caused her to be permanently and totally disabled. The treatment recommended by Dr. Torres is to treat her symptoms causally related to the trauma and her subsequent PTSD. Based on the totality of the evidence, Claimant has met her burden to prove that companion care services up to 12 hours a day as recommended by Dr. Torres is reasonable, necessary and causally related to the medical treatment needed to continue maintaining Claimant's ongoing and present PTSD, fifteen years after the work related injury in this permanently and totally disabled Claimant.

Claimant has failed to show that a 24 hour in patient facility is reasonably necessary at this time as Claimant continues to live with her daughter, though may become necessary when that living arrangement terminates.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall authorize and pay for attendant care services up to 12 hours a day as recommended by Dr. Torres and Dr. Entin to provide Claimant appropriate reasonably necessary maintenance treatment in the form of companionship for her work related PTSD.

2. Claimant's request for 24 hour care is denied and dismissed at this time as premature.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 20th day of June, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-953-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on July 18, 2022.

2. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment on October 27, 2022 under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving Temporary Total Disability (TTD) benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a Cashier. She testified that on July 18, 2022 she was carrying heavy boxes of water and juice while performing stocking duties for Employer. Claimant remarked that, while carrying a box, she felt a crack/pop in her back and could not move. She then called her husband and he finished carrying the boxes. Claimant subsequently completed her work shift.

2. Because of her back pain, Claimant visited Denver Health Urgent Care on July 18, 2022. Claimant reported right lower back pain and urinary symptoms. The medical note states that "yesterday tweaked her back lifting juice boxes at work and now has pain in her right low back." The medical record also reflects that Claimant had dysuria with mild suprapubic pain. Claimant was able to walk with pain, but there was no radiation down her legs. After a physical examination and a urinalysis, Claimant was diagnosed with a back strain as well as acute cystitis without hematuria.

3. Claimant did not report her July 18, 2022 injury to Respondents until July 29, 2022. On July 29, 2022 Claimant visited Kathy Okamatsu, FNP at Authorized Treating Provider (ATP) Concentra Medical Centers. The report noted Claimant had a Worker's Compensation injury on July 18, 2022 with "right lower back pain radiating to right posterior thigh after lifting at work." NP Okamatsu recounted that Claimant's job duties involved stocking cases of water, juice, and soda. Each case weighed approximately 50 pounds. The report specified that "[u]pon completion, [Claimant] started having vaginal pain, pain with urination, and muscular pain in the right lower back with radiation to the mid posterior aspect of the right thigh." NP Okamatsu assessed Claimant with a lumbar strain, provided medications, referred Claimant to physical therapy and assigned temporary work restrictions. She concluded that her objective findings were consistent with a work-related mechanism of injury. However, NP Okamatsu noted that "treatment of vaginal pain and urinary tract infection" was not work related.

4. On August 2, 2022 Claimant underwent an MRI of her lumbar spine at Denver Health. The MRI revealed L4-5 "moderate right and severe left foraminal

narrowing with flattening of the exiting left L4 nerve at L4-5 due to central disc bulge, facet arthropathy, and thickening of the ligamentum flavum." At L5-S1 Claimant had a paracentral disc extrusion with "7 mm inferior migration compressing the left S1 nerve root."

5. On August 12, 2022 Claimant visited Cynthia Rubio, M.D. at Concentra. Claimant reported continued lower back pain as a result of lifting heavy cases of water, juice and soda on July 18, 2022. Dr. Rubio diagnosed Claimant with a lumbar strain and probable herniated disc. She continued Claimant's work restrictions. Dr. Rubio concluded that her objective findings were consistent with a work-related mechanism of injury.

6. On September 8, 2022 Claimant visited Robert Kawasaki, M.D. at Concentra. Claimant reported that, while lifting heavy boxes at work, she felt something ripping in her back. Claimant developed a sharp, burning sensation in her lower back and down her right leg. She initially visited Denver Health and was diagnosed with a urinary tract infection and a lumbar strain. Dr. Kawasaki reviewed the August 2, 2022 lumbar MRI and noted it revealed an L5-S1 disc extrusion with compression of the left S1 nerve root. However, he commented that Claimant's symptoms were on the right side. Nevertheless, Dr. Kawasaki summarized that Claimant had an extrusion that had broken off from the disc. He remarked that there could have been migration of the disc that was compressing the right S1 nerve root and thus would account for Claimant's symptoms. After conducting a physical examination, Dr. Kawasaki diagnosed Claimant with the following: (1) severe lower back complaints with right leg radicular symptoms in an S1 distribution; (2) adjustment disorder with significant pain responses; and (3) "poor coping ability for her pain with very dramatic presentation."

7. Later on September 8, 2022 Claimant returned to Concentra for a follow-up visit with Rebecca Blatt, M.D. After conducting a physical examination and reviewing Claimant's medical records, Dr. Blatt determined the Claimant was able to return to modified duty with temporary restrictions of no lifting, repetitive lifting and carrying not to exceed 10 pounds, and remaining seated for 75% of the time or 45 minutes each hour. She also remarked that Claimant was prohibited from bending, twisting, squatting and climbing and might "need to be off work from 9/8/22 to 9/10/22 to get used to new medications." Dr. Blatt concluded that her objective findings were consistent with a work-related mechanism of injury.

8. On October 13, 2022 Claimant returned to Concentra and visited Stephen Danahey, M.D. Claimant reported that her lower back pain worsened and she wanted to be taken off work. She specified that she was experiencing symptoms in the left lower back that radiated down the left leg. There was also pain in the right gluteal area. Dr. Danahey noted that Claimant had undergone a second MRI on October 6, 2022 that revealed a left paracentral disc herniation with caudal extrusion at L5-S1, impingement of the S1 nerve and moderate spinal stenosis. The MRI also reflected exaggerated left foraminal impingement at L4-5 and multilevel degenerative changes. Dr. Danahey concluded that his objective findings were consistent with a work-related mechanism of injury. He also continued Claimant's work restrictions and remarked "no work with assistant manager."

9. On October 19, 2022 Claimant visited Jesus Sanchez, PhD for a psychological assessment. Claimant reported that medication was ineffective in dealing with the pain, and she did not identify any effective coping strategies to manage her symptoms. She commented that she continued to work 32 hours per week, in 8-hour shifts, four days per week. Claimant remarked that her work restrictions were not respected and being off work was necessary for improvement. Dr. Sanchez determined Claimant's presentation was "remarkable for expressive distress related to pain, fear of re-injury while at work and feeling unfairly treated there, limited coping skills to manage pain, catastrophic thoughts of the future, and feelings of loss of value and diminished self-concept…." He diagnosed Claimant with adjustment disorder including anxiety and depressed mood.

10. On October 25, 2022 Claimant underwent an examination with Michael J. Rauzzino, M.D. based on a referral from Dr. Danahey. After reviewing Claimant's medical records, Dr. Rauzzino remarked that Claimant initially reported right lower back and right leg pain after lifting heavy boxes at work. However, after an MRI revealed a large, left-sided disc herniation, her symptoms changed more toward her left leg. Nevertheless, Dr. Rauzzino determined Claimant's symptoms were consistent with her mechanism of injury. He remarked that there was a strong emotional overlay in Claimant's presentation and she exhibited significant pain behaviors. Noting Claimant's large left-sided disc herniation, Dr. Rauzzino explained she could benefit from a minimally invasive L5-S1 discectomy. However, he was concerned about Claimant's prognosis and recovery based on psychological factors. Dr. Rauzzino stated that he first wanted to consult with Dr. Sanchez to determine if Claimant would be a good surgical candidate. In an addendum he noted that he discussed the matter with Dr. Sanchez who noted concerns about her surgical candidacy.

11. On October 27, 2022 Employer terminated Claimant's employment. Specifically, Human Resources Generalist [Redacted, hereinafter LF] sent a letter to Claimant appraising her that she had been absent from work from October 23-25, 2022. He explained that, based on Employer's attendance policy, "missing two consecutive shifts on 10/23/2022, 10/24/2022 without notifying your manager is considered job abandonment. Due to your absence not being approved and not receiving any communication from you, we have determined that you have abandoned your position." LF[Redacted] noted that Claimant's termination was effective immediately.

12. The record reveals that Claimant has received escalating disciplinary violations during her employment. In step two of the process, Claimant obtained a written warning for dishonesty. Specifically, on October 18, 2022 Employer became aware of Claimant's allegations that Assistant Manager [Redacted, hereinafter DB] had struck her on the buttocks during her work shift on September 29, 2022. Employer commenced an investigation on the same day after Human Resources Generalist [Redacted, hereinafter AJ] received a doctor's note from Claimant stating that her injury had worsened due to unwanted physical touch. Claimant specified that, on September 29, 2022 between 2-3 pm MST, she was assisting a customer near the cash register when DB[Redacted] struck her on the buttocks. As part of the investigation, Employer obtained statements from other employees who were working during the shift including [Redacted, hereinafter LF],

[Redacted, hereinafter RM], [Redacted, hereinafter RG] and DB[Redacted]. Employer also reviewed store surveillance video from September 29, 2022. Although Claimant was visible in the video, the reported incident did not occur. The other employees stated that Claimant did not appear to be in any pain and left as she normally would at the end of the shift. The investigation concluded that there was no evidence of any unwanted physical touching. Employer thus determined Claimant was dishonest regarding the allegations. Based on the Employee Handbook that Claimant signed on April 19, 2022, Employer explained "this is a 'serious' offense 2. Dishonesty, intentional cash irregularities, and intentional miss-marking of merchandise may result in immediate dismissal."

13. In an e-mail dated October 19, 2022 LF[Redacted] and AJ[Redacted] contacted Claimant regarding the results of the investigation. LF[Redacted] and AJ[Redacted] explained to Claimant that they had reviewed video surveillance footage and verified that she was being dishonest in her report. The correspondence noted that AJ[Redacted] would be immediately returning to work. They emphasized that the dishonesty displayed by Claimant would not be tolerated by Employer and further infractions would lead to additional disciplinary action up to termination. LF[Redacted] explained that Claimant would physically receive the final written counseling from her District Manager on her return to work. Claimant responded that she would refuse to sign the document and "it is all a lie."

14. Employer also provided specific documentation in the form of a step four violation that recounted the reasons for Claimant's termination. The report detailed that on October 14, 2022 Claimant was contacted regarding her availability for the following week. Claimant reported additional back pain but failed to provide a medical report excusing her from work. On October 19, 2022 Employer contacted Claimant regarding an investigation for violating her medical restriction that she could not stand for over 20 minutes. Employer instructed Claimant to follow her medical recommendations and noted that a chair would be added to her workstation regardless of her shift. Finally, effective immediately Claimant would be added to the store schedule along with DB[Redacted]. On October 22, 2022 Claimant was informed through a group chat by her store manager about the upcoming weekly schedule. However, she failed to acknowledge the message and did not report to work on October 23-25, 2022. Claimant's absences constituted no call/no shows in violation of Employer's attendance policy that Claimant had acknowledged receiving on April 19, 2022. Notably, the attendance policy provided that upon receiving two no-call absences in a 12-month rolling period, the employee would be terminated.

15. AJ[Redacted] testified Employer's attendance policy provides that, if an employee is unable to work a scheduled shift, she must notify a manager as soon as possible. If an employee fails to show up for a scheduled shift and does not call, the employee will receive an automatic one-day suspension. If an employee fails to show up to work for a scheduled shift twice in a rolling 12-month period, the employee will be terminated. The record reflects that Claimant was aware of Employer's attendance policy as specified in the handbook. She acknowledged receipt of the handbook and attendance policy on April 19, 2022 and electronically signed off on the policies. Finally, Claimant

admitted at the hearing that she knew she could be fired if she did not show up for a scheduled work shift.

16. The record reveals that the work schedule for the week of October 23, 2022 was sent to employees and posted at Claimant's store on the Friday before October 21, 2022. The schedule was also sent by group chat on October 22, 2022. The preceding were the two customary methods for transmitting the work schedule to employees. Claimant was on the schedule and expected to work on October 23, 24 and 25, 2022. However, Claimant did not show up for her scheduled shifts or contact her manager. As evidenced by a series of angry text messages in the record, Claimant was aware that her employment had been terminated for failing to show up for scheduled work shifts.

17. On December 12, 2022 Claimant underwent an independent medical examination with J. Taschof Bernton, M.D. Dr. Bernton administered a Battery for Health Improvement 2 psychological test. After performing an extensive record review and physical examination, Dr. Bernton determined that the symptoms Claimant reported to medical providers on July 18, 2022 did not correlate with the MRI findings of Claimant's lumbar spine. However, he concluded that, based on all of the available information, it was probable that Claimant suffered a lumbar strain while carrying boxes on July 18, 2022. Dr. Bernton specified that "I would regard [Claimant's] condition as work related based on her acute presentation to the emergency room." Nevertheless, Claimant's urinary tract infection was not related to any work activities. Dr. Bernton concluded that Claimant was not a surgical candidate but a psychological evaluation to determine surgical candidacy was appropriate.

18. On April 22, 2023 Claimant visited Timothy Shea, PsyD for a psychological evaluation. Dr. Shea remarked that Claimant made it very clear her employment was a primary source of stress and she had problems with numerous people at work. She reported "the lies" from Employer were very frustrating. Dr. Shea reasoned that Claimant's hyper-focus on her job and associated stressors were clearly impacting her perception of actual events. After administering numerous psychological tests during the evaluation, Dr. Shea determined there was a clear disconnect between Claimant's behaviors, reports of pain and emotions. He explained that Claimant's much higher than expected pain reports were likely caused by expressing stressors, depression, and anxiety through increased pain experiences. Dr. Shea noted some concern for exaggeration of pain and likely misattribution of symptoms. He concluded "[t]here is bountiful evidence that there are multiple non-organic factors that may be further exacerbating her reported pain experience over what would be expected based upon the reviewed documentation." Dr. Shea agreed with Dr. Sanchez that a diagnosis of adjustment disorder with anxiety and depressed mood was appropriate.

19. Dr. Bernton testified at the hearing in this matter. He considered the information he had available at the time of his examination as well as the subsequent psychological evaluations of Drs. Sanchez and Shea. Dr. Bernton emphasized his opinion had solidified regarding Claimant's condition at her July 18, 2022 medical visit to Denver Health Urgent Care. He concluded that Claimant had presented with only a non-work-related urinary tract infection.

20. Claimant has demonstrated that it is more probably true than not that she suffered compensable injuries during the course and scope of her employment with Employer. Initially, Claimant has maintained that she experienced lower back pain after carrying heavy boxes of juice and water at work on July 18, 2022. She visited Denver Health Urgent Care after her work shift, reported right lower back pain and was diagnosed with a back strain as well as acute cystitis without hematuria. On July 29, 2022 NP Okamatsu at ATP Concentra assessed Claimant with a lumbar strain, provided medications, referred her to physical therapy and assigned temporary work restrictions. NP Okamatsu concluded that her objective findings were consistent with a work-related mechanism of injury. A subsequent MRI of Claimant's lumbar spine revealed a paracentral disc extrusion at L5-S1 that was compressing the left S1 nerve root. Dr. Rubio then diagnosed Claimant with a lumbar strain and probable herniated disc. She also concluded that her objective findings were consistent with a work-related mechanism of injury.

21. On September 8, 2022 Dr. Kawasaki reviewed the August 2, 2022 lumbar MRI and noted it revealed an L5-S1 disc extrusion with compression of the left L1 nerve root. However, he commented that Claimant's reported symptoms were on the right side in an S1 distribution. Nevertheless, Dr. Kawasaki remarked that there could have been migration of the disc that was compressing the right S1 nerve root to account for Claimant's right-sided symptoms. On the same date, Dr. Blatt determined that Claimant's objective findings were consistent with a work-related mechanism of injury. Dr. Danahey subsequently noted that Claimant had undergone a second lumbar MRI on October 6, 2022 that revealed a left paracentral disc herniation with caudal extrusion at L5-S1 with impingement of the S1 nerve and moderate spinal stenosis. He also concluded that his objective findings were consistent with a work-related mechanism of injury. After noting concerns about the migration of Claimant's pain, Dr. Rauzzino also determined her symptoms were consistent with the reported mechanism of injury. Noting Claimant's large left-sided disc herniation, Dr. Rauzzino explained she could benefit from a minimally invasive L5-S1 discectomy. However, based on psychological factors, Dr. Rauzzino expressed trepidation about Claimant's surgical candidacy.

22. In contrast to the opinions of the Concentra physicians, Dr. Bernton determined that the symptoms Claimant reported to medical providers on July 18, 2022 did not correlate with her lumbar MRI findings. However, he concluded that it was probable Claimant suffered a lumbar strain while carrying boxes on July 18, 2022. Nevertheless, Claimant's urinary tract infection was not related to any work activities. In addition to Dr. Bernton's opinion, the migration of Claimant's symptoms from the right to left side of her lower back casts doubt on the veracity of her complaints. Importantly, psychological assessments reflected a disconnect between Claimant's behaviors, reports of pain and emotions. Notably, Dr. Shea expressed concern for exaggeration of pain and likely misattribution of symptoms. He concluded "[t]here is bountiful evidence that there are multiple non-organic factors that may be further exacerbating her reported pain experience, over what would be expected based upon the reviewed documentation." Dr.

Shea agreed with Dr. Sanchez that a diagnosis of adjustment disorder with anxiety and depressed mood was appropriate.

23. Despite Dr. Bernton's opinion and concerns about Claimant's reported symptoms based on psychological factors, the record reveals that Claimant likely suffered an industrial injury at work on July 18, 2022. Lumbar MRIs revealed a L5-S1 disc extrusion that is compressing the left S1 nerve root. Furthermore, the record is replete with opinions from Concentra physicians that Claimant's objective findings were consistent with a work-related mechanism of injury. Claimant's work activities thus aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered an industrial injury while working for Employer on July 18, 2022.

24. Respondents have proven it is more probably true than not that Claimant was responsible for her termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on October 27, 2022 Claimant was terminated from employment based on the violation of Employer's attendance policy for missing two consecutive work shifts on October 23-24, 2022 without notifying her manager. Employer considered Claimant's actions to constitute job abandonment.

25. The record reveals that Claimant has received escalating disciplinary violations during her employment. Employer also provided specific documentation in the form of a step four violation that recounted the reasons for Claimant's termination. AJ[Redacted] credibly explained that Employer's attendance policy specifies that, if an employee is unable to work a scheduled shift, she must notify a manager as soon as possible. If an employee fails to show up for a scheduled shift and has not called, the employee receives an automatic one-day suspension. If an employee fails to show up to work for a scheduled shift twice in a rolling 12-month period, the employee is terminated. Claimant was aware of Employer's policies as reflected by her acknowledgment of receiving the handbook and attendance policy on April 19, 2022 and electronically signing off on the policies. Claimant also admitted at hearing that she knew if she did not show up to work she could be fired.

26. The record reveals that the work schedule for the week of October 23, 2022 was sent to employees and posted at Claimant's store on the Friday before October 21, 2022. The schedule was also sent by group chat on October 22, 2022. The preceding were the two customary ways the work schedule was communicated to employees. Claimant was on the schedule and able to work October 23, 24 and 25, 2022. However, Claimant did not show up for her scheduled shifts or contact her manager. As evidenced by a series of angry text messages in the record, Claimant was aware that her employment had been terminated for failing to show up for scheduled work shifts.

27. The record reflects that Claimant failed to report for her scheduled work shifts on October 23, 24 and 25, 2022 and was aware that termination could result. To the extent Claimant argues that her attendance issues were related to her work injury, her contention is not credible. The weight of the evidence establishes that Claimant simply

violated known and well-communicated attendance policies. She thus precipitated her employment termination by a volitional act that she would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment. She is thus precluded from receiving TTD benefits after October 27, 2022.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to

produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).; *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician may provide diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, there is no mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer. Initially, Claimant has maintained that she experienced lower back pain after carrying heavy boxes of juice and water at work on July 18, 2022. She visited Denver Health Urgent Care after her work shift, reported right lower back pain and was diagnosed with a back strain as well as acute cystitis without hematuria. On July 29, 2022 NP Okamatsu at ATP Concentra assessed Claimant with a lumbar strain, provided medications, referred her to physical therapy and assigned temporary work restrictions. NP Okamatsu concluded that her objective findings were consistent with a work-related mechanism of injury. A subsequent MRI of Claimant's lumbar spine revealed a

paracentral disc extrusion at L5-S1 that was compressing the left S1 nerve root. Dr. Rubio then diagnosed Claimant with a lumbar strain and probable herniated disc. She also concluded that her objective findings were consistent with a work-related mechanism of injury.

9. As found, on September 8, 2022 Dr. Kawasaki reviewed the August 2, 2022 lumbar MRI and noted it revealed an L5-S1 disc extrusion with compression of the left L1 nerve root. However, he commented that Claimant's reported symptoms were on the right side in an S1 distribution. Nevertheless, Dr. Kawasaki remarked that there could have been migration of the disc that was compressing the right S1 nerve root to account for Claimant's right-sided symptoms. On the same date, Dr. Blatt determined that Claimant's objective findings were consistent with a work-related mechanism of injury. Dr. Danahey subsequently noted that Claimant had undergone a second lumbar MRI on October 6, 2022 that revealed a left paracentral disc herniation with caudal extrusion at L5-S1 with impingement of the S1 nerve and moderate spinal stenosis. He also concluded that his objective findings were consistent with a work-related mechanism of injury. After noting concerns about the migration of Claimant's pain, Dr. Rauzzino also determined her symptoms were consistent with the reported mechanism of injury. Noting Claimant's large left-sided disc herniation, Dr. Rauzzino explained she could benefit from a minimally invasive L5-S1 discectomy. However, based on psychological factors, Dr. Rauzzino expressed trepidation about Claimant's surgical candidacy.

10. As found, in contrast to the opinions of the Concentra physicians, Dr. Bernton determined that the symptoms Claimant reported to medical providers on July 18, 2022 did not correlate with her lumbar MRI findings. However, he concluded that it was probable Claimant suffered a lumbar strain while carrying boxes on July 18, 2022. Nevertheless, Claimant's urinary tract infection was not related to any work activities. In addition to Dr. Bernton's opinion, the migration of Claimant's symptoms from the right to left side of her lower back casts doubt on the veracity of her complaints. Importantly, psychological assessments reflected a disconnect between Claimant's behaviors, reports of pain and emotions. Notably, Dr. Shea expressed concern for exaggeration of pain and likely misattribution of symptoms. He concluded "[t]here is bountiful evidence that there are multiple non-organic factors that may be further exacerbating her reported pain experience, over what would be expected based upon the reviewed documentation." Dr. Shea agreed with Dr. Sanchez that a diagnosis of adjustment disorder with anxiety and depressed mood was appropriate.

11. As found, despite Dr. Bernton's opinion and concerns about Claimant's reported symptoms based on psychological factors, the record reveals that Claimant likely suffered an industrial injury at work on July 18, 2022. Lumbar MRIs revealed a L5-S1 disc extrusion that is compressing the left S1 nerve root. Furthermore, the record is replete with opinions from Concentra physicians that Claimant's objective findings were consistent with a work-related mechanism of injury. Claimant's work activities thus aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered an industrial injury while working for Employer on July 18, 2022.

Responsible for Termination

12. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that the claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAO, Sept. 27, 2001).

13. As found, Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on October 27, 2022 Claimant was terminated from employment based on the violation of Employer's attendance policy for missing two consecutive work shifts on October 23-24, 2022 without notifying her manager. Employer considered Claimant's actions to constitute job abandonment.

14. As found, the record reveals that Claimant has received escalating disciplinary violations during her employment. Employer also provided specific documentation in the form of a step four violation that recounted the reasons for Claimant's termination. AJ[Redacted] credibly explained that Employer's attendance policy specifies that, if an employee is unable to work a scheduled shift, she must notify a manager as soon as possible. If an employee fails to show up for a scheduled shift and has not called, the employee receives an automatic one-day suspension. If an employee fails to show up to work for a scheduled shift twice in a rolling 12-month period, the employee is terminated. Claimant was aware of Employer's policies as reflected by her acknowledgment of receiving the handbook and attendance policy on April 19, 2022 and electronically signing off on the policies. Claimant also admitted at hearing that she knew if she did not show up to work she could be fired.

15. As found, the record reveals that the work schedule for the week of October 23, 2022 was sent to employees and posted at Claimant's store on the Friday before October 21, 2022. The schedule was also sent by group chat on October 22, 2022. The

preceding were the two customary ways the work schedule was communicated to employees. Claimant was on the schedule and able to work October 23, 24 and 25, 2022. However, Claimant did not show up for her scheduled shifts or contact her manager. As evidenced by a series of angry text messages in the record, Claimant was aware that her employment had been terminated for failing to show up for scheduled work shifts.

16. As found, the record reflects that Claimant failed to report for her scheduled work shifts on October 23, 24 and 25, 2022 and was aware that termination could result. To the extent Claimant argues that her attendance issues were related to her work injury, her contention is not credible. The weight of the evidence establishes that Claimant simply violated known and well-communicated attendance policies. She thus precipitated her employment termination by a volitional act that she would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment. She is thus precluded from receiving TTD benefits after October 27, 2022.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable injuries during the course and scope of her employment with Employer on July 18, 2022.

2. Claimant was responsible for her termination from employment on October 27, 2022 and is thus precluded from receiving TTD benefits.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 20, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. The amount that most fairly constitutes Claimant's average weekly wage (AWW).

II. Whether temporary disability benefits should be modified based on a changed AWW.

FINDINGS OF FACT

1. This is an admitted claim involving a November 19, 2021 low back injury.

2. Claimant earned a gross salary of $2,578.00 per month in June 2021. That figure corresponds with an AWW of $594.92.

3. Claimant earned $2,655.00 per month from July 2021 through June 2022, the period of time that corresponded with Claimant's date of injury. That figure corresponds with an AWW of $612.69.

4. Claimant also received a one-time $1,000.00 yearly stipend in July 2021, as well as a $1,274.00 cost-of-living adjustment payment in June 2022. The Court finds that neither of these payments were of the type that would have been affected by disability.

5. In July 2022, Claimant's monthly salary increased to $2,734.67, an AWW of $631.08, and remained at that level until January 2023, when his monthly salary again increased to $3,133.00, an AWW of $723.00, coinciding with a job reallocation to "Structural Trades I."

6. In February, 2023, Claimant earned $3,424.73, corresponding with an AWW of $790.32.

7. On May 4, 2023, the [Employer] issued a letter to all [Redacted] employees announcing that all employees would receive a 5% pay increase effective July 1, 2023.

8. Respondent filed a General Admission of Liability (GAL) on August 18, 2022. The GAL admitted to an AWW of $808.04.

9. Respondent filed two more GALs on November 16, 2022, and March 14, 2023, admitting for intermittent temporary partial disability (TPD) benefits. The TPD benefits were calculated based upon the admitted AWW of $808.04.

10. The GALs documented lost time (in hours) on the following dates:

DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME
11/22/2021	2.5	1/17/2022	2	3/7/2022	1	4/20/2022	1.5	6/13/2022	2	7/20/2022	3	8/31/2022	2	12/14/2022	3.75
11/23/2021	8	1/18/2022	2	3/9/2022	2	4/21/2022	2	6/16/2022	2.5	7/22/2022	3	9/12/2022	6	1/18/2023	0.25
11/29/2021	3	1/19/2022	2	3/14/2022	1	4/25/2022	2	6/23/2022	3	7/27/2022	3	9/13/2022	0.5	1/23/2023	2.5
12/1/2021	2.75	1/21/2022	1.25	3/16/2022	1.5	4/27/2022	2	6/24/2022	3	7/28/2022	2	9/15/2022	2	1/26/2023	1
12/6/2021	1.5	1/26/2022	2	3/21/2022	3	5/2/2022	2	6/27/2022	3	7/29/2022	3	9/16/2022	8	2/1/2023	1
12/9/2021	2	1/27/2022	4.25	3/23/2022	1.5	5/3/2022	4	6/28/2022	2	8/1/2022	3	9/26/2022	8	2/6/2023	2
12/14/2021	2	1/28/2022	2.75	3/28/2022	1	5/4/2022	1.5	6/30/2022	3	8/2/2022	2	9/30/2022	8	2/9/2023	1
12/17/2021	1.5	2/3/2022	2.25	3/29/2022	2	5/6/2022	2	7/3/2022	3	8/4/2022	3	10/17/2022	2	2/13/2023	1
12/22/2021	3.25	2/7/2022	6.5	3/30/2022	1.5	5/13/2022	1.5	7/5/2022	3	8/15/2022	3	10/21/2022	8	2/23/2023	3
1/3/2022	1.75	2/9/2022	2	3/31/2022	8	5/18/2022	2	7/7/2022	4	8/16/2022	2	10/26/2022	5.5	2/28/2023	2.5
1/4/2022	2	2/10/2022	2	4/4/2022	2	5/20/2022	1.5	7/8/2022	3	8/17/2022	5	10/28/2022	1		
1/5/2022	2	2/11/2022	2.5	4/6/2022	1.5	5/26/2022	2	7/11/2022	5	8/18/2022	8	10/31/2022	2		
1/7/2022	4.5	2/17/2022	4	4/7/2022	2.5	5/27/2022	1.5	7/13/2022	3	8/22/2022	3	11/1/2022	2.5		
1/12/2022	1.25	2/24/2022	1.5	4/12/2022	2	6/3/2022	2	7/14/2022	3	8/23/2022	8	11/7/2022	2		
1/13/2022	2	3/2/2022	3.5	4/13/2022	1.5	6/7/2022	4	7/18/2022	3	8/24/2022	2	11/28/2022	1		
1/14/2022	1.5	3/3/2022	2.5	4/18/2022	4	6/8/2022	2	7/19/2022	2	8/26/2022	4	12/7/2022	8		

11. The parties stipulated at a post-hearing conference on June 12, 2023 to the following facts:

    a. Claimant's authorized treating physician placed him at maximum medical improvement (MMI) on April 14, 2023.

    b. Respondent has requested a Division independent medical examination (DIME), which is currently pending.

12. At hearing, Respondent presented the testimony of Z.M.[Redacted], an HR specialist for Respondent.

13. Ms. Z.M.[Redacted] testified about Claimant's earnings and explained the line items on Claimant's pay records. Regarding the $1,000.00 stipend payment in July 2021, Ms. Z.M.[Redacted] testified that it was an across-the-board payment for all [Redacted] classified employees. Although it was labeled as "extra duty" on the pay record, she testified that the categorization was simply due to the categories available on the software used for pay records.

14. Ms. Z.M.[Redacted] also explained that the June 2022 payment of $1,274.00 was a one-time lump sum "across-the-board" payment to compensate employees for the absence of a cost-of-living adjustment that year.

15. Regarding Claimant's raise in January 2023, which corresponded with Claimant's position reallocation from "Labor I" to "Structural Trades I," Ms. Z.M.[Redacted] testified that the reallocation resulted in an increased salary, but that the raise was not merit-based. Ms. Z.M.[Redacted] also testified on cross examination that there had been discussions of [Redacted] raises for July 2023, but that that information had not yet been released.

16. The Court finds Ms. Z.M.[Redacted]'s testimony credible, except insofar as she testified that the July 2023 raise had not yet been announced.

17. Claimant testified on his own behalf at hearing. Claimant testified consistently with the pay records regarding his raises. Additionally, Claimant testified that he was supposed to receive a 3.5% raise in 2022, but instead received the [Redacted] standard raise.

18. Regarding his reallocation to "Structural Trades I," Claimant testified that the reallocation was based on his skill set, including building walls, building ramps, and running machines. Claimant also testified that he developed a key system to track keys as part of his new position, worked with a COVID task force for testing students, performed some camera work of different structures, and built a ramp for motorcycles. Claimant denied that any doctor ever took him off work.

19. The Court finds Claimant's testimony credible.

20. Respondent presented rebuttal testimony of Ms. Z.M.[Redacted] regarding Claimant's new duties. Specifically, she testified that the new duties simply constituted modified duty to accommodate Claimant's work restrictions. To the extent this testimony conflicts with Claimant's, the Court credits Claimant's testimony.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo.App.2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or

unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo.App.2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Commission,* 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo.App.2000).

AWW

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM*, 867 P.2d 77, 82 (Colo. App. 1993. In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury. *See* § 8-42-102(2), C.R.S. (2021).

Where the prescribed methods will not result in a fair calculation of a claimant's AWW in the particular circumstances, section C.R.S. § 8-42-102(3) grants an ALJ discretion to determine AWW "in such other manner and by such other method as will, in the opinion of the director *based upon the facts presented*, fairly determine such employee's average weekly wage." Section 8-42-102(3), C.R.S. (emphasis added).

Here, the parties have agreed that the AWW of $808.04 is incorrect. Each party has argued as to what they believe the correct AWW to be.

Respondent argues that Claimant's AWW should be calculated as $612.69 based on Claimant's earnings at the time of Claimant's injury. Respondent argues that the "default method" of calculating AWW as of the date of injury would fairly compute the AWW in this case and that it would be inappropriate for the Court to apply the discretionary provisions of § 8-42-102(3), C.R.S. Respondent distinguished the cases of *Campbell v. IBM* and *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo.App.2007), on the basis that those cases involved claimants who sustained injuries at a lower paying job only to later lose wages at a different, higher-paying job. Respondent further distinguished *Pizza Hut v. ICAO*, 18 P.3d 867 (Colo.App.2001), as that case involved a claimant who began a new, much higher-paying employment only two weeks after his date of injury, whereas Claimant continued to earn his date-of-injury wages for seven months following his date of injury. Last, Respondent argues that none of Claimant's wage increases were merit-based.

Claimant argues that it would be "manifestly unjust" for the Court to base Claimant's AWW on the earnings in effect at the time of injury given that Claimant experienced subsequent increases in wages during the course of his entitlement to temporary disability benefits. He cited *Campbell* for that proposition.

Respondent argued persuasively at hearing that application of the discretionary provision to all cases where claimants receive wage increases during periods of disability would be an exception that swallows the rule. Although ALJs have found similar such arguments persuasive in the past in cases analogous to this one, *Campbell* remains good law and binds this Court.

For example, in *Romero v. Liberty Mutual Ins. Co.*, W.C. No. 4-218-823 (2000), an ALJ declined to apply the discretionary standard and calculated the AWW based on the date of injury, despite the claimant receiving pay increases during the months after his injury, which included periods of disability. The ALJ cited policy reasons for why the discretionary provision should not be applied. The ICAO set aside the ALJ's order and remanded the matter, noting:

> "We do not disagree with the ALJ's observation that the redetermination of AWW to include a post-injury wage increase is inconsistent with determining AWW based on the "remuneration which the injured or deceased employee was receiving at the time of the injury," as provided by § 8-42-102(2) . . . . As noted by the ALJ, it arguably also undermines the 'predictability and certainty' of the respondents' liability. . . . However, these consequences are expressly contemplated by *Campbell*, and *Campbell* represents the current state of the law on the issue."

Id.

Therefore, because the facts in this case are sufficiently analogous to those in *Romero* and *Campbell*, the Court must apply the discretionary provision of § 8-42-102(3), C.R.S.

Were the Court to use Claimant's AWW effective as of the date of injury, Claimant would be undercompensated during later periods when his earning capacity increased. Conversely, were the Court to base the AWW on the highest, most recent earnings, Claimant would receive a windfall at Respondent's expense during earlier periods of disability. The Court could adopt a variable AWW which would adjust for different periods of temporary disability. Although this practice achieves fair AWW calculations for periods of temporary disability, it raises an obvious issue as to which of the various AWWs to use once permanent disability benefits come due. One party might plausibly argue that the AWW as of the date of injury would result in the most appropriate calculation permanent disability benefits. The opposing party might make an equally plausible argument that permanent partial disability should be based on the AWW at the time of MMI. *See, e.g.*, *Waalkes v. The Salvation Army*, W.C. No. 4-533-879 (September 30, 2003); *Porter v. Wal-Mart Stores*, W.C. No. 4-392-507 (August 12, 2002).

Therefore, the Court in this case determines a single AWW based on the weighted averages of Claimant's earnings during periods of temporary disability. The AWW is weighted based on the number of hours of lost time during each period. Admittedly, this will result in Claimant being both overcompensated for early temporary disability and overcompensated for later periods of disability. But, in the aggregate, it will ensure that Claimant is neither overcompensated nor undercompensated, and will achieve the fairest outcome for the parties.

During the course of this claim, Claimant has lost wages corresponding to 343 lost hours. Those periods of disability can be broken down as follows:

- From Claimant's date of injury through June 2022, while earning an average weekly wage of $612.69,[1] Claimant had 172.5 hours of lost time, representing 50% of the total lost time.
- From July 2022 through December 2022, while earning an average weekly wage of $631.08,[2] Claimant had a total of 156.25 hours of lost time, representing 46% of the total lost time.
- In January 2023, while earning an average weekly wage of $722.89,[3] Claimant had a total of 3.75 hours of lost time, representing 1% of the total lost time.
- From February 2023 until the March 14, 2023 GAL, while earning $790.32 per month,[4] Claimant had 10.5 hours of lost time, representing 3% of the total lost time in this matter.

Claimant has since been placed at MMI effective April 14, 2023, and Respondent has requested a DIME.

Claimant cites to *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (May 7, 1997), for the proposition that Claimant's July 1, 2023 pending raise should be factored in to calculate Claimant's AWW. However, the facts here do not support inclusion of Claimant's prospective July 1 raise in the calculation of AWW.

In *Ebersbach*, the ICAO held that the claimant was entitled as a matter of law to have her AWW adjusted to account for post-injury pay raises she was eligible to receive under a union contract. The Panel stated:

> [T]he facts in this case cannot be meaningfully distinguished from those in *Campbell*. Here, at the time of the injury, the claimant had a contractual right to an increase in her hourly earnings as of May 7, 1995. This right was not contingent on performance evaluations or other subjective factors. Thus, the undisputed evidence establishes that the claimant would have been earning an additional twenty-five cents per hour subsequent to that date but for the intervention of the

[1] This is based on $2,655.00 per month.
[2] This is based on $2,734.67 per month.
[3] This is based on $3,132.53 per month.
[4] This is based on $3,424.73 per month.

industrial injury. The claimant's right to receive the increase was sufficiently definite that it would be manifestly unjust to deprive her of the benefit of the increase when calculating her average weekly wage.

Id.

Here, unlike in *Ebersbach*, the Court does not find that Claimant is more likely than not to have sustained lost wages due to temporary disability after the July 1, 2023 raise.

While it is possible that Claimant will be entitled to temporary disability benefits beyond those which were admitted on the March 14, 2023 GAL, entitlement to such benefits at this time is speculative. Although imperfect, using the existing dates of disability currently admitted on the March 14, 2023 GAL is the Court's best approximation of Claimant's total lost time in this matter. Therefore, the Court does not include the July 1, 2023 raise in its calculation, and instead weighs wages based on the amount of lost time during each period during which Claimant earned those wages.

Period	November 19, 2021, through June 2022	July 22 through December 22	January 2023	February 2023 to March 14, 2023	TOTAL
Hours	172.5	156.25	3.75	10.5	343
Monthly Gross Pay	$2,655	$2,734.67	$3,132.53	$3,424.73	
AWW	$612.69	$631.08	$722.89	$790.32	
Weight	50%	46%	1%	3%	1
AWW x Weight	$308.13	$287.48	$7.90	$24.19	**$627.71**

Based on the above, and weighing the AWWs for each period of lost time based on that period's share of the total lost time, the Court calculates an AWW of $627.71.

ORDER

1. Respondent proved by a preponderance of the evidence that the admitted AWW was incorrect. Respondent shall file an amended general admission of liability or a Final Admission of Liability within twenty-one days of this Order admitting for benefits consistent with an AWW of $627.71.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2023.

/s/ Stephen J. Abbott
Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-153-666-006

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening his claim.

2. If Claimant's claim is reopened, whether Claimant established entitlement to temporary disability benefits.

3. If Claimant's claim is reopened, whether Claimant established an entitlement to additional reasonable and necessary medical benefits.

FINDINGS OF FACT

1. On November 12, 2020, Claimant sustained an admitted injury to his left knee arising out of the course of his employment with Employer. On that date, Claimant sustained a fracture of the left tibia while delivering a package for Employer.

2. Claimant was initially seen at St. Joseph Hospital and was hospitalized for approximately two weeks and then transferred to Vibra Rehab Hospital of Denver where he remained for until December 4, 2020. (Ex. E).

3. On January 27, 2021, Claimant saw authorized treating physician (ATP) Matthew Lugliani, M.D., at COMP. Dr. Lugliani ordered a CT scan of Claimant's left knee and referred Claimant to Rajesh Bazaz, M.D., an orthopedic surgeon. (Ex. F).

4. The CT scan was performed on February 4, 2021, and showed a partially-healed non-displaced fracture of the anterior and medial tibial plateau, without soft tissue pathology. (Ex. 15 & H).

5. On February 12, 2021, Claimant saw Dr. Bazaz at Western Orthopaedics for evaluation of his left knee. Dr. Bazaz indicated Claimant did not require surgery, and ordered an MRI of Claimant's left knee. (Ex. G & 13).

6. On February 16, 2021, Claimant saw Dr. Lugliani and reported 10% improvement of his left knee. Claimant also reported new complaints of low back and neck pain. On examination, Dr. Lugliani noted decreased range of motion and tenderness to palpation of Claimant's back, but an otherwise normal examination. Dr. Lugliani referred Claimant for chiropractic care and massage therapy. (Ex. 19).

7. On March 2, 2021, Claimant had MRIs performed of his left knee ordered by Dr. Bazaz. The left knee MRI showed moderate bone marrow edema of the left tibia, consistent with subacute healing of the fracture, and intact menisci and anterior cruciate ligament. (Ex. H).

8. Also on March 2, 2021, Claimant had cervical, thoracic, and lumbar spine MRIs on that date. Although the imaging reports indicate Claimant was referred by Dr. Lugliani, Dr. Lugliani's medical records do not reflect that he referred Claimant for the MRI. The cervical MRI showed multilevel disc bulges and protrusions with mild thecal sac narrowing at C4-5 and C5-6, and a C5-6 posterior annular fissure. (Ex. 16). The lumbar MRI showed disc bulges at L4-5, L5-S1 and L5-S1 with mild neuroforaminal narrowing at L4-5 and L5-S1. (Ex. 18). Claimant's thoracic MRI showed only mild to moderate disc desiccation. (Ex. 17). No credible evidence was admitted indicating any provider has opined that the pathology shown on the cervical, thoracic, or lumbar MRIs was causally-related to Claimant's November 12, 2020 work injury.

9. Dr. Bazaz reviewed Claimant's left knee MRI on March 5, 2021. He opined that Claimant's fractur had healed appropriately, and that Claimant needed to start physical therapy. Claimant requested that Dr. Bazaz treat his back complaints, but Dr. Bazaz indicated he did not order Claimant's cervical, thoracic, or lumbar MRI and would not be the appropriate physician to treat his back complaints. (Ex. 14 & G).

10. Claimant returned to Dr. Bazaz on April 16, 2021. Claimant had not begun physical therapy, and had not returned to Dr. Lugliani. Dr. Bazaz again indicated that Claimant should be in physical therapy for his knee, but was unclear why this had not occurred. (Ex. G).

11. Claimant's next documented medical visit was with Lawrence Lesnak, D.O., on July 7, 2021. (Dr. Lesnak indicated that he had now been designated as Claimant's ATP). Claimant reported left knee pain, and lumbar pain. He also reported to Dr. Lesnak that he had a different work-related low back injury in October 2020 while working for a different employer, and was treated at Concentra for approximately one month. (No records of this injury were admitted into evidence). Dr. Lesnak examined Claimant and recommended a trial of physical therapy. (Ex. E). Dr. Lesnak also ordered a CT of Claimant's left knee, which was performed on August 6, 20212, and showed a healed proximal tibial stress fracture. Dr. Lesnak further opined that Claimant did not sustain spinal injuries as a result of his November 12, 2020 work injury. (Ex. H).

12. Claimant began physical therapy for his left knee on August 31, 2021, at Select Physical Therapy. Claimant attended four sessions before he was discharged for non-compliance on September 17, 2021. (Ex. I).

13. On November 4, 2021, Claimant saw Dr. Lesnak again. Dr. Lesnak noted that the only recommended treatment for Claimant was aggressive physical therapy, and although Claimant had previously been discharged from physical therapy, he was willing to provide a new physical therapy prescription. If Claimant elected not to pursue further physical therapy, Dr. Lesnak indicated he would place Claimant at maximum medical improvement (MMI). (Ex. E). No credible evidence was admitted indicating Claimant followed through with additional physical therapy.

14. On March 10, 2022, Dr. Lesnak placed Claimant at maximum medical improvement (MMI) effective January 10, 2022 for his November 12, 2020 injury. Dr.

Lesnak assigned Claimant a 2% left lower extremity impairment rating, and opined that Claimant did not require work restrictions or maintenance care, unless he continued to have symptoms. Dr. Lesnak opined that Claimant' reported neck and back symptoms were unrelated to his November 12, 2020 injury. (Ex. E).

15. On March 29, 2022, Respondents filed a final admission of liability (FAL) for Claimant's November 12, 2020 injury, admitting for a 2% left lower extremity impairment rating. (Ex. B).

16. Claimant did not request a Division-sponsored independent medical examination (DIME), file an objection to the FAL, or file an Application for Hearing within thirty days of the March 29, 2022 FAL. Consequently, Claimant's claim closed on April 29, 2022 pursuant to § 8-42-107.2, C.R.S.

17. After being placed at MMI, Claimant apparently sought treatment for his left knee from providers in [Redacted hereinafter PT]. On May 16, 2022, Claimant had a left knee x-ray ordered by Parham Pezeshk, M.D. The x-ray showed no joint effusion or degenerative changes. On July 27, 2022, Claimant had another left knee x-ray at the same facility, which was interpreted as showing no significant changes from the May 16, 2022 x-ray. (Ex. H). No additional records from these providers were offered into evidence.

18. In addition to Claimant's November 12, 2020 knee injury, Claimant sustained two additional work-related injuries. On August 25, 2020, Claimant sustained a lower back injury while unloading a container working for a different employer. Claimant was released to full duty from his August 25, 2020 injury on September 22, 2020.[1] On April 1, 2021, Claimant was evaluated by Kathy McCranie, M.D., for an independent medical examination related to the August 25, 2020 injury. Dr. McCranie opined that Claimant was at maximum medical improvement by early October 2020, and had no permanent impairment from that injury. (Ex. D).

19. On February 23, 2022, Claimant reported he sustained an injury to his low back, including the lumbar and lumbosacral spine while working for Employer. A First Report of Injury was filed on March 2, 2022. Respondents filed a Notice of Contest on March 18, 2022. (Ex. C).

20. Claimant's submitted exhibits demonstrate Claimant has been evaluated for issues involving his lower back since reaching MMI for the November 12, 2020 knee injury. This includes undergoing a lumbar MRI on September 15, 2022 which demonstrated mild lateral foraminal narrowing due to a disc bulge at the L5-S1 level. No credible evidence was admitted indicating that the lower back treatment Claimant has received is causally related to his November 12, 2020 knee injury. The ALJ makes no findings as to whether Claimant's lower back condition is causally related to any other industrial injury.

[1] The ALJ infers that the August 2020 injury is the same injury Claimant reported to Dr. Lesnak as occurring in October 2020.

21. At hearing, Claimant testified that both Dr. Lesnak and Dr. Bazaz verbally told him that he had a spinal injury as a result of the November 12, 2020 work injury. Dr. Lesnak indicated he was unable to treat Claimant's spine because the treatment was not authorized by Insurer. Claimant testified that he was in a wheelchair for two years following the November 12, 2020 injury, and that he was provided a brace for his knee. He indicated that except for a brief period where he attempted to return to Employer, he has not been able to obtain work.

22. Claimant testified that Dr. Lesnak was the last physician he saw in Colorado for his November 12, 2020 injury, and he was not able to complete treatment with him. Claimant indicated Dr. Lesnak told him he would not be able to work as a driver due to the injury to his back, and that he could not perform a job where he was constantly standing because of his knee. He also indicated Dr. Lesnak informed him he could work with restrictions, including sitting for 30 minutes every two to three hours. Claimant testified that at his last visit with Dr. Lesnak, he indicated Claimant's leg had been affected by 15%, and that he was surprised to see a 2% impairment rating.

23. Sometime between March 10, 2022 and May 16, 2022, Claimant moved to PT[Redacted] where he sought treatment from new providers, including Dr. Tse Wong, and Dr. Ahmoud, both of whom were orthopedists. (Ex. 24). Claimant had another lumbar spine MRI which Claimant testified the same as his previous lumbar MRI. (The ALJ infers that the MRI Claimant referenced was the undated lumbar MRI taken in PT[Redacted], and submitted as Exhibit 21). Claimant testified he also saw a family doctor, who recommended spinal injections. Claimant testified that the physician in PT[Redacted] informed him that if he did not improve, he would require spinal surgery, but that he was advised that an operation could paralyze him. Claimant was then referred to "Workforce" in PT[Redacted], for training that would help him get a job working on a computer, but he was not able to complete the training because he left PT[Redacted].

24. Claimant then moved to [Redacted, hereinafter PM], where he saw another physician, who recommended a spine specialist and a pain management clinic. Claimant then moved to [Redacted, hereinafter LK], where he now resides. Claimant indicated that he was unable to receive pain management treatment because he has no insurance.

25. Claimant testified that he continues to have swelling and pain in his knee and leg, and issues with his spine, which Claimant believes could cause him to be paralyzed.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find

that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

REOPENING CLAIM

Claimant seeks to reopen his claim for the purpose of obtaining additional medical benefits and temporary disability benefits, but has not articulated a statutory basis for reopening. The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. The party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012). An otherwise final award of benefits may be reopened under § 8-43-303, C.R.S., which provides, in relevant part:

> At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

Claimant's testimony demonstrates that he disagrees with Dr. Lesnak's impairment rating, lack of work restrictions, his opinion that Claimant does not require additional care for his knee, and his opinion that Claimant did not sustain a back injury on

November 12, 2020. Claimant's testimony that Dr. Lesnak informed him he had a spinal injury, and required additional care is not reflected in Dr. Lesnak's medical records. While Claimant's testimony that he continues to experience pain in his knee and lower back are credible, no credible evidence was presented to indicate that Claimant's lower back condition is causally related to his November 12, 2020 injury. Moreover, Claimant has not established that the physical condition of his left knee has changed since being placed at MMI. Claimant has not established that his claim should be reopened for any of the bases set forth in § 8-43-303, and no credible evidence was admitted upon which a finding that these factors exist could be reasonably based.

In substance, Claimant's claim seeks to challenge Dr. Lesnak's determination that he was at MMI on January 10, 2022, for his November 12, 2020 work-related left knee injury. However, the ALJ lacks authority to resolve that issue because Claimant did not seek a DIME and did not timely contest his MMI and impairment determinations. Under § 8-42-107 (8)(b)(I), an ATP makes the initial determination as to whether a Claimant has reached MMI. If a party disputes the ATP's MMI determination, the party may request an division independent medical examination ("DIME") in accordance with § 8-42-107.2, C.R.S., to resolve that dispute. Section 8-42-107.2 (2)(a)(I)(A), provides that when a claimant initiates an MMI dispute, the time for selection of a DIME commences with the date of mailing of an FAL that includes an impairment rating. Section 8-42-107.2 (2)(b) provides that the party seeking an IME to dispute an ATP's determination must provide written notice and propose candidates to perform the IME within thirty days after the date of mailing of the FAL. If no notice is submitted within 30 days, the "authorized treating physician's findings and determinations shall be binding on all parties and on the division." *Id*. "A DIME is a prerequisite to any hearing concerning the validity of an authorized treating physician's finding of MMI, and, absent such a DIME, an ALJ lacks jurisdiction to resolve a dispute concerning that determination." *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513, 515 (Colo. App. 2002), *citing Story v. Indus. Claim Appeals Office*, 910 P.2d 80, 82 (Colo. App. 1995).

Respondent mailed its FAL on March 29, 2022. To challenge the FAL and the finding of MMI, Claimant was obligated to request a DIME on or before April 29, 2020. No evidence was admitted indicating that Claimant requested a DIME within 30 days of the mailing of the FAL or thereafter. Consequently, pursuant to § 8-42-107.2 (2)(b), C.R.S., Dr. Lesnak's MMI determination is binding on the parties, and the ALJ lacks authority to resolve any dispute concerning that determination. The ALJ finds that Claimant has failed to establish by a preponderance of the evidence grounds for reopening his claim.

TEMPORARY DISABILITY BENEFITS AND MEDICAL BENEFITS

Because Claimant has failed to establish grounds for reopening his claim, Claimant's claim for temporary disability benefits and medical benefits is denied and dismissed. The ALJ makes no conclusions as to whether Claimant requires additional treatment for alleged spinal injuries or whether any such treatment is causally related to any other alleged industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his November 12, 2020 worker's compensation claim is denied and dismissed.

2. Claimant's request for temporary disability benefits and additional medical benefits related to his November 12, 2020 worker's compensation claim is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 21, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-147-151-004

PROCEDURAL HISTORY

On July 19, 2022 Respondent filed an Application for Hearing on issues which included overcoming the DIME physician's opinions by clear and convincing evidence, causation, failure to comply with modified job offer and unauthorized medical care, as well as offsets, overpayment and credits.

Claimant filed a Response to Application for Hearing on August 18, 2022 listing the issues of medical benefits that were authorized, reasonable and necessary, temporary total and temporary partial disability benefits, and defense of the DIME physician's opinion and defense to failure to comply with modified job offer.

The parties submitted the Stipulation of Facts on March 29, 2023. The Stipulation of Facts are accepted and approved. The Stipulation of Facts are the official transcript for the November 15, 2022 hearing.

On April 6, 2023 this ALJ issued Findings of Fact, Conclusions of Law and Order, which specified that Respondents were ordered to pay temporary disability benefits from March 29, 2021 through July 8, 2021. This ALJ stated as follows: Respondents shall provide Claimant an accounting of the wages paid to Claimant and the exact dates paid. Should the parties be unable to calculate the amount, the parties may provide the information within 10 days of this order and this ALJ may issue a Supplemental Order.

Respondents' filed an Uncontested Motion for Extension of Time to Complete Exchange of Additional Wage Records and/or to Request Supplemental Order Re Retro TTD/TPD. This motion was granted on April 21, 2023.

Respondents filed a Request for Supplemental Order and Submission of the Additional Wage Information on May 8, 2023. The motion was accompanied by wage records previously admitted as Exhibit P and not the records requested by this ALJ in order to issue a supplemental order. An order was issued by ALJ Peter J. Cannici on May 24, 2023 granting the motion. However, Judge Cannici's order was not brought to the attention of this ALJ.

Claimant's Petition to Review filed on April 26, 2023 and a Briefing Scheduled was issued by the OAC on April 28, 2023. As no transcript was available, the official transcript of the hearing is the Stipulation file by the parties. Claimant failed to file a Brief in Support of the Petition to Review. Respondents filed a Brief in Opposition of the Petition to Review on

This Supplemental Order is issued pursuant to the above order and the petition to review.

ISSUES

I. Whether Respondent proved by clear and convincing evidence that the Division of Workers' Compensation Independent Medical Examination (DIME) physician, Dr. Ranee Shenoi, was incorrect in her findings of causation, maximum medical improvement (MMI), and permanent partial impairment.

II. What were Claimant's permanent partial impairments related to the work injury, if any.

III. Whether Claimant has shown by a preponderance of the evidence that she sustained a loss of wages from March 29, 2021 through MMI.

IV. Whether Respondent has shown by a preponderance of the evidence that Claimant was responsible for her wage loss and Respondent entitled to recoup an overpayment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Generally:

1. Claimant worked for Employer as a bus driver since approximately 2018. As part of her job, she conducted a pre-trip inspections of the bus. She had to open the hood of the bus, check oil and everything under the hood to make sure it was in working order. She had to do a break test, check windows and seats, check the First Aid kits, the tires, bolts, lights, dings or damage to the bus. The pre-trip inspection allotted time was 12 minutes but sometimes it took more time to complete it. Then she would be ready to proceed with her route. She would pick up elementary, middle school and high school children on her route. The preschoolers had paraprofessionals sometimes ride with them during the noon time. She never really had any problems with the kids, and she did not normally have do much lifting other than the heavy bus hood. The job required her to lift 50 lbs. minimum to qualify for the job. Claimant did not have any problems doing her day to day activities related to the job before her accident. She stated that she liked the summers off because it gave her time to recoup and recharge.

2. On a snowy day, on November 11, 2019, she slipped on ice when stepping up onto a curb. She had a bag in her left hand and a purse in her other hand. She slipped in a split with each leg going opposite ways. Another coworker went to grab her on her way down. She fell onto her big bag and her left leg, hitting the ground, but not all of her body fell to the ground. She did not specifically hit her head or her shoulder. One of her hands did hit the ground. She jarred her body but she did finish her bus route. She reported it to her supervisor and was seen by Dr. Matus on the date of her accident.

3. Claimant stated that she had no prior problems or injuries prior to the November 11, 2019 event. This ALJ does not find this particularly credible since Claimant injured her left lower extremity, specifically had a bone spur in her left heel in 2000,

including a surgery to her left heel,[1] and had a neck whiplash injury in the 1980s, as documented in the medical records.

B. <u>Medical records</u>:

4. Claimant was evaluated by Dr. Brenden Matus at WorkWell on March 10, 2020.[2] Dr. Matus noted the patient was feeling a bit better. She had a flare with a particular stretch. Claimant had pain present in the mid-to-low back and left foot. Her pain rating was 7/10. She had "upper back neck tension and paresthesias in the right ulnar nerve distribution since her last massage." Dr. Matus stated he would monitor this problem. He further stated that if she continued to have left foot pain, he would order an MRI of the left foot and ankle as well as refer her to Dr. Myers.

5. On May 15, 2020 Claimant was evaluated by Dr. Bruce Cazden at WorkWell. He noted the mechanism of injury of November 11, 2019 when Claimant slipped on ice while stepping up on a curb with her left leg. She reported right mid to low back pain from slipping and left foot and ankle pain. He specifically noted that "[S]he has new symptoms of neck pain with numbness and tingling in both upper extremities. It does not appear that this is related to her work comp claim." He did not diagnose the neck condition as work related.

6. An MRI[3] of the cervical spine from July 14, 2020 showed degenerative disc and joint changes with mild dural sac indentation and multilevel bilateral foraminal narrowing.

7. Samuel Chan, M.D. evaluated Claimant on July 24, 2020. He took a history consistent with that described by Claimant and other providers. He specifically noted that claimant had landed on her left foot and continued to have problems with the left foot, low back, interscapular area and cervical spine. Claimant reported that her treatment plan was somewhat interrupted because of the COVID pandemic. He documented that Dr. Myers was treating her for the left foot pain and recommended she obtain HOKA shoes. He reviewed all of Dr. Matus' records. He reviewed both the x-rays of the foot and the MRI of the ankle and foot. They showed moderate anterior talofibular and mild deltoid ligament sprains as well as suspected hammertoe deformities but were otherwise normal. Dr. Chan documented that Dr. Matus continued to cite to Claimant's ongoing cervical spine complaints. On exam he noted that Claimant was tender to palpation of right greater and lesser occipital nerve insertion areas. There was also tenderness to palpation of right trapezius, levator scapulae, and splenius capitis muscles, with active trigger points noted. Tenderness to the bilateral AC joints but otherwise a normal cervical spine exam. He noted negative lumbar spine exam but tenderness to palpation of the calcaneus, sinus tarsi and downgoing toes bilaterally. He diagnosed bilateral occipital neuralgia, migraine

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[1] See Dr. McCranie's, Dr. Chan's and Dr. Shenoi's past medical history and surgery sections on Exhibit F, bate 031; Exh. M, bate 90, and Exh. N. bate 99.

[2] Records between November 11, 2019 and March 10, 2020, where not in evidence, only other providers' summaries of the visits, including physical therapy and massage therapy visits. This ALJ chose to rely on the descriptions from those records.

[3] Description taken from multiple medical records, including Dr. Ogin's March 11, 2021 report, as the original report was not in evidence.

syndrome and myalgia. He recommended trigger point injections for the occipital neuralgia, which he proceeded to perform.

8. The initial visit with Dr. Barry Ogin was on November 9, 2020 when Dr. Ogin took a fairly long history. Claimant was referred to Dr. Ogin by Dr. Matus with ongoing complaints of neck and cervicogenic headaches. He noted that Claimant had a comprehensive course of conservative care including physical therapy, massage therapy, dry needling and trigger point injections, and medications. Claimant reported that her low back pain only gave her occasional problems. He noted that Claimant's chief complaint was her neck, including aching and stiffness centrally but worse on the left hand than on the right side. She reported daily headaches and radiation into her shoulders and upper back centrally. Claimant had full shoulder range of motion without pain, scapular retraction and protraction was symmetric, she had full active range of motion of the cervical spine including with flexion, extension, right and left rotation, right and left lateral flexion. She was not reporting any numbness and tingling at that time. Dr. Ogin recommended medial branch block to the cervical spine given the MRI indications and, per the guidelines p. 28, physical examination findings consistent with facet origin pain, at least 3 months of pain, unresponsive to conservative care, including manual therapy, and has a positive psychosocial screen without aberrant concerns.

9. Dr. Ogin also documented that on December 10, 2020 she had a 100% relief following a cervical facet injection at the C2-5 bilateral MBB.

10. Dr. Ogin's report noted responses for December 18, 2020 that Claimant was three days post medial branch block (MMB) and her neck and headaches were feeling better with a good diagnostic response though the pain was gradually returning. She also complained of tingling and numbness down her left arm and into her left fourth and fifth fingers of the left hand.

11. On March 11, 2021 Dr. Ogin took a history that Claimant had increasing pain along her parascapular region, with severe pain in her right upper shoulder, down her medial arm to her hand, along the ulnar distribution. She also complained of pain in her sternum. She denied any new injuries other that the fact that she had returned to driving and had to hold out her arms to hold the steering wheel. His diagnosis and assessment was sprain of the ligaments of the cervical spine, including cervical facet joint syndrome, cervical pain, myalgia, cervical stenosis and cervical disc disorder with radiculopathy of mid-cervical region. He noted that the upper neck and headaches had responded to treatment but that, following performing an EMG which revealed a right C8-T1 radiculopathy. After a re-review of the MRI, the multi-level degenerative disc with spinal stenosis was more prevalent in the C5-C7. With that in mind, he recommended a C7-T1 epidural steroid injection.

12. On April 11, 2021, Dr. Paul Ogden responded to a request to approve a modified job offer, which included assembling and bagging hoagie sandwiches, assisting administrative personnel, and watching videos. Dr. Ogden added that "[B]ased on the restrictions of March 29, 2021 of avoiding reaching out or overhead" as well as allowing "position changes sit/stand/walk every 20-30 minutes" that Claimant was able to perform the tasks listed.

13. Respondent scheduled Claimant for an Independent Medical Evaluation (IME) with Dr. Kathy McCranie which took place on June 15, 2021. She took a history, which included the event of November 11, 2019 as well as an incident where she was cleaning out a closet and had an immediate onset of symptoms into her upper extremities and neck. She noted Claimant's recall of her medical treatment including that she did not have any benefit from the trigger point injections but had 100% immediate relief from the epidural steroid injections, though they lasted for a fairly short time before symptoms started to return. She also reviewed the medical records. Dr. McCranie opined that Claimant sustained both a lumbar strain and a strain of the foot and ankle, both of which resolved. She opined that Claimant's continuing complaints involving the cervical spine and the right greater than left upper extremity paresthesias, which were not documented until March 10, 2020, were not work related conditions. Lastly, Dr. McCranie opined that the right shoulder labral tear was not related to the November 11, 2019, injury, as an acute labral tear would cause immediate, severe pain in the shoulder and Claimant did not report shoulder pain for approximately seven months post-accident. Dr. McCranie further stated that, while the treatment for the cervical spine and shoulder were reasonably necessary, they were not causally related to the November 11, 2019 work injury.

14. Dr. McCranie stated as follows:

> It is my impression that the cervical spine is not accident related, making an impairment rating non-applicable. If, however, this condition is deemed to be accident related for administrative purposes, an impairment rating was performed as it is my opinion that she is at MMI for the cervical spine regardless of causality. For degenerative changes in the cervical spine, she would receive a 6% impairment with a 4% impairment for range of motion as her sensory examination was normal. Motor examination revealed some weakness in the ulnar distribution, more likely related to findings of peripheral neuropathy. If the cervical spine is deemed to be accident related, impairment would be 10% whole person. As noted previously, it is my opinion, however, that this impairment is not accident related. Regarding the right shoulder, it is my opinion that this impairment is not accident related. She is currently involved in ongoing workup of the right shoulder and if this is deemed accident related, this is not yet at MMI. However, it is my opinion, this should be treated outside of the worker's compensation arena for the reasons outlined above.

15. On June 21, 2021 Dr. Matus issued a report which included a description of Claimant's treatment to date. He noted his diagnosis as a work related fall injury with a strain of the low back and other muscle spasms, and strain of the muscles and tendons of the ankle and foot and the objective findings of those injuries were consistent with the history and mechanism of injury.[4] His physical exam revealed full range of motion of the cervical spine though Claimant reported tenderness on palpation of the right paraspinous muscles and trapezius muscles on the right, but no midline cervical spine tenderness. Back pain was causing minimal to some difficulty in daily life and left ankle had very minimal pain. Dr. Matus provided restrictions of limited use of the right upper extremity,

[4] As found, the section in Dr. Matus' June 21, 2021 and July 9, 2021 reports under "Case Summary" (Exh. H, bates 054-055; Exh. I, bate 065-066) are summaries of other providers' diagnosis, opinions and recommendations for treatment and were not necessarily adopted by Dr. Matus.

avoid repetitive reaching out or overhead; limited lift, push and pull of 5 pounds maximum, and should be allowed to change positions regularly between sit/stand/walk at least every 20-30 minutes; and referred her to Dr. Primack for a final evaluation and impairment rating.[5]

16. Claimant was placed at maximum medical improvement on July 9, 2021 by Dr. Matus without restrictions or impairment. Dr. Matus agreed with the IME examiner, Dr. McCranie that the cervical spine, headaches and shoulder conditions were not work related injuries and should be treated by Claimant's PCP, if Claimant continued to have ongoing complaints regarding those problems. He did not provide a diagnosis for the neck, nor did he show in his report that he performed an impairment rating for the related low back or left lower extremity. Yet he continued to document that back pain was causing minimal to some difficulty in daily life and left ankle had very minimal pain. Dr. Matus stated "[W]e have agreed to target Maximum medical improvement status, Injury related symptoms resolved, ongoing non related symptoms." As found, Dr. Matus placed Claimant at MMI as of July 9, 2021 noting that only the low back and left lower extremity injuries were related to the November 11, 2019 work injury. As further found, he did not perform an impairment rating with regard to either condition but considered them resolved.

17. On July 22, 2021 Respondent filed a Final Admission of Liability. Claimant objected and requested a Division Independent Medical Evaluation (DIME). The FAL admitted to an average weekly wage of $622.50.

18. Dr. Ranee Shenoi was selected as the DIME physician. She evaluated Claimant on October 12, 2021 and issued her report on October 12, 2022. She opined that Claimant reached MMI on July 9, 2021 and had a 7% whole person impairment related to the cervical spine, including 4% for specific disorder of the spine (Table 53 IIB), a 2% for loss of range of motion, and 1% for neurologic system (loss of strength). Dr. Shenoi stated that she was asked to evaluate the cervical, thoracic and lumbar spine as well as the left foot. She stated "[A]s the DIME Examiner, I will address MMI and impairment. I will not address causation."

19. Dr. Shenoi stated that the DIME application did not request she address the bilateral shoulder problems and she believed that the thoracic spine issues were coming directly from the shoulder pathology. Based on the *AMA Guides* she opined that the left foot injury provided a 1.25% impairment of the lower extremity which converted to 0% whole person impairment of the foot based on the peroneal nerve injury for altered sensation.

20. Dr. Shenoi asked Claimant what complaints were related to the work injury and she related sleep problems, pain in her right shoulder, arm, elbow and hand, including burning in the right axillary line and that her hand would get cold. She reported multiple neck complaints, going across her shoulders, which radiated into her chest and sternum as well as the right upper extremity. She reported headaches that were only intermittent. She also reported low back and left foot pain as well as ringing in her ears. As found,

[5] The evaluation with Dr. Primack did not take place, according to the medical records and the parties statements at hearing.

Dr. Shenoi only provided an impairment rating for the neck and foot, without providing a causation analysis of the body parts for which she was providing impairment ratings. Further, she did not rate the lumbar spine or go through the process to assess the lumbar spine range of motion.

21. Dr. McCranie issued a supplemental report on November 5, 2021. Dr. McCranie specifically commented regarding the DIME physician's report. She noted that Dr. Shenoi had specifically erred by failing to perform a causation analysis. She noted as follows:

> A causation analysis is necessary in order to determine if the body part to be rated is applicable for a work-related impairment rating. By stating that she made no causation analysis, Dr. Shenoi is indicating that she is not making an opinion as to whether the rating provided is applicable to the work injury. The rating itself was otherwise technically correct. However, without any causation analysis, there is no indication that the impairment rating is applicable to the work injury of November 11, 2019. According to Desk Aid 11 impairment rating tips number 7, division independent medical examiner may declare that a condition is not work related. This may occur despite the fact the payer has accepted a body part or a diagnosis as part of the claim. In [Claimant]'s case, treatment has occurred and MMI has been declared by an authorized provider. Considering the late onset of [Claimant]'s cervical symptoms, and a new non-accident-related event that caused the onset of these symptoms in April of 2020, it was essential that Dr. Shenoi perform a causation analysis in order to opine as to the relatedness of the cervical impairment.

C. <u>Dr. McCranie's Deposition:</u>

22. Dr. McCranie testified by deposition on June 1, 2022 as a board certified physiatrist and pain medicine specialist, with a Level II accreditation. She noted that she continued to see both private patients, including at Concentra twice a week, and patients for medicolegal evaluations with approximately 30 years of experience. Dr. McCranie indicated she was familiar with the *AMA Guides to the Evaluation of Permanent Impairment,* Third Edition (*Revised*), WCRP and the Impairment Rating Tips of the Colorado Division of Workers Compensation.[6] She specifically noted that Rule 11-3(K) required that each DIME physician make "all relevant findings regarding MMI, permanent impairment, and apportionment of impairment, unless otherwise ordered by an ALJ." Dr. McCranie stated that a causation analysis was an integral part of conducting a determination of permanent impairment. She specified that physician were required to comply with the Rules, the Division materials and Level II accreditation coursework.

23. Dr. McCranie testified that following the review of the medical records and consideration of the history provided by Claimant, March 10, 2020 was the first medically documented problem, including some tension in her neck and some right upper extremity paresthesias. The first documented pain in her cervical spine/neck was on May 15, 2020. Dr. McCranie explained that in order to link a cervical injury to the original date of injury, there needed to be a temporal relationship between the onset of symptoms and the initial

[6] Division's Desk Aid No. 11, Impairment Rating Tips, Division of Workers Compensation Rules of Procedure.

accident, which was not present in this case. What was significant here is that Claimant reported to Dr. McCranie that she was cleaning out her closet in April of 2020, and she was reaching, lifting and moving some hair products, towels and sheets from her closet, and had an acute onset of neck pain and right shoulder pain at the point that brought on a lot of these symptoms, which was a more probable cause of Claimant's neck and shoulder pain.

24. Dr. McCranie specifically noted that Dr. Shenoi was aware that the medical records indicated Claimant had not reported any problems until the March 10, 2020 date when she reported tension in her upper back and neck, that Dr. Shenoi was aware of the "closet" incident, but that Claimant had stated that she had felt a pop in physical therapy as an explanation of when she started to have problems in her neck and upper back. Dr. McCranie explained that it was incorrect to simply rely on a Claimant's claim that any particular injured body part was caused by the injury but it was up to the DIME physician to make and explain the causation analysis. As a DIME physician, it is up to that physician to determine the injuries or body parts that are causally related to the work injury in question and the DIME physician cannot rely on the items check off on the Application for a DIME.

25. Finally, Dr. McCranie opined that Dr. Shenoi committed a clear error in addressing MMI and impairment and declining to address causation of the particular body parts, which rendered her opinions on impairment clearly incorrect under the *AMA Guides*, Third Edition, and the Division training material. Dr. McCranie stated that based on the Division's Rules of Procedures specifically dealing with DIMEs and Level II accreditation, the Division's Impairment Ratings Tips, the training for recertification, the requirement that physicians utilize the methodology in the *AMA Guides*, Third Edition, it is absolutely incumbent on a DIME physician to do a causation analysis.[7] Dr. McCranie also suggested that Dr. Shenoi relied on the fact that the ATPs had provided treatment which was paid for by Respondents. This ALJ agrees with Dr. McCranie's inference that in relying on the fact that Respondent paid for the treatment for the cervical spine that it justifies addressing impairment to that body part as related to the November 11, 2019 work injury, which is clearly incorrect.

26. Dr. McCranie cited to the Impairment Rating Tips. The Section on DIME Panel Physician Notes, under Section 7, the tips emphasize as follows:

> Declaring Condition is Not Related to Injury: Division Independent Medical Examiners may declare a condition is not work-related. This may occur despite the fact a payer has accepted a body part or diagnosis as part of the claim, treatment has occurred, and MMI has been declared by the authorized provider. If this situation arises, an impairment rating must be provided in the report or as an addendum to the DIME report. This information will often be used by the parties for further negotiations and/or settlement of the claim. However, only the work-related impairment ratings are to be recorded on the DIME Examiner's Summary Sheet.

[7] At hearing Dr. McCranie explained that the *AMA Guides to the Evaluation of Disease and Injury Causation* explains a somewhat different and more expansive methodology of causation determinations. However, This ALJ will only rely on the law and rules applicable in this matter.

D. Dr. McCranie's Hearing Testimony:

27. Dr. McCranie's testimony at hearing was consistent with her testimony during the deposition and her reports. She opined that, considering the degenerative disc disease in the spine as verified by the MRI report of the cervical spine and the evidence of acute injury sometime in April or May 2020, when she reported excruciating pain, the incident of the closet was the more likely cause of the neck injury. Further, Dr. McCranie did explain, that sometimes, ATPs take time to make a final causation analysis, which Dr. Matus provided in his MMI report. She opined that the fact that Claimant was sent to multiple providers, including Drs. Chan, Ogin, and Castro, for the neck injuries, was not a *de facto* determination of causation.

28. Dr. McCranie opined that Dr. Shenoi's failure to specifically address causation in her DIME report was clearly incorrect. She explained that, based upon her understanding of the Division of Worker's Compensation Rating Tips, the *AMA Guides to the Evaluation of Permanent Impairment*, Third Ed. (*Revised*), and other medical publications that the failure to perform or provide a causation analysis to support her cervical impairment rating rendered her opinion on medical impairment clearly incorrect because a DIME physician must do a causation analysis for every body part that is rated and that it is insufficient and contrary to the impairment rating tips simply because the claimant had received treatment for the body part to provide a rating. Dr. McCranie also explained that the causation analysis required both an explanation of the temporal relationship of when the symptoms manifested as well as an analysis of the mechanism of injury. Dr. McCranie opined that without this analysis regarding the initial causation, the entire rating process was defective.

E. Risk Manager's Testimony:

29. The Risk Manager for Employer (JO) testified at hearing in this matter. She stated that she handled the workers' compensation claims until the excess policy carrier was activated by large expenses. As the Risk Manager she managed, monitored, reviewed, and made decisions with regard to workers' compensation claims and liability. She was generally involved from day one of a claim. She was the one that issued the First Reports of Injury (FROI) and made sure she was getting the M-164 forms to determine a worker's work status. She commented that she stayed involved in a case until the end of the claim.

30. The Risk Manager explained that Employer saw claims from the perspective of getting workers back to work, so they may authorize medical care that may not necessarily be related to the particular work accident. Employer would frequently request that providers conduct diagnostic testing early on in the case instead of delaying the process, in the hope that conservative care would work and the worker would get back to work sooner.

31. [Redacted, hereinafter MJ] was involved in the case, however, a younger adjuster through the third party administrator, who may not have felt confident enough to question the ATP's causation analysis, was handling the day to day issues. MJ[Redacted] testified she might have handled this case differently but she had a wealth

of approximately 30 years' experience. It was clear that the adjuster continued to authorize care despite a lack of a good causation analysis, until she, as the Employer's Risk Manager, requested the IME with Dr. McCranie.

32. The Risk Manager was very familiar with the modified job offers made to Claimant and was involved in the process. The February 9, 2021 offer was for Claimant to perform some office work and watch safety videos (approximately 50 of them) in order to keep Claimant busy and engaged in work activities. Dr. Matus authorized this modified job offer on the same day and Employer sent the offer of modified work for Claimant to start on February 15, 2021. On March 28, 2021 Claimant advised her supervisor that she had completed the safety videos so modified duty was terminated.

33. Based on the FAL of July 22, 2021, Claimant was originally paid regular salary through December 12, 2019 (pursuant to Sec. 8-42-124, C.R.S.) at which time the Third Party Administrator paid TTD benefits beginning December 13, 2019 through January 27, 2021. Then Claimant was paid temporary partial disability (TPD) on January 28 for one day and TTD resumed as of February 1, 2021 through February 15, 2021. As of February 18, 2021[8] Claimant was paid TPD until March 28, 2021.

34. Then MJ[Redacted] worked with Nutrition Services because they were frequently understaffed. At that time they were making sandwiches for the lunch truck that was provided to the children and community. They were to have Claimant sitting at a conference room table, where other workers would bring the ingredients and Claimant could make the sandwiches.

35. MJ[Redacted] stated that Claimant never went back and that Dr. Matus had said that the job was within her restrictions. The Risk Manager stated that Claimant was not placed back on temporary total disability because Claimant was the one to violate the April 9, 2021 Rule 6 offer of modified employment and that the job was still available. Then school ended on May 27, 2021, and because the bus drivers were paid on a twelve month cycle despite summer time off, they restarted to pay regular wages, despite Claimant not working.

36. MJ[Redacted] stated that while the pay check periods showed payment at the end of the month, the period of payment was not correct because Employer's pay period was really from the middle of the month through the middle of the following month. This ALJ infers from this testimony that, for example, the March 31, 2021 pay check actually paid from February 15 through March 14, 2021. This was confirmed by Claimant.

37. MJ[Redacted] was on vacation through April 26, 2021 and prepared a letter to Dr. Matus, which was sent on May 13, 2021 with a job description of assembling and bagging hoagie sandwiches. On May 14, 2021 Dr. Matus answered stating that the prior restrictions provided by Dr. Ogden were still applicable, as long as the job did not require any work lifting greater than 10 lbs. and that Claimant be able to keep her arm close to her side. As found, this is a new restriction as of May 14, 2021.

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[8] There was no explanation as to why Claimant was not paid for February 16 and 17, 2021, but it does show on the time log that she worked 6 hours a day for both days and it is to be assumed that those hours were paid by Employer.

38. Respondent argued that Employer should be entitled to a reimbursement for overpayment to Employer of the 24 hours paid to Claimant at the rate of $20.75 per hour for a total of $498.00, if Claimant was entitled to temporary disability benefits. MJ[Redacted] stated that this was for the period of April 27, 2021 through April 30, 2021 paid by Employer.

39. MJ[Redacted] testified that Claimant returned to work as of March 29, 2021 and temporary partial disability benefits stopped per the Final Admission of Liability (FAL) dated July 22, 2021.

40. The statement of earnings showed that in March[9] 2021 Claimant was paid $2,033.49,[10] in April 2021 she was paid $1,523.67, in May she was not paid any wages, in June she was paid $814.44 and in July she was paid $814.44 as well.

41. The hours worked print out showed Claimant working from March 29, 2021 through April 9 2021. This is consistent with what the Risk Manager testified, with the exception that it did not seem that Claimant worked her full hours all days following March 29, 2021. In fact, there were some periods that were listed as "Leave Without Pay."

F. <u>Other Evidence:</u>

42. On May 21, 2021 Claimant secured the signature of the supervisor approving the note stating that Claimant had showed up for work on April 26, 2021 but spoke with both the Nutrition Services Manager (supervisor) and her assistant (JC), that she was unable to make the sandwiches because of the repetitive nature of the job. The supervisor confirmed that she took down Claimant's phone number and advised Claimant to go home. The Manager further confirmed that she would call Claimant "when she found out what they should do." Claimant's testimony in this matter is found credible and supported by the supervisor's signature on the note.

43. The note further stated that Claimant worked on April 22, 2021[11] and could punch the clock at Nutrition Services but the "[Redacted, hereinafter OE]" system would not take her badge number. The time clock report at Exhibit Q, bate 134 seems to indicate that Claimant did, in fact, work on April 22 as it reports "5 Trans_Bus Cleaning" and provides a rate of pay. It is also clear from this print out that Claimant's work was not logged into this system after April 22, 2021. However, Claimant reported working May 24, 25, and 27, 2021 and on June 1, 2021 she received instructions from the Risk Manager to enter May 28, 2021 as work injury leave.[12] Therefore the hourly payroll print

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[9] Pay periods were calculated on a monthly bases from the first to the last day of any given month and paid generally on the last day of the month.

[10] This ALJ was unable to reach the same calculation by Employer, at least with the March 31, 2021 Employee Statement of Earnings. Claimant's rate of pay was $20.75. The accrual wages showed 108 hours were paid at $1,960.88. However, 108 hours multiplied by $20.75 equals $2,241.00 not $1,960.88. Even if we deduct the leave without pay of 11.50 hours from the 108 hours, that would total 96.5 hours times $20.75 for $2,002.37. There may be something this ALJ is not aware of and certainly was not clarified during MJ's[Redacted] testimony or Claimant's testimony.

[11] The note showed the year 2020 but given the time line of work and when work was offered, this ALJ infers that the correct year was 2021.

[12] Exh. 8.

out is clearly erroneous. Also, no payroll was paid in May and the June payroll earnings statement does not include any hours worked.[13]

44. A second note dated May 24, 2021 stated that on April 23, 2021 Claimant showed up for her work shift but was in pain, feeling she needed to see her doctor, so she would not be working. The front desk receptionist agreed and noted that she would let "them" know.

45. The third note dated May 27, 2021 stated Claimant worked hours for May 24, 25, and 27, 2021. It noted Claimant was working without breaks, took May 26, 2021 off as a personal day, and on May 28, 2021, pursuant to the Assistant, JC, that she should not go into work. Claimant stated this document was signed by another supervisor (JCS-D). These dates and times were also sent to the Risk Manager, who confirmed that May 28, 2021 should be entered as work injury leave.[14]

G. <u>Claimant's Testimony:</u>

46. Claimant testified that she continued to suffer from the effects of the injury at the time of the hearing. She stated that the treatment she received, including physical therapy, massage therapy, and the different injections helped her, but when she returned to her job of injury, she continued to have the symptoms. She also stated that treatment was delayed during some period because of the COVID pandemic and most of 2020 she was off work. Treatment was also delayed because she was struck with pneumonia and was out for multiple weeks without the ability to attend any medical appointments.

47. Claimant stated that she was initially seen at the original WorkWell for her physical therapy but because of how busy they were, she changed over to get PT at the Parker WorkWell. Claimant testified that they treated her neck symptoms in PT from the beginning as well.

48. Claimant testified that she reported the neck complaints from the beginning of her injury to her providers. As found, this was not documented in the medical records provided as evidence in the matter, though there was a dearth of records from the time period of November 11, 2019 through March 9, 2020.

49. Claimant stated that when she returned to work on January 28, 2021, she spoke with the coordinator about having problems driving the bus. She was taken back off work and WC started paying her again. Eventually she receiving the modified duty offer.

50. The offer went to Claimant on April 9, 2021 to start as of April 15, 2021. Claimant testified she started with Nutrition Services on April 22, 2021. Claimant reported that she had concerns that the work was outside her restrictions and was too repetitive. On the following day, April 23, 2021 Claimant showed up to work but left work that day to go to the doctor. On April 26, 2021 she advised her supervisor that the work was violating

[13] Exh. P, bates 111-112.
[14] Exh. 8.

her restrictions. Nutrition Services did not know what to do so they sent her home. As found, Claimant is credible in this matter.

51. When she went to Nutrition Services she would have to reach for the items she needed, which was causing increased symptoms and problems for her. At one point she was delegated to just opening bags, and she had to open over two thousand baggies in one day and was in so much pain, she could not tolerate that work. She testified that she called the Risk Manager and she called Dr. Ogden without response. Claimant was frustrated by the fact that she could not clock in and out of Nutrition Services because officially, she was not one of their employees. Claimant testified that she went to WorkWell and was seen Dr. Ogden's PA on April 23, 2021.

52. She testified that she went to work on April 26, 2021. This was confirmed by signature of the supervisor. She reported that the work was outside of her restrictions. She stated that she never told the Manager or the supervisor that she could not do any of the work, only that she could not do the baggies all day, opening them. Nutrition Services did not know what to do with her. She was willing to do something other than opening the hoagies bags. Dr. Matus never took her off work completely but provided restrictions.

53. Claimant was then sent home by the Nutrition Services supervisor and was told by the supervisor that she would call Claimant when she knew something. Claimant testified that she never received any calls after April 26, 2021 from Nutrition Services, HR or from the Risk Manager. She stated that it really was not her choice to leave. She had, at one point been making cookies from boxes of frozen ones and put them on trays to bake them, something she could do. It was really not her choice to leave but the work of opening baggies repetitively, was too much.

54. She stated that she prepared, typed and took the note dated May 21, 2023 to the Nutrition Services Manager and had her sign it to confirm the statements. Claimant did confirm she did not work in either June or July, as school was out. She did work at the end of May, 2021, after which she was again sent home. Claimant stated that she had worked some days in April and in May, 2021 but did not recall which ones exactly, other than the ones mentioned on the notes that the supervisors signed.

H. <u>Ultimate Findings:</u>

55. As found, Respondents have shown by clear and convincing evidence that Dr. Shenoi was incorrect in her final assessment of Claimant's impairment for the cervical spine being caused to the work accident. Dr. Shenoi failed to accomplish one of the integral requirement of a DIME physician in that she declined to make causation assessments in this matter. While she issued an impairment rating for the cervical spine and the left lower extremity, this does not equate to a determination of causation. A determination of causation cannot be declined or evaded. It is a requirement established by the Act, case law, the AMA Guides, the WCRP, the Level II accreditation materials as well as the Division's Impairment Rating Tips.

56. As found, the lumbar spine and left lower extremities are causally related to the November 11, 2019 work related injury.

57. As found, Claimant reached MMI with regard to the work related medical conditions on July 9, 2021, as opined by both the ATP, Dr. Matus, and Dr. Shenoi.

58. As found, the cervical spine injury was not causally related to the November 11, 2019 work injury and, despite Dr. McCranie's and Dr. Shenoi's rating of the cervical spine, no benefits are indicated in this matter.

59. However, also as found, all providers who address the condition of the left lower extremity indicated that the left lower extremity injury was causally related. This is persuasive. The ATP provided no rating nor did he take any range of motion measurements as required by the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. McCranie, while she mentions that Claimant had full range of motion testing, she did not provide a worksheets upon which to rely, nor did she address the Claimant's loss of sensation. Therefore, as found, Dr. Shenoi's lower extremity impairment is found to be persuasive in this matter. Claimant is entitled to a 1.25% impairment of the lower extremity related to the peroneal nerve loss of sensation.[15]

60. As found, Claimant was under restrictions from March 29, 2021 through July 8, 2021, after which she was placed at MMI by the ATP. Claimant has shown she was entitled to temporary disability benefits from March 29, 2021 through April 9, 2021 and April 22, 2021through July 8, 2021.

61. As found, Respondents failed to show Claimant was responsible for her wage loss. Dr. Ogden's restrictions were "avoiding reaching out or overhead" as well as allowing "position changes sit/stand/walk every 20-30 minutes." Dr. Matus agreed with these restrictions and added that as long as the job did not require any work lifting greater than 10 lbs. and that Claimant should keep her arm close to her side. Dr. Matus again confirmed these restrictions on June 21, 2021 stating Claimant should "Limit use right upper extremity, avoid repetitive reaching out or overhead. Limit lift, push and pull 5 pounds max. Must be able to change positions regularly between sit/stand/walk, recommend at least every 20-30 minutes."

62. As specifically found, Claimant never received a call between April 26, 2021 through the time she returned to work in May, 2021 due to poor communication between the assigned Manager of Nutrition Services and the Risk Manager or HR. Claimant was found to be credible in this matter. As found she was provided instructions to go home and await a phone call. The Manager of Nutrition Services specifically took down Claimant's phone number down and it was reasonable to assume, if Employer wanted Claimant to return to work that the Manager of Nutrition Services or another of Employer's delegated individual would call Claimant or communicate with her in some manner. This was confirmed in the note signed by the Manager on May 21, 2021. Even the note of May 27, 2021, when Claimant was working, showed that Claimant was not provided the required breaks pursuant to Dr. Ogden's and Dr. Matus' recommendations.

63. As found, Claimant is entitled to temporary disability from March 29, 2021 through April 14, 2021, when Claimant should have started work pursuant to the modified job offer dated April 9, 2021. This ALJ infers that Claimant did not stop working as of March 28, 2021 but April 9, 2021, as shown by the wage records, when she was working

[15] As this is an ankle and foot injury, the scheduled impairment is appropriate.

irregular hours. Claimant showed up for work on April 22, 2021 instead of April 15, 2021. Claimant is not entitled to indemnity benefits from April 15, 2021 through April 21, 2021.

64. As found, Claimant is entitled to temporary disability benefits from April 22, 2021 through July 8, 2021, after which Claimant was placed at MMI without restrictions. Claimant credibly testified that she believed the work was not within her restrictions as she was working without breaks and in a repetitive manner. On April 26, 2021 her supervisor at Nutrition Services sent Claimant home, advising Claimant that the supervisor of Nutrition Services would call her when she found out what to do. At no time was any credible evidence provided that Nutrition Services called Claimant back to report to work. Claimant returned to work on May 24, 2021, and worked the 24th, 25th and 27th, the last day the school was open. Claimant was instructed that she should not go into work on May 28, 2021 by the Nutrition Services assistant supervisor (JC). This was confirmed by another supervisor (JCS-D). He also confirmed that Claimant had no breaks, despite the restrictions imposed by Dr. Ogden for breaks every 20-30 minutes.

65. Claimant earned an AWW of $622.50 or a daily rate of $88.93. Since it is deduced from the evidence that wages were paid from mid-month to mid-month in any particular month, it is inferred that the April 2021 employee statement of earnings incorporated Claimant's earnings from March 16, 2021 through April 15, 2021, a period of 31 days. No credible evidence was provide that Claimant missed any other days other than March 29, 2021 through April 14, 2021 during this period. Claimant should have earned $2,756.83.[16] Claimant earned $1,960.88 for a difference of $795.95. As found, temporary disability benefits for this period are owed in the amount of $530.19.

66. As found, Claimant failed to appear to work on April 15, 2021 until April 22, 2021. This is a 7 day period. According to the May 2021 statement of earnings, wages earned from April 16 through May 15, 2021 (30 day period) were $0.00. Therefore, after deducting the 7 days that Claimant failed to appear to work pursuant to the offer of employment, for the remaining 23 days, Claimant should have earned $2,045.39. As found, Claimant is entitled to temporary disability in the amount of $1,363.59 for this period.

67. According to the June 2021 statement of earnings, wages for May 16, 2021 through June 15, 2021, a 31 day period, were $814.44. Claimant should have earned $2,756.83, minus the actual earnings of $814.44, a difference of $1,942.39. As found Claimant is entitled to temporary disability benefits in the amount of $1,294.93 for this period.

68. According to the July 8, 2021 statement of earnings, wages for June 15, 2021 through July 15, 2021 (30 day period) were also $814.44. Claimant was placed at MMI as of July 9, 2021. Claimant's last day of work was May 28, 2021. Therefore, any wages in this period is presumed to be for wages owed after July 8, 2021. For the period of June 15, 2021 through July 8, 2021, Claimant was owed $1,363.59.

69. Claimant has shown by a preponderance of the evidence that she is owed a total of $4,552.30 in temporary disability benefits.

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[16] Calculated by multiplying the $88.93

70. Testimony and evidence inconsistent with the above findings are not credible, significantly relevant and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming the DIME Physician's determination of MMI and Impairment

Respondent argues that the DIME physician, Dr. Shenoi, was incorrect in multiple manners with regard to Claimant's MMI status and work related impairment ratings. The party challenging a DIME physician's opinions must prove that the DIME physician's determinations were incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003); *In re Claim of Lopez*, 102721 COWC, 5-118-981 (Colorado Workers' Compensation Decisions, 2021). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the determination is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. See *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 2002). Consequently, when a party challenges the DIME physician's opinion, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning her opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's opinion is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to reach a particular determine is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008); *In re Claim of Pulliam*, 071221 COWC, 5-078-454-001 (Colorado Workers' Compensation Decisions, 2021). Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden

of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

The Act requires a DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* A determination of MMI requires the DIME physician to asses, as a matter of diagnosis, whether various components of the claimant's medical condition are casually related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*. Lastly, where an ALJ finds a claimant's description of her present symptoms credible, this is sufficient to overcome the DIME physician's opinion. *In re Claim of Conger*, 100521 COWC, 4-981-806-001 (Colorado Workers' Compensation Decisions, 2021).

It is clear from the evidence that Dr. Shenoi's true opinion is that, as a DIME physician, she need not address the issue of causality with regard to the different components of Claimant complaints of work related injuries. This is inconsistent with the law as established by the Act, the *AMA Guides*, the WCRP, the Division's teachings under Level II accreditation and the Impairment rating tips. Dr. McCranie is persuasive in this matter that the issue of causality is an integral part of the DIME process as well as the medical process of any physician in the workers' compensation system. She persuasively testified that a failure of a DIME physician to conduct a causation analysis before assigning an impairment rating violates the *AMA Guides* as to causation, multiple DOL

rules of procedure as well as recognized standards among level II physicians for performing impairment ratings.

Dr. McCranie's opinion that Dr. Shenoi's impairment rating is "clearly incorrect" is unrebutted in the medical records or in the hearing testimony. Unlike other situations wherein a Court has to interpret multiple or even conflicting opinions from a DIME; in this case there are no such conflicting opinions with regard to causation. In fact, there are no opinions from Dr. Shenoi on causation because she failed to provide one and specifically stated she declined to do so.

Claimant argues that since Dr. Shenoi provided a diagnosis for the neck, that it is to be assumed that it was related to the November 11, 2019 incident. However, Dr. Shenoi also lists upper extremity paresthesias as well as shoulder pain and did not perform an impairment evaluation on those body parts or explain sufficiently why she did not provide ratings for the shoulder injuries. Claimant also argued that it can be assume that Dr. Shenoi adopted a causation analysis because she was aware from the medical records that Claimant had received extensive authorized medical treatment for her cervical spine under this workers compensation claim. However, as testified to by Dr. McCranie, and as set out the Division's Impairment Rating Tips, Division has made it clear to Level II physicians and DIME physicians that simply because a specific condition is identified on a DIME application and/or simply because medical treatment has been voluntarily provided for a specific body part, causation is not to be assumed.

Here, as found, Dr. Shenoi made the assumption that, since treatment was authorized for the cervical spine, that Respondent was liable and therefore rated the cervical spine. As found, Dr. Shenoi was in error. This is further supported by the fact that she discussed Claimant's shoulder issues. She stated that, since the shoulder was not checked off on the Application for a DIME, that she need not address it. This is another assumption that is incorrect. A DIME physician has an obligation to consider all body parts and make causation determinations with regard to those body parts, whether they are or not related to the injury in question, and only then can a DIME physician make determinations whether Claimant has reached MMI for those related conditions and/or if the related conditions justify an impairment rating. Dr. McCranie's testimony in this regard is credible and persuasive. Respondents have shown by clear and convincing evidence that Dr. Shenoi was clearly incorrect and have overcome the DIME physician's opinions by clear and convincing evidence.

C. Maximum Medical Improvement

Where a party has carried the initial burden of overcoming the DIME physician's opinion by clear and convincing evidence, the ALJ's determination of the correct MMI determination or rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence." *Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov.

16, 2006). When the ALJ determines that the DIME has been overcome, the ALJ may independently determine the correct rating or date of MMI. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004). An ALJ may thus determine whether a claimant has reached MMI and assign an impairment rating as a question of fact. *Destination Maternity and Liberty Mutual Insurance Company v. Burren*, 19SC298 (Colo. May 18, 2020); *see Niedzielski v. Target Corporation*, WC 5-036-773-001 (ICAO, Mar. 9, 2020) (when an ALJ determines that a DIME opinion has been overcome, the issue of the claimant's correct impairment rating becomes a question of fact and the ALJ may calculate the impairment based upon a preponderance of the evidence).

In this matter, Claimant's ATP, Dr. Matus, determined that Claimant was at MMI as of July 9, 2021. Claimant continued to have treatment, including therapy for the work related condition until that time. While Dr. McCranie identified an earlier date, based on her review of the medical records, this is only considered speculation as Dr. McCranie did not evaluate Claimant at that point in time. Once Dr. McCranie did evaluate Claimant and the report was provided to the ATP, the ATP had the option to make a determination of when Claimant reached MMI, and he did so by stating Claimant had reached MMI with regard to her lumbar spine and lower extremity injury on July 9, 2021. This opinion is more credible and persuasive than Dr. McCranie's speculative choice. Claimant has proven that she reached MMI as of July 9, 2021.

D. Permanent Impairment Ratings

Here, the parties must show by a preponderance of the evidence what the proper determination of impairment with regard to the work related conditions should be. But before this can be address, it is essential to have a determination of which injuries are causally related to the November 11, 2019 accident.

In this matter, it is found that the cervical spine is not a work related injury caused by the November 11, 2019 work related event. The medical records in evidence, supported the opinion of Dr. Cazden and Dr. McCranie, that Claimant did not have the cervical spine and shoulder complaints until sometime in March or April 2020, well over four months from the date of injury. While Claimant did state that the "closet" incident was not the cause of the neck and shoulder conditions, this was not persuasive. Dr. McCranie persuasively testified that it was more likely that the closet incident was the cause of those conditions and that, in order to link a cervical injury to the original date of injury, there needed to be a temporal relationship between the onset of symptoms and the initial accident, which was not present in this case. This is also true of the Claimant's continuing bilateral upper extremity symptoms. Dr. McCranie credibly opined that Claimant's continuing complaints involving the cervical spine and the right greater than left upper extremity paresthesias, which were not documented until March 10, 2020, were not work related conditions.

Lastly, Dr. McCranie credibly opined that the right shoulder labral tear was not related to the November 11, 2019, injury, as an acute labral tear would cause immediate, severe pain in the shoulder and Claimant did not report shoulder pain for approximately seven months post-accident. Dr. McCranie credibly explained that what was significant here is that Claimant reported to Dr. McCranie (and to Dr. Shenoi) that she was cleaning

out her closet in April of 2020, and she was reaching, lifting and moving some hair products, towels and sheets from her closet, and had an acute onset of neck pain and right shoulder pain at that point that brought on a lot of these symptoms, which was a more probable cause of Claimant's neck and shoulder pain. Respondents have shown that it was more likely than not that the cervical spine condition and the bilateral shoulder conditions are not related to the November 11, 2019 work related accident.

It is further found that Claimant has shown that the lumbar spine and the left lower extremity conditions are related to the claim by a preponderance of the evidence. This determination is supported by the medical records of Claimant's initial treatment records that are available. None of the rating physicians have provided a lumbar spine rating in this matter. Therefore, Claimant's lumbar spine rating is 0%.

Claimant has shown that the lower extremity condition continues to have an impairment cause by loss of sensation due to damage to the peroneal nerve. Dr. Shenoi persuasively rated Claimant's lower extremity impairment at 1.25% of the lower extremity in accordance with the *AMA Guides* to the Evaluation of Permanent Impairment, Third Edition (*Revised*). This was not addressed at all by Dr. McCranie. Therefore, Dr. Shenoi's determination of permanent impairment of the lower extremity cause by the damage to the peroneal nerve is more persuasive than any contrary determination. Claimant has shown by a preponderance of the evidence that it was more likely than not she has a 1.25% lower extremity impairment rating.

E. Temporary Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. Sec. 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant was under restrictions from March 29, 2021 through July 8, 2021, after which she was placed at MMI by the ATP. Here, Claimant was paid TTD through March 28, 2021. Claimant credibly testified that, when she completed watching the videos, she advised her supervisor that she had completed her assigned tasks. No further offers of employment were made by Employer between March 29, 2021 until April 9, 2021. As found, Claimant was not responsible for her wage loss. Claimant continued to be under restrictions due to the work related injury at this time. As found, Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits between March 29, 2021 through April 14, 2021,[17] in the amount of $530.19.

On April 9, 2021 Employer sent Claimant an offer of modified duty to begin April 15, 2021. This job offer was approved on April 11, 2021 by one of Claimant's ATPs, Dr. Paul Ogden. The job was to report to Nutrition Services by April 15, 2021. Claimant failed to report until April 22, 2021. Therefore, as found, Claimant was not entitled to temporary disability benefits from April 15, 2021 through April 21, 2021.

Claimant started work on April 22, 2021. On April 23, 2021 Claimant reported to work but was in significant pain due to the repetitive nature of the tasks assigned and went to her provider. On April 26, 2021 Claimant advised her supervisor that the work was violating her restrictions due to the repetitive nature of the job. Nutrition Services did not know what to do so they sent her home. As found, Claimant was credible in this matter and, as found, she was not responsible for her wage loss. While Employer consulted with Claimant's treating provider, Dr. Matus on May 13, 2021 to determine if Claimant's job with Nutrition Services complied with Claimant's restrictions. He stated that "presuming she can keep her arm close to her side this should not preclude assembling sandwiches and placing them in bags." However, Nutrition Services nor the HR manager communicated that new restriction to Claimant nor that they would accept Claimant back to work under those terms. Claimant was credible in this regard. As found, Claimant was not responsible for her wage loss and Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits from April 22, 2021 through July 8, 2021,[18] in the amount of $4,022.11.

ORDER

IT IS THEREFORE ORDERED:

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[17] The wage records at Respondent's Exhibit Q are specifically found not to be accurate or credible, because we know that Claimant worked on May 24, 25 and 27 and these records fail to show the hours worked. This was confirmed by a supervisor at Exhibit 7 bate 45, and Exhibit 8 email from the Risk Manager.

[18] Employer argued that Employer made a payment of $498.00 for wages paid from April 27, 2021 through April 30, 2021 which should be credited or offset from any benefits paid. However, this is beyond this ALJ's purview and jurisdiction to address. Only benefits under the Act may be determined in this venue. Furthermore, in the calculation of temporary disability above, pursuant to the statements of earnings, Respondents are credited with all benefits reported in the exhibits.

1. The Stipulation of Facts signed by the parties on March 29, 2023 are approved. The Stipulation of Facts is the official transcript of the November 15, 2022 hearing.

2. Respondent overcame Dr. Ranee Shenoi's DIME opinion by clear and convincing evidence.

3. Claimant was at MMI as of July 9, 2021.

4. Respondents shall pay permanent partial disability of 1.25% extremity impairment in accordance with Dr. Shenoi's impairment of the lower extremity for the peroneal nerve injury.

5. Respondents shall pay temporary partial disability benefits from March 29, 2021 through July 8, 2021 in the amount of $4,552.30.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 22nd day of June, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-175-654

ISSUES

I. Whether Claimant established by a preponderance of the evidence he is entitled to Temporary Total Disability ("TTD") benefits May 11, 2022, ongoing.

II. In the alternative, whether Claimant established by a preponderance of the evidence he is entitled Temporary Partial Disability ("TPD") benefits from May 11, 2022 through October 19, 2022 and TTD from October 20, 2022, ongoing.

III. Whether Respondents demonstrated by a preponderance of the evidence Claimant was responsible for his termination from employment.

FINDINGS OF FACT

1. Claimant sustained a work injury to his low back on June 14, 2021.

2. Respondents admitted liability for the work injury and began payment of TTD on June 18, 2021.

3. Claimant underwent treatment with authorized treating physicians ("ATPs") Jonathan Rudolf, M.D. and Maneula Ewing, M.D. at Animas Occupational Medicine.

4. On March 3, 2022, Dr. Rudolf imposed the following temporary work restrictions: lifting, carrying, pushing, pulling up to 25 lbs.; repetitive lifting up to 10 lbs.; walking, standing, and sitting 4 hours per day; and no crawling, kneeling, squatting or climbing. These restrictions were in effect as of March 15, 2022.

5. In a letter dated March 15, 2022, Respondents asked Dr. Rudolf to approve a modified duty position for Claimant. The letter stated, in relevant part:

> The position consists of: WILL ASSIST WITH LIGHT CLEAN UP, PHONES, REGISTER AND DAILY CLEANING TASKS. MAY LIFT, PUSH, PULL AND CARRY UP TO 25 LBS. ALTERNATE BETWEEN SITTING AND STANDING AS NEEDED, NO CRAWLING, KNEELING, SQUATTING OR CLIMBING.
>
> Location of job: 201 N. PINON DR. D, CO 81321
>
> The position is available for 37.5 hours per day and up to 5 days per week.

(Ex. G, p. 22).

6. The letter included a job description which stated "# of Hours Working" as "37.5". Dr. Ewing approved the modified duty position on April 25, 2022.

7. Employer sent Claimant a written offer of modified duty dated March 15, 2022. Employer notified Claimant that light duty was available for Claimant within the restrictions given by his physician. The letter stated: "Schedule: TUESDAY – SATURDAY 8:00AM TO 5:00PM" and "Job Description: will assist with like clean up, phones, register and daily cleaning tasks, may lift, push, pull, and carry up to 25 pounds. alternate between sitting and standing as needed. [N]o crawling, kneeling, squatting, or climbing." (Id. at p. 18). The rate of pay listed is $14.00 per hour. Under the section "Initial Meeting" it states "YOU ARE EXPECTED TO BEGIN YOUR FIRST SHIFT IMMEDIATELY FOLLOWING THE INITIAL MEETING." (Id.) No date is specified for the initial meeting.

8. The letter to Claimant further states "To accept this offer please report to the above scheduled meeting on. [sic]" (Id.) Again, no date for the scheduled meeting is identified. The letter notes that, while participating in the modified employment, Claimant was required to follow all of Employer's HR policies and "[f]ailure to report will be considered an unexcused absence, and you will not be paid for any days missed." (*Id*.) The letter includes the name and telephone number of the individual to contact with questions. The letter notes, "Please be advised that if you decline this offer of light duty work that is within your work restrictions, this may affect your right to receive ongoing Workers' Compensation benefits." (Id.)

9. Claimant checked that he accepted the offer and signed and dated the letter on April 25, 2022. Claimant testified he did so while at a follow-up evaluation with Dr. Ewing on April 25, 2022. On April 25, 2022 Dr. Ewing assigned temporary work restrictions of lifting, repetitive lifting, carrying, pushing, and pulling up 25 lbs.; no reaching over head; walking, standing and sitting 5 hours/day; and no crawling, kneeling, squatting, or climbing.

10. Claimant credibly testified at hearing. Claimant testified that, per his ATPs, he was restricted to working 4 or 5 hours per day at the time he signed the offer of modified employment on April 25, 2022. Claimant testified that, despite the number of hours detailed in the offer letter exceeding his restrictions, he signed the offer accepting the modified employment because he believed it was the only way to keep his workers' compensation benefits. Claimant testified he tried to call "workman's comp" to obtain clarification regarding the hours, but received no response. He did not attempt to contact Employer for clarification. Claimant testified it was his understanding that his attorney was going to address the issue with Respondents. Claimant testified he was not physically capable of working 40 hours per week.

11. No evidence was offered establishing that Claimant received clarification regarding the offer of modified employment or a corrected offer of modified employment.

12. Claimant did not begin the modified employment because the number of hours as detailed in the offer letter exceeded his work restrictions. Claimant has not since returned to work or had any other communication with Employer.

13. On September 7, 2022 Respondents filed a General Admission of Liability ("GAL") for TTD from 6/18/2021 through 5/10/2022 at a weekly rate of $373.33 based on an average weekly wage ("AWW") of $560.00. Under remarks, the adjuster noted Claimant accepted modified duty but did not report to work on 5/10/2022.

14. On October 20, 2022 Claimant called Dr. Rudolf to request modification of his work restrictions. Dr. Rudolf reduced Claimant's lifting limitation from 25 pounds to 20 pounds and the maximum hours worked from 5 to 4 hours per day.

15. [Redacted, hereinafter RW] owns a franchise of Employer, which is a temporary employment agency. RW[Redacted] credibly testified on behalf of Respondents at a post-hearing deposition. RW[Redacted] testified that the letter stating the modified duty position was for 37.5 hours per day was a typographical error. He explained that the offer was to work 3.75 hours per day. RW[Redacted] testified that the schedule of Tuesday to Saturday 8:00am to 5:00pm included in the offer letter represented a range of days and hours during which Claimant could work his 3.75 hours/day, not Claimant's actual work schedule. RW[Redacted] acknowledged that Employer did not communicate these clarifications to Claimant, nor communicate to Claimant the date on which he was to begin the modified employment.

16. RW[Redacted] testified that Employer considered Claimant's failure to begin the modified employment and to otherwise contact Employer as job abandonment, resulting in Claimant's termination:

> Q: So you said my client is listed as inactive. Was he ever formally terminated?
>
> A: Yes. So what we do in that situation where we inactivate an individual that we have not had contact with for some time, we give them a period of time that we try to reach out to them, or in their actual handbook they are supposed to contact us weekly to let us know that they're available or not available.
>
> And once the period of time goes by and we can't get ahold of them or we've had no contact, we inactivate them.

(RW[Redacted] Dep. Tr. 9:13-25).

17. The handbook referred to by RW[Redacted] was not offered as evidence. No evidence was offered indicating Employer attempted to reach out to Claimant after April 25, 2022. RW[Redacted] testified Claimant was not notified of his termination.

18. Claimant testified he was unaware that he was terminated by Employer. No evidence was offered establishing Claimant received the employee handbook or was

otherwise aware of any Employer policy requiring him to contact Employer on a weekly basis.

19. Claimant has not worked since the date of injury. As of the date of hearing, Claimant has not been released to full duty or been placed at maximum medical improvement ("MMI").

20. The ALJ finds that the offer of modified employment presented to Claimant exceeded the work restrictions imposed by Claimant's ATP and that Claimant's ultimate rejection of the offer and failure to begin the modified employment was reasonable under such circumstances. The preponderant evidence establishes Claimant is entitled to TTD benefits from May 11, 2022, ongoing.

21. Respondents failed to prove by a preponderance of the evidence Claimant was responsible for termination of his employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

TTD

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

The term "modified employment" means employment within the restrictions established by the attending physician. *In re Claim of Willhoit*, W.C. No. 5-054-125-01 (ICAO, July 23, 2018). The modified employment must be reasonably available to the injured worker under an "objective standard*." Id.,* citing *Ragan v. Temp Force*, W.C. No. 4-216-578 (ICAO, June 7, 1996).

Claimant does not dispute the attending physician gave Claimant a written release to return to modified employment or that Claimant failed to begin modified employment. The crux of Claimant's argument is that the modified employment offered to him exceeded his work restrictions, rendering his failure to begin the modified employment reasonable. The ALJ agrees.

As of the date of the letters to the attending physicians and to Claimant, March 15, 2022, Claimant was restricted to working 4 hours per day. As of the date the attending physician Dr. Ewing approved the modified duty position and Claimant accepted the offer, April 25, 2022, Claimant was restricted to working 5 hours per day. RW[Redacted] testified that the actual modified duty position was for 3.75 hours per day, which would be within Claimant's work restrictions. However, such offer was not made to Claimant, nor is there sufficient evidence establishing Claimant knew or reasonably should have known the offer was to work 3.75 hours per day.

The description of modified employment approved by Dr. Ewing stated Claimant would be working 37.5 hours per day, up to five days per week. While a reasonable person would recognize 37.5 hours per day to be a typographical error, the documents provided to the attending physicians and to Claimant do not otherwise provide any context or basis upon which Claimant could reasonably infer the offer was for 3.75 hours per day. The job description notes the number of hours as 37.5 hours without specifying per day, per week, per month or some other computation. The offer letter sent to Claimant does not include any reference to number of hours, but lists a work schedule of 8:00 a.m. to 5:00 p.m., Tuesday through Saturday. Assuming a one-hour lunch period, this equates to working 8 hours per day, 40 hours per week. Such schedule exceeded the work restrictions imposed by Claimant's ATPs.

Although RW[Redacted] testified that the schedule listed in the offer letter was not Claimant's work shift but, rather, a range of days and hours during which Claimant could work 3.75 hours per day, such information was not communicated to Claimant nor was any evidence offered suggesting Claimant knew such information. Without further basis, expecting Claimant to infer that an offer letter denoting a schedule of 40 hours per week was actually an offer for modified employment of 3.75 hours per day is unreasonable. The offer, as proffered to Claimant and as reasonably understood by Claimant, exceeded Claimant's work restrictions.

Claimant credibly testified he signed to accept the offer based on the belief that he had to do so in order to keep his workers' compensation benefits, that he attempted to contact someone with "workman's comp" regarding clarification of the hours, and believed his attorney was addressing the issue with Respondents. No evidence was offered indicating Claimant received clarification or confirmation that the hours were within his restrictions. Claimant did not begin the modified employment because the offer, as presented to him, exceeded his work restrictions. Based on the totality of the circumstances, Claimant's failure to begin the modified employment was reasonable.

Employer did not make any subsequent offers of modified employment to Claimant. Claimant has not returned to modified or regular employment, been released to return to regular employment, or reached MMI. Claimant continues to sustain wage loss as a result of disability caused by the work injury. Accordingly, Claimant is entitled to TTD benefits from May 11, 2022, ongoing.

Responsibility for Termination

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As used in the termination statutes, the word "responsible" "does not refer to an employee's injury or injury-producing activity." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002). Therefore, Colorado termination statute §8-42-105(4)(a), C.R.S. is inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *See Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Colorado Springs Disposal*, 58 P.3d at 1062. Notably, a separation from employment is not necessarily due to an injury simply because it occurs after the injury, and the injured employee need not be offered modified employment before discontinuation of benefits if his was responsible for the separation. *See Gilmore*, 187 P.3d 1129; *Ecke v. City of Walsenburg*, WC 5-002-020-02 (ICAO, May 5, 2017) (injury occurring one day before claimant's previously-announced retirement did not cause claimant's separation from

employment or loss of wages). However, if the injury also leads to wage loss at a claimant's secondary employment, she is eligible for compensation for those wages, even if the separation from primary employer was voluntary or for cause. *Id.*

Subparts (b) and (c) of §Section 8-42-105 C.R.S. provide:

> (b) The claimant's refusal to accept an offer of modified employment under either of the following conditions does not constitute responsibility for termination:
>
> (I) The offer of modified employment would require the claimant to travel a distance of greater than fifty miles one way more than the claimant's pre-injury commute; or
>
> (II) An administrative law judge determines that the claimant's rejection of the offer of modified employment was reasonable considering the totality of the claimant's circumstances, including accounting for:
>
> (A) The consequences of the industrial injury;
>
> (B) The financial hardship that would be imposed on the claimant in order to accept the offer of modified employment; or
>
> (C) Any other reasons that would, in the opinion of the administrative law judge, make it impracticable for the claimant to accept the offer of modified employment.
>
> (c) The circumstances described in paragraph (b) of this subsection (4) are not exhaustive.

As found, Respondents failed to prove it is more probable than not Claimant was responsible for his termination. Respondents contend Claimant was terminated for job abandonment due to Claimant's failure to appear for the modified employment and subsequent failure to contact Employer. As discussed, Claimant's ultimate rejection of the modified employment was reasonable based on the totality of the circumstances. Claimant did not begin the modified employment as the offer presented to Claimant exceeded his work restrictions in terms of the number of hours per day Claimant could work. Claimant credibly testified he initially accepted the offer due to his belief he was required to do so to keep his workers' compensation benefits, and that he believed his attorney would further address the issue with Respondents. No evidence was offered indicating Claimant was informed the modified duty position was for 3.75 hours per day. As Claimant's ultimate rejection of the modified duty position was reasonable, he was not responsible for termination of his employment based on such rejection.

Additionally, there is insufficient credible and persuasive evidence demonstrating that Claimant's failure to subsequently contact Employer as expected by Employer was volitional. RW[Redacted] testified that employees with whom Employer does not have contact for a period of time are terminated. He further testified that the employee

handbook provides that an employee is supposed to contact Employer weekly regarding their availability. No evidence was offered regarding the specific “period of time” referenced by RW[Redacted], whether Claimant received the employee handbook, or whether Claimant was otherwise aware of Employer’s expectation that he contact Employer on a weekly basis in Claimant’s specific circumstances. Additionally, while the offer letter to Claimant states Claimant was expected to begin modified employment immediately after the “initial meeting” and the “scheduled meeting”, the letter contains yet another clerical error by leaving the date of such meetings blank.

There is insufficient evidence Claimant was aware of and deliberately failed to comply with Employer’s expectations. His failure to begin the modified employment was based on the reasonable belief the employment exceeded his work restrictions, and his subsequent failure to contact Employer was based on the belief his attorney was addressing such issue with Respondents. The preponderant evidence does not establish Claimant precipitated his termination by a volitional act that he would reasonably expect to cause the loss of employment. Under the totality of the circumstances, Claimant is not responsible for his termination and thus entitled to TTD benefits.

ORDER

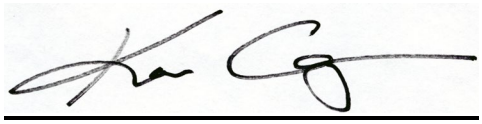
It is therefore ordered that:

1. Claimant is entitled to TTD benefits from May 11, 2022, ongoing until terminated by statute.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 23, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant established, by clear and convincing evidence, that the maximum medical improvement (MMI) opinion of Dr. Karl Larsen, as the Division Independent Medical Examiner, is highly probably incorrect.

- If Claimant is at MMI, whether Claimant established, by clear and convincing evidence, that Dr. Larsen's impairment rating opinions are highly probably incorrect and if so, what is the correct impairment rating associated with Claimant's industrial injury.

- If Claimant established that he is not at MMI, whether treatment for complex regional pain syndrome (CRPS), vision loss, carpal tunnel syndrome, cervical and lumbar spine is reasonable, necessary or related to the injury as medical benefits.

- If Claimant failed to overcome Dr. Larsen's MMI determination, whether treatment for CRPS, vision loss, carpal tunnel syndrome, cervical and lumbar treatment is reasonable, necessary or related to the injury as maintenance medical benefits.

- Whether Respondents are liable for treatment by Fenix Health LLC, Colorado Springs Neurological Associates, Vision Institute and any of their referrals as authorized providers.

- Whether Claimant established, by a preponderance of the evidence, that he is entitlement to temporary disability benefits and if so, whether such benefits were properly terminated for failure to appear for a modified duty offer on July 31, 2020.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Burns, the ALJ enters the following findings of fact:

1. Claimant suffered an admitted work-related injury to his right pinkie finger on April 20, 2020 while using a jackhammer to break cement located close to an adjacent wall. As Claimant was operating the jackhammer, his right pinkie finger was caught and crushed between the wall and the handle on the jackhammer. *(Respondent's Exhibit (RE), C, p.41*). X-rays were obtained and revealed a comminuted crush fracture to the "distal tuft of the fifth distal phalanx with mild displacement of the fracture fragments. *Id*. *at p. 46, 54*. *See also, RE OO; RE J, p. 1593.*

2. Claimant was referred to orthopedics and was evaluated by their service on April 23, 2020. *(RE C, p. 1471).* Orthopedics recommended nonsurgical treatment and provided a fingertip protector with daily dressing changes. *Id*. Claimant was

released by orthopedics on April 30, 2020 and instructed to return to work as able using his fingertip protector. Id. at p. 1471-1472.

3. After his release from orthopedics Claimant continued to treat with Employers designated provider, UC Health and specifically Dr. Emily Burns as Claimant's authorized treating provider (ATP). Dr. Burns treated Claimant from April 27, 2020 through July 30, 2021. On August 6, 2021, Dr. Burns completed a narrative report outlining Claimant's impairment after she placed Claimant at MMI on July 30, 2021.[1] *(RE C, p. 1470-1477).* Claimant's medical history is complicated and the claim record is voluminous. Indeed, the parties have submitted in excess of 1000 pages of exhibits (including many duplicate documents) and the testimony of Claimant versus Drs. Burns and Mathwich can aptly be described as being at odds with each other. Nonetheless, the record submitted supports a finding that at the time Dr. Burns completed her August 8, 2021 MMI/impairment rating report, Claimant reported continued use of Cymbalta, Lyrica, trazodone, and propranolol. He was also complaining of persistent 10/10 pain with little functional improvement, informing Dr. Burns that he didn't feel like he could drive or return to work. *Id.*

4. Dr. Burns summarized the course of Claimant's treatment in her August 6, 2021 MMI/impairment rating report. According to Dr. Burns' August 6, 2021 report, Claimant had been seen several times via video by June, 2020, during which appointments he complained of "worsening and intense 10 out of 10 pain, with shooting pain up his arm from the right pinkie finger, giving him headaches and watering in his right eye". *(RE C, p. 1472).* Dr. Burns advised Claimant that the extent of his symptoms could not all be attributed to the laceration and fracture in his pinkie finger. *Id*. Accordingly, she advised him to follow up with his primary care provider. *Id.* Dr. Burns also noted that Claimant had returned to his orthopedist on July 23, 2020, who noted that Claimant had been ill at home for several weeks. *Id.* Claimant was apparently advised by his orthopedist that his injury had healed in acceptable alignment. *Id*. Therefore, he was instructed to discontinue the use of his splint and start hand therapy immediately. *Id.* Dr. Burns noted that Claimant had been evaluated by a pain management specialist, Dr. Meyer who was "not convinced" that there is a significant component of CRPS causing Claimant's symptoms and whom noted that Claimant had "significant psychological and stress related issues that cause dysfunction for him in general". *Id*. Regarding the potential of Claimant having CRPS, Dr. Burns noted that Claimant had seen three specialists over the course of his treatment and all three "assessed that his symptoms were not consistent with CRPS and advised no further intervention". *Id at p. 1476*. As noted, Dr. Burns placed Claimant at MMI and assigned a combined whole person impairment of 12%. She also recommended maintenance treatment to include 3 months of refills for Cymbalta and Lyrica to allow Claimant time to follow up with his PCP for discussion about continuing versus tapering these medications. *Id. at p. 1477*. Dr. Burns made it clear that because Claimant had not experienced any functional improvement with these medications that it was not "indicated" that he continue them through workers' compensation beyond the 3 months she recommended. *Id.*

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[1] *See RE C, pp. 1418-1420.*

5. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Burns' opinions regarding MMI/impairment on August 13, 2021. *(RE LL, pp. 1756-1758)*.[2]

6. Claimant requested a Division Independent Medical Examination which was performed by Dr. Karl Larsen on February 28, 2022. *(RE A, pp. 1-11)*. Dr. Larsen obtained a history surrounding Claimant's injury in addition to completing a records review[3] and a physical examination. *(RE A, pp. 1-2)*. Dr. Larsen's physical examination of the right hand revealed no obvious deformity and while the fingernail on the right pinkie finger was overgrown compared to the surrounding digits, there were no "trophic changes, abnormal hair distribution, or shiny skin changes suggestive of CRPS". *Id*. at p. 2. Claimant was noted to guard his finger making the sensory and vascular examination difficult. Nonetheless, Claimant did have capillary refill in all the digits and a 2+ symmetric radial pulse. *Id*. Although Claimant reported hypersensitivity to attempted light touch in the small finger, his sensation and range of motion in the remaining digits, wrist and elbow were within normal limits. *Id.* Dr. Larsen noted that Claimant had received "extensive" psychological and psychiatric treatment to include medications "directed" at treating anxiety and depression. *Id*. Accordingly, Dr. Larsen adopted (incorporated) the 6% mental health impairment rating into his overall impairment rating assigned to Claimant, noting that it was abundantly "clear that psychological factors [were] having a tremendous impact on [Claimant's] overall function". *Id.*

7. Dr. Larsen diagnosed Claimant with neuropathic pain and hypersensitivity with resultant stiffness and loss of motion in the right pinkie finger "due to disuse and guarding". *(RE A, p. 2).* He noted that Claimant had an "array of nonphysiologic complaints associated with this that [he could not] explain". *Id*. *at pp. 2-3*. Dr. Larsen did not provide a diagnosis of CRPS nor did he recommend CRPS testing, noting further that he could not ascribe "many of the disabilities [Claimant] describes . . . to his injury and hypersensitivity".[4] Consistent with Dr. Burns, Dr. Larsen assigned a combined physical and mental health impairment rating of 12% of the whole person. *Id*. *at p. 3*. Dr. Larsen also adopted Dr. Burns' 3 month recommendations for maintenance care. While Claimant was apparently not using his right hand for activities, Dr. Larsen opined that it was unlikely that he was at risk of re-injuring the right finger if he did so. *Id.* Accordingly, Dr. Larsen indicated he would "allow [Claimant] to perform any activity he feels he can accomplish without restrictions". *Id.* Dr. Burns has repeatedly opined that there are no work restrictions associated with the work injury.

8. After being placed at MMI by Dr. Larsen, Claimant sought treatment on his own from Colorado Springs Neurological Associates. *(RE F).* On March 15, 2022, Claimant was evaluated by Physician Assistant (PA) Chase Alexander Tucker. *(RE F,*

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[2] *See also, RE KK, pp. 1720-1722*.

[3] Dr. Larsen documented that he reviewed 468 pages of records. *(RE A, p. 1).*

[4] Specifically, Dr. Larsen noted that he could not physiologically related Claimant's reported eye pain/watering or the "twitching" events Claimant described to the April 20, 2020 injury.

p. 1544). PA Tucker noted that following the crush injury to Claimant's finger, he developed "shooting pain which radiates up his right arm into his neck" and down his right leg from the calf to the ankle and up from the ankle to the right knee. *Id*. *at p. 1544-1545.* PA Alexander opined that Claimant's neuropathic pain involving the right arm and leg might be related to CRPS "given the chronicity and onset following crush injury to his hand." *Id*. *at p. 1544*. PA Alexander referred Claimant for NCV/EMG testing of the right arm/leg and an MRI of the cervical spine to rule out other focal neuropathy and instructed Claimant to follow-up on completion of this testing. *Id.*

9. During a follow-up appointment with Dr. Gregory Ales, at Colorado Springs Neurological Associates, April 21, 2022, the mechanism of injury (MOI) was mistakenly identified as a "crush injury to his right hand . . ." rather than the right distal phalanx of the small finger. *(RE F, p. 1550).* Moreover, Dr. Ales indicated that Claimant "[had] been diagnosed with CRPS and was treated with neuropathic pain medications". *Id*. This appointment and the representations of Dr. Ales that the April 20, 2020 MOI was to the right hand and that Claimant was diagnosed with CRPS were after MMI from Dr. Burns and the DIME from Dr. Larsen. More importantly the ALJ is unable to find record support for the conclusion that Claimant crushed his hand and that he was diagnosed with CRPS. In this case, the record is replete with references that the injury was limited to the distal phalanx of the right small finger. Furthermore, there is there is no evidence that Claimant had been tested for or diagnosed with CRPS. As noted above, the authorized workers' compensation providers agree that Claimant did not demonstrate clinical signs of CRPS that would warrant CRPS testing or a diagnosis of CRPS. Indeed, Claimant has never undergone CRPS testing consistent with the Division Guidelines, because that has never been recommended or requested. *(Burns Depo. p. 30, 40, 42).*

10. Respondents filed a FAL adopting the opinions of Dr. Larsen regarding MMI and permanent impairment on May 6, 2022. *(RE HH, pp. 1697-1699).*

11. Claimant attended a follow-up appointment with Dr. Ales on June 30, 2022 after completion of the recommended EMG and cervical spine MRI. *(RE F, p. 1553; 1557).* Claimant's MRI revealed moderate to severe foraminal disease predominantly on the left side. *Id*. *at p. 1557*. EMG testing demonstrated "evidence of a right median sensorimotor neuropathy across the wrist supportive of moderate right CTS (carpal tunnel syndrome)". *Id*. The remainder of Claimant's EMG testing including conductions of the right arm and leg were interpreted as "normal". *Id*. Dr. Ales recommended that Claimant follow-up with pain management through Peak Vista as the neuropathic pain medications he was prescribing were not effective in controlling Claimant's pain. *Id. at p. 1553.*

12. After the representations regarding the Claimant crushing his hand and having been diagnosed with CRPS documented in Dr. Ales' initial April 21, 2022 visit, the other non-workers' compensation providers rendering care through Peak Vista seemingly have carried forward the diagnosis of CRPS. Indeed, during an August 24, 2022 appointment with his primary care provider (PCP) to formulate a treatment plan to

address Claimant's ongoing complaints of pain, Family Nurse Practitioner (FNP) Mark Lynch noted that Claimant's injury was to the right hand rather than the distal phalanx of the right small finger. (RE D, p. 1489). Moreover, without documenting any clinical/objective signs of CRPS on examination, FNP Lynch provided an assessment of "[c]omplex regional pain syndrome type 2 of right upper extremity" for which he prescribed opioid medication. *Id. at p. 1488-1489*. The records from Claimant's subsequent appointments with Nurse Practitioner Veronica Misko are largely unchanged in content[5] and simply adopt the examination findings and assessments of FNP Lynch. *Id. at pp. 1501-1507*. Like FNP Lynch, Ms. Misko also elected not to perform a "focused" physical examination, choosing instead to document that it was not needed. *Id. at pp. 1501, 1504, 1506*.

13. Dr. Brian Mathwich evaluated Claimant on December 13, 2022. He reviewed and summarized all of the medical records. He agreed with Dr. Larsen that Claimant was at MMI. *(RE B).* He agreed with the evaluators before him that there were no clinical signs of CRPS warranting CRPS testing under the Division Guidelines. Dr. Mathwich testified at hearing as a Level II Accredited, Board certified expert in Family Medicine. He described his evaluation of Claimant. Claimant told him he was in 8/10 pain at the time of the evaluation. However, upon distraction, Dr. Mathwich was able to hold the right hand and palpate it quite firmly including the pinkie, without eliciting increased complaints of pain. He did not observe atrophy in the hand or ecchymosis. There was good hair growth, consistent with the left. The hand was not excessively cold or warm, color was normal, capillary refill was normal, and there was no mottling or tight/shiny skin. He opined that Claimant did not meet the objective criteria for CRPS testing. Dr. Mathwich indicated that Claimant is receiving CRPS like treatment from his PCP based upon his subjective verbal reports of pain despite there being no objective findings to establish a diagnosis of CRPS. He noted that providers outside the workers compensation system are not constrained by the same rigors required by the Colorado Workers' Compensation Medical Treatment Guidelines, i.e. WCRP, Rule 17, Exhibit 7 when diagnosing and treating suspected cases of CRPS. He emphasized that subjective complaints alone are insufficient to establish a diagnosis of CRPS. Accordingly, he concluded that Claimant's CRPS treatment was/is not reasonable and necessary.

14. During cross-examination, Claimant confronted Dr. Mathwich with a record from NP Alesha Barker which declared that Claimant met the Budapest Criteria, for a diagnosis of CRPS within a short time of his evaluation of Claimant. *(See NP Barker's 12/16, 2022 report at Claimant Exhibit (CE) A).* Dr. Mathwich reiterated that, under the Medical Treatment Guidelines, both verbal reports of symptoms *and* objective clinical signs, i.e. findings of the clinician must be present to refer Claimant for testing and confirming a diagnosis of CRPS. According to Dr. Mathwich, Claimant does not meet Budapest Criteria, and therefore cannot be diagnosed with CRPS.

15. Careful review of NP Barker's 12/16/2022 report indicates that Claimant's

[5] Except for Claimant's complaints of ongoing severe and increasing pain for which NP Misko prescribed higher doses of narcotic medication.

history of injury is again inaccurately documented. According to NP Barker, Claimant sustained a "crushing injury to his right *hand/wrist* when he was using a 95 lb jackhammer and his *hand* became caught underneath it. (CE A, p. 5)(emphasis added). The report goes on to reflect that Claimant had been diagnosed with CRPS of the right upper extremity (probably from the records of NPs Lynch/Misko without support from objective clinical findings). While Claimant described color and temperature changes, NP Barker's report is devoid of any indication that she completed a physical examination. Consequently, there is no evidence that Claimant's verbal reports of color and temperature changes were independently verified by this clinician. *Id. at pp. 1-6 of the 12/16/2022 report*. Instead, NP Barker simply noted:

> [Claimant] has CRPS of his right upper extremity near his right hand and wrist. He does meet the Budapest Criteria with discoloration to the hand, numbness and burning, and temperature changes that are disproportionate to the rest of his body. . . . Regarding the CRPS, I believe [Claimant] would benefit from a set of 4 stellate ganglion blocks one week apart each.

16. Dr. Burns was deposed, and explained in her testimony that she did not suspect clinically that Claimant had CRPS, did not document or observe additional findings that would indicate CRPS, and did not believe that CRPS testing needed to be done in this case. (*Burns Depo, p. 25-27*). Indeed, Dr. Burns testified: "At the time I saw him, no, we didn't feel like [testing] was reasonable. And it wasn't just me, that was two orthopedic specialists and a pain management specialist." *Id, at p. 30; RE C, 1476.* Despite Claimant's suggestion to his treating psychologist (Sean Kelly) that his providers thought he might have CRPS *(See, RE B, p. 21),* the record evidence supports a finding that the balance of Claimant's treating providers were skeptical of the diagnosis and were in agreement with Dr. Burns that Claimant probably did not have CRPS as evidenced by the following statements of Dr. Mark Meyer: "I've examined it several times and I still am not convinced that there is significant component of CRPS." "I do not think the symptoms are related to his injury on the fifth digit". *(RE I, p. 1592, 1586; RE B, pp. 20-21)* and Dr. Wallace Larson: I do not see any evidence of CRPS. (RE B, p. 18).

17. As referenced above, Claimant has reported anxiety, depression and PTSD associated with his work injury. Claimant's records indicate that he experienced several stressors during the period of time he was treated for his right finger injury. These include two of his brothers having been diagnosed with cancer, one of these being sentenced to prison, Claimant's personal concerns that he may also have cancer, his brother being injured when his car caught on fire ("quite traumatizing to him."), and the very disturbing discovery of one of his brothers frozen to death in his back yard. *(RE H, p. 1573, RE. I, p. 932, 1587, 1592; RE B, p. 17).* Dr. Stephen Moe treated Claimant for anxiety and depression, placed him at MMI and provided a 6% mental impairment rating. *Id. at pp. 1579-1582*. He did not apportion or reduce the rating based upon the non-work causes. *Id*. At the time of his rating, he discussed the Claimant's mental health condition with Dr. Burns. His report says, "She also shared

her concerns, with which I agree, that non-injury factors have contributed to his reported symptoms and impairment, which we both recognize make it challenging to determine his work-related mental impairment." Id. at p. 1579. Dr. Meyer agreed, indicating: "[Claimant] continues to demonstrate a lot of pain behaviors and I do believe that there are some significant psychosocial and emotional issues that contribute to his pain complex." *(RE I, p. 1589).*

18. Respondents submitted surveillance video of Claimant at hearing that was shown to and discussed with Dr. Burns during her deposition. *(RE M; Burns Deposition).* After review of Claimant's activities on June 26, 2022, June 30, 2022, and July 2, 2022, Dr. Burns reiterated her opinion that Claimant can clearly use his right hand. The videos demonstrate Claimant engaged in daily activities using his right hand to carry bags, using his smart phone one handed on the right, place his sensitive right hand into his jeans pocket and walk for an extended period, and open car doors and other doors. Further, he is actively involved in a construction or maintenance job, going in and out of a particular building. He is seen spraying and drying off a window, wearing knee pads, which the ALJ reasonably infers to be for work on the floor, carrying drills, ladders, furniture, a vacuum, and a heavy bag and five gallon bucket with items weighty enough to alter his gait, all with his right hand and frequently with his left hand empty. Moreover, other people, including [Redacted, hereinafter MT], are present in the video with Claimant who are not carrying things, and who could assist if Claimant was incapable or having trouble using his right hand. There is no hesitation in movement, no overt pain behavior, and no sign that Claimant's right pinkie finger is fixed in an "extended position". *(See Disfigurement Award and Order, 11/8/2021, Ex. JJ).* Importantly, Claimant's reports to his PCP, i.e. his Medicaid providers during this same time period was of 10/10 of pain. (See e*.g. RE. D, p. 1489).*

19. Between Claimant's appearance before the court on April 6, 2022 and the May 10, 2023 hearing, additional surveillance was obtained of Claimant's activities. Similar to the June and July 2022 videos, Claimant appears to move without hesitation or signs of overt pain. *(RE M, April 19, 20, 26 & 30, 2023).* He wears a hand covering only on the day that he is being picked up by Medicaid transportation for a doctor's appointment on April 20, 2023. However, while waiting, he displays no difficulty with or sensitivity of the right hand as evidenced by using this hand to hold dog leashes, zip up his pants, manipulate his phone and thrusting that hand into the front pocket of his jeans. Accordingly, the ALJ finds Dr. Larsen's suggestion that Claimant is unable to use his right hand/finger or that his pinkie finger "remains in an extended position" as represented to Judge Cayce during his disfigurement hearing unpersuasive. Indeed, Claimant admitted that he could use the right hand per the 12/16/2022 report of NP Barker. (CE A, p. 6).

20. Of additional concern regarding Claimant's functionality are the conclusions of Dr. Albert Hattem who was asked to comment on Claimant's MMI status on June 4, 2021. As part of his physician advisor opinion, Dr. Hattem was provided Facebook postings which depicted that by November 25 and 29, 2020, approximately 7 months after his 4/20/2020 injury, Claimant was capable of jogging. He posted a picture

at a casino, with his girlfriend on November 2, 2020 and on August 3, 2020, he posted a picture from [Redacted, hereinafter TS] where he had traveled with his significant other. Again during the time of these postings, Claimant was reporting 10/10 pain and other associated symptoms including headaches, nausea, vision changes and severe anxiety he related to his industrial injury. Because Claimant's demonstrated activity level was inconsistent with his severe complaints/symptoms without supporting objective findings, Dr. Hattem concluded that Claimant had reached MMI as of June 4, 2021. *(See RE G; CE B).*

21. Dr. Burns testified that Claimant remains at MMI. (*Burns Deposition, p. 27, ll. 16-19*). She reiterated her opinion that Claimant was medically capable of working. *Id. at ll. 20-22*.

22. Claimant alleges that he suffers visual loss related to CRPS caused by his April 20, 2020 work-injury. Records from Vision Institute were submitted by both parties. There is no indication in these records or the records of any other medical provider that there is a causal link between Claimant's right pinkie finger injury and his vision loss. *(See generally RE E, p. 1525).* Claimant has been diagnosed with glaucoma.

23. Temporary benefits have never been paid under this claim. [Redacted, hereinafter RH] testified as Employer's Human Resources Manager. He testified that he managed the claim and assisted Claimant with return to work issue from the time of his work injury, forward. Claimant returned to work and was accommodated with a light duty position after his April 20, 2020 injury. According to RH[Redacted], Claimant was accommodated with one handed tasks, including computer work and predominately a flagging position where he earned regular wages.

24. Per RH[Redacted], Claimant was working in this modified duty position when he contacted Employer via test message on May 15, 2020 to report that he could not come to work because of COVID-like symptoms. Between May 15 and May 29, 2020, Claimant was provided with COVID pay. Beginning June 2020, RH[Redacted] testified that Claimant was required to provide the results of a COVID test. RH[Redacted] testified that testing results were requested 3 times in June but Claimant never responded. Although the evidence presented supports a finding that Claimant never took a COVID test, he instead provided successive recommendations for isolation from separate "Little Clinic" offices in Erie, Parker, and Westminster Colorado over the next several weeks. *(RE QQ).* The end of the last "self-isolation" period was July 2, 2020*. Id. at p. 1829.* Nonetheless, Claimant did not return to work and did not contact Employer. Employer then submitted a modified duty job description to Dr. Burns. This included the same one-handed job of flagging, and the duties of reviewing safety videos, that claimant was doing before he asserted COVID like symptoms on May 15, 2020. *(RE K, p. 1609).* Dr. Burns approved the position and signed off on this modified job duty letter on July 16, 2020 *(See, in contrast, text representation by claimant July 10, 2020, RE QQ, 1831).* Claimant was sent a modified duty offer on July 22, 2020. *Id at p. 1608.* Claimant's modified duty work was to commence on July 31, 2020. *(RE K).*

Claimant did not appear for work and did not begin that job. Indeed, the evidence presented supports a finding that Claimant did not appear for work at any time after May 15, 2020. Moreover, there is no persuasive evidence that Claimant's work related condition worsened after his failure to appear for modified duty on July 31, 2020. On August 5, 2020, Respondents filed a medical only General Admission of Liability (GAL). *(RE NN, p. 1768).* RH[Redacted] testified that Claimant was eventually terminated on September 30, 2020 after Employer gave Claimant ample time to appear for modified duty as his continued absence was affecting the companies missed work status with OSHA.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent, expert testimony is subject to conflicting

interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). Generally, the ALJ finds the testimony of Claimant to be inconsistent with the more convincing medical records of Drs. Burns, Meyer, Larsen, Hattem and Mathwich. When considered in its totality, the evidence in this case supports a reasonable inference/conclusion that while Claimant suffers from persistent neuropathic pain, there is insufficient support for the conclusions of NPs Lynch, Misko and Barker that he suffers from CRPS and that the treatment he is receiving through these providers is reasonable, necessary and related to his April 20, 2020 industrial injury.

Overcoming Dr. Larsen's Determination of MMI and Impairment

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI and/or causation is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI and/or the cause of a particular condition asserted to be related to Claimant's industrial injury, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

F. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Based primarily on NP Barker's 12/16/2022 report, Claimant alleges that he has a diagnosis of CRPS, is in need of additional treatment, and is therefore, not at MMI. While he suspects the same, the record evidence does not support such conclusion.

Indeed, careful review of the record supports a finding that none of Claimant's authorized treating physicians have diagnosed him with CRPS.

G. A diagnosis of CRPS is governed by Rule 17, Exhibit 7, of the Medical Treatment Guidelines. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act and provide a vetted consensus regarding the diagnosis of CRPS. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); *See also*, *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: "All health care providers shall use the Guidelines adopted by the Division". *Hall v. Industrial Claim Appeals Office, 74 P.3d 459 (Colo. App. 2003).* "Accordingly, compliance with the Guidelines is mandatory for medical providers." *Chrysler v. Dish Network*, W.C. No. 4-951-475-002 (ICAO, July 15, 2020). In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. Section 8-43-201(3)(C.R.S. 2020). Indeed, Rule 17-4 (A) acknowledges that "reasonable medical care may include deviations from the Guidelines in individual cases." *Chrysler v. Dish Network*, *supra.* Nonetheless, the Guidelines carry substantial weight and should be adhered to unless there is evidence justifying a deviation. *See Hall v. Industrial Claim Appeals Office, supra*; *See Logiudice v. Siemans Westinghouse*, W.C. No. 4- 665-873 (ICAO, January 25, 2011).

H. The ALJ may consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse, supra.* Guidelines concerning the assessment and treatment of complex regional pain syndrome and been prepared by the Colorado Department of Labor and Employment, Division of Worker's Compensation (Division) and are enforceable under the Division's Rules of Procedure. *See* 7 CCR 1101-3. The Medical Treatment Guidelines (MTGs) for Complex Regional Pain Syndrome are found at WCRP 17, Exhibit 7. These Guidelines are applicable regardless of the alleged inflicted extremity. Per Rule 17, Exhibit 7, the "[d]iagnosis of CRPS continues to be controversial and the clinical criteria used by the International Association for the Study of Pain is thought to be overly sensitive and unable to differentiate well between those patients with other pain complaints and those with actual CRPS. Pertinent sections of the CRPS guides provide:

- WCRP, Rule 17, Exhibit 7(G)(2): <u>DIAGNOSTIC COMPONENTS OF CLINICAL CRPS</u>: Patients who meet the following criteria for clinical CRPS, consistent with the Budapest criteria, may begin initial treatment with oral steroids and/or tricyclics, physical therapy, a diagnostic sympathetic block, and other treatments found in the Division's Chronic Pain Disorder Medical Treatment Guideline. All treatment should be periodically evaluated with validated functional measures. Patient completed functional questionnaires such as those recommended by the Division as part of Quality Performance and Outcomes Payments (QPOP, see Rule18-8) and/or the Patient Specific Functional Scale can provide

useful additional confirmation. Further invasive or complex treatment will require a confirmed diagnosis. (Emphasis added).

D. To meet the criteria for initial treatment, the patient must establish the following:

- Continuing pain, which is disproportionate to any inciting event; and

- At least one symptom in 3 of the 4 following categories:

  - Sensory: reports of hyperesthesia and/or allodynia;

  - Vasomotor: reports of temperature asymmetry and/or skin color changes and/or skin color asymmetry;

  - Sudomotor/edema: reports of edema and/or sweating changes and/or sweating asymmetry; or

  - Motor/trophic: reports of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

- At least one sign at time of evaluation in 2 or more of the following categories:

  - Sensory: evidence of hyperalgesia (to pinprick) and/or allodynia (to light touch and/or deep somatic pressure and/or joint movement);

  - Vasomotor: evidence of temperature asymmetry and/or skin color changes and/or asymmetry. Temperature asymmetry should ideally be established by infrared thermometer measurements showing at least a 1°C difference between the affected and unaffected extremities;

  - Sudomotor/edema: evidence of edema and/or sweating changes and/or
  sweating asymmetry. Upper extremity volumetrics may be performed by therapists that have been trained in the technique to assess edema; or

  - Motor/trophic: evidence of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

- No other diagnosis that better explains the signs and symptoms. It is essential that other diagnoses which may require more urgent treatment, such as infection, allergy to implants, or other neurologic conditions, are diagnosed expediently before defaulting to CRPS.

- Psychological evaluation should always be performed as this is necessary for all chronic pain conditions.

WCRP, Rule 17, Exhibit 7(G)(2)(a-e).

I. Because significant harm can beset patients by over-diagnosing CRPS, including physical harm caused by overreliance on invasive procedures, the MTGs strongly recommend that patients with suspected CRPS undergo "objective testing to verify their diagnosis. *(See WCRP, Rule 17, Exhibit 7 above)*. Simply because Claimant continues to experience pain of increased intensity in his right hand/arm neck and leg following his finger injury does not support a conclusion that she has CRPS or that it is related to his April 20, 2020 industrial injury. In this case, the objective tests to assist in confirming the likelihood of a diagnosis of CRPS have not been performed. Accordingly, the ALJ finds/concludes that the opinions expressed by Dr. Ales, and NPs Lynch, Misko and Barker regarding Claimant's CRPS diagnosis are premature and unconvincing. Their diagnostic impressions are unpersuasive because they doctors completely failed to employ the MTGs in their diagnosis and all failed to appropriately diagnose Claimant with CRPS through objective testing. Indeed, their diagnosis of CRPS, based solely upon Claimant's subjective complaints of pain runs afoul not only of the specific diagnostic requirements found in the CRPS MTG, but also ignores the warnings of premature CRPS diagnosis imbedded within the guideline itself. While Dr. Ales and NPs Lynch, Misko and Barker have strong opinions regarding Claimant's diagnosis, the ALJ finds that making a diagnosis of CRPS based solely on Claimant's subjective reports of pain, without objective testing data or justification for such deviation, contrary to the MTGs. The failure of Drs. Ales and/or NPs Lynch, Misko and Barker to properly utilize the MTGs to diagnose CRPS prior to recommending treatment supports this ALJ's conclusion that their diagnostic impressions are premature and probably incorrect. (*See Goff v. Schwan's Home Services, W.C. No. 947-921-01 (September 7, 2016)(affirming ALJ's denial of treatment for CRPS because MTG diagnostics were not met).*

J. Here, Dr. Burns has repeatedly addressed the question of whether Claimant might have CRPS during the course of her treatment. Indeed, on December 2, 2020, Claimant's wife and spokesperson, MT[Redacted], entered the examination room at the end of Claimant's visit and asked why Dr. Burns had not diagnosed CRPS. Dr. Burns documented that a variety of medications were tried to address the neuropathic symptoms and complaints, with no clear functional benefits from any of the medications. Dr. Burns discussed nerve pain in general and the additional symptoms seen in CRPS, "which the patient does not have at this point". (*RE C, p. 762).* Dr. Burns added that CRPS would not explain the symptoms Claimant was reporting in remote/unconnected parts of his body. *Id.* Six months later, on July 8, 2021, Dr. Burns participated in a Samms conference with Claimant's attorney and Respondents during which the issue/diagnosis of CRPS was raised. (RE C, p. 1360). Dr. Burns specifically addressed why testing for CRPS is not indicated. Indeed the stated reason why testing was not indicated was the lack of "objectively documented additional clinical characteristics"

observed/documented by multiple specialists and herself. Id. In addition, Dr. Burns noted that the "low chance" that such testing would be reliable with such a "minute area of involvement", i.e. the distal phalanx of the little finger in combination that testing would not change the management of Claimant's injury spoke against CRPS and testing. *Id*. Drs. Meyer, Larson (Wallace), Mathwich and Larsen (Karl) all agree with Dr. Burns that Claimant does not have clinical signs consistent with CRPS to warrant testing or a diagnosis of CRPS.

K. After considering the totality of the evidence presented, including the DIME report of Dr. Larsen, the reports of Dr. Burns, Dr. Meyer, Dr. Larson, Dr. Hattem, and Dr. Mathwich along with the balance of the medical record and contrasting them with the reports of Dr. Ales and NPs Lynch, Misko and Barker, the ALJ concludes that Claimant has failed to produce unmistakable evidence establishing that the Dr. Larsen's determination regarding causality and MMI is highly probably incorrect.[6] Rather, the ALJ concludes that the evidence presented regarding Claimant's medical diagnosis and recommendations raised by Dr. Ales and NPs Lynch, Misko and Barker are based upon Claimant's inaccurate and incomplete injury history provided to these providers. Thus, to the extent that the opinions of Dr. Ales and NPs Lynch, Misko and Barker diverge from those of Dr. Larsen, the ALJ concludes that these differences constitute a mere professional difference of opinion regarding whether Claimant has CRPS and if he does, whether it is related to the April 20, 2020 industrial injury. A difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Larsen's opinions concerning causality and MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000); Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). Consequently, Claimant has failed to meet his required legal burden to set Dr. Larsen's causality (diagnostic) and MMI determinations aside. As such, his request must be denied and dismissed.

Claimant's Entitlement to Treatment for CRPS, Vision Loss, Carpal Tunnel Syndrome, and/or Cervical, Lumbar or Leg Pain

L. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. See § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

[6] Neither party presented evidence challenging Dr. Larsen's permanent impairment rating.

M. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013.* Based upon the evidence presented, the ALJ concludes that Claimant has failed to establish that the treatment rendered by the Vision Institute, Dr. Ales and NPs Lynch, Misko, Barker is reasonable, necessary and related to his April 20, 2020 industrial injury. As found, the evidence in the instant case persuades the ALJ that Claimant is at MMI for the effects related to his April 20, 2020 right finger injury, that he has not been tested for, but likely does not have CRPS or work related diagnostic or treatment needs for CRPS, that his visual disturbance is likely related to glaucoma and that he needs no further maintenance treatment to cure and relive the symptoms caused by his April 20, 2020 injury or prevent deterioration of his work-related condition. On these issues, the ALJ credits the opinions of Drs. Burns, Meyer, Mathwich and Larsen.

Claimant's Entitlement to Temporary Total Disability (TTD) Benefits

N. To receive temporary disability (TTD) benefits, Claimant must prove the injury caused a disability. In addition, the claimant must prove that the industrial disability lasted greater than three working days. Section 8-42-103(1), C.R.S. 2001; *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

O. In this case, the persuasive evidence supports a conclusion that Claimant has failed to establish his entitlement to temporary benefits, having failing to show that he missed work as a result of his work injury. Indeed, Claimant's restrictions were accommodated and he performed modified duty work at full wages following his April 20, 2020 injury to May 15, 2020 when he removed himself from work for an extensive length of time based upon COVID like symptoms. After presenting successive recommendations for isolation from separate "Little Clinic" offices in Erie, Parker, and Westminster Colorado over the next several weeks, Claimant failed to return to work on July 2, 2020, the date the last self-isolation period ran out. Consequently, Employer sent an approved modified job offer which provided that Claimant was to start modified duty on July 31, 2020. The evidence presented supports a conclusion that Claimant did

not contact the employer and did not appear for the modified duty position approved by his authorized treating physician. Consequently, he was terminated. Accordingly, Claimant's wage loss is not attributable to his industrial injury, but rather his conscious decision not to appear for modified duty. Under C.R.S. § 8-42-103(1)(g), Claimant has failed to establish his threshold entitlement to temporary benefits.

P. As noted above, Claimant returned to work for Employer but was subsequently terminated on September 30, 2020 after Employer gave Claimant ample time to appear for modified duty. Moreover, the evidence presented supports a conclusion that Claimant failed to establish that his condition objectively worsened after his termination date. It is well settled that a claimant who might otherwise be considered disabled is not eligible for TTD benefits if he/she was "responsible for termination of employment." *Kerstiens v. All American Four Wheel Drive*, W.C. No. 4-865-825-04 (August 1, 2013). Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). Here, the evidence presented persuades the ALJ that Claimant is responsible for his separation from employment and his resulting wage loss.

Q. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008).

R. Considering the entire evidentiary record, the ALJ concludes that Claimant was responsible for the termination of his employment. Claimant exercised a degree of control over the circumstances resulting in his termination by repeatedly ignoring Employer's pleas to present COVID testing results and failing to report to modified duty on July 31, 2020 despite the position being approved by his authorized workers' compensation medical provider, Dr. Burns. The ALJ concludes that any employee would reasonably expect the failure to report for work to result in the loss of employment. Because his termination was not compelled by the natural consequence of the work injury and because he failed to establish a worsening of his condition, Claimant is "responsible" for his wage loss and is not entitled to TTD. Accordingly, the claim for such benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request to set the MMI and impairment rating determinations of Dr. Larsen is denied and dismissed.

2. Claimant's request for additional medical benefits following his release from care by Dr. Burns from Fenix Health LLC, Colorado Springs Neurological Associates, Vision Institute is denied and dismissed. Claimant has not met his burden to prove entitlement to additional reasonable, necessary or related maintenance benefits, including but not limited to treatment for CRPS, his vision, or any other conditions. Accordingly, Claimant's claim for maintenance medical benefits at this time is also denied and dismissed.

3. Claimant's request for TTD benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

Dated: June 23, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-212-530-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury on May 10, 2022?

2. If Claimant sustained a compensable injury, did Claimant prove by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from December 6, 2022 to January 9, 2023?

3. If Claimant sustained a compensable injury, did Claimant prove by a preponderance of the evidence that medical care, including the neck surgery he underwent and the proposed elbow surgery, are reasonable, necessary and related?

Stipulations

The parties agreed to an average weekly wage (AWW) of $415.37.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 61 year-old man who worked for Employer as a driver. Claimant's primary responsibility included delivering vehicles to customers. (Tr. 18:14-20).

2. Claimant testified that on May 10, 2022, he and the commercial manager, [Redacted, hereinafter ZR], made a delivery to a customer in Delta, Colorado. Claimant was driving a high-profile vehicle that did not have running boards. Once the paperwork for the delivery was completed, Claimant was getting back into the vehicle and as he was doing so, he slipped and grabbed for the steering wheel with his right hand. He testified that felt a pop down his right shoulder and arm, and experienced some tingling and numbness. (Tr. 19:2-13).

3. Claimant further testified that after feeling the pop, his arms dropped onto the seat. He was able to get into the vehicle by crawling, and he drove back to Greeley. Claimant reported the incident to his manager [Redacted, hereinafter JM]. JM[Redacted] gave Claimant a list of medical providers to choose from to seek medical attention. (Tr. 20:1-19).

4. Claimant went to Workwell on May 13, 2022, and was evaluated by Lloyd Luke, M.D. Claimant told Dr. Luke he heard and felt a painful pop in his right upper extremity,

when pulling himself into the truck on May 10, 2022. He described experiencing a pop in his right shoulder area. (Ex. A). Claimant did not complain of neck or elbow pain.

5. Dr. Luke diagnosed Claimant with an injury to the brachial plexus. He ordered physical therapy, and restricted Claimant's work activities to no lifting, pushing, pulling or carrying more than five pounds with the right arm, and no climbing involving the right arm. (Ex. 6).

6. Claimant returned to see, ATP, Dr. Luke, on May 24, 2022. Claimant told Dr. Luke he felt worse. Specifically, Claimant reported experiencing more frequent and intense paresthesia and stinging pains down his right arm, and felt he was weaker in shoulder flexion and elbow supination and pronation. Dr. Luke ordered an EMG of Claimant's right upper extremity, an MRI of his right shoulder, and a physiatry consult with Greg Reichhardt, M.D. Claimant had been seeing Dr. Reichhardt, and he told Dr. Luke that Dr. Reichhardt was his pain specialist. (Ex. 5).

7. Dr. Reichhardt evaluated Claimant on June 29, 2022. Claimant explained he was pulling himself into a pick-up truck and felt a pop, but he was not sure where he felt the pop. Claimant also reported the onset of weakness and numbness in his right arm. Claimant did not report neck pain. Dr. Reichhardt noted Claimant's history of Poland syndrome with congenital hypoplasia of the right upper extremity, primarily in the forearm and hand, including the right pectoralis region. He noted treating Claimant for a prior injury and his forearm and hand did not look grossly different from Claimant's previous visits. Dr. Reichhardt diagnosed Claimant with ulnar neuropathy at the elbow, possible radial neuropathy at the elbow, and possible mild median neuropathy at the wrist. Dr. Reichhardt opined that Claimant's presentation was puzzling, particularly due to his "modest mechanism of injury." (Ex. B).

8. On July 8, 2022, Claimant saw Joshua Snyder, M.D., at Orthopaedic & Spine Center of the Rockies (OCR) for "right elbow pain."[1] Claimant told Dr. Snyder that on May 10, 2022, he was getting into a truck without a running board, and was reaching in with his left arm. He then reached over the steering wheel with his right arm to pull himself up when he "felt immediate pain in his elbow." Claimant reported the pain was "tolerable" but when he went to pick up a bottle of water, he experienced pain and weakness. According to the record, Claimant wanted Dr. Snyder to review the MRI of his right shoulder. The MRI of Claimant's right shoulder was normal, but he was to follow up with a hand and elbow specialist. Claimant did not report any neck pain. (Ex. E.).

9. Claimant told Dr. Luke he felt a pop in his right shoulder. He told Dr. Reichhardt he felt a pop, but was not sure where it was. Claimant told Dr. Snyder he felt immediate pain in his elbow. Claimant did not report neck pain to any of these doctors. The ALJ finds that the descriptions of his injury, which Claimant gave his medical providers, were inconsistent and not credible.

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[1] Dr. Snyder operated on Claimant in December 2020, performing a right shoulder arthroscopy with labral repair, biceps tenotomy and decompression of cyst and labral debridement. (Ex. E).

10. On July 28, 2022, Claimant returned to OCR and was examined by Bret Peterson, M.D. Claimant had a chief complaint of forearm weakness and stiffness. Claimant told Dr. Peterson he was injured when he pulled himself into his work truck, lost his balance and used his right arm to stabilize himself. He said he "felt some kind of pop and subsequently some pins and needles in his arm and hand." Claimant reported the thing he was upset about was the he could not play golf. Dr. Peterson opined "[w]hile there is electrodiagnostic evidence of median nerve entrapment at the wrist and elbow ulnar nerve entrapment, I am not convinced clinically that these are responsible for his predominant symptoms and certainly what may have occurred at his workplace injury." (Ex. E).

11. Claimant testified he received a Notice of Contest on or about August 18, 2022, and "everything stopped at that point." (Tr. 21:3-9). Claimant's personal physician, Stacy Garber, M.D., at Family Physicians of Greeley, ordered multiple MRIs and referred Claimant to Hans Coester, M.D., at U.C. Health. Dr. Coester was familiar with Claimant because he had performed multiple back surgeries on Claimant. (Ex. D).

12. Zachary Hitchcock, PAC, evaluated Claimant on November 15, 2022, because Claimant wanted an opinion about his cervical spine. Mr. Hitchcock noted in the record that Dr. Garber referred Claimant for evaluation of "cervical disc herniation" and that the cervical MRI that Dr. Garber ordered, showed cervical spondylosis C5-C6. (Ex. D). Claimant told Dr. Hitchcock that he injured himself at work when he "grabbed onto something with his right arm to avoid falling." Claimant reported having progressive issues with his right upper extremity, decreased strength, and altered sensation with occasional zingers down his right arm. Claimant never reported any popping, nor did he describe the mechanism of pulling himself into the truck.

13. There is no objective evidence in the record that Claimant reported experiencing cervical spine pain to either Dr. Luke or Dr. Reichhardt. The ALJ infers that Claimant never reported having cervical spine pain to Dr. Luke or Dr. Reichhardt.

14. Dr. Coester, diagnosed Claimant with C5-6 and C6-7 disk disease and cervical spondylosis with spinal cord impingement and nerve root compression with pain and weakness in the right upper extremity. Dr. Coester operated on Claimant on December 6, 2022. (Ex. 14).

15. Claimant testified that the surgery performed by Dr. Coester helped him restore some of his strength and that he regained movement in some of the fingers in his right hand. Claimant testified that his strength is about 60% better following the surgery as compared with his strength immediately following the work incident. (Tr. 23:9-16). Claimant testified he believed he returned to work January 8, 2023, after being off for about four and a half weeks. (Tr. 22:16-24).

16. Claimant testified he has Poland's Syndrome, and this affected the development of his right arm. Claimant testified that his right upper extremity has always been a little weaker than his left side, by 10-15%, but he has been able to compensate for his limitations his entire life has been able to participate in activities including collegiate baseball. (Tr. 24:12-25:12).

17. Claimant suffered a prior neck sprain while pulling weeds at work in 2016, which resulted in a Workers' Compensation claim. (Ex. H). On June 10, 2016, James Rafferty, D.O. evaluated Claimant and diagnosed him with a "contusion and strain of right shoulder, cervical strain and possible C6 radiculopathy." Dr. Rafferty placed Claimant on restrictions that included no forceful use of the right shoulder, no use of the right arm at or above shoulder level unless stretching. (Ex. C).

18. Claimant testified that this injury resolved and he got better. (Tr. 51:6-10). He testified that the injury did not require any extensive treatment. He did not have physical therapy, an MRI or surgery as a result of the neck sprain that was diagnosed by Dr. Rafferty in 2016. (Tr. 49:15-21). Claimant testified that his neck symptoms resolved and that the 2016 claim was primarily for his back and hip. He continued treatment with Dr. Reichhardt for the back and hip issues. He underwent back surgery and multiple hip surgeries as a result of the work injury of 2016. (Tr. 51:17-52:7).

19. On October 1, 2020, Claimant presented to Dr. Snyder for right shoulder pain after dismounting a stationary bike that began to tip over, and reaching forward with his right shoulder to grab the bike. Claimant complained of increasing soreness going into his neck as well as decreased strength, numbness and tingling down into his fingers. In February 2023, Claimant was still complaining of numbness, tingling and weakness in his fingers as documented in by Dr. Peterson. (Ex. E).

20. Despite Dr. Reichhardt's diagnosis and reference to C6 radiculopathy, Claimant did not disclose his prior neck conditions, or his seeking treatment for possible C6 radiculopathy with his providers. There is no objective evidence in the record that Claimant shared this information with Dr. Luke, Dr. Reichhardt, Mr. Hitchcock, Dr. Peterson, Dr. Snyder or Dr. Coester, who eventually performed the cervical surgery. (Tr. 38:8-21; 40:10-41:16; and 79:9-21).

21. The ALJ finds that Claimant failed to tell any of his providers in the instant claim about his prior neck complaints and possible C6 radiculopathy.

22. Claimant testified that prior to the May 10, 2022 work incident he did not have any neck or elbow pain. (Tr. 18:16-21). The ALJ does not find this testimony credible.

23. Claimant testified he needs additional treatment for his injuries, including treatment for a compressed nerve in his elbow. (Tr. 27:6-12). Dr. Peterson diagnosed Claimant with an ulnar nerve entrapment in the right elbow. (Ex. 17). And Dr. Reichhardt opined that it was reasonable for the claimant to consider ulnar transposition at the elbow with Dr. Peterson. (Ex. 7).

24. Respondents retained Lawrence Lesnak to perform an independent medical examination (IME). As a part of the IME, Dr. Lesnak asked Claimant about his medical conditions. Claimant told Dr. Lesnak he had been diagnosed with hypercholesterolemia and diffuse polyarthritis and depression. Dr. Lesnak asked about other medical conditions, and Claimant denied the same. When Dr. Lesnak asked Claimant to remove his shirt for the examination, he noticed that Claimant's right chest musculature was

absent with atrophy of his right upper extremity. Claimant conceded he had Poland Syndrome after Dr. Lesnak commented on the condition. Claimant also failed to disclose any prior medical care for prior cervical radiculopathy, despite being seen for this condition. (Tr. 60:2-61:12).

25. Dr. Lesnak testified that some expected symptoms associated with Poland Syndrome included weakness and limited range of motion on the underdeveloped side of the body. (Tr. 64:16-24). Claimant had difficulty with supination and pronation and would have to adapt to do certain things. (Tr. 65:9-12). While Claimant testified he had difficulty with supination, Dr. Lesnak documented that Claimant had chronic difficulty with pronation and supination of his right forearm for many decades. (Ex. J).

26. Dr. Lesnak is the only physician who had access to Claimant's pertinent prior records, including those related to Claimant's neck issues and the cervical radiculopathy reports. Unlike the other providers, Dr. Lesnak was able to consider the prior conditions as part of his causation analysis.

27. Dr. Lesnak testified that Claimant's EMG results displayed chronic findings, which are indicative of at least six months or more of pathology. This is distinguishable from acute findings that are present up to several weeks after the accident. (Tr. 70:4-9). He also credibly testified that radiculopathy is an abnormality involving the nerve root and this is identified either through objective EMG findings or clinical findings such as muscle atrophy rather than subjective findings. Some symptoms associated with radiculopathies include weakness, tingling, numbness, and poor range of motion. (Tr. 72:4-20). Claimant told Dr. Lesnak he was experiencing ongoing diffuse weakness and numbness, which are symptoms consistent with radiculopathy. (Ex. J).

28. Dr. Lesnak testified that neuropathic pain-blocking agents, such as Gabapentin are typically prescribed for radiculopathy. Claimant had been taking 600 mg of Gabapentin for the last few years with no change in dosage. (Tr. 73:4-20) Claimant denied taking Gabapentin for radiculopathy, and testified he took it for nerve damage in his right hip. (Tr. 51:11-14).

29. Dr. Lesnak credibly testified that the October 13, 2022 cervical spine MRI showed chronic age-related findings that included multilevel degenerative disc changes, bone spurs, and arthritis with no evidence of any acute findings. (Tr. 74:17-21). He opined that there was no evidence on any diagnostic testing of any signs of injury, trauma, or aggravation of pre-existing conditions. (Tr. 80:22-24). He credibly testified that the May 10, 2022 incident did not result in any disability. (Tr. 81:9-18).

30. Dr. Lesnak credibly testified that the cervical spine surgery Claimant underwent on December 6, 2022 was not reasonable, necessary, or work-related. Specifically, there was no indication Claimant injured his neck in this claim or aggravated any preexisting pathology. Instead, it was the result of chronic conditions. (Tr. 77:2-15). Dr. Lesnak also credibly testified that the elbow surgery recommended by Dr. Peterson is not reasonable, necessary or work-related. Dr. Lesnak explained that the two EMGs showed mild to moderate ulnar neuropathy that was chronic. Lastly, he opined there was no objective

evidence that Claimant injured his elbow and developed or aggravated the chronic nerve pathology. (Tr. 76:18-79:8).

31. The ALJ finds Dr. Lesnak's opinions, specifically those that the alleged incident did not cause the need for medical care or disability, and that neither the elbow surgery nor the neck surgery were reasonable, necessary or causally related to the alleged work injury, are credible and persuasive.

32. The ALJ finds that Claimant's failure to provide his other medical providers recited herein with a complete picture of his medical history ultimately undermines the credibility and persuasiveness of opinions that are contrary to those Dr. Lesnak's.

33. As found Claimant's description of the incident is inconsistent and not persuasive. Based on the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that he suffered a compensable injury on October 10, 2022.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict

by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa Cnty. Valley School*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

The mere occurrence, however, of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 P.2d at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

It is undisputed that Claimant was working on May 10, 2022, when the incident occurred. Claimant, however, failed to prove by a preponderance of the evidence that he suffered a compensable injury. As found, Claimant was neither credible nor persuasive. He reported differing sources of pain and failed to disclose his prior neck injury for which he underwent some treatment and received a diagnosis of possible C6 radiculopathy to his providers. The medical records also contradict Claimant's testimony that his neck condition resolved, as there was documentation of ongoing neck pain with numbness and tingling in 2020.

Dr. Lesnak reviewed Claimant's prior records, including those documenting pre-existing arm and neck symptoms, and he made a causality determination based on a comprehensive understanding of the extent of Claimant's condition. Dr. Lesnak credibly opined that it is not medically probable that the Claimant sustained an injury requiring medical care or causing disability. He also credibly testified that there was no medical evidence to support aggravation of any preexisting condition either. Dr. Lesnak's opinion supports that any incident of May 10, 2022 did not result in a compensable injury. The totality and weight of the evidence supports that even if an incident did occur on May 10, 2022, Claimant did not sustain a compensable injury.

Claimant Failed to Prove Entitlement to an Award of Medical Benefits

In the event of a compensable injury, an employer must provide an injured employee with reasonable and necessary medical treatment to cure and relieve the effects of the injury. § 8-42-101(1)(a) C.R.S. The employee, however, must prove a causal relationship between the injury and the medical treatment for which he is seeking benefits. *Snyder v. ICAO*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). Because Claimant has failed to establish a compensable work injury for the reasons set forth above, he has also failed to prove that he is entitled to reasonable and necessary medical benefits related to this claim.

Further, even had Claimant met his burden of proof, as found, the ALJ finds the opinions of Dr. Lesnak to be credible and persuasive that neither the elbow surgery nor the neck surgery are reasonable, necessary, or related to the May 10, 2022 claim. The treatment that Claimant underwent, such as the cervical spine surgery, and the proposed elbow surgery are related to chronic conditions that are unrelated to the May 10, 2022 claim.

Claimant Failed to Prove Entitlement to an Award of TTD Benefits

An award of TTD benefits is payable if the following conditions exist: (1) the injury or occupational disease causes disability, (2) the injured employee leaves work as a result of the injury, and (3) the temporary disability is total and lasts more than 3 regular working days. *PDM Molding, Inc. v. Stanberg*, 989 P.2d 542, 546 (Colo. 1995). TTD continues until the employee returns to regular or modified employment. § 8-42-105(3), C.R.S. Because Claimant has failed to establish a compensable work injury for the reason as set

forth above, he has also failed to prove that he is entitled to temporary total disability benefits related to the claimed industrial condition. Specifically, any time off work following the surgical procedure is not work-related.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits is denied and dismissed.

2. Claimant's request for TTD benefits is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-104-002

ISSUES

- Respondents are challenging the determination of the Division IME (DIME) doctor that the Claimant is not at MMI.

- Claimant requests additional medical care to cure and relieve the Claimant for his injuries to his neck, left upper extremity and knees.

- Whether the DIME opinions on MMI and Impairment are void for Claimant's violation of Rule 11-4(B)(2).

FINDINGS OF FACT

1. Claimant was employed as a truck driver for the employer driving a vehicle that removes lane stripes on the highway when he was injured in a motor vehicle accident. On June 21, 2021, he was driving south bound on Interstate 25 approaching University Boulevard in the dark and in heavy rain when he encountered a concrete barrier on the highway that was not readily visible under the conditions. He did not see the barrier prior to impact and collided with the concrete "jersey" barrier. Claimant does not recall the collision, but the incident was recorded on a "dash-cam" and that video was submitted into evidence.

2. After the collision occurred, Claimant exited the vehicle and walked around to assess the situation including whether any other vehicles were involved in the collision. Claimant called his supervisor and his supervisor came to the scene and drove him to Aurora Medical Center. Claimant underwent treatment at Aurora Medical Center and received treatment for his left shoulder and left knee.

3. On June 22, 2021 Claimant presented to UCHealth where he was seen by Scott Rinehart, PAC. At that visit Claimant had soreness in his left shoulder, left knee, and down his head. He also had a contusion on his left bicep and abrasions on both forearms and scalp. Claimant was provided with work restrictions of carrying or lifting of no more than 25 pounds from floor to waist, no overhead reaching, no kneeling, no squatting, and no driving.

4. On July 1, 2021 Claimant returned to UCHealth and was seen by P.A. Payton. Contained in the records is a questionnaire filled out by Claimant. In that questionnaire, Claimant is asked to list any specific concerns or issues he would like to address during that day's visit. He hand wrote "Shoulder and arm hurting a lot. Difficulty sleeping because of pain. Pain comes and goes but never fades completely. Radiates from my shoulder down my arm and up my neck". Similarly, the follow up questionnaire has a review of systems and under the musculoskeletal section Claimant checked neck pain both now and in the past. Despite the Claimant's identification of the neck as a

concern, there is no mention in the narrative portion of the chart note of the neck as being injured, evaluated or requiring treatment.

5. Claimant continued to treat at UCHealth in July and August for left shoulder pain and left knee pain. Claimant was seen by Dr. Larimore via telehealth on September 30, 2021 with ongoing complaints of pain in the left shoulder and left knee. Dr. Larimore refilled Claimant's medications and referred him to Dr. Michael Simpson for an orthopedic evaluation.

6. Dr. Simpson saw Claimant on October 11, 2021. Claimant was complaining of left shoulder and left knee pain. Dr. Simpson recommended an MRI arthrogram for the left shoulder and a corticosteroid injection for the left knee.

7. The MRI was reviewed with Claimant on November 10, 2021. Claimant was seen on that date by P.A. Eathough. The MRI showed articular sided fraying of the supraspinatus, labral tearing with biceps involvement and some AC joint arthritis. Mr. Eathough recommended arthroscopic surgery for Claimant's left shoulder. Mr. Eathough also noted that the Claimant reported some left-sided lateral neck pain. Mr. Eathough was not sure if the neck pain would be alleviated by the shoulder surgery.

8. Dr. Simpson performed arthroscopic shoulder surgery on Claimant's left shoulder on December 9, 2021. Surgery consisted of an arthroscopic biceps tenodesis left shoulder, arthroscopic inferior and anterior - inferior capsulorrhaphy, arthroscopic subacromial decompression, and arthroscopy left shoulder with extensive debridement including debridement of posterior-inferior labrum and anterior rotator interval.

9. On December 12, 2021 Claimant was seen by Dr. Larimore for post-surgical follow-up of the left shoulder and recheck of the left knee. Dr. Larimore noted that Claimant was having some right knee difficulty and explained to Claimant that the right knee "would not be covered under this claim."

10. At a follow-up visit with P.A. Eatough on January 10, 2022 it was noted that Claimant's left shoulder was doing well. Mr. Eatough went on to note that Claimant was still having some neck tenderness and encouraged him to bring this up to his authorized treating physician and "work comp" for further evaluation and workup if warranted.

11. Claimant was seen by Elizabeth Bisgard, MD on April 7, 2022. At this visit Claimant gave Dr. Bisgard a detailed history of how he was injured. Furthermore, Claimant showed Dr. Bisgard the dash cam video of the accident. Dr. Bisgard noted that the video showed Claimant striking a jersey barrier. According to the office note of this visit, Claimant told Dr. Bisgard that as he progressed in rehab, his shoulder improved but that cervical spine pain has not. Claimant also told Dr. Bisgard that on some mornings he wakens with no pain but more often than not he awakens with 1-2/10 cervical pain which worsens as the day progresses going up to a 7/10 pain. Claimant related that driving his work truck, manipulating tools, bilateral cervical rotation and flexion extension increase his neck pain. Claimant also related his migraine headaches are more frequent going from one to two a month to 2-3/week. Dr. Bisgard performed a physical examination which

revealed tenderness to palpitation in the bilateral cervical spine without spasm along with decreased range of motion.

12. Dr. Bisgard requested an MRI of the cervical spine due to the chronicity of the symptoms and the mechanism of the injury. Dr. Bisgard opined that her exam is most consistent with cervical facet symptomatology.

13. In a Rule 16 record review dated April 8, 2022 concerning the causality of Claimant's cervical neck syndrome Dr. Gary Zuehlsdorff opined that there is "limited causality" and that Claimant's shoulder surgery could have caused pulling of the cervical spine musculature causing pain and spasm. Dr. Zuehlsdorff wrote that 4-6 chiropractic treatments would be a reasonable treatment modality for the neck.

14. The MRI of the cervical spine taken on April 26, 2022 showed the follow findings:

> 1. At C7-T1 there is stenosis secondary to complex disc bulging and congenital factors with left C8 nerve impingement of the cord.
>
> 2) At C6-7 there is spinal cord compression on the left side secondary to disc protrusion with associated crowding impingement of the proximal left C7 nerve.
>
> 3) At C5-6 there is combined left sided disc protrusion with left ventral cord impingement and probable impingement of the left C6 nerve. There's crowding of the right side of the cord secondary to the disc bulging.
>
> 4) At C4-5 there is disc bulging with moderate left foraminal stenosis and mild left lateral recess stenosis.
>
> 5) At C3-4 there is mild cord impingement and moderate left foraminal stenosis and mild left lateral recess stenosis.

(Claimant's Exhibit 42, p. 348).

15. In her June 1, 2022 note, Dr. Bisgard discussed with Claimant the PT he was receiving in April 2021 for a pre-existing work-related left shoulder injury. Claimant told Dr. Bisgard that in the past he had experienced cervical discomfort and occasional numbness in his hands but it did not limit his function. Dr. Bisgard wrote that she reviewed the PT records from April 26, 2021 through June 18, 2021 and noted that while Claimant was having some neck stiffness and bilateral hand numbness in the beginning of his PT sessions that by May 21, 2021 he was reporting significant improvement and his symptoms from that day up to June 21st was located in the left shoulder. Dr. Bisgard also disagreed that the medical records don't reflect cervical spine problems until 4 months post-accident. Dr. Bisgard reviewed the July 5, 2021 intake paperwork which according to her "clearly documented" that Claimant had neck pain. In addition, Dr. Bisgard noted that Claimant also reported neck pain on September 10, 2021 which was described as stabbing with a dull ache. Dr. Bisgard's opinion regarding causation was that while

Claimant had some cervical symptoms prior to his injury he had a "substantial worsening" following the motor vehicle accident which has not returned to baseline and therefore "meets the definition of permanent aggravation." Dr. Bisgard noted that Claimant has unresolved issues with his cervical spine that need treatment.

16. Following the denial of treatment for the cervical spine, Dr. Bisgard placed the Claimant at maximum medical improvement and assigned a 4% impairment rating of his left upper extremity, after apportionment.

17. As of the date of the hearing, Claimant has not received any treatment for his neck other than physical therapy, primarily for his shoulder, but also therapeutic for his neck.

18. Respondents filed a Final Admission of Liability for the rating and Claimant then timely requested a Division IME (DIME). The DIME was performed by Dr. Rook. Dr. Rook determined that the Claimant was not at MMI since he required curative care for his cervical spine and the need for this treatment was work related. Specifically, he recommended diagnostic and potentially therapeutic spinal injection therapy, which could include an epidural steroid injection versus facet or medial branch block or selective nerve root blocks. He also recommended an electrical study of Claimant's left arm. Finally, He recommended an orthopedic evaluation for both of his knees.

19. Dr. Rook opined that both knees were symptomatic due to motor vehicle accident. He testified that "immediately after the motor vehicle accident, he had severe left-knee pain, because his left knee had struck and penetrated through the dashboard and he was limping. And because of the alteration of his gait, he was bearing more weight on his right leg. And states that within a month of the accident, he was having right knee pain; therefore I believe the worsening of his right knee condition is associated with the alteration of his gait due to the left injury - - left knee injury, which is from the accident. And with that in mind, I chose to provide an impairment rating for range-of motion loss of the right knee. So that was my reasoning why to rate it. I thought it wasn't a direct result of the initial accident, but was an indirect result of sequela from the original accident"." (Rook transcript 4/3/2023, p. 24).

20. Following the DIME with Dr. Rook, Dr. Brian Mathwich performed an IME at the request of Respondents on March 6, 2023. With respect to his cervical spine, Dr. Mathwich opined that Claimant had a temporary exacerbation of a preexisting issue that had resolved and Claimant was back to his baseline. With respect to Claimant's right knee, Dr. Mathwich also testified that "limping for a short time on a - - on an injured extremity is not going to cause impairment in the opposite extremity. And that's why I did not include that as a claim-related injury". (Hearing transcript p. 47).

CONCLUSIONS OF LAW

A. Respondents did not overcome the DIME determination that the Claimant is not at maximum medical improvement.

A DIME's determination regarding Maximum Medical Improvement is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing standard also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME's whole person rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc.*, W.C. No. 4-842-550-01 (March 18, 2016).

Respondents failed to overcome the DIME's determination that the Claimant is not at MMI due to the need for cervical treatment which is causally related to the compensable work injury rating by clear and convincing evidence. Dr. Mathwich's testimony and report constitutes a difference of opinion as to the causal connection of Claimant's cervical spine problems and that of the DIME opinion from Dr. Rook. Additionally, the authorized treating physician, Dr. Bisgard is also of the opinion that the Claimant's cervical spine symptoms are due to a work related aggravation of the Claimant's preexisting cervical condition and requires treatment. Unfortunately, that treatment was denied based on a Rule 16 review. Since the carrier denied authorization of any treatment for the neck, Dr. Bisgard placed the Claimant at MMI.

I find the opinions as to causation of the cervical spine symptoms offered by Dr. Rook and Dr. Bisgard, in this case, to be credible and persuasive. Furthermore, Respondents' IME, Dr. Mathwich does not deny that the Claimant sustained a cervical spine injury, but his opinion is that the injury sustained was a temporary exacerbation rather than a permanent injury. This is a difference of opinion and I conclude that it is not sufficient to overcome Dr. Rook's causation opinion by clear and convincing evidence.

B. Causal relationship of Claimant's right knee

There is no dispute that the Clamant sustained an injury to his left knee in the motor vehicle accident. What is in dispute is whether Claimant's right knee symptoms are work related due to an altered gate. Initially, a determination as to whether the right knee injury is a scheduled or non-scheduled injury must be made in order to determine the appropriate burden of proof. If the injury is a scheduled impairment, the DIME doctor's determination carries no added weight and Respondents are not required to overcome

that causation opinion by clear and convincing evidence. *See, Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). I determine that the right knee is a scheduled injury and Claimant has the burden of proof by a preponderance of the evidence to prove that the right knee is compensable. I conclude that Dr. Mathwich's opinion that the right knee is not related to the work injury is more persuasive than Dr. Rook's opinion that the right knee is work related due to altered gait. Claimant has failed to sustain his burden of proof by a preponderance of the evidence that the right knee is work related.

C. Violation of WCRP 11-4(2)(B)

Respondents argue that Claimant's showing of the video depicting the accident from the vehicle to the DIME physician is a violation of 11-4(2)(B) such that the DIME report should be stricken. However, such a drastic remedy is not mandated by Rule 11. WCRP 11-11 provides that "Non-compliance with this rule may be addressed thought the Dispute Resolution process described in Rule 16 or through any other mechanism of dispute resolution provided for in rule or statute." I conclude that it is not necessary to strike the DIME report of Dr. Rook since the video did not change the opinions of Dr. Rook as to causation of the neck injury but served only to reinforce his preliminary opinions as to causation. In his deposition transcript from April 3, 2023 the following question and answer were obtained.

"Q. And in viewing it then, do you think that you would have been able to have such a clear understanding of those - - that mechanism of injury and the incident itself without viewing that video? For instance, if you hadn't had that video and just reviewed the medical records?

A. Well, I think I would have came (sic) up with the same conclusion. But I think the video was a powerful reinforcement." (Rook Transcript 4/3/23 p. 20).

Based on this testimony, the ALJ concludes that Claimant's showing of the video to the DIME doctor had minimal effect on the conclusions of Dr. Rook that the Claimant is not at MMI and requires treatment for the neck and evaluation of the Claimant's left knee complaints. Furthermore, Respondents are not prejudiced by Claimant showing the dash cam video to Dr. Rook since their IME was given the opportunity to view it and ultimately, Dr. Rook should have also had the opportunity to view the video in order to address Dr. Mathwich's opinions based on his review of that video.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME's determination that the Claimant is not at MMI is denied and dismissed.

2. Claimant is entitled to medical treatment to cure and relieve him from the effects of his compensable cervical spine injury.

3. Claimant's right knee symptoms are not work related. Claimant's left knee symptoms are work related and Claimant is entitled to an evaluation recommended by Dr. Rook for the left knee.

4. Respondents' request to invalidate the DIME opinions as to causation of the Claimant's cervical spine for a violation of the rules is denied and dismissed.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 28, 2023

Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-086-844-004

A hearing in the above captioned matter was held before Administrative Law Judge (ALJ), Richard M. Lamphere on April 26, 2023. By agreement of the parties, the proceeding was conducted virtually via video/teleconference and digitally recorded on the Google Meets platform between 1:00 and approximately 3:51 p.m. Claimant was present by video as was his attorney, Sean E. Goodbody, Esq. Paul Kruger, Esq. appeared via video on behalf of Respondents.

Hearing testimony was taken from Claimant and Dr. Jeffrey Schwartz. In addition to the aforementioned hearing testimony, the ALJ admitted the following exhibits into evidence: Claimant's Hearing Exhibits 1-14 and Respondent's Hearing Exhibits A-JJJ. The ALJ also took administrative notice of the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*).

On June 15, 2023, the undersigned ALJ issued a Summary Order. As part of his June 15, 2023 Summary Order, the ALJ determined that Claimant overcame the Division Independent Medical Examination (DIME) opinion of Dr. Linda Mitchell regarding MMI, but did not overcome her opinion regarding permanent impairment. The ALJ also determined that Respondents failed to establish that they were entitled to collect an asserted $89,595.44 overpayment in temporary total disability (TTD) benefits because of Dr. Mitchell's backdating of Claimant's maximum medical improvement (MMI) date. Indeed, the ALJ concluded that, "[b]ecause the alleged over payment arises from the backdating of Claimant's MMI date to November 28, 2018 and because the ALJ concludes that Claimant reached MMI on June 29, 2021 (a date past the May 16, 2021, last payment of TTD per Respondent's FAL), the ALJ concludes that Respondents have failed to prove, by a preponderance of the evidence, that they are entitled to collect the asserted ($85,595.44) overpayment in TTD benefits.

On June 21, 2023, Respondents filed an uncontested motion for a corrected order, asserting that $4,077.04 of the asserted $85,595.44 overpayment arose, not from the backdating of Claimant's MMI date, but because TTD benefits were paid beyond the date of Claimant's return to full wage work. Respondents request repayment of the asserted $4,077.04 overpayment in TTD paid while Claimant earned full wages between May 17, 2021 and June 26, 2021. Review of Respondent's motion and the evidence presented at the April 26, 2023 hearing, including Respondent's Hearing Exhibit B[1] and E[2], persuades the ALJ that the overpayment asserted by Employer did not arise completely from the backdated MMI date. Rather, the ALJ is convinced that

[1] Respondent Exhibit B is the General Admission of Liability dated July 6, 2021, which documents TTD termination on May 16, 2021, based on Claimant's return to full wages. The GAL documents a TTD overpayment of $4,749.23.

[2] Respondent Exhibit E is the indemnity log, which establishes that after Claimant's return to full wages, he received TTD benefits totaling $4,077.04 (May 17, 2021 – June 26, 2021).

$4,077.04 of the asserted $85,595.44 overpayment resulted from Claimant receiving TTD while simultaneously earning full wages. Accordingly, the ALJ agrees with Respondents that the portion of the June 15, 2023 Summary Order, which determined that the asserted overpayment resulted entirely from the backdated MMI date is erroneous and constitutes an inadvertent, but nonetheless, material mistake for which correction is warranted.

Accordingly, for good cause shown, the ALJ GRANTS Respondents' June 21, 2023, motion and issues this CORRECTED SUMMARY ORDER to reflect the following additional findings of fact, conclusions of law concerning the alleged overpayment in this case.

FINDINGS OF FACT

1. Claimant testified that he earns $52,000.00 per year working as a sales manager for a firearms optics company. He is married and his wife works outside the home earning approximately $55,000.00 annually.

2. Claimant and his wife share household expenses including a mortgage of $2,400.00/month. They do not have car payments but spend approximately $350.00/month on utilities, $90.00/month on internet services and $178.00/month for cell phone services. Claimant was unable to estimate a monthly cost for food but did indicate that he has approximately $60,000.00 in student loan debt for which he has a $700.00/month payment obligation; although he testified that he has only been able to make $100.00 to $200.00/month payments towards this loan.

3. Claimant testified that he has not recently been able to set any money aside to contribute to his savings account, which he estimated has a balance of approximately $2,500.00. He testified that his checking account has a balance of approximately $300.00 and that he has a retirement account with Employer that has an approximate value of $5,000.00, but only roughly $2,000.00 if he cashes it out.

4. Based upon the evidence presented, Claimant's household expenses total $3,718.00 assuming a student loan repayment obligation of $700.00 rather than the $100.00 - $200.00/ monthly payments he has been making. Conversely, Claimant and his spouse have a combined income of $107,000.00 annually or $8,916.67/month. Despite Claimant's protestations otherwise, the ALJ is convinced that Claimant's finances support a finding that he has the ability to repay the proven overpayment in TTD benefits of $4,077.04, even assuming additional expenses not testified to by Claimant including food and fuel costs. Indeed, ascribing an addition $1,000.00 in expenses to the household for such things as food and fuel leaves $4,198.67 in income from which a portion can be used to repay the proven overpayment in TTD benefits.

5. In this case, Respondents request repayment of the established overpayment at a rate of $500.00 per month or $125.00/week. Here the established overpaid benefits were paid out over a period of approximately six weeks. In order to

repay the overpaid benefits in a similar time frame, Claimant would need to remit $679.50 week to expunge the proven overpayment. Given that a reduction of $500.00/month from the balance of $4,198.67 would still leave Claimant $3,698.67/month in disposable income to meet additional living expenses combined with the fact that the requested $500.00/month payment is substantially ($554.50/month) less than the $679.50/week payment Claimant would need to remit in order to repay the overpayment in a similar time it took to pay out the TTD in question, the ALJ finds Respondents request for a repayment amount of $500.00/month reasonable. At $500.00/month or $125.00/week, it will take in excess of 8 months to repay an overpayment that took a mere six weeks to create. Simply put the ALJ finds Respondents proposed payment of $500.00 unlikely to create an undue financial hardship on the Claimant.

CONCLUSIONS OF LAW

A. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(1) C.R.S. to conduct a hearing to "[r]equire repayment of overpayments. In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo.App. 2009) rev'd on other grounds, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 210), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy concerning repayment. This includes the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo.App. 1994).

ORDER

IT IS THEREFORE, ORDERED THAT:

1. Claimant shall repay Respondents a total of $4077.04 at a rate of $500.00/month. Claimant's first payment to Respondents is due the first of the month after this order becomes final and subsequent payments of $500.00 are due the first of every month thereafter until the overpayment is extinguished. Claimant's counsel shall contact Respondents' counsel to obtain the necessary details regarding where payments are to be sent.

2. Any and all issues not decided herein are reserved for future determination

DATED: June 30, 2023

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-637-001

ISSUE

1. Did Claimant proven by a preponderance of the evidence that he is entitled to maintenance treatment in the form of acupuncture and chiropractic treatment?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 63-year old man who works for Employer as a dock worker, and has worked for Employer since July 2003.

2. On May 12, 2021, Claimant suffered an admitted work-related injury. Claimant injured his neck, left elbow and shoulder. He received treatment from doctors at Concentra, including Stephen Danahey, M.D., who referred Claimant to specialist, John Sacha, M.D., for additional care. (Ex. A).

3. Dr. Sacha performed radiofrequency neurotomies bilaterally at C2-C3 and C3-C4 on Claimant. He also managed Claimant's medications. (Ex. 4).

4. In the September 26, 2022, Physician Progress Report, Dr. Sacha recorded Claimant was 20-30% better, but also noted Claimant was "such a poor historian" it was somewhat difficult to say how he was doing. Dr. Sacha recommended "physical therapy x8 post radiofrequency with strengthening, conditioning and posturing." He did not mention, nor recommend, acupuncture or chiropractic care. (Ex. B)

5. Dr. Sacha saw Claimant for a follow-up appointment on October 10, 2022. Dr. Sacha stated he wanted Claimant to finish physical therapy, and then he would be at maximal improvement. Dr. Sacha again did not discuss, nor did he recommend, chiropractic care and/or acupuncture as treatment recommendations. (Ex. B).

6. On November 21, 2022, Dr. Sacha saw Claimant for an impairment rating. Dr. Sacha noted Claimant had completed all care "without any improvement whatsoever," and Claimant had a "long complex and very sophisticated workup and treatment, but [had] no improvement whatsoever". He further reported that with Claimant there was a "high risk of over utilization of medical resources." Dr. Sacha placed Claimant at maximum medical improvement (MMI) and he recommended maintenance care consisting of eight physical therapy visits, a gym membership with pool pass for six to twelve months and a couple of follow-up visits. He made no mention of chiropractic care or acupuncture. (Ex. B).

7. Claimant saw Dr. Sacha again on December 5, 2022. Dr. Sacha noted in the medical record that Claimant "has completed all care, is at maximum medical improvement, appropriate for case closure and impairment rating." Claimant told Dr. Sacha that he "needs surgery" but could not articulate why he felt he needed surgery. Dr. Sacha explained that cervical facet syndromes are not surgical problems, and Claimant was not a candidate "for further aggressive care." According to Dr. Sacha, Claimant had "progressively become more and more nonphysiologic as time has gone and has progressively gotten to the point where [Dr. Sacha] feel[s] there is a nonmedical component to his ongoing complaints." Dr. Sacha reported an impression of nonphysiologic presentation and physical findings "not consistent with someone who has been having true pain." He found Claimant to have an "extremely high risk for overutilization of medical resources." Dr. Sacha recommended continuation of post-MMI maintenance care, but he did not recommend or discuss chiropractic care or acupuncture. (Ex. B).

8. ATP, Dr. Danahey placed Claimant at MMI on December 9, 2022. Dr. Danahey noted Claimant reported "some ongoing discomfort," but he did not prescribe Claimant any medication. In addressing the need for medical care after MMI, Dr. Danahey noted "N/A" or not applicable. (Ex. A).

9. Claimant returned to see Dr. Sacha on December 23, 2022. Dr. Sacha noted that there had been a "trial of some chiro and acupuncture", but Claimant did "not want to move forward with that." Dr. Sacha, however, without explanation, referred Claimant for chiropractic care and acupuncture with Dr. Aspegren. (Ex. B).

10. Dr. Sacha saw Claimant on January 19, 2023 and February 17, 2023. At both appointments, Dr. Sacha noted that all care had been declined, so they were taking a "wait and see approach." He noted the presence of cervical facet syndrome and that Claimant's conditions were stable. There was no mention as to the necessity of either chiropractic care or acupuncture.

11. Claimant testified he previously received acupuncture and chiropractic care, and his last care of this type was in the summer of 2021. Claimant testified, the acupuncture gave him some relief, but his last treatment was problematic. He further testified that the chiropractic care only gave him temporary relief.

12. There is no objective evidence in the record as to the amount of acupuncture and chiropractic care Claimant received, the dates of such treatment, or the overall efficacy of the treatment.

13. Claimant testified he still has pain at the base of his neck and on his trapezius from the May 12, 2021, admitted work injury. Claimant credibly testified that he would like to receive acupuncture and chiropractic treatment.

14. Dr. Sacha's prescription for chiropractic care and acupuncture was reviewed at Respondent's request by Eddie Sassoon, M.D. In a March 6, 2023 report, Dr. Sassoon

stated that the requested sessions of chiropractic care and acupuncture were not medically necessary. (Ex. C)

15. The ALJ finds that there is no objective evidence in the record as to why Dr. Sacha ordered chiropractic care and acupuncture.

16. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that acupuncture and chiropractic care is medically necessary.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Post-MMI Medical Care

Claimant was placed at MMI on December 9, 2022, and Claimant's ATP, Dr. Danahey, noted that maintenance medical care after MMI was "N/A." There is no objective evidence in the record that Claimant's placement at MMI has been rescinded or

challenged. Thus, the appropriate legal standards for determining Claimant's entitlement to medical benefits are those applicable to post-MMI medical treatment. Generally, medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury may be awarded. § 8-42-101(1)(a)(I), C.R.S. As Claimant has been placed at MMI, no additional treatment is necessary to "cure" the effects of his May 12, 2021, admitted work injury.

Claimant is seeking post-MMI medical treatment in the form of acupuncture and chiropractic care as recommended by Dr. Sacha. Dr. Danahey, Claimant's ATP, specifically found that post-MMI medical care was not necessary, and he did not recommend chiropractic care or acupuncture for Claimant.

Claimant credibly testified that he experienced some unquantified relief from chiropractic care, and that that acupuncture improved his condition with the exception of the final session. Claimant testified that the last time he received acupuncture and chiropractic care was in the summer of 2021, nearly two years ago. As found, there is no objective evidence in record as to the amount of acupuncture and chiropractic care Claimant received, the dates he received the treatment, or the efficacy of the treatment. Claimant credibly testified that he wants chiropractic care and acupuncture. But at his December 23, 2022 appointment with Dr. Sacha, Claimant said he did not want to move forward with acupuncture and chiropractic treatments. Despite Claimant's position, Dr. Sacha prescribed chiropractic care and acupuncture for Claimant. Dr. Sacha, however, provided absolutely no basis or rationale for his recommendation.

An ALJ can order ongoing medical treatment post MMI if a claimant's condition can reasonably be expected to deteriorate so that a greater disability results without the ongoing care. *Milco Constr. v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1990). "[S]uch medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." *Id.* The record must reflect the medical necessity of any requested treatment. *Public Serv. v. Indus. Claim Appeals Office*, 979 P.2d 584, 585 (Colo. App. 1999); *see also Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995) (there must be substantial evidence in the record to support a determination of future medical treatment). Here, there is no objective or persuasive evidence in the record that Claimant's condition can be reasonably expected to deteriorate in the absence of chiropractic care and/or acupuncture.

As found, Claimant has failed to prove, by a preponderance of credible evidence, that he is entitled to chiropractic care or acupuncture.

ORDER

It is therefore ordered that:

1. Claimant's request for chiropractic care and acupuncture is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 30, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-213-399-002

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on February 27, 2023 on issues of compensability, medical benefits that are authorized, reasonably necessary and related to the alleged August 5, 2022 work injury, as well as average weekly wage, temporary total disability from August 6, 2022 and continuing and penalties for failure to insure and failure to admit or deny. Claimant listed permanent partial disability benefits, however, withdrew this issue as premature since her providers have not yet released her from care.

The Notice of Hearing was sent to the employer on March 17, 2023. The NOH sent to employer by the OAC was sent by mail and was not returned to the OAC. This ALJ makes the inference that Employer received notice of the hearing. Claimant also indicated that she forwarded the NOH by email and it was not returned to her either.

Claimant was provided with a pro se advisement. Claimant elected to proceed without counsel.

Claimant filed a Case Information Sheet dated May 17, 2023.

Claimant informed the court that she had been in contact with the Division and the Colorado Uninsured Employer's Fund through the third party administrator, Corvel.

Claimant also informed the court that she had been in contact with the liability insurer for the vehicle she drove and was advised that she was not covered as the vehicle had not been involved in an accident.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment with Employer on August 5, 2022.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 5, 2022.

III. Whether Claimant has proven what her average weekly wage is at the time of the incident in question.

IV. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 6, 2022 and continuing until terminated by law.

V. Whether Claimant has proven by a preponderance of the evidence that she is entitled to a penalty for Employer's failure to carry workers' compensation insurance.

VI. Whether Claimant has proven by a preponderance of the evidence that she is entitled to a penalty for Employer's failure to admit or deny the claim.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is 44 years old at the time of the hearing. She worked as a truck driver for 20 years, since 2001 with different employers, driving flatbeds, reefers (refrigerated trailers), pneumatic trucks (concrete powder containers), 53 foot eighteen wheelers, extended trailers and others.

2. Claimant worked for Employer as a Class A delivery driver beginning the week after July 4, 2022. Employer was a subcontractor of [Redacted, hereinafter XL] Logistics in Henderson, CO, but other than picking up loads from XL[Redacted], Claimant had no contract with XL[Redacted]. Employer required Claimant to send the bills of lading to Employer directly by email at the same email she use to email the Application for Hearing and the Notice of Hearing. Claimant was never provided with a physical address for Employer other than the one on Fraser Way in Denver CO, where Employer would keep his trucks, and trailers and Claimant would pick up the truck from that location. She conducted all her deliveries within the local areas close to Denver.

3. Employer provided the equipment, and always provided her with a specific schedule of delivery from which she was not to deviate. The only thing Claimant provided in order to carry out her work were her personal gloves and the reflective vest. Everything else Employer provided. Employer provided the truck, the trailer, tools, and paid for the fuel with his company card. Employer directed Claimant where to put gas in the truck, and Employer would meet Claimant at the gas station where he had a contract and could use his EFS Fuel Card. Claimant explained that when the driver fuels the truck, at the diesel pump they were required to put in the truck number, the trailer number, the mileage of the truck, and driver ID number and, if needed, any additives to the fuel. In her case, Employer would meet her and he would input the information because he had not issued Claimant her own card at that time like previous employers had done.

4. At the beginning of their relationship, Employer was very professional until her injury when he became very evasive. Later, Employer became unresponsive. Employer did not pay her for the last week of work and Claimant resorted to filing with the Division of Labor Standards and Statistics who advised her she was not an independent contractor and was entitled to wages and needed to file her claim with the Division of Workers Compensation, a separate entity within the Colorado Department of Labor and Employment.

5. On August 5, 2022 Claimant picked up the truck on Fraser Stree, which was white, with a green sign with Employer's logo on the truck, with the DOT matching the one she was assigned. There was a trailer on sight that belonged to Employer as well (with the same logo), but she was advised that it was not her assigned trailer. She did a pre-trip on the tractor truck, which every truck driver is required to do, checking the oil, the fuel, the tires, brakes, and everything else required in order to make sure the truck was safe to drive.

6. Claimant drove to XL[Redacted], located in Henderson, CO, a 25 minutes' drive. She was went to her assigned door, one of probably 100 freight doors, where her trailer No.[Redacted, hereinafter 123], was being loaded. Claimant parked in front of her trailer with the tractor truck, as if to hook up but she got out and locked up, went into the XL[Redacted] office where she was advised that they were finishing up loading the trailer. She located her pallet jack to use on the pallets, which was Employer's equipment. Once they closed up the back of the trailer, Claimant hooked up to the trailer.

7. Claimant again did a pre-trip on the trailer then pulled up to the outbound office to obtain the bill of lading. She looked at the bill of lading for the customer's address, she filled out her portion as the driver receiving product for delivery. (The customer would sign the bill of lading when they received the product being delivered.) Claimant opened up the trailer and compared her bill of lading with the freight that was loaded. Before she left the yard, she texted Employer and the XL[Redacted] representative that she had the load and was leaving the yard.

8. On August 5, 2022, she was driving a day cab with a 28 foot pup trailer, once she arrived at the place of deliver, she found that the freight to be unloaded was behind another pallet that was for a different delivery. She was using a pallet jack, the manual kind that was assigned to her, moved the load to the left, and then went to take the pallet and crate that she needed to deliver at this particular location. There was wood surrounding the pallet and freight, to protect it, going up to above Claimant's height. As she was moving the pallet jack, the wheels got caught and would not come out. She readjusted the pallet jack a little, then attempted to move it, while holding on to the top piece of wood that surrounded the freight. The wood broke, and the momentum of pulling the pallet jack and the wood breaking, sent her flying out of the back of the trailer. She attempted to catch herself on the way out but failed to grab onto the side of the trailer. She fell out of the back of the trailer, about 3 and one half to four feet, to the ground onto her left side.

9. She lost consciousness for some undefined amount of time and came to, noticing that the concrete was hot, and that she was laying on the ground. She hit the whole left side of her body, including her head, her left arm, shoulder, left wrist (which was swollen), ribs, left hip and left leg. No one came to her rescue. No one was there. She tried to get up, noting that she was very weak. When she did get up using the ICC bar (the rear impact bar or bumper), she noticed that the pallet jack and freight on the pallet were only about one foot away from falling off the rear of the truck. She did not see any individuals, so she made her way to the drivers' side door of the tractor. She normally used three point contact to get up into the truck, but because her left side was hurting so much, she was only able to grab onto the bar on the right to pull herself up. She dialed 911 to come get her. She also called Employer to let him know what was going on and so that he could come pick up the truck and trailer with the rest of the load. He must have been in the immediate area, because Employer, I.W. whom Claimant knew to be the owner, arrived before the ambulance.

10. When the EMTs arrived, they assessed her and they administered Fentanyl which helped her with the pain. She asked the ambulance driver to give her boss, I.W. the truck keys. Employer stated that he "hoped she was OK." And that was the last time

Claimant saw her employer. The ambulance took her to UCH Hospital Emergency despite Claimant asking to be taken to St. Joseph Hospital. She was evaluated, they took x-rays, and after a couple of hours of attention and care she was released.

11. Claimant contacted Employer multiple times, speaking with I.W. on the phone. Employer failed to provide Claimant with insurance information or a designated provider list. They discussed it on the phone but he was very vague and evaded her questions. Claimant later found out from the Division that Employer did not have workers' compensation insurance, which explained Employer's attitude and his breaking off all communications with her. Employer did request her ETF information. Claimant completed a Direct Deposit form for the [Redacted, hereinafter WA] and sent it to employer on August 15, 2022. Claimant spoke with multiple individuals at Division, who provided her guidance with regard to where to look for steps to take in proceeding with her claim. Division advised Claimant that Employer had not responded to their inquiries regarding Claimant's claim.

12. Claimant earned a base wage of $250.00 a day, $1,250.00 a week. Claimant was never able to speak with Employer about why her checks were short, after she was hired.

13. Claimant was seen at the UCH Hospital Emergency Care at the Anschutz Medical Campus on August 5, 2022. The ordered x-rays of her left wrist and chest. Claimant was diagnosed with a fall, initial encounter, with a closed nondisplaced fracture of scaphoid of left wrist, unspecified portion of scaphoid, initial encounter, closed fracture of one rib of left side, initial encounter. She was advised to continue to wear a splint until follow-up with either a primary care physician or sports medicine provider for repeat x-rays of her left wrist to evaluate for fracture. She was also advised that failure to wear the left wrist splint could lead to long-term arthritis. They provided acetaminophen and a Lidoderm patch while at the ER and prescribed Tylenol, 1000 mg every 6 hours for pain. Dr. Andra Farcas wrote that Claimant was unable to return to work until follow up on August 12, 2022.

14. Claimant was seen by Hayley Roberson, F.N.P.-C at UC Health Primary Care, Green Valley Ranch on August 10, 2022. Ms. Roberson stated that Claimant was under her care and took Claimant off work from August 10, 2022 through August 19, 2022. In a follow up on August 17, 2022 Ms. Roberson stated that Claimant continued to be off work.

15. On October 6, 2022 Ms. Roberson stated that Claimant she was able to return to work on a reduced schedule, with frequent breaks and a 20 lbs. restriction for lifting, pushing and pulling.

16. A chest CT on November 3, 2022, as read by Scott Loomis, M.D, showed an incompletely healed, nondisplaced fracture of the left anterolateral eighth rib. The CT also revealed some unrelated benign lung nodules on her liver and unrelated nodules in the right lung also believed to be benign. A nurse informed Claimant of the results on November 21, 2022.

17. Claimant was attended again by Nurse Hayley Roberson on May 25, 2023. She noted Claimant was a long time patient with work related accident on August 5, 2022

and was diagnosed with a left rib fracture. She stated that Claimant progressively improved and was able to start working. She stated that Claimant was likely to completely improve from the injury but that she continued with mild discomfort in the left side.

18. Claimant testified that she continued to have pain in the left knee, 8th left rib and left wrist that are related to the work related accident. She further stated that when she was seen initially she advised that her employer did not provide her with insurance information, and UCH took her Medicaid information. She stated that it was likely medical providers had been paid by Medicaid as neither UCH nor Medicaid had sought reimbursement from Claimant for her medical care.

19. Claimant stated that Employer failed to admit or deny her claim. In fact, Claimant had not heard from her employer again after he told her "let it be clear there will be no payment for your work." Claimant did not know how to interpret that information. She stated that Employer had not formally or explicitly made any admission or denial with regard to her claim for compensation.

20. Claimant testified that the lack of payments and Employer's failure to admit or deny the claim has been devastating to her to the point that she had to resort to living in a shelter, which has been very bad. She lost her car, by selling it very cheap in order to get money to live on. She stated she was depressed, stressed and financially strapped, and the lack of ability to care for herself had been horrible for her. She was accustomed to paying her bills and living off of her earnings but her inability to work, and her Employer's failure respond to her communications and to pay her while she was disabled, was extremely hard for her. She also had to resort to getting food stamps. Even now, she only has a temporary living arrangement. She was very confused by the fact that Employer did not have insurance, stating she was unaware that an employer could operate without insurance.

21. As found, Claimant has proven that it was more likely than not she was injured in the course and scope of her employment with Employer on August 5, 2023 when she fell off the back of a trailer while working for Employer injuring her left side, including her head, left shoulder, left wrist, ribs, left hip and left lower extremity.

22. As found, Claimant has shown she is entitled to medical benefits that are reasonably necessary and related including the emergent care she received and the follow up care at UCH.

23. As found, Employer failed to provide a designated provider list pursuant to statute and selection of a provider passed to Claimant. Claimant selected UCHealth and they are deemed authorized.

24. Claimant credibly testified that she earned $1,250.00 per week. As found, Claimant's average weekly wage is determined to be $1,250.00.

25. As found, Claimant has proven by a preponderance of the evidence that she was taken off work as of August 5, 2022 by the emergency physician and that status continued when she went under the care of Nurse Roberson until Claimant was release to return to work on May 25, 2023. Claimant is entitled to temporary total disability benefits from August 5, 2022 through May 2, 2023.

26. As found, the medical records are inconclusive regarding whether Claimant was placed at maximum medical improvement on May 25, 2023, was simply released to return to work or whether the release was to modified or her regular job of driving and delivering freight. The issue of TTD from May 25, 2023 and continuing is reserved.

27. Employer is found to be uninsured at the time of the work related accident of August 5, 2022 and Claimant is entitled to a penalty for failure to insure.

28. As found, Employer, to Claimant's significant detriment, failed to admit or deny the claim made by Claimant. Employer was at the site of the accident by the time the ambulance had arrived. Claimant has shown by a preponderance of the evidence that Employer knew or should have known his responsibility to admit or deny the claim within the statutory time period.

29. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to

be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Claimant has proven that it was more likely than not she was injured in the course and scope of her employment with Employer on August 5, 2023 when she fell off the back of a trailer while working for Employer injuring her left side, including her head, left shoulder, left wrist, ribs, left hip and left lower extremity. Claimant's claim is determined to be compensable.

C. Medical benefits

Employer is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116

(Colo. 1984); Industrial Commission v. Royal Indemnity Co., supra, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005).

Claimant has shown she is entitled to medical benefits that are reasonably necessary and related. Following Claimant fall from the trailer on August 5, 2022, Claimant immediately contacted 911 and was taken by ambulance to UCH Hospital for medical care. Claimant then selected UCH Primary Care, as Employer failed to provide her with a designated provider list. Claimant has proven by a preponderance of the evidence that Claimant's medical care through UCH was authorized, reasonably necessary medical treatment causally related to the August 5, 2022 accident.

23. In this matter, Employer failed to provide a designated list of providers pursuant to statute and selection of a provider passed to Claimant. Claimant selected UCHealth and they are deemed authorized. Further, Medicaid likely paid for Claimant's treatment at UCH Hospital and UCHealth Primary Care and otherwise financed Claimant's care. Employer is thus financially responsible for the payment of Claimant's medical expenses, including any outstanding lien from the Colorado Department of Health Care Policy & Financing due to payments made by Medicaid.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). Claimant credibly testified that she was contracted in July 2022 to work for $250.00 per day or $1,250.00 per week. As found, Claimant has proven that the fair approximation of her average weekly wage is $1,250.00.

E. Temporary Total Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

The medical records from UCH Hospital and Nurse Roberson show that Claimant was unable to work from the day of her injury through May 24, 2023. On May 25, 2023 Nurse Roberson released Claimant to work. Claimant has clearly shown by a preponderance of the evidence that she is entitled to TTD benefits from August 6, 2022 through May 24, 2023 in the amount of $34,762.60. However, this ALJ cannot determine whether that release was to return to her to her full time job as a delivery driver or not. It intimates that Claimant continues to have limitations and Claimant credibly testified that she continued to have symptoms that limited her activities and ability to work. Claimant's claim for TTD benefits from May 25, 2023 and continuing are reserved.

F. Penalties

Insurance Coverage

Every employer subject to the provisions of the Workers' Compensation Act shall carry Workers' Compensation insurance. Sec. 8-44-101, C.R.S. Sec. 8-43-408(5), C.R.S.[1] in effect at the time of Claimant's August 5, 2022 work related injury provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

[1] Due to statutory change as of July 1, 2017. The prior statutory provision of a 50% wage increase was paid to Claimant.

As found, Employer did not have Worker's Compensation insurance on or prior to Claimant's August 5, 2022 date of injury. Claimant spoke directly with her supervisor and boss on multiple occasions following the work injury of August 5, 2022. As found, Employer failed to disclose multiple times to Claimant whether he had workers' compensation insurance coverage. Claimant was informed by Division that no policy could be found for Employer, and that Employer had failed to respond to inquiries from Division. Employer knew or should have known about the accident and his obligations to carry insurance and or respond to Division inquiries regarding insurance and Claimant's claim. As found, it is determined that Employer failed to carry workers' compensation insurance. Neither did Employer file an admission or denial of the claim. Employer was given ample opportunity to respond to the claim and present a defense to these issues. Claimant emailed Employer copies of the Application for Hearing and the Notice of Hearing, the same email address which Claimant utilized to conduct her business with Employer. The Notice of Hearing was mailed to Employer by OAC to the mail address on record. None of the emails sent by Claimant nor the mail sent by the OAC were returned. Further, Employer failed to respond to Claimant's calls. As found, Employer was provided with notice of the hearing in this matter and failed to show. Claimant has shown by a preponderance of the evidence that a penalty is due for failure to insure.

As found, Respondent-Employer is liable for temporary total disability benefits and reasonable and necessary medical treatment related to the work injury. Based on Claimant's AWW of $1,250.00, Claimant's TTD rate is $833.33. Claimant is owed TTD benefits from August 6, 2022 through May 24, 2023, which is 292 days or 41 weeks and 5 days. Claimant is owed TTD benefits in the amount of $34,762.60. It is undisputed Respondent-Employer did not carry workers' compensation insurance at the time of Claimant's industrial injury. Accordingly, Respondent-Employer shall pay as a penalty an additional $8,690.65 (25% of $34,762.60) to the Colorado Uninsured Employer Fund.

Failure to Admit or Deny Liability

It if inferred by Claimant's statements at hearing that Employer knew of the work related injury as he was present when the ambulance arrived and spoke with Claimant about the accident. Employer did not respond to Claimant's filing of the claim, to her emails, to her calls, to Division's inquiries and demands, or to the Notice of Hearing sent by the Office of Administrative Courts. Claimant is entitled to penalties pursuant to the violations of Sec. 8-43-203(1)(a), C.R.S.

Section 8-43-203(1)(a) states that "The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…"

Claimant seeks a penalty for failure to admit or deny liability. Pursuant under Sec. 8-43-203(2)(a), C.R.S. The employer must admit or deny liability within 20 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." An employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot

exceed “the aggregate amount of three hundred sixty-five days’ compensation.” Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. See Sec. 8-43-203(2)(a), C.R.S.

The phrase “may become liable” means the imposition of a penalty under Sec. 8-42-203(2)(a), C.R.S. is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer’s position so the Division can exercise administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colo. Civil Rights Comm’n*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Assoc. Bus. Prod. v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Indus. Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty under Sec. 8-43-203(2)(a), C.R.S. *Pioneer Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

As found, Employer knew or should have known Claimant had a significant injury that occurred on August 5, 2022 after falling from the back of the trailer and had to call the ambulance. Employer was present before the ambulance arrived at the scene of the accident. Claimant was credible in testifying that she had multiple conversations with employer and that Employer was evasive, failed to answer Claimant’s question and eventually failed to answer her mail, emails or phone calls. Employer failed to file an Employer’s First Report and failed to notify the Division what employer’s position was with regard to Claimant’s claim for compensation. Claimant was injured on August 5, 2022 and Employer had 20 days to file an admission or denial, through August 26, 2022, which is 285 days counting through the date of the June 6, 2023 hearing.

Claimant has proven by a preponderance of the evidence that she is entitled to a penalty for failure to admit or deny. Employer was given an opportunity to put on a defense following receiving notice of the hearing and failed to appear at hearing. This ALJ has little information with regard to Employer’s ability to pay. However, given Claimant’s testimony that Employer had multiple drivers and vehicles as well as trailers, this ALJ declines to make any assumption with regard to Employer’s ability to pay. Claimant suffered humiliation, devastation and horror due to her inability to work caused to this August 5, 2022 work related injury, in addition to having to resort to giving up her home, having to sell her truck and having to live in a shelter. This has had a significant impact on Claimant. Therefore, it is determined that a daily penalty of $60.00 per day or $420.00 per week[2] beginning August 26, 2022 through June 6, 2023 is appropriate in this

[2] This constitutes little more than 50% of Claimant’s weekly compensation, which is much less than “up to one day’s compensation for each day’s failure to so notify.

matter for a penalty of $17,100.00, apportioned pursuant to statute, with $8,550.00 to Claimant and $8,550.00 to the subsequent injury fund.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant suffered compensable work related injuries to her head, left shoulder, left wrist, 8th left rib, left hip, and left lower extremity on August 5, 2022 in the course and scope of her employment with Employer.

2. Employer shall pay for all authorized, reasonably necessary treatment related to the August 5, 2022 injury from authorized providers to cure or relieve the effects of Claimant's compensable injury, including but not limited to the charges from UCH Hospital and UCH Primary Care including reimbursement to Medicaid (Colorado Department of Health Care Policy & Financing).

3. Claimant's average weekly wage is $1,250.00 and her temporary disability rate is $833.33.

4. Employer shall pay Claimant TTD benefits at the rate of $833.33 per week from August 6, 2022 through May 24, 2023 in the amount of $34,762.60. Claimant's claim for TTD benefits from May 25, 2023 and continuing are reserved.

5. Respondent-Employer shall pay $8,690.65 (25% of $34,762.60) to the Colorado Uninsured Employer Fund for failure to insure with payment mailed to DOWC Revenue Assessment Unit, 633 17th St. Suite 400, Denver, CO 80202.

6. Employer shall pay penalties to Claimant in the amount of $8,550.00 for failure to admit or deny the claim.

7. Employer shall pay penalties to the subsequent injury fund in the amount of $8,550.00 for failure to admit or deny the claim payable to DOWC Division Trustee and mailed to DOWC Division Trustee c/o Mariya Cassin 633 17th St. Suite 400 Denver, CO 80202.

8. In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $60.553.25, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to DOWC Division Trustee, c/o Mariya Cassin, 633 17th St. Suite 400, Denver, CO 80202; cdle_revenueassess_dowc@state.co.us

or

b. File a bond in the sum of $60.553.25 with the Division of Workers' Compensation, which guarantees payment of the compensation and benefits awarded, within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

10. Employer shall pay statutory interest at the rate of 8% per annum on benefits not paid when due.

11. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

12. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 28th day of June, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-186-156-001; and 5-079-064-006

ISSUES

FINDINGS OF FACT

The ALJ make the following factual findings based on the admitted evidence:

Background and Procedural History

1. Claimant worked in Employer's meat packing plant for approximately seventeen years, removing sweetbreads[1] from hanging cattle carcasses on a moving conveyor system. Claimant's position required her to use a hook in her left hand to hold the sweetbreads, and cut them free from the carcass with a knife in her right hand. Claimant performed these tasks approximately every 2-4 seconds over her eight-hour shift. Claimant testified that on a typical day, she would remove sweetbread from 2,550 to 2,800 cow carcasses, and each carcass was divided into two sections, each of which would require sweetbread to be removed. As a result, Claimant removed between 5,100 and 5,600 sweetbreads over an eight-hour shift. Most of Claimant's work was performed between waist and shoulder level. Employer's Job Demands Summary indicates that Claimant's position required her to constantly lift, carry, push, and pull up to ten pounds, and required constant repetitive use of the hands and arms. (Ex. 12)

2. **WC No. 5-079-064-006**: On May 16, 2018, Claimant filed a Workers' Claim for Compensation alleging injuries to her left arm, from the shoulder to hand, arising out of her Employment with Employer. (Ex. L). Respondents filed a Notice of Contest on June 21, 2018, contesting Claimant's claim as not work-related. (Ex. L). Claimant filed an Application for Hearing in the present matter on January 6, 2022.

3. **WC No**. **5-186-156-001**: On October 26, 2021, Claimant filed a Workers' Claim for Compensation alleging repetitive motion injuries to the "bilateral upper extremities" with a date of "injury/disease" of June 7, 2018. (Ex. J). On February 18, 2022, Respondents filed a Notice of Contest stating claim was denied or contested because the alleged injury is not work-related. (Ex. K). Claimant filed an Application for Hearing on this claim on January 17, 2022.

4. On March 9, 2022, the two matters were consolidated for the purposes of hearing. Hearing commenced on May 25, 2022, but was continued to August 22, 2022. The record was held open to permit the parties to conduct post-hearing depositions, and the record

[1] A "sweetbreads" are a portion of the cow located in the neck.

was ultimately closed on April 17, 2023, when the final deposition transcript was lodged with the OAC.

Claimant's Medical History

5. In 2011, Claimant received treatment at Employer's clinic for pain in her right elbow and upper arm. (Ex. 4). Cathy Smith, M.D. diagnosed Claimant with right elbow lateral epicondylitis and a right shoulder strain. (Ex. 5). Claimant received physical therapy at Pro Active Physical Therapy for approximately one month, and Dr. Smith indicated Claimant's epicondylitis had resolved by November 28, 2011. (Ex. G & 5).

6. Between August 2, 2016 and August 12, 2016, Claimant was seen at Employer's in-house clinic and reported pain in her left shoulder, hand, and elbow. She was evaluated and received treatment consisting of cold compresses, "Biofreeze," and ibuprofen. The individuals who evaluated Claimant noted an assessment of "alteration in comfort," but provided no diagnosis for Claimant's condition. No evidence was admitted indicating Claimant was examined by a physician for these issues. (Ex. 3).

7. Between September 7 and September 9, 2017, Claimant was seen again at Employer's in-house clinic reporting bilateral shoulder pain and pain in the right hand and forearm. Claimant was treated with cold compresses, "Biofreeze," and provided a wrist guard. No evidence was admitted indicating Claimant was examined by a physician for these issues, nor was any diagnosis provided. (Ex. 2).

8. From April 6, 2018 to April 27, 2018, Claimant was evaluated and treated for pain in the neck on the left with radiation to the left elbow. The treatment records are labeled as "ART Daily Session Notes," and appear to indicate Claimant received "Active Release Techniques." The records contain no indication of the provider who performed the treatment, no substantive information regarding the nature of the treatment, and no diagnosis for Claimant's condition. (Ex. 7). Claimant testified that a therapist gave her massages during ART treatment.

9. On May 16, 2018, Claimant was seen at the Employer's in-house clinic reporting pain in her left arm, extending from her neck to her wrist. Claimant completed a pain diagram showing pain in her the left side of her neck, left shoulder, and down her left arm into her hand. Claimant reported she was performing her job saving sweetbread cutting meat with her left hand, pulling back, and throwing product to the side and behind her into a "combo" when she began to experienced pain in her left hand and arm. It was noted that Claimant reported a similar injury in September 2017. The individual who saw Claimant – [Redacted, hereinafter SS] - documented dark discoloration on the forearm below the elbow, less resistive strength in the left arm, and a positive "Jamar" test in the left hand. The assessment was "alteration in comfort," and Claimant was treated with a cold compress, ibuprofen, and Biofreeze. She was advised to take ibuprofen and home and apply cold therapy at home. (Ex. 1).

10. On May 17, 2018, Claimant was placed on modified duty, consisting of a "quarter count," meaning she would work 25% of her normal workload. These restrictions

remained in effect until at least May 30, 2018. (Ex. 1). Claimant's payroll records indicate she was paid her full wages during this time, and did not have a loss of earnings during this time. (Ex. I).

11. Over the next few weeks, through May 30, 2018, Claimant continued to report to the clinic twice per day, as requested. During this time, the clinic treated Claimant with cold and warm compresses, Biofreeze, and ibuprofen. Throughout, Claimant's "assessment" was "alteration in comfort." Claimant was not provided with a formal diagnosis, and did not see a physician between May 16, 2018 and May 30, 2018. (Ex. 1).

12. On May 25, 2018, Claimant reported bilateral trapezius pain at Employer's clinic. (Ex. 1). With the exception of these reports, Claimant did not report right-sided pain to either her shoulder or arm from November 28, 2011 until December 2020.

13. On June 5, 2018, Claimant saw Anjmun Sharma, M.D., at Banner Health for her continued left neck, shoulder, and arm complaints. Dr. Sharma examined Claimant's shoulder and cervical spine and opined that Claimant's symptoms were cervical in nature, a chronic issue, and not work-related because her job did not require overhead use of her left arm. His shoulder examination showed full range of motion and no shoulder weakness. He provided no work restrictions, placed Claimant at maximum medical improvement (MMI), and indicated Claimant was able to return to full duty on that day. (Ex. 6). Dr. Sharma did not refer Claimant for any additional treatment, and recommended that she take over the counter medications, use ice every 2-3 hours, and perform range of motion exercises.

14. Claimant testified that she selected Dr. Sharma from a list provided to her by Employer's clinic. She also testified that she did not recall whether she selected him from a list of doctors given to her by Employer. No other plausible explanation was provided for Claimant coming under Dr. Sharma's care. The ALJ finds that Claimant selected Dr. Sharma from a list of physicians provided to her by Employer. Dr. Sharma was Claimant's authorized treating physician (ATP), when he saw Claimant on June 5, 2018.

15. Claimant testified she returned to normal work after seeing Dr. Sharma, but was unable to perform the job without restrictions due to the pain in her left shoulder and arm. Claimant has not returned to Employer since, and voluntarily terminated her employment with Employer in June 2018. The date Claimant terminated her employment was not clearly articulated in the evidence, but medical records appear to indicate it was on or about June 7, 2018. (*See* Ex. C, p. 58). Claimant has not attempted to return to work since leaving Employer. She testified she does not believe she can return to work for Employer because of pain and repeated movements. Claimant applied for and received unemployment benefits at the rate of $287.00 per week beginning in January 2019 for an undetermined period.

16. Dr. Sharma was admitted as an expert in family and occupational medicine and testified through post-hearing depositions in lieu of live testimony. Dr. Sharma's testimony was inconsistent, confusing, and not credible. For example, he testified he is Board-

certified by the American Board of Family Practice (ABFP), and later that he has not been Board-certified by the ABFP since 2018, when his certification lapsed.

17. With respect to his opinions, the evidence demonstrates that Dr. Sharma based his opinion that Claimant's condition is not work-related on incomplete medical records and medical history and an incomplete understanding of her job duties. With respect to medical records and medical history, Dr. Sharma was not aware Claimant had been seen at Employer's clinic for approximately three weeks before seeing him, and appears to have assumed he was the first health care provider to evaluate her. He was not provided Claimant's records from Employer's clinic, and did not request them. He testified that he "was not aware [Claimant] had gone to physical therapy," but also documented in his June 5, 2018 treatment note that Claimant "went to physical therapy to better understand her symptoms." He then testified that he "did not ask her where she had gone to physical therapy." (Sharma, Vol. II, p. 65). He also testified he "was under the impression that she had been going for a non-work-related condition," because "she told me that she had been having pain for quite some time, and I don't recall why." (Sharma Vol. 2, p. 65). No credible evidence was admitted indicating Dr. Sharma asked Claimant the reason she had been in physical therapy. He offered no cogent explanation for this impression, and no credible evidence was admitted indicating Claimant had sought or received treatment for any non-work-related injury to her left shoulder. (No records were admitted indicating Claimant attended physical therapy in the months before she saw Dr. Sharma, although she was seen in Employer's clinic and attended ART treatment during this period.)

18. With respect to Claimant's job duties, Dr. Sharma testified that he reviewed a job description of Claimant's position, but his testimony and records demonstrate he had an incomplete understanding of Claimant's job duties when he made the determination that her condition was not work-related. He understood Claimant's job to be moving meat with a hook and placing it on a conveyor belt, and that the job did not require overhead movement. However, he was not aware of Claimant's the weight Claimant was required to move, her production quotas, the frequency she performed the task, how long she had performed the job, or whether her job required the use of both hands. Given that much of this information is contained in the Job Demands Assessment admitted as Exhibit H, the ALJ infers that Dr. Sharma did not review this document. Notwithstanding, his testimony demonstrated he did not consider the repetitive movements Claimant performed in her job when reaching his opinions.

19. Dr. Sharma testified that he believed Claimant's pain was chronic, non-work-related, and cervical in nature, but offered no cogent, credible explanation for this opinion. that Claimant's complaints were caused by something other than her employment. No credible evidence was admitted indicating Dr. Sharma attempted to determine whether Claimant's symptoms were related to any non-work-related activity. Based on his testimony and records, the ALJ finds that Dr. Sharma's opinion that Claimant did not sustain a work-related injury to her left shoulder unpersuasive and not credible.

20. No evidence was submitted indicating Claimant requested a Division independent medical examination to challenge Dr. Sharma's opinion that Claimant was at MMI as of June 5, 2018.

21. On June 8, 2018, Claimant self-referred to the SCHC Monfort Family Clinic, and was seen by Kelsey Hrenko, PA-C for her continued left shoulder pain. Claimant reported left shoulder pain radiating to her fingers. On examination, Ms. Hrenko noted tenderness to palpation over the left scapula, with full strength and range of motion, and recommended a chiropractic evaluation and possible referral to orthopedics. (Ex. 9). A left shoulder x-ray taken on June 8, 2018 was interpreted as unremarkable. (Ex. 8).

22. Claimant returned to the Monfort Clinic on June 19, 2018, and saw Steve Ponicsan, P.A. Mr. Ponicsan noted hypertonicity of the left trapezius with trigger point nodule that was painful to palpation. (Ex. 9).

23. On January 23, 2019, Claimant returned to the Monfort Clinic, and saw Ludia Battaglia, FNP. Claimant reported continued left shoulder pain with difficulty lifting her arm overhead, and attributed the condition to her job at Employer. Ms. Battaglia opined that Claimant's injury was likely from overuse at her former job. (Ex. 9). A left shoulder x-ray taken on January 23, 2019 was interpreted as unremarkable. (Ex. 8).

24. On November 14, 2019, Claimant saw Sara Curzon, PA-C, at the Monfort Clinic with continued reports of left shoulder pain. Ms. Curzon's assessment was left shoulder pain, resulting from overuse Claimant's prior job, and recommended physical therapy. (Ex. 9).

25. Claimant was next seen for her left shoulder on March 23, 2020, when she again saw Ms. Curzon. Ms. Curzon noted that physical therapy had helped somewhat, but Claimant's left shoulder pain persisted. Her assessment was of continued left shoulder pain, with suspected impingement. Based on her examination, Ms. Curzon recommended an MRI of Claimant's left shoulder, however the MRI was not performed. (Ex. 9).

26. Claimant returned to the Monfort Clinic on September 1, 2020, and saw Ms. Hrenko for continued left shoulder pain and to obtain an MRI referral, indicating that the prior MRI referral had been canceled. (Ex. 9). The MRI was performed on October 19, 2020, and showed a full-thickness tear of the supraspinatus tendon. (Ex. 8).

27. Claimant then came under the care of Mark Grossnickle, M.D., at UC Health. No credible evidence was admitted indicating whether Claimant was referred to Dr. Grossnickle or self-referred. Claimant initially saw Dr. Grossnickle on October 21, 2020, however no substantive medical records from that visit were offered into evidence. On December 3, 2020, Dr. Grossnickle examined Claimant and found left shoulder pain radiation from the neck to the fingers with numbness in the left hand. Claimant reported having left shoulder pain that was tolerable, except when lifting away from her body or above shoulder height. He noted that Claimant's left shoulder had positive impingement signs, and mild weakness on abduction. With respect to Claimant's right shoulder, Claimant reported that she had worsening shoulder pain over the "last few months" which was worse with activity. He noted positive impingement signs over the right supraspinatus tendon, positive Speed and empty can tests, mild biceps tenderness and weakness in external rotation and abduction. Dr. Grossnickle suspected a right rotator cuff tear and

ordered a right shoulder MRI. Dr. Grossnickle diagnosed Claimant with impingement syndrome of both shoulders. (Ex. B).

28. On December 13, 2021, Claimant had a right shoulder MRI which was interpreted as showing high-grate tearing of the supraspinatus tendon, suspicion of a torn superior labrum, and moderate lateral acromial down sloping, which was thought to contribute to impingement. (Ex. 8). Claimant reported to multiple providers that her right shoulder pain began a few months before December 2020. Claimant testified that she did not recall when her right shoulder symptoms started.

29. On January 7, 2021, Dr. Grossnickle reviewed Claimant's right shoulder MRI and recommended right shoulder surgery to address the torn supraspinatus tendon and SLAP lesion. When addressing causation of Claimant's right shoulder, Dr. Grossnickle stated "this could be the result of the repetitive trauma from work but it would be difficult to say with certainty as it has been a few years it sounds like since she was actually working. I do not have all those old records for review." (Ex. B). Claimant did not return to Dr. Grossnickle and has not had the surgery he recommended.

30. On August 11, 2021, Claimant saw James Ferrari, M.D., for evaluation of both shoulders. Based on his examination and review of Claimant's right shoulder MRI, he diagnosed Claimant with non-traumatic bilateral rotator cuff tears. He opined that Claimant's rotator cuff tears were "secondary to the repetitive motion and that lifting she did for 17 years as a meat packer…" Dr. Ferrari recommended surgery on both shoulders. (Ex. D). No credible evidence was admitted indicating who referred Claimant to Dr. Ferrari.

31. Dr. Ferrari was admitted as an expert in orthopedic surgery, and testified at hearing. Dr. Ferrari examined Claimant and evaluated both shoulders, and reviewed the MRI reports. He did not review medical records at the time of his initial evaluation, but later reviewed medical records, including records from Employer's clinic, Dr. Grossnickle, and Banner Health.

32. Dr. Ferrari testified that Claimant's MRIs show tears in the rotator cuffs of both arms. He testified that patients of Claimant's age (*i.e.*, 50s), there is typically an underlying cause for rotator cuff tears, such as lifting a lot of weight, jobs with repetitive motion or old injuries. He testified that the motions Claimant employed in her job placed significant force and load on the shoulder joint, which increased when moving weight. He opined that the most medically probable cause of Claimant's rotator cuff tears is the repetitive motion used In her job over a period of years. He noted that there are no other documented non-work-related injuries or probable causes of the rotator cuff pathology. Dr. Ferrari also credibly testified that a person does not have to reach overhead to put strain on the rotator cuff.

33. With respect to her right shoulder, he testified that sometimes when a patient has bilateral rotator cuff pathology, only one side may be symptomatic, and that the tear can enlarge over a period of years.

34. Dr. Ferrari's opinion that Claimant's left shoulder injury Is causally related to her employment is credible and persuasive. However, with respect to Claimant's right shoulder, the ALJ finds Dr. Ferrari's opinion unpersuasive. No credible evidence was offered to cogently explain why Claimant's right shoulder would be asymptomatic from 2018 to 2020, if the Injury were work-related.

Claimant's Testimony

35. At hearing, Claimant demonstrated the motions she performed in the course of her job saving sweetbreads, using a hook and knife. Claimant held the knife in her right hand and the hook in her left. Claimant's right hand was partially extended away from her body at the mid-chest level using the knife, she cut sweetbread from the carcass. Once the sweetbread was on the hook, Claimant used the hook to throw it over her right arm at approximately biceps level into a tray behind her (*i.e.*, internally rotating her shoulder across her body).

36. She testified that she had pain in her left shoulder in the Spring of 2018., and that she received treatment in Employer's in-house clinic twice per day. She testified that her symptoms did not improve with the treatment provided by Employer's clinic. Claimant testified that she could not reach across her body or over her head with her left arm without causing pain, and that she had difficulty pushing up with her arm, such as getting out of a chair.

37. Claimant testified she had no outside activities that would account for her shoulder or arm pain. She had not been in any automobile accidents, or sustained any other injuries to her shoulder outside of work.

38. Claimant's testimony was credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to ensure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; without bias toward either claimant's or respondents' rights; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if

other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

WC 5-186-156-001

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose

out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Marjorie Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, W.C. No. 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified, or aggravated the disease for which compensation is sought. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner, supra*. In this regard, the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO Aug. 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Claimant has failed to establish by a preponderance of the evidence that she sustained a repetitive motion injury to her right shoulder arising out of the course of her employment with Employer. Claimant's first report of right shoulder pain consistent with a rotator cuff or impingement issue was in December 2020 when she saw Dr. Grossnickle. Claimant indicated the pain began a few months earlier. At hearing, Claimant testified that she did not recall when her right shoulder pain started. While Dr. Grossnickle commented that Claimant's right shoulder condition "could" have been caused by the repetitive motions associated with her job, he did not opine it was likely.

As found, Dr. Ferrari's opinion regarding Claimant's right rotator cuff injury is not persuasive. Dr. Ferrari's opinion fails to account for the significant gap in Claimant's complaints of right shoulder pain. When Claimant first reported right shoulder pain to Dr. Grossnickle, she had not worked for Employer for approximately 30 months, and had no documented complaints of right shoulder pain in the interim, despite seeing multiple health care providers for her left shoulder during that time. No credible evidence was admitted which explained how right shoulder pain that began in December 2020 was causally related to work activities occurring more than two and a half years earlier. Dr. Ferrari's opinion that Claimant's right shoulder condition was caused by her work activities that ended in June 2018 unpersuasive. Claimant not met her burden of establishing her right shoulder condition is work-related.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970). Medical benefits are not owed for a non-compensable claim.

Because Claimant has failed to establish a compensable injury to her right shoulder, Claimant has failed to establish an entitlement to medical benefits for her right shoulder condition.

Statute of Limitations

Notwithstanding the lack of causation, Claimant's claim for her right shoulder is time-barred by the Act. Under § 8-43-103 (2), C.R.S., Claimant's right to compensation and benefits is barred unless a "notice claiming compensation is filed with the division" within two years of the date of injury.[2] Claimant asserts her right shoulder injury began on or before June 7, 2018, her last date of employment with Employer. Accordingly, she had to file a claim with the Division before June 7, 2020. Claimant, however, did not file a

[2] Although exceptions to the two-year limitation period exist for certain causes of injury, the exceptions are not applicable. Claimant does not asset her injuries were the result of exposure to radioactivity, fissionable materials, uranium poisoning, asbestos, silicosis or anthracosis.

Worker's Claim for Compensation with the Division related to this alleged injury until October 26, 2021, more than three years later. Claimant has not established any reasonable excuse for the failure to file the required notice with the Division. Consequently, Claimant's claim designated as WC 5-186-156-001 is time-barred, and dismissed.

Because Claimant's claim related to her right shoulder is denied and dismissed, the remaining issues related to right shoulder surgery are moot.

WC 5-079-064-006

Compensability

Claimant has established by a preponderance of the evidence that she sustained a repetitive motion injury to her left shoulder arising out of the course of her employment with Employer. Although Dr. Sharma indicated he found no injury to Claimant's shoulder, her later providers did find objective evidence of shoulder pathology and clinical evidence of shoulder impingement. Claimant began reporting left shoulder problems in May 2018. She sought treatment from Employer's in-house clinic, and reported symptoms radiating from her neck throughout her left arm. Over the course of the next two-plus years, Claimant consistently reported the same symptoms to multiple health care providers.

Dr. Sharma's opinion that Claimant's position with Employer was not likely to cause a shoulder injury was not credible or persuasive. Claimant worked in the same position for nearly all of her 17 years working for Employer. Her job required her to use her left arm, removing sweetbreads with a hook and transferring them into a bin every 2-4 seconds (*i.e.*, 15-30 times per minute), for approximately seven and a half hours a day, for 17 years. Conservatively, Claimant repeated the same motion with her left arm 5,000-6,000 times per day, over the course of 17 years. Dr. Ferrari credibly testified that these repetitive motions of Claimant's were the most medically probable cause of her left shoulder rotator cuff tears. No credible evidence was admitted indicating Claimant participated in other activities which would have placed the same stress on her left shoulder as those sustained while working for Employer. The ALJ credits Dr. Ferrari's opinion and finds it more credible and persuasive than Dr. Sharma's. It is more likely than not the repetitive motion involved in Claimant's work with Employer resulted in the full-thickness tear of the supraspinatus tendon identified on Claimant's October 19, 2020 MRI.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written

list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing."

The term "select," is unambiguous and means "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Serv.,* WC 4-995-888-01 (ICAO, Oct. 28, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri, supra*.

Claimant could not recall whether she was provided a list of providers, but also testified she selected Dr. Sharma from a list given to her by Employer. The ALJ finds Claimant was, more likely than not, provided a list of physicians by Employer and selected Dr. Sharma (or Banner Health) from that list of physicians. Notwithstanding, if Respondents did not provide a list of physicians, Claimant, through her actions, selected Dr. Sharma for treatment and evaluation of her injury. As found, Dr. Sharma was Claimant's authorized treating physician.

Medical Benefits

Because Claimant has established a compensable injury to her left shoulder, Claimant has also established an entitlement to authorized medical treatment reasonably necessary to cure or relieve the effects of her industrial injury.

Specific Medical Benefits

The Act imposes upon respondents the duty to furnish medical treatment "as may reasonably be needed at the time of the injury…and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Claimant has failed to establish an entitlement to specific medical benefits for treatment provided by Monfort Clinic, UC Health, Dr. Grossnickle, or Dr. Ferrari, or for the recommended left shoulder surgery. As found, Dr. Sharma did not refer Claimant for further treatment after June 5, 2018. No credible evidence was admitted indicating

Claimant sought authorization from Respondents to obtain treatment through the Monfort Clinic, UC Health, Dr. Grossnickle, or Dr. Ferrari. As such, these were not ATPs or within the chain of referral from Dr. Sharma. Respondents are not required to pay for treatment that is unauthorized, even where the treatment is reasonable, necessary, and related to the industrial injury. § 8-43-404 (7), C.R.S., *see also Johnston v. Hunter Douglas, Inc.*, W.C. No. 4-879-066-001 (ICAO Apr. 29, 2014).

Similarly, although Claimant has established by a preponderance of the evidence that surgical repair of her left rotator cuff injury is reasonably necessary to cure or relieve the effects of her industrial injury, the procedure was not recommended by an ATP. Because no ATP has recommended surgery, the ALJ is without jurisdiction to authorize such treatment. *Potter v. Ground Serv. Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Mgmt. of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995).

Temporary Disability Benefits

Claimant seeks Temporary Total Disability benefits beginning on June 7, 2018, the date Claimant terminated her employment with Employer. Claimant asserts that because Dr. Sharma released her to full duty and Claimant was physically unable to perform her job without restrictions after that date, she was entitled to TTD benefits. For the reasons set forth below, Claimant has failed to establish an entitlement to TTD benefits after June 5, 2018.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Once an injured worker becomes entitled to TTD benefits, those benefits continue until terminated pursuant to § 8-42-105 (3), C.R.S., which provides: “Temporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to

regular or modified employment; (c) The attending physician gives the employee a written release to return to regular employment; or (d) (I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment."

The evidence establishes that Claimant had a medical incapacity to perform her work due to pain and restrictions in her left shoulder beginning on or about May 16, 2018. At that time, the provider in Employer's clinic determined that Claimant had diminished strength in the left arm, difficulty with range of motion, and pain to palpation. The following day, Claimant was placed on a restriction to work a ¼ count (*i.e.*, 25% of her normal workload). Claimant then continued to work in a modified capacity, but she sustained no loss of earning capacity, because she was paid her full wages, and was not entitled to TTD benefits.

On June 5, 2018, Dr. Sharma found Claimant was at MMI, and released Claimant to return to regular employment. Claimant credibly testified that the condition of her left neck, arm and shoulder prevented her from performing her regular employment duties, and she stopped working for Employer on or about June 7, 2018. Because Dr. Sharma placed Claimant at MMI on June 5, 2018, her entitlement to TTD ended on that date.

Pursuant to section 8-42-107(8)(b), C.R.S., "if either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examination may be selected in accordance with section 8-42-107.2…" *See also* 8-42-107.2 (b), C.R.S. No credible evidence was admitted indicating Claimant requested a DIME to challenge Dr. Sharma's MMI determination. Thus, Claimant's request for medical benefits is a constructive challenge to Dr. Sharma's MMI determination. The ALJ lacks authority to decide the issue because no DIME was requested or performed to challenge Dr. Sharma's MMI determination. *See Ayala v. Conagra Beef Co.*, W.C. 4-579-80 (ICAO June 22, 2004).

ORDER

It is therefore ordered that:

WC 5-186-156-001

1. Claimant's claim designated for right shoulder injuries as WC 5-186-156-001 is denied and dismissed.

2. Claimant's requests for medical benefits and authorization of right shoulder surgery are denied and dismissed.

WC 5-079-064-006

3. Claimant has established by a preponderance of the evidence that she sustained a left shoulder repetitive use injury arising out of the course of her employment with Employer on or about May 18, 2018.

4. Claimant has established an entitlement to authorized medical care that is reasonable and necessary to cure or relieve the effects of Claimant's left shoulder injury.

5. Claimant's request for authorization of left shoulder surgery is denied. .

6. Claimant's request for temporary total disability benefits is denied and dismissed.

7. Claimant's authorized treating physician is Anjun Sharma, M.D.

8. Determination of Claimant's average weekly wage is moot.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 2, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether the respondent has demonstrated, by a preponderance of the evidence, that on July 12, 2022, the claimant was not an employee of the employer, but rather an independent contractor.

2. If the claimant is deemed an employee of the employer, whether the claimant has demonstrated, by a preponderance of the evidence, that she sustained an injury arising out of and in the course and scope of her employment.

3. If the claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that the medical treatment she received was authorized.

4. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she received was reasonable and necessary to cure and relieve her from the effects of the injury.

5. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits.

6. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that penalties shall be assessed pursuant to Section 8-43-408, C.R.S. for the respondent's alleged failure to obtain and maintain worker's compensation insurance.

FINDINGS OF FACT

The parties provided conflicting versions of events in this matter. The ALJ has considered the evidence and testimony presented at hearing and makes the following findings of fact:

1. The respondent operates a funeral and cremation business. The claimant previously worked for the employer and returned in May 2022. [Redacted, hereinafter MG] asserts that the claimant was an independent contractor when she returned to work for the respondent in May 2022.

2. Upon her return the claimant worked as the general manager and funeral director. The claimant's business cards identified these as the claimant's titles. The claimant's job duties included all facets of operating the respondent's business. The

claimant was paid $20.00 per hour. The claimant was paid via check. These checks were issued to the ciaimant in her own name.

3. On July 7, 2022, MG[Redacted] authored a letter stating that the claimant was paid $2,500.00 per month. The purpose of this letter was to assist the claimant with obtaining a mortgage. The ALJ calculates that this would be equal to $576.92 per week ($2,500.00 times 12 months in a year is $30,000.00; divided by 52 weeks is $576.92.)

4. On July 12, 2022[1], the respondent's workforce met at a local cemetery to engage in upkeep of the cemetery. This included painting a sign and cutting grass around headstones. On that date, the claimant operated a riding lawnmower at the cemetery. This specific piece of equipment has a mechanism that allows the driver to raise and lower the blade while in operation. This is done by pressing down a foot pedal with one's right foot.

5. Typically as the respondent's general manager and funeral director the claimant would not have been engaged in mowing activities. However, on July 12, 2022 it was necessary for the claimant to mow, because the respondent was short-handed and the claimant had absorbed a number of job duties, including mowing.

6. On July 12, 2022, the claimant used the pedal mechanism on the mower to raise and lower the blade while mowing around headstones and sprinklers. While operating the mower in this manner and pushing down on the foot lever, the claimant felt a pop in her right knee and experienced pain symptoms.

7. Other workers were present when the claimant felt this pop and pain in her knee, including [Redacted, hereinafter MRG]. The claimant was allowed to stop working and sat in a vehicle while the others continued working.

8. After July 12, 2022, the claimant continued to perform all of her normal job duties, despite ongoing pain and swelling in her right knee. The claimant utilized a knee brace and crutches. The claimant asked MRG[Redacted] to provide her with information for filing a workers' compensation claim. MRG[Redacted] repeatedly assured the claimant that the company did have workers' compensation insurance and promised to provide her with the relevant information. MRG[Redacted] did not provide the claimant with the requested workers' compensation information.

9. Initially, the claimant believed that her knee was simply sprained and she attempted to self-treat her symptoms. However, the claimant's right knee symptoms did not improve and she sought medical treatment.

[1] The date of July 13, 2022 appears in the medical records and on the claimant's Application for Hearing. The ALJ is persuaded by the claimant's testimony that this was a typographical error, and the incident at issue occurred on July 12, 2022.

10. On August 11, 2022, the claimant again requested the insurance information from MRG[Redacted] via text message. MRG[Redacted] responded "[Redacted, hereinafter PE] and some other company. I can get numbers etc tomorrow."

11. On August 12, 2022, the claimant was seen by her primary care provider (PCP) Dr. Tarek Arja with Grand Valley Family Medicine. The claimant did not see Dr. Arja prior to that date for three primary reasons: 1) she hoped her knee would improve without medical treatment; 2) she was busy working for the respondent; and 3) MRG[Redacted] was not providing workers' compensation insurance information to her.

12. On August 12, 2022, the claimant's appointment with Dr. Arja was via "telehealth" and no examination was performed. On that date, the claimant reported to Dr. Arja that she had injured her right knee one month prior while operating a riding lawn mower for her employer. The claimant reported that her right knee symptoms included pain, swelling, decreased range of motion, and instability. Dr. Arja recommended the claimant rest and elevate her right knee. He also recommended the use of a knee brace, ice, and heat. Finally, Dr. Arja ordered x-rays[2] of the claimant's right knee.

13. On August 12, 2022, MRG[Redacted] texted the claimant and stated that the parties "should go other routes ... I don't like the lack of respect for each other. Not good. I appreciate all you have done I really do". When the claimant asked if she was being terminated, MRG[Redacted] responded "Yes I'm sorry". Thereafter, the claimant was provided a letter dated August 12, 2022 in which the respondent notified the claimant that her employment was terminated as of that date. The letter did not provide a reason for the termination. MRG[Redacted] testified that the claimant was terminated due to poor performance.

14. On August 18, 2022, the claimant was examined by Dr. Arja. On that date, Dr. Arja listed the claimant's right knee symptoms as pain, swelling, locking, instability, decreased range of motion, and decreased weight bearing. In addition, Dr. Arja noted that the claimant experienced a popping sound in her right knee at the time of the injury. On examination, Dr. Arja noted that the claimant had moderate right knee tenderness on palpation "about the anterior aspect, over the lateral joint line, over the medial joint line and over the patella". Dr. Arja recommended the continued use of the knee brace and over-the-counter pain medications. Dr. Arja also referred the claimant to physical therapy. The claimant was restricted from all work on August 18, 2022.

15. The claimant began physical therapy on August 23, 2022. The claimant continued to be restricted from all work.

16. The claimant had a telehealth visit with Dr. Arja on August 27, 2022. Dr. Arja continued to recommend physical therapy and use of a knee brace.

[2] It is unclear from the records entered into evidence whether the x-rays recommended by Dr. Arja were ever taken.

17. A letter dated September 2, 2022[3], was admitted into evidence at the hearing. The respondent stated that the claimant's employment was terminated "due to the lack of not following the vision we have set forth as a company." The letter further stated that the claimant's "business and leadership practices were not to our standards, expectations and processes that weren't being followed. You had total supervision and management over the staff and some things weren't handled properly." In that letter the respondent also stated that the company does have workers' compensation insurance.

18. On January 5, 2023, Dr. Arja authored a letter in which he stated that the claimant was released to full work duty as of December 20, 2022.

19. While working for the respondent, the claimant worked a varied schedule depending upon the company workload. At times the claimant would report to work as early as 7:00 a.m. At other times, the claimant would arrive by 9:00 a.m. The claimant's workday typically ended between 3:00 p.m. and 3:30 p.m. A time sheet for a two week period in May 2022 demonstrates that the claimant worked 61 hours during that time.

20. Based upon the time sheet entered into evidence, the ALJ calculates that the claimant typically worked 6 hours per day, five days per week for a total of 30 hours per week. At $20.00 per hour this is equal to $600.00 per week. The ALJ determines that $600.00 per week was the claimant's average weekly wage (AWW) with the respondent as of the date of her work injury.

21. While working for the respondent, the claimant had two other part-time jobs as a home health worker. The claimant worked for [Redacted, hereinafter CK] and was paid $15.25 per hour. In the 12-week period leading up to July 12, 2023 the claimant had earnings with CK[Redacted] of $3,685.92. The claimant also worked for [Redacted, hereinafter KS] providing care for her mother. That employer paid the claimant $15.00 per hour. Based upon the claimant's testimony, the ALJ infers that the claimant worked approximately 15 hours per week while working for KS[Redacted].

22. As a result of the work restrictions placed by Dr. Arja on August 18, 2022, the claimant was unable to perform her job duties for CK[Redacted] and KS[Redacted]. The claimant retired to work with CK[Redacted] on January 17, 2023. She returned to work for KS[Redacted] on January 22, 2023.

23. With regard to her concurrent employment with CK[Redacted] and KS[Redacted], the ALJ makes the following calculations. The claimant's AWW with CK[Redacted] was $307.16; ($3,685.92 divided by 12 weeks is equal to $307.16 per week). The claimant's AWW with KS[Redacted] was $225.00; ($15.00 per hour at 15 hours per week equals $225.00).

[3] The claimant testified that she did not receive the September 2, 2022 letter until she was provided with the exhibits of this hearing.

24. The claimant asserts that the employer does not have workers' compensation insurance, as evidenced by the employer's failure to provide her with that information. MRG[Redacted] testified that the respondent does carry workers' compensation insurance for their employees. However, no evidence was provided of the respondent's workers' compensation policy and/or related coverage. In addition, no insurance company has been identified in this matter.

25. With regard to whether the claimant was an independent contractor, the ALJ credits the claimant's testimony and the various documents entered into evidence. The ALJ finds that the respondent has failed to demonstrate that it is more likely than not that the claimant was an independent contractor. In reaching this finding, the ALJ notes that the claimant was paid an hourly rate and was paid in her own name. The claimant's business cards identified her as a general manager and funeral director. The respondent stated that the claimant "had total supervision and management over the staff'. The ALJ finds that such oversight and management would not be delegated to a contractor. In addition, the respondent provided the claimant with instruction, training, and tools. These facts indicate that the respondent exercised direction and control over the claimant in the performance of the work. The ALJ finds that the claimant did not engage in an independent trade or business providing similar services to others, nor did she intend to do so at the time of the injury. For all of the foregoing reasons, the ALJ concludes that the claimant was an employee of the respondent and was not an independent contractor.

26. The ALJ further credits the claimant's testimony and the medical reports entered into evidence. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that on July 12, 2022, the claimant suffered a right knee injury while working for the employer.

27. The ALJ credits the claimant's testimony and the medical reports entered into evidence and finds that the claimant has demonstrated that it is more likely than not that the treatment she received for her right knee from Dr. Arja and the recommended physical therapy was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the July 12, 2023 work injury.

28. The ALJ credits the claimant's testimony, the medical records, and wage records entered into evidence and finds that the claimant has demonstrated that it is more likely than not that for the period of August 18, 2022 through January 5, 2023 the claimant suffered a wage loss due to her work restrictions.

29. The ALJ calculates that as of July 12, 2022, the claimant's AWW from all employers was $1,132.16; (the total of $600.00, $307.16, and $225.00). The claimant's rate for temporary total disability (TTD) benefits is $860.44; (two-thirds of the AWW of $1,132.16).

30. The ALJ is not persuaded that the claimant was at fault for the termination of her employment with the respondent.

31. The ALJ finds that the claimant has demonstrated that it is more likely than not that as of July 12, 2022, the respondent did not obtain and/or maintain workers' compensation insurance.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation... under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

6. As found, the claimant provided services to the respondent and was paid for her services. Therefore, the claimant is presumed to be an employee of the respondent.

7. The respondent has the burden of proving that the claimant was an independent contractor rather than an employee. Section 8-40-202(2)(b)(II), C.R.S., sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office,* 859 P.2d 278 (Colo. App. 1993). Those nine factors are whether the person for whom services are provided:

- required the individual to work exclusively for the person for whom services are performed; (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);

- established a quality standard for the individual; (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed);

- paid a salary or hourly rate but rather a fixed or contract rate;

- may terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce results that meet the specifications of the contract;

- provided more than minimal training for the individual;

- provided tools or benefits to the individual; (except that materials and equipment may be supplied);

- dictated the time of performance; (except the completion schedule and range of mutually agreeable work hours may be established);

- paid the individual personally, instead of making checks payable to the trade or business name of the individual; and,

- combined their business operations in any way with the individual's business, or maintained such operations as separate and distinct.

8. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), C.R.S, provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(II) in order to prove by a preponderance of the evidence that the

individual is not an employee. See *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. **App.** 1999).

9. In *Industrial Claim Appeals Office v. Softrock Geological Services,* 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court stated "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in Section 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors.* W.C. No. 4-950-181, May 4, 2015.

10. The *Softrock* Court pointed to *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008) in which the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. See *Pierce v. Pella Windows* & Doors, W.C. No. 4-950-181, May 4, 2015.

11. Section 8-40-202(b)(IV), C.R.S., provides that a written document may create a rebuttable presumption of an independent contractor relationship if it meets the nine criteria listed in Section 8-40-202(b)(II), C.R.S. and includes language in boldface font or underlined typed that the worker is not entitled to workers' compensation benefits and is obligated to pay all necessary taxes. Additionally, the document must be signed by both parties. Here there was no written contract.

12. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that the claimant was an employee of the respondent. The respondent has failed, by a preponderance of the evidence, to overcome the presumption of an employee-employer relationship. In reaching this conclusion the ALJ notes that the claimant was paid an hourly rate and was paid in her own name. The claimant's business cards identified her as a general manager and funeral director. The respondent stated that the claimant "had total supervision and management over the

staff'. As found, such oversight and management would not be delegated to an independent contractor. In addition, the respondent provided the claimant with instruction, training, and tools. These facts indicate that the respondent exercised direction and control over the claimant in the performance of the work. The ALJ finds that the claimant did not engage in an independent trade or business providing similar services to others, nor did she intend to do so at the time of the injury.

13. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." See *H & H Warehouse v. Vicory, supra.*

14. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered an injury that arose out of and in the course and scope of her employment with the respondent on July 12, 2022. As found, the claimant's testimony and the medical records are credible and persuasive.

15. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.,* W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985), *citing,* 2 A. Larson, *Workers' Compensation Law* Section 61.12(9)(1983).

16. There is no persuasive evidence in the record to indicate that the respondent provided the claimant with a list of designated medical providers, upon learning of the claimant's work injury. In the absence of a selection of physician by the respondent, the claimant has demonstrated by a preponderance of the evidence that choice of medical provider passed to the claimant. Therefore, the medical treatment the claimant received as a result of the July 12, 2022 work injury is authorized medical treatment.

17. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

18. As found, the claimant has demonstrated by a preponderance of the evidence that the medical treatment she received following the July 12, 2022 injury was reasonable and necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the testimony of the claimant are credible and persuasive.

19. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inabiUty to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 **P.2d** 595 (Colo. **App.** 1998).

20. As found, the claimant has demonstrated, by a preponderance of the evidence, that the July 12, 2022 work injury caused disability that resulted in a wage loss from August 18, 2022 through January 5, 2023. Therefore, the claimant is entitled to TTD benefits during that period of time. As found, the medical records and the testimony of the claimant are credible and persuasive.

21. The ALJ must determine a claimant's AWW by calculating the monetary rate at which services are paid to the claimant under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon her AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning

capacity. *Ebersbach v. United Food & Commercial Workers Local No.* 7, W.C. No. 4-240-475 (ICAO, May 7,

22. As found, the claimant's AWW is $1,132.16 and her TTD rate is $860.44. The ALJ calculates that the claimant is owed unpaid TTD benefits totalling $17,331.72.

23. Sections 8-43-408(1) and (2) C.R.S., provide that in cases in which a claimant suffers a compensable injury and the employer failed to comply with the insurance provisions of the Colorado Workers' Compensation Act, the employer shall pay the Colorado uninsured employer fund an amount equal to the present value of all unpaid compensation or benefits.

24. Section 8-43-408(1)(5), C.R.S., provides that in cases in which a claimant suffers a compensable injury and the employer failed to comply with the insurance provisions of the Colorado Workers' Compensation Act, the employer shall also pay the Colorado uninsured employer fund an amount equal to twenty five percent (25%) of the compensation or benefits due to the claimant. Based upon the calculations above, 25 percent of the TTD owed is $4,332.93.

ORDER

It is therefore ordered:

1. On July 12, 2023, the claimant was an employee of the respondent.

2. The claimant suffered a compensable injury on July 12, 2022.

3. The respondent is responsible for the medical treatment the claimant received for her right knee including treatment with Dr. Arja beginning August 12, 2022 and physical therapy.

4. The claimant's average weekly wage (AWW) is $1,132.16.

5. The claimant is entitled to temporary total disability (TTD) benefits for the period of August 18, 2022 through January 5, 2023, totalling $17,331.72.

6. For failing to maintain workers' compensation insurance, the respondent shall pay the Colorado uninsured employer fund $17,331.72. The respondent shall also pay to the Colorado uninsured employer fund an amount equal to 25% of the TTD benefits due to the claimant for the period of August 18, 2022 through January 5, 2023, which is $4,332.93. The employer shall send such payment to the Colorado Uninsured Employer Fund to the Division of Workers' Compensation, 633 17th St., Suite 400, Denver, CO 80202, Attention: Iliana Gallegos.

7. In lieu of payment of the above compensation and benefits to the claimant, the respondent shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $21,664.65 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, 633 17th St., Suite 400, Denver, CO 80202, Attention: Gina Johannesman, Trustee; **OR**

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $21,664.65 with the Division of Workers' Compensation within ten (10) days of the date of this order:

i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

ii. Issued by a surety company authorized to do business in Colorado.

iii. The bond shall guarantee payment of the compensation and benefits awarded.

8. The respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

9. The filing of any appeal, including a petition to review, shall not relieve the respondent of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

10. All matters not determined here are reserved for future determination.

Dated May 2, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-083-958-004

ISSUES

I. Whether Claimant has proven by preponderance of the evidence that he was injured in the course and scope of his employment on June 15, 2018.

II. If Claimant proved compensability, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that were reasonably necessary and related to the June 15, 2018 work injury.

III. If Claimant proved compensability, what is his average weekly wage.

IV. If Claimant proved compensability, whether he has proven by a preponderance of the evidence he is entitled to temporary total disability benefits beginning June 15, 2018 until through 2019.

V. If Claimant proved compensability, whether he has proven by a preponderance of the evidence that he is entitled to penalties for failure to admit or deny the claim as required by law.

PROCEDURAL HISTORY

Upon review of the file from the Office of Administrative Courts, this ALJ noted that three prior Applications for Hearing (AFH) were previously filed on Claimant's behalf. The first was on September 4, 2018 by attorney Robert F. James, Esq., on the same issues set for this hearing. No hearing was scheduled. A second AFH was filed also by counsel on October 10, 2018. A hearing was scheduled for February 7, 2019 at the OAC. The hearing was cancelled by counsel. The third AFH was filed on April 15, 2022 by pro se Claimant[1] on the same issues set for this hearing. There is an indication that the hearing was set for June 21, 2022 but no documents were in the file indicating why the hearing did not take place.

Pro se Claimant filed an Application for Hearing dated September 23, 2022 on the issues of compensability, medical benefits that are reasonably necessary and related to the injury, average weekly wage, permanent partial disability benefits, disfigurement and penalties from July 20 to December 2022.[2]

Respondents were provided notice at multiple addresses and failed to file a Response to Application for Hearing.

[1] There is no indication in the OAC file that counsel withdrew from representation. However, the Division chronological history form shows counsel filed a Motion to Withdraw on February 19, 2019 and it was granted on March 8, 2019.
[2] This ALJ inferred that the "July 20" date was July 20, 2018.

A Notice of Hearing for the December 20, 2022 hearing was sent to Employer at multiple addresses and all the notices were returned to the Office of Administrative Courts.

The December 20, 2022 hearing was convened and Claimant was provided with a *pro se* advisement. Claimant requested that the hearing proceed as he had attempted to obtain counsel and also Claimant attempted to go through a mediator, [Redacted, hereinafter NS], without success.

During the hearing, this ALJ noticed that all the NOH were returned and surmised that Employer did not have notice of the hearing.

Claimant provided a new address and a corrected address which coordinated with the one the Division had on file. This ALJ continued the hearing to be reset by the Office of Administrative Courts.[3]

The hearing was rescheduled for this 24th day of April, 2023 at 8:30 a.m. NOH were sent to all four addresses for Employer that were available. Additionally Claimant indicated that he had made a copy of the order and the NOH and sent a text directly to the Employer at his advertised telephone number, which is the same telephone number seen on a copy of a check from Employer to Claimant. This ALJ noted that three of the NOH were returned to the OAC and one of the NOH was not. The one that was not returned was the same address as was seen on a copy of a check from Employer to Claimant as well as in the Division file. This ALJ presumed that employer had notice of the hearing and the hearing proceeded as scheduled.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant stated that he was working for Employer on June 15, 2018 as a laborer in the roofing industry. The accident happened at a customer's home close to Florida and Federal in Federal Heights, Denver Colorado. They were in the process of installing a new roof. Claimant was told by his boss that he needed to get down from the roof to retrieve a saw and bring it back up to the roof to cut some plywood for some roof repairs. He was carrying a measuring tape and a chalk line in his hand as he was going down the ladder.

2. The ladder was not correctly placed or secured. He was going down the rungs of the ladder from the roof, when the latter shifted and he lost his footing on the rung of the ladder, fell and immediately hit his head on a 2x6 an then fell onto his left side hurting his left upper extremity, his low back and left hip. Claimant fell onto a whole pile of wood. Claimant stated he had a left shoulder, left elbow, left arm, head, neck, low back and hip injury.

[3] The delay in resetting this hearing was cause by difficulties with communication by the OAC with Claimant, and was not Claimant's fault.

3. Immediately following the fall, his boss came down from the roof and tried to reassure Claimant that he was well. Claimant reported that he was not well and had a fracture of his arm.

4. Claimant was initially taken by his supervisor and boss (FM) to a chiropractor close to where they were working. But the chiropractor informed them that Claimant had a serious fracture of his left arm and needed to see a surgeon.

5. His boss then took Claimant to Denver Health Medical Center (DHMC). Claimant testified that his boss simply dropped him off at the hospital and did not stay with him.

6. Claimant stated that he was attended at DHMC but that they did not do the surgery for his right arm right away. They had to reduce the dislocation of the shoulder and allow it to heal first. The process was not easy. It was very painful. He was in the hospital for three days and then was sent home where he had to wait at home until his surgery was set up. He received a bill for $12,500.00. He was instructed to reinforce his defenses in order to be able to withstand the surgery because he was very weak. While Claimant was in the hospital, he called his boss, who came to the hospital to speak with him. His boss was not very nice. He screamed at him and gave him a box of noodle soup.

7. A month went by while Claimant was in very serious pain. He was in really bad shape as the pain was intolerable to the extent that he sometimes felt like he was going to die. Since he had heard nothing from the hospital to schedule his surgery, Claimant called them. The hospital staff were surprised that he had not had his surgery yet.

8. Claimant stated that he called his boss again, about a month later, which was when his boss gave him that last check of money that had been owed to him from work he had performed. That was all his boss gave him. This ALJ notes that the check mentioned by Claimant is dated July 2, 2018 in the amount of $400.00.

9. DHMC scheduled the surgery, which occurred around July 18, 2018. Claimant remained in the hospital approximately four days after the surgery. The surgery involved the elbow and up the upper arm. They placed a metal plate secured with screws to repair the severe fracture. Following the surgery he received a bill for $42,750.00. Claimant estimated that his medical bill were approximately $64,000.00. He believed Medicaid paid for his treatment.

10. Claimant credibly testified that he was off of work from the date of the injury on June 15, 2018, through all of the rest of 2018 until February 28, 2019 because the healing process took a long time. Claimant was in serious pain and unable to move his left upper extremity both at the elbow and the left shoulder for a very long time.

11. Claimant stated that to the day of the hearing, he continued to have pain going from the elbow to the shoulder. He also continued to have pain in his low back, his neck and in his left shoulder. Though the areas that continued to be the most painful included the left upper extremity from the elbow to the shoulder due to the severe fractures of the bone as well as dislocation of the shoulder joint.

12. This ALJ noted that Claimant was wearing a prosthesis on his left hand. Claimant explained that he had a crush injury to his left hand during a car accident on December 19, 2015 and the hand at the wrist was amputated. The amputation was not related to his work related claim of June 15, 2018.

13. Claimant had further communications from his boss who advised him that he had no insurance to take care of Claimant and that he was not to bother him any further because he was dealing with his own health problems, including diabetes. He advised Claimant to contact the contracting company [Redacted, hereinafter CG] directly. Claimant advised his boss that if the company was not going to help, then he would be filing a complaint. Claimant further credibly stated that he had also shown up at his boss' home to ask for help and was told never to show up there again. The boss told Claimant that if he filed a claim against him or the company that the boss would hire an attorney to fight the claim.

14. Claimant filed a Workers' Claim for Compensation on August 7, 2018. The form indicated that Claimant lost his balance and fell approximately 8 feet, hitting his head on a 2x6 board and injuring his left shoulder, left elbow, left arm, head, neck and hip, including a left distal humerus fracture.

15. Claimant clarified that the fall might have been approximately twelve feet instead of just eight, as it was a full floor and he was at the top of the ladder. The wood of the roof was rotten in the area that the ladder was attached with some screws and cord, which came loose when Claimant started his descent from the roof.

16. On August 10, 2018 Division sent Claimant's boss a letter, which enclosed a copy of the Workers' Claim for Compensation, requesting Employer's workers' compensation insurance information that was supposed to be submitted to Division within 20 days of the date of the letter. This ALJ noted that the address on this letter from Division to Employer is the same address of the NOH that was not returned to the OAC and this ALJ infers that this is a correct address for Employer.

17. Claimant had called his boss on many occasions. Always to the same phone number, the same number that is on the most recent website. He never said whether he would pay for benefits. He just said repeatedly that he would contact his attorney but never gave Claimant any information of how or if he would be compensated. Claimant's boss stated that he would no longer employ Claimant.

18. While he was in the hospital, he was provided with a check dated July 2, 2018 in the amount of $400.00, which were past due wages. Claimant testified that his earnings varied and was sometimes paid $720.00, sometimes $800.00 and sometimes $900.00 per week. Claimant stated that they would normally complete the roofs of two to four houses a week, depending on how big the houses were and the labor force.

19. Claimant was evaluated by Dr. Anthony Beardmore of DHMC and he was initially placed into a brace. Claimant was required to wait for a full month before they scheduled him for surgery with Dr. Beardmore.

20. Claimant was provided with multiple notes stating that he should continue off work. On August 27, 2018 Dr. Cyril Mauffrey of DHMC noted that Claimant should remain out of work until he was seen next in the Ortho Trauma Clinic in four weeks' time.

It states that they were following him for his left lower upper arm fracture. They placed a 10 lb. restriction on Claimant.

21. On September 6, 2018 Nurse Kelly Schmadeke on behalf of Dr. Mauffrey issued a second note. It stated as follows:

> It is my medical opinion that [Claimant] should remain out of work until his next appointment on September 24, 2018. At this visit, we will update his plan of care and are happy to write another work letter at [Claimant]'s request. If he is cleared to bear weight on affected arm on 9/24/18, he may likely need an additional 1-3 weeks to progress to full weight bearing and safely climb ladders, lift, etc.
>
> If you have any questions or concerns, please don't hesitate to call.

22. On September 11, 2018, Division sent Employer a letter requesting they respond, as they had sent Employer prior communication requesting Employer's insurance carrier. The letter informed Claimant that he could proceed with a hearing noting that Employer could be liable for medical bills, temporary and permanent disability, penalties in the amount of 25% of awarded benefits for failure to carry insurance. They were further advised that an additional penalty up to $250 per day could be assessed for failure to carry coverage. Claimant was evaluated on September 24, 2018 by Dr. Parker Prusick of DHMC Ortho Trauma Clinic. He noted that Claimant should continue off work until October 22, 2018 as he was still recovering from his injuries that required operative fixation. After that day he would be cleared to return to work.

23. Claimant indicated that he had no billing statements because they covered him under a waiver or government program. He was not aware of any other outstanding billing statements.

24. He received physical therapy and rehabilitation for some time as well, but had to stop sometime in 2019 because he no longer had the ability to pay, even though it was not much. He continued with a lot of pain in his left upper extremity, he did not know if it was just dysfunction or problems with the screws. But that continued for a long time. Now he is somewhat better but he has never returned to the way he was before the work injury. He has tried to work but it has been very difficult due to the loss of his left arm. He also continues with problems with his low back and neck.

25. Claimant showed the disfigurements related to his surgery of the left upper extremity. The main surgical scar was 7 inches long and started at right above the level of the elbow. This scar was discolored, white compared to rest of the skin on his upper extremity and looked indented. A large second area of scarring at the base of the surgical scar, which looked like it had been an open wound that had healed, was significantly discolored, was one inch round and somewhat keloid. A third scar of approximately three quarters inch that comes out from the surgical scar was also discolored. There were multiple stich scars that surrounded the main surgical scar that were also white in color and very visibly showing the appearance almost like a zipper. Further, it was noticeable that Claimant could not straighten his left elbow and there was swelling at the elbow, which Claimant stated really still bothered him, and which is larger than the opposite elbow. Claimant explained that he did not finish his rehabilitation to try and get his arm to straighten out due to his inability to pay for his care.

26. The ALJ finds and concludes that as a result of the June 15, 2018 work injury, Claimant has a visible disfigurements to the left upper extremity. Claimant's testimony was credible. Claimant, and on inspection by this ALJ, described surgical scars. The ALJ hereby finds that Claimant has sustained serious permanent disfigurements to areas of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to Section 8-42-108 (1), C.R.S.

27. Claimant called as a witness a coworker (JP). Mr. JP testified that he was working the day Claimant fell off of the roof. He was working on top of the roof. He heard the noise of the fall. And he went down to find out what had happened. But he did not see Claimant fall. He asked Claimant what had happened and Claimant showed him his head injury. He saw the elbow problem was not normal. After Claimant had fallen off the ladder, he could not work anymore because of the injuries.

28. Claimant testified that he had a significant damage to his head, which required seven stitches. Claimant showed the area where the scar was on the back of his head but it was not visible to the eye as he had a head full of hair. Around his waist line, he also had a scrape or an abrasion on the side of his ribs but it is no longer visible.

29. As found, Claimant has proven by a preponderance of the evidence that he incurred multiple injuries in the course and scope of his employment with Employer on June 15, 2018, including to his head, neck, hip, low back and left upper extremity. Claimant's testimony is credible. Further, Claimant's testimony was supported by the testimony of his coworker, JP.

30. As found, Claimant was taken personally by his supervisor and boss to Denver Health Medical Center, where he was treated for his injuries, including surgery and rehabilitation. DHMC is an authorized provider and the medical care he received was reasonably necessary and related to the June 15, 2018 work related injuries.

31. This ALJ determined that the fair computation of Claimant's average weekly wage was $806.67.

32. Claimant proved by a preponderance of the evidence that he is entitled to temporary disability benefits. TTD benefits at the rate of $537.78 from June 16, 2018 through February 28, 2019 are calculated to be $19,745.31.

33. Claimant has proven by a preponderance of the evidence that Employer failed to carry workers' compensation insurance and failed to admit or deny the claim, causing Employer to be responsible for penalties in this matter.

34. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable

cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Sec. 8-41-301(1)(b), C.R.S. (2022); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold *D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

The preponderance of the evidence demonstrates that Claimant's June 15, 2018 accident occurred within the scope of Claimant's employment when he was complying with his boss' request to retrieve the saw. As further found, Claimant's accident occurred arising out of Claimant's employment activities as he fell from the ladder, which his boss had secured to the roof and came lose, causing Claimant to fall hitting his head on a 2x6 and then to the concrete ground, causing injuries to his head, neck, left upper extremity, hip and low back. As found, Claimant met his burden of proof and Claimant's claim for injuries caused on June 15, 2018 are compensable.

C. Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Sec. 8-42-101(1)(a), C.R.S., *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo.1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012); *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999)

As a result of the work injury of June 15, 2018, Claimant received medical treatment, including two stays at Denver Health Medical Center, undergoing surgery in July 2018 for the fractured left distal humerus at DHMC as well as physical therapy and rehabilitation. Claimant has proven by a preponderance of the evidence that he is entitled

to reasonably necessary medical benefits to cure and relieve him of the compensable work related conditions caused by the June 15, 2018 accident.[4]

As found, Medicaid likely paid for Claimant's treatment at Denver Health Medical Center and otherwise financed his care. Employer is thus financially responsible for the payment of Claimant's medical expenses, including any outstanding lien from the Colorado Department of Health Care Policy & Financing due to payments made by Medicaid.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services were paid to the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

Here, the wage records are not available. Claimant credibly testified that he would earn sometimes $720.00 per week, but at other times he would earn $800.00 or $900.00 in a given week. This ALJ determined that the fair approximation and calculation was to average out the three amounts, which provides for an average weekly wage of $806.67.

E. Temporary Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical

[4] This does not include any treatment due to the amputation of the left hand at the wrist.

opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbios* Logic, 952 P.2d 831 (Colo. App. 1997).

As found, the persuasive evidence shows Claimant was disabled by the June 15, 2018 injury because he could not use his left upper extremity. He was initially several days in the hospital following the reduction of the left shoulder dislocation. Then was sent home to recover in order to be able to proceed with the surgery for the left arm fracture. The surgery was performed in July 2018, when he stayed again in the hospital for several days. Further, following the surgery, Claimant could not work without limitations pursuant to multiple provider's restriction letters, including Dr. Mauffrey's. As found, Claimant was unable to return to work beginning on June 16, 2018. Claimant credibly testified that he was unable to return to work due to his injuries until March 2019. Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits beginning on June 16, 2018 through February 28, 2019. Based on Claimant's AWW of $806.67 and Claimant's TTD rate is $537.78, Claimant is owed TTD benefits from June 16, 2018 through February 28, 2019. TTD benefits calculated through February 28, 2019 (257 days or 36 week and 5 days) are in the amount of $19,745.31.

Any claim for temporary partial disability benefits from March 1, 2019 through the present is reserved.

F. Penalties

Insurance Coverage

Every employer subject to the provisions of the Workers' Compensation Act shall carry Workers' Compensation insurance. Sec. 8-44-101, C.R.S. Sec. 8-43-408(5), C.R.S.[5] in effect at the time of Claimant's June 15, 2018 injury provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

As found, Employer did not have an active Worker's Compensation insurance policy effective on or prior to Claimant's June 15, 2018 date of injury. Claimant spoke directly with his supervisor and boss on multiple occasions following the work injury of June 15, 2018. As found, Employer conveyed to Claimant that he did not have workers' compensation insurance coverage and that Claimant needed to communicate with the contractor. The contractor and Employer were provided with notice of the hearing in this matter and failed to show. Therefore, based on the evidence presented, it must be

[5] Due to statutory change as of July 1, 2017. The prior statutory provision of a 50% wage increase was paid to Claimant.

assumed that Employer did not have insurance on the date of the work injury. Claimant has shown that a penalty is due and owing for failure to insure.

As found, Respondent-Employer is liable for temporary total disability benefits and reasonable and necessary medical treatment related to the work injury. The ALJ was unable to determine the amount of unpaid medical benefits, as the evidence offered was an estimate and not the exact amount of the related medical costs incurred by Claimant other than an approximate cost of $64,000.00 based on Claimant's testimony. Based on Claimant's AWW of $806.67, Claimant's TTD rate is $537.78. Claimant is owed TTD benefits from June 16, 2018 until February 28, 2019. TTD benefits calculated through February 28, 2019 are in the amount of $19,745.31. It is undisputed Respondent-Employer did not carry workers' compensation insurance at the time of Claimant's industrial injury. Accordingly, Respondent-Employer shall pay an additional $4,936.33 (25% of $19,745.31) to the Colorado Uninsured Employer Fund.

Failure to Admit or Deny Liability

It if inferred by Claimant's statements at hearing Claimant argues that since the Division issued letters dated August 10, 2018 and September 11, 2018, stating that Division had not received a timely admission or denial from Respondents, that Claimant is entitled to penalties pursuant to alleged violations of Section 8-43-203(1)(a), C.R.S..

Section 8-43-203(1)(a) states that "The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…"

Claimant seeks a penalty for failure to admit or deny liability. Pursuant under Sec. 8-43-203(2)(a), C.R.S. The employer must admit or deny liability within 20 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." An employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot exceed "the aggregate amount of three hundred sixty-five days' compensation." Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. See Sec. 8-43-203(2)(a), C.R.S.

The phrase "may become liable" means the imposition of a penalty under Sec. 8-42-203(2)(a), C.R.S. is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colo. Civil Rights Comm'n*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Assoc. Bus. Prod. v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Indus. Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty under Sec. 8-43-203(2)(a), C.R.S. *Pioneer Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

As found, Employer knew or should have known Claimant had a significant injury that occurred on June 15, 2018 as employer was the one to take Claimant from the home that was being worked on to, first the chiropractor and then, the emergency room at Denver Health Medical Center. Claimant was credible in testifying that he had multiple conversations with employer and that Employer himself knew he was off work for greater than three shifts. Employer failed to file an Employer's First Report and failed to notify the Division what employer's position was. Division sent Employer a copy of the Workers' Claim for Compensation dated August 7, 2018 on August 10, 2018. Division further followed up advising Employer that it was likely that penalties may assessed against Employer by letter dated September 11, 2018. Claimant has suffered significantly by Employer's failure to comply with the requirements of the law. As found, Employer knew Claimant filed a Workers' Compensation Claim (WCC) on August 7, 2018, as Division provided Employer a copy of the WCC to Employer with their letter of August 10, 2018. Further, Employer knew that they may be subject to penalties pursuant to Division's letter of September 11, 2018. The deadline to admit or deny liability was August 30, 2018, but certainly no later than October 1, 2018. Employer has never filed an admission or denial of liability regarding Claimant's injuries.

Claimant's hearing initially started on December 20, 2022, but was continued to April 24, 2023 due to lack of notice to Employer. Claimant's case was been delayed, and Claimant has been prejudiced, by Employer's failure to admit or deny liability. Claimant's multiple filings, including the two Applications for Hearing filed by his prior counsel and later by Claimant, who stated he struggled to understand the workers' compensation process and had been suffering from the ongoing consequences of the work related injury, have created procedural challenges for Claimant in this case.

The ALJ finds Employer should be penalized $18,250.00, (calculated for $50.00 per day for 365 days)[6] for failure to admit or deny liability from August 30, 2018 through August 30, 2019. Respondents not only failed to admit or deny, but they failed to show at the hearing and presented no defenses or mitigating circumstances in challenge to the penalty. Further, Claimant testified to the hardships that he endured related to his injuries, including having no income and having to terminate his medical care due to lack of funds. The penalty of $18,250.00 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant in the amount of $9,125.00 and fifty percent (50%) to the Subsequent Injury Fund.

G. Disfigurement

[6] The maximum allowable by statute was 365 times Claimant's daily rate of $76.83 for a potential total of $28,042.95.

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." A disfigurement is an observable impairment of the natural appearance of a person, including a limp. See *Arkin v. Industrial Commission*, 358 P.2d 879, 884, 145 Colo. 463, 472 (Colo. 1961); *Piper v. Manville Products Corp*., W.C. No. 3-745-406 (July 29, 1993); *Josefiak v. Green and Josefiak, P.C.,* W.C. No. 3-783-081 (March 12, 1987); Marcelli v. Echostar Dish Network, W.C. No. 4-776-535, ICAO (August 30, 2012); *In re Claim of Nagle,* W.C. No. 5-105-891 (July 24, 2020). The ALJ finds and concludes that as a result of the June 15, 2018 work injury, Claimant has visible disfigurements to the left upper extremity. Claimant's testimony was credible. Claimant, and on inspection by this ALJ, described the surgical scars as stated above. As found, Claimant has sustained serious permanent disfigurements to areas of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to Section 8-42-108 (1), C.R.S. As determined, Respondent shall pay Claimant five thousand nineteen dollars and eighty three cents ($5,019.83) for those disfigurement as described above.[7]

H. Payment to Trustee or Posting of Bond

Under Sec. 8-43-408(2), C.R.S. Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado."

As found, this Order awards no ongoing benefits, so the present value equals the total benefits awarded. The Order awards no specific medical benefits at this time, but indemnity benefits of $19,745.31, disfigurement of $5,019.83, and penalties totaling 23,186.33[8], for total compensation of $47,951.47, which does not include the approximately $64,000.00 in medical benefits which was either paid by Medicaid or discounted by the provider. Employer is thus required to pay the trustee of the Division a total amount of $47,951.47. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

IT IS THEREFORE ORDERED:

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[7] Maximum allowable disfigurement for injuries occurring between July 1, 2017 and June 30, 2018.
[8] Only $9,125.00 of the total penalties are to be paid to Claimant.

1. Claimant suffered compensable work related injuries to his head, neck, low back and hip as well as his left upper extremity, including the elbow and left shoulder, on June 15, 2018 in the course and scope of his employment with Employer.

2. Respondent shall pay for all authorized, reasonably necessary treatment related to the June 15, 2018 injury from authorized providers to cure or relieve the effects of Claimant's compensable injury, including but not limited to the charges from Denver Health Medical Center and reimbursement to Medicaid (Colorado Department of Health Care Policy & Financing).

3. Claimant's average weekly wage is $806.67 and his temporary disability rate is $537.78.

4. Respondent shall pay Claimant TTD benefits at the rate of $537.78 from June 16, 2018 through February 28, 2019 in the amount of $19,745.31.

5. Employer shall pay penalties to Claimant in the amount of $9,125.00 for failure to admit or deny the claim.

6. Employer shall pay the Colorado Uninsured Employer Fund a total of $4,936.33 in penalties for failure to insure.

7. Employer shall pay the Subsequent Injury Fund a total of $9,125.00 in penalties for failure to admit or deny benefits in a timely manner.

8. In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $47,951.47, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $47,951.47 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

10. Employer shall pay statutory interest at the rate of 8% per annum on benefits not paid when due.

11. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

12. Pursuant to Sec. 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

9. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 3rd day May, 2023.

Elsa Martinez Tenreiro

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant overcome the DIME's 14% whole person rating by clear and convincing evidence?
- If Claimant overcame the DIME rating, what is the proper rating, based on a preponderance of the evidence?
- Did Claimant prove his average weekly wage should be increased to $1,029.65?
- The parties stipulated Insurer is entitled to a credit for PPD previously paid in this claim if additional PPD is awarded.
- The parties agreed to reserve the issue of overpayment, pending the outcome of the hearing.
- There is no current dispute regarding medical treatment. The parties stipulated Claimant is entitled to a general award of post-MMI *Grover* medical benefits from authorized providers, subject to Respondents' right to contest the reasonable necessity or causal relationship of any specific treatment.
- Because the hearing was conducted virtually, the parties agreed to reserve the issue of disfigurement for determination on a future in-person docket.

FINDINGS OF FACT

1. Claimant worked for Employer as a medical assistant. The job was physically demanding and required frequent patient transfers. Claimant occasionally lifted up to 100 pounds, although the heavier patients were more commonly moved with a "two-person lift" approach.

2. Claimant suffered an admitted low back injury on January 16, 2014 while transferring a patient from a wheelchair to an x-ray table.

3. Claimant had a prior injury to his low back on October 27, 2004 while working as an automotive technician for [Redacted, hereinafter FM] He was treated conservatively, and put at MMI on March 10, 2005 with no impairment or restrictions. A Final Admission of Liability (FAL) dated May 19, 2005 shows no PPD was awarded. The only maintenance care admitted was a single follow up with the ATP within six months of MMI.

4. Claimant did not object to the May 19, 2005 FAL, and the claim closed.

5. Claimant underwent an L5-S1 microdiscectomy with Dr. Steven Zielinski on April 4, 2006. The surgery was covered by Claimant's private health insurance.

6. On April 20, 2006, Claimant filed a Petition to Reopen the 2004 claim based on a change in condition. Claimant attached Dr. Zielinski's surgical report to the Petition. The insurance carrier on the 2004 claim did not voluntarily reopen the claim, and Claimant did not pursue a hearing. The ALJ infers the Petition to Reopen was abandoned.

7. Claimant received no PPD award or settlement for the 2004 injury.

8. Claimant recovered well after the 2006 surgery and returned to work with no restrictions or limitations. He started working for Employer in 2007. Despite performing a demanding job, Claimant missed no work and never modified his job in any way because of the previous injury. Nor did Claimant have any difficulty engaging in regular exercise, including running and weightlifting.

9. Employer presented no persuasive evidence to refute Claimant's testimony regarding the exertional requirements of his job or his functional abilities before the 2014 work accident.

10. Claimant received no treatment for his low back from 2007 until 2014. However, imaging studies were performed on his low back approximately one year before the work accident. Lumbar x-rays on December 11, 2012 showed some minor osteophytes at L3-4, but no acute findings. According to the report, the clinical indication for the x-rays was "Back pain."

11. Claimant subsequently had a lumbar MRI on January 7, 2013. The indication was listed as "Chronic back pain. Surgery in 2005." The MRI showed an L5-S1 disc osteophyte complex with facet arthropathy, postsurgical scarring, and a small lateral recess disc protrusion.

12. The MRI report identifies the ordering provider as Dr. Robert Nolan, a physician in Employer's practice. Claimant testified that Dr. Noland ordered the MRI "as a favor," to investigate the cause of persistent gastrointestinal issues. Respondents' IME, Dr. Primack, doubted Claimant's explanation because "[Dr. Noland] could be in a lot of hot water . . . by putting something in there, quote, just to get it scanned." Nonetheless, there are no treatment records from Dr. Noland, and no persuasive evidence Dr. Noland recommended any treatment.

13. There are no additional records relating to Claimant's low back until the work accident on January 16, 2014.

14. After the January 2014 injury, Claimant was sent to physical therapy and prescribed medications. A lumbar MRI on February 10, 2014 showed no nerve root compression or other acute pathology. Comparison with the previous MRI from January 2013 showed interval improvement in an L5 S1 disc protrusion.

15. Claimant underwent right L2-L5 rhizotomies in March 2014, which were helpful.

16. Dr. Daniel Olson at CCOM put Claimant at MMI on July 28, 2014. Dr. Olson calculated a 16% whole person rating, comprised of 10% for specific disorders under Table 53, combined with 7% for range of motion. However, Dr. Olson noted Claimant's previous work-related low back injury in 2004, with an L5-S1 laminectomy in 2006. Even though Dr. Olson noted Claimant "was released without restrictions and evidently had no problems with his back since the [2005] surgery," he apportioned the rating because the prior injury was work-related. Dr. Olson subtracted 8% for the prior surgery from the 10% specific disorder rating. Dr. Olson did not apportion the range of motion impairment because he had no evidence showing functional impairment or treatment within 12 months before the current injury. Dr. Olson provided an overall rating of 9% whole person after apportionment.

17. Insurer filed a Final Admission of Liability (FAL) on September 30, 2014, admitting for Dr. Olson's 9% rating and for medical benefits after MMI. Claimant did not contest the FAL, and the claim closed. Insurer paid Claimant $18,261.59 in PPD benefits.

18. Claimant received regular post-MMI treatment, including multiple epidural steroid injections (ESIs) and repeat rhizotomies. He was eventually referred for a surgical consultation because of continued and progressive back and leg symptoms.

19. Dr. Bryan Castro performed an L5-S1 laminectomy, microdiscectomy, and decompression on December 12, 2019.

20. Insurer voluntarily reopened the claim and reinstated TTD benefits in December 2019 based on Claimant's worsened condition and surgery.

21. Claimant initially reported complete resolution of his leg symptoms after surgery. However, his right leg pain recurred after approximately four months. An MRI on April 18, 2020 showed a central disc protrusion at L5-S1 producing right L5 nerve root effacement and postoperative scar formation.

22. Claimant followed up with Dr. Castro on May 15, 2020. Dr. Castro did not believe the MRI showed recurrent herniation. He recommended ESIs.

23. Bilateral L5-S1 ESIs were performed on June 30, 2020, and provided approximately 75% pain relief.

24. Dr. Thomas Centi put Claimant at MMI on July 30, 2020. He released Claimant to full duty with no restrictions and referred him to Dr. Malinky for maintenance care.

25. Dr. Dwight Caughfield performed a DIME on January 12, 2021. Dr. Caughfield determined Claimant was not at MMI "given his progressive leg pain and cramps that presented before MMI and have resulted in gradual functional declined that is not responding well to injections." Dr. Caughfield recommended lower extremity

electrodiagnostic testing, a repeat MRI, a psychological evaluation, and a "surgical second opinion" to consider a possible fusion.

26. Claimant was referred to Dr. Timothy Sandell to complete the DIME recommendations. Dr. Sandell performed electrodiagnostic testing on February 23, 2021. The testing was normal with no evidence of nerve entrapment or radiculopathy.

27. A repeat lumbar MRI was completed on March 9, 2021. It was largely unremarkable aside from post-surgical changes and a slight bulge at L5-S1.

28. Claimant was evaluated by Dr. Sana Bhatti, a neurosurgeon, on April 23, 2021. Claimant described severe low back pain and radiating pain and numbness in his thighs. Dr. Bhatti reviewed the MRI and considered it "essentially unremarkable" with no evidence of neurologic compromise or other findings to account for Claimant's symptoms. Dr. Bhatti did not think Claimant was a surgical candidate and recommended therapy and pain management.

29. Claimant underwent additional injections and rhizotomies with Dr. Malinky in July 2021.

30. Dr. Sandell put Claimant at MMI on August 4, 2021. Dr. Sandell calculated a 16% whole person rating, including 13% under Table 53 and 4% for range of motion. Dr. Sandell did not perform apportionment because he was "unclear" whether Claimant had previously received a rating for the 2014 injury or for the 2004 injury. Dr. Sandell recommended a permanent work restriction of no lifting more than 50 pounds. He recommended periodic follow-up with Dr. Malinky as maintenance care.

31. Claimant had a follow-up DIME with Dr. Caughfield on November 2, 2021. Dr. Caughfield determined that Claimant reached MMI as of September 16, 2021.[1] Dr. Caughfield calculated a 21% whole person rating, based on 9% under Table 53 and 13% for range of motion loss. Dr. Caughfield further opined,

> However, since he had a lumbar Laminectomy at L5-S1 prior to 2008 (2004 surgical date), apportionment is appropriate Per Division Apportionment Calculation Worksheet. His prior table 53 impairment is IID lumbar which is 8%. This is apportioned from his current injury table 53 rating of 9% for one percent table 53 impairment apportionment. There is no prior injury ROM or impairment available to apportion the ROM impairment which results in a 13% whole person impairment for range of motion. . . . [H]is total lumbar spine impairment is 14% whole person apportioned.

32. Dr. Caughfield attached a copy of the Apportionment Calculation Worksheet he completed to determine whether apportionment applied to the rating. The worksheet reflects a critical error at Step 2:

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[1] This date appears to correspond with the date of the electronic signature on Dr. Sandell's August 4, 2021 report.

Step 2: The date of the *current injury* is:

☑ **Before** July 1, 2008 → Apportion - proceed to **Step 4**

☐ **After** July 1, 2008 → Proceed to **Step 3**

33. Claimant's "current injury" occurred in 2014, which is "After July 1, 2008." Therefore, Dr. Caughfield should have moved to Step 3 of the worksheet. Instead, he applied Step 4, which simply instructs the physician to "Apportion by subtracting the previous impairment from the current total rating." As a result of this error, he neglected to consider the appropriate factors under the version of the apportionment statute applicable to Claimant's injury.

34. Dr. Caughfield noted Claimant had "No residual symptoms or functional impairment" after the 2006 surgery.

35. Respondents filed a FAL on November 29, 2021 admitting for Dr. Caughfield's 14% rating.

36. Dr. Scott Primack performed an IME for Respondents on May 25, 2022. Dr. Primack documented, "[Claimant] tells me that he did extremely well following his [2006] spine operation and was able to return to work." Dr. Primack agreed with Dr. Caughfield's rating methodology. He opined apportionment for the 2006 surgery was necessary "to prevent double dipping." However, Dr. Primack could point to no evidence showing Claimant's prior low back condition was "disabling" before January 16, 2014.

37. Claimant overcame the DIME's 14% rating by clear and convincing evidence. Dr. Caughfield's application of apportionment was highly probably incorrect because it is inconsistent with the law in effect on the date of injury. Although Claimant had a prior work-related low back injury in 2004, he received no award or settlement. Moreover, he recovered well from the 2006 surgery and the prior injury was not "independently disabling" at the time of the 2014 injury. Therefore, apportionment is not permitted.

38. Claimant proved the correct rating is 21% whole person, the rating calculated by Dr. Caughfield before apportionment.

39. Insurer initially admitted an AWW of $559.49 based on Claimant's earnings on the date of injury.

40. When the claim was reopened in December 2019, Insurer voluntarily increased the admitted AWW to $661.84, based on post-injury pay raises.

41. Claimant continued working for Employer until July 2020, when he left to take a new job at [Redacted, hereinafter PM]. Claimant was earning on average $760 per week when he resigned from Employer. Claimant changed jobs because of COVID-related issues and commuting time, not the effects of the work injury.

42. Claimant earned $720 per week at PM[Redacted], from August 2020 until February 2021.

43. Claimant was unemployed from February 2021 until October 2021. Claimant conceded he was still unemployed on the date of MMI.

44. In October 2021, Claimant started a new job for Employer as an anesthesia technician. His base pay in the new position is $22.90 per hour.

45. Claimant failed to prove his AWW should be increased to $1,029.65. Claimant's AWW is most fairly calculated by his earnings immediately before he left Employer in 2020, which is $760 per week. In reaching this conclusion, the ALJ has considered the alternative computations of $661.84 (the admitted AWW), $720 (Claimant's wage immediately before MMI), and $1,029.65 (advocated by Claimant for his post-MMI position).

CONCLUSIONS OF LAW

A. Claimant overcame the 14% DIME rating by clear and convincing evidence

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing burden also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc.*, W.C. No. 4-842-550-01 (March 18, 2016).

Apportionment of permanent medical impairment is governed by § 8-42-104 (the "apportionment statute").[2] The current statute distinguishes work-related and nonwork-related prior impairments. Sections 8-42-104(5)(a), (b). If the prior impairment was work-related, apportionment applies if the prior impairment involved "the same body part" and resulted in "an award or settlement" in a workers' compensation claim. In such a case, the prior rating "as established by the award or settlement" is subtracted from the rating for the current injury. In the case of prior nonwork-related impairment, the statute only allows apportionment if the prior impairment was "independently disabling" at the time of the subsequent injury.

[2] There have been several iterations of the apportionment statute since 1991. From July 1, 1991 to June 30, 1999, apportionment of PPD was codified in § 8-42-104(2). From July 1, 1999 to June 30, 2008, apportionment of PPD was codified in § 8-42-104(2)(b). Effective July 1, 2008, apportionment of PPD is governed by § 8-42-104(5).

The parties disagree whether Dr. Caughfield performed "apportionment" or made a "causation" determination regarding prior impairment. If the issue is "apportionment," the rating can only be reduced if the requirements of § 8-42-104(5) are satisfied. On the other hand, if the issue is solely one of "causation," the apportionment statute is not applicable, and Claimant must overcome the causation determination by clear and convincing evidence. The *AMA Guides* define apportionment as "the determination of the degree to which each of various occupational and nonoccupational factors have contributed to a particular impairment." *See also, Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). By contrast, the issue of "causation" involves whether an entire component of the claimant's impairment is or is not related to the industrial injury. *E.g.,* Coble v. Pioneer Group Inc., W.C. No. 4-290-596 (August 24, 2001); *Johnson v. Christian Living Campus*, W.C. No. 4-354-266 (October 5, 1999).

Several factors persuade the ALJ that Dr. Caughfield addressed "apportionment" rather than "causation." First, Dr. Caughfield explicitly stated "apportionment is appropriate," and he used the term "apportion" or "apportionment" no less than five times. Second, he applied the algorithm set forth in the Division's Apportionment Calculation Worksheet, which attempts to distill the requirements for apportionment under § 8-42-104(5). Third, and more important, his methodology was the essence of apportionment, *i.e.*, he calculated an overall rating and subtracted the prior impairment rating to the same body part. This is to be contrasted with a "causation" determination wherein an entire body part or component of impairment is simply not included in the rating. *E.g., Hernandez v. Dairy Farmers of America*, W.C. No. 5-028-658-001 (February 4, 2020).

As found, Claimant overcame the DIME's 14% rating by clear and convincing evidence.[3] Dr. Caughfield's application of apportionment was highly probably incorrect because it is inconsistent with the law in effect on Claimant's date of injury. Although Claimant had a prior work-related low back injury in 2004, he received no award or settlement for any permanent impairment. Moreover, Claimant recovered well from the 2006 surgery and the prior injury was not "independently disabling" at the time of the 2014 injury.

Admittedly, Claimant's testimony that his low back was asymptomatic before the January 16, 2014 work accident is not entirely credible. As Dr. Primack pointed out, the x-rays and MRI in December 2012 and January 2013 indicate he probably had some symptoms at the time. But he received no treatment for any such symptoms. Regardless, the apportionment statute focuses on prior "disability," which is not synonymous with "symptoms." The term "disability" pertains to a claimant's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). The persuasive evidence clearly and convincingly shows Claimant was not "disabled" by the prior back injury immediately

[3] Arguably, the DIME's determinations regarding apportionment are not entitled to presumptive weight, and the applicability of § 8-42-104(5)(a) and (b) are factual issues for determination by the ALJ under the preponderance standard. *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68, 71 (Colo. App. 2001). But in this case, the persuasive evidence strong enough to overcome the DIME even under the clear and convincing evidence standard.

before the 2014 work accident. Claimant maintained a physically demanding job for years, with no restrictions, limitations, or difficulty. He also engaged in strenuous avocational activities such as weightlifting and running. Claimant worked many years for Employer, and the ALJ expects Respondents would have called a manager or coworker at hearing were Claimant's testimony regarding his pre-injury functional abilities exaggerated or untrue.

B. The correct rating is 21% whole person

When the DIME rating is overcome "in any respect," the proper rating becomes a matter for the ALJ's determination based on the preponderance of the evidence. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). The ALJ is not limited to merely choosing from competing ratings offered by Level II physicians, but may independently determine the rating based on the evidence in the case. *Garlets v. Memorial Hospital, supra*. The only constraint is that the rating must be supported by the evidence and consistent with the *AMA Guides* and other rating protocols. *Gallegos v. Lineage Logistics Holdings LLC*, W.C. No. 5-054-538-002 (February 11, 2020). Even if the ALJ finds the DIME rating has been overcome, the ALJ does not have to reject every other component of a DIME rating. *Lee v. J. Garlin Commercian Furnishings*, W.C. No. 4-421-442 (December 17, 2001).

Claimant proved the correct rating is 21%, as calculated by Dr. Caughfield. Aside from the erroneous apportionment, Dr. Caughfield's rating is otherwise supported by the evidence and consistent with the *AMA Guides*.

C. Average weekly wage

Section 8-42-102(2) provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Avalanche Industries v. Clark*, 198 P.3d 589 (Colo. 2008). The "entire objective" of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

The "discretionary exception" is frequently invoked to account for post-injury wage increases when calculating temporary disability benefits. *E.g., Campbell v. IBM Corp.*, *supra; Romero v. Cub Foods*, W.C. No. 4-218-823 (September 28, 2000). This is because of the direct correlation between the claimant's "actual wage loss" during a period of temporary disability and "a salary a claimant was actually earning when forced to stop working." *Avalanche Industries, supra*, at 596.

Here, Claimant did not endorse temporary disability as an issue for hearing, so any adjustment to the AWW is moot with respect to TTD and TPD. The only issue for

determination in this proceeding is whether the AWW should be increased for purposes of calculating PPD benefits.

The discretionary authority to deviate from the "default" AWW formula extends to PPD benefits, which compensate a claimant for a permanent loss of "future earning capacity." *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). But such cases are less common than those involving TTD, partly because the correlation between a claimant's *future* earning capacity and wages earned in a specific post-injury job is more tenuous with respect to permanent disability benefits.

The outcome in *Pizza Hut* was heavily influenced by the relatively unique circumstances in that case. At the time of the injury, the claimant was working part-time as a pizza delivery person while attending nursing school. By the time he reached MMI, the claimant had already received his degree and was working full time as a nurse, earning much higher wages than during the pizza delivery job. Ultimately, the ALJ determined it was manifestly unjust to calculate the claimant's PPD award—which is intended to compensate for loss of future earning capacity—based on wages from a temporary, part-time pizza delivery job. The court upheld the ALJ's determination as a reasonable exercise of the discretionary authority regarding AWW.

Similarly, in *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 857 (Colo. 1992), the court cited several "unique" factors in finding the "default" AWW provision to be manifestly unjust with respect to calculating the claimant's permanent total disability benefits.

As found, Claimant failed to prove his AWW should be increased to $1,029.65. Instead, the ALJ agrees with Respondents that the most appropriate AWW at the time of MMI is $760. This case presents no "unique" or unusual circumstances, such as those in *Pizza Hut* and *Vigil*. Claimant's only permanent work restrictions is a 50-pound lifting limit, and there is no persuasive evidence that this relatively liberal restriction has or will impact his future earning capacity. In fact, Claimant secured a higher-paying job after MMI, despite the restrictions. Increasing Claimant's AWW to $760 accounts for all post-injury pay raises in the job Claimant held at the time of his injury, and "fairly compensates" for his loss of future earning capacity.

ORDER

It is therefore ordered that:

1. Claimant's request to increase his average weekly wage to $1,029.65 is denied and dismissed.

2. Claimant's AWW is $760 as of the date of MMI.

3. Insurer shall pay Claimant PPD benefits based on a 21% whole person rating. Insurer may take credit for any PPD previously paid in connection with this claim.

4. Insurer shall pay statutory interest of 8% per annum on all compensation not paid when due.

5. Insurer shall cover reasonably necessary and related medical treatment after MMI from authorized providers.

6. The issues of disfigurement and overpayments are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 3, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-195-255-001

ISSUE

Whether Claimant has established by a preponderance of the evidence that the robotic repair of his paraesophageal hiatal hernia requested by Authorized Treating Physician (ATP) Philip Woodward, M.D. and performed on December 5, 2022 was reasonable, necessary and causally related to his admitted December 30, 2021 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a firefighter. He explained that in 2001 he was diagnosed with Gastroesophageal Reflux Disease (GERD) or acid reflux. He received omeprazole, generically named "Prilosec" to control his symptoms. Claimant specifically took 20mg of Prilosec twice daily to subdue the burning sensation in his stomach.

2. On December 30, 2021 Claimant was assigned to assist with evacuations during the [Redacted hereinafter MF] fire in the town of [Redacted, hereinafter SC]. He was specifically locating individuals and taking them to safety. Claimant was not wearing a respirator or breathing mask. He worked from 10:35 p.m. on December 30, 2021 until he was relieved at 11:30 a.m. on December 31, 2021.

3. Claimant explained that during the evacuations he was exposed to large quantities of smoke from burning vegetation, houses, plastics, trash cans and various other materials. He was coughing and found it difficult to breathe at times. Claimant also experienced a runny nose, watery eyes and a sore throat.

4. On January 14, 2022 Claimant visited Authorized Treating Physician (ATP) Workwell Occupational Medicine for an initial evaluation. He reported wheezing and shortness of breath with exertion as a result of his December 30, 2021 work activities. Claimant did not mention any increase in GERD symptoms. He was diagnosed with respiratory conditions due to smoke inhalation and received work restrictions.

5. On January 24, 2022 Claimant returned to Workwell and visited Felix Meza, M.D. for an examination. Because Claimant's respiratory symptoms failed to improve, Dr. Meza referred him to National Jewish Health for an evaluation.

6. On February 6, 2022 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged that Claimant was entitled to receive medical and Temporary Total Disability (TTD) benefits.

7. On March 17, 2022 Claimant visited Annyce Mayer, M.D. at National Jewish for an examination. Dr. Mayer remarked that Claimant had a previous diagnosis of

seasonal asthma and a prescription for albuterol that he rarely used. She also recounted that Claimant had been diagnosed with GERD in 2001 and had good symptom control by taking 20mg of omeprazole every morning. Dr. Mayer noted that Claimant had not only suffered more heartburn since the MF[Redacted] fire, but began to develop acid brash in his mouth that aggravated his cough. She commented that Claimant sleeps with his bed elevated 15 to 20 degrees with a wedge and tries not to eat anything two hours before bedtime to alleviate his GERD symptoms.

8. At the March 17, 2022 evaluation Dr. Mayer concluded that Claimant's exposure to smoke and other inhalants on December 30, 2021 exacerbated his GERD condition. She detailed that Claimant suffered the following:

> Significant exacerbation of previously well-controlled GERD on daily omeprazole, with frequent heartburn and symptoms of brash. GERD is an established sequelae of [Redacted hereinafter WC] exposures, and given the high level exposure and prolonged exposure to the complex mixture including irritant vapors, dust, gas, and fumes contained within the smoke in the absence of respiratory protection, in my opinion to a reasonable degree of medical probability was also swallowed and caused the exacerbation of his previously well-controlled GERD.

9. On April 29, 2022 Claimant returned to National Jewish for an examination. Dr. Mayer prescribed Famotidine to address Claimant's stomach acid and reflux. Additionally, Claimant's Prilosec was doubled to 40mg twice daily prior to address his symptoms.

10. On July 8, 2022 Claimant again visited National Jewish for an evaluation. Dr. Mayer recounted that, because of additional GERD symptoms, Claimant "had increased his omeprazole to 40mg in the morning and 20mg at night that did help the reflux but did not change the symptoms in his throat." Claimant also remained on Famotidine for his GERD.

11. On August 22, 2022 Pranav Periyalwar, M.D. at National Jewish Health, Division of Gastroenterology performed an "Ambulatory Gastroesophageal and Supraesophageal Reflux Monitoring" test on Claimant. The testing involves the placement of electrodes in the esophagus to determine whether ph levels decrease due to increased acid levels from reflux. The monitoring revealed normal results with 0.2% total distal esophageal acid exposure. Overall acid and nonacid reflux events remained within normal levels throughout the daytime and while lying down at night. Although Claimant reported three drug and 21 respiratory symptoms they did not correlate with observed underlying reflux events. Notably, because there were zero observed episodes of supra-esophageal reflux events, the study was considered within normal limits.

12. Based on a referral from Dr. Meza, Claimant underwent a psychological evaluation with Melanie Heto, Psy.D. on August 30, 2022. Claimant reported stressors predominantly with the uncertainty of his condition, perceived delays in treatment, and wondering if his providers were withholding information about their prognosis. He was

concerned about his future health. The thoughts were consuming 70-80% of his day. Claimant reported that "his stress response included a high level of irritability, anger, feeling 'super negative,' and feeling helpless to provide for his family."

13. After extensively interviewing Claimant, Dr. Heto performed a battery of psychological testing. On the Beck Depression Inventory – Second Edition (BDI-II), Dr. Heto documented the following:

> [Claimant] has a total level of depressive symptoms in the severe range. He endorsed moderate distress from the following symptoms: feelings of failure, self-disappointment, self-criticism, loss of interest, difficulty making decisions, feelings of worthlessness, loss of energy, loss of sleep, increased appetite, and loss of interest in sex. He endorsed mild sadness, pessimism, loss of pleasure, guilt, passive suicidal ideation without intent, crying, restlessness, irritability, difficulty concentrating, and fatigue.

14. On the Beck Anxiety Inventory (BAI), Dr. Heto documented that Claimant had endorsed a total level of anxiety in the moderate range. On the Battery for Health Improvement (BHI-2), Dr. Heto noted the following:

> His level of somatic complaints was higher than that seen in 94% of patients, indicating the perception of severe illness symptoms. He endorsed 20 of the 26 Somatic Complaints items. This level of complaints is very unusual. Patients with this profile tend to be preoccupied with their physical functioning. Somatic hypervigilance may be present, with the patient interpreting common symptoms as being problematic.

15. On September 27, 2022 Claimant returned to National Jewish for an evaluation. Dr. Mayer remarked that Claimant had "normal pulmonary function testing, negative methacholine challenge testing and high-resolution CT imaging revealing only mild large and small airway collapse." She commented that he had significant acceleration of his underlying GERD that was likely the result of prolonged exposure to fumes and smoke. Dr. Mayer commented "whether or not this is the cause of his ongoing burning of the throat and swallowing difficulties remains to be determined." She remarked that Claimant remained on Famotidine and 40mg of omeprazole twice daily.

16. Dr. Mayer also addressed the results and data from Dr. Periyalwar's "Ambulatory Gastroesophageal and Supraesophageal Reflux Monitoring" test, the maximum multistage exercise treadmill test and continuous laryngoscopy performed at National Jewish. Regarding reflux monitoring, Dr. Mayer only noted an "Abnormal study on PPI and H2 blocker." She failed to document Dr. Periyalwar's findings of a "normal study," and that "overall acid and non-acid reflux events remain[ed] within normal limits throughout the daytime upright and nocturnal recumbent monitoring." Dr. Mayer also did not mention Claimant's inconsistent reported complaints "that did not correlate with

observed underlying reflux events." Specifically, there were zero episodes of supra-esophageal reflux events observed during the study.

17. On October 4, 2022 the medical providers at National Jewish submitted a request to Respondents for a GI consultation. On October 11, 2022 Respondents authorized the procedure.

18. On October 21, 2022 Claimant presented to Dr. Periyalwar for a consultation. He remarked that Dr. Mayer referred Claimant because of a history of irritant exposure based on a "high level of ongoing GERD and abnormal impedance testing despite max does of omeprazole 20 mg twice daily and famotidine 40 mg at night." Dr. Perioyalwar commented that he reviewed Claimant's previous ph impedance testing that showed significant nonacid reflux but no elevated acid exposure. He recommended an upper endoscopy and a screening colonoscopy.

19. On November 18, 2022 Claimant visited Philip Woodward, M.D. at the "Institute for Esophageal and Reflux Surgery" for a GI consultation. Dr. Woodward stated that Claimant suffered from the primary symptom of regurgitation. He remarked that Claimant was not able to lie down on flat surfaces because gastric juices come into his mouth. He requested surgical authorization for a "Robotic Repair of PEH and ARS (A180) … with Fundo/MSA (Simple)." On November 30, 2022 Respondents denied Dr. Woodward's request based on a Peer Review by Mahdy Flores, D.O.

20. On December 5, 2022 Claimant underwent robotic surgery of his paraesophageal hiatal hernia with Dr. Woodward under private insurance. Claimant remarked that the surgery significantly improved his condition so that he no longer requires any medication for GERD.

21. On January 6, 2023 J. Tashof Bernton, M.D. performed an independent medical examination of Claimant. He conducted a physical examination and reviewed Claimant's medical records. Dr. Bernton also testified at the hearing in this matter. He concluded that that Claimant's robotic paraesophageal hiatal hernia was not reasonable, necessary and causally related to his December 30, 2021 work exposure to smoke and other irritants.

22. In reviewing Claimant's medical history prior to the December 30, 2021 incident, Dr. Bernton noted that Claimant had diagnoses of asthma and GERD. He remarked that, although prior records reflect that Claimant suffered from pre-existing asthma, testing after the exposure revealed that he does not suffer from the condition. In fact, Dr. Bernton described that Claimant underwent methacholine challenge testing that induces asthma symptoms and is the gold standard for assessing the condition. However, Claimant had a negative result. Moreover, Claimant exhibited 98% maximum oxygen consumption on an exercise treadmill test. Dr. Bernton thus reasoned that Claimant does not have asthma. Instead, Claimant likely suffers from a somatoform disorder that constitutes a significant portion of his symptoms.

23. In addressing Claimant's alleged aggravation of GERD as a result of the December 30, 2021 exposure, Dr. Bernton commented that, in Claimant's initial evaluation at Workwell two weeks after the smoke exposure, he did not mention any increase in his GERD symptoms. However, Dr. Bernton remarked that, if Claimant's GERD had been aggravated by his occupational exposure on December 30, 2021, his symptoms would have been the most pronounced shortly after the incident. Moreover, Dr. Bernton explained that physicians performed ambulatory gastroesophageal and supraesophageal reflux monitoring on August 22, 2022 to assess Claimant's GERD condition. The testing involves the placement of electrodes in the esophagus to determine whether ph levels decrease due to increases in acid levels from reflux. The monitoring revealed normal results with .2 percent total distal esophageal acid exposure. Overall acid and nonacid reflux events remained within normal levels throughout the daytime and while lying down at night. Claimant had reported three drug and 21 respiratory symptoms but they did not correlate with observed underlying reflux events. Dr. Bernton summarized that there was no acid coming into Claimant's esophagus or mouth and the events that Claimant correlated to his symptoms were not attributable to acid based on long-term monitoring. He reasoned that Claimant thus did not suffer from GERD. In conjunction with the asthma testing, Dr. Bernton explained that Claimant has reported symptoms for conditions that do not exist. Testing simply did not support Claimant's subjective complaints of both asthma and GERD.

24. Dr. Bernton further discussed the importance of Claimant's somatoform condition in assessing his reported symptoms.

> [P]sychologic evaluation did show not only anxiety and depression, but findings consistent with a somatoform contribution to the patient's symptom profile with a level of somatic complaints, which was described as "higher than that seen in 94% of patients."
>
> Further, it is clear that a somatoform component plays a major role in the patient's symptom presentation, and simply relying on subjective symptoms as reported by the patient over time is not a sufficient basis to determine an occupational causation without objective correlation. The patient's ambulatory study for gastroesophageal and supraesophageal reflux monitoring on 08/22/2022 was normal.

25. In his hearing testimony Dr. Bernton further clarified his reasons for determining that Claimant's robotic paraesophageal hiatal hernia was not reasonable, necessary and causally related to his December 30, 2021 work exposure to smoke and other irritants.

> The work-relatedness…even if you accept his symptoms at face value, the record doesn't document an abrupt increase in those symptoms at the time or directly after that event.
>
> Second, at the time of the work-related impact the symptoms would have been the greatest and they were not. So the second thing is, I have had

> an opportunity to review the literature on WC[Redacted] workers and esophageal reflux, and it's not very strong. I mean, they found that some workers had -- and I can quote the specific literature if that's helpful -- but they found that some workers had an increased risk of esophageal reflux, but those workers were workers that also specifically had pulmonary disease. And, also, it wasn't correlated to the amount of time that they were exposed to the site. So, you know, that's -- it's a pretty weak association to begin with. And that goes to the work-relatedness of it. The reasonableness of it is directly contradicted by that study. You don't do fundoplication for acid reflux on patients with normal acid studies, and he had one. And that's -- that, I think, speaks for itself.

Dr. Bernton also determined that Claimant's surgery "clearly wasn't medically necessary."

26. Claimant has failed to establish that it is more probably true than not that the robotic repair of his paraesophageal hiatal hernia requested by ATP Dr. Woodward and performed on December 5, 2022 was reasonable, necessary and causally related to his admitted December 30, 2021 industrial injury. Initially, Claimant explained that while assisting with evacuations from the MF[Redacted] fire, he was exposed to large amounts of smoke from burning vegetation, houses, plastics, trash cans and various other materials. On January 14, 2022 Claimant visited Workwell for an evaluation and reported wheezing and shortness of breath with exertion as a result of his December 30, 2021 work activities. Claimant did not mention any increase in GERD symptoms. After a referral to National Jewish, Dr. Mayer concluded that Claimant suffered a "significant exacerbation of previously well-controlled GERD." She reasoned that, based on Claimant's prolonged exposure to irritant vapors, dust, gas, and fumes contained within the smoke in the absence of respiratory protection, Claimant aggravated his pre-existing GERD condition. Claimant ultimately underwent robotic surgery of his paraesophageal hiatal hernia with Dr. Woodward under private insurance to alleviate his GERD symptoms.

27. Despite Dr. Mayer's opinion, the record reveals that Claimant likely did not suffer an aggravation of his GERD condition during the course and scope of her employment with Employer on December 30, 2021. Objective testing for GERD was normal. Specifically, in his report of August 22, 2022, Dr. Periyalwar documented that the ambulatory gastroesophageal and supraesophageal reflux monitoring test was a "normal study" and "considered within normal limits." As Dr. Bernton persuasively explained, the testing revealed normal results with .2 percent total distal esophageal acid exposure. Overall acid and nonacid reflux events remained within normal levels throughout the daytime and while lying down at night. Claimant had reported three drug and 21 respiratory symptoms but they did not correlate with observed underlying reflux events. Dr. Bernton summarized that there was no acid coming into Claimant's esophagus or mouth and the events that Claimant correlated to his symptoms were not due to acid based on long-term monitoring. Similarly, as Dr. Bernton reasoned, Claimant does not have a diagnosis of asthma. The methacholine challenge test, or gold standard of asthma testing was negative for reactive airway disease. Furthermore, the exercise treadmill test demonstrated 98% of predicted maximum oxygen consumption. Therefore, Dr. Bernton reasoned that Claimant does not suffer from asthma.

28. Dr. Bernton persuasively explained that Claimant's somatoform disorder was the most likely source of his perceived symptoms. He agreed with Dr. Heto's psychological evaluation and report from August 30, 2022. The BHI-2 testing noted that Claimant's "level of somatic complaints was higher than that seen in 94% of patients indicating the perception of severe illness symptoms…somatic hypervigilance may be present with the patient interpreting common symptoms as being problematic." Dr. Bernton commented that Claimant was not likely consciously misrepresenting his symptoms but instead presented precisely what he actually perceived. However, the diagnostic testing revealed that there was no physiological basis for Claimant's complaints. Specifically, objective testing for GERD and asthma demonstrated that the symptoms are not physiologically-based. Therefore, Claimant's somatoform condition is the source of his perceived symptoms.

29. Based on the medical records and persuasive opinion of Dr. Bernton, the surgery performed by Dr. Woodward was not reasonable, necessary and causally related to Claimant's December 30, 2021 work activities. The surgery was intended to address Claimant's GERD symptoms. However, the objective diagnostic record is replete with evidence that Claimant did not, and does not, suffer from GERD. Furthermore, because Claimant did not suffer from GERD on December 30, 2021, his work activities at the MF[Redacted] fire did not aggravate his condition and require surgery. The surgery was thus not causally related, reasonable or necessary. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the

course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to establish by a preponderance of the evidence that the robotic repair of his paraesophageal hiatal hernia requested by ATP Dr. Woodward and performed on December 5, 2022 was reasonable, necessary and causally related to his admitted December 30, 2021 industrial injury. Initially, Claimant explained that while assisting with evacuations from the MF[Redacted] fire, he was exposed to large amounts of smoke from burning vegetation, houses, plastics, trash cans and various other materials. On January 14, 2022 Claimant visited Workwell for an evaluation and reported wheezing and shortness of breath with exertion as a result of his December 30, 2021 work activities. Claimant did not mention any increase in GERD symptoms. After a referral to National Jewish, Dr. Mayer concluded that Claimant suffered a "significant exacerbation of previously well-controlled GERD." She reasoned that, based on Claimant's prolonged exposure to irritant vapors, dust, gas, and fumes contained within the smoke in the absence of respiratory protection, Claimant aggravated his pre-existing GERD condition. Claimant ultimately underwent robotic surgery of his paraesophageal hiatal hernia with Dr. Woodward under private insurance to alleviate his GERD symptoms.

9. As found, despite Dr. Mayer's opinion, the record reveals that Claimant likely did not suffer an aggravation of his GERD condition during the course and scope of her employment with Employer on December 30, 2021. Objective testing for GERD was normal. Specifically, in his report of August 22, 2022, Dr. Periyalwar documented that the ambulatory gastroesophageal and supraesophageal reflux monitoring test was a "normal study" and "considered within normal limits." As Dr. Bernton persuasively explained, the testing revealed normal results with .2 percent total distal esophageal acid exposure. Overall acid and nonacid reflux events remained within normal levels throughout the daytime and while lying down at night. Claimant had reported three drug and 21 respiratory symptoms but they did not correlate with observed underlying reflux events. Dr. Bernton summarized that there was no acid coming into Claimant's esophagus or mouth and the events that Claimant correlated to his symptoms were not due to acid based on long-term monitoring. Similarly, as Dr. Bernton reasoned, Claimant does not have a diagnosis of asthma. The methacholine challenge test, or gold standard of asthma testing was negative for reactive airway disease. Furthermore, the exercise treadmill test demonstrated 98% of predicted maximum oxygen consumption. Therefore, Dr. Bernton reasoned that Claimant does not suffer from asthma.

10. As found, Dr. Bernton persuasively explained that Claimant's somatoform disorder was the most likely source of his perceived symptoms. He agreed with Dr. Heto's psychological evaluation and report from August 30, 2022. The BHI-2 testing noted that Claimant's "level of somatic complaints was higher than that seen in 94% of patients indicating the perception of severe illness symptoms…somatic hypervigilance may be present with the patient interpreting common symptoms as being problematic." Dr. Bernton commented that Claimant was not likely consciously misrepresenting his

symptoms but instead presented precisely what he actually perceived. However, the diagnostic testing revealed that there was no physiological basis for Claimant's complaints. Specifically, objective testing for GERD and asthma demonstrated that the symptoms are not physiologically-based. Therefore, Claimant's somatoform condition is the source of his perceived symptoms.

11. As found, based on the medical records and persuasive opinion of Dr. Bernton, the surgery performed by Dr. Woodward was not reasonable, necessary and causally related to Claimant's December 30, 2021 work activities. The surgery was intended to address Claimant's GERD symptoms. However, the objective diagnostic record is replete with evidence that Claimant did not, and does not, suffer from GERD. Furthermore, because Claimant did not suffer from GERD on December 30, 2021, his work activities at the MF[Redacted] fire did not aggravate his condition and require surgery. The surgery was thus not causally related, reasonable or necessary. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 3, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-144-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence the C4-C6 ACDF surgical procedure recommended by authorized treating provider ("ATP") Michael Rauzzino, M.D. is reasonable, necessary and related medical care.

FINDINGS OF FACT

1. Claimant, who is 46 years of age, worked for Employer as a return ramp agent. His job duties included inspecting returned rental cars, providing receipts to customers and driving customers to the airport. Claimant also works as a barber.

2. Claimant sustained an admitted industrial injury on March 22, 2022 when he was involved in a rollover motor vehicle accident ("MVA") while traveling on the highway at approximately 45 miles per hour. Claimant was the restrained driver in a vehicle that rolled over at least once and landed on the driver's side. Claimant extricated himself from the vehicle by kicking out the front windshield.

3. Denver paramedics arrived at the scene of the MVA. The paramedics noted chief complaints of dizziness and nausea. Under "Assessments" no abnormalities were documented. Claimant was alert and able to walk to the ambulance without assistance.

4. An ambulance transported Claimant to the emergency department at UC Health for further evaluation. The ambulance records note reports of dizziness, visual disturbance/photosensitivity, giddiness, low back pain, leg pain and nausea. Physical assessment revealed tenderness to palpation of left lower back and left lower leg. No visible head trauma or other visible signs of injury or abnormality were documented.

5. Claimant was admitted at the emergency department at UC Health at approximately 8:41 a.m. The approximately 56-page medical record from this visit notes Claimant was evaluated by multiple providers over the course of several hours. Jenn Fickes, RN noted at 8:43 a.m. that Claimant reported pain in the left lower back and left lower extremity and headache, but denied neck, abdomen and chest pain. Claimant endorsed light sensitivity and back pain. A musculoskeletal review of symptoms was positive for back pain. Attending physician Barbara Kay Blok, M.D. noted on examination tenderness to palpation of the lower thoracic T11-T12, left paraspinal and the left anterior forehead. There was no tenderness to palpation to the cervical spine with full cervical range of motion without paresthesia. Claimant underwent x-rays of the chest and pelvis, as well as a brain CT, none of which revealed any abnormalities. A CT scan and x-rays of the lumbar spine demonstrated anterior wedge compression deformities at L1 and L2.

6. Angela E. Downes, M.D. performed a neurosurgical consultation of Claimant at approximately 1:20 p.m. Review of systems was negative for facial swelling, neck pain, neck stiffness and arthralgias and back pain. HENT was documented as normocephalic, atraumatic. On examination, Dr. Downes noted midline lumbar spine tenderness with no neurological deficits.

7. Michael Cripps, M.D. in the acute care surgery trauma unit evaluated Claimant at approximately at 3:36 p.m. Dr. Cripps documented Claimant's chief complaint as neck/back pain. The review of symptoms for HENT was positive for neck pain and back pain. Dr. Cripps noted cervical tenderness on examination.

8. The emergency department providers diagnosed Claimant with a lumbar compression fracture and discharged him with instructions to follow up with his primary care provider.

9. Claimant established care for the work injury with authorized provider Concentra on March 29, 2022. Claimant initially presented to Nicole K. Huntress, M.D. who noted Claimant was involved in a rollover MVA with injuries to his head and back. Claimant reported back soreness. Dr. Huntress also noted Claimant "Reports R thumb numbness which he states was preexisting and he is following with his PCP." (Cl. Ex. 7, p. 259). Specific cervical complaints and examination of the cervical spine are not documented. Dr. Huntress diagnosed Claimant with a work related lumbar compression fracture and released him to modified duty.

10. Claimant saw Kathy Okamatsu, FNP at Concentra on March 31, 2022. Claimant complained of soreness in the mid spine of his lower back. Specific cervical complaints and examination of the cervical spine are not documented. NP Okamatsu's assessment was a lumbar compression fracture.

11. Claimant subsequently saw either NP Okamatsu or Leah Johansen, M.D. on April 4, April 11, April 25, May 9, May 23, and June 6, 2022. These evaluations focused on Claimant's lumbar condition. Specific cervical complaints and examination of the cervical spine are not documented.

12. Claimant attended several physical therapy sessions for his low back from April 6, 2022 through June 8, 2022. The physical therapy records from these sessions do not specifically document cervical spine complaints or examination of the cervical spine.

13. On June 14, 2022 Claimant presented to Ruth Vanderkooi, M.D. at Concentra. Claimant reported that he was having right arm pain for which he went to see his primary care physician, who ordered a cervical MRI. Dr. Vanderkooi noted that the cervical MRI obtained on June 3, 2022 showed

> C3-4 disc bulge and posterior endplate degenerative change, eccentric to the right with mild facet arthropathy, mild canal and moderate neural foraminal stenosis, C4-5 right central disc protrusion moderate to severe tight and mild left foraminal narrowing, C5-6 broad based disc bulge with mild facet arthropathy mild to moderate thecal sac, moderate right and

> mild to moderate left foraminal narrowing, C6-7 moderate right and mild to moderate left foraminal narrowing, C6-7 mild facet arthropathy, no stenosis, C7-T1 mild facet arthropathy, no stenosis.

(Cl. Ex. 7, p. 204).

14. Claimant complained to Dr. Vanderkooi of right neck pain with right arm loss of strength and numbness. Dr. Vanderkooi noted Claimant "[t]ried going back to work for 5 h, was sent home because right side seized up. Not able to do job – requires too much neck and arm movement." (Id. at 205). Physical examination of the shoulder was normal. Cervical spine range of motion was limited and there was a positive Spurling's test. Dr. Vanderkooi assessed Claimant with, *inter alia*, cervical radiculopathy due to degenerative joint disease of the spine. She noted, "Pt also has cervical disc disease with radiculopathy (new diagnosis) likely causally related to the MVA." (Id.). She referred Claimant to John Aschberger, M.D. for evaluation of his neck pain.

15. Claimant presented to Dr. Aschberger on June 22, 2022. Dr. Aschberger noted,

> [Claimant] was involved in a motor vehicle rollover accident on 3/22 and did have workup regarding the head and brain. He subsequently developed issues of cervical tightness and his main complaints are radiating symptoms to the upper extremities. He indicates to the lateral arm and radial forearm to the thumb and index finger. He has numbness, tingling, as well as pain predominantly proximal at the arm. He has had findings of weakness in therapy. Numbness has been fairly constant form.

(Id. at 200).

16. On examination, Dr. Aschberger noted good cervical flexion with mild restriction and irritation with extension. Spurling's maneuver was positive with radiating symptoms to the radial forearm. Facet loading showed no localized irritation. Dr. Aschberger assessed Claimant with cervical radiculitis, noting symptom distribution in a C6 pattern. He further noted that the 6/3/2022 cervical MRI showed disc protrusions and bulging at multiple levels C3 through C7 with moderate to severe C4-C5 foraminal narrowing on the right and moderate at C5-C6. Dr. Aschberger recommended proceeding with an EMG. He also referred Claimant to Robert Kawasaki, M.D. for a cervical epidural injection.

17. Claimant returned to Dr. Vanderkooi on June 28, 2022 reporting constant pain in the right side of his neck and down his right arm. Shoulder exam was normal. Examination of the cervical spine revealed tenderness in right paraspinal and right trapezius muscle and limited range of motion.

18. At a follow-up evaluation with NP Okamatsu on July 13, 2022, NP Okamatsu noted Claimant reported experiencing constant pain in the right trapezius and right side of his neck with an onset approximately 3-4 weeks prior. He reported that he was unable to feel his right arm and had constant numbness and decreased feeling in his

fingers. On examination NP Okamatsu noted tenderness in right paraspinal and right trapezius muscle, no bilateral muscle spasms, and full cervical range of motion with painful flexion. NP Okamatsu noted similar complaints and exam findings on July 27, 2022.

19. Claimant returned to Dr. Aschberger on August 3, 2022 with continued pain at the right neck with radiation of symptoms to the right arm, radial forearm to the thumb and index finger. On examination, Dr. Aschberger noted positive Spurling's maneuver with radiation into the arm, thumb and index finger. Facet loading was negative. Dr. Aschberger performed EMG testing of the right upper extremity and associated cervical paraspinal musculature. The EMG did not identify any abnormalities indicating a radicular process. Nerve conduction values were within normal range. Dr. Aschberger's assessment was persistent symptoms of cervical radiculitis.

20. On August 5, 2022 Claimant reported to Dr. Huntress increased neck pain, pain in his right arm, and numbness in his thumb and second digit. Dr. Huntress noted the cervical MRI demonstrated moderate foraminal narrowing at C5-6 and moderate to severe foraminal narrowing at C4-5. She remarked that Claimant's symptoms were consistent with C6 radiculopathy. Examination revealed tenderness of the cervical spine and right trapezius muscle with full range of motion and sensory deficits of the right thumb and lateral aspect of the second digit.

21. Claimant began physical therapy for his neck on August 15, 2022. Katrina Palmer Seal, PT at Concentra noted

> Pt reports that he has been experiencing neck pain and radicular symptoms since the accident on 3/22/22. He states that he thought it was originally related to his lower back compression fractures, however did not improve. MRI showed compression of C6 nerve root. He states that he primarily has pain along the R side of his neck and R UE. He has constant numbness in this thumb and index finger. Pain radiates from lateral shoulder to volar forearm into radial hand. Symptoms increase with any activity.

(Cl. Ex. 7, p. 168).

PT Palmer Seal noted tenderness to cervical paraspinals, normal cervical range of motion, and a positive Spurling's test on the right. Claimant subsequently attended multiple physical therapy sessions at Concentra for treatment to his neck, which did not result in any significant improvement.

22. Claimant presented to Dr. Kawasaki on August 24, 2022 with complaints of neck pain with radiation down the right upper extremity with numbness and tingling. Dr. Kawasaki noted that a cervical MRI showed evidence of right-sided foraminal narrowing at C5-6. He administered a right C5-C6 transforaminal epidural steroid injection/C6 spinal nerve block to Claimant at this visit.

23. On September 15, 2022 Dr. Aschberger noted Claimant underwent a right C5-6 transforaminal injection on 8/24/2022, with pain level pre-injection of 5-8/10 and post-injection 0-2/10. Claimant confirmed relief of symptoms from the injection, including decreased irritation in the arm and hand but persistent recurrent numbness. On examination, Dr. Aschberger noted mild restriction of cervical extension and lateral flexion. Spurling's maneuver resulted in radiation to the lateral arm. There was mild weakness in the triceps compared to the left side. Dr. Aschberger opined Claimant had a diagnostic response to the first injection and referred Claimant for second injection at C7-T1.

24. On October 12, 2022 Claimant underwent a right C7-T1 interlaminar epidural steroid injection performed by Dr. Kawasaki.

25. On October 27, 2022 Dr. Aschberger noted Claimant's pain levels pre-injection on 10/12/2022 were 4-9/10 and post injection pain levels were 0-3/10. Claimant reported no long term gains from the second injection with persistent neck pain radiating into the right arm. Spurling's test resulted in radiation down to the radial forearm and radial hand. Dr. Aschberger opined that the second injection was diagnostic but provided no long term benefit. He referred Claimant for a surgical consultation for his C6 radiculopathy, noting Claimant had a positive Spurling's maneuver and corresponding MRI.

26. Claimant first presented to neurosurgeon Michael Rauzzino, M.D. on November 7, 2022. Dr. Rauzzino noted that the first injection by Dr. Kawasaki was diagnostic, but not therapeutic and the second injection was not helpful. He further noted that the cervical spine MRI showed disc herniation at C5-6 and foraminal stenosis at C4-5. On examination there was a positive Spurling maneuver sign with paresthesia in the right C6 distribution along with some weakness at his biceps on the right compared to the left. Dr. Rauzzino discussed Claimant's treatment options, including undergoing either a two-level ACDF or two-level disc replacement. He recommended Claimant undergo an updated cervical MRI, CT, and x-rays.

27. A repeat cervical MRI was performed on November 14, 2022. William Wall, M.D. gave the following impression: C4-C6 age-indeterminate disc protrusion with moderate central canal narrowing and severe bilateral neural foraminal narrowing; C5-C6 degenerative disc osteophyte complex with moderate central canal narrowing and severe right and moderate left neural foraminal narrowing; cervical cord is normal without cervical cord compression, myelomalacia, syrinx formation, or cord lesion; no fracture or spondylosis; no evidence of ligamentous injury. (Cl. Ex. 16, p. 271).

28. Claimant also underwent a CT scan of the cervical spine on November 14, 2022 which demonstrated multilevel degenerative disc disease and degenerative central canal and neural foraminal narrowing.

29. On November 22, 2022 John Burris, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. As part of his examination, Dr. Burris reviewed Claimant's medical records, noting that despite Claimant denying any

prior back or neck injuries, a review of a 2020 physical therapy record for his lumbar spine documented a prior MVA in 2005 involving fractures of some bones in his back. Dr. Burris noted that the medical records contained no documentation of significant neck complaints until approximately two months after the March 22, 2022 MVA. On examination, Dr. Burris noted diffuse tenderness in the right paraspinal region without muscle spasm or trigger points and positive Spurling's on the right with reported radiation down the right arm. There was reported decrease in sensation in the thumb and index finger of the right hand. Dr. Burris gave an assessment of low back pain, neck pain and cervical radiculitis. He opined that Claimant's cervical spine condition is not causally related to the March 22, 2022 MVA, based on lack of involvement of the neck with the original injury, and a significant delay in the onset of neck symptoms.

30. Claimant returned to Dr. Rauzzino on December 5, 2022. Dr. Rauzzino reviewed Claimant's updated imaging, noting the most recent cervical MRI demonstrated disc protrusion at C4-C5 with central and foraminal stenosis and C5-C6 with central narrowing and severe right greater than left foraminal stenosis. He wrote,

> Based on my direct review of the MRI, I do not believe the component C5-C6 is actually a somewhat acute free fragment. It is a free fragment of disc. We reviewed the CT as well as the MRI and he does have a significant kyphosis at this level. I think based on his anatomy and the need adequately decompress the nerves, I think he would be best served with a two-level ACDF.

(Cl. Ex. 7, p. 104)

He further stated,

> On my examination, he continue to have signs, symptoms of a right greater than left cervical radiculopathy. He has a positive Spurling's on the right producing paresthesia in the right C6-C6 distribution. He continues to have numbness and tingling in the first 3 digits of his right hand. He has had diagnostic but not therapeutic injections and he would like to have definitive surgical treatment, in the far hands this would be a C4-C6 ACDF. This is how he would like to proceed.

(Id.).

31. Dr. Rauzzino submitted a request for authorization of C5-C7 ACDF on December 8, 2022.

32. Dr. Burris testified by pre-hearing deposition on January 5, 2023. Dr. Burris testified as Level II accredited expert in occupational medicine. Dr. Burris testified that Claimant denied to him any prior injuries or pain involving his neck, right arm and low back; however, prior medical records from 2020 documented left-sided low back pain with left-sided sciatica and a prior history of MVA in 2005 with some fractured bones in his back but complete recovery. Dr. Burris testified that Claimant's the findings on Claimant's cervical MRI were largely degenerative and preexisting. He explained that

bony changes are preexisting and disc changes are non-specific and commonly seen in degenerative conditions. Dr. Burris testified that it is very common to see degenerative changes in asymptomatic individuals.

33. Dr. Burris testified that there was no evidence in medical records from the date of injury through June 6, 2022 indicating Claimant suffered radicular symptoms from his cervical spine. He stated that it was highly unlikely three independent providers at Claimant's emergency department evaluation would fail to document cervical complaints and findings. Dr. Burris testified that the first positive Spurling's test was documented on June 14, 2022. He opined that, while possible the MVA resulted in a cervical injury, it was not probable, based on the significant delay in the onset of symptoms. Dr. Burris acknowledged that there were findings on his examination, as well as the examinations of Drs. Aschberger, Kawasaki and Rauzzino of protentional nerve root irritation as an indication for surgery. He deferred to Dr. Rauzzino's opinion as to whether the surgery would improve Claimant's condition, but maintained that the surgery is not causally related to the work injury.

34. On January 17, 2023 John Hughes, M.D. performed an IME at the request of Claimant. Claimant reported to Dr. Hughes that his lumbar spine began to improve during physical therapy but during this time he also had cervical spine pain. On examination, Dr. Hughes noted cervical paraspinous tenderness without palpable hypertonicity, positive right-sided Spurling's and guarded range of motion. There was also upper extremity right thenar muscular atrophy and diminished sensation in a right C6 distribution. Dr. Hughes concluded Claimant sustained a cervical spine sprain/strain injury as a result of the March 22, 2022 MVA, that only gradually became symptomatic with cervical spine pain and right upper extremity radiculopathy. He opined that it was reasonable to relate the high-energy rollover MVA with documented closed head injury with Claimant's emerging cervical spine disc herniation with right radiculopathy. He agreed with the findings of Dr. Rauzzino's December 5, 2022 report and opined that the recommended cervical surgery is reasonable, necessary and related to the March 22, 2022 MVA.

35. Dr. Hughes testified at both a pre-hearing deposition on March 9, 2023 as well as at hearing. Dr. Hughes testified as a Level II accredited expert in occupational medicine. He testified consistent with his IME report and continued to opine the March 22, 2022 MVA caused a cervical spine injury. Dr. Hughes acknowledged that Claimant's medical records dated March 31, 2022 through June 14, 2022 do not document cervical spine pain and that his diagnostic tests do not establish the definitive age or cause of Claimant's pathology. Nonetheless, he testified that the mechanism of injury, along with Claimant's objective pathology and symptoms, are consistent with trauma sustained in the work-related MVA. Dr. Hughes explained that a high-energy MVA necessitating a brain CT is sufficient to cause injury to the cervical spine. He testified that it was not impractical for Claimant to not experience immediate severe neck symptoms and to become more symptomatic over a short period of time. Dr. Hughes testified that the findings of Claimant's June 2022 and November 2022 cervical MRIs correlate with Claimant's symptoms. He further explained that Claimant's exam findings, including positive Spurling's results as documented by multiple physicians, are also consistent

with Claimant's MRI findings. Dr. Hughes testified that Claimant's injections were diagnostic. Dr. Hughes opined that the surgery recommended by Dr. Rauzzino is reasonably necessary to address Claimant's radiating pain, numbness and weakness.

36. Claimant testified at hearing that he struck his head on the driver's side window during the MVA. He testified that he experienced neck and back pain at the time, but that that the back pain was the most problematic. Claimant testified he told his providers of his neck complaints and ultimately went to his primary care physician because his providers were not addressing his neck and arm. He testified that he did not have any neck treatment or neck injuries prior to the work injury. Claimant further testified he experiences continued symptoms and functional limitations.

37. Dr. Burris testified by post-hearing deposition on March 23, 2023. He continued to opine that there is no objective evidence the March 22, 2022 MVA caused a cervical spine injury, based on the delay of documented neck complaints and findings in the records. Dr. Burris opined that Claimant the recommended surgery is necessary, but not causally related. He further testified that the Medical Treatment Guidelines recommend that a psychological evaluation is completed prior to surgery, which Claimant has not had.

38. The ALJ finds the opinions of Drs. Hughes, Aschberger, Rauzzino and Vanderkooi, as supported by the medical records and Claimant's credible testimony, more credible and persuasive than the opinion of Dr. Burris.

39. Claimant proved it is more probably true than not the C4-C6 ACDF requested by Dr. Rauzzino is reasonable, necessary and related medical care.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact

finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

Respondents are liable for medical treatment that is causally related and reasonably necessary to relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S.; *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant proved it is more probably true than not the surgery recommended by Dr. Rauzzino is reasonably necessary and causally related medical treatment. Respondents argue that the work-related MVA did not result in any injury to Claimant's cervical spine, relying on the opinion of their IME physician Dr. Burris. Dr. Burris opined that no causal relationship exists between the work injury and Claimant's cervical complaints, based on what he considered to be significant delay in Claimant's documented neck complaints in the medical records. While, at different points in the emergency department records, providers document no cervical complaints or findings, Dr. Cripps specifically documented Claimant's reports of neck pain and cervical tenderness on examination. Claimant credibly testified that he experienced neck pain at

the time of his injury, although the primary symptoms at the time were in his low back. Subsequent records indicate a focus on Claimant's low back until June 2022. Dr. Hughes credibly opined that Claimant sustained a cervical spine sprain/strain injury as a result of the MVA, that gradually became symptomatic with cervical spine pain and right upper extremity radiculopathy. Dr. Hughes' opinion that Claimant's cervical condition is work-related is supported by the opinion of Dr. Vanderkooi, who also opined that Claimant's cervical condition is likely related to the MVA.

Claimant credibly testified that prior to the work injury he did not have any neck injury or treatment. While Dr. Huntress noted some pre-existing right thumb numbness, no evidence was offered indicating Claimant's pre-existing symptoms and limitations were similar to those post work injury. Since the work injury, Claimant has experienced a gradual onset of neck pain radiating into his right upper extremity. To the extent Claimant had pre-existing degenerative pathology, the evidence demonstrates it is more likely than not the MVA aggravated, accelerated or combined with Claimant's pre-existing condition to produce disability and the need for treatment. Thus, the totality of the evidence establishes that the recommended surgery is causally related medical treatment.

The preponderant evidence also establishes the recommended surgery is reasonably necessary to cure and relieve the effects of Claimant's cervical condition. There is extensive objective medical evidence of Claimant's cervical pathology and need for the recommended surgery, including exam findings, MRI findings and diagnostic injections. Dr. Rauzzino recommended the surgery based on Claimant's anatomy and need to adequately decompress the nerves. Dr. Hughes credibly opined the surgery would likely help in relieving Claimant's symptoms. While Dr. Burris disagrees the surgery is causally related, he acknowledges the necessity of the surgery. Accordingly, Claimant has met his burden to demonstrate the C4-C6 ACDF is also reasonable and necessary medical treatment.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for the C4-C6 ACDF surgical procedure requested by Dr. Rauzzino.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 4, 2023

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-127-145-003

ISSUE

1. Did Respondents establish by a preponderance of the evidence that they should be able to withdraw the General Admission of Liability (GAL)?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 62 year-old woman who has worked for Employer since approximately November 2, 2018, and continues to work for Employer as a cashier.

2. In June 2019, Claimant lived with a co-worker, [Redacted, hereinafter SS], a dispatcher for Employer. Claimant testified that SS[Redacted] owned the home, and Claimant rented a room from her. Two of Claimant's co-workers, [Redacted, hereinafter RS] and [Redacted, hereinafter TM], lived together two houses down from Claimant. TM[Redacted] was Claimant's manager.

3. Claimant testified that in 2019 she would make and sell burritos at work to supplement her income. On July 22, 2019, Claimant exchanged text messages with RS[Redacted]. He had ordered burritos earlier, but wanted two more. Claimant texted RS[Redacted] saying she would be over by 9:30 a.m. At 10:41, Claimant texted RS[Redacted] and said "[j]ust don't tell SS[Redacted] you paid me she'll be upset." (Ex. A). Claimant testified that SS[Redacted] did not want Claimant to charge her friends for burritos.

4. Claimant testified that while going to RS[Redacted] house to deliver the burritos, she fell on the walkway to the house, and landed on her knees. There is nothing in the e-mail exchange on July 22, 2019 between Claimant and RS[Redacted] regarding the fall. The only subsequent text on that date related to not telling SS[Redacted] that RS[Redacted] paid for the burritos. (Ex. A).

5. Claimant credibly testified that she did not have any scars or abrasions on her knees from her fall on July 22, 2019. Further, Claimant did not seek medical attention following the fall. There is no objective evidence in the record that Claimant injured herself, or that she had any difficulty walking following her fall on July 22, 2019.

6. On July 26, 2019, Claimant went to Aurora Family Practice Group, P.C. for a new patient visit, and Mark Nathanson, D.O. evaluated her. Claimant credibly testified that the main reason for her July 26, 2019, doctor's appointment was get her thyroid medication filled, since she recently got insurance. She further testified that she told the doctor she experienced cracking and popping in her knees. In the medical record Dr.

Nathanson noted that Claimant's gait was within normal limits. He also noted "R knee with effusion vs patellar edema." Dr. Nathanson ordered bilateral x-rays of Claimant's knees. (Ex. B). The radiology reports for both knees noted that Claimant had bilateral knee swelling and popping sensation over last five years, but the impression was normal for both knees. (Ex. C and D).

7. On August 2, 2019, Claimant returned to Dr. Nathanson for an annual examination. Claimant completed a "Well-Woman Exam" form, and under the section asking her to describe any concerns she had, Claimant wrote "my knee and my thyroid haven't taken med for it." She also noted in the "exercise" section that she stopped walking four miles at a time because of "her knee." Dr. Nathanson diagnosed Claimant with patellofermoral syndrome. He gave Claimant a steroid injection in her right knee. (Ex. E).

8. The ALJ finds that Claimant went to see Dr. Nathanson on July 26, 2019 to establish a physician-patient relationship and on August 2, 2019 to have an annual examination. The ALJ further finds that the doctor visits on July 26, 2019 and August 2, 2019, were not related to Claimant's fall on July 22, 2019.

9. Claimant testified that on August 15, 2019, she arrived at work and parked her car. She was walking through the gate to the valet when she fell and hit her left knee and left elbow on the curb. Claimant testified she was limping through the parking lot, and her general manager ordered an Uber and sent her to Concentra. The ALJ finds this testimony credible.

10. Claimant was evaluated by Michael Roberts, P.A. at Concentra. Claimant told Mr. Roberts that she tripped on poured concrete and landed on her left knee. She further reported never having a previous knee injury. Mr. Roberts diagnosed Claimant with a left knee contusion, and noted that she had a small abrasion on her left knee. He gave her an Ace wrap and crutches. She declined a referral for physical therapy at that time. Claimant's restrictions were that she "must use crutches/non weight bearing/should be sitting 90% of the time." (Ex. F.)

11. Claimant testified she was in so much pain on August 15, 2019, she forgot to tell Mr. Roberts about the injection in her right knee a few weeks prior. The ALJ finds this testimony credible.

12. On August 21, 2019, Claimant returned to Concentra for a follow up appointment. Claimant reported that the bruising on her left knee had worsened, as had the pain right below her kneecap. She told Devin Jacobs, P.A., that her right knee had increased pain and a lump due to putting more pressure on it. Mr. Jacobs noted in the medical record that Claimant's PCP gave Claimant an injection in her right knee at the "beginning of the month." Mr. Jacobs gave Claimant a referral for physical therapy. She was to continue using the Ace wrap and crutches. Her work restrictions continued. (Ex. G).

13. Claimant continued treatment with Concentra. On May 22, 2022, Respondents filed a GAL admitting to medical benefits, temporary total disability benefits, and temporary partial disability benefits. (Ex. 3)

14. Subsequent to the May 22, 2022 GAL, Respondents learned of a text message Claimant sent RS[Redacted] on August 15, 2019, the day of the incident at work. The text reads:

> I said I fall in the parking lot, hope you did tell TM[Redacted] that fall at your house? I'm at Concenta Bing checked ☹ hurt my left knee

(Ex. A).

15. Claimant testified that the August 15, 2019 text was mistakenly sent to RS[Redacted], but was intended for SS[Redacted]. She further testified that she was trying to tell her roommate, SS[Redacted], that she had fallen in the parking lot, but when she was picked up by the Uber immediately following her fall, Claimant put her phone in her purse, and was unaware of the text until it was brought to her attention. When asked what she meant by "your house", Claimant had no explanation. She further testified that she had never fallen at SS's[Redacted] house. Claimant explained she is simply "not that great" with texting. Claimant also testified that she needs new glasses and that may have caused the error.

16. The ALJ does not find Claimant's testimony regarding the August 15, 2019 text message to RS[Redacted] to be credible. The ALJ, however, does not find Claimant's August 15, 2019 text message, to be evidence that she did not fall at work on August 15, 2019.

17. As found, Claimant suffered a compensable injury on August 15, 2019, when she fell on her left knee in the parking lot at work. Claimant's failure to disclose the previous steroid injection in her right knee, at her initial Concentra visit, was not a material misrepresentation or concealment. Claimant did not materially misrepresent a workers' compensation claim resulting in Respondents filing an admission of liability.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in

the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

An injury is compensable under the Act if incurred by an employee in the course and scope of employment. § 8-41-301(1)(b), C.R.S.; *Price v. Indus. Claim Appeals Office,* 919 P.2d 207 (Colo. 1996). The claimant must show a connection between the employment and the injury such that the injury has its origin in the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *See Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999). To prove causation medical evidence is not necessary and the claimant's testimony, as well as the constellation of facts surrounding the claimant's injury, have sufficed to establish the requisite *nexus* between her injury and work. *See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). If a pre-existing condition is stable but aggravated by an occupational injury the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Indus. Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce a disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Additionally, if the industrial injury aggravates, accelerates or combines with a pre-existing disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan*, 107 P.3d at 1001.

The ALJ found Claimant's testimony regarding her fall on August 15, 2019 at work, to be credible. Claimant's testimony concerning the work relatedness of her left knee injury is supported by the medical records. The evidence reflects that Claimant had a contusion on her left knee and she was restricted to using crutches. Claimant had a history of swelling and popping in her knees, but she was not required to use crutches or go to physical therapy prior to her August 15, 2019 injury. Although Claimant did not tell her treating providers at her first visit of the cortisone injection in her right knee in mid-

July, six days later at the August 21, 2019 visit she did make that representation. Additionally, the injection was in Claimant's right knee, and Claimant's original admitted injury involved her left knee. The medical records are consistent that Claimant's left knee required treatment in the form of crutches, physical therapy, and a leg sleeve following the August 15, 2019 injury. As found, Claimant suffered a compensable injury on August 15, 2019.

Withdrawal of a General Admission of Liability

Section 8-43-203(1)(c) of the Colorado Revised Statutes provides:

> The employer or, if insured, the employer's insurance carrier may not withdraw initial admission of liability on the issue of compensability filed pursuant to this subsection (1) if two years or more have elapsed since the date the initial admission of liability was filed with the division, except in cases of fraud.

Because admissions of liability may not ordinarily be withdrawn retroactively, the party seeking reopening bears the burden of proof by a preponderance of the evidence to establish the existence of fraud. § 8-43-201(1) C.R.S; *see Salisbury v. Prowers Cnty. School District*, WC 4-702-144 (ICAO June 4, 2012). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *In re Arcynski*, WC 4-156-147 (ICAO Dec. 15, 2005).

Here, Respondents seek to withdraw the May 22, 2022 GAL based upon fraud. To prove fraud or misrepresentation, Respondents must show: (1) a false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) knowledge on the part of one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is more, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) making of the representation or concealment of the fact with the intent that it be acted upon; (5) action based on the representation or concealment resulting in damage. *In re Arczynksi, supra, citing Morrison v. Goodspeed*, 68 P.2d 458 (Colo. 1937).

As found, Claimant suffered a compensable injury on August 15, 2019. Although the circumstances surrounding Claimant's August 15, 2019 text message are confusing, and Claimant's testimony regarding the text message was not credible, the text message standing alone without any other collaborating evidence does not undermine the fact that Claimant has had extensive medical care, all of which Claimant's designated physicians have deemed to be related to her workplace injury of August 15, 2019. But for the one text message, no medical provider has questioned Claimant's injury, symptoms, or the need for treatment. As found, Claimant's failure to disclose the previous steroid injection at her first Concentra appointment is not material, and it was not a concealment of a material fact. Respondents have failed to demonstrate by the preponderance of the

evidence that Claimant knowingly made a false representation to Employer indicating she sustained work injuries to gain workers' compensation benefits.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she suffered an injury in the course and scope of her employment on August 15, 2019.

2. Respondents have failed to establish by a preponderance of the evidence that Claimant perpetrated a fraud.

3. Respondents' request to withdraw the General Admissions of Liability is denied.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 4, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-797-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits from August 28, 2022, ongoing until terminated pursuant to statute.

II. Whether Claimant made a proper showing justifying a change of physician.

STIPULATIONS

At hearing the ALJ approved the parties' stipulation to an average weekly wage ("AWW") of $680.00.

FINDINGS OF FACT

1. Claimant is 68 years of age. Claimant's regular job duties involved cleaning and picking up debris on construction sites and moving drywall.

2. Claimant sustained an admitted industrial injury on January 18, 2022. Claimant experienced pain in his low back when lifting and pulling a sheet of drywall.

3. Claimant reported the incident to his supervisor, who advised Claimant to go see a doctor of Claimant's choosing. Employer did not provide Claimant a list of designated providers.

4. The following day Claimant went to what he describes as a "Mexican store" and underwent some injections that provided him some benefit.

5. Claimant then sought treatment at Clinica Family Health ("Clinica") on January 20, 2022 with complaints of low back pain and decreased mobility and weakness in his legs. Claimant presented with a walker. On examination, Chelsea Batten, PA noted increase pain with all movement of the lower extremities as well as tenderness in the lumbar region. She gave an assessment of acute midline low back pain without sciatica and weakness of both lower limbs. PA Batten prescribed Claimant Tylenol and prednisone and referred him for a lumbar spine MRI and physical therapy.

6. Claimant underwent a lumbar spine MRI on January 20, 2022. Trent Paradis, M.D. provided the following impression:

1. Minimal to mild multilevel degenerative disc disease. No disc herniation or high-grade spinal canal or neuroforaminal narrowing.

2. Small right foraminal disc protrusion at L3-4 causes mild neuroforaminal narrowing but does not contact the nerve root.

3. Marrow edema in L5 pars interarticularis region and pedicles bilaterally, right greater than left, is a potential source of low back pain. This is likely due to chronic stress reaction. No discrete fracture is seen. There is also mild bilateral facet arthrosis at L5-S1.

(Cl. Ex. 7).

4. Claimant returned to Clinica on January 25, 2022 with complaints of worsening back pain and decreased mobility and tingling in his legs. Diane Asher, NP reviewed the January 20, 2022 lumbar MRI and documented the same assessment. On examination she noted decreased strength in the bilateral lower extremities, lumbar spine tenderness, decreased lumbar spine range of motion, and an antalgic gait. NP Asher prescribed Claimant Meloxicam for pain.

5. At a follow-up evaluation at Clinica on January 31, 2022 Claimant complained of mid and low back pain radiating into his bilateral thighs. He reported that his symptoms were aggravated by bending, daily activities, rolling over in bed, sitting, standing, twisting and walking. On examination, the provider noted an antalgic gait, muscle spasms in the thoracic and lumbar spine, thoracic tenderness, and pain in Claimant's right and left buttocks. Claimant underwent an injection of Toradol in his left buttock for pain and was prescribed Lidocaine patches for pain and Flexeril for muscle spasms.

6. Claimant began physical therapy at Therahand Physical Therapy on February 4, 2022. Andrew Klein, PT noted that Claimant presented with decreased muscle strength, decreased muscle flexibility, impaired gait, positive special test, and impaired posture. Claimant attended 14 physical therapy sessions between February 11, 2022 and May 18, 2022, at times reporting some improvement but continued symptoms.

7. On February 7, 2022 Claimant saw Jesus Santana PA-C at Clinica. Claimant reported some relief with the injections but persistent pain. Claimant was now wearing a back brace along with using a walker. On examination PA Santana noted an antalgic gait, and lumbar spine spasms and tenderness. His diagnosis was acute midline low back pain and bilateral sciatica. Claimant underwent a Toradol injection to his right buttock.

8. On February 21, 2022 Rachel Laaff, NP at Concentra noted Claimant was not improving with conservative treatment. She referred Claimant for a neurosurgical evaluation and prescribed Claimant Cymbalta for additional pain relief.

9. Claimant returned to Clinica on March 4, 2022 with continued symptoms. Claimant reported that the spoke with the neurosurgery department but elected not to proceed with an evaluation due to the cost and work. The provider noted Claimant was using a walker and belt brace for added support. Claimant underwent an injection to his left deltoid.

10. Claimant underwent an injection to his right deltoid on March 18, 2022 at Clinica.

11. On March 21, 2022 W. Rafer Leach, M.D. performed an Independent Medical Examination ("IME") at the request of Claimant. On examination of the lumbar spine Dr. Leach noted myospasm, positive facet examination, limited range of motion, a positive SI joint Fortin finger test, and diffuse gluteal spasm. Based on his interview with Claimant, review of records, and physical examination, Dr. Leach diagnosed Claimant with headaches; cervical thoracic, lumbar and gluteal myospasm; cervical axial pain with clinical facet syndrome; thoracic strain; lumbosacral axial pain concerning facet syndrome; nonspecific bilateral thoracolumbar radiculitis; sacroiliitis; adjustment disorder with depression and anxiety and repetitive sleep intrusion. Dr. Leach concluded that Claimant's symptoms and injuries were causally related to the January 18, 2022 work incident. He opined that Claimant had not reached maximum medical improvement ("MMI"), recommending additional treatment including, inter alia, 48 more sessions of physical therapy, lumbar flexion and extension x-rays to evaluate instability, and L4-5 and L5-S1 bilateral facet injections, possible medial branch blocks. Dr. Leach recommended the following work restrictions: maximum lifting, pushing, pulling and carrying of 10 pounds infrequently; no repetitive lifting, carrying, pushing or pulling; 15 minutes of position change per hour of static posture; and work limited to four hours per day, three days per week.

12. Claimant returned to NP Laaff on March 29, 2022 with continued low back pain radiating into bilateral lower extremities. NP Laaff noted Claimant did not have any significant improvement with treatment. Claimant underwent a repeat Toradol injection into his deltoid muscle.

13. On August 8, 2022 Dr. Leach issued a response to letter from Claimant's counsel regarding Claimant's work restrictions. Dr. Leach opined that the work restrictions he recommended in his March 2022 IME report applied as of the date of the injury and continued through such time as further medical care was implemented and Claimant's response to such care was evaluated. He opined Claimant had been medically unable to work his regular employment since the date of the work injury.

14. PA Santana reevaluated Claimant on September 27, 2022. Claimant continued to report low back pain. On examination PA Santana noted lumbar spine tenderness and reduced range of motion. He prescribed Claimant Naproxen and Tizanidine and referred him for more physical therapy.

15. On December 30, 2022 Claimant saw Pamela Guthrie M.D. at Clinica. Claimant reported continuing symptoms. He further reported that he remained unable to lift heavy items but that he could now walk. Claimant was referred for physical at North Boulder Physical Therapy.

16. Claimant began physical therapy at North Boulder Physical Therapy on January 4, 2023. Claimant reported pain with lifting, sleeping, walking a distance of more than one mile, carrying things, and performing household chores. He reported that he was unable to resume work, and that he was unable to walk well and experienced tension

throughout his back when standing and walking. Elizabeth Paige Dow, PT noted an antalgic gait, decreased lumbar spine range of motion, muscle guarding and tension in the lumbar paraspinals. Claimant attended 5 physical therapy sessions at North Boulder Physical Therapy from January 16, 2023 through February 13, 2023, reported some improvement in his symptoms and function.

17. Dr. Leach performed a follow-up IME on February 10, 2023 during which he reexamined Claimant and reviewed additional records. Claimant complained of severe pain in his low back radiating into his buttocks, hip region and lower extremities. Claimant reported that his low back symptoms were aggravated by prolonged sitting and standing, sleep, lifting, bending, sneezing, coughing, recreational activities, driving and traveling. He had mild improvement with medication. Dr. Leach noted that his physical examination was generally unchanged from the March 2022 exam. He continued with the same diagnosis as well as recommendations for treatment and restrictions in his March 2022 IME report.

18. Dr. Leach credibly testified at hearing on behalf of Claimant. He testified consistent with his IME report. He reiterated his opinion that Claimant suffered from a work-related injury and requires further treatment and restrictions. Dr. Leach testified that Claimant is unable to perform his regular work duties and is not at MMI. Dr. Leach testified that he did not examine Claimant as a treating doctor and was paid by Claimant for his IME.

19. Other than Dr. Leach's IME reports, the medical records do not address work restrictions.

20. Claimant credibly testified at hearing. Claimant testified he continues to experience constant low back pain as well as pain on his sides and his bilateral lower extremities. Claimant testified he has not worked since the date of the work injury due to the work injury. Claimant testified he is unable to perform his regular job duties. Claimant testified that he selected Clinica as his provider because he had no money. Claimant testified that Clinica did not refer him to Dr. Leach.

21. Claimant offered to testimony or other evidence as to why he is requesting a change in physician. Claimant did not indicate any particular reason for his request to change physicians nor indicate any specific dissatisfaction with his medical care at Clinica.

22. Claimant has not worked since the date of the work injury. From the date of injury through August 27, 2022 Employer continued paying Claimant his regular wages of $17.00 per hour for 40 hours per week. Claimant subsequently incurred wage loss due to the work injury.

23. The ALJ credits the testimony of Dr. Leach and Claimant, as supported by the medical records, and finds that Claimant proved it is more probably true than not he is entitled to TTD benefits from August 28, 2022, ongoing.

24. Claimant failed to make a proper showing to justify a change of physician.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection

between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME’s MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Respondents contend that Claimant failed to demonstrate entitlement to TTD benefits from August 28, 2022 and ongoing as Claimant’s treating physicians did not remove Claimant from work. That the records of Claimant’s treating providers do not specifically address work restrictions does not preclude Claimant from an award of TTD benefits based on the totality of the evidence.

A claimant is not required to present medical evidence to prove the work injury rendered him physically unable to perform his regular employment. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). A claimant’s testimony alone is sufficient to demonstrate a disability. (*Id*.). Claimant’s regular job duties of cleaning and moving items inherently required continuous lifting, carrying, bending, standing and walking. Claimant credibly testified, and consistently reported, that he was unable to perform his regular job duties as a result of the work injury. No evidence was offered indicating Claimant had issues performing his job duties prior to the work injury. The medical records document findings of pain, decreased range of motion, antalgic gait, and spams. Various records also document Claimant’s use of a walker and back brace. Dr. Leach credibly and persuasively opined that Claimant’s work-related condition has continued to render Claimant unable to perform his regular employment.

Claimant was unable to effectively and properly perform his regular employment due to the work injury. As a result, he has not worked since January 18, 2022. Claimant began to incur actual wage loss as a result of the disability on August 28, 2022 as Employer ceased paying him his regular wages as of that date. No evidence was offered demonstrating that Claimant has reached MMI, returned to regular or modified employment, or that the attending physician has given Claimant a written release to

return to regular or modified employment. Accordingly, the preponderant evidence demonstrates that Claimant is entitled to TTD benefits from August 28, 2022 and ongoing, until terminated by operation of law.

Change of Physician

Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO Nov. 19, 2014).

As found, Claimant failed to make a proper showing justifying his request to change physicians. Claimant offered no explanation regarding his request to change physicians. Claimant did not allege nor offer any evidence of even "mere dissatisfaction" with Clinica's treatment. It is not alleged there is any bias or incompetence on the part of Clinica. The ALJ is left to infer that Claimant would simply prefer that Dr. Leach act as his treating physician, which is insufficient in this case to establish a proper showing justifying a change in physician.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits from August 28, 2022, ongoing, until terminated by operation of law.

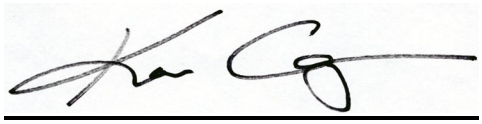
2. Claimant failed to make a proper showing justifying a change of physician. Claimant's request for a change of physician is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 8, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS STATE OF COLORADO
WORKERS' COMPENSATION NO. WC5-201-474-002

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer?

- Whether Respondents have proven by a preponderance of the evidence that Claimant is an independent contractor for Employer?

- If Claimant has proven that he suffered a compensable injury, whether Claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable, necessary and related to cure and relieve Claimant from the effects of his industrial injury and provided by a physician who was authorized to treat Claimant for his injury?

- If Claimant has proven that he suffered a compensable injury, whether Claimant has proven by a preponderance of the evidence that that he is entitled to temporary total disability ("TTD") benefits from September 27, 2021 to December 6, 2021?

- If Claimant has proven that he suffered a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD") benefits from December 7, 2021 and ongoing?

- If Claimant has proven by a preponderance of the evidence that that he is entitled to temporary disability benefits, whether respondents proven by a preponderance of the evidence that the temporary disability benefits may be terminated by statute.

- If Claimant has proven that he suffered a compensable injury, what is Claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was hired by Employer to perform services associated with being a catering chef. Employer is a catering company operating in the Aspen area that caters to private events in the area. [Redacted, hereinafter KF], the owner for Employer, testified that Employer would cater events that included meals to clients' homes/residences, birthdays, weddings, bar mitzvahs and corporate events. KF[Redacted] testified that Employer has been in business for 25 years and has three employees, himself, [Redacted, hereinafter TJ], the executive chef, and [Redacted, hereinafter LM], the sous chef. Employer leases space at a building owned by the [Redacted, hereinafter FE] which includes a kitchen and refrigerators that are used by Employer.

2. Claimant testified he began working for Employer on or around August 2019. Claimant testified he was September 26, 2021 when he was descending stairs at the FE[Redacted] building and fell. Claimant testified he was loading a car with food to take to an event when he was injured. Claimant testified he had worked earlier that day on a catering event for Employer and then returned to the kitchen at the FE[Redacted] for another catering event for Employer when he fell. Claimant testified TJ[Redacted] was eventually called and took Claimant to the Aspen Valley Hospital Emergency Room ("ER") for treatment for his injuries. Claimant was diagnosed at the ER with a fracture of two process vertebra of his thoracic spine, a cervical strain and a facial laceration. Claimant was provided with work restrictions of no lifting greater than five pounds and no carrying, pushing/pulling or reaching overhead until cleared by orthopedics. The ALJ finds that the treatment obtained from the ER was reasonable emergency medical treatment that resulted from his September 26, 2021 injury.

3. Claimant testified at hearing that he was not referred to a physician by Employer to treat his injuries. Claimant subsequently sought treatment with Dr. Anderson at the Steadman Clinic based on the referral from the ER physician. Claimant had previously been treated by Dr. Khan-Farooqi with the Steadman Clinic in June 2021 for complaints involving his left foot.

4. Claimant was initially seen by Dr. Anderson on October 18, 2021. Dr. Anderson noted that Claimant reported that following his fall, his experience mid back, left knee and left wrist pain along with post-concussion symptoms. Claimant reported that after about one week, his mid back and head symptoms improved, but his left wrist and left knee pain worsened. Dr. Anderson performed x-rays of the lumbar spine and recommended a magnetic resonance image ("MRI") of the left wrist. Dr. Anderson recommended physical therapy.

5. Claimant testified that following the injury, Claimant requested that Employer file a workers' compensation claim, but was informed by KF[Redacted] that Claimant was not covered by workers' compensation insurance.

6. KF[Redacted] testified that Employer is a seasonal business with peak times occurring during ski season and in the summer. KF[Redacted] testified that Employer typically shuts down for approximately 6 weeks from mid-April to Memorial Day or early June along with from late September until early December.

7. KF[Redacted] indicated that it is standard in the catering industry in Aspen to hire independent contractors to help with catering. KF[Redacted] testified the number of independent contractors that Employer may need would *vary.*

8. KF[Redacted] testified that he had a conversation with Claimant about him being an independent contractor when he hired Claimant. KF[Redacted] testified Claimant did not express any concerns about being an independent contractor rather than an employee. KF[Redacted] testified Claimant was happy about the arrangement since he did have any withholdings taken out of his pay. Claimant signed a W-9 for Employer and

was sent a 1099 form for tax purposes. However, KF[Redacted] did not have Claimant sign a contract identifying himself as an independent contractor when Claimant was hired.

9. Claimant was not required to work exclusively for Employer as was free to work for other catering companies. Claimant worked for a separate entity at the [Redacted, hereinafter JF] in Snowmass over the Labor Day holiday in September 2021. Claimant testified that he had worked approximately 7-10 days for the separate company during this time frame.

10. KF[Redacted] testified that the catering business is dictated by supply and demand and Claimant did not have a set schedule for Employer. However, the invoices provided by Claimant demonstrate that Claimant was consistently working in excess of 30 hours per week for Employer in June, July and August of 2021. Claimant and KF[Redacted] agreed that Claimant would be assigned catering jobs to work and if Claimant was not available, he could reject the catering job.

11. Claimant was paid by Employer by submitted billing invoices to Employer. The invoices would indicate which catering job he worked on, how many hours he worked on the catering job, the hourly rate Employer allowed him to charge for the job, and reimbursement of any supplies he personally bought for the catering job. KF[Redacted] testified that people who work for Employer can submit their invoices however they choose and Employer does not require any specific format be used. Claimant created his invoices using a software program/application called "[Redacted, hereinafter SK]." Claimant was not provided with business cards from Employer, was not provided with letterhead and was not listed on Employer's website and did not have an email address associated with Employer.

12. Claimant testified that at times, he would be provided with a company credit card from [Redacted, hereinafter TJ] to purchase supplies, but would otherwise be reimbursed by invoice. Claimant testified that at times he would be reimbursed a fee for gas on occasion in cases in which he had to travel a significant distance for a client. This testimony was confirmed by KF[Redacted]. Employer did not provide Claimant with a company vehicle to deliver the food. Employer did not provide Claimant with health insurance or a company phone.

13. Claimant and KF[Redacted] both testified that Claimant was paid an hourly rate based on the job he was performing and the client he was performing the job for. For instance, Claimant would be paid $25 per hour for preparation work associated with the catering job and between $35 and $40 per hour for being on site at a catering event and cleaning up. Once Claimant submitted invoices, Claimant was paid by check made out to Claimant individually.

14. There was some testimony at hearing as to whether Claimant was required to use the recipes provided by Employer or if he could use his own recipes. KF[Redacted] testified that Claimant would be provided with project sheets. KF[Redacted] testified that the project sheets would be developed as a collaboration between himself, the office and the chef with the client also being involved. Claimant testified that he

would occasionally bring in his own food and provide it to co-workers with the idea that if the co-workers liked the food, it could be used for clients at a later time. There was additional testimony as to whether Claimant could change aspects of the recipes for projects provided by Employer. The ALJ finds that whether or not Claimant could make adjustments to the Employer's recipes is not outcome determinative to the finding of whether or not Claimant was an employee of Employer. Most importantly however, the testimony of KF[Redacted] establishes that the menu in question was primarily prepared by TJ[Redacted], the executive chef for Employer, and the client. Claimant would then be provided with the menu to prepare for the client. KF's[Redacted] testimony that Claimant could change the menu is found to be not credible. KF[Redacted] testified that Claimant could add "twists" to the menu or personal touches is not the same as changing the menu. While Claimant may have been able to add a personal touch to the menu, this is not sufficient to establish independence in how Claimant performed his work for Employer.

15. Claimant testified that Employer provided the ingredients for which the food was to be prepared, but if fresh ingredients were necessary, he would purchase the fresh ingredients and submit for reimbursement from Employer. Claimant used the kitchen provided by Employer including the stoves, pots, pans and utensils provided by Employer. Claimant testified that he did use his own set of knives and knife sharpener along with specific items such as an apple corer in preparing the food for Employer. KF[Redacted] testified that while typically food preparation was performed at Employer's kitchen at the FE[Redacted], Claimant could prepare food at his home. Claimant testified he only prepared food at his home on one occasion and that occurred when the power was out at Employer's kitchen. The ALJ finds Claimant's testimony credible with regard to the location where the food preparation occurred.

16. Claimant testified his work as a chef was overseen by Employer. However, Claimant was not provided with specific training as a chef. Claimant was provided by Employer a checklist for the event which included the location, information regarding food allergies, menu options, and how much staffing was needed. However in providing the necessary staffing, Employer was responsible for providing individuals to serve the food and drinks at the events. Testimony was presented at the hearing that Claimant could request specific staff work events that Claimant was assigned, but no credible evidence was presented that Claimant actually requested specific staff to work events that he was assigned.

17. With regard to the catering event Claimant was working on when he was injured, Claimant noted that this was a family that had specifically requested that he prepare food for the family and the food was to be delivered to the home where the family was staying. KF[Redacted] acknowledged that even though Claimant was specifically requested as the chef for the family, Claimant would not be able to perform the services of catering to the family because Claimant would not be allowed to steal clients from Employer.

18. Due to the fact that there was no contract for hire that identified Claimant as an independent contractor pursuant to Section 8-40-202(b)(III), the burden of proof to

establish independence pursuant to Section 8-40-202(b)(II). Section 8-40-202(2)(b)(II) provides in pertinent part that in order to prove independence it must be shown that the person for whom services are performed does not:

- Require the individual to work exclusively for the person for whom services are pertormed; except that the individual may choose to work exclusively for such person for a finite period of specified in the document;

- Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

- Pay a salary or at an hourly rate instead of a fixed or contract rate;

- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- Provide more than minimal training for the individual;

- Provide tools or benefits to the individual; except that materials and equipment may besupplied;

- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

19. In this case, Claimant was not required to work exclusively for Employer and Claimant was not provided training by Employer. Likewise, Claimant was provided with a mutually agreed upon work hours that were effectively dictated by the client (notably the time Claimant was required to be at the event).

20. Factors that demonstrate that Claimant was not independent from Employer include the fact that Claimant was paid individually and was paid an hourly rate, as opposed to a contract rate. Additionally, testimony demonstrated that after Claimant's injury, Claimant sought to have the FE[Redacted] cover the cost of his medical expenses and wrote a letter seeking compensation from the FE[Redacted] for the injury as the injury had occurred on the FE[Redacted] premises. This resulted in the FE[Redacted] advising Employer that they did not want Claimant on the premises, and Claimant was effectively

terminated by Employer. This demonstrates that Employer maintained the right to terminate Claimant's performance without Claimant violating the terms of his service agreement.

21. Moreover, Employer provided Claimant with the prep kitchen at the FE[Redacted] where Claimant performed his prep work. This is the area where the injury occurred and where Employer kept most of the ingredients used by Claimant to prepare the meals to be provided at the catered events.

22. Based on weighing the 9 factors in determining whether Claimant was engaged in an independent occupation, the ALJ finds that Respondents have failed to prove by a preponderance of the evidence that Claimant was free from the direction and control of Employer in performing the duties assigned to Claimant by Employer.

23. The ALJ would also note that testimony presented by Claimant and KF[Redacted] at the hearing established that the Claimant was not allowed to do projects for clients of Employer, even if requested by the client, without putting the project through Employer's business. Claimant's work in this regard had to be performed under Employer's business and could not be performed directly for the client by Claimant.

24. While Claimant was allowed to work other projects for other catering companies, specifically the Labor Day concert testified to by Claimant and KF[Redacted], the ALJ finds that this is no different than any other employee of a company who may be allowed to set a schedule that allowed the employee to work at an event that the employee sought to work at. Notably, no credible evidence was presented at hearing that Claimant's work at the Labor Day concert event was performed under a subcontractor business maintained by Claimant, nor was any credible evidence presented with regard to the nature of the work performed by Claimant at the Labor Day concert event that would indicate the work completed by Claimant was performed as an independent contractor as opposed to an employee.

25. Following Claimant's injury, Claimant was off of work through December 7, 2021 at which time he continued to work for Employer. Claimant was eventually terminated by Employer after authoring a letter to the FE[Redacted] requesting a payment of $10,000 to settle any potential liability against FE[Redacted] as a result of the fall that occurred on their premises. Claimant testified that KF[Redacted] issued an email to Claimant that terminated Claimant's employment. This testimony is consistent with KF's[Redacted] testimony that when the FE[Redacted] advised KF[Redacted] that they did not want Claimant on the premises, KF[Redacted] was trying to be respectful of the request of his landlord.

26. KF[Redacted] testified that Employer is a seasonal business and that they would have been shut down for the autumn and did not have work during the time after Claimant's injury and prior to December 7, 2021. While this may be the case, Employer's seasonal operations do not provide a basis for denial of temporary disability benefits where Claimant was taken off of work by the ER physician based on the five pound work restrictions set forth in the ER.

27. The ALJ credits Claimant's testimony and finds that Claimant has established by a preponderance of the evidence that he is entitled to an award of TTD benefits for the period of September 27, 2021 through December 7, 2021 when Claimant returned to work for Employer.

28. Because Claimant was never released to work without restrictions by a treating physician, Claimant is entitled to an award of temporary partial disability benefits beginning December 7, 2021.

29. For the period between June 22, 2021 through September 26, 2021 when Claimant was injured, Claimant's invoices reflect that Claimant was paid $15,152.50 in hourly wages. This 96 day period of time results in a daily wage of $157.84 which equates to an AWW of $1,104.88.

30. Following Claimant's injury, Claimant sought treatment with Dr. Anderson Dr. Armstrong and Dr. Khan-Farooqi. Most notably, Claimant had treated with Dr. Khan-Farooqi prior to his work injury for a left toe injury which was diagnosed as a left great toe bunion on June 18, 2021. Dr. Khan-Farooqi noted during the June evaluation that Claimant may need aspiration or steroid injections in the future. Dr. Khan-Farooqi noted that Claimant had a history of gout.

31. Following Claimant's injury, Claimant returned to Dr. Khan-Farooqi on November 3, 2021. Dr. Khan-Farooqi noted Claimant had ongoing turf toe and left foot pain and noted Claimant feel down the stairs on September 26 which resulted in multiple injuries and aggravated his left bunion. Dr. Khan-Farooqi noted there was increased pain and swelling on the first metatarsophalangeal joint ("MTPJ") medially and dorsally. Dr. Khan-Farooqi noted in his report that the increased pain and swelling occurred after a high energy fall onto his right side. Dr. Khan-Farooqi recommended an MRI of the left foot to look for turf toe injury given the swelling and crease valgus deformity. Dr. Khan-Farooqi obtained x-rays of the left foot and noted that they showed bipartitie medial sesamoid versus a fracture medial sesamoid.

32. Claimant returned to Dr. Khan-Farooqi on January 21, 2022. Dr. Khan-Farooqi diagnosed Claimant wlth a symptomatic turf toe and arthritic MTPJ. Dr. Khan-Farooqi recommended physical therapy and noted that injections or possible surgery may be necessary.

33. Claimant underwent a second MRI at the request of Dr. Armstrong on April 15, 2022. Dr. Armstrong recommended Claimant undergo osteophyte excision based on the MRI results. Claimant returned to Dr. Khan-Farooqi on May 3, 2022 after being evaluated by Dr. Armstrong. Dr. Khan-Farooqi noted Claimant reported a failure to improve despite maximal physical therapy, chiropractic care, rest, orthotics, injections and home exercise. Dr. Khan-Farooqi recommended surgery.

34. Claimant eventually underwent surgery under the auspices of Dr. Khan-Farooqi on July 15, 2022.

35. Respondents obtained an independent medical evaluation ("IME") with Dr. Messenbaugh on July 1, 2022. Dr. Messenbaugh reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Messenbaugh opined that as a result of Claimant's fall he had a laceration of his left forehead, a strain of his lower back that had resolved, transverse process fractures involving the T3 and T4 level, a left wrist strain and a left shoulder and left knee contusion that had resolved. Dr. Messenbaugh opined that Claimant had not sustained an injury to his left great toe as a result of the September 26, 2021 accident. Dr. Messenbaugh opined Claimant was at MMI with no permanent impairment.

36. Dr. Messenbaugh further opined that Claimant's surgery involving his left great toe was not at all related to his fall of September 26, 2021.

37. Claimant was also evaluated at Aspen Medical Care by Dr. Bryan C. Gieszl on April 14, 2022 for a "new workers' comp injury" that occurred September 26, 2021. Dr. Gieszl eventually referred Claimant to be treated by Dr. Armstrong. There is a lack of information contained in the records as to how Claimant came to be treated by Dr. Gieszl and Claimant's testimony fails to establish that Dr. Gieszt was within the chain of referrals for medical treatment related to Claimant's injury. Therefore, the ALJ concludes that the treatment provided by Dr. Gieszl and Dr. Armstrong are not within the chain of referrals and are not "authorized" medical treatment.

38. Claimant testified at hearing that his pain in his left big toe was much more severe after his work injury. The ALJ credits the testimony of Claimant at hearing along with the reports from Dr. Khan-Farooqi and finds that Claimant has proven that it is more probable than not that Claimant's fall on September 26, 2021 aggravated accelerated or combined with Claimant's pre-existing condition to cause the need for medical treatment with Dr. Khan-Farooqi beginning November 3, 2021. The ALJ further finds that Dr. Khan-Farooqi is within the chain of authorized referrals as he was a referral from Dr. Anderson, who was the physician Claimant was referred to by the ER.

39. The ALJ further notes that because the Employer did not provide Claimant with a list of treating physicians at any time following his injury, the choice of treating physician was waived and Claimant chose to treat with Dr. Anderson and the Stedman Clinic. The ALJ finds the treatment provided by Dr. Anderson, Dr. Khan-Farooqi and the Stedman Clinic to be reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

40. The ALJ therefore finds that Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer and Respondents are liable for the cost of the medical treatment provided by Dr. Anderson, Dr. Khan-Farooqi and the Stedman Clinic. The ALJ further finds that Claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits for the period of September 27, 2021 through December 6, 2021 based on an AWW of $1,104.88. Claimant has further proven that he is entitled to an award of TPD benefits from December 7, 2021 through ongoing based on an AWW of $1,104,88.

41. With regard to Respondents' argument that there is a statutory cut off for TTD benefits, the ALJ notes that Jade Golden, PA-C with Dr. Gieszl's office filled out a report dated April 15, 2022 which checked a box indicating that Claimant was at MMI. However, Claimant was under the care of Dr. Khan-Farooqi for the compensable foot injury for which Dr. Khan-Farooqi subsequently performed surgery. PA-C Golden specifically notes in the report that the MMI was for "head injury, right shoulder, thoracic spine, left knee only" and reported Claimant was still being evaluated for left foot and wrist. Therefore, the ALJ does not find that this report provides a basis to terminated temporary disability benefits.

CONCLUSIONS OF LAW

1. The purpose of the 'Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Section 8-40-202(2)(a), C.R.S., provides that an individual performing services for another is deemed to be an employee:

> [U)nless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

5. Section 8-40-202(2)(b)(II), *supra,* then sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office,* 859 P.2d 278 (Colo. App. 1993). The nine factors include:

> (1) whether the person for whom services are performed does not require the individual to work exclusively for the person for whom services are performed;
> (2) whether the person for whom services are performed does not establish a quality standard for the individual;
> (3) whether the person for whom services are performed does not pay a salary or at an hourly rate instead of a fixed or contract rate;
> (4) whether the person for whom services are performed does not terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets expectations of the contract;
> (5) whether the person for whom services are performed does not provide more than minimal training for the individual;
> (6) whether the person for whom services are performed does not provide tools or benefits to the individual, except that materials and equipment may be supplied;
> (7) whether the person for whom services are performed does not dictate the time of performance;
> (8) whether the person for whom services are performed does not pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and
> (9) whether the person for whom services are performed does not combine the business operation of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

6. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), *supra,* provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(II) in order to prove by a preponderance of the evidence that the individual is not an employee. See *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1999).

7. As found, no document existed as to the requirements to prove independence. Because no document exists to establish the requirements set forth at Section 8-40-202(2)(b)(II), it is Respondents' burden of proof by a preponderance of the evidence that Claimant's work for Employer was performed as an independent contractor. As found, based on the evidence presented at hearing, the ALJ finds that

Respondents have failed to establish that claimant was an independent contractor with regard to the work performed as a chef.

8. In *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.,* 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court noted that whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is a question of fact that can only be resolved by analyzing several factors and whether the individual worked for another is not dispositive of whether the individual was engaged in an independent business. *See Softrock, supra.* The Colorado Supreme Court held that the determination must be based on a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer. The Court in *Softrock* further held that while the nine fact test may be relevant to determining whether the individual is an independent contractor, the test does not provide an exhaustive list of factors that may be considered.

9. In considering other factors outside of the nine factors set forth by Section 8-40-202(2)(b)(II), C.R.S., the ALJ finds no other factors establish that Claimant was performing work as an Independent Contractor as opposed to an employee.

10. Notably, in this case, Claimant was paid an hourly rate that was set by Employer for the work performed by Claimant which varied depending on the work Claimant was performing for Employer. Claimant was not paid at a contract rate per job. Claimant was paid personally by Employer and was not paid to a business entity. Claimant was provided with a menu by Employer and was then responsible for preparing the meal or meals in accordance with the instructions by Employer. As found, any personal touches Claimant may have been able to add to the menu is insufficient to establish independence in order to determine Claimant was not an employee of Employer.

11. Based on the facts presented in this case, including that Claimant was paid an hourly rate, the money was paid to Claimant personally as opposed to a business, the Employer provided Claimant with the kitchen to perform the prep work, the injury occurred at the building where the kitchen was located while Claimant was performing work for Employer, Claimant was provided with contact sheets and advised of the date and time to provide services to the clients.

12. The ALJ finds and concludes that Respondents have failed to prove by a preponderance of the evidence that Claimant was free from direction and control in the performance of the duties of his employment.

13. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not

change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office,* 931 P.2d 570 (Colo. App. 1996).

14. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.,* W.C. No. 4-304- 437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission,* 701 P.2d
168 (Colo. App. 1985), *citing,* 2 A. Larson, *Workers' Compensation Law* § 61.12(9)(1983).

15. As found, Respondents failed to refer Claimant to an authorized treating provider by Respondents after his work injury. Therefore, the Claimant then has the right to select the physician to treat with for the injuries sustained in the accident.

16. As found, the treatment Claimant received was authorized emergency medical treatment that resulted from Claimant's compensable work injury. As found, Dr. Anderson was selected by Claimant as the physician to treat Claimant for his injury. As found, Dr. Anderson subsequently referred Claimant to Dr. Armstrong and Dr. Khan-Farooqi for his injury.

17. As found, Claimant has proven by a preponderance of the evidence that the treatment with Dr. Anderson, Dr. Armstrong and Dr. Khan-Farooqi was reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury. As found, although Dr. Khan-Farooqi had treated Claimant prior to his work injury for ongoing turf toe and left foot pain, Dr. Khan-Farooqi also noted that Claimant's fall at work resulted in multiple injuries and aggravated Claimant's left bunion resulting in increased pain and swelling on the first MTPJ medially and dorsally. As found, the ALJ credits the medical reports of Dr. Khan-Farooqi's and finds Claimant has proven by a preponderance of the evidence that the treatment provided by Dr. Khan- Farooqi was reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury.

18. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra,* requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume

his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.,* 964 P.2d 595 (Colo.App. 1998).

19. As found, Claimant has proven by a preponderance of the evidence that he sustained an injury resulting in a disability that lasted for longer than three days after he was hospitalized following his fall at work on September 26, 2021. The mere fact that Employer was a seasonal business that did not operate during the autumn months until the beginning of ski season is not a defense to a claim for temporary disability benefits where Claimant's injury results in a disability lasting for longer than three days.

20. As found, Claimant returned to work for Employer on December 7, 2021 earning less wages than he was earning at the time of his industrial injury. During this time, Claimant was still receiving medical treatment for his work injury and had not yet been released to return to work without restrictions. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary partial disability benefits beginning December 7, 2021 and continuing until terminated by law or statute.

21. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). As found, based on the evidence presented at hearing, the ALJ finds that Claimant has established an AWW of $1,104.88.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury, including the medical treatment provided by the ER, Dr. Anderson, Dr. Armstrong and Dr. Khan-Farooqi.

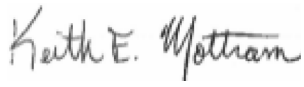
2. Respondents shall pay Claimant TTD benefits for the period of September 27, 2021 through December 6, 2021 based on an AWW of $1,104.88.

3. Respondents shall pay Claimant TPD benefits for the period of December 7, 2021 through ongoing based on an AWW of $1,104.88.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. In **addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: May 8, 2023



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on September 3, 2022.

2. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits after September 3, 2022.

3. Whether Respondents have established by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on September 3, 2022 and his non-medical benefits should thus be reduced by fifty percent.

FINDINGS OF FACT

1. Employer is a retail and pharmacy store that sells a variety of items to customers. On April 4, 2020 Claimant began working for Employer as a Customer Service Associate (CSA). His primary job duties involved operating a cash register.

2. Claimant acknowledged that during the course of his employment with Employer he received training involving workplace violence, safety, and dealing with shoplifters. Although Claimant explained that he has not personally interacted directly with shoplifters, he has witnessed numerous shoplifting incidents on a daily basis. He remarked that sometimes coworkers permitted the shoplifters to leave, other times shoplifters were told to pay for their items and occasionally coworkers have gone outside the store and became involved in physical altercations with shoplifters. Claimant was unaware whether coworkers had received warnings or been terminated for their actions with shoplifters.

3. Claimant testified that on September 3, 2022 his shift lasted from 2:00 p.m. until 10:00 or 10:30 p.m. He was working with supervisor [Redacted, hereinafter NF]. NF[Redacted] told Claimant there was a shoplifter in the store. Claimant then noticed that NF[Redacted] was talking to the shoplifter near the front of the store and they began to struggle over a shopping cart filled with merchandise. When Claimant saw the shoplifter swinging at NF[Redacted], he left his register. As Claimant approached, the suspect exited the store. Claimant then recounted that NF[Redacted] told him to get the shoplifter's vehicle license plate number.

4. Claimant exited the store and attempted to take a picture of the shoplifter's license plate number with his phone but was unsuccessful. He acknowledged that he had

never previously been asked, nor heard that anyone else had ever been asked, to obtain a license plate number of a shoplifter's vehicle. Claimant then picked up and threw two rocks at the suspect's truck but missed. He testified he threw the rocks because he could not get a good description of the suspect and wanted to break the vehicle's headlight so the police would have an easier time identifying the shoplifter. Claimant noticed the shoplifter's truck coming in his direction and sought to leave the area. However, he slipped and the truck drove onto the sidewalk. The vehicle then struck Claimant in front of Employer's store. NF[Redacted] called 9-1-1 for assistance. Paramedics took Claimant by ambulance to St. Anthony's North Hospital, where he was admitted and remained for treatment that included multiple surgeries.

5. On the following day or September 4, 2022 Store Manager [Redacted, hereinafter MW] visited Claimant in the hospital. MW[Redacted] told Claimant he had been fired for the shoplifter altercation and NF[Redacted] had already resigned her position.

6. On cross-examination Respondents' played excerpts from surveillance video of the September 3, 2022 shoplifting incident. The video showed Claimant working behind the cash register and then moving to help MH[Redacted] as she was engaged in an altercation with a suspected shoplifter. Claimant then followed the shoplifter outside the store. Claimant was outside the store with the suspect for just four seconds, allegedly attempting to take pictures of the shoplifter's vehicle, before he determined he was unable to take the pictures. He then picked up two rocks and threw them at the suspect's truck, but missed. The video depicts Claimant in the middle of the parking lot approaching the suspect's vehicle and throwing rocks at the truck prior to being struck by the vehicle.

7. Claimant acknowledged that Employer had a policy prohibiting employees from touching or attempting to apprehend suspected shoplifters. He also recognized that he had received training regarding workplace violence and handling confrontational situations. In fact, the record reveals that in 2020 and 2021 Claimant completed numerous trainings. The materials related to Employer's workplace violence policy, shoplifting deterrence, responding to shoplifting incidents, and handling confrontational situations. Claimant was required to obtain passing scores during training quizzes in order to continue employment.

8. MW[Redacted] also testified at the hearing in this matter. He explained that his duties as Employer's Store Manager involve overseeing all operations of the establishment including merchandizing, hiring and training. Although MW[Redacted] asked MH[Redacted] to complete a statement about the September 3, 2022 shoplifting incident, she simply resigned her position and provided no specific details about the event. MH[Redacted] generally explained that she became involved in a tussle with the suspect after her glasses were knocked off. MW[Redacted] noted that MH[Redacted]never mentioned she told Claimant to exit the store to take a picture of the shoplifter's license plate.

9. MW[Redacted] also testified about Employer's policies involving shoplifting, workplace violence and handling confrontation. The general purpose of the policies was

to keep employees safe. Employees were never trained employees to physically engage with shoplifters. The only reason for a physical confrontation with a suspected shoplifted was if the situation was unavoidable and involved purely self-defense. Notably, MW[Redacted] emphasized that employees are always told that it is a policy violation to leave the store to pursue a suspect. Workplace violence policies were designed to de-escalate situations and keep employees safe. MW[Redacted] explained that Employer never intended for employees to fight, throw objects, or act physically aggressive towards customers or shoplifters.

10. MW[Redacted] also discussed the implementation of Employer's policies regarding confrontational situations, workplace violence and safety. He detailed that employees receive training on Employer's shoplifting and workplace violence policies at the outset of their employment and then undergo refresher training on an annual basis. Employer specifically downloads trainings into employee accounts that include deadlines for completion. There are also periodic, brief meetings on important topics, including shoplifting guidelines, in order to refresh employees. MW[Redacted] remarked that the policies were enforced by telling employees that any violation could result in disciplinary action up to and including termination. In fact, termination for both MH[Redacted] and Claimant was recommended after the September 3, 2022 incident, but MH[Redacted] quit her position. Importantly, MW[Redacted] stated that Claimant was not acting within his job duties and violated Employer's policies by throwing objects at the shoplifter outside the store on September 3, 2022. He testified that Claimant's act of throwing of rocks at the suspect's vehicle did not provide any benefit to Employer. Claimant should have stopped at the exit and let the suspect leave the store.

11. Employer's policies include a "Preventing and Handling Shoplifting SoftStop Reference Guide." The first line of defense to shoplifting includes the following: (1) greeting every customer; (2) making eye contact with customers; (3) offering assistance to customers; (4) keeping stores neat, displays full, and trash off floor; (5) keeping aisles properly faced to easily notice discrepancies; and (6) using the designated security code over the intercom to alert management of a shoplifter. Notably, the policies specify that it is especially important to remember:

> …no employee is allowed to physically touch suspected shoplifters;
>
> …no employee is allowed to leave the store premises during the apprehension of a shoplifter;
>
> …if the shoplifter refuses or resists, let him or her leave the premises, and then call 911;
>
> …while waiting for the police to arrive, a witness must be with the shoplifter the entire time.

The training also involves 46 slides of hypotheticals and asks employees how to appropriately respond to shoplifting incidents. The slides include multiple choice responses requiring employees to choose the correct answers.

12. Respondents' also introduced Employer's Combined Shoplifting Policy and Training (Shoplifting Policy) into evidence. The Shoplifting Policy specifies that an employee should not place himself between a suspected shoplifter and the exit door. Moreover, an employee is prohibited from following an individual who is carrying stolen merchandise out the door in an attempt to obtain a license plate number. Employer also produced policies involving "Guidance for shoplifting Prevention and Response." Pursuant to Employer's training, if a suspected shoplifter refuses to give up merchandise, employees are directed to allow the suspect to leave the premises. One question specifically inquires, "If an individual walks out the door with stolen merchandise you should follow the person and try to get their license plate number." The correct answer is "False."

13. Among the Standard Operating Procedures for Handling Confrontational Situations are rules stating that employees are not to block or stand in the entryway, not touch or try to apprehend an individual, and "do not leave the store to obtain information about the individual such as a license plate number. If the individual attempts to exit the store, allow him/her to leave as quickly as possible to help ensure the safety of everyone." Notably, the Standard Operating Procedures specify that employees are not to attempt to stop the individual and "do not leave the store in an attempt to follow after him/her. Let the individual leave and report the situation to law enforcement when they arrive." Moreover, Employer's "Guidance for Shoplifting Prevention and Response" within the Workplace Violence Policy is designed to deter and handle shoplifting. Employees are trained that inappropriate behavior includes "creating unsafe working conditions by engaging in physical aggression or other dangerous or offensive behavior, including but not limited to fighting, throwing objects, and horseplay." The Policy Against Workplace Violence was Employer's "overarching policy regarding workplace violence. It describes the requirements for appropriate behavior at work and for keeping the workplace safe."

14. Claimant has failed to demonstrate it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on September 3, 2022. Initially, Claimant worked for Employer as a CSA or cashier. While working behind the cash register on September 3, 2022 Claimant saw his supervisor MH[Redacted] engaged in an altercation with a suspected shoplifter. As Claimant left the register area and approached the altercation, the shoplifter exited the store. Although Claimant stated that MH[Redacted] then asked him to exit the store to obtain the suspect's license plate number, his testimony was not corroborated and is in direct conflict with Employer's store policies. Moreover, MW[Redacted] noted that MH[Redacted] never mentioned that she told Claimant to exit the store to take a picture of the shoplifter's license plate before abruptly resigning after the incident. Nevertheless, Claimant then followed the shoplifter outside. Surveillance video shows Claimant in Employer's parking lot approaching the suspect's vehicle and throwing rocks at the truck. The shoplifter subsequently struck Claimant with his vehicle.

15. Many of Employer's policies permit employees to approach or interact with suspected shoplifter's to deter shoplifting and de-escalate confrontational situations inside Employer's store. Employees are encouraged to greet, make eye contact and offer assistance. The directives in Employer's trainings reveal they were designed to regulate

the conduct of employees while performing their job duties and address appropriate behavior in dealing with potential shoplifters inside Employer's store.

16. However, employees are strictly prohibited from leaving store premises to confront shoplifters or obtain license plate information. Claimant acknowledged that he received training and was required to pass quizzes relating to Employer's workplace violence policy, handling confrontational situations, and shoplifting deterrence policy during his employment. Employer specifically forbid employees from leaving the store during a shoplifting incident. In fact, Employer's SoftStop Reference Guide specifies that "no employee is allowed to leave the store premises during the apprehension of a shoplifter." Moreover, Employer's Standard Operating Procedures direct employees to "not leave the store to obtain information about the individual such as a license plate number. If the individual attempts to exit the store, allow him/her to leave as quickly as possible to help ensure the safety of everyone." An employee is simply prohibited from following an individual who is carrying stolen merchandise out the door in an attempt to obtain a license plate number. As MW[Redacted] explained, nothing in Claimant's job duties as a CSA allowed him to exit the store to pursue a shoplifter and throw objects.

17. By exiting Employer's store, walking into the middle of the parking lot and throwing rocks at the shoplifter's vehicle, Claimant removed himself from the employment relationship. Employer's detailed training and instructions regarding exiting the store and obtaining a license plate number limited Claimant's sphere of employment by creating a restriction on the scope of Claimant's job. Employer's directives were specific and reflected a clear intent to limit the sphere of the employment relationship. The training and directives evidenced an intent to cease the employment relationship for a violation. Claimant's actions of exiting Employer's store on September 3, 2022 to obtain a license plate number and throw rocks at a suspected shoplifter's vehicle directly contravened Employer's directives and exceeded the realm of his job duties. By acting outside the scope of employment Claimant severed the causal relationship between his job function and injuries.

18. The present case is distinguishable from *Sewald v. Safeway, Inc.*, WC 5-188-401 (ICAO, Dec. 21, 2022). In *Sewald*, the injury occurred when an employee encountered a shoplifter inside the store, reached for his shopping cart and fell when the shoplifter pulled the cart away. The ALJ in *Sewald* explained that the employer provided the claimant with training about interacting with suspected shoplifters, but the directives did not evidence an intent to cease the employment relationship for a violation. Instead, the directives in the employer's shoplifting guidelines and training were intended to regulate the claimant's conduct while performing her duties and not to limit the scope of her employment. However, the present case is distinguishable from *Sewald* and provides a bright-line rule for defining the "sphere of employment." Critically, Employer's policies about exiting the premises after a shoplifter are designed to prohibit interaction and promote safety. Once the suspected shoplifter has left the store, employees are not encouraged to approach or interact with the shoplifter, but rather must refrain from pursuit. By the time a suspect has exited the store, deterrence has failed and employees are no longer performing their job duties by pursuing the shoplifter outside.

19. As illustrated in 2 A. Larson, *Workmen's Compensation Law* § 33.02 (2013) cited in *Sewald*, there is a distinction between an employer's instruction sufficient to remove an employee's activity from the realm of employment and an instruction only directed at the "method" of carrying out a work function. Specifically, "rules and prohibitions may define the ultimate 'thing' which the Claimant is employed to do, or they may describe the methods which he may or may not employ in accomplishing that ultimate thing." Here, some of Employer's training encourages interaction in dealing with suspected shoplifters. They are designed to regulate employees' conduct while performing job duties. However, leaving the store to pursue a shoplifter and throwing rocks at a vehicle removed Claimant's activity from the realm of his employment as a CSA. Claimant's actions in pursuing a shoplifter were not encompassed within his duties to discourage or limit shoplifting inside Employer's store. Rather than prescribing the method in which Claimant was to perform his job, Employer's policies and training prohibiting the pursuit of shoplifter's outside the store limited Claimant's sphere of employment. Claimant simply acted outside the realm of his employment on September 3, 2022.

20. The directives about not pursuing shoplifters outside the store reflect Employer's intent to cause the cessation of employment even on a temporary basis. By exiting Employer's store, walking into the middle of the parking lot and throwing rocks at the shoplifter's vehicle, Claimant removed himself from the employment relationship. As MW[Redacted] stated, Claimant was not acting within his job duties and violated Employer's policies by throwing objects at the shoplifter outside the store on September 3, 2022. Claimant should have stopped at the exit and let the suspect leave the store. Employer's detailed policies and training, store video, and MW's[Redacted] credible testimony demonstrate that Claimant's injuries while outside Employer's store and throwing rocks at a suspect shoplifter's vehicle occurred outside the sphere of employment. Therefore, Claimant's violation of Employer's instructions governing the sphere of employment severed the causal relationship between his employment and his injuries. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).; *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As a general rule, an employer has the right to issue directives concerning what an employee may do, and when she may do it. *In re Eelorriaga*, WC 5-047-389-01 (ICAO, June 19, 2018). In such circumstances the employer's instructions are said to limit

the “sphere” of the employment. *Id.* The employee’s violation of the employer’s instructions governing the “sphere” of employment severs the causal relationship between the employment and the injury, rendering the injury non-compensable. *Bill Lawley Ford v. Miller*, 672 P.2d 1031, 1032 (Colo. App. 1983); *see Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007). Conversely, the violation of rules and directives relating only to the employee's conduct within the sphere of employment do not remove injuries from the realm of compensability. *Bill Lawley Ford* 672 P.2d at 1032. Importantly, the direction “may limit the sphere of the employment relationship, or it may simply regulate the employee’s conduct while he is engaged in such employment.” *Ramsdell v. Horn*, 781 P.2d 150, 152 Colo. App. 1989).

8. There are several factors to be considered in discerning whether a direction has limited the sphere of employment as opposed to only regulating the employees’ conduct. *Nielson v. PXC Denver*, W.C. No. 4-241-772 (ICAO Mar. 5, 1996). The factors include the circumstances under which the directive was given, what the employer intended to prohibit, and the manner in which the claimant interpreted the order. *Id.* The distinction between an employer’s instruction that is sufficient to remove an employee’s activity from the realm of employment and one that is only directed at the “method” of completing a work function is illustrated in 2 A. Larson, *Workmen's Compensation Law* § 33.02 (2013):

> We have here to do with a simple distinction: that between “thing” and “method.” Rules and prohibitions may define the ultimate “thing” which the claimant is employed to do, or they may describe the methods which he may or may not employ in accomplishing that ultimate “thing.” The only tricky feature of this distinction is that it can, by a play upon words, be converted into a contradiction of itself. For example, it seems clear enough that if the claimant’s main job is to lift flour sacks, the raising of the flour sacks is the “thing” for which he is employed. If, in violation of instruction, he rigs up a rope hoist to do the job, it should be clear enough that his departure is merely from the method prescribed.

See Sewald v. Safeway, Inc., WC 5-188-401 (ICAO, Dec. 21, 2022).

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on September 3, 2022. Initially, Claimant worked for Employer as a CSA or cashier. While working behind the cash register on September 3, 2022 Claimant saw his supervisor MH[Redacted] engaged in an altercation with a suspected shoplifter. As Claimant left the register area and approached the altercation, the shoplifter exited the store. Although Claimant stated that MH[Redacted] then asked him to exit the store to obtain the suspect’s license plate number, his testimony was not corroborated and is in direct conflict with Employer’s store policies. Moreover, MW[Redacted] noted that MH[Redacted] never mentioned that she told Claimant to exit the store to take a picture of the shoplifter’s license plate before abruptly resigning after the incident.

Nevertheless, Claimant then followed the shoplifter outside. Surveillance video shows Claimant in Employer's parking lot approaching the suspect's vehicle and throwing rocks at the truck. The shoplifter subsequently struck Claimant with his vehicle.

10. As found, many of Employer's policies permit employees to approach or interact with suspected shoplifter's to deter shoplifting and de-escalate confrontational situations inside Employer's store. Employees are encouraged to greet, make eye contact and offer assistance. The directives in Employer's trainings reveal they were designed to regulate the conduct of employees while performing their job duties and address appropriate behavior in dealing with potential shoplifters inside Employer's store.

11. As found, however, employees are strictly prohibited from leaving store premises to confront shoplifters or obtain license plate information. Claimant acknowledged that he received training and was required to pass quizzes relating to Employer's workplace violence policy, handling confrontational situations, and shoplifting deterrence policy during his employment. Employer specifically forbid employees from leaving the store during a shoplifting incident. In fact, Employer's SoftStop Reference Guide specifies that "no employee is allowed to leave the store premises during the apprehension of a shoplifter." Moreover, Employer's Standard Operating Procedures direct employees to "not leave the store to obtain information about the individual such as a license plate number. If the individual attempts to exit the store, allow him/her to leave as quickly as possible to help ensure the safety of everyone." An employee is simply prohibited from following an individual who is carrying stolen merchandise out the door in an attempt to obtain a license plate number. As MW[Redacted] explained, nothing in Claimant's job duties as a CSA allowed him to exit the store to pursue a shoplifter and throw objects.

12. As found, by exiting Employer's store, walking into the middle of the parking lot and throwing rocks at the shoplifter's vehicle, Claimant removed himself from the employment relationship. Employer's detailed training and instructions regarding exiting the store and obtaining a license plate number limited Claimant's sphere of employment by creating a restriction on the scope of Claimant's job. Employer's directives were specific and reflected a clear intent to limit the sphere of the employment relationship. The training and directives evidenced an intent to cease the employment relationship for a violation. Claimant's actions of exiting Employer's store on September 3, 2022 to obtain a license plate number and throw rocks at a suspected shoplifter's vehicle directly contravened Employer's directives and exceeded the realm of his job duties. By acting outside the scope of employment Claimant severed the causal relationship between his job function and injuries.

13. As found, the present case is distinguishable from *Sewald v. Safeway, Inc.*, WC 5-188-401 (ICAO, Dec. 21, 2022). In *Sewald*, the injury occurred when an employee encountered a shoplifter inside the store, reached for his shopping cart and fell when the shoplifter pulled the cart away. The ALJ in *Sewald* explained that the employer provided the claimant with training about interacting with suspected shoplifters, but the directives did not evidence an intent to cease the employment relationship for a violation. Instead,

the directives in the employer's shoplifting guidelines and training were intended to regulate the claimant's conduct while performing her duties and not to limit the scope of her employment. However, the present case is distinguishable from *Sewald* and provides a bright-line rule for defining the "sphere of employment." Critically, Employer's policies about exiting the premises after a shoplifter are designed to prohibit interaction and promote safety. Once the suspected shoplifter has left the store, employees are not encouraged to approach or interact with the shoplifter, but rather must refrain from pursuit. By the time a suspect has exited the store, deterrence has failed and employees are no longer performing their job duties by pursuing the shoplifter outside.

14. As found, as illustrated in 2 A. Larson, *Workmen's Compensation Law* § 33.02 (2013) cited in *Sewald*, there is a distinction between an employer's instruction sufficient to remove an employee's activity from the realm of employment and an instruction only directed at the "method" of carrying out a work function. Specifically, "rules and prohibitions may define the ultimate 'thing' which the Claimant is employed to do, or they may describe the methods which he may or may not employ in accomplishing that ultimate thing." Here, some of Employer's training encourages interaction in dealing with suspected shoplifters. They are designed to regulate employees' conduct while performing job duties. However, leaving the store to pursue a shoplifter and throwing rocks at a vehicle removed Claimant's activity from the realm of his employment as a CSA. Claimant's actions in pursuing a shoplifter were not encompassed within his duties to discourage or limit shoplifting inside Employer's store. Rather than prescribing the method in which Claimant was to perform his job, Employer's policies and training prohibiting the pursuit of shoplifter's outside the store limited Claimant's sphere of employment. Claimant simply acted outside the realm of his employment on September 3, 2022.

15. As found, the directives about not pursuing shoplifters outside the store reflect Employer's intent to cause the cessation of employment even on a temporary basis. By exiting Employer's store, walking into the middle of the parking lot and throwing rocks at the shoplifter's vehicle, Claimant removed himself from the employment relationship. As MW[Redacted] stated, Claimant was not acting within his job duties and violated Employer's policies by throwing objects at the shoplifter outside the store on September 3, 2022. Claimant should have stopped at the exit and let the suspect leave the store. Employer's detailed policies and training, store video, and MW's[Redacted] credible testimony demonstrate that Claimant's injuries while outside Employer's store and throwing rocks at a suspect shoplifter's vehicle occurred outside the sphere of employment. Therefore, Claimant's violation of Employer's instructions governing the sphere of employment severed the causal relationship between his employment and his injuries. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed. *See Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007) (where ALJ determined that the sphere of employment was limited by the employer's direction to either go home or wait for scaffolding to be repaired and claimant was told not to perform his duties, the claimant's subsequent injuries were not compensable). *Compare Sewald v. Safeway, Inc.*, WC 5-188-401 (ICAO, Dec. 21, 2022) (concluding that, because Employer's direction to employees not to grab or step in front

of a suspected shoplifter's cart was aimed at the method for stopping shoplifter activity, it did not represent an intent to cease the employment relationship); *In re Claim of Eelorriaga*, W.C. No. 5-047-389-001 (ICAO, June 19, 2018) (because the employer's directive prohibiting phone calls while driving constituted an effort to control the claimant's method of carrying out her duties and not a regulation concerning the sphere of employment, her injuries were compensable).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant did not suffer compensable injuries during the course and scope of his employment with Employer on September 3, 2022.

2. It is unnecessary to address whether Claimant was responsible for his termination from employment or committed a safety rule violation.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 8, 2023.

DIGITAL SIGNATURE.

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-213-534-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury at work on July 27, 2022.

2. If Claimant proved he suffered a compensable work injury, did he prove by a preponderance of the evidence that he is entitled to reasonable, necessary and related medical benefits as a result of the alleged injury on July 27, 2022?

3. If Claimant proved he suffered a compensable work injury, did he prove by a preponderance of the evidence that he is entitled to temporary total disability benefits commencing July 28, 2022 and continuing?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 55 year-old male who worked as a day laborer for Employer. Claimant began working for Employer on July 21, 2022. Employer assigned Claimant to work at [Redacted, hereinafter PW], starting July 21, 2022. PW[Redacted] is a manufacturer of tape products.

2. Claimant's supervisor at PW[Redacted] was [Redacted, hereinafter MS]. MS[Redacted] was responsible for assigning daily tasks to temporary employees, including Claimant. MS[Redacted] testified that some temporary workers were assigned to perform production duties inside the warehouse. Other workers were assigned to work outside, primarily working on tree removal for a fence project. Generally, the temporary employees working outside would cut down trees and throw the branches away.

3. Claimant was assigned to work outside on July 22, 2022. That day, he picked up logs and branches, and threw them into the dumpster.

4. On July 27, 2022, Claimant was assigned to work outside again. This day, however, Claimant and other temporary workers were directed to clear out materials in the back of the warehouse yard. Claimant testified that the yard was full of broken pallets and large rolls of plastic. He further testified that MS[Redacted] was operating a forklift outside to move the heavy broken pallets and rolls of plastic. MS[Redacted] initially testified that he did not "think" there were any large materials out back that needed removing. On cross examination, Claimant showed MS[Redacted] pictures of the property, and this refreshed MS's[Redacted] recollection. (Ex. 3). MS[Redacted] testified that he was indeed operating a forklift outside on July 27, 2022. At some point, MS[Redacted] was needed elsewhere, so he turned the operation of the forklift over to

his brother. Claimant testified that MS's[Redacted] brother was unable to separate the plastic rolls and pallets with the forklift. Claimant tried to assist by sitting on top of the materials and pushing them with his legs to try to separate them. Claimant testified that while doing this, he felt a sensation in his low back and right leg. Claimant continued to work the rest of the day. According to the daily work slips, Claimant began work at 6:00 a.m. that day, and worked 10 hours. (Ex. D).

5. MS[Redacted] testified that on July 27, 2022, Claimant approached him about speaking with "HR" because he was having issues with another employee. He also told MS[Redacted] he would not be available on July 28, 2022, but would return on July 29, 2022. This is consistent with Claimant's testimony that he told MS[Redacted] he would not be back at work until July 29, 2022. Claimant's July 27, 2022, work slip also noted Claimant needed a day sub on July 28, 2022, but he would return on July 29, 2022. (Ex. D).

6. Even though Claimant spoke with MS[Redacted] on July 27, 2022, he did not tell him that he allegedly injured his back working that day. MS[Redacted] testified that there is a procedure in place for reporting injuries. Had Claimant reported any injury to him, he would have recorded this in the comment section of the daily ticket and he would have reported the injury to his safety manager. The ALJ finds that Claimant did not report his alleged injury to MS[Redacted] on July 27, 2022.

7. There is no objective evidence in the record that Claimant contacted Employer on July 27, 2022, to report the alleged work-related injury to his back.

8. Employer's "Job Site Safety" guidelines are set forth in the Employee Handbook. The handbook states Employees are required to wear safety equipment, and to ask the supervisor if additional equipment is needed to perform the job safely. (Ex. 9). Claimant testified he was not provided any safety gear while working at PW[Redacted]. MS[Redacted] confirmed that Claimant was not provided any safety gear because safety gear was not necessary. According to the daily work slips, the only equipment that was necessary to perform the work was a pair of steel toe boots. (Ex. D). There is no objective evidence in the record that Claimant asked MS[Redacted] or anyone at PW[Redacted] for any additional safety equipment at any time while he worked there.

9. The ALJ finds MS's[Redacted] testimony credible, and finds that safety equipment was not necessary, or required, to perform the work at PW[Redacted] that Claimant was assigned to do.

10. [Redacted, hereinafter is JA] is a Machine Operator and line lead at PW[Redacted]. JA[Redacted] testified her duties included organizing workers in the morning, and operating a production machine throughout the day. JA[Redacted] testified that she was responsible for monitoring the work being performed outside, and periodically checking up on the temporary workers.

11. JA[Redacted] testified that she provided supervision and an explanation of duties to Claimant on July 27, 2022. She testified that the temporary employees were cleaning

the back area, removing branches and trees to make room for a new fence. JA[Redacted] testified that she checked on the crew periodically to see if they needed anything and that everyone was okay. JA[Redacted] also testified that Claimant did not tell her about any back pain or injury, and he did not ask her for Aspirin for his back.

12. The ALJ does not find JA's[Redacted] testimony to be credible. As found, on July 27, 2022, Claimant was moving pallets and large rolls of plastic in the back of the warehouse yard, he was not removing branches and trees that day.

13. Claimant testified that about 11:30 a.m., he spoke to "[Redacted, hereinafter AA]" and told her that his back was killing him, and asked if she had any Advil. Claimant questioned JA[Redacted] about him asking her, not AA[Redacted], for Aspirin on July 27, 2022. Although it was unclear who Claimant spoke to, the ALJ credits Claimant's testimony and finds that he asked a female employee at PW[Redacted] for Advil or Aspirin some time on July 27, 2022.

14. Claimant testified that the following day, July 28, 2022, he developed pain from his low back up to his neck with tingling in both legs and feet, and extreme urinary incontinence.

15. Claimant did not return to work at PW[Redacted]. The last day he worked there was July 27, 2022. Claimant testified that he did not like the job and it was "horrible." The ALJ finds that Claimant did not return to work at PW[Redacted] because he no longer wanted to work there.

16. Claimant did not report the alleged July 27, 2022 injury until August 17, 2022. On the "Employee's Report of Injury Form," Claimant marked "yes" to the question "[w]as the supervisor notified about injury." (Ex. C). This is contrary to both Claimant's testimony and MS's[Redacted] testimony. Claimant further wrote that his lower back was injured at 12:00 "while on top of the material I was pushing with my legs to assist forklift driver so the material wouldn't tip over." Claimant selected Concentra as his designated provider.

17. Claimant testified that between July 27, 2022 and August 17, 2022, he stayed home, and this is why it took him a while to report the injury. Claimant further testified he thought his back would improve.

18. There is no objective evidence in the record that Claimant was unable to work because of his alleged back injury.

19. A year prior, in 2021, Claimant injured his back while working out. Claimant testified he was doing squats when he injured himself. In the medical records, the injury is described as the result of Claimant using the leg press machine. The ALJ finds Claimant injured his back in 2021 while working out.

20. Claimant testified that on August 17, 2022, he saw to Ron Rasis, PA at Concentra Medical Center. According to the medical records[1], Claimant told Mr. Rasis that he was injured from repeatedly lifting tree branches and logs, and throwing debris, including large sections of a tree, over a fence. Claimant testified that he did not describe the other mechanism of injury involving the forklift and pushing materials with his legs to Mr. Rasis.

21. Concentra referred Claimant to physical therapy. Claimant completed five of the six physical therapy sessions. Claimant testified that he wanted an x-ray, but Mr. Rasis informed him it was not necessary. Claimant also wanted a cortisone shot, but Mr. Rasis did not feel this was necessary either. Claimant's last visit to Concentra was in August 2022.

22. F. Mark Paz, M.D., conducted an Independent Medical Examination (IME) of Claimant at Respondent's request on November 23, 2022. (Ex. A). As part of the IME, Dr. Paz testified that he examined Claimant, collected a direct history, and reviewed available medical records regarding this claim. Dr. Paz did not take an MRI of Claimant's back. The ALJ finds that Dr. Paz was not required to order an MRI as that was not a part of the IME.

23. Dr. Paz testified that Claimant reported low back pain, mid back pain, neck pain and lower extremity pain, all of which he related to a work incident on July 27, 2022, where Claimant was pushing a "large container" with his legs. Claimant reported developing acute pain that day. Dr. Paz testified that Claimant's description of the mechanism of injury, was inconsistent with the Concentra records and Claimant's reported symptoms. Dr. Paz credibly testified that according to the Concentra records, Claimant developed pain after moving branches and logs, but the pain did not include radicular symptoms or pain in the upper back and neck. Dr. Paz testified that Claimant asserted all the symptoms he described at the IME and documented on the pain diagram were present on the date of injury. (Ex. A) Dr. Paz testified that when Claimant first sought treatment, he only reported low back pain, which Dr. Paz concluded was myofascial. Claimant did not report radicular symptoms until August 29, 2022, well after his initial report of injury.

24. Dr. Paz reviewed the radiology reports admitted into evidence on behalf of Claimant. On June 9, 2021, Claimant had an x-ray of his lumbar spine for his low back pain. And on June 11, 2021, he had an MRI of his lumbar spine. (Ex. 1 pp 27-29). Dr. Paz testified that the imaging showed advanced age-related degenerative changes in Claimant's lumbar spine. He further testified that the imaging also showed a right-sided cyst attached to the facet of the lumbar spine that pushed against the right L5 nerve root. The MRI noted that the imaging was ordered to address low back pain and radicular symptoms.

25. Claimant testified he recovered from his gym injury in 2021 after receiving injections. Dr. Paz testified that the medical records and findings were consistent with Claimant's described mechanism of injury in 2021. He further testified that any injections

[1] Claimant's Concentra records were not offered as exhibits or admitted into evidence. The records were summarized, however, by F. Mark Paz, M.D.

Claimant received were palliative, so the objective degenerative changes of his spine would not go away following injections, but would continue to advance with age.

26. Dr. Paz testified that there are no objective findings in the Concentra records to support Claimant's claim of an acute low back injury at work. He testified that Claimant's symptoms, particularly in the upper back and neck, were not consistent with the mechanism of injury Claimant reported. Dr. Paz further testified it is not medically probable that Claimant experienced an aggravation or acceleration of his low back symptoms from his 2021 non-work injury because Claimant did not report the same radicular symptoms at the outset of his treatment. Dr. Paz credibly testified that the 2021 MRI describes the source of Claimant's ongoing radicular symptoms as the natural progression of his degenerative condition, not the result of Claimant's work at PW[Redacted]. Dr. Paz concluded that Claimant likely had myofascial pain, which does not involve the lumbar spine. The ALJ finds Dr. Paz's opinion to be credible and persuasive.

27. The ALJ credits Claimant's testimony that on July 27, 2022, he was working outside, clearing large pallets and rolls of plastic, and at one point he pushed a heavy object with his legs to try to move it. There is no objective evidence in the record, however, to prove Claimant suffered an injury within the course and scope of his employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936);

Bodensieck v. Indus. Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of, or natural progression of, a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question

of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 P.2d at 786; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant's description of his alleged injury was inconsistent. Claimant testified that he injured his back on July 27, 2022 while pushing heavy materials with his legs. But when Claimant went to Concentra on August 17, 2022, he reported that he injured his back by moving branches and logs. This is contrary to Claimant's testimony, and the description of mechanism of injury Claimant provided to Dr. Paz. Claimant also failed to report any alleged injury to his supervisor, MS[Redacted], even though he spoke with MS[Redacted] on July 27, 2022 to discuss an "HR" issue and to tell him he would not be at work on July 28, 2022. Yet, when Claimant reported his injury on August 17, 2022, he asserted that he told his supervisor about his injury. Claimant's description of his alleged injury is inconsistent, and not credible.

Furthermore, Claimant presented no objective evidence from either the Authorized Treating Provider, or his own personal physician to demonstrate he suffered a work-related incident that caused an injury within the course and scope of his employment. Claimant provided radiology reports from 2021 of his lumbar spine. (Ex. 1 pp 27-29). As found, these radiology reports demonstrate that Claimant has a pre-existing degenerative condition. Dr. Paz credibly testified that the imaging showed advanced age-related degenerative changes in Claimant's lumbar spine. He further testified that the imaging also showed a right-sided cyst attached to the facet of Claimant's lumbar spine that pushed against the right L5 nerve root. According to the MRI, the imaging was ordered to address low back pain and radicular symptoms. Dr. Paz testified that the 2021 MRI indicates that Claimant's radicular symptoms are due to a pre-existing condition. Dr. Paz credibly testified that Claimant's pre-existing condition was not aggravated or accelerated by any work incident, because had it been, the radicular symptoms would have been present immediately on July 27, 2022, which they were not. When Claimant reported his alleged injury on August 17, 2022, he only reported lower back pain, not radicular symptoms. As found, Dr. Paz's testimony is credible and persuasive. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury.

Medical Treatment

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Claimant is seeking an MRI of his back and cortisone shots. As found, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable industrial injury, so Respondents are not liable for any medical treatment.

Temporary Total Disability Benefits

Claimant has the burden of proving entitlement to temporary total disability benefits in the first place. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Temporary total disability benefits are payable if Claimant proves a causal connection between his industrial injury and the temporary loss of wages. As found, Claimant did not suffer a compensable injury, so he is not entitled to temporary total disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work injury.

2. Claimant's request for medical benefits is denied and dismissed.

3. Claimant's request for temporary total disability benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 8, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on November 1, 2022 on issues that included medical benefits that are authorized and reasonably necessary, and penalties as follows:

> Medical benefits ordered by Administrative Law Judge Nemechek March 3, 2022, and July 6, 2022. Failure to pay Claimant and medical providers pursuant to 7/6/2022 ICAO Order, attached, and failure to make any meaningful attempt to arrange payment. $1000 per day since 8/26/2022. Section 8-43-401 (2)(a), CRS Respondents owe 8% of the amount of wrongfully withheld benefits. Respondents have unilaterally changed PTD benefits payment scheduled without Division or Claimant approval. Respondents owe 8% interest on all late direct deposit payments. Section 8-43-401 (2)(a).

Respondent filed a Response to November 1, 2022 Application for Hearing on December 1, 2022 listing as issues reasonably necessary, authorized and related medical benefits. Respondent also listed an affirmative defense to Claimant's alleged penalties as follows:

> C.R.S § 8-43-304(4) in Claimant has not stated with specificity the grounds on which the penalty is being asserted, therefore, pursuant to C.R.S. § 8-43-304(4), Respondents reserve the right to cure any alleged violation, if any, within 20 days of Claimant specifying the violation; statute of limitations

Respondent also listed under other issues:

> Relatedness; pre-existing injury and/or condition; idiopathic injury and/or condition; Respondents deny any change of authorized treating physician; Respondents deny that the PTD benefits payment schedule has been changed, payments are issued biweekly and have been so issued since September 22, 2020, as such the one-year statute of limitation has run on penalties pursuant to C.R.S. § 8-43-304(5); Respondents properly denied medical treatment consistent with Rule 16; Credits; Offsets; Overpayments; Upon further investigation and discovery of this matter, Respondents may agree to withdraw or add affirmative defenses.

Claimant's exhibits 1 through 8 were admitted into evidence. Also admitted over Respondent's objection were Claimant's Exhibit 9, Exhibit 10 bates 0001-0003 and 0006 (for purposes of a timeline and date documents were exchanged not for the truth of the matter asserted in the body of the email), Claimant's Exhibits 12 through 15, 17 and 18. This ALJ will take judicial notice of Exhibit 16 as part of the Act. Respondent's exhibits A through C and E were admitted into evidence.

On March 30, 2023[1] this ALJ issued an Order noting that the issues for hearing were to be bifurcated and that this ALJ would issue a separate Findings of Fact, Conclusions of Law and Order regarding the issue of authorization of medical benefits in this matter. The parties were granted through April 6, 2023 to provide briefs, post-hearing position statements or proposed orders with regard to the bifurcated authorization of medical benefits issue.

On April 13, 2023 this ALJ issued a Summary Order on the bifurcated issue of authorization of medical benefits determining that selection of authorized provider had passed to Claimant and Claimant selected Dr. Ryan Bozzell. The order was served to the parties on the same day. The Order specified that the parties were required to submit a request for a full order within ten working days of the date of service. Neither party requested a full order pursuant to Section 8-43-215 (1), C.R.S., so the Order issued on April 13, 2023 is final. Claimant's authorized treating provider (ATP) in this matter is now Dr. Bozzell, and any providers within the chain of referral he refers Claimant to are authorized with regard to Claimant's orthopedic, pulmonary and urological problems related to this claim.

STIPULATIONS OF THE PARTIES

At the time of the hearing on March 29, 2023 Claimant withdrew the penalty with regard to late indemnity benefits. This is considered a stipulation of the parties. Therefore both parties agreed to withdraw exhibits related to this issue, Claimant's Exhibit 11 and Respondent's Exhibit D.

Further, Claimant offered to stipulate to the admission of Respondent's Exhibit E, which would not normally be admitted under the Act automatically or without laying a foundation and would be considered hearsay, with the following conditions:

A. That the exhibit be utilized only as a per unit or per line example of fair costs of the items Claimant itemized in Exhibit No. 17, not to represent the total owed to Claimant and only be utilized to calculate the expenses Claimant has had in the past, not for future costs.

B. That Claimant be allowed to testify about her usage of the items enumerated in Claimant's Exhibit 17, including how much she is currently using the items listed and how much she used them in the past as well as how she will be using them in the future.

C. That Claimant will, from the March 29, 2023 hearing forward, obtain receipts of all supplies purchased and submit them to Respondent for payment.

D. That the bills paid by BC[Redacted] be paid in full by virtue of Sec. 8-42-101(6)(a) & (b), C.R.S.

E. That Respondent provide the items listed that Claimant requires and are reasonably necessary or accept the receipt of the costs from Claimant in the

[1] The order was mistakenly dated December 30, 2023 instead of March 30, 2023.

future, reimbursing Claimant the full value of what Claimant has paid out of pocket pursuant to Sec. 8-42-101(6)(b).

This ALJ accepted that Exhibit E is not a document that would normally be admitted into evidence, without the laying of foundation, and notes that Claimant's conditions are reasonable. Respondent neither acquiesced nor provided sufficient arguments supporting an objection to the stipulation.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Respondent failed to comply with ALJ Nemechek's March 2, 2023 Findings of Fact, Conclusions of Law and Order following closure of the appeal process by July 27, 2022.

II. If Respondent failed to comply with the Order, what are the reasonably necessary and related maintenance medical benefits that Claimant or any insurers owed?

III. If Respondent failed to comply with the Order, whether Claimant proved by a preponderance of the evidence that she is owed eight percent (8%) interest on all benefits past due and owing pursuant to Sec. 8-43-401, C.R.S.

IV. If Respondent failed to comply with ALJ Nemechek's March 2, 2022 Order to pay Claimant and medical providers within a reasonable time, whether Claimant proved by a preponderance of the evidence if a penalty is owed pursuant to Sec. 8-43-304 and 8-43-305, C.R.S. and the appropriate penalty, considering the *Demi* test.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. This matter is an adjudicated permanent total disability claim where Claimant was injured in the course and scope of her employment with Employer on July 23, 2015.[2] Claimant was working as an assistant produce manager for Respondent-Employer when she was injured while pulling a pallet of heavy bags of potatoes. The pallet began moving very fast and Claimant was thrown into a set of double doors. Claimant then fell on her back and left hip. Claimant initially received conservative medical treatment care, including physical therapy, injections, and medications. However, she continued to experience pain and urinary incontinence, which worsened over time.

2. Claimant is currently 58 years old and has trouble with mobility, function, and urinary incontinence, in addition to low back pain, left lower extremity radicular problems, breathing problems and chronic pain.

[2] Claimant testified that she had been injured on July 24, 2015 but all three of the prior orders issued by other ALJs as well as pleadings submitted all cite to July 23, 2015 as the date of the injury.

3. ALJ Kimberly Turnbow issued Findings of Fact, Conclusions of Law and Order on June 26, 2017 ordering further neurosurgical evaluation with Scott P. Falci, M.D. Claimant underwent surgery for her low back in 2017 under Dr. Falci. During the surgery her lungs collapsed. Subsequent to the surgery, Claimant developed problems breathing as a consequence of the lung collapse. Claimant also had urinary incontinence as a consequence of her low back injury. ALJ Turnbow specifically found that

> The ALJ is concerned about the possibility of continuing progressive worsening of the urinary incontinence and left leg weakness conditions, and possible right leg weakness and even bowel incontinence as described by Dr. Falci. This ALJ finds and concludes that all reasonable conservative treatment and diagnostics have been exhausted, and is that Claimant's conditions are significant and require urgent care. The ALJ notes that Claimant's description of her urinary incontinence was credible and compelling.

4. ALJ Turnbow ordered that:

> Respondents shall pay for a repeat neurosurgical consultation with Dr. Falci and, if he offers a spinal untethering surgery, Respondents shall pay for all reasonable and related pre-operative, operative, and postoperative expenses, according to the Colorado Fee Schedule, that are related to such surgery.

5. Following ALJ Turnbow's decision, Claimant did, in fact, follow up with Dr. Falci and he performed the untethering surgery. She stated that the low back surgery, while it did not solve all her problems with her lumbar spine or her urinary incontinence, and added additional pulmonary issues, the surgery helped her to stand up straight, when she had been bent over due to the pain for a long time. She explained that the surgery was necessary to stop the progression of nerve damage in the spine, going into her lower extremities and bladder problems.

6. On June 11, 2020 ALJ Glen B. Goldman issued Findings of Fact, Conclusions of Law and Order awarding permanent total disability benefits, and stated that "Respondents shall provide Claimant maintenance medical benefits for her back injury and urinary incontinence." ALJ Goldman noted that Claimant required the following supplies:

. Incontinence pads, extra heavy, two bags per week, since August 2015.
· Periodic visits with Dr. Paulsen who has assumed direct care.
· Wipes, which she has bought herself.
· Urinary pads for the bed, which she has bought on her own.
· Self-Catheterization supplies.
· Oxygen and oxygen supplies.
· Cane which she bought.
· Grabber which she has bought.
· Large ball, small ball, one and 3-pound weights, balancing pad, recumbent bike recommended by her physical therapist.

7. ALJ Goldman noted that "[D]uring her testimony, Claimant asked for a bathroom break, cried several times, and changed chairs because of discomfort." This ALJ noted similar behavior during her March 29, 2023 hearing, as Claimant was uncomfortable, would frequently shift, tear up during testimony and discussion of her claim, and required breaks.

8. In addition to making a finding that Claimant was permanently and totally disabled, ALJ Goldman found that:

> 58. Claimant's urinary incontinence and need for medical treatment for such condition was caused by her work injury when she suffered a contusion to her sacral nerve.
>
> 59. Claimant requires maintenance medical treatment to relieve her from the effects of her work injury and to maintain MMI.
>
> 60. Claimant requires maintenance medical treatment for her back injury and urinary incontinence.

9. On August 25, 2020, Respondent filed a Final Admission of Liability ("FAL") in which it admitted for reasonable necessary and related medical benefits for Claimant's back injury and urinary incontinence pursuant to ALJ Goldman's Order.

10. ALJ Timothy L. Nemechek issued a Summary Order on November 26, 2021 ordering as follows:

> 1. Claimant established by a preponderance of the evidence that she is entitled to maintenance medical benefits under the Colorado Workers' Compensation Act.
>
> 2. Respondents shall provide medical benefits to Claimant required to treat the effects of her work injury and to maintain MMI, pursuant to the Colorado Workers' Compensation Medical Fee schedule. Specifically, Respondent shall pay for the following:
>
> - All medical supplies related to Claimant's urinary incontinence (including catheters, small and large wipes).
> - Oxygen concentrator (reimbursement for expenses previously incurred).
> - CPAP machine and supplies (including cannula, tubing mask/headgear).
> - The walking cane, 4-wheel walker, wheelchair.
> - Exercise equipment (large and small exercise balls, 1 and 3 pound weights, treadmill, exercise bands, balancing pad, and recumbent bike), [reimbursement for expenses previously incurred].
>
> 3. Claimant's request for a one-year gym membership is denied and dismissed.[3]

11. These findings were supported by a letter issued by Dr. Paulsen dated August 26, 2020 which noted that Claimant would require the following items and that Respondent had denied liability for the medical supplies by letter dated October 6, 2020:

> I. Urinary Incontinence Supplies:
> 1. Urinary pads – 2 bags/week
> 2. Wipes – 10 bags/year
> 3. Cloth urinary pads for bed – 8 pads/year

[3] This was denied because Claimant was no longer in the Granby, Colorado area and had moved to New Mexico.

II. Mobility Items:

4. Cane
5. 4 wheel walker
6. Wheelchair
7. Grabber

III. Exercise equipment including:

8. Large exercise ball
9. Small exercise ball
10. One and three pound weights
11. Treadmill
12. Exercise bands
13. Balancing pad
14. Recumbent bike
15. Suction handrails for bathroom
16. Pool therapy access
17. Annual pass to Durango Rec. Center

12. ALJ Nemechek noted that "Counsel for Respondent stipulated to pay for the co-pays of (sic.) incurred by Claimant for urinary incontinence pads totaling $360.00. This Stipulation was accepted by the Court and is made part of this Order." However, Claimant stated that none of the items she listed on the request for reimbursement were part of any reimbursement. Claimant stated that did not receive the $360.00. Further, in examining the medical benefits payment log, no check was issued to Claimant following the date the stipulation was made on November 10, 2020 to the last payment to medical providers on February 28, 2022.

13. ALJ Nemechek specified Dr. Paulsen's testimony that Claimant required supplies for urinary incontinence, assistive devices for mobility and oxygen supplies was persuasive. Further, ALJ Nemechek found Claimant's testimony, that she requires the supplies, persuasive.

14. The hearings before ALJ Nemechek, took place on November 10, 2020. At that time Claimant testified that she had moved to New Mexico. The move was specifically noted in both the Summary Order and the Findings of Fact, Conclusions of Law and Order that was issued by ALJ Nemechek on March 2, 2022. This Order was consistent with his prior Summary Order in listing Respondent's same responsibilities to pay.

15. The process for the hearing before ALJ Nemechek likely started no later than August 2020, as a hearing is generally set between 80 to 100 days. Claimant stated that she had been waiting before this to receive payments without response. She stated that she had been excited to receive ALJ Nemechek's order with the hope that she would get the care and equipment she needed but after the order was issued nothing happened. She felt disappointed and disheartened when nothing happened. She felt emotionally drained by the process and was depressed, though she had good days and bad days. The same was true of her physical abilities, that she has good and bad days. She has had to take money out of her limited grocery budget to get needed supplies that are indispensable, like pads and wipes. Claimant was noted to breakdown on multiple

occasions, and explaining what happened with her hopes of getting some resolution for medical care and reimbursement for items that she required was one of those occasions.

16. Respondent appealed the decision of ALJ Nemechek and a Final Order was issued by the Industrial Claim Appeals Office (ICAO) on July 6, 2022 affirming ALJ Nemechek's decision of March 2, 2022. ICAO noted that Respondent had 21 days to file a Notice of Appeal to the Colorado Court of Appeals. Pursuant to Sec. 8-43-301(10), C.R.S., after July 27, 2022, the right to appeal was closed and the order was final.

17. The Application for Hearing dated November 1, 2022 before this ALJ listed Claimant's address in Farmington, New Mexico and was sent to Respondent's. In Respondent's Response to Application for hearing dated December 1, 2022, Respondent listed Claimant's address in Farmington, New Mexico.

18. At the current hearing Claimant stated that she moved from Granby, Colorado to Farmington, New Mexico, a little over two and one half years ago. She lived in Granby for approximately eight to nine years, where she had worked for Employer. She testified that she was planning to live in Farmington for the foreseeable future. She moved because most of her family lived in New Mexico and she wanted to live at a lower elevation. She explained that she had been using the oxygen machine almost all the time when she lived in Granby and the lower elevation helped her breath easier.

19. But while in Colorado Claimant suffered from pulmonary issues following her 2017 surgery requiring her to use both a CPA machine and an oxygen machine from that time until she moved to New Mexico. She currently continues using her CPA machine nightly but not her oxygen machine as the lower altitude has help significantly. She does, however, continue to keep track of what her oxygen levels are, in case she has to start using the oxygen machine again.

20. After Claimant moved, starting in approximately May 2021, after she last saw Dr. Paulson, she was no longer able to continue with her Colorado treating provider, because Dr. Paulson declined to do telemedicine, especially to prescribe medications long distance or have Claimant travel from New Mexico to Colorado simply to see her treater. Claimant stated that she required a physician that could make the appropriate referrals, including to an orthopedic specialist, an urologist as well as a pulmonologist, to continue appropriate maintenance care.

21. Claimant has been seeing her personal treating provider, Dr. Ryan Bozzell, a family doctor, in Farmington, New Mexico for her conditions, including for her low back and bladder incontinence problems but because he was not designated by Respondent as an authorized medical provider for the workers' compensation claim, Claimant had only seen him in a limited capacity for this claim. Claimant has other conditions which Dr. Bozzell has also addressed, including her rheumatoid arthritis and her ankylosing spondylitis. She has been on Medicare and Medicaid since approximately July 2020, when she moved to New Mexico. Dr. Bozzell is approximately ten minutes from where she has lived for over two years. She has been seeing him for approximately one year. He has been paid by Medicaid and Medicare.

22. This ALJ issued a Summary Order on April 13, 2023 that determined the selection of authorized provider had passed to Claimant and Claimant selected Dr. Ryan

Bozzell. Dr. Bozzell is now Claimant's authorized treating physician as the period to appeal that order has expired making the order final.

23. Since Claimant's July 23, 2015 work related injury to the present, Claimant has had bladder problems and incontinence. This was determined related by ALJ Turbow in her June 26, 2017 order. She specifically stated that "ALJ finds credible and persuasive Dr. Falci's theory that a stretched spinal cord suffered in her fall at work in conjunction with Claimant's low-lying conus explains why Claimant suffers from urinary incontinence and left leg weakness." Claimant has been using pads, cloth wipes, bed pads, cleansing wipes and antibacterial hand wash since that time or shortly thereafter. Further, following the surgery of 2017, claimant had to use catheters and urine bags for approximately 10 months. As found these are all reasonably necessary as previously found by ALJ Nemechek. Respondent is liable for these medical benefits and costs that are reasonably necessary and related to the claim. Claimant's estimate of usage and length of time of use is credible and are laid out below.

24. This ALJ found the price on the receipt Claimant submitted from Walmart as the actual cost Claimant incurred for maximum absorbency pads, which is what Claimant actually uses. (See ALJ Goldman Order of June 2020 listing "[I]ncontinence pads, extra heavy, two bags per week," and Dr. Paulson's letter of August 26, 2020 cited in ALJ Nemechek's Order.) This ALJ also determines that the antibacterial soap was critical to avoid infections and to remain sanitary in light of Claimant having to deal with dirty pads, wipes and accidents caused by the incontinence, including changing wet bedding and clothing. While Claimant may have used this product before her surgery in 2017, she credibly testified that she started using it regularly after her 2015 accident.

25. Claimant purchased a cane for walking, which cost her approximately $20.00, but has since purchased two others. She also bought a four wheel walker from a garage sale for approximately $25.00. Both of these items are shown in the pictures within Claimant's Exhibits. Claimant did not obtain receipts for these items and the costs were approximated. Claimant stated she required the use of these items to allow her to be as functional as possible. Claimant stated that she uses the cane in her home, and the walker when she leaves the house. Her left leg frequently gives out and is notstable so she needs the wheel chair to prevent any further falls. Both the cane and the four wheel walker (not the aluminum two wheel one listed by [Redacted, hereinafter OM) were determined to be reasonably necessary medical benefits related to Claimants injury by ALJ Nemechek. As found, the canes and the walker should be reimbursed to Claimant.

26. It has become more and more difficult for Claimant to get around and she requires a wheel chair that has the outer large wheels so she can operate the chair herself and not have to rely on others to push her around in the chair. When there is a family outing that requires too much walking, she cannot participate because of her inability to be on her feet for long. She showed a picture of the kind of wheel chair she required

(Empower lightweight wheelchair)[4] that was priced at $319.98. As found, this chair is reasonably necessary and related to the July 23, 2015 work injury.[5]

27. Claimant continued to be out of pocket for the cost, which were not covered by her personal insurance, of the oxygen concentrator, which is a large machine that holds 2 liters of oxygen, and CPAP machine. She paid a portion of the oxygen machine, purse and CPAP machine but some of the cost were paid by her prior insurance, BC[Redacted]. She paid $2,185.00, for the oxygen machine and oxygen purse, which have not been reimbursed. She did not contact BCBS to find out how much the insurer paid because they discontinued her insurance since July 2020 and she was no longer a member. In addition, she required the cannulas, used to place the oxygen into her nose, the headset and mask since approximately 2017. This was mentioned by ALJ Goldman in June 2020. She also had a small portable oxygen purse. She used the oxygen concentrator from the time she had her surgery in 2017 continuously while in Granby, CO. She has been able to taper off of the oxygen since moving to New Mexico due to the lower altitude. The oxygen machine, purse and CPAP machine as well as all the necessary supplies are reasonably necessary and related to the 2015 work injury.

28. Claimant continues to use the CPAP machine, which is a machine that provides forced air (but not concentrated oxygen). It helps her breath while sleeping at night. The CPAP machine requires supplies as well, including cannula, mask, headgear, tubing, filters, replacement water chambers and a CPAP cleaner. She has purchased the equipment on her own, except for the CPAP cleaner, which she does not have as she could not afford to purchase the cleaner, which cost $264.99 at Walgreens. The cleaner sanitizes the supplies including the headgear, cannula, and tubing. This is required to keep bacteria and germs from forming on the equipment and supplies. She explained that she runs the risk of infection without the sanitizer and has been operating the machine without cleaning it properly since 2017, sucking whatever forms on the supplies into her lungs. While ALJ Nemechek specifically stated Respondent shall pay for "CPAP machine and supplies (including cannula, tubing/headgear)" he did not specifically address the equipment necessary to keep the CPAP supplies clean. Claimant testified that the cleaner is recommended for use every day. As found, Claimant requires this machine to keep her CPAP equipment clean and sterile for use and avoid any further risks of infections or bacterial overgrowth. This durable equipment is a reasonably necessary medical benefit and related to the July 23, 2015 work injury.

29. Claimant testified that her inability to care for herself as recommended by her prior provider has affected her emotionally and financially. Following the long process of trial and appeal, she continued to be somewhat skeptical that she would have resolution of the issues and finally obtain the funds to purchase those items she has been unable to obtain due to failure of the insurance to provide her with any options. As found, Respondent's failure to take any steps to provide either the equipment itself or the payment for the cost of the equipment is inexcusable.

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[4] There was also a picture of a "Transport chair," which is one that a patient cannot move herself. Claimant credibly testified that this chair was not suitable for her as she would be dependent on others to push her. ALJ Nemechek also found it reasonably necessary and related to the injury.

[5] While there was mention of an electric chair, Claimant stated that she did not require one at this time.

30. Claimant continued to have to make the trip to Denver to see Dr. Paulson, until approximately May 2021, when she had her last appointment in person. Claimant advised that she was informed by Dr. Paulson it was too far for Claimant to be travelling for maintenance care from Farmington, New Mexico to Denver, Colorado. Further, he declined to provide virtual appointments. Lastly, he did not provide a referral to a medical provider in Farmington, New Mexico. It is clear that Respondent provided consistent payments for medical care including for prescription medication by TS[Redacted] through May 7, 2021. Following this date there were only three more payments to TS[Redacted], two for a November 12, 2021 date of service and one for February 11, 2022. No other payments were shown on the payment log and there is no indication that the payment log is incomplete.

31. Claimant stated that she had worked long hours with the assistance of her sister to write all the expenses she had incurred since her injury that had not been paid. She initially submitted spreadsheet to Respondent by early December, 2022.[6] Further, on January 13, 2023 Claimant submitted some receipts and again, prior to trial, Claimant found, after a three to four hour in her storage, several other receipts which were sent to Respondent.

32. Respondent was responsible for the costs of reasonably necessary and related maintenance medical care as previously established by orders issued by ALJ Goldman and Nemechek. Claimant noted that she required additional assistance even when she was treating with the medical providers, which included the alternating use of over the counter Tylenol and ibuprofen. Further, to assist her with pain relief, Claimant obtained Theraworx, a topical pain relief foam. As found Claimant's use of these three products was and is reasonably necessary and related to her July 23, 2015 work related injury.

33. Claimant has been unable to purchase the recumbent bike ordered by ALJ Nemechek because she could not afford the purchase price of $469.99. Given ALJ Nemechek's denial of a gym membership, it was critical for her to receive the exercise equipment needed to maintain her functional abilities, to allow her to lose some weight, and help control pain and depression. She also has to keep up her strength as she needs to be able to keep as mobile as possible for as long as possible. Further, the balancing pad would help her as well. These also were items ordered by ALJ Nemechek to be paid by Respondent and continue to be reasonably necessary and related to the claim.

34. Claimant further paid for the exercise balls, weights, a treadmill, exercise bands, also photographed in the exhibits and listed on her spreadsheet. Claimant paid for this equipment out of her own pocket and requested that Respondent reimburse her, pursuant to ALJ Nemechek's order, without response. For these items alone she is still owed approximately appropriate $342.88.

35. On March 3, 2023 Respondent obtained some of the pricing through OM[Redacted] for multiple of the items which Claimant purchased. The OM[Redacted] pricing was submitted as a spreadsheet of the items with prices. After considering the pricing that OM[Redacted]

[6] As Claimant was unable to pinpoint the exact date, this ALJ will infer it was no later than December 31, 2022.

recalculated, Claimant re-drafted a second spreadsheet which more accurately reflected her expenses.[7]

36. As found, Respondent knew or should have known that Claimant would require continuing medical care.

37. As found, Respondent knew or should have known that they were responsible to pay for the ordered medical benefits listed by ALJ Nemechek. This put the onus on Respondent to comply with the order. There was an order stating that "Respondents shall pay" for the items listed. As further found, the order does not specify that Claimant has to make a claim as she had already made a claim and it was discussed by ALJ Nemechek and ordered.

38. As found, by combining the information that was persuasive and credible from both the Claimant's and OM's[Redacted] spreadsheets as well as considering Claimant's testimony and other receipts in the record, this ALJ makes the reasonable choice to determine the actual cost of past due benefits that Respondent was ordered to pay.

39. This ALJ issued a Summary Order dated April 13, 2023, finding that Respondent knew or should have known that Claimant moved to Farmington, New Mexico as of at least November 10, 2020 tough likely around May 2020. Respondent knew that Claimant required ongoing medical care for her low back, respiratory conditions and her urinary incontinence. Yet, when Claimant moved, they did not designate a provider nor did they pay for any further medical care other than the occasional prescription.

40. As found, Respondent were aware and had notice of the itemized list of medical benefits Claimant required by July 27, 2022 when the appeal process terminated and ALJ Nemechek's order became final. Respondent had knowledge of the items Claimant was requesting as they featured prominently in both ALJ Goldman's and ALJ Nemechek's Final Orders which were found as reasonably necessary medical benefits related to the claim. Respondent failed to comply with ALJ Nemechek's Order to pay the reasonable, necessary and authorized medical care.

41. Respondent shall pay Claimant as follows:

Bladder & Incontinence Supplies

Item description	Price per unit	Amount	Total price
EQUATE OPTION PADS, DISCREET BLADDER PROTECTION LONG LENGTH, MAXIMUM ABSORBENCY; BAG OF 72	$14.34	368	$ 5,277.12
CARDINAL HEALTH DISP DRY WASHCLOTH, 9" X 13.5", WHITE CS/500 (MFR# AT907)	$ 13.10	85	$ 1,113.50
FIBERLINKS TEXTILES INC AMERICARE ULTRA	$13.50	14	$ 189.00

[7] With the exception of the "Handicap Features for her Household," which have not been requested and

were not at issue at this hearing, and reserved for future determination.

WATERPROOF SHEET PROTECTOR WITH HANDLES 34" X 36" TWIN SIZE (MFR# A12605/H)				
BARD ALL PURPOSE RED RUBBER URETHRAL CATHETER 16FR, CASE/100 (MFR# 9416)	$ 82.30	10	$	823.00
URINARY DRAIN BAG MCKESSON ANTI-REFLUX VALVE STERILE 2000ML, VINYL, CS/20 (MFR# 37-2802)	$40.95	10	$	409.50
MEDLINE ALOETOUCH QUILTED PERSONAL CLEANSING WIPES 8 X 12, PK/48 (MFR# MSC263625)	$ 3.58	20	$	71.60
DIAL ANTIBACTERIAL W/ MOISTURIZERS, SCENTED, 7.5OZ (MFR# 2461275)	$ 2.95	144	$	424.80
		Total		**$8,308.52**

Mobility Aids

		Amount	Total price	
CARDINAL HEALTH ADJUSTABLE OFFSET PUSH BUTTON CANE, BLACK (MFR# CNE0014)	$ 22.50	3	$	67.50
FOUR WHEEL WALKER	$25.00	1	$	25.00
MEDLINE EMPOWER LIGHTWEIGHT WHEELCHAIR UP TO 300 LBS. WEIGHT CAPACITY	$319.99	1	$	319.99
CANE HEAVY DUTY REPLACEMENT TIPS	$16.35	14	$	228.90
		Total	**$**	**641.39**

Oxygen Supplies

Item description	Price	Amount	Total Price	
CPAP TUBING	$ 47.13	20	$	942.60
CPAP MASK	$ 115.21	10	$	1,152.10
CPAP HEADGEAR	$ 30.26	10	$	302.60
CPAP FILTERS (EACH FILTER)	$ 2.64	30	$	79.20
CPAP CLEANER	$ 316.14	1	$	316.14
REPLACEMENT WATER CHAMBER	$30.99	10	$	309.90
PORTION PAID BY CLAIMANT OF PURCHASED CPAP MACHINE AND OXYGEN CONCENTRATORS	$2,185.00	1	$	2,185.00
PULSE OXIMERT FINGER TIP	$29.97	1	$	29.97
				$5,317.51

Other Miscellaneous Supplies

Item description	Price			
Large Ball	$24.99	1	$	24.99
Small Ball Set	$27.99	1	$	27.99
Weights - bar bells	$49.95	1	$	49.95
Used Treadmill	$200.00	1	$	200.00
Exercise Bands	$39.95	1	$	39.95
Recumbent Bike	$469.99	1	$	469.99
Balancing Pad	$159.99	1	$	159.99
Ibuprofen (OTC)	$13.70	42	$	575.40
Tylenonl (OTC)	$8.99	28	$	251.72
THERAWORX TOPICAL PAIN RELIEF SPRAY (MFG# AZVTWR08SPH)	$24.50	28	$	686.00
				$2,485.98

Cum. Total	**$**	**16,753.40**

42. Respondent shall pay Claimant the total amount of $ 16,753.40 for those benefits as established by the chart above.

43. Respondent shall pay past due medical benefits to [Redacted, hereinafter BC] for any out of pocket reasonably necessary medical care they may have paid for problems with incontinence and oxygen or lung issues suffered by Claimant related to her July 23, 2015 work injury.

44. Further, as found, Respondent failed to comply with ALJ Nemechek's order, which merits an additional penalty due to the violation of the order to pay. This penalty is deemed to be from July 27, 2022 and continuing until the funds are paid by Respondent to Claimant.

45. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

(2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

B. Failure to Comply with ALJ Order

Claimant alleges that Respondent failed to comply with ALJ Nemechek's Summary Order on November 26, 2021 and subsequent Findings of Fact, Conclusions of Law and Order of March 2, 2022 wherein he ordered Respondent to pay for, in compliance with the Colorado Workers' Compensation Fee Schedule, certain items he found were reasonably necessary and related to the injury. These items included, but were not limited to, medical supplies related to Claimant's urinary incontinence, oxygen concentrator, CPAP machine and supplies, walking cane, 4-wheel walker, wheelchair, and specific exercise equipment. Some of the items Claimant had already purchased, some had been partially paid by her personal insurance, some of the items required an ongoing recurring purchase and some of the items had not been purchased due to the costly nature of the items.

What is clear is that Respondent neither paid for nor made arrangements to pay for what Claimant paid for, what she could not pay for and/or failed to make arrangements for Claimant's receipt of the items prescribed. Nothing in ALJ Nemechek's order could be confused. He specifically stated that Claimant had established she was entitled to maintenance medical benefits and that "Respondent shall pay for the following items." The use of "shall" here is interpreted as mandatory. Nothing in ALJ Nemechek's order indicated that they only needed to pay for the items if Claimant produced a receipt that Respondent accepted as accurate or reasonable. Nothing in the order noted that Claimant had to purchase the items and then produce the receipts. Neither did the order indicated that Respondent was able to reject the price or value of what Claimant had purchased. In fact, pursuant to Sec. 8-42-101(6)(b) Claimant must be reimbursed the full amount of what she paid.

No persuasive evidence was provided by either party as to the cost of the items listed pursuant to the Colorado Workers' Compensation Fee Schedule or what items were not listed on the Fee Schedule. It is not up to this ALJ to provide those costs and rule on what medical services or items are on the Fee Schedule. However, Claimant either provided a receipt, an estimate of the cost of the item or agreed to the number identified by Respondent on the OM[Redacted] listing, which Respondent tendered as an exhibit of potential costs of the item. Respondent did not state or assert that those per item cost listed on the OM[Redacted] document were in compliance with the Fee Schedule either. However, what is clear from the evidence is that ALJ Nemechek ordered Respondent to pay for items which were reasonably needed to maintain Claimant at MMI and ordered Respondent to pay. Nothing in the evidence indicated that any of the items listed by Claimant in her spreadsheet had actually been paid for previously. In fact, the only statement that indicated that Respondent had paid pursuant to a stipulation of the parties which specifically stated "Counsel for Respondent stipulated to pay for the co-pays of (sic.) incurred by Claimant for urinary incontinence pads totaling $360.00. This Stipulation was accepted by the Court and is made part of this Order." However, Claimant credibly testified that she had not been paid pursuant to the stipulation and Employer's log does not show a payment.

What is patently clear to this ALJ is that Respondent failed to comply with ALJ Nemechek's order once it became final. They did not make the arrangements necessary for Claimant to receive the items or the promised payment. They did not send any inquiries of what Claimant would prefer to happen or make arrangements with Claimant

to pay for the items. They did not provide persuasive evidence that they were in the process of acquiring the items to send to Claimant through a vendor, which is commonly done within the workers' compensation system in cases like these, where Claimant has an ongoing disability that requires frequent refills, like medications, incontinence pads, or equipment. What is clear, is that, pursuant to ALJ Nemechek's order, Respondent had, at the very least, a list of Claimant's ongoing medical need requirements as authored by ATP Paulsen since August 26, 2020. It is inconceivable that Respondent had the list of these items by no later than the hearing of November 10, 2020 and, still, Respondent provided little evidence that they had taken any affirmative steps to procure the items or pay for the items. Therefore, they cannot credibly assert that they had no knowledge of them or not enough time to provide them. This pattern of behavior is a blatant disregard for the Workers' Compensation System and to the Act as it showed that Respondent, had indeed, not given any importance to the ALJ's findings and his order. Claimant has shown by a preponderance of the evidence that Respondent failed to comply with ALJ Nemechek's order when it became final.

C. Reasonably necessary and related medical benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000). Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Commission, supra*. When the respondents contest liability for a particular

benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.*

ALJ Nemechek found that multiple items were reasonably necessary and related to the July 23, 2015 work injury. This ALJ also finds those items are reasonably necessary and related to the July 23, 2015 work injury. That includes:

- All medical supplies related to Claimant's urinary incontinence (including catheters, small and large wipes).
- Oxygen concentrator (reimbursement for expenses previously incurred).
- CPAP machine and supplies (including cannula, tubing mask/headgear).
- The walking cane, 4-wheel walker, wheelchair.
- Exercise equipment (large and small exercise balls, 1 and 3 pound weights, treadmill, exercise bands, balancing pad, and recumbent bike), [reimbursement for expenses previously incurred].

This ALJ also determines that the antibacterial soap was critical to avoid infections and to remain sanitary in light of Claimant having to deal with incontinence and is reasonably necessary and related to the July 23, 2015 work injury.

While ALJ Nemechek specifically stated Respondent shall pay for "CPAP machine and supplies (including cannula, tubing/headgear)" he did not specifically address the equipment necessary to keep the CPAP supplies clean. Claimant testified that the cleaner is recommended for use every day. As found, Claimant requires this machine to keep her CPAP equipment clean and sterile for use and avoid any further risks of infections or bacterial overgrowth. This durable equipment is a reasonably necessary medical benefit and related to the July 23, 2015 work injury.

Claimant continued to be out of pocket for the cost, which were not covered by her personal insurance, for the oxygen concentrator, OxyGo (small portable oxygen purse) and CPAP machine in the amount of $2,185.00. She paid a portion but some of the costs were paid by her prior insurance, BC[Redacted]. In addition, Claimant required the cannulas, the headset and mask since approximately 2017. This was mentioned by ALJ Goldman in June 2020. The oxygen machine, purse and CPAP machine as well as all the necessary supplies are reasonably necessary and related to the 2015 work injury. Claimant has shown by a preponderance of the evidence that both Claimant and BC[Redacted] should be paid for the costs listed above.

Claimant credibly and persuasively testified that she required additional assistance to control pain levels, even when she was treating with the medical providers, which included the alternating use of over the counter Tylenol and ibuprofen. Further, to assist her with pain relief, Claimant obtained Theraworx, a topical pain relief foam. As found Claimant has shown it is more likely than not that her of these three products was and is reasonably necessary and related to her July 23, 2015 work related injury.

Claimant purchased some exercise equipment that ALJ Nemechek already found reasonably necessary and related to her injury. What Claimant has not been able to afford on her own is the recumbent bike ordered by ALJ Nemechek because she could not afford the purchase price of $469.99. As found, the exercise equipment needed to

maintain her functional abilities listed in the chart above including the recumbent bike are reasonably necessary and related to the injury.

Claimant has shown by a preponderance of the evidence that Respondent owes Claimant the amount of $ 16,753.40 for those benefits as established by the chart above, which will not be replicated here. Further, Claimant has shown she has continuing needs for ongoing supplies, both due to the incontinence as well as for use of the CPAP machine. Respondent is liable for both past benefits set out in the chart above and ongoing benefits, which Respondent shall send to Claimant through a vendor or Respondent shall pay Claimant at the rate established in the chart.[8]

D. Interest Penalties on Past Due Benefits

Sec. 8-43-401(2)(a), C.R.S. states as follows:

> After all appeals have been exhausted … all … employers shall pay benefits within thirty days after any benefits are due. If any … self-insured employer knowingly delays payment of medical benefits for more than thirty days …, such … employer shall pay a penalty of eight percent of the amount of wrongfully withheld benefits....

Claimant alleges that Respondent owe eight percent interests on all benefits not paid when due, specifically citing to the items that ALJ Nemechek listed as reasonably necessary medical benefits in his final order of March 2, 2022. However, in looking at case law, the Court in *Pena v. ICAO*, 117 P.3d 84 (Colo. App. 2005) provides some guidance. In that case, the Court stated that the ALJ appropriately denied penalties under Sec. 8-43-401(2)(a) for failure to pay benefits timely because Claimant did not submit evidence of medical bills that were not timely paid. *Id.* at p. 90.

Like in the *Pena* case, here, there was no requirement for prior authorization and the insurer did not treat the order as a request for prior authorization by contesting it in accordance with rules that apply to prior authorizations. Further, it is not a situation in which Claimant received treatment, the provider submitted a bill for the treatment, payment was due, and Respondent delayed payment of that medical benefit for more than thirty days after the due date or stopped payment. Sec. 8-43-401(2)(a) does not apply as it does not specifically provide a penalty for Respondent's actions following receipt of the ALJ's decision and Respondent's failure to provide medical benefits in accordance with the order. Claimant established that Respondent failed to comply with the Order issued by ALJ Nemechek and failed to provide the medical benefits Claimant was entitled to pursuant to the Order. The appropriate penalty is pursuant to Sec. 8-43-304, C.R.S. Therefore, Claimant's request for penalties under Sec. 8-43-401(2)(a) is denied.

E. Penalties Due for Violation of an Order

[8] The amounts may be subject to change and either party may request a change in the costs set out in the chart incorporated in this order or challenge the continuing reasonable, necessity of the supplies.

Under Sec. 8-43-304(1), C.R.S. (2022), penalties of up to one thousand dollars per day may be imposed against a party who: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order. *Pena v. Indus. Claim Appeals Office,* 117 P.3d 84, 87 (Colo. App. 2004). Further, Sec. 8-43-305, C.R.S. states that "Every day during which any employer … fails to comply with any lawful order of an administrative law judge, … shall constitute a separate and distinct violation thereof."

To determine whether penalties should be imposed under Sec. 8-43-304(1), C.R.S. there is a two-step process, first requiring the ALJ to determine if the employer's conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must then determine whether the party's actions were objectively reasonable. An ALJ may impose a penalty under Sec. 8-43-304(1) if it is shown that the employer failed to take an action that a reasonable employer would have taken to comply with the order. The employer's conduct is measured by an objective standard of reasonableness. *Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965, 967 (Colo. App. 2003). Different divisions of the Colorado Court of Appeals have reached different conclusions regarding the measure of "objectively reasonable" conduct. Some divisions have concluded that the relevant inquiry is whether the conduct was based upon a rational argument in law or fact, while others have concluded that the question is merely whether the conduct was unreasonable. *See Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97, 100 (Colo. App. 2005) [discussing the two lines of cases]; *Diversified Veterans Corporate Ctr. v. Hewuse,* 942 P.2d 1312, 1313 (Colo.App.1997).

The ALJ also has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The penalty should be sufficient to discourage future violations, but should not be constitutionally excessive or "grossly disproportionate" to the violation found. *Colorado Dept. of Labor & Employment v. Dami*, 442 P.3d 94 (Colo. 2019). When assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses." *Id*. at 103. The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Actual prejudice or harm to the claimant is relevant but is not dispositive, particularly where the violation is not explained by the evidence. *Strombitski v. Man Made Pizza, Inc*., W.C. No. 4-403-661 (July 25, 2005).

Here, Claimant alleges Respondent failed to comply with ALJ Nemechek's Summary Order dated November 26, 2021 and subsequent Findings of Fact, Conclusions

of Law and Order dated March 2, 2022, wherein the ALJ ordered Respondent to pay, in compliance with the Colorado Workers' Compensation Fee Schedule, for certain items he found were reasonably necessary and related to the injury. This ALJ acknowledges Respondent's right to appeal in this matter and the fact that the ALJ's order was not final until all appeals were abandoned on July 27, 2022. Here, this ALJ was persuaded there was a violation of the Order issued by ALJ Nemechek. Specifically, ALJ Nemechek issued an order that stated that Respondent "shall provide medical benefits to Claimant required to treat the effects of her work injury and to maintain MMI, pursuant to the Colorado Workers Compensation Medical Fee schedule" and that "Respondents shall pay" Claimant for specific items, which he listed in his order.

Respondent argues that they did not pay because Claimant had not provided receipts for the items she was purchasing. However, nothing in the order stated that was required of Claimant, only that "Respondents will be required to reimburse Claimant for said equipment." And even if it implied that some form or proof was necessary, the Claimant's statement alone in sufficient to establish what she paid and what should have been reimbursed to Claimant. Stated another way, Claimant was not required by the ALJ's order to provide a receipt in order to receive reimbursement. The onus here was on Respondent, not Claimant, to make the payment in accordance with the Colorado Workers' Compensation Fee schedule. Respondent's "negligence in failing to take the action a reasonable carrier would take should result in the imposition of penalties..." See *Diversified, supra*, at p. 1313. As found, Respondent failed to take any credible or persuasive steps to even investigate the costs of the items until March 2, 2023 when they obtained the OM[Redacted] listing of items priced. Nothing in counsel's statements or in the evidence presented at hearing clarifying the OM[Redacted] pricing stated that the OM[Redacted] pricing was consistent with the Colorado Fee Schedule. While Claimant's statements clarifying her actual costs of what she had paid for certain items that were not provided by Respondent, was helpful in determining what Claimant is owed, this was not a critical element in determining the reprehensibility of Respondent's failure to comply with ALJ Nemechek's order. Respondent provided no reasonable or appropriate explanation for violating the Order and Respondent's neglect was not objectively reasonable.

Respondent knew what the Summary Order issued by ALJ Nemechek on November 26, 2021[9] stated. They knew what ALJ Nemechek stated in his order of March 2, 2022. Yet they waited until a year later to take any steps whatsoever to investigate the costs. And even when they obtained the OM[Redacted] pricing, still they paid nothing. Had this been a bill that was being disputed by a medical provider, they would have paid what they believed the Medical Fee schedule said and fought about the reasonable costs or discrepancy at a later time. The same would happen if Respondent had received a demand for mileage reimbursement. A reasonable Respondent would have paid what was undisputed and fought over the disputed mileage at a later time. Here, as found, Respondent failed to take any action that a reasonable Respondent would have taken to comply with the order and Respondent failed to act even when they received Claimant's spreadsheet or when they received the OM[Redacted] pricing estimate, by not paying Claimant anything even by the date of the hearing. A reasonable Employer would have paid

[9] Mailed on November 29, 2021.

something, even if it was less than what Claimant paid. Respondent's conduct was objectively unreasonable.

Respondent also argued that Claimant, in fact, obtained some of the equipment and supplies she needed and was not deprived of the needed medical benefits. This argument seems egregious. Claimant credibly testified that she had to set aside funds she would normally use for other household needs, like needed groceries, in order to get some of those supplies she needed. She is forced by that added expense to just sit at home and wait since any extra money has gone towards paying for products and supplies that should be paid for by Employer as part of her ongoing medical benefits. Further, Claimant was not able to obtain some of the essential supplies she does need, such as the CPAP cleaner that keeps the supplies sanitized and lowers her risk of infections or transferring germs into her lungs. Respondent was not the one to supply the funding, Claimant had to do so to her own detriment. This one simple thing, Respondent's failure to pay pursuant to the order, is in violation of the very principles of the Workers' Compensation Act, "to assure the quick and efficient delivery of disability and medical benefits to injured workers." Sec. 8-40-102(1), *supra.* Therefore, Respondent's conduct was objectively unreasonable.

Also as found, Respondent knew or should have known that Claimant required maintenance medical benefits to maintain her at MMI pursuant to both ALJ Goldman's and ALJ Nemechek's orders. The payment log showed that Respondent was consistently making payments for medical care through the time she was no longer able to see Dr. Paulsen. Since then, there were only three payments made to [Redacted, hereinafter TS].[10] However, this showed Claimant consistently required medical care which Respondent stopped providing and/or paying. Claimant cannot be faulted by the fact that she was attempting to handle her medical conditions in any manner she could. Respondent even made a stipulation to make a payment of $360.00 and Respondent did not pay this agreed upon amount. This ALJ finds that Respondent acted reprehensibly in failing to act at all after Claimant moved to New Mexico, first to designate a provider, then not paying the stipulated amount of $360.00 and lastly to provide the maintenance care she required. The Workers' Compensation Act does not prohibit a Claimant from moving from the state of the injury. In this matter, Claimant acted in a reasonable manner given her circumstances, especially considering her continual need for oxygen in Colorado, which she was actually able to ween off of after the move, with the exception of the nightly forced air treatment provided by the CPAP machine. As found, Respondent's conduct was objectively unreasonable.

Next, this ALJ considers the appropriate amount of the penalty to "punish the violator and deter future misconduct." Case law instructs that when assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty." The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. Here, the ALJ considers that the failure to act and pay Claimant in accordance with the ALJ's Order significantly limited Claimant's ability to obtain the maintenance care she required to

[10] It is not clear from the log whether the payments were made for medical services before she no longer had access to Dr. Paulson or after, but this ALJ is inferring that it was after. This ALJ also is assuming that the TS[Redacted] benefits was for prescription medications.

maintain MMI, including additional equipment ordered to maintain her functionality. The original Summary Order was issued in November 2021, so Respondent knew or should have known what benefits Claimant was due, and any further delays past the final order of July of 2022 is reprehensible. This has been an extremely stressful situation for Claimant and caused Claimant depression related to Respondent's failure to pay. Respondent failed to provide evidence regarding Respondent's ability to pay, so consideration of this factor is limited. However, this ALJ takes notice that the employer and its' parent company is a large chain store under multiple names and has stores in at least 10 states in the nation when considering their ability to pay. Respondent knew or should have known that the *Dami* test would be applied and they had the opportunity to put on evidence in defense of the penalties issue including ability to pay. This ALJ finds that Respondent not only acted reprehensibly but acted in a manner that showed total lack of regard to the Act and to the ALJ's order and failed to put on a defense to the issue despite the opportunity to do so.

Therefore, it is found and concluded that Claimant proved that Respondent acted objectively unreasonable in this matter. *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). Claimant proved by a preponderance of the evidence that a penalty is due. As found, Respondent shall pay $150.00 per day for each day's failure to comply with ALJ Nemechek's March 2, 2022 order beginning from the date the Order became final on July 27, 2022 to the present and continuing until paid. As found, from July 27, 2022 to the date of the hearing of March 29, 2023 a 245 day period, penalties owed are $36,750.00. Thereafter, Respondent shall continue to owe ongoing penalties per day until the benefits are paid. As found, this is a penalty that is reasonable (only 15% of the maximum allowed), and not grossly disproportionate to the violation in light of the reprehensible act of Respondent in failing to make any payments in accordance with the order. While this ALJ views Respondent's actions as extremely and objectively unreasonable and reprehensible in failing to act and should merit a $1,000.00 a day penalty for their non-actions, when comparing similarly placed parties in other cases, this ALJ determined that the $150.00 per day may be viewed by any reviewing panel or court as "not disproportionate" to the harm caused to Claimant and Respondent's complete disregard of the order issued and a sufficient penalty to punish Respondent and deter future misconduct. As found, there is no evidence indicating Respondent is unable to pay a penalty that is proportionate to its offense. Based on the degree of reprehensibility of Respondent's conduct, the harm suffered by Claimant, and penalties assessed in comparable cases, the ALJ concludes that a penalty of $150.00 per day is appropriate. The amount of the penalty is more than proportionate to the harm to Claimant and Respondent's disregard for the order issued by the ALJ as well as to punish Respondent and deter this conduct in the future.

ORDER

IT IS THEREFORE ORDERED:

1. Respondent failed to comply with ALJ Nemechek's order of March 2, 2022.

2. Respondent shall pay the past due $ 16,753.40 for the reasonably necessary and related medical benefits itemized in the above chart.

3. Claimant's request for interest on the past due amounts pursuant to Sec. 8-43-401(2)(a) is *denied* and *dismissed*.

4. Respondent shall pay a penalty for failure to comply with ALJ Nemechek's order of March 2, 2022 in the aggregate amount of $36,750.00, and continuing thereafter at the rate of a $150.00 per day until Respondent issues payment to Claimant for the $ 16,753.40 for ordered reasonably necessary and related medical benefits based on the chart shown above. Of the penalties, seventy five percent of the fine shall be apportioned to Claimant and twenty five percent of the fine shall be apportioned to the Colorado Uninsured Employer Fund.

5. Respondent shall either arrange for delivery of the monthly items Claimant requires which have previously been found to be reasonably necessary and related to the July 23, 2015 injury or send a payment based on the chart above on a monthly basis for Claimant's future supplies.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 9th day of May, 2023.

Elsa Martinez Tenreiro

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered a whole person impairment to his right shoulder?
- If Claimant did not prove whole person impairment to his right shoulder, what is the proper scheduled rating based on a preponderance of the evidence?
- Did Respondents prove the DIME process is incomplete?
- Did Respondents overcome the DIME's whole person rating(s) by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant works for Employer as journeyman gas fitter, installing and servicing natural gas lines. He has done this work for Employer for seven years. The job is physically demanding and requires heavy lifting, digging, and awkward postures.

2. Claimant suffered admitted injuries to his low back and right shoulder on February 12, 2020. He was walking across a snow-covered area and stepped on a PVC pipe buried in the snow, which caused him to lose his balance and fall onto his right arm and back.

3. Claimant's case is complicated by a pre-injury history of low back and right shoulder issues. He had a two-level lumbar fusion in 2001. The surgery was largely successful, but he was left with chronic left leg radiculitis. The lumbar fusion was the result of a personal health condition and not associated with any work-related injury.

4. On December 23, 2009, Claimant injured his right shoulder while working for [Redacted, hereinafter CT]. He underwent a right shoulder arthroscopy with biceps tenolysis in late-March 2010. Claimant also injured his right hip in the December 2009 accident and had a total hip arthroplasty. Claimant was put at MMI on March 31, 2011, with a combined 13% whole person rating for both injuries. The MMI report is not in the record and no evidence was offered at the hearing to show what portion of the 13% rating, if any, was attributable to the right shoulder.[1]

5. After the February 12, 2020 accident, Claimant treated at Advanced Urgent Care. He was referred to Dr. Michael Hewitt for his shoulder and Dr. Karen Knight for his back.

[1] Some portion of the overall 13% rating was probably for the hip arthroplasty, which is typically assigned at least 20% lower extremity/8% whole person under Table 45 of the *AMA Guides*.

6. Claimant's initial evaluation with Dr. Knight took place on November 30, 2020. He described back pain radiating to the right buttock, with associated numbness and tingling. Recent imaging studies showed postsurgical changes from the prior fusion at L4-S1, and multilevel degenerative disc disease with central stenosis. Dr. Knight recommended lumbar epidural steroid injections (ESIs).

7. Dr. Hewitt performed a right shoulder arthroscopy on December 30, 2020. Dr. Hewitt repaired a supraspinatus tear and debrided the superior labrum.

8. Advanced Urgent Care closed its clinic and Claimant's care was transferred to Dr. Matthew Lugliani at Colorado Occupational Partners. Claimant's first saw Dr. Lugliani on March 9, 2021. He reported ongoing right shoulder and low back pain. The shoulder was tender to palpation, but there was no tenderness or other abnormality on examination of the trapezius, AC joint, or scapula. Dr. Lugliani agreed with Dr. Knight's recommendation for lumbar ESIs.

9. The record contains only two pain diagrams completed by Claimant, dated January 14, 2021 and March 9, 2021. The diagrams are barely legible but appear to show pain limited to the superior aspect of the right shoulder and low back. There is no persuasive indication of neck, trapezius, or scapular pain.

10. At a three-month surgical follow up appointment on March 24, 2021, Dr. Hewitt noted Claimant was making "excellent progress" with PT and taking no pain medication. Examination of the shoulder showed reduced range of motion and strength, but "minimal pain" and "no focal shoulder tenderness."

11. Claimant attended PT from January to early May 2021. On April 7, 2021, the therapist noted Claimant could not perform heavier household chores and yard work, but "all other ADLs have returned to normal." On May 5, 2021, the therapist documented, "Shoulder is not impacting any ADL function." Claimant had his final PT appointment on May 10, 2021. Claimant reported, "overall, shoulder is treating him well. Began 'light duty' work today. Back has been bothering him a bunch." Claimant was seeing chiropractor and a massage therapist for his ongoing low back symptoms. Shoulder strength was normal with all movements. Lumbar range of motion was reduced in all planes. The report makes no mention of any neck, trapezius, or scapular symptoms.

12. Claimant received chiropractic treatment from Dr. Zachary Jipp in April through July 2021. The treatment was primarily focused on Claimant's back. Dr. Jipp's records contain no persuasive evidence of any scapular, trapezius, or neck symptoms related to Claimant's shoulder injury.

13. Claimant also received massage therapy from April through June 2021. The therapist typically worked on Claimant's entire back including his "traps," "lats," and thoracolumbar paraspinal muscles. The therapist repeatedly observed hypertonicity on palpation of Claimant's low back, buttocks, and upper legs. However, there are no similar clinical findings related to the trapezius or latissimus dorsi, such as spasm, trigger points, or tenderness.

14. Dr. Knight eventually performed ESIs at L3-4 and L4-5 in August 2021. The injections resolved Claimant's lower extremity radicular symptoms and reduced his low back pain. At the last documented appointment with Dr. Knight on September 24, 2021, Claimant reported "good days and bad days" but was generally doing well. Lumbar range of motion was limited. Dr. Knight released Claimant to follow up as needed if his back pain worsened.

15. Dr. Lugliani put Claimant at MMI on October 27, 2021. Claimant had "minimal pain" and estimated 95% improvement since the injury. He was working full duty without difficulty. Examination of Claimant's right shoulder showed well-healed surgical sites and no tenderness to palpation. Shoulder and lumbar ranges of motion were reduced in all planes. Dr. Lugliani assigned a 6% upper extremity rating for the right shoulder, which converts to 4% whole person. He also provided a 16% whole person lumbar rating, consisting of 5% under Table 53 and 12% for range of motion. Dr. Lugliani opined, "while apportionment may be indicated in this case, we have no previous medical records to evaluate. Patient does have a history of lumbar fusion." Regarding medical maintenance, Dr. Lugliani recommended one year of follow-up with pain management and repeat injections for flareups. He released Claimant to full duty with no formal restrictions, but stated "patient is aware of his limitations and will interact with them."

16. Claimant saw Dr. Brian Beatty for a DIME on July 20, 2022. Dr. Beatty documented a thorough record review, including extensive pre-injury records. The records include a March 31, 2011 report from the December 2009 injury claim documenting a 13% combined whole person rating for Claimant's right hip and right shoulder. Dr. Beatty provided no breakdown of the rating. Claimant reported he was working regular duty but having some difficulty with shoulder pain with overhead work and reaching away from his body. He also had ongoing low back pain. Claimant was not interested in additional injections because the first set had not produced sustained benefit. Examination of Claimant's low back showed tenderness but no apparent spasms. Lower extremity strength and sensation were normal. The lateral aspect of the right shoulder was tender to palpation. There is no mention of any proximal symptoms or limitations, such as neck, trapezius, or scapular pain. Lumbar and shoulder motion were limited in all planes. The lumbar ROM measurements were internally consistent and valid per the *AMA Guides'* reproducibility criteria.

17. Dr. Beatty agreed Claimant reached MMI on October 27, 2021. He assigned a 21% whole person rating, based on 5% under Table 53 combined with 17% for ROM. He also assigned a 9% upper extremity rating for the right shoulder, which coverts to 5% whole person. Dr. Beatty commented,

> [T]here was a significant difference between my range of motion measurements and Dr. Lugliani's range of motion measurements and therefore I would like to bring the patient back to repeat the range of motion measurements.

18. Dr. Beatty opined apportionment of the low back rating was not appropriate because the prior lumbar fusion was not work-related and "was not independently

disabling at the time of this injury." He opined Claimant required no work restrictions and no maintenance care.

19. After receiving Dr. Beatty's DIME report, the DIME Unit issued an "Incomplete Notice" dated August 12, 2022. Specifically, the Notice indicated Dr. Beatty had (1) miscalculated the percentage rating for lumbar flexion under Table 60, and (2) added the lumbar and shoulder ratings rather than combining the ratings. The Notice made no mention of a follow-up evaluation for repeat ROM measurements.

20. Dr. Beatty issued an amended report correcting the errors identified by the DIME Unit. The corrected final rating was 27% whole person, including 23% for the lumbar spine and 5% whole person for the right shoulder. The amended report was otherwise identical to the first report.

21. On August 19, 2022, the DIME Unit issued a Notice entitled "DIME PROCESS CONCLUDED." The Notice stated, "The Division Independent Medical Examination Unit is in receipt of the sufficient DIME report. The DIME process is now concluded."

22. Respondents filed an Application for Hearing on September 8, 2022 on the issue of PPD to challenge Dr. Beatty's ratings.

23. Dr. John Raschbacher performed a record review for Respondents and testified at the hearing. Dr. Raschbacher opined that Dr. Beatty "wasn't done" with the DIME, and that Claimant should return for repeat range of motion measurements. Dr. Raschbacher testified that the Division's Form WC201 requires the DIME to "Address any impairment rating differences between providers." Dr. Raschbacher explained that the language from the Division indicates this it is a mandatory requirement. Dr. Raschbacher noted that Dr. Beatty tried to address the rating differences, as evidenced by his request for Claimant to return for repeat measurements. He testified, "Dr. Beatty said basically he wasn't finished. [Claimant] should come back. Those are the instructions per the DIME unit." Dr. Raschbacher concluded, "[Dr. Beatty] didn't make an error. . . . Look to the DIME unit for the error."

24. Dr. Raschbacher opined the difference in ROM measurements is not a validity issue, but rather a disparity issue, which must be addressed by the DIME. Additionally, Dr. Raschbacher testified the ROM measurements must "make sense" medically. He went on to question whether Claimant's range of motion measurements were medically appropriate or an accurate depiction of his function.

25. Dr. Raschbacher's opinions that the DIME Unit "erred," and that Dr. Beatty's ROM measurements do not "make sense" are not persuasive.

26. Respondents failed to prove by a preponderance of the evidence that repeat ROM measurements are needed to "complete" the DIME.

27. Respondents failed to overcome the DIME's 23% whole person lumbar rating by clear and convincing evidence.

28. Claimant failed to prove he suffered impairment whole person impairment to his right shoulder.

29. The preponderance of persuasive evidence shows Claimant suffered a 6% scheduled right upper extremity impairment.

30. Respondents failed to prove Claimant's shoulder or lumbar ratings should be apportioned. There is no persuasive evidence to prove the specific rating Claimant received for his previous work-related right shoulder injury. The previous lumbar spine impairment was not work-related and not "independently disabling" at the time of the February 12, 2020 work accident.

CONCLUSIONS OF LAW

A. The DIME is "complete"

Section 8-42-107.2(4)(a)(II) requires the Division to review all DIME reports and determine whether the report contains "any deficiencies." Consistent with this provision, WCRP 11-5(E)[2] provides that "Services rendered by a DIME physician shall conclude upon acceptance by the Division of the final DIME report."

After receiving Dr. Beatty's amended report, the DIME Unit notified the parties the report was "sufficient" and "this DIME process is now concluded." Under the plain language of Rule 11-5(E), the DIME's "services" ended at that time, and the DIME was "complete." Respondents failed to show any "deficiency" that obliged the Division to keep the DIME open and arrange for a follow-up evaluation. Dr. Beatty rated all involved body parts using the proper tables in the *AMA Guides*. He completed all required worksheets and applied the right "math" (*i.e.*, adding or combining components where appropriate). And his rating was based on valid ROM measurements obtained during the DIME. Given the absence of any express provision in the Act, Rules, Level II Curriculum, or Rating Tips requiring a repeat evaluation when the DIME has obtained valid measurements, the decision to accept the DIME report was a reasonable exercise of the Division's discretionary authority to manage the DIME process. Respondents failed to prove by a preponderance of the evidence that the DIME process is "incomplete" pending repeat ROM measurements.

B. Burdens and standards of proof

The DIME assigned ratings for Claimant's lumbar spine and right shoulder. The lumbar spine rating is unquestionably a whole person impairment, which is binding unless overcome by clear and convincing evidence. But the shoulder rating a whole person or scheduled impairment, which has implications for the burden and standard of proof.

Whether a claimant sustained a scheduled or non-scheduled impairment is a threshold question of fact for determination by the ALJ. The heightened burden of proof

[2] Rule 11-5 was amended effective March 2, 2023, and this provision is now found at 11-5(F). No substantive change was made to the text.

that attends a DIME rating applies only if the claimant establishes by a preponderance that the injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (August 16, 2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) (DIME provisions do not apply to the scheduled ratings).

In light of the foregoing principles, the ALJ has allocated the burdens of proof in the following manner: (1) Respondents must overcome the DIME's lumbar rating by clear and convincing evidence; (2) Claimant must prove by a preponderance of the evidence he sustained whole person impairment to his right shoulder; (3) if Claimant has whole person impairment to his shoulder, Respondents must overcome the DIME rating by clear and convincing evidence; (4) if Respondents overcome the DIME whole person rating, the proper rating is a factual question based on a preponderance of the evidence; (5) if Claimant does not have a whole person impairment, then Claimant must prove the proper shoulder rating by a preponderance of the evidence.

C. Claimant's right shoulder is a scheduled impairment

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant failed to prove his injury caused functional impairment beyond the right arm. Claimant's testimony regarding referred pain from his shoulder to his trapezius and neck is not substantiated by other persuasive evidence. Dr. Failinger

documented some proximal findings in his IME, but that was before the surgery performed by Dr. Hewitt. No treating or examining provider documented similar complaints after surgery. Claimant successfully returned to his physically demanding job and requires only minor self-modifications for a handful of tasks. While Claimant may still experience transient trapezius or neck, there is no persuasive evidence those symptoms give rise to permanent functional impairment affecting parts of his body not listed on the schedule.

D. Claimant has a 6% upper extremity impairment to his right shoulder

Permanent impairment ratings must be "based on" the *AMA Guides to the Evaluation of Permanent Impairment* (3d ed. rev. 1991) ("AMA Guides"). Section 8-42-101(3.7). Where, as here, the claimant suffers a purely scheduled impairment, the claimant must prove entitlement to a rating by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

MMI is the dividing line between temporary disability and permanent impairment. Section 8-40-201(11.5). Ideally, permanency would be measured and determined on the date of MMI. However, the practical realities of the workers' compensation system make that impossible in many cases. *E.g., Lopez v. Redi Services*, W.C. No. 5-118-981 & 5-135-641 (October 27, 2021). Nevertheless, as a general proposition, and all other factors being equal, measurements taken contemporaneous with MMI probably provide a more accurate assessment of a claimant's impairment at the time of MMI, as opposed to measurements taken many months later.

The preponderance of persuasive evidence shows Dr. Lugliani's 6% upper extremity rating is the most appropriate under the circumstances. Dr. Lugliani completed his rating the same day he put Claimant at MMI. There is no persuasive evidence of any flaw in Dr. Lugliani's measurement methodology, or that Claimant's condition was not fairly representative of his general level of function. The measurements appear valid on their face, and there is no persuasive suggestion of any inconsistency with the *AMA Guides*. Dr. Lugliani selected the proper percentages from the rating tables and completed the worksheets correctly. In the absence of any persuasive reason to prefer a later assessment (such as presumptive weight given a DIME's whole person rating), the measurements taken on the date of MMI are probably the best representation of Claimant's impairment.

E. Respondents failed to overcome the DIME's 23% lumbar rating

A DIME's whole person impairment rating is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing burden also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62

P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc.*, W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondents failed to overcome the DIME's 23% lumbar rating by clear and convincing evidence. Respondents pointed to no technical flaw in Dr. Beatty's rating methodology or his application of the rating tables and other guidelines. Indeed, Dr. Raschbacher conceded that Dr. Beatty "didn't make an error." Respondents' primary argument is that repeat ROM measurements are necessary to "resolve" a perceived "discrepancy" between Dr. Beatty's rating and the lower rating assigned by Dr. Lugliani. Respondents cited no statue or Rule reflecting this purported "requirement." The only authority Dr. Rasbacher cited is the DIME report template promulgated by the Division (Form WC201).

Dr. Raschbacher's opinion that repeat range of motion measurements were required is not persuasive. A DIME is typically a self-contained, one-time evaluation. In most cases, the rating is based on data obtained at the DIME appointment. However, the *AMA Guides* and Impairment Rating Tips contemplate repeat measurements in limited circumstances, none of which are present here. The *AMA Guides* provide that, "if acute spasm . . . is observed by the examiner . . . the patient must be reexamined in a few days or weeks after the spasm has resolved." *AMA Guides*, § 3.3a, p. 78. The Impairment Rating Tips state that "to invalidate spinal range of motion measurements, due to internal or straight leg validity, or for physiologic reasons, claimants must have two visits". Desk Aid #11 – Impairment Rating Tips (July 2020), p.6 (underlining in original). There is no mention of repeating measurements in any other context.

Dr. Beatty's lumbar ROM measurements are "valid" because they satisfy the *AMA Guides*' "reproducibility" criteria and the straight leg raise test. Dr. Beatty found no muscle spasm or acute flare that would necessitate deferring the ROM measurements to another day. Nor did he opine Claimant was malingering, exaggerating, or otherwise gave less than full effort during ROM testing. There is no indication Dr. Beatty considered the measurements "nonphysiologic." The only alleged "discrepancy" is that the DIME measurements show less motion than those obtained by Dr. Lugliani. The Respondents have pointed to no authority that *requires* repeat ROM measurements where, as here, the DIME obtains valid measurements that are simply different than those obtained by the ATP. Indeed, the hope of obtaining a different rating than given by the ATP is one of the primary reasons parties request DIMEs. Respondents failed to prove Dr. Beatty's 23% spinal rating was highly probably incorrect.

F. Respondents failed to prove apportionment is appropriate

Once the rating physician determines a claimant has a work-related permanent impairment, the question of how to account for any pre-existing impairment is answered § 8-42-104(5) (the "apportionment statute").[3] The current iteration of the apportionment

[3] There have been several iterations of the apportionment statute since 1991. From July 1, 1991 to June 30, 1999, apportionment of PPD was codified in § 8-42-104(2). From July 1, 1999 to June 30, 2008,

statute distinguishes work-related and nonwork-related prior impairments. Sections 8-42-104(5)(a) and (b). If the prior impairment was work-related, the current rating must be reduced by a previous rating involving "the same body part" that resulted in "an award or settlement." In such a case, the prior rating "as established by the award or settlement" is subtracted from the rating for the current injury. Section 8-42-104(5)(a). In cases of prior nonwork-related impairment, the statute only allows apportionment if the prior impairment was "independently disabling" at the time of the subsequent injury. Because application of the apportionment statute hinges on legal issues rather than medical factors, apportionment under § 8-42-104(5) is a factual question for the ALJ's determination under the preponderance standard. *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68, 71 (Colo. App. 2001).

Respondents failed to prove Claimant's lumbar or shoulder ratings should be apportioned. Although the previous right shoulder impairment resulted in an "award" in a prior workers' compensation claim, there is no persuasive evidence to prove the specific rating. The prior shoulder rating was not offered at the hearing, and the only evidence is the notation in Dr. Beatty's report that Claimant received a combined 13% whole person rating for the right hip and right shoulder. Accordingly, there is no basis to discern the prior impairment "established by the prior award or settlement" as required by § 8-42-104(5)(a).

Additionally, Respondents failed to prove the medical impairment from Claimant's 2001 nonwork-related lumbar fusion was "independently disabling" at the time of the February 12, 2020 accident. The phrase "independently disabling in § 8-42-104(5)(b) invokes the analysis set forth in *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). *Askew* held that "medical impairment" is not synonymous with "disability." Impairment is "an alteration of an individual's health status that is assessed by medical means," whereas disability is assessed by "nonmedical means," and pertains to "an individual's capacity to meet personal, social, or occupational demands." The court held that, "Impairment gives rise to disability only when the medical condition limits the individual's capacity to meet the demands of life's activities." *Id*. at 1337. Dr. Beatty's opinion that Claimant's lumbar spine was not disabling before February 2020 is credible and supported by persuasive evidence in the record. Claimant maintained a physically demanding job without limitation or difficulty for almost two decades after his back surgery. Nor is there any persuasive evidence to show limitation in the performance of avocational activities.

ORDER

It is therefore ordered that:

1. Respondents' request to return Claimant to the DIME for repeat range of motion testing is denied and dismissed.

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apportionment of PPD was codified in § 8-42-104(2)(b). Effective July 1, 2008, apportionment of PPD is governed by § 8-42-104(5).

2. Respondents' request to overcome the DIME's 23% whole person lumbar rating is denied and dismissed.

3. Claimant's request whole person impairment to the right shoulder is denied and dismissed.

4. Insurer shall pay Claimant PPD benefits based on a 23% whole person lumbar rating and a 6% scheduled right upper extremity rating.

5. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

6. Claimant's request for PPD based on a 9% upper extremity rating is denied and dismissed.

7. Respondents request for apportionment of Claimant's lumbar spine and or shoulder rating is denied and dismissed.

8. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 9, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-215-058-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his lower back arising out of the course of his employment with Employer.

2. If Claimant established a compensable injury, whether Claimant established by a preponderance an entitlement to medical benefits.

3. If Claimant established a compensable injury, determination of Claimant's authorized treating physician.

FINDINGS OF FACT

1. Claimant works for Employer as a delivery truck driver, delivering seafood products to grocery stores and other customers. Claimant alleges that on August 17, 2022, while making a delivery to a grocery store in Colorado Springs, he sustained an injury to his lower back.

2. Claimant testified that while in the process of making a delivery, he was sorting through boxes of products located in his truck, he moved a box on the floor of the truck using his foot and felt and pain in his lower back, hip, tailbone, and thigh.

3. Claimant has a history of injuries and conditions to his lower back that predate the August 17, 2022 incident. On January 10, 2014, Claimant sustained a work-related injury to his lower back. Claimant's authorized treating provider (ATP) for that injury was John Sacha, M.D., who opined that Claimant had discogenic lower back pain from this injury. He placed Claimant at maximum medical improvement (MMI) for that injury on July 23, 2014, and assigned a whole person impairment of 11% due to his injury. However, he also noted that Claimant had a non-work-related condition -- diffuse idiopathic skeletal hyperostosis ("DISH") -- which also contributed to Claimant's loss of lumbar range of motion. Consequently, Dr. Sacha ultimately assigned Claimant with a 5% whole person impairment for his work-related lumbar radiculopathy. (Ex. 6)

4. Claimant returned to Dr. Sacha on September 25, 2019 reporting he had a flare of pain in his lower back and right buttock after riding in a truck that bounced. Dr. Sacha opined that Claimant sustained a minor aggravation of his pre-existing work-related lumbar discogenic pain, but remained at MMI. (Ex. 6). Claimant's symptoms continued for several months, and he received a lumbar epidural steroid injection (LESI) on November 21, 2019. (Ex. F).

5. On December 10, 2019, Dr. Sacha examined Claimant and noted he received excellent relief from the LESI, and was nearly back to his baseline pain level. (Ex. G).

6. Claimant next saw Dr. Sacha on February 3, 2020, when he reported minimal back pain. Dr. Sacha noted some lumbar spasms, and pain with straight leg raise, and diagnosed Claimant with lumbosacral radiculopathy. Dr. Sacha discharged Claimant with instructions to comply with a home exercise program, and to return on an as-needed basis. (Ex. 6)

7. Claimant returned to Dr. Sacha on October 16, 2020, noting a "slight flare" of pain in his low back and buttocks. Dr. Sacha documented an equivocal straight leg raise test, lumbar paraspinal spasms, and diminished thoracic and lumbar range of motion. He provided Decadron and recommended Claimant return in one year. (Ex. 6)

8. Claimant's next documented lower back examination was on February 22, 2022, when he saw Dr. Sacha. At that time, Claimant reported low back pain (right greater than left), right hip pain, bilateral buttocks pain, and bilateral shoulder pain. No radiating pain was documented. Claimant reported that his pain had been worse over the previous six months. He recommended x-rays of Claimant's lumbar spine and hips to evaluate a diagnosis of ankylosing spondylitis of the lumbosacral region. (Ex. J).

9. Dr. Sacha saw Claimant again on March 8, 2022. At that visit, Dr. Sacha indicated Claimant's x-rays demonstrated "ongoing worsening of his spinal osteophyte bridging" and mild osteoarthritic changes in the bilateral hips. These findings were attributable to Claimant's DISH or ankylosing spondylitis diagnoses. On examination, he noted pain with straight leg and neural tension testing. He also indicated Claimant's back and buttock pain was reproduced with extension and rotation to the right. Dr. Sacha recommended Claimant undergo medial branch blocks for his lumbar spine, and a steroid injection for his hips. (Ex. K & L).

10. On April 14, 2022, Dr. Sacha performed medial branch blocks on the right side at L3-4, L4-5, L5-S1 and S1-S2, and bilateral hip injections. (Ex. M). On April 26, 2022, Claimant reported improvement in his lower back and hips. Dr. Sacha recommended proceeding with a radiofrequency ablation, but Claimant decided not to undergo the procedure noting that he had significant reduction in his hip pain with the injections. (Ex. N).

11. Claimant's next documented medical treatment was on August 17, 2022, when he saw Gary Childers, M.D. at Aviation & Occupational Medicine. Claimant reported that when he was unloading his truck that morning, he turned to the right exit his truck and had a sharp pain from the right side of his tailbone radiating to the right lateral hip through the posterior thigh. Claimant advised Dr. Childers of his 2014 injury and his treatment with Dr. Sacha and that Dr. Sacha had performed lumbar injections in April 2022. Dr. Childers examined Claimant, finding a positive straight leg test on the right without radiation, and tenderness in the lower back, buttock, flank, and right hip. X-rays were negative for acute findings. He diagnosed Claimant with a sprain of the lumbar spine and pelvis and radiculopathy. He further opined that Claimant's condition was more likely than not work-related. Dr. Childers placed claimant on modified duty, and referred him to Dr. Sacha. (Ex. 9).

12. Claimant followed up with Dr. Childers on August 19, 2022, with no significant changes. (Ex. 9).

13. On August 22, 2022, Claimant saw Jennifer Voag, P.A. and/or Michael Ladwig, M.D.,[1] at Aviation & Occupational Medicine, and reported continued burning and stabbing pain and tingling in his right hamstring that stopped at the knee. Claimant advised Ms. Voag of his April injections, and indicated he had no symptoms until the August 17, 2022 injury. Claimant requested to see a different specialist than Dr. Sacha. Ms. Voag ordered a lumbar MRI to rule out internal derangement as a cause of his radicular symptoms, and referred Claimant to Nicholas Olsen, D.O, for evaluation. (Ex. 9).

14. An MRI was performed on August 25, 2022, and was interpreted as showing progressive degenerative changes combined with congenitally short pedicles and dorsal epidural lipomatosis resulting in high-grade spinal stenosis at L2-5. The MRI also showed "progressive disc bulges" at each level with facet arthropathy at L2-3 through L4-5. (Ex. R).

15. On August 29, 2022, Claimant saw Dr. Olsen. Claimant described the mechanism of injury to Dr. Olsen as occurring when was turning to the right, while unloading his delivery truck, without lifting anything. Claimant reported pain in his right lower back, and right buttock radiating toward the thigh. Dr. Olsen found negative straight leg raises for radicular pain, and increased right lower back pain with facet loading. He diagnosed Claimant as sustaining a lumbar sprain/strain injury on August 17, 2022. Dr. Olsen also opined that Claimant did not sustain a work-related injury and that "it was more likely that his symptoms have returned after his successful injection in April." He indicated that "a simple turn to the right and having the onset of severe pain is not characteristic of an injury. It is more likely that his symptoms have returned after his successful injection in April." Dr. Olsen opined that he was unable to identify a specific work injury that "would qualify as a distinct and separate work injury." He recommended Claimant return to Dr. Sacha for treatment including repeating the April 2022 injection, under his commercial insurance and outside the workers' compensation system. (Ex. 10).

16. On September 6, 2022, Claimant saw Ms. Voag and/or Dr. Ladwig again but was no examined. Dr. Ladwig discharged Claimant from his care based on Dr. Olsen's opinion that Claimant's condition was not work-related and recommendation that Claimant return to Dr. Sacha "for continued management of his pain outside the workers' comp system." Dr. Ladwig placed Claimant at maximum medical improvement (MMI) with no maintenance care, and provided no further care to Claimant for his August 17, 2022 injury. (Ex. 9).

17. Claimant returned to Dr. Sacha on September 20, 2022, reporting pain in his low back, buttock, and thigh, all on the right side. Claimant's description of the mechanism of injury was consistent with his testimony at hearing, but different than his reports to other physicians. Dr. Sacha opined that Claimant's leg symptoms were new, and that he had

[1] The record is unclear whether Claimant saw Dr. Ladwig at this visit. Claimant testified he saw Ms. Voag several times and saw Dr. Ladwig twice.

not had any for more than one year. He recommended that Claimant have a one-time lumbar epidural on the right at L4-5, and if the result was diagnostic, he believed it would be a work-related injury and aggravation of his pre-existing problem. He opined that if the steroid injection was not diagnostic, then the problem would not be work-related, and presumably a result of his DISH diagnosis. He also provided Claimant with an oral steroid, Decadron. (Ex. 11).

18. Claimant returned to Dr. Sacha on October 4, 2022, who noted Claimant received some temporary relief from the oral steroid. Dr. Sacha indicated he had reviewed Claimant's medical records from Dr. Olsen and opined that Claimant sustained a work-related injury that was discogenic or radicular in nature, or, at a minimum, a flare up of a preexisting problem. As of October 4, 2022, Claimant had not undergone the lumbar epidural injection Dr. Sacha recommended on September 20, 2022. (Ex. 11).

19. Claimant testified that he underwent a transforaminal injection on the right side at the L4-L5 level on October 27, 2022. He testified that the injection resulted in some lasting relief, although it took a few days. No medical record of the October 2022 injections was offered or admitted into evidence.

20. On December 16, 2022, Claimant saw Lawrence Lesnak, D.O., for an independent medical examination at Respondents' request. Dr. Lesnak opined that Claimant did not engage in any activity on August 17, 2022 that would have caused an injury to his lumbar spine or pelvis, or aggravation of any preexisting pathology. He stated "there is no medical evidence to support that [Claimant] has any medical diagnosis or sustained any type of injury whatsoever that would in any way pertain to his reported occupational incident of 08/17/2022." He opined Claimant's did not have any objective evidence of injury and that his subjective symptoms were "merely symptoms from his ongoing chronic symptomatic lumbar spine/pelvic pathology that has apparently been present since 01/2014." He opined that any medical treatment Claimant received would be unrelated to his work incident on August 17, 2022. (Ex. U). Dr. Lesnak testified at hearing and was admitted as an expert in physical medicine and rehabilitation. His testimony was consistent with his December 16, 2022 report.

21. Dr. Lesnak's statement that Claimant had "ongoing" lumbar symptoms since January 2014 is incorrect. The medical records demonstrate that Claimant did not have "ongoing" symptoms, but did have periodic exacerbations. Claimant had no documented treatment from June 2014 through September 2019, or from October 2020 until February 2022. Following the medial branch blocks in April 2022, Claimant did not have any documented treatment or symptoms until August 17, 2022. The records demonstrate Claimant's symptoms were not "ongoing" on August 17, 2022. Moreover, Claimant's admitted medical records do not document any pain radiating into his right thigh prior to August 17, 2022. The ALJ finds that Dr. Lesnak's opinion is neither credible nor persuasive.

22. Dr. Olsen testified through deposition and was admitted as an expert in physical medicine and rehabilitation. Dr. Olsen testified that when examined on August 26, 2022, Claimant had "a lumbar sprain/strain/maybe muscular." He also testified that Claimant did

not sustain a work-related injury on August 17, 2022. Dr. Olsen indicated Claimant had no clinical symptoms of a lumbar radiculopathy when he examined him, based on his review of records, it is more likely Claimant's post-August 17, 2022 pain was from his hip than from his back, although he did not evaluate Claimant's hip at his examination. Dr. Olsen testified that DISH is a condition of the thoracic, and not the lumbar spine, and that Claimant has congenital stenosis of his lumbar spine, independent of DISH. With respect to the Claimant's MRI, Dr. Olsen testified that a comparison of prior MRIs would be necessary to determine whether Claimant's lumbar spine pathology had progressed, or if he had new pathology after August 17, 2022. Dr. Olsen opined that Claimant's symptoms had been waxing and waning for years, and the waxing and waning of symptoms was consistent with Claimant's MRI.

23. Dr. Sacha testified through deposition in lieu of live testimony and was admitted as an expert in physical medicine and rehabilitation. Dr. Sacha testified that Claimant had discogenic pain and also facet-based pain before August 17, 2022. He testified that Claimant's original discogenic pain was related to his 2014 injury, and the facet-based pain was related to his DISH diagnosis. Dr. Sacha testified that by the time he saw Claimant in 2021, his pain was not discogenic, and was facet-based, and that Claimant had no evidence of discogenic pain after 2021. He testified that the medial branch blocks in April 2022 were to address facet-based pain caused by DISH. He indicated that when he examined Claimant in September 2022, Claimant's pain was predominantly discogenic pain, which he believed was related to the August 17, 2022 injury. Dr. Sacha indicated that the Claimant's relief from the October 2022 L4-5 injections demonstrated that the Claimant's pain was discogenic in nature, and not related to his DISH diagnosis.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's

testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury arising from the course of his employment with Employer on August 17, 2022. The evidence demonstrates that, although Claimant has preexisting back conditions, he was symptom-free for approximately four months before August 17, 2022, and had not seen a health care provider for back pain since April 2022. Moreover, when Claimant saw Dr. Childers, and thereafter, he reported pain radiating into his right thigh, which he had not previously reported. Regardless of the later inconsistencies in Claimant's description of the mechanism of injury, Dr. Childers initially found Claimant's injury to be work-related, based on Claimant's report of sustained an injury while turning to the right. Dr. Olsen also opined that Claimant sustained a lumbar sprain/strain on August 17, 2022. He also opined, that Claimant sustained no work-related injury, but offered no cogent, credible explanation for this inconsistency. Dr. Ladwig did not express any independent opinion that Claimant's injury was not work-related, and instead reiterated Dr. Olsen's opinion. Dr. Olsen and Dr. Lesnak each determined that the mechanism of twisting or turning was insufficient to cause an injury or aggravation of a preexisting condition. The ALJ does not find these opinions credible or persuasive. As found, Claimant has a history of lower back and hip pain that was prone to exacerbation. Claimant was not experiencing ongoing symptoms in the months before August 17, 2022, when the symptoms returned while Claimant was performing work for Employer. Dr. Olsen's and Dr. Lesnak's opinions imply that on August 17, 2022, Claimant's then-asymptomatic preexisting conditions became symptomatic by coincidence, and independent of any work-related activity. The ALJ does not find these opinions persuasive.

The ALJ finds it more likely than not that Claimant's work-related activities caused an aggravation of his preexisting conditions. As such, Claimant has established that it is more likely than not he sustained a compensable injury.

Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Because Claimant sustained a compensable injury, he is entitled to reasonable and necessary authorized medical treatment to cure or relieve the effects of his injury.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo.

App. 1999). “The insurer’s right to select the treating physician contemplates the insurer will appoint a physician willing to treat the claimant based on the physician’s best medical judgment. *Dover v. Ameriserve Food Distrib.*, WC No. 4-451-332 (ICAO Sept. 27, 2002). “Consequently, if the designated treating physician refuses to provide medical treatment for non-medical reasons, the insurer must designate a new treating physician or the right of selection passes to the claimant,” and the physician selected by the claimant is authorized. *Id*., *see also Garcia v. McDonald’s Corp.*, WC No. 4-862-853-01 (ICAO Jan. 2, 2014); *Davis v. Interstate Brand Corp.*, WC No. 4-291-678 (ICAO May 17, 1999). The insurer’s obligation to appoint a new treating physician arises forthwith upon notice that the previously designated physician has refused to treat. *Dover, supra*. Whether the ATP has refused to treat the claimant for non-medical reasons is a question of fact for the ALJ. *Rubyal v. Univ. Health Sciences Ctr.*, 768 P.2d 1259 (Colo. App. 1988).

On September 6, 2022, Claimant’s ATP, Dr. Ladwig discharged Claimant and declined to provide further medical care based on Dr. Olsen’s opinion that Claimant’s need for further treatment was not work-related. Both Dr. Olsen and Dr. Ladwig indicated that Claimant may require further treatment, and indicated that Claimant should seek that treatment from Dr. Sacha outside the workers’ compensation system. The decision to decline treatment was not medical in nature, but on Dr. Olsen’s opinion concerning legal issues of compensability and causation. *See e.g.*, *Dover v. Ameriserve Food Distrib.*, W.C. No. 4-451-332 (Mar. 12, 2003); *Garcia, supra*; *Davis, supra*. Dr. Ladwig’s report includes a notation that it was received by Respondents’ counsel on October 27, 2022, from which the ALJ infers that Respondents either knew, or should have known, that Dr. Ladwig had declined to provide further treatment. Respondents were, therefore, under the obligation to appoint a new ATP “forthwith,” and did not do so. Consequently, the right of selection passed to Claimant, and Claimant selected Dr. Sacha as his ATP. Claimant has satisfied his burden of establishing that Dr. Sacha is his ATP.

ORDER

It is therefore ordered that:

1. Respondent sustained a compensable injury to his lower back on August 17, 2022.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant’s August 17, 2022 industrial injury.

3. Dr. Sacha is Claimant’s authorized treating physician.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 9, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee surgery performed by Dr. David Elfenbein on October 20, 2022, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 2022 work injury.

FINDINGS OF FACT

1. The claimant is employed with the employer at the [Redacted, hereinafter GN]. The claimant's job duties include checking-in airline passengers, weighing and tagging luggage, assisting with boarding, and related activities. This airport has a busy period during ski season, which typically runs from December to April. During ski season, passengers will often have larger and heavier bags containing ski equipment.

2. While performing her normal job duties on February 22, 2022, the claimant noted that she was experiencing pain in her left knee. The claimant noted this pain developed and worsened when she would lift luggage from the scale, and turn to place it on a conveyor belt behind her work station.

3. This conveyor belt was a new and temporary arrangement during construction at the airport. Prior to the placement of this conveyor belt, employees would not lift and place luggage on a belt. Rather, after a bag was weighed, the passenger would place the bag through a door. From there an employee with [Redacted, hereinafter TA] would handle the luggage for boarding.

4. The placement of the temporary belt was very close to the work station. The claimant testified that due to the narrow space, it was necessary to pivot on her left leg as she lifted and turned with the bags. This resulted in the development of pain in her left knee. The claimant communicated her concerns about the placement of the belt in an email to her supervisor, [Redacted, hereinafter ES], on February 22, 2022.

5. After February 22, 2022, the claimant attempted to work through this left knee pain, however, the pain did not improve. On March 23, 2022, the claimant emailed ES[Redacted] and stated: "Last month I mentioned to you I was struggling with bags and I still am. In addition what was originally just soreness has turned into a full blown injury. My knee is swollen and I can't bend it and I have numbness in both legs and feet." Following this email, the claimant was instructed to complete an OJI Incident Report.

6. On March 23, 2022, the claimant completed the requested report. The claimant specifically noted "since the new baggage belt has been installed I have had to twist and lift baggage sometimes exceeding 60 [pounds] [onto] the belt in a confined area." She also noted that she initially had soreness that would go away, "but now I have a constant pain, swelling and limited movement in my knee."

7. Thereafter, the claimant began treatment with Bonnie Strickland, FNP as her authorized treating provider (ATP). Nurse. Strickland recommended physical therapy. When the claimant's symptoms did not improve, on April 27, 2022, Nurse Strickland referred the claimant for an orthopedic consultation. In the medical record of that date, Nurse Strickland opined "although a pre-existing condition, her symptoms were exacerbated by the new requirement to move luggage."

8. On May 4, 2022, the claimant was seen for an orthopedic evaluation by Dr. David Elfenbein. In the medical record of that date, Dr. Elfenbein noted that the claimant had experienced two months of left knee pain since experiencing a twisting injury. At that time, the claimant's left knee symptoms included aching, stabbing, clicking, popping, numbness, and tingling. On examination, Dr. Elfenbein noted that the claimant's left knee had mild effusion, and medial joint line tenderness. Dr. Elfenbein opined that the claimant had suffered a tear of the medial meniscus. At that time, he ordered magnetic resonance imaging (MRI) of the claimant's left knee.

9. On May 31, 2022, the claimant underwent the recommended left knee MRI. The MRI showed a mildly displaced horizontal cleavage tear of the medial meniscus body, and scattered high-grade degenerative changes involving all compartments.

10. On June 3, 2022, the claimant returned to Dr. Elfenbein to discuss the MRI findings. Dr. Elfenbein noted that the claimant had an undersurface posterior medial meniscus tear with mild arthritic changes. Dr. Elfenbein also noted some subchondral edema and cyst formation. On that date, Dr. Elfenbein recommended that the claimant undergo four weeks of physical therapy.

11. On July 6, 2022, Dr. Elfenbein continued to recommend physical therapy. He specifically noted "I am not recommending a surgical intervention at this time, this may be recommended or necessary in the future to alleviate or treat this condition, especially if conservative measures fail or the condition continues to progress or worsen."

12. On July 29, 2022, the respondents filed a General Admission of Liability regarding the claimant's injured left knee.

13. On August 3, 2022, the claimant returned to Dr. Elfenbein. On that date, the claimant reported continuing left knee pain with little improvement from physical therapy. Dr. Elfenbein recommended that the claimant undergo surgery to her left knee. Specifically, Dr. Elfenbein recommended a left partial meniscectomy.

14. At the request of the respondents, Dr. Timothy O'Brien conducted a review of the claimant's medical records. In a report dated September 15, 2022, Dr. O'Brien opined that the claimant did not suffer a left knee injury at work in February 2022. With regard to the recommended left knee surgery, Dr. O'Brien opined that the surgery would fail, cause an increase in pain, and aggravate the arthritic condition in the claimant's left knee. In support of his opinions, Dr. O'Brien noted that the claimant did not report a specific incident that resulted in her left knee pain. Dr. O'Brien also noted that the claimant did not immediately seek treatment of her left knee and the MRI findings demonstrate chronic and long-standing degenerative conditions in the claimant's left knee.

15. The respondents relied upon the opinions of Dr. O'Brien and denied authorization for the requested left knee surgery.

16. Following the respondents' denial, the claimant elected to undergo the recommended left knee surgery. On October 20, 2022, Dr. Elfenbein performed a left knee diagnostic and surgical arthroscopy with partial medial and lateral meniscectomies and chondroplasty of the patella trochlea. This surgery was paid for by the claimant's private insurance, [Redacted, hereinafter RP].

17. On February 13, 2023, Dr. Elfenbein authored a letter regarding the claimant's need for left knee surgery. In that letter, Dr. Elfenbein noted that a twisting injury is an extremely common mechanism of meniscal tearing. Dr. Elfenbein stated his opinion that the claimant suffered an acute left meniscal tear. Dr. Elfenbein noted that the medial meniscal tear was complex, which indicates some chronic component. Dr. Elfenbein also noted that during the surgery there was significant synovitis, which also suggests "an acute or subacute component to that tear." Although Dr. Elfenbein agrees with the medical literature identified in Dr. O'Brien's report, it is Dr. Elfenbein's opinion that those studies do not apply to the claimant's left knee condition.

18. Dr. O'Brien's testimony was consistent with his written report. Dr. O'Brien testified that it continues to be his opinion that the claimant did not suffer a work injury. Dr. O'Brien also testified that the type of surgery performed by Dr. Elfenbein on the claimant's left knee should never be performed on an individual with osteoarthritis.

19. The claimant testified that prior to feeling pain in her left knee at work in February 2022, she did not experience pain in her left knee. The claimant further testified that since the surgery in October 2022, she has significantly less pain and improved range of motion. The claimant testified that since the surgery her left knee has "improved tremendously".

20. The ALJ credits the medical records, the claimant's testimony, and the opinions of Dr. Elfenbein and Nurse Strickland over the contrary opinions of Dr. O'Brien. The ALJ finds that the claimant has demonstrated that it is more likely than not that the left knee surgery performed by Dr. David Elfenbein on October 20, 2022, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 2022 work injury. The ALJ finds that the pre-existing condition in the

claimant's left knee was aggravated and accelerated by her February 2022 injury, resulting in the need for the surgery performed by Dr. Elfenbein.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left knee surgery performed by Dr. David Elfenbein on October 20, 2022, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 2022 work injury. As found, the medical records, the claimant's testimony, and the opinions of Dr. Elfenbein and Nurse Strickland are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the claimant's left knee surgery performed by Dr. Elfenbein on October 20, 2022.

Dated May 10, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-208-346-002

ISSUES

I. The parties seek an order accepting the stipulated facts and allocating dependency benefits at this time evenly between Decedent's three minor biological children, Dependent-Claimants [Redacted, hereinafter CF], [Redacted, hereinafter JG], and [Redacted, hereinafter KF].

STIPULATIONS

The parties entered into stipulated facts as follows:

1. Alleged Dependent-Claimant [Redacted, hereinafter MG] is not a dependent of Decedent under the Act;
2. Alleged Dependent-Claimant [Redacted, hereinafter AA] is not a dependent of Decedent under the Act;
3. Alleged Dependent-Claimants JG[Redacted], JG[Redacted], and KF[Redacted] are dependents of Decedent entitled to dependency benefits under the Act;
4. Dependency benefits should be allocated evenly between Decedent's three biological children, each of whom is currently a minor, CF[Redacted], JG[Redacted], and KF[Redacted];
5. Decedent's AWW for calculating dependent benefits is $1,692.85;
6. Respondents shall not seek a safety rule violation offset against the above identified entitled Dependent-Claimants' dependency benefits; and
7. Respondents have reimbursed Decedent's family for funeral benefits and therefore owe no additional funeral benefits under the Act.

FINDINGS OF FACT

Based on the evidence presented at hearing, and the stipulation of the parties, the Judge enters the following specific findings of fact:

1. Decedent was hired by Employer November 1, 2021. (Resp. Ex. B, bn 006). Decedent filled out an Employee Information Form identifying his emergency contact as his girlfriend, [Redacted, hereinafter MZ]. (Resp. Ex. A, bn 001) He also completed a W-4 form (Employee's Withholding Certificate) indicating he was single, or married filing separately. (Id. at bn 003)
2. Decedent passed away on June 18, 2022, in the course and scope of his duties for Employer. (Resp. Exs. B-D)
3. An Amended Workers' Claim for Compensation was filed on behalf of Decedent on July 7, 2022. (Resp. Ex C)

4. A Dependents' Notice and Claim for Compensation was filed by Alleged Dependent-Claimant MG[Redacted] on behalf of herself, Dependent-Claimant surviving son CF[Redacted], Dependent-Claimant surviving son JG[Redacted], Dependent-Claimant surviving daughter KF[Redacted], and Alleged Dependent- Claimant AA[Redacted], who was not related to Decedent, but is the biological son of MG[Redacted]. (Resp. Ex. D)

5. Alleged Dependent-Claimant MG[Redacted] is the biological mother and legal guardian of Dependent-Claimant surviving son CF[Redacated] (D.O.B. 9/27/05), Dependent-Claimant surviving son JG[Redacted] (D.O.B. 9/19/07), and Dependent-Claimant surviving daughter KF[Redacted] (D.O.B. 08/12/10). (Resp. Ex. D; Clt Exs. 1-3) As stipulated, MG[Redacted] is not a dependent of Decedent under the Act. (Stipulation #1)

6. Alleged Dependent-Claimant AA[Redacted] (D.O.B. 9/23/14) is the biological son of MG[Redacted] and [Redacted, hereinafter JH]. (Resp. Ex. D, bn 013) He is not the biological son of Decedent. MG[Redacted] is the mother and legal guardian of AA[Redacted]. As stipulated, AA[Redacted] was not a dependent of Decedent under the Act. (Stipulation #2)

7. As stipulated, on his date of death, Decedent left three Dependents, his biological minor children identified as Dependent-Claimant surviving son CF[Redacted] (D.O.B. 9/27/05), Dependent-Claimant surviving son JG[Redacted] (D.O.B. 9/19/07), and Dependent-Claimant surviving daughter KF[Redacted] (D.O.B. 08/12/10). (Resp. Ex. D; Clt. Exs. 1-3; Stipulation #3)

8. On April 7, 2023, Respondent Insurer filed a Fatal Case – General Admission. (Resp. Ex H) In the remarks section Insurer indicated it was admitting for funeral benefits, and a hearing was set for April 18, 2023 to determine dependents. (Id. at bn 023) A copy of the Statement of Funeral Goods and Services Selected Worksheet was attached to that admission. (Id. at bn 026) As stipulated, by the date of hearing Insurer had fully reimbursed Decedent's family for the funeral benefits. (Stipulation # 7)

9. At the time of Decedent's death, he was living with MZ[Redacted], his girlfriend. (Resp. Ex. A, E) On October 17, 2022 a prehearing was held before PALJ Zarlengo which included MZ[Redacted], who testified by phone. (Ex. C) During the prehearing MZ[Redacted] verbally represented that she has no intention of pursuing a dependency claim. (Id.) As of the date of hearing, MZ[Redacted] has not filed a dependency claim. As of the date of hearing, the parties had no knowledge of any other possible dependents of Decedent who were dependents of Decedent as of the date of Decedent's death.

10. Dependent-Claimants, through their counsel, represented that none of the entitled Dependent-Claimants have received any social security survivor benefits as of the date of the hearing. Respondents therefore withdrew and reserved the issue of offsets.

11. As stipulated, the Decedent's average weekly wage for calculating dependent benefits is $1,692.85

CONCLUSIONS OF LAW

Based on the foregoing stipulations and findings of fact, the Judge draws the following conclusions of law:

1. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).
2. Section 8-42-121, C.R.S,. 2021, provides in pertinent part that death benefits "shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable."
3. The parties seek an order affirming their stipulation regarding the identity of entitled Dependent-Claimants, and for an allocation of death benefits/dependency between Dependent-Claimant surviving son CF[Redacted] (D.O.B. 9/27/05), Dependent-Claimant surviving son JG[Redacted] (D.O.B. 9/19/07), and Dependent-Claimant surviving daughter KF[Redacted] (D.O.B. 08/12/10), at equal amounts of 1/3 each, to try to help protect these children's workers' compensation benefits for their future needs.
4. As found, the ALJ finds that an apportionment of the death benefits between Dependent-Claimant surviving son CF[Redacted] (D.O.B. 9/27/05), Dependent-Claimant surviving son JG[Redacted] (D.O.B. 9/19/07), and Dependent-Claimant surviving daughter KF[Redacted] (D.O.B. 08/12/10), in a 1/3 split, is equitable and fair.
5. The ALJ finds, consistent with the Act, that the allocation of dependency benefits between the identified entitled Dependent-Claimants will continue until an event occurs that requires a reallocation of dependency benefits between entitled dependents, as determined by law, such as death of an entitled dependent-claimant, or a dependent-claimant reaching the age of majority as defined by the Act.
6. The ALJ finds that MG[Redacted], as mother and guardian of the Dependent-Claimants, should establish separate bank accounts for Dependent-Claimant surviving son CF[Redacted], Dependent-Claimant surviving son JG[Redacted], and Dependent-Claimant surviving daughter KF[Redacted], so that each currently minor Dependent-Claimant receives all benefits which they are entitled to under the Act.

ORDER

1. Dependent-Claimant CF[Redacted], Dependent-Claimant JG[Redacted], and Dependent-Claimant KF[Redacted] are the only persons entitled to recover death benefits/dependency benefits under the Act in this case.
2. Decedent's AWW for computing death benefits/dependency benefits is $1,692.85.

3. Respondents waive their right to assert a safety rule offset against the identified Dependent-Claimants.
4. Respondents shall pay death benefits/dependency benefits to identified Dependent-Claimant CF[Redacted], Dependent-Claimant JG[Redacted], and Dependent-Claimant KF[Redacted] in an allocation of 1/3 each, from the date of Decedent's passing until said benefits can be modified/reallocated and/or terminated by operation of law.
5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2023

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-213-239-002

ISSUES

- Did Claimant prove by a preponderance of the evidence that a left total shoulder arthroplasty recommended by Dr. David Weinstein and Dr. Joseph Ruzbarsky is reasonably needed and causally related to the admitted June 6, 2022 industrial injury?

FINDINGS OF FACT

1. Claimant works for Employer as a ski lift mechanic. The job is physically demanding and requires frequent heavy lifting, overhead work, and awkward postures. He has worked for Employer approximately 18 years. Repair and maintenance of ski lifts occurs year-round.

2. On June 6, 2022, Claimant and a co-worker were in a ski lift basket repairing equipment on a lift tower. The bucket was approximately 40 feet above the ground. Claimant misstepped and started to fall forward out of the basket. He reached behind his body with his left arm and grabbed a bar to prevent himself from falling. He hung by his left arm, which caused him to swing around and hit his right shin on the basket frame. He then crawled back into the basket.

3. Claimant suffered a significant laceration to his right shin and felt immediate pain in his left shoulder. After resting for few moments, Claimant continued working. However, the shoulder pain made it difficult to lift his arm. The co-worker performed the bulk of the remaining work because Claimant could not effectively use his left arm.

4. Claimant returned to the base of the ski lift, where he was met by EMTs. They gave Claimant a sling and he returned to work. Claimant finished the shift, and also worked the next day, using primarily his right arm. He did not seek treatment because he hoped the shoulder would improve on its own.

5. Claimant saw Kimberly Woodke, PA-C at the Rio Grande Hospital Clinic on June 8, 2022. Ms. Woodke observed Claimant held his left arm close to his body to minimize pain with movement. Shoulder range of motion was significantly limited. X-rays showed severe glenohumeral joint narrowing and osteophyte formation, but no fracture or dislocation. Ms. Woodke ordered an MRI and referred Claimant to Dr. David Weinstein, an orthopedic surgeon. Claimant was put in a sling and released to work with limited use of the left arm.

6. Claimant had the left shoulder MRI on June 27, 2022. The interpreting radiologist noted rotator cuff tendinosis but appreciated no tears. The MRI showed advanced glenohumeral joint osteoarthritis with degenerative labral tearing and maceration, osteophytes, and prominent subchondral cysts.

7. Claimant saw Dr. Weinstein on June 29, 2022. Dr. Weinstein personally reviewed the MRI images. He agreed with the radiologist about the advanced osteoarthritis, but also saw signal consistent with a partial-thickness subscapularis tear and medial subluxation of the biceps. Dr. Weinstein advised Claimant could consider an arthroscopic rotator cuff repair and subacromial decompression, but such a procedure would probably not be effective because of the extensive degenerative changes. The most likely surgical option was a total shoulder replacement. Because of his age and "high activity level," Claimant wanted to avoid arthroplasty as long as possible. Dr. Weinstein administered a steroid injection and ordered six weeks of PT.

8. Claimant returned to Dr. Weinstein on August 10, 2022 and reported no improvement. He described constant aching, exacerbated by any use of the left arm. Claimant stated, "Prior to his injury, he was having mild discomfort but was able to do full activities, he is no longer able to do so." Dr. Weinstein opined Claimant's injury caused "significant aggravation of his pre-existing glenohumeral arthritis." Dr. Weinstein recommended a total shoulder arthroplasty.

9. Dr. Jon Erickson reviewed the preauthorization request for Respondents on August 18, 2022. Dr. Erickson noted conflicting interpretations from Dr. Weinstein and the radiologist about whether the MRI showed a tendon tear. Dr. Erickson opined, "Based upon the lack of indication of aggravation or worsening of his pre-existing condition . . . [I] recommend denial of the surgical request. Based on the patient's MRI, clearly this procedure is indicated but should be pursued using his private healthcare insurance."

10. Dr. Weinstein appealed the preauthorization denial on August 26, 2022. Dr. Weinstein wrote,

> Apparently, there is a question regarding the patient having a partial tear or not. There is certainly evidence of inflammation on the patient's MRI scan from 06/29/2022. By my interpretation on series 4, image 13, there is evidence of interstitial tearing of the supraspinatus. On image 15 and 16 of series 3, there is subluxation of the biceps, which would indicate at least partial tearing of the superior portion of the subscapularis. While there is certainly preexisting glenohumeral arthritis, he appears to have aggravated this from his Workman's Compensation injury of 06/06/2022, as he was able to perform all full activities prior to his injury and is no longer able to do so.

11. Dr. Erickson responded to Dr. Weinstein's appeal on September 1, 2022. He opined, "The fact that [Claimant] is no longer able to do his work is not in any way evidence of aggravation or worsening of a pre-existing condition. What is needed is radiographic evidence of acute trauma, and that is not present on this MRI." However, Dr. Erickson stated, "Out of deference to the skills of Dr. Weinstein, I will request that I have a chance to review the actual MRI, and I will do so with an MSK expert radiologist. We will try to determine whether or not there is evidence of any acute tears."

12. Claimant had a second surgical opinion with Dr. Joseph Ruzbarsky on September 15, 2022. Dr. Ruzbarsky reviewed the MRI images did not see a rotator cuff

tear. He agreed with the recommendation for a total shoulder arthroplasty. Regarding causation, Dr. Ruzbarsky concluded Claimant suffered an "acute exacerbation of shoulder arthritis due to an injury at work," and stated, "we would submit for approval through his workers' compensation insurance."

13. Dr. Erickson issued a supplemental report on September 19, 2022. He had reviewed the MRI with a MSK expert radiologist, and opined "all the abnormalities seen on this MRI are clearly pre-existing and in no way were caused by his injury of 06/06/2022." Dr. Erickson opined, "the presence of pain or dysfunction, according to the medical treatment guidelines, is not adequate to provide evidence of aggravation or worsening of a pre-existing condition." Rather, Dr. Erickson opined there must be "actual objective evidence of acute trauma on the patient's MRI." Accordingly, Dr. Erickson maintained his opinion the shoulder arthroplasty is unrelated to the work injury.

14. On October 26, 2022, Ms. Woodke issued a report disagreeing with Dr. Erickson's causation assessment. She stated, "based on my physical examination there was a definite change and significant limitation of strength and range of motion following the reported injury." Ms. Woodke later reiterated, "I strongly believe [the] need for shoulder surgery is related to his industrial injury."

15. At hearing, Claimant credibly described the substantial change in the condition and function of his shoulder since the work accident. Claimant previously had periodic aches and pains, including occasional left shoulder discomfort, but never injured the shoulder and never required any left shoulder treatment. His shoulder never interfered with his ability to perform physically demanding work. Additionally, Claimant regularly participated in activities such as hunting, fishing, backpacking, kayaking, maintaining his mountain property, and vehicle maintenance without difficulty.

16. By contrast, Claimant's left shoulder has been severely limited since the work accident. Even simple movements with his left arm cause severe pain and discomfort. He has difficulty sleeping and awakens frequently because of shoulder pain. He now needs to support his arm with a pillow while driving. Claimant can no longer access a drive-up ATM with his left arm and has trouble closing his vehicle door. He has been unable to engage in his normal recreational activities or home maintenance tasks.

17. Dr. Erickson testified at hearing consistent with his reports. Dr. Erickson agrees a total shoulder arthroplasty is reasonable because of the severe bone-on-bone glenohumeral joint arthritis. However, he reiterated that the need for the surgery is related to the natural progression of Claimant's severe, pre-existing arthritis, and not the June 6, 2022 work accident. He opined that relying on Claimant's subjective report of symptoms and post-injury functional capacity to determine causation "goes against the basis of . . . the medical treatment guidelines which is based purely on objective medical evidence." Dr. Erickson opined Claimant suffered a minor strain on June 6, 2022, which resolved within 4-6 weeks. Claimant's ongoing symptoms are solely related to his pre-existing condition.

18. Claimant's testimony is credible and persuasive.

19. The causation opinions of Dr. Weinstein, Dr. Ruzbarsky, and Ms. Woodke's are credible and more persuasive than the contrary opinions offered by Dr. Erickson.

20. Claimant proved the total shoulder arthroplasty recommended by Dr. Weinstein and Dr. Ruzbarsky is reasonably needed to cure and relieve the effects of the June 6, 2022 work accident. The industrial injury aggravated, accelerated, or combined with Claimant's underlying pre-existing condition to produce the need for shoulder replacement surgery.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Considering the severe, "bone-on-bone" osteoarthritis in Claimant's shoulder, there is no substantial question that the proposed arthroplasty is reasonbly needed. The real issue here is causation. As found, Claimant proved the work accident aggravated, accelerated, or combined with his pre-existing condition and proximately caused the need for a left total shoulder arthroplasty. The causation opinions of Dr. Weinstein, Dr. Ruzbarsky, and Ms. Woodke are credible and more persuasive than the contrary opinions offered by Dr. Erickson. Claimant's testimony regarding the significant change in his symptoms and level of function after the accident is credible and persuasive. Claimant's left shoulder was severely arthritic and "bone on bone" immediately before the work accident, but he was still able to perform physically demanding work and engage in a wide range of outdoor-related avocational activities without difficulty.

Dr. Erickson's insistence on the need for "objective evidence of actual trauma on Claimant's MRI" is inconsistent with the legal standard for compensable aggravations. A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). Certainly, the absence of

objective structural change is a factor to consider when assessing the veracity of reported symptoms, but the persuasive evidence supports Claimant's statements his shoulder was asymptomatic or minimally symptomatic before the work accident. The June 6, 2022 accident caused an abrupt, substantial, and long-lasting change in Claimant's symptomology and functional abilities. As such, the injury proximately caused disability and a need for treatment, *i.e.*, arthroplasty, that would not have existed "but for" the accident.

ORDER

It is therefore ordered that:

1. Insurer shall cover the left total shoulder arthroplasty recommended by Dr. David Weinstein and Dr. Joseph Ruzbarsky.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 11, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their July 23, 2021 General Admission of Liability (GAL) acknowledging that Claimant suffered compensable injuries on August 9, 2019.

2. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover an overpayment of Temporary Total Disability (TTD) benefits in the amount of $52,610.34.

FINDINGS OF FACT

1. Claimant worked for Employer as a Robot and Freezer Operator. He testified that on August 9, 2019 a robot was not functioning on line one. While helping the line one operator hand-stack 30-pound cases of cheese, Claimant tripped over an empty palate, fell backwards and landed on his back. Claimant noted he experienced pain in the middle of his lower back. He completed an incident report and Employer offered medical treatment. However, Claimant declined. Notably, the incident report specified "[n]ot seeking medical attention." Claimant felt he could manage the symptoms on his own with stretching and taking over-the-counter medications.

2. Claimant explained that for three days after the accident he stayed home in a chair and took Ibuprofen for his symptoms. About one month after the August 9, 2019 incident he began having pain in the right thigh with numbness and weakness into his entire right leg. He also suffered pain in the right buttock. Although Claimant attempted to manage his symptoms with pain patching and Ibuprofen, they progressively worsened. Nevertheless, Claimant continued to work full duty for Employer. However, he explained that other employees would hand-stack for him because of his continuing lower back symptoms when a robot broke down.

3. On May 14, 2021 Claimant was disciplined by Employer and told that his job performance was unacceptable. Furthermore, on June 22, 2021 Claimant was disciplined by Employer for repeatedly failing to complete paperwork.

4. Claimant did not seek professional medical treatment for his August 9, 2019 industrial accident until he visited primary care physician Garrett Urban, M.D. on June 25, 2021. Dr. Urban recounted that Claimant had a previous back Injury that was well-controlled "until a fall at work a few years ago. His pain has persisted since with flares. It is currently flaring," Dr. Urban permitted Claimant to return to modified duty employment with restrictions of not lifting, carrying, pushing, or pulling in excess of 10 pounds. He was also limited to walking and standing for no more than two hours per day.

5. Claimant explained that he had suffered a Workers' Compensation injury in the form of a bulged disc while working for a different employer in 2005. He received medical treatment for about six to eight weeks and had no symptoms after 2005. Claimant had no additional injuries prior to his August 9, 2019 back injury while working for Employer.

6. On June 29, 2021 Claimant saw Nurse Practitioner Ryan Reiss, who is in practice with Dr. Urban. NP Reiss recounted that Claimant continued to suffer lower back pain as the result of a workplace injury. He noted that x-ray findings revealed minimal grade 1 spondylolisthesis of L4-5 and lumbar spondylosis. NP Reiss assigned Claimant 5-pound weight restrictions with no lifting or bending at the waist.

7. On July 23, 2021 Respondents filed a General Admission of Liability (GAL) acknowledging that Claimant was entitled to receive medical benefits and Temporary Total Disability (TTD) benefits as a result of his August 9, 2019 industrial injury.

8. Because Employer was unable to accommodate the restrictions from Dr. Urban and NP Reiss, Claimant has not returned to work. Respondents began paying Claimant TTD benefits at the rate of $595.91 per week beginning June 29, 2021. TTD benefits paid up to the date of hearing totaled $52,610.34 (88 2/7 weeks x $595.91).

9. On September 15, 2021 Claimant underwent an MRI of his lumbar spine. The imaging showed mild degenerative disc disease and facet arthritis at L4-5 and L5-S1; a rightward disc bulge and annular fissure with mild right foraminal stenosis at L4-5; and mild central canal and mild bilateral foraminal stenosis, left greater than right, at L5-S1.

10. Based on a referral from NP Reiss, on October 21, 2021 Claimant underwent an evaluation with Physician's Assistant Sherrie Kay McCoy of Greeley Neurosurgery. PA McCoy noted that Claimant had suffered lower back pain since he was stacking boxes in 2019. She commented that on June 21, 2021 Claimant "got up but could not stand up straight." PA McCoy diagnosed Claimant with back pain, obesity and tobacco use.

11. On December 21, 2021 Claimant returned to PA McCoy for an examination. She remarked that the MRI findings of the lower back revealed only a "small HNP at L5/S1 which is not causing his symptoms. This is a very small disc, not causing impingement." PA McCoy administered an L5/S1 epidural steroid injection at L5/S1.

12. On January 6, 2022 Claimant visited NP Reiss for an evaluation and noted little improvement. NP Reiss recounted that Claimant had suffered a complex injury several years ago when he fell at work. He had been treating his lower back pain with Ibuprofen but the symptoms had become severe and radiated down his right leg with any type of flexion. NP Reiss referred him to orthopedic surgery. The surgeon's office referred Claimant for an EMG/NCV study due to the new symptom of radiculopathy down the right thigh. The EMG/NCV testing performed on February 17, 2022 was unremarkable.

13. On March 21, 2022 Claimant returned to NP Reiss for an examination. NP Reiss summarized that Claimant had undergone the following treatment:

> [He] has had MRIs and x-rays. [N]eurosurgical PA Sherry McCoy has seen patient who states this is not a surgical problem. He has had conservative therapy with injections and PT. [N]othing seems to be making pain better or worse. [A]ctivity and standing seems to cause worsening symptoms. [S]edentary lifestyle also seems to cause more stiffness…. Neurosurgery also recently x-rayed both of patient's hips to see if there are more than 1 issue causing his pain from shooting down the right leg. There were findings of mild osteoarthritis.

14. On March 21, 2022 NP Reiss also referred Claimant to physiatrist Greg Reichhardt, M.D. However, on April 6, 2022 Claimant visited physiatrist John Shonk, M.D. at PM&R for an evaluation. Dr. Shonk determined Claimant's facet joints were driving his myofascial pain and referred him for L1-S1 facet blocks. If successful, then Claimant would be referred for median branch blocks. If the branch blocks were successful, then Claimant would be referred for possible ablations.

15. On May 31, 2022 Claimant visited Jerome Allen Swanson, M.D. Dr. Swanson noted that the reason for the visit was lumbar facet joint arthropathy. He performed bilateral facet injections.

16. On June 30, 2022 Claimant underwent an independent medical evaluation with Katherine F. McCranie, M.D. After conducting a physical examination and reviewing Claimant's medical records, Dr. McCranie concluded that Claimant likely did not sustain an injury that caused a disability or need for medical treatment on August 9, 2019 while working for Employer. She recounted that on August 9, 2019 Claimant was involved in an incident at work in which he tripped and fell onto his back. However, Claimant did not experience significant enough symptoms at the time to seek medical treatment. Dr. McCranie reasoned that, considering the two-year gap between the time of the incident and when Claimant first sought medical treatment, "causality is not within a degree of medical probability." She commented that, if the injury on August 9, 2019 was an acute lumbar discogenic or facetogenic event, it would have been significant enough to seek medical treatment.

17. Dr. McCranie explained that the progressive nature of Claimant's increase in symptoms over time was more suggestive of degenerative disc disease rather than an acute injury. Furthermore, Claimant continued regular duty employment during the two years after the incident. Dr. McCranie reasoned that Claimant's symptoms were not significant enough during the intervening period before medical treatment to warrant time off work. She also remarked that it is unknown what other activities Claimant was involved with outside of the workplace that could have contributed to the onset of progressive symptomatology. Dr. McCranie thus determined that there was not a 50% causality link between Claimant's current symptoms and the August 9, 2019 incident. She summarized that Claimant's lack of medical treatment for two years, continued full-time work without

restrictions and reported progressive symptomatology was more consistent with a degenerative process.

18. At a follow-up appointment with NP Reiss on July 25, 2022 Claimant noted his symptoms had significantly improved. NP Reiss assessed lumbar back pain with radiculopathy affecting the lower extremities. Claimant could resume moderate activities with a five-pound weight restriction.

19. On August 17, 2022 Claimant returned to Dr. Shonk for an examination. Dr. Shonk noted the facet injections were wearing off after providing two months of very good relief. He referred Claimant for nerve ablations.

20. On September 9, 2022 Claimant underwent bilateral medial branch blocks and medial branch ablations at L3, L4, and L5. He subsequently received bilateral medial branch ablations at L1 and L2 on September 30, 2022.

21. On October 28, 2022 Claimant visited East Morgan County Hospital for physical therapy based on a referral from Dr. Schonk. Angela Eicher, PT recounted that Claimant "tripped and was flipped on his back at work and had severe pain which he tried to medicate with tylenol and ibuprofren but eventual had to see the MD due to pain and cramping." PT Eicher assessed Claimant with chronic lower back pain based on a history of ruptured and herniated discs. She remarked that Claimant had suffered right lower extremity pain, but improved with recent nerve ablations. Pt Eicher recommended physical therapy once or twice per week for six weeks.

22. On November 18, 2022 Claimant returned to NP Reiss for an examination. NP Reiss assessed Claimant with radiculopathy that affected his right lower extremity. He referred Claimant to Dr. Reichhardt for a second opinion. NP Reiss noted that Claimant felt the ablations and therapies had been unsuccessful because he was unable to perform basic household tasks without significant pain and spasms.

23. On January 3, 2023 Claimant again visited NP Reiss for an examination. NP Reiss remarked that Claimant had been released from employment. Nevertheless, he continued Claimant's five-pound lifting restriction based on his "poor response to multipole etiologies of treatment." Treatment had included injections, physical therapy, dry needling and, rest over the preceding 1.5 years. NP Reiss diagnosed Claimant with lower back pain including right-sided sciatica.

24. On January 31, 2023 Claimant returned to Dr. Reichhardt for an evaluation. Dr. Reichhardt documented that Claimant's mechanism of injury was tripping over a pallet and landing on his lower back on August 9, 2019. He noted that the objective findings were consistent with a work-related mechanism of injury causing lower back pain. Dr. Reichhardt reviewed possible lower back pain generators with Claimant and commented on a negative SI joint screen. He explained that, because of Claimant's lack of improvement with radiofrequency ablation, he likely did not have facet-mediated pain. The most likely pain generator was discogenic. Dr. Reichhardt thus suggested an independent exercise program and continued physical therapy. He noted that, once

Claimant completed physical therapy and strengthening, he would likely be approaching Maximum Medical Improvement (MMI).

25. After considering additional medical records, Dr. McCranie issued a supplemental report on February 9, 2023. She maintained that Claimant's symptoms were not likely causally related to the August 9, 2019 work incident.

26. Dr. McCranie also testified at the hearing in this matter. She explained that Claimant's lower back symptoms were not causally related to the August 9, 2019 work accident. Dr. McCranie reiterated that Claimant stated he had fallen at work on August 9, 2019 but did not seek any medical treatment for a period of about 23 months. She reasoned that, if Claimant had suffered a significant back injury, there would not have been a significant temporal gap in medical treatment. Moreover, Claimant continued to work on a full-time basis during the almost two-year period. Dr. McCranie remarked that, if he had suffered a back injury and received treatment earlier, his work restrictions would have been greater in the beginning and lessened over time. Third, Dr. McCranie commented that there was a lack of objective pathology to suggest a traumatic injury. She explained that electrodiagnostic testing was normal, there was no evidence of acute or chronic radiculopathy, and an MRI essentially revealed age-appropriate discogenic changes.

27. Respondents have failed to demonstrate that it is more probably true than not that they are entitled to withdraw their July 23, 2021 GAL acknowledging that Claimant suffered compensable injuries on August 9, 2019. Initially, Claimant testified that, while hand-stacking 30-pound cases of cheese on August 9, 2019, he tripped over an empty palate, fell backwards and landed on his back. He noted he experienced pain in the middle of his lower back. Claimant completed an incident report and Employer offered medical treatment but he declined. Claimant subsequently developed pain in his right thigh with numbness and weakness into his entire right leg. He attempted to manage his back symptoms with pain patches and Ibuprofen, but they progressively worsened. Although Claimant continued to work full duty for Employer, he explained that other employees would hand-stack for him when a robot broke down because of his continuing lower back symptoms. Claimant did not seek professional medical treatment for his August 9, 2019 industrial accident until he visited primary care physician Dr. Urban on June 25, 2021. He has subsequently undergone significant medical treatment including physical therapy, diagnostic testing, epidural steroid injections, bilateral medial branch blocks and medial branch ablations. Although a specific diagnosis has been elusive, on January 31, 2023 Dr. Reichhardt determined Claimant's most likely pain generator was discogenic. Claimant has not reached MMI.

28. Although Respondents filed a GAL on July 23, 2021, Dr. McCranie concluded that Claimant likely did not sustain an injury on August 9, 2019 that caused a disability or need for medical treatment. She reasoned that, considering the two-year interval between the time of the work accident and when Claimant first sought medical treatment, "causality is not within a degree of medical probability." Dr. McCranie commented that, if Claimant had suffered a back injury, there would not have been a significant temporal gap in seeking medical treatment. Moreover, Claimant continued full-

time work during the almost two-year period. Dr. McCranie thus determined that there was not a 50% causality link between Claimant's current symptoms and the August 9, 2019 incident. She summarized that Claimant's lack of medical treatment for two years, continued full-time work without restrictions and reported progressive symptomatology was more consistent with a degenerative process.

29. Despite Dr. McCranie's testimony, the medical records reveal that Claimant has consistently maintained he suffered an industrial injury while working for Employer on August 9, 2019. When Claimant initially sought professional medical treatment on June 25, 2021, Dr. Urban recounted that Claimant had a previous back Injury that was well-controlled "until a fall at work a few years ago. His pain has persisted since with flares. It is currently flaring." During an October 21, 2021 evaluation at Greeley Neurosurgery, PA McCoy noted that Claimant had suffered lower back pain since he was stacking boxes in 2019. She commented that by June 21, 2021 Claimant "got up but could not stand up straight." On January 6, 2022 NP Reiss recounted that Claimant had suffered a complex injury several years ago when he fell at work. He had been treating his lower back pain with Ibuprofen but the symptoms had become severe and radiated down his right leg with any type of flexion. On October 28, 2022 PT Eicher recounted that Claimant had "tripped and was flipped on his back at work and had severe pain which he tried to medicate with tylenol and ibuprofren but eventually had to see the MD due to pain and cramping." Finally, on January 31, 2023 Dr. Reichhardt documented that Claimant's mechanism of injury was tripping over a pallet and landing on his lower back on August 9, 2019. He determined that the objective findings were consistent with a work-related mechanism of injury.

30. As the preceding chronology illustrates, the medical records are replete with references to a work injury in 2019 that necessitated the use of over-the-counter medications until Claimant's back symptoms became severe enough to seek professional medical treatment. Despite the lack of temporal proximity, there is a causal connection between Claimant's August 9, 2019 work injury and his subsequent medical treatment. There was no break in the causal chain between Claimant's work accident while hand-stacking 30-pound cases of cheese and his current back symptoms. Therefore, Claimant's work activities on August 9, 2019 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Respondents' request to withdraw the July 23, 2021 GAL is denied and dismissed. Respondents are therefore not entitled to recover an overpayment of TTD benefits in the amount of $52,610.34.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo.

306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. Generally, a claimant is required to prove by a preponderance of the evidence that an alleged injury was directly or proximately caused by the employment or working conditions. However, §8-43-201, C.R.S. provides that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." As found, on July 23, 2021 Respondents filed a GAL acknowledging that Claimant was entitled to receive medical and TTD benefits as a result of his August 9, 2019 industrial injury. Because Respondents seek to withdraw their GAL, they bear the burden of proof by a preponderance of the evidence.

7. As found, Respondents have failed to demonstrate by a preponderance of the evidence that they are entitled to withdraw their July 23, 2021 GAL acknowledging

that Claimant suffered compensable injuries on August 9, 2019. Initially, Claimant testified that, while hand-stacking 30-pound cases of cheese on August 9, 2019, he tripped over an empty palate, fell backwards and landed on his back. He noted he experienced pain in the middle of his lower back. Claimant completed an incident report and Employer offered medical treatment but he declined. Claimant subsequently developed pain in his right thigh with numbness and weakness into his entire right leg. He attempted to manage his back symptoms with pain patches and Ibuprofen, but they progressively worsened. Although Claimant continued to work full duty for Employer, he explained that other employees would hand-stack for him when a robot broke down because of his continuing lower back symptoms. Claimant did not seek professional medical treatment for his August 9, 2019 industrial accident until he visited primary care physician Dr. Urban on June 25, 2021. He has subsequently undergone significant medical treatment including physical therapy, diagnostic testing, epidural steroid injections, bilateral medial branch blocks and medial branch ablations. Although a specific diagnosis has been elusive, on January 31, 2023 Dr. Reichhardt determined Claimant's most likely pain generator was discogenic. Claimant has not reached MMI.

8. As found, although Respondents filed a GAL on July 23, 2021, Dr. McCranie concluded that Claimant likely did not sustain an injury on August 9, 2019 that caused a disability or need for medical treatment. She reasoned that, considering the two-year interval between the time of the work accident and when Claimant first sought medical treatment, "causality is not within a degree of medical probability." Dr. McCranie commented that, if Claimant had suffered a back injury, there would not have been a significant temporal gap in seeking medical treatment. Moreover, Claimant continued full-time work during the almost two-year period. Dr. McCranie thus determined that there was not a 50% causality link between Claimant's current symptoms and the August 9, 2019 incident. She summarized that Claimant's lack of medical treatment for two years, continued full-time work without restrictions and reported progressive symptomatology was more consistent with a degenerative process.

9. As found, despite Dr. McCranie's testimony, the medical records reveal that Claimant has consistently maintained he suffered an industrial injury while working for Employer on August 9, 2019. When Claimant initially sought professional medical treatment on June 25, 2021, Dr. Urban recounted that Claimant had a previous back Injury that was well-controlled "until a fall at work a few years ago. His pain has persisted since with flares. It is currently flaring." During an October 21, 2021 evaluation at Greeley Neurosurgery, PA McCoy noted that Claimant had suffered lower back pain since he was stacking boxes in 2019. She commented that by June 21, 2021 Claimant "got up but could not stand up straight." On January 6, 2022 NP Reiss recounted that Claimant had suffered a complex injury several years ago when he fell at work. He had been treating his lower back pain with Ibuprofen but the symptoms had become severe and radiated down his right leg with any type of flexion. On October 28, 2022 PT Eicher recounted that Claimant had "tripped and was flipped on his back at work and had severe pain which he tried to medicate with tylenol and ibuprofren but eventually had to see the MD due to pain and cramping." Finally, on January 31, 2023 Dr. Reichhardt documented that Claimant's mechanism of injury was tripping over a pallet and landing on his lower back on August

9, 2019. He determined that the objective findings were consistent with a work-related mechanism of injury.

10. As found, as the preceding chronology illustrates, the medical records are replete with references to a work injury in 2019 that necessitated the use of over-the-counter medications until Claimant's back symptoms became severe enough to seek professional medical treatment. Despite the lack of temporal proximity, there is a causal connection between Claimant's August 9, 2019 work injury and his subsequent medical treatment. There was no break in the causal chain between Claimant's work accident while hand-stacking 30-pound cases of cheese and his current back symptoms. Therefore, Claimant's work activities on August 9, 2019 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Respondents' request to withdraw the July 23, 2021 GAL is denied and dismissed. Respondents are therefore not entitled to recover an overpayment of TTD benefits in the amount of $52,610.34.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' request to withdraw the July 23, 2021 GAL is denied and dismissed. Respondents are thus not entitled to recover an overpayment of TTD benefits in the amount of $52,610.34.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: May 11, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening his claim.

2. Whether the medical treatment recommended by ATP Holmboe is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

3. Alternatively, whether the medical treatment recommended by ATP Holmboe is reasonable and necessary to relieve the effects or prevent deterioration of Claimant's industrial injury.

4. If Claimant establishes grounds for reopening, whether Claimant is entitled to temporary disability benefits.

FINDINGS OF FACT

1. On October 31, 2019, Claimant sustained an admitted injury arising out of the course of his employment with Employer. The injury occurred when Claimant fell on ice and landed on his back, striking his head on the ground.

2. On November 1, 2019, Claimant began treatment with authorized treating physician (ATP), Kirk Holmboe, D.O., at Midtown Occupational Health Services. Dr. Holmboe diagnosed Claimant with a closed head injury, abdominal wall strain and cervical, thoracic, and lumbar strains. Dr. Holmboe referred Claimant for physical therapy, massage and chiropractic care, and Claimant reported improvement with treatment. In January 2020, Dr. Holmboe referred Claimant to Samuel Chan, M.D., for a physiatry evaluation. (Ex. B).

3. Claimant saw Dr. Chan initially on January 14, 2020, with complaints of head pain, right shoulder pain, and right-sided lower back pain with numbness and tingling into the right foot. Dr. Chan indicated his clinical findings were suggestive of facet-related pain, but ordered a lumbar MRI to rule out disc issues. (Ex. D). The MRI, performed on January 20, 2020, did not reveal any acute findings, and Dr. Chan interpreted the results as being within normal limits. (Ex. E & D).

4. Dr. Chan determined that Claimant's symptoms were suggestive of suprascapular neuritis and right SI joint dysfunction, and recommended a right suprascapular nerve block, and right SI joint injection. He performed the suprascapular nerve block on February 4, 2020, and the SI joint injection on February 20, 2020. (Ex. D). Claimant reported to both Dr. Chan and Dr. Holmboe that he received significant benefit from both injections and that his pain was minimal. (Ex. B & D).

5. On March 19, 2020, Dr. Chan indicated that Claimant was having only occasional pain with no functional limits, and that Claimant was likely at maximum medical improvement (MMI). He did not anticipate any permanent impairment, and recommended maintenance care in the form of two additional SI joint injections over the following 4-6 months. (Ex. D).

6. On March 20, 2020, Dr. Holmboe placed Claimant at MMI, with no formal work restrictions and no impairment rating. (Ex. B).

7. Claimant next sought treatment on October 22, 2020, when he saw Dr. Chan. Claimant reported that his lumbar spine pain had returned. Dr. Chan recommended a repeat SI injection. He opined that Claimant remained at MMI, but that the injection shoulder be performed as maintenance care. (Ex. 5).

8. On November 12, 2020, Dr. Chan performed the SI injection. Claimant returned one week later and reported his pain had resolved, and he was discharged. (Ex. D).

9. Approximately four months later, on April 6, 2021, Claimant returned to Dr. Holmboe, reporting that pain had returned to his right lower back, and reported symptoms radiating down his right leg. Dr. Holmboe referred Claimant back to Dr. Chan. (Ex. 6). Dr. Holmboe opined that Claimant's symptoms were related to his original, November 30, 2019 injury because the symptoms had returned without an intervening event. He recommended a repeat lumbar MRI and referred Claimant to Dr. Chan. Dr. Holmboe indicated that Claimant remained at MMI, but the case may need to be reopened depending on Dr. Chan's treatment recommendations. (Ex. 6).

10. The MRI, performed on April 28, 2021, showed no significant changes when compared to the January 20, 2020 MRI. (Ex. D).

11. Claimant saw Dr. Chan on May 4, 2021, reporting that he had done well following the November 2020 SI injection, and that his pain had returned slowly. Dr. Chan indicated that Claimant's leg pain was not likely related to his work injury, if he had not previously reported leg symptoms. Dr. Chan's clinical findings were consistent with a chronic SI joint dysfunction. Due to the recurrence of symptoms, Dr. Chan recommended Claimant undergo a L5 medial branch block (MBB) and S1-3 lateral branch blocks (LBB) for diagnostic purposes. He indicated that if the blocks were diagnostic, Claimant may be a candidate for radiofrequency rhizotomies in both locations. He further opined that these procedures should be considered as maintenance care. (Ex. D).

12. Claimant saw Dr. Holmboe on May 27, 2021, reporting continued pain over the right SI joint with some pain radiating into his thigh. Dr. Holmboe requested additional chiropractic sessions noting that Claimant found these helpful previously. Dr. Holmboe indicated Claimant was not at MMI, but offered no explanation for the change in MMI status from April 6, 2021. (Ex. 6).

13. On June 10, 2021, Dr. Holmboe indicated the medial and lateral branch blocks recommended by Dr. Chan were reasonable, and that Claimant's symptoms were the result of his November 30, 2019 work injury. Dr. Holmboe indicated Claimant was at MMI

effective March 20, 2020, and that he was receiving current treatment under maintenance care. His record contains no explanation for the change in MMI status from May 27, 2021. (Ex. 6).

14. On July 8, 2021, Dr. Chan performed a right SI injection, which resulted in a temporary improvement in Claimant's symptoms. Dr. Chan indicated that the injection provided some diagnostic benefit, and that consideration of the medial and lateral branch blocks would be appropriate. (Ex. D).

15. On August 5, 2021, Dr. Holmboe saw Claimant and indicated that he had no further treatment to offer except the rhizotomies recommended by Dr. Chan. He discharged Claimant from care, noted that Claimant remained at MMI and imposed no formal work restrictions. (Ex. 6).

16. Respondents have not authorized the MBB or LBBs requested and recommended by Dr. Holmboe and Dr. Chan.

17. Respondents conducted surveillance of Claimant on March 19, 2022, June 7, 2022, and August 1, 2022. (Ex. F, G & H). In the surveillance videos, Claimant is seen walking, driving, climbing in and out of vehicles, climbing on and off of trailers, and lifting various objects, without apparent difficulty.

18. On March 30, 2022, Claimant saw Allison Fall, M.D., for an independent medical examination (IME) at Respondents' request. Dr. Fall testified at hearing and was admitted as an expert in physical medicine and rehabilitation. Dr. Fall opined that Claimant had no significant objective findings which would indicate a worsening of condition. She recommended Claimant participate in an active exercise program. In a later addendum, on May 3, 2022, Dr. Fall opined that there was no medical indication for MBB, because Claimant's complaints were subjective. She also opined there was no indication for additional active medical treatment. In her report, Dr. Fall opined that it is "inappropriate to recommend maintenance care when there is no permanent impairment." Dr. Fall offered cogent explanation for this opinion. (Ex. A).

19. On April 28, 2022, Claimant saw Caroline Gellrick, M.D., for an IME requested by Claimant's counsel. Dr. Gellrick opined that Claimant is not at MMI, and that the MMI determination should be reversed "due to further active treatment intervention that was in process." She further opined that the medial and lateral branch blocks requested by Dr. Chan are reasonable and necessary, and if Claimant has an RFA that is not successful, he may require further facet injections at the L4-5 level. Dr. Gellrick's opinion that Claimant is not at MMI is not persuasive. Her opinion regarding the reasonableness and necessity of medial and lateral branch blocks is credible. Dr (Ex. 4).

20. Employer terminated Claimant's employment on October 6, 2020.

21. [Redacted, hereinafter TM] was Claimant's supervisor when he worked at Employer in 2020, and testified at hearing regarding Claimant's termination. TM[Redacted] testified that Employer terminated Claimant for "a number of reasons, the primary one being falsifying recounts of incidents." TM[Redacted] testified that Claimant

sustained a finger injury in July 2020, and told TM[Redacted] he initially did not want treatment. He testified that later he was "made aware after the fact that [Claimant] was trying to seek financial compensation" from Employer. TM[Redacted] testified that it was "brought to [his] attention that [Employer] was unable to help in that regard because -- specifically because [Claimant] had told his medical provider that this incident, in fact, did not happen at work." TM[Redacted] offered no explanation as to how he learned this information, or whether he had personal knowledge. TM[Redacted] also testified that in September 2020, Claimant sustained another finger injury. TM[Redacted] indicated that Claimant did not want to file an injury report, and that while walking to TM's[Redacted] supervisor's office, Claimant "made it clear to me at that point that he planned on lying once we got up to the office, he told me that was his intent, and he didn't understand why we're going up to the office." TM[Redacted] offered no cogent testimony as to whom Claimant allegedly intended to lie or what he intended to lie about. He later testified that he did not know if Claimant wanted to file a worker' compensation claim, or whether Claimant ultimately filed a claim regarding the September 2020 finger injury. TM's[Redacted] testimony is of little evidentiary value because his testimony demonstrates he had little, if any, personal knowledge of the information to which he testified.

22. Claimant testified at hearing that his pain is worsened by certain activities, primarily driving, and lifting. He testified that when he lifts things, he tends to feel the effects the following day or evening. He testified that he did not work from October 2020, when he was terminated by Employer until April 5, 2021. During this period, he testified that he did not sustain any new injuries involving his lower back. Claimant testified that his back pain waxes and wanes, and has good and bad days depending on activities. Claimant's testimony was credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible

inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Reopening for Change in Condition

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Indus. Comm'n*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Constr. Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004)

Claimant has failed to establish that his claim should be re-opened due to a change in condition. The evidence establishes that Claimant has experienced an return of symptoms, but not that his original work injury has changed. Neither Dr. Chan nor Dr. Holmboe have opined that Claimant's condition has changed. The April 2021 MRI, when compared to the January 2020 MRI confirmed that Claimant's lumbar pathology was unchanged. When Claimant was placed at MMI in March 2020, Dr. Chan and Dr. Holmboe opined that maintenance medical treatment (*i.e.*, injections) may be reasonable and appropriate in the future, despite the fact that Claimant was reporting minimal pain at that time. From this, the ALJ infers that it was reasonably anticipated that Claimant may experience a return of symptoms after MMI, without a change of condition. The fact that

Claimant has experienced exacerbations or recurrence of symptoms is not evidence that Claimant's physical condition has changed since reaching MMI. Additionally, both Dr. Chan and Dr. Holmboe opined that Claimant remained at MMI when each last saw him, and neither opined that Claimant's physical condition had changed or worsened.

Maintenance Medical Benefits

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established that the medial and lateral branch blocks and the SI joint injections recommended by Dr. Chan and Dr. Holmboe is reasonably necessary to relieve the effects or prevent the deterioration of Claimant's work-related injury. The procedures recommended by Dr. Chan - MBB and LBB, are diagnostic tests that are performed to determine the potential efficacy of a radio frequency rhizotomy or radio frequency ablation (RFA) procedure. *See* W.C.R.P. Rule 17, Ex. 1, F.4.e, and F.4.f. As Dr. Chan indicated, the results of the medial and lateral branch blocks would dictate whether RFA procedures are warranted. No credible evidence was presented that an RFA would "cure" Claimant's work-related injury. However, the RFA procedure is a procedure that provides extended pain-relief of 7-9 months or longer. *Id*. The ALJ therefore finds that the MBB and LBB procedures recommended by Drs. Chan and Holmboe are more likely than not reasonably necessary to relieve the effects of the Claimant's industrial injury.

While the surveillance video demonstrates that Claimant was able to function without apparent difficulty at the time of surveillance, the actions performed in the video are do not conflict with the restrictions placed on Claimant and do not demonstrate that Claimant does not experience symptoms which may be relieved by the MBB and LBBs recommended by Dr. Chan and Dr. Holmboe.

With respect to the July 8, 2021 SI injection, Claimant received the injection based on Dr. Chan's recommendation. Dr. Chan indicated that the SI injection should be considered maintenance care based on the Claimant's chronic right SI symptoms, and that he had concordant findings on examination. Claimant had also received symptomatic relief from previous SI joint injections. Although the Claimant received only temporary relief from the July 8, 2021 injection, this does not render the treatment unreasonable given the information available before the injection was performed. Claimant has established that the July 8, 2021 SI injection was reasonably necessary to relieve the effects of his industrial injury.

With respect to chiropractic care recommended by Holmboe, Claimant has failed to establish that the treatment is a reasonably necessary maintenance medical treatment. Although Claimant reported subjective improvement to Dr. Holmboe from chiropractic care, no records of chiropractic care were offered or admitted into evidence from which it can be determined whether chiropractic care resulted in any objective improvement. The ALJ finds it more likely than not that further chiropractic care is not reasonably necessary to relieve the effects of or prevent deterioration of Claimant's industrial injury.

Temporary Disability Benefits

An injured worker entitlement to temporary disability benefits continue until terminated pursuant to § 8-42-105 (3), C.R.S., which provides: "Temporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to regular or modified employment; (c) The attending physician gives the employee a written release to return to regular employment; or (d) (I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." See also § 8-42-106 (2), C.R.S. (temporary partial disability benefits).

Claimant was placed at MMI on March 20, 2020. Although Dr. Holmboe briefly stated Claimant was not at MMI on May 27, 2021, the following visit, two weeks later he stated Claimant was at MMI. When Dr. Holmboe discharged Claimant on August 5, 2021, he indicated the date of MMI was March 20, 2020, from which the ALJ infers his May 27, 2021 MMI statement was a mistake or typographical error. Notwithstanding, because Claimant has failed to establish grounds to reopen his claim, and remains at MMI, Claimant has failed to establish an entitlement to temporary disability benefits. Claimant's request for temporary disability benefits is denied and dismissed.

The issue of whether Claimant is responsible for his termination is moot.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim is denied and dismissed.

2. Respondents shall pay for the medial branch block and lateral branch blocks, recommended by Dr. Chan and Dr. Holmboe and for the July 8, 2021 SI injection performed by Dr. Chan according to the Medical Fee Schedule, as maintenance medical benefits.

3. Claimant's request for authorization of chiropractic care as a maintenance medical benefit is denied and dismissed.

4. Claimant's request for temporary disability benefits is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 15, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-147-757-003

STIPULATION

- The parties stipulate that the Claimant was assigned a 2% left upper extremity rating by the ATP and neither party disputes this rating.

ISSUES

- Did Respondents overcome the DIME's cervical rating and determination of MMI by clear and convincing evidence?

- Whether the medical treatment for Claimant's cervical spine, including the cervical surgery is reasonable, necessary, and related?

FINDINGS OF FACT

1. Claimant was a custodian for the [Redacted, hereinafter KC] District.

2. Claimant suffered admitted injuries on August 6, 2020 when she fell as she was exiting a vehicle after driving to another school building to use the bathroom.

3. Claimant initially treated at Keefe Memorial Hospital, Prairie View Clinic on the date of the injury. Her primary complaint was "LEFT SHOULDER INJURY /BUMP ON FOREARM". She also added that she also hurt her right hip. The assessment was:

    1. work related injury

    2. fall – tripped over curb

    3. left elbow strain

    4. lumbar strain

    5. left shoulder strain

    6. chest wall bruising

    She was treated with an injection of Toradol and given a prescription for Ibuprofen. (Respondents' Exhibit F, pp. 54 – 55).

4. On October 15, 2020 Claimant returned for examination at Keefe Memorial Hospital and noted "vast improvement" in her medial elbow pain. Her treating provider had growing concern Claimant had sustained a left wrist injury given her medial elbow improvement and lack of findings elsewhere and Claimant's physical therapist was concerned she had sustained a scapholunate injury. She was noted as wearing a thumb splint for the past 2 weeks and had continued pain with movements like turning a doorknob. A left wrist MRI was ordered. (Respondents' Exhibit F, p.73).

5. On December 21, 2020 Claimant reported to Dr. Nicholas Olsen for further work-up of her upper extremity issues. (Respondents' Exhibit N, pp. 280-283). Claimant denied mid or lower back pain and physical examination by Dr. Olsen **showed Claimant's c-spine to have full range of motion, no signs of radiculopathy, and was otherwise unremarkable.** Dr. Olsen believed Claimant had a fairly extensive workup thus far but had yet to complete an EMG. **He noted that Claimant was unlikely to have cervical radiculopathy as she had an unremarkable cervical spine examination.** He noted a fairly benign examination, but ordered tests to rule out CRPS as all other explanations for her pain had been eliminated.

6. Similar physical examination findings were documented by Dr. Olsen during Claimant's January 11, 2021 examination as she continued to have full range of motion in her c-spine without pain or dysfunction. (Respondents' Exhibit N, p. 286). **He noted EMG results were negative for findings of cervical radiculopathy** and all CRPS testing was negative.

7. A February 11, 2021 MRI of Claimant's c-spine showed stenosis of the central canal at C4-5 with moderate bilateral foraminal narrowing, moderate stenosis of the central canal at C5-6, and mild stenosis of the central canal at C6-7. (Respondents' Exhibit E, p. 27).

8. Claimant followed up with Dr. Olsen on May 13, 2021 with reports of an undiagnostic response to both the c-spine TESIs that were attempted by Dr. Olsen. (Respondents' Exhibit N, p. 308), Claimant noted that the "only injection that has helped her to date is the first coronavirus. She states that after getting the coronavirus, she noted her left arm paresthesia had improved for a week." Dr. Olsen was not able to offer an explanation as to why she may have experienced relief. He explained to Claimant that "we have thoroughly worked up a pain generator in the cervical spine. Neither the left C4-5 or C5-6 transforaminal epidural steroid injection offered significant efficacy. This would rule out her neck as the source of her symptoms." (Respondents' Exhibit N, p. 309).

9. Claimant continued to treat until she was placed at MMI by Dr. Olsen on July 6, 2021. This was following an IME with Dr. Mark Paz. Dr. Olsen agreed with the 2% upper extremity rating given by Dr. Paz.

10. Claimant underwent a Division Sponsored IME with Dr. Winslow on March 1, 2022. The initial report issued by Dr. Winslow is undated and unsigned. (Claimant's Exhibit 9). In his report, Dr. Winslow agreed to the 2% upper extremity rating. He also noted that the Claimant had a cervical surgery recently and felt that the cervical spine was related. In his initial report he states "The patient presented to the clinic in a neck brace with a recent cervical spine fusion. I have no notes from surgeon, consult, surgical notes or information regarding the surgery. While the previous independent medical examiner dismissed and did not include cervical thoracic or lumbar spine, the patient's injury MOA was indeed injured during a fall, had symptoms early on of neck, back and lower back symptoms, was treated and accepted as part of her care." However, with respect to the neck, Dr. Winslow does not reference any neck or cervical diagnosis or treatment in the medical records until December 21, 2020. In the summarized note for that date, he notes a consultation from Associates of Colorado and the notation that it is unlikely she has cervical radiculopathy as she has an unremarkable cervical examination. Despite this apparent contradiction, he determined in the initial report that the cervical spine was work related. Having made that determination, he deferred a cervical rating since the evaluation was too soon after Claimant's cervical surgery and he could not perform the range of motion testing.

11. Dr. Winslow subsequently issued an addendum report dated June 28, 2022 where he provided an updated rating of 19% impairment for the cervical spine, in addition to the 2% upper extremity rating. (Claimant's Exhibit 10). He also determined that the Claimant reached MMI on May 3, 2022. This is the date of his follow up DIME. He states "Dr. Paz reports MMI June 8, 2021, MMI in my opinion is after the patient completes her therapy for her surgery which can be completed as maintenance. She will be placed at MMI today 5/3/2022". (Respondents' Exhibits H, p. 24). In his rationale for his decision as to MMI and impairment, he states "On review of the medical records in my opinion and based on application of the guidelines it is apparent that causally this is related to her work accident and is reasonable and necessary care. She had no symptoms prior to this, she had cervical spine disease that necessitated surgery resulting in significant improvement in the patient's clinical symptoms. Either this is the most incredible coincidence or more likely the work injury aggravated accelerated and placed the patient in a position where she required a fusion that she did not require prior to this injury, there was no indication in the medical record, history or any other information provided that the patient was getting ready for or would likely have needed a spinal fusion/surgery if this had not been case. She is therefore rated appropriately; her surgery will be included and her previous injury and subsequent impairment rating related to her accident." (Respondents' Exhibit H, p. 125).

12. Dr. Hattem testified on behalf of Respondents. He performed a record review IME of the Claimant on behalf of Respondents. He issued reports dated August 25, 2022 and January 17, 2023. Dr. Hattem was qualified as an expert in occupational medicine with Level II accreditation. In addition to review of extensive medical records regarding Claimant's treatment, he also reviewed the DIME report from Dr. Winslow.

According to his initial report, Dr. Winslow assigned an impairment rating to the left upper extremity of 2%.[1]

13. Dr. Hattem persuasively testified, consistent with his report, that Dr. Winslow made various errors in his cervical rating including providing a Table 53 rating for a 1 level fusion, instead of a 2 level fusion, and errors in range of motion testing where he provided incorrect ratings for cervical right rotation and cervical left rotation. The range of motion ratings were both inaccurate based on the applicable tables in AMA Guides resulting in an under-rating based on the range of motion measured by Dr. Winslow.[2] Although these errors exist and, are well documented, they do not resolve the central issue as to whether there should be a cervical rating in first place and whether that part of the DIME Report is clearly incorrect.

14. Dr. Hattem also testified that with respect to causation of the neck, he reviewed the medical records which revealed all cervical exams prior to March 2020 were normal. He reviewed Dr. Olsen's records with respect to evaluation of symptoms that might be related to the neck. With respect to Dr. Olsen's evaluation in December, 2020, Dr. Hattem interpreted his evaluation as an attempt to rule out the cervical spine as a pain generator, even though Claimant had never complained of cervical pain.

15. Dr. Hattem testified consistently with his IME report that utilizing a causation analysis, his opinion was that the cervical spine was not related to the work injury. As part of his analysis, he noted that Dr. Winslow was under the false impression that Claimant had never experienced similar types of symptoms. According to the records reviewed by Dr. Hattem, Claimant had consulted with an orthopedic surgeon, Dr. Hurley in June 2017 and presented with non-traumatic bilateral elbow pain, neck, bilateral shoulder, bilateral hand pain, soreness in the hips, knees, ankles and toes.[3]

16. Dr. Hattem also opined that Dr. Winslow's inclusion of a cervical impairment rating as a work related injury was clearly in error based on the lack of an adequate causal analysis. In his report dated January 17, 2023 he concludes that based on his analysis, ". . . Dr. Winslow clearly erred when he attributed [Redacted, hereinafter MA] cervical spine condition to her fall of August 6, 2020." Additionally, Dr. Hattem testified that the causal analysis employed by Dr. Winslow, namely that because X followed Y that Y caused X, was insufficient. I find Dr. Hattem's testimony and report to be persuasive, credible and more than a difference of opinion with the opinions of Dr. Winslow as to causation. Based on Dr. Hattem's testimony and written opinions, I find Dr. Winslow's inclusion of a cervical impairment rating to be clearly incorrect.

17. Dr. Reiss also testified at the hearing via telephone on behalf of Respondents. Dr. Reiss, an orthopedic surgeon was qualified as an expert in orthopedic

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[1] The DIME summary sheet references the right upper extremity in error, but in the narrative, he correctly refers to the left upper extremity. (Respondents' Exhibit H, p. 121).

[2] These errors are also noted by the Division IME Unit in an incomplete notice dated July 15, 2022. (Respondents' Exhibit Z). The evidence is devoid of any response to the notice.

[3] Dr. Hurley's note of June 8, 2017 is consistent with the testimony of Dr. Hattem. (Respondents Exhibit G).

surgery and as a level II accredited physician. He testified that he reviewed the X-Rays and MRI images and it was his opinion that the imaging showed degenerative preexisting changes rather than anything acute. He elaborated that if there was an acute cervical strain at the time of the injury, there would be neck pain at the time of the injury. Contrary to that, there was considerable documentation of a lack of neck symptomatology and a normal exam of the neck. It was his opinion that it is very unlikely that Claimant injured her neck in the incident and that is supported by the non-diagnostic cervical injections and the results of the EMG testing. Dr. Reiss opined that Dr. Winslow made a significant error in determining that the cervical spine was causally related to the work injury incident.

18. After the Claimant was placed at MMI and before the DIME occurred, the Claimant underwent a 2 level cervical fusion at C4 – C6 with Dr. Rauzzino. However, the exhibits submitted by the parties do not include the pre-operative or operative reports. The only records from Dr. Rauzzino's office are post-surgery. As such, absent is a complete, concurrent historical record as to the Claimant's symptoms or the rationale for surgery, other than the historical data contained in the post-surgical records.

19. Post-fusion, Claimant reported an improvement of symptoms for the first few weeks to few months. However, according to a report of December 19, 2022 from Dr. Rauzzino, approximately 11 months after the surgery, the Claimant was complaining of pain in her left upper extremity. Dr. Rauzzino reviewed a recent CT scan and MRI scan and found no obvious complications. He wanted to do an EMG/nerve conduction study for potential RSD.[4]

CONCLUSIONS OF LAW

A. Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

[4] Dr. Hattem noted in his testimony that Claimant had a work up for CRPS previously, which was negative.

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

B. Burden and standard of proof

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). The finding of a DIME physician concerning a claimant's MMI status or medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

In this case, Respondents must overcome the DIME's cervical rating and MMI determination by clear and convincing evidence. With respect to the medical benefits sought, Claimant must prove that the medical treatment sought, including the surgery performed by Dr. Rauzinno was reasonable, necessary and related.

C. Respondents overcame the cervical rating and determination of MMI of the DIME by clear and convincing evidence.

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing standard also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME's whole person rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As noted in the findings, Dr. Hattem persuasively testified that Dr. Winslow made errors in his rating of the Claimant's cervical spine. However, more concerning than the errors with respect to the Table 53 rating and the range of motion ratings is the lack of a meaningful causation analysis by Dr. Winslow with respect to the claimed injury to the cervical spine. His causation analysis is based on a "temporal" relationship between the occurrence of the injury followed by the neck surgery. He states "Either this is the most incredible coincidence or more likely the work injury aggravated accelerated and placed the patient in the position where she required a fusion that she did not require prior to this injury. . ." (Claimant's Exhibit 10, p.38). This *post hoc* fallacy ignores the facts that Dr. Winslow notes in his own report. Specifically, Dr. Winslow summarized in his initial report the medical records he reviewed beginning on August 6, 2020. Importantly, in the summary of the chart note of September 24, 2020 from KC[Redacted], he notes "KC[Redacted] clinic again focusing everything seems to be focused around the assessment left elbow sprain pain, continued left elbow pain. *(No comments conversations discussions about cervical spine low back are noted in the exam, treatment, history."* (Claimant Exhibit 9, p. 25). Clearly, at the initial DIME evaluation, Dr. Winslow noted the lack of temporal complaints or discussion of cervical pain or injury. However, without any discussion regarding this prior observation, he determines in the addendum report that there is a causal relationship between the initial injury and the need for subsequent cervical fusion.

I conclude that Dr. Hattem's opinions that Dr. Winslow's causation determination is deficient, based on his incomplete causation analysis, to be credible and persuasive. I further conclude that Dr. Winslow clearly erred in his determination that the Claimant's cervical spine condition is related to the compensable work injury of August 6, 2020.

Since the Respondents' have overcome the determination of Dr. Winslow that the neck was related, the treatment for the neck at the hands of Dr. Rauzzino is rendered moot since the treatment for the neck is not related.

Respondents' have also challenged the date of MMI assigned by Dr. Winslow. I conclude that based on the totality of the evidence that the date of MMI assigned by Dr. Winslow was based on his consideration that the surgery performed by Dr. Rauzzino extended the MMI date since it was his opinion that the surgery was related. Since I conclude that the surgery was not related to the work injury, I conclude that the date of MMI assigned by Dr. Olsen of July 6, 2021 to be the date of MMI.

ORDER

It is therefore ordered that:

1. Respondents prevailed in their challenge to the Division IME impairment rating for the cervical spine by clear and convincing evidence. Respondents are not obligated to pay the 19% whole person rating for the cervical spine imposed by the Division IME physician, Dr. Winslow. The date of Maximum Medical Improvement is July 6, 2021.

2. Pursuant to the parties' stipulation, the 2% impairment rating for the left upper extremity is determined to be awardable.

3. Respondent may take credit for any PPD benefits previously paid to Claimant in connection with this claim.

4. Claimant has failed to sustain her burden of proof that the surgery performed by Dr. Rauzzino was reasonable, necessary and related and the request for the medical benefits related to that surgery are denied.

5. Respondent shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 16, 2023

Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-109-869-002

ISSUE

1. Did Claimant overcome the DIME physician's permanent impairment rating by clear and convincing evidence, and if so, what is Claimant's correct permanent impairment rating?

PROCEDURAL ISSUES

At the hearing, Claimant endorsed the issue of disfigurement, specifically as it related to voice/vocal issues. Claimant has withdrawn that issue.

On October 24, 2022, the second day of the hearing, Claimant offered Exhibit 4, an addendum report from Karin Pacheco, M.D. dated October 4, 2022, into evidence. Respondents' counsel objected, and moved to exclude the report. On the first day of hearing, Claimant's counsel completed Dr. Pacheco's direct examination, and Respondents' counsel was in the middle of cross-examination when the June 27, 2022 hearing was continued because Dr. Pacheco was no longer available to testify that day. Claimant's counsel asserted, in support of Exhibit 4, "I requested that Dr. Pacheco prepare this supplemental report in order to conserve the time, energy, and effort of the Court, because I'm entitled to redirect, and that is basically, the report would be the redirect testimony that Dr. Pacheco would provide." (Vol. II Tr. 13:19-24). The ALJ took Exhibit 4 under advisement. Respondents' counsel completed his cross-examination of Dr. Pacheco, and Claimant's counsel completed her redirect of Dr. Pacheco. Exhibit 4 is not admitted into evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

Claimant's Prior Medical History

1. Claimant is a 48 year-old woman who worked for Employer as a registration clerk in the emergency department (ED).

2. On May 31, 2019, Claimant was seen by her PCP for symptoms that had been ongoing for three weeks, including coughing, dyspnea/shortness of breath (SOB), and bronchitis. According to the medical records, Claimant had checked into the ED the previous Thursday, had a chest x-ray and a nebulizer treatment, and she received steroids. Claimant rested for a few days and returned to work, but she could not make it through her 12-hour shift. (Ex. A).

3. Less than two weeks later, on June 11, 2019, Claimant returned to her PCP for escalating issues that included wheezing, a recurring cough, an upper respiratory infection (URI) and dyspnea/SOB. Blanca Richmond-Coca, M.D., documented in the medical record that Claimant's wheezing was a new problem, and they should consider whether Claimant has undiagnosed asthma. She also documented that at times exertion provoked flares of coughing and difficulty talking, so Claimant would require FMLA leave one to three times each month, for one to two days for each episode. She referred Claimant to pulmonologist, James, Meyer, M.D. (Ex. A).

Claimant's Admitted Work Injury Through October 20, 2020 (MMI)[1]

4. On June 13, 2019, Claimant was working for Employer. Law enforcement brought a man to the ED who was placed in the behavioral health unit. When Claimant entered the room to band the patient, she noticed a strong pungent odor. Shortly after leaving the room, Claimant started sneezing, her nose and face started to swell, and she had trouble breathing. (Ex. D).

5. Claimant continued to have difficulty breathing so she went to the ED. Kelli Jones, M.D., treated Claimant emergently as Claimant's problems were becoming severe, and she was suffering respiratory distress and wheezing. Dr. Jones intubated Claimant and noted that Claimant's "presentation was very rapidly progressive and [she] was concerned she may need a cricothyroidotomy if she could not be intubated. She had an in-line nebs and at one point was difficult to bag." Dr. Jones noted that after Claimant was intubated, they took a chest x-ray to verify correct placement of the tube. Based on the x-ray, respiratory therapy withdrew the tube 4 cm. Dr. Jones specifically noted in the medical record that there were no complications with the intubation, and Claimant tolerated the procedure well. Claimant was admitted to the ICU. (Ex. B).

6. The ALJ finds that Claimant's intubation on June 13, 2019 was emergent, but there were no documented complications.

7. Claimant was extubated on June 15, 2019. James Knight, M.D. examined Claimant that day. Claimant reported dyspnea, throat tightness, and chin numbness. Dr. Knight noted Claimant was moving air well. On June 17, 2019, Claimant was discharged from the hospital with a primary diagnosis of anaphylaxis, and secondary diagnoses of airway obstruction and acute respiratory failure. It was recommended that Claimant follow up with an allergist. (Ex. F).

8. On June 19, 2019, Claimant saw Dr. Richmond-Coca, her PCP, with a chief complaint of worsening anxiety. Dr. Richmond-Coca noted that Claimant's anxiety increased following her recent hospitalization. (Ex. F).

9. On July 3, 2019, Claimant was evaluated by Authorized Treating Provider (ATP), William Woo, M.D. He diagnosed Claimant with respiratory distress, and noted in the medical record that he spoke with another allergist who agreed that Claimant's labs were not consistent with an anaphylaxis type reaction. Dr. Woo further documented that

[1] The MMI date, October 20, 2020, is not at issue.

Claimant experienced respiratory anxiety after the intubation, and her PCP prescribed her Xanax. Claimant remained fearful, so Dr. Woo recommended she see a psychologist, and referred her to John DiSorbio, Ed.D. (Ex. D). Dr. DiSorbio's treatment notes identify the emotional impact Claimant's work injury and personal stressors have had on Claimant. (Ex. E).

10. On July 15, 2019, Claimant was seen at an ED for her continued cough, increased SOB, and wheezing. These are the same symptoms Claimant had prior to the admitted work-related injury on June 13, 2019. Her pulmonary function testing (PFT) on July 15, 2019, was normal. On July 19, 2019, she was seen by John Ferguson, M.D., a pulmonologist, who performed another PFT, which was also normal. On September 4, 2019, Claimant was seen by another pulmonologist, Majd Kobitary, M.D. Dr. Kobitary administered another PFT and performed spirometry testing, both of which were normal. (Ex. F).

11. On September 11, 2019, Claimant was evaluated by Justin King M.D., an ENT. Dr. King performed a laryngoscopy on Claimant. The laryngoscopy was normal. (Ex. F).

12. Claimant went to an ED on September 13, 2019, for an URI and bronchitis. The following day she was seen at a different ED for SOB. (Ex. F).

13. Dr. Woo evaluated Claimant on October 23, 2019. He noted that since his last evaluation, Claimant had been on a cruise when she experienced a coughing episode that caused her vocal cord to spasm and close, and she passed out. The ship's doctor performed a chest x-ray and diagnosed her with bronchitis. Claimant continued to be anxious, and fearful that if she coughed it would trigger a larynx spasm. Dr. Woo referred Claimant to Gary Gutterman, M.D., a psychiatrist. (Ex. F).

14. On November 11, 2019, Claimant was seen at the UCHealth ED, with SOB and chest heaviness that had been ongoing since June. A CT of her neck and upper chest showed no masses or evidence of other lesions along the course of the vagus or recurrent laryngeal nerves. A laryngoscopy showed left vocal cord weakness, but no significant paradoxical movement of the cords or upper airway obstruction. (Exs. F and M).

15. Daniel Beswick, M.D., the ENT Stat Consult at UC Health ED, evaluated Claimant and performed a fiberoptic laryngoscopy on Claimant the same day, November 11, 2019. The testing indicated Claimant had left vocal fold hypomobility, and the right vocal fold had normal and full abduction and adduction. The neck CT showed no evidence of masses along the course of the left recurrent laryngeal nerve, and there was no subglottic stenosis on imagining. Dr. Beswick indicated that Claimant had left vocal cord weakness that ***could be*** from intubation several months prior. He also noted that the laryngoscopy examination had limited utility in evaluating for vocal cord dysfunction (VCD) as it is an episodic disorder that was not seen on that date. According to the medical record, Claimant's symptoms improved with nebulizer treatments and steroids with no airway obstruction, and no acute ENT intervention was needed. Dr. Beswick

recommended Claimant follow up in an ENT clinic for an evaluation of the left vocal cord paresis. (Ex. F).

16. On November 15, 2019, Claimant had her third session of speech therapy. Claimant told her therapist about her recent trip to the ED. The therapist noted that Claimant had a new diagnosis of a paralyzed vocal cord, and she had been diagnosed with left TVF paralysis, which would explain Claimant's hoarseness and breathy vocal quality. (Ex. F).

17. On December 1, 2019, Claimant presented to the ED with SOB and mild hoarseness. She was diagnosed with simple vocal cord dysfunction, SOB, vocal cord dysfunction (VCD), and chronic cough. Claimant was to follow up with the ENT. (Ex. F).

18. A few days later, on December 6, 2019, Claimant was evaluated by Mona Abaza, M.D., an ENT at UC Health. Dr. Abaza performed a video stroboscopic vocal cord evaluation on Claimant. The testing showed Claimant had muscle tension dysphonia (MTD), laryngopharyngeal reflux, and striking zone mass. Claimant was assessed with vocal cord weakness, functional voice disorder, vocal cord nodules, vocal cord leukoplakia and spasm of the larynx. Dr. Abaza recommended a referral to a speech ENT and she felt Claimant would benefit from 8-12 aggressive voice therapy sessions. (Ex. F).

19. Dr. Woo evaluated Claimant on January 15, 2020, and noted Claimant was using inhalers, had started speech therapy, was seeing a psychiatrist, and had a cold. Dr. Woo indicated that since he last saw Claimant, she had a laryngoscopy that identified possible left-sided vocal cord paralysis or weakness, but she then went to an ENT clinic and had another laryngoscopy that revealed there was no paralysis, and only some vocal cord nodules. He also noted that Claimant might have a form of cough variant asthma, and it is possible that the cough variant asthma had been irritating her vocal cords, and could be the underlying cause of the vocal cord nodules. (Ex. D)

20. On January 17, 2020, Claimant was seen by a certified speech pathologist for a therapy session. Claimant had a URI that was worsening her cough and causing more difficulty with her breathing. (Ex. 2) On February 12, 2020, Claimant's speech therapist diagnosed Claimant's speech issue as being related to MTD, and she recommended Claimant see Daniel Fink, M.D., an Otolaryngologist, for a trial of superior laryngeal nerve (SLN) blocks and a repeat vocal cord scope. (Ex. M).

21. On March 13, 2020, Claimant saw Dr. Fink for administration of an SLN block. The SLN block was performed in his office without any difficulty. On July 9, 2020, Dr. Fink performed a laryngoscopy that showed normal abduction and adduction on the right, and a reduced abduction and adduction on the left, with no lesions. Dr. Fink's plan was to give Claimant laryngeal Botox injections bilaterally and concurrent with the SLN blocks. On August 13, 2020, Dr. Fink diagnosed Claimant's conditions as MTD, vagus neuropathy, and a cough. He noted Claimant received a good, but temporary response, from the SLN blocks. Following Claimant's first Botox injection, her breathlessness resolved, her cough resolved, her breathing improved, and her speech was normal. On

September 24, 2020, Dr. Fink reported that Claimant's symptoms returned two weeks prior, and were back to baseline. On October 1, 2020, Dr. Fink noted Claimant was only getting about six weeks of relief from the SLN Block and Botox injections, so she would need them on a more frequent basis than the standard recommendations. (Exs. I and M).

22. At Respondents request, Kathleen D'Angelo, M.D. performed an Independent Medical Examination (IME) on Claimant. She conducted an extensive review of Claimant's medical records and issued a very long and detailed IME report dated March 15, 2020, summarizing those records. Dr. D'Angelo opined that Claimant had work-related acute respiratory failure as well as a resultant vocal cord dysfunction and paralysis, pre-existing asthma, Anosmia (not work related), and an aggravation of Claimant's anxiety and insomnia due to her work-related condition. Dr. D'Angelo recommended a repeat laryngeal scope to determine if the vocal cord function was normalized. She also recommended that Claimant continue with speech therapy. (Ex. F).

23. Dr. D'Angelo noted that "due [to] what appears to have been a difficult intubation" Claimant sustained a known complication of vocal cord dysfunction/paralysis. She noted that Dr. Jones had difficulty intubating the patient and had considered performing a stat-tracheotomy. According to Dr. D'Angelo it is well known in ER medicine that anaphylaxis causes swelling to the airway with associated problems in passage of an endotracheal tube. She noted that once on the ventilator, [Redacted, hereinafter MM] was documented to be "difficult to bag" which is another sign of airway obstruction. (Ex. F).

24. The ALJ finds Dr. D'Angelo's opinion generally credible, but not persuasive. Dr. D'Angelo completed a very detailed and comprehensive review of Claimant's medical records. But Dr. D'Angelo's conclusion regarding Claimant's intubation being difficult is not supported by the medical records. As found, there were no complications with Claimant's intubation on June 13, 2019, and Claimant tolerated the procedure well.

25. Between March 15, 2020 and October 20, 2020 (Claimant's date of MMI), Claimant continued to treat with Dr. Woo (Ex. D), Dr. DiSorbio (Ex. E), Dr. Gutterman (Exs. G and H), and Dr. Fink (Ex. I).

26. On June 10, 2020, Dr. Gutterman opined Claimant reached MMI for the mental aspect of her claim with a 6%-7% mental impairment rating associated with PTSD. (Ex. H)

27. Dr. Woo opined Claimant was at MMI as of October 20, 2020. He noted that during the examination, Claimant did not cough throughout the visit, there was no wheezing and her speech was coherent and intelligible. He further noted that as a result of Dr. Fink's injections Claimant experienced better speech and breathing control without laryngeal spasms, and Claimant's respiratory distress with vocal cord dysfunction was stable. With regard to permanent impairment, Dr. Woo indicated that "there is no evidence of impairment. She has good breathing ability when she is optimally treated. She has

had previous PFT's which were normal. Using Table VI on page 182 of the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition, Revised she is Class 1 for speech and I would assess zero percent impairment." He recommended regular intervals of SLN blocks about every six weeks. (Ex. J).

Claimant's Post October 20, 2020 MMI History

28. On October 23, 2020, Claimant was seen by her PCP for hypertension, fatigue, snoring apnea fatigue, possible sleep apnea, chronic anxiety, and wheezing. Claimant's PCP noted that Claimant "has a complex history prior to her work comp injury where she was intubated. There has been [a] question if she has had asthma in the past and would like to see specialists at NJH." On November 20, 2020, Claimant was seen by her PCP for COVID, and another episode of bronchitis. Her symptoms included SOB, and a worsening cough. (Ex.1).

29. After being placed at MMI by Dr. Woo, Claimant still treated with Dr. Fink, who continued to provide the same diagnoses, including MTD. He continued to administer SLN bocks and Botox injections every six weeks, without any identified side effects. (Ex. I).

30. On December 21, 2020, Respondents filed a Final Admission of Liability consistent with Dr. Woo's opinions regarding MMI, and impairment. (Ex. K) On January 15, 2021, Claimant filed a Notice and Proposal for a DIME. On the Notice, the two regions selected for evaluation were Region 5, ENT (Nose & Throat) and Region 6, Other (Respiratory/Pulmonary). (Ex. L).

31. Michael Volz, M.D., a Level II accredited pulmonologist was selected as the DIME physician. Dr. Volz met with Claimant on March 20, 2021, took a history from Claimant, performed a comprehensive record review, and physically examined Claimant (including an oropharynx/throat exam). (Ex. M).

32. Dr. Volz spent over 12 hours reviewing Claimant's medical records, and he prepared a 29-page DIME report. He listed numerous pertinent medical conditions and 14 different clinical diagnoses (work and non-work related), none of which included difficulty swallowing/dysphagia. He agreed that Claimant achieved psychiatric MMI as of June 20, 2020, and opined Claimant achieved overall MMI by October 20, 2020. He agreed with Dr. Gutterman's 6-7% mental health impairment for PTSD. Dr. Volz addressed the medical impairment aspect of this claim, as follows:

> Determination of Permanent Disability related to laryngeal problems is based upon Section 9.3a – Respiration (page 180-181) as found in Chapter 9, pages 173-183, of the Revised 3rd Edition of the AMA Guides to the Evaluation of Permanent Impairment. More specifically, the PI is related to the larynx as discussed in the narrative on pages 180-181 and in Table 5 – Classes of Air Passage Defects found on page 181. Using this information, I am assigning an IR of 5%. She has Class [1] IR of WP that is moderate and therefore applying 5% IR.

> Additionally, the claimant has experienced cough and shortness of breath (dyspnea) as well as hypoxemia/hypoxia. These manifestations are discussed in Chapter 5, pages 115-126, of the Revised 3rd Edition of the AMA Guides to the Evaluation of Permanent Impairment. None of these manifestations have attributable designation for Permanent Impairment and a search for the underlying basis is recommended or needed to ascertain attribution as there are a number of diagnoses/causes for these manifestations, whether lung/pulmonary or another organ system. (Ex. M).

33. Dr. Volz opined that the "medical aspect of the MMI that is or might be attributed to the injury on the DOI is exclusively related to laryngeal problems that Dr. Fink is managing. The most current diagnosis is related to laryngeal problems of adductor spasmodic dysphonia as well as vocal cord edema." He assigned Claimant a 12% whole person impairment rating (7% psychological and 5% other/air passage defect). (Ex. M).

34. The ALJ finds that Dr. Volz's opinions are based upon an exhaustive review and analysis of all available information, and his opinions are credible and persuasive.

35. On October 5, 2021, Respondents filed a new FAL consistent with Dr. Volz's opinions. (Ex. O). Claimant disagreed with the impairment rating provided by Dr. Volz and requested a hearing to overcome his opinion. (Ex. P).

36. On behalf of Respondents, Jeffrey Schwartz, M.D. conducted an IME on Claimant. Dr. Schwartz is a pulmonologist, but he is not Level II accredited. Dr. Schwartz reviewed over 1,200 pages of Claimant's medical records (including prior medical records and reports from Drs. Woo, DiSorbio, Kobitary, King, Gutterman, Fink, D'Angelo, and Volz). As part of his IME, Dr. Schwartz took a history from Claimant, examined her, and ran additional spirometry testing, which was normal. (Ex R).

37. In his IME report, Dr. Schwartz discussed the complexity of Claimant's medical situation, including the cause of Claimant's symptoms in light of her preexisting issues. Dr. Schwarz opined that there was no evidence of laryngeal damage from intubation. He noted Claimant had undergone multiple laryngoscopies since November 2019, all of which failed to confirm VCD. Dr. Schwartz noted that Dr. Fink diagnosed Claimant as having MTD, and Dr. Fink treated this successfully with injections. He opined that Claimant's MTD was likely secondary to her PTSD. He indicated that Dr. Volz's reasoning in providing a limited respiratory rating was appropriate given Claimant's repeated normal objective measures on PFTs. (Ex. R).

38. At the hearing, Dr. Schwartz testified that in his opinion, Claimant has MTD, which is a speech disorder, and it is caused by her PTSD. (Vol II Tr. 163:12-164:14). He explained that with MTD the muscles in the throat get tense or overly active, and therefore this condition affects the muscles in the larynx, which controls speech, so speech is abnormal. (*Id*. at 164:22-165:6) He opined that MTD is a speech disorder, not an air passage disorder, and the correct treatment for MTD is speech therapy and Botox injections, which is consistent with Dr. Fink's treatment. (*Id*. at 165:22-166:18). Dr. Schwartz also testified that there is no evidence that Claimant had a swallowing issue as

of her date of MMI, he explained that Claimant's swallowing issue could be caused by a number of non-work injury related conditions including GERD, and in his opinion, to a reasonable degree of medical probability, Claimant's swallowing issue is not causally related to the injections administered by Dr. Fink. (*Id*. at 171:22-173:3). The ALJ finds Dr. Schwartz's testimony to be credible and persuasive.

39. Karin Pacheco, M.D., is an allergist, immunologist and occupational medicine physician at National Jewish Hospital. She is also Level II accredited. Dr. Pacheco performed an Occupational/Environmental Consultation on behalf of Claimant. She received a subjective history of Claimant's symptoms and present illness from Claimant, and she reviewed select medical records. According to Dr. Pacheco's report, she reviewed the following: two reports from Dr. Fink (9/24/20 and 10/1/20), imaging from Platte Valley Medical Center, notes from Claimant's hospitalization from June 13, 2019 – June 17, 2019 (ER notes, 6/13/19 note from the internal medicine attending physician, 6/15/19 progress note, 6/13/19 pulmonary consult, and discharge summary), and National Jewish test data from 2022. The testing performed at National Jewish in April of 2022, all of which was normal, included full pulmonary function testing, methacholine challenge, laryngoscopy, and a CT scan of the chest. (Ex. V).

40. Dr. Pacheco testified that the documents listed in her report are the only records she reviewed (Vol. I Tr. 123:17-22). Thus, in forming her opinion, Dr. Pacheco did not review any of the following: Dr. Volz's DIME report; Dr. Woo's records; Claimant's PCP's records; ED records after the work-related event; post-hospitalization pulmonology reports; or any ENT reports other than the two reports from Dr. Fink. Dr. Pacheco also did not review the PFT reports, spirometry reports or laryngoscopy reports for testing administered prior to 2022.

41. According to her report, Dr. Pacheco was asked to reconsider Claimant's impairment rating regarding the upper airway work-related injuries that Dr. Pacheco stated were related to vocal cord trauma from intubation or from treatment of the vocal cord trauma. In her report, Dr. Pacheco writes, "[a]ccording to her records, it is unclear if the patient underwent a traumatic intubation. She reports several attempts, but only 1 is recorded in the emergency room record." (Ex. V).

42. Claimant testified she currently has problems speaking, difficulty breathing and has to exert herself to speak. Her condition is made worse with stress. (Vol. I Tr. 41:18-42:15). Claimant testified she had has difficulty swallowing and started choking on her food in December 2021/January 2022. (Vol I Tr. 49:20-50:7).

43. Dr. Pacheco used the same Table (Table 5 Classes of Air Passage Defects) from the AMA Guidelines as utilized by Dr. Volz. She opined that Claimant's presentation was consistent with Class II from that table, for 15 to 30% impairment of the whole person. Dr. Pacheco also opined that Claimant's swallowing issue, warranted permanent impairment ratings. She concluded:

> I consulted the AMA guides to the evaluation of permanent impairment, third edition (revised) as used in the state of Colorado. I first turned to Chapter 9, "Ear,

nose, throat and related structures" on page 173. I then turned to table 5, classes of air passage defects, on page 181. I considered that the patient's presentation was consistent with class II, 15 to 30% impairment of the whole person. Specifically, a recognized air passage defect exists, as described by Dr. Fink, and includes decreased motion of the right vocal cord, and no movement of the left vocal cord [untrue]. Dyspnea does not occur at rest and is not produced by walking freely on the level. Dyspnea is produced by stress, prolonged exertion, hurrying, hill climbing, etc. Part of the patient's dyspnea relates to difficult in regulating vocal cord movement. Examination does reveal partial obstruction of the laryngeal pharynx and larynx. Treatment for vocal cord dysfunction requires Botox injections every 6 weeks, on an ongoing basis. I therefore placed the patient at the upper range of class II impairment at 25% impairment of the whole person.

I then turned to chapter 10, the digestive system, and specifically consulted table 2, classes of impairment of the upper digestive tract on page 189. I noted that the patient developed dysphagia and abnormal swallowing, as evidenced by the barium swallowing study obtained May 9, 2022. I considered that the patient's findings fall in class I, 0 to 5% impairment of the whole person, as symptoms and signs of upper digestive tract disease are present with anatomic loss or alteration, but continuous treatment is not required and weight can be maintained. Further treatment with speech pathologist will be necessary to maintain adequate and safe swallow. I therefore assigned a 5% impairment of the whole person for this condition. (Ex. V).

44. At the hearing, Dr. Pacheco testified that Claimant suffers from VCD caused by vocal cord trauma sustained during intubation. (Vol I. Tr. 77:16-79:25). She based her opinions primarily on the November 2019 laryngoscopy showing left vocal cord weakness, but she also reasoned Claimant must have VCD because Dr. Fink would not have provided ongoing injections if Claimant did not have a vocal cord injury. (*Id*. 77:6-15). Dr. Pacheco admitted that the most recent laryngoscopy performed in April 2022 at National Jewish did not identify any airway obstruction or difficulty. (Vol. II. Tr. 56: 7-17; Ex. V). She attributed each of the normal laryngoscopies obtained after the November 2019 laryngoscopy, to where Claimant was in her Botox cycle. (Vol. I Tr. 98:10-99:1).

45. With regard to Claimant's swallowing issue, Dr. Pacheco indicated that while Claimant responded well to Dr. Fink's injections, in her opinion this treatment resulted in the side effect of dysphagia/difficulty swallowing. Specifically, she testified that Claimant's injection treatment with Botox, Marcaine and Kenalog caused Claimant's repetitive disorganized tongue movement, reduced tongue based retraction leading to dysphagia, vocal breathiness, and SOB with talking. (Vol. I Tr. 75:23-77:15, 90:15-91: 1-15). Again, in her opinion, because the swallowing issue is a consequence of claim-related treatment, Claimant is entitled to an impairment rating under Chapter 10 of the AMA Guidelines, which she assessed at 5%.

46. Other than Dr. Pacheco's testimony, there is no objective evidence in the record that Claimant experienced side effects, including swallowing issues, from Dr. Fink's injections. Dr. Fink's records do not document any swallowing side effects from

the SLN blocks and Botox injections.

47. Furthermore, the Notice for DIME only specified two regions for the DIME evaluation: Nose and Throat, and Respiratory/Pulmonary. Thus, these are the only two regions Dr. Volz, the DIME physician evaluated. (Ex. L). The ALJ finds that Claimant never requested a DIME evaluation of her digestive system.

48. Dr. Pacheco was not aware of Claimant's preexisting issues (URIs, bronchitis, coughing, anxiety), or that Claimant was being treated for escalating URI issues just prior to her date of injury. Similarly, Dr. Pacheco was unaware Claimant was experiencing difficulty with talking, physical exertion and SOB severe enough that just prior to her date of injury, she was being referred to a pulmonologist, and regular FMLA leave was recommended. Dr. Pacheco was also not aware that after the work injury Claimant went to the ED repeatedly for bronchitis and SOB. (Ex. V.; Vol. I Tr. 114:22-25, 118:6-119:17, 120:23-123:22). Dr. Pacheco was not aware of these numerous issues because she only reviewed a very limited subset of Claimant's medical records before rendering her opinion.

49. Claimant has an extremely complex mental and physical medical history both before and after her work incident that involved some claim-related issues, and some unrelated issues.

50. Claimant's ATP, Dr. Woo gave Claimant a permanent impairment rating of 0%, and he relied upon Table 6 (Speech Classification Chart). Dr. Woo diagnosed Claimant with respiratory distress with VCD. He noted that Claimant had good breathing ability when she is optimally treated, and her PFTs were normal. Dr. Volz gave Claimant an impairment rating of 12% (5% Medical and 7% Mental Health), and he relied upon Table 5 (Classes of Air Passage Defects). Dr. Volz noted that a vocal cord disorder has been established, but a VCD has not yet been determined or diagnosed. Dr. Pacheco gave Claimant an impairment rating of 29 % (Medical only), and relied upon Table 5 (Classes of Air Passage Defects) and Chapter 10 (Digestive System), Table 2 (Classes of Impairment of the Upper Digestive Track). Dr. Pacheco testified that Claimant has vocal cord trauma caused by intubation resulted in VCD.

51. As found, Dr. Volz's DIME report is thorough, credible, and persuasive. He was familiar with Claimant's complex medical history and treatment. While he and Dr. Woo relied upon different tables in Chapter 9 of the AMA Guidelines, their impairment ratings were not drastically different. In contrast, Dr. Pacheco's medical impairment rating, just for Claimant's medical condition is nearly five times what Dr. Volz assigned. Further, Dr. Pacheco did not have all of Claimant's relevant medical records, and she assigned an impairment rating for a condition not listed on the Notice of Dime, and not present until after Claimant reached MMI.

52. Based on the totality of the evidence, Claimant failed to prove by clear and convincing evidence that it is highly probable that Dr. Volz's impairment rating is incorrect.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME's Impairment Rating

The determination and assessment of permanent impairment requires the DIME physician to diagnose the claimant's condition or conditions, and determine their causal relationship to the industrial injury. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998) A DIME physician's findings regarding causation, relatedness, and impairment are binding on the parties unless overcome by "clear and convincing

evidence." § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Clear and convincing evidence is that quantum and quality of evidence that renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it is highly probable the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. Wellbridge d/b/a Colo. Athletic Club*, W.C. No. 4-914-378-02 (ICAO, June 25, 2015). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO July 19, 2004). This enhanced burden of proof for non-scheduled injuries reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med*, 961 P.2d at 592.

In addition to examining Claimant, Dr. Volz, the DIME physician, spent over 12 hours reviewing Claimant's voluminous medical records. He thoroughly reviewed and summarized Claimant's medical care from March 2015 through January 5, 2021. This included Claimant's pre-existing conditions, and her claim-related and unrelated care subsequent to her admitted work injury on June 13, 2019. Dr. Volz reviewed Claimant's multiple laryngoscopies, her PFTs, the reports of her ATP, and the multiple reports from Dr. Fink regarding the current treatment he was providing (SLN blocks and Botox injections). In his DIME report, Dr. Volz discussed 14 different clinical diagnosis, including, but not limited to, disorder of vocal cords, respiratory distress, laryngeal edema determined by laryngoscopy, cough, dyspnea, and wheezing. Dr. Volz noted that this was a "highly complex case" and many of Claimant's listed diagnosis are symptomatic diagnoses. (Ex. M). As found, Dr. Volz's DIME opinion is credible and persuasive.

Dr. Schwartz, a pulmonologist, agreed that Claimant's medical situation is very complex, including the cause of Claimant's symptoms in light of her preexisting issues. Dr. Schwartz reviewed over 1,200 pages of Claimant's medical records and he examined her. Dr. Schwartz credibly testified that Dr. Volz's reasoning in providing a limited respiratory rating was appropriate given Claimant's repeated normal objective measures on PFTs. While Dr. Schwartz and Dr. Volz have different opinions as to whether Claimant suffers from a speech disorder or a laryngeal disorder, the ALJ finds this is a mere difference of medical opinion. Claimant's voluminous medical records contain diagnoses of MTD, VCD, and vocal cord disorder. As found, Dr. Schwartz is credible and persuasive.

Dr. Pacheco is board-certified in Internal Medicine, Allergy/Immunology, and Occupational Medicine. Dr. Pacheco, unlike Dr. Schwartz is Level II accredited. Dr. Pacheco examined Claimant, and relied upon Claimant to provide her with a summary of her injury, history and treatment. As a part of her Occupational/Environmental Consultation, Dr. Pacheco reviewed a very limited number of Claimant's medical records. Claimant saw Dr. Fink on numerous occasions, yet Dr. Pacheco only reviewed two of his records. In addition to these records, Dr. Pacheco reviewed Claimant's medical records from June 13, 2019 – June 17, 2019, when Claimant was intubated and hospitalized after the admitted work-injury, imaging from Platte Valley Medical Center, and testing Dr.

Pacheco ordered in April 2022. As found, Claimant has a complex medical history, including treatment before and after the admitted injury. Dr. Pacheco, however, did not have Claimant's complete set of medical records to base her opinion on, but instead her opinion is based upon incomplete information and assumptions. Dr. Pacheco's limited review of this complex case is not sufficient to meet the burden of proving that Dr. Fink's impairment rating is wrong.

Claimant testified her swallowing issues and choking on food started in December 2021/January 2022. Dr. Pacheco opined that Claimant's post-MMI swallowing issue is directly related to the injection treatment provided by Dr. Fink under this claim, and is a side effect of that treatment. She further opined this swallowing issue entitles Claimant to a 5% rating under Chapter 10 of the AMA Guidelines. This opinion is not persuasive for several reasons. First, as found, there is no objective evidence in Dr. Fink's medical records that Claimant was experiencing side effects, particularly difficulty swallowing food, as a result of his SLN blocks and Botox injections. Second, the Notice of Dime noted two regions for evaluation: Region 5, ENT (Nose & Throat) and Region 6, Other (Respiratory/Pulmonary). (Ex. L). Dr. Volz did not diagnosis, relate or rate Claimant's swallowing issue because that issue had not materialized as of the date of MMI, and it was not identified as an issue by Claimant or any other provider as of the date of Dr. Volz's DIME evaluation. As such, Dr. Volz did not err in failing to diagnose, relate and rate a condition that had not yet developed, and one that he had not been asked to evaluate.

Claimant has an extremely complex medical history, both before and after her admitted work injury. Dr. Volz thoroughly reviewed and outlined Claimant's complex medical history, and analyzed Claimant's situation before ultimately rendering his opinions on impairment. As found, Claimant failed to prove by clear and convincing evidence that it is highly probable that Dr. Volz's impairment rating of 5% for an air passage defect is incorrect.

ORDER

It is therefore ordered that:

1. Claimant failed to overcome the DIME opinion of Dr. Volz regarding permanent impairment with clear and convincing evidence.

2. Claimant's request for a 29% whole person impairment rating is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-148-418-004

ISSUES

- Did Claimant prove that Respondent CS[Redacted] is subject to a penalty pursuant to C.R.S. §8-43-304 for violation of C.R.S. §8-42-101(3)(a)(1).[1]

PROCEDURAL HISTORY (NOTICE TO PMC AND JURISDICTION)

An Application for Hearing was filed in this matter on October 26, 2022 by Claimant requesting penalties against [Redacted, hereinafter PM] and [Redacted, hereinafter CS] for "seeking to recover bills from the Claimant despite knowing the bills are covered under this workers compensation claim". According to the Certificate of Mailing, the Application was sent to counsel for CS[Redacted], counsel for Employer and PM[Redacted]. The notice of hearing sent by OAC on December 7, 2022 provided notice that the hearing scheduled for April 11, 2023 at 1:00 p.m. would be held at the Pueblo Municipal Courthouse. The certificate of service indicated service to counsel for Claimant and Counsel for CS[Redacted]. The official notice does not include counsel for the employer or PM[Redacted]. Counsel for Claimant has provided evidence that his office forwarded the notice to PM[Redacted] separately. This forwarded notice was not served by the Office of Administrative Courts as provided by C.R.S. 8-43-211(1). As such, it does not constitute statutory notice of the hearing to be held. Further, even if the Claimant's notice was sufficient, there is no evidence that PM[Redacted] was advised that the in person hearing scheduled in Pueblo was converted to a "virtual" video hearing. Finally, since PM[Redacted] was neither joined pursuant to C.R.C.P 19, or waived personal jurisdiction, it was not subject to the jurisdiction of this tribunal for the purposes of imposition of a penalty. *See, Delta County Memorial Hospital v. ICAO*, 495 P.3d 984 (Colo. App. 2021). As such, the penalties against PM[Redacted] may not proceed due to lack of notice and lack of jurisdiction.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on April 13, 2020 while working as a police officer for the [Redacted, hereinafter CP] when he was struck from behind in his patrol car while investigating an accident. He was taken to PM[Redacted] by ambulance.

[1] As indicated below, the ALJ considers the issue of violation of C.R.S. §8-42-101(4) as tried by consent instead of C.R.S. §8-42-101(3)(a)(1), which was an incorrect citation utilized by Claimant in his Application for Hearing.

2. Claimant was provided treatment at PM[Redacted] on the date of the injury and released the following day. (Claimant's Exhibit 4, pp. 18 -23).

3. A general admission of liability admitting for medical benefits and temporary disability benefits was filed on December 2, 2020. The certificate of service indicates that the admission was served on the Employer, the Division of Workers' Compensation and the Claimant.

4. A Final Admission of Liability was filed on March 18, 2022 and was served on Claimant, Claimant's attorney, the Employer and the carrier's attorney and the Division of Workers Compensation. (Respondent CS's[Redacted] Exhibit C, p.11).

5. Following the apparent non-payment of the medical bills for Claimant's treatment at PM[Redacted], Respondent CS[Redacted] prepared a Complaint on or about October 21, 2021 to be filed in Pueblo Count Court alleging damages for its Client, PM[Redacted] for two dates of service; November 26, 2019 and April 14, 2020. The amount sought for the workers compensation date of injury was $4,884.56 in principal and $299.60 in interest. The Summons, Complaint and Return of Service were filed in the Pueblo County Court on November 9, 2021 by CS's[Redacted] counsel, [Redacted, hereinafter MB]. (Respondent CS's[Redacted] Exhibit D, p. 28).

6. On November 2, 2021, attorney [Redacted, hereinafter AS], on behalf of Claimant, sent a letter to attorney MB[Redacted] and informed him, among other things, that the incident on April 14, 2020 that resulted in the treatment with PM[Redacted] was while the Claimant was an employee of the CP[Redacted] and was covered by Workers Compensation and that information was communicated to PM[Redacted]. He further stated "As you are aware, "It is unlawful, void and unenforceable as a debt for any physician, chiropractor, **hospital**, person, expert witness, reviewer, evaluator or institution to contract with, bill, **or charge any party** for services, rendered in connection with injuries coming within the purview of this article." (Emphasis in the original). (Claimant's Exhibit 3, p. 16).[2]

7. Claimant, now Defendant in the County Court action, through counsel [Redacted, hereinafter LS], filed an Answer to the Complaint on December 13, 2021 generally denying the allegations in the Complaint and specifically alleging that the claim for treatment was covered under and admitted workers compensation claim with a WC number of 5-148-418. (Claimant Exhibit 1, p. 6). The filing fee for the Answer was $124.73 (Claimant Exhibit 5, p. 24).

8. A trial on the County Court case was set for June 2, 2022. (Claimant Exhibit 1, p. 9). The trial was continued by unopposed motion dated June 1, 2022. An order granting the continuance was entered on that date. (Respondent CS[Redacted] Exhibit D, p. 28). On July 11, 2022 the County Court E-Filing record indicates that the case was

[2] This quotation from the statute is incomplete and misleading since it omits the reference to billing medical fees in excess of the medical fee schedule.

closed on that date. No other information as to the basis for the closure is evidenced on the E-Filing record or provided by the parties.

9. On July 13, 2022, counsel for CS[Redacted], [Redacted, hereinafter HC] sent an email for Respondents' counsel [Redacted, hereinafter LM] requesting a Financial (sic) Admission of Liability or letter of liability. LM[Redacted] responded on July 20, 2022 providing the Final Admission of Liability "which is evidence of the compensable work related injury that [Redacted, hereinafter LC] sustained on 4.13.20". (Respondent CS[Redacted] Exhibit C, p. 009).

CONCLUSIONS OF LAW

A. Penalty

Section 8-43-304(1) provides that any person who ". . .violates articles 40 to 47 of this title 8, or does any act prohibited thereby. . . shall also be punished by a fine of not more than one thousand dollars per day for each such offense. . ." Further, C.R.S. §8-43-305 provides that 'Every day during which any . . other person . . . fails to perform any duty imposed by articles 40 to 47 of this title. . . shall constitute a separate and distinct violation thereof."

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. First, the ALJ must determine whether, in this case, CS[Redacted] violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

Initially, CS[Redacted] argues in its position statement that Claimant incorrectly cites to C.R.S. 8-42-101(3)(a)(I) as the basis for the penalty. As correctly pointed out by CS[Redacted], that section deals with charging a medical fee in excess of the fee schedule. No evidence of a violation of that section was provided. Clearly, based on Claimant's arguments, evidence presented and the arguments and evidence presented by CS[Redacted], the penalty sought is for a violation of 8-42-101(4). For example, the issue framed by Claimant in his position statement is "Whether Claimant proved by a preponderance of the evidence that he is entitled to penalties from CS[Redacted] for its attempt to collect a debt against the Claimant? Similarly, CS[Redacted] presented testimony from [Redacted, hereinafter DC] that no admission pertaining to W.C. 5-148-418 was received until it was transmitted by LM[Redacted] (Respondents' attorney) to HC[Redacted] on July 20, 2022. Based on this, I conclude that this issue was tried by consent. Issues may be tried by consent if not properly raised by the pleadings,

amendments to the pleadings at the conclusion of the trial or hearing. See, *Robbolino v. Fisher-White Contractors*, 738 P.2d 70 (Colo. App. 1987).

C.R.S. 8-42-101(4) provides that "Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee."

Although Claimant submitted copies of the General Admission and the Final Admission, Claimant has failed to sustain its burden of proving that is provided adequate notice of either of these two documents to CS[Redacted] until it was provided by attorney LM[Redacted] to CS's[Redacted] attorney on July 20, 2022. By then, all collection activity by CS[Redacted] had ceased. Claimant has not provided evidence that there was any collection activity occurred after this date. Claimant has argued that he provided information regarding the claim on February 11, 2022 in his position statement to MB's[Redacted] and that the Final Admission sent at that time was on another claim. Instead of sending the correct Final Admission on this claim to CS[Redacted], he argues he sent the hearing notice with all the information to get the bills paid to CS[Redacted], through counsel, on February 24, 2022. While this information is helpful to understand the communications that occurred, the actual communications were not submitted into evidence. As such, the ALJ is unable to credit this argument without the supporting documentation which may be subject to examination by counsel for CS[Redacted]. Relying on the actual evidence submitted, I conclude that CS[Redacted] was not adequately notified of the compensable nature of the claim for which payment of the medical fees were requested until it was supplied with the Final Admission of Liability on July 20, 2023. The collection activities prior to that date did not violate C.R.S. 8-42-101(4) since CS[Redacted] did not have proper notice that the medical fees sought were related to a compensable workers compensation claim. I conclude that based on the evidence presented, any representations prior to the submission of the Final Admission of Liability, in this case, were not sufficient notice to trigger compliance with that statute.

ORDER

It is therefore ordered that:

1. Claimant's request for imposition of penalties against the Respondent CS[Redacted] is denied and dismissed.

2. Any issue not resolved by this order is reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will

be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 18, 2023

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-215-086-001

ISSUES

1. Whether Dependent has demonstrated by a preponderance of the evidence that she a proper and sole recipient of death benefits related to Decedent's industrial fatality.

STIPULATIONS OF THE PARTIES

1. By stipulation of the parties and Order of Administrative Law Judge Royce Mueller on April 28, 2023, Decedent's weekly death benefit rate is $1,228.99.

FINDINGS OF FACT

1. Decedent died on August 30, 2022, while in the course and scope of his employment. Respondents ultimately filed a Fatal General Admission of Liability on January 4, 2023, establishing the compensable nature of Decedent's industrial fatality. The General Admission of Liability noted that dependency was still undetermined at that time.

2. There is a question as to whether another individual, [Redacted, hereinafter EV], is an appropriate dependent under the Workers' Compensation Act regarding the death benefits related to Decedent's industrial fatality.

3. Counsel for Claimant/Dependent [Redacted, hereinafter MG] provided various representations during the hearing, as an officer of the court. Respondents did not object to the representations made. Counsel for MG[Redacted] stated that he made contact with EV[Redacted] by telephone in December of 2022. During the telephone conversation, Counsel for Claimant obtained EV's[Redacted] mailing address and email address from EV[Redacted].

4. On February 6, 2023, Claimant's counsel's office mailed a copy of the Notice of Hearing for the May 4, 2023, hearing to EV[Redacted]. The Notice of Hearing was mailed by regular USPS mail as well as by certified mail, return receipt requested.

5. On March 30, 2023, the Notice of Hearing Claimant's counsel mailed to EV[Redacted] by certified mail, return receipt requested was returned to Claimant's counsel's office as unclaimed. The Notice of Hearing mailed by Claimant's counsel that was sent by regular USPS mail was not returned. After receiving the certified mail back as unclaimed, counsel for Claimant mailed a second Notice of Hearing for the May 4, 2023, proceedings to EV[Redacted] by regular mail and also emailed EV[Redacted] a

copy of the same. The Notice of Hearing mailed to EV[Redacted] on March 30, 2023, was not returned to Claimant's counsel's office.

6. On April 19, 2023, counsel for Respondents mailed a copy of the Notice of Hearing for the May 4, 2023, proceedings to EV[Redacted] using the same address as that used by counsel for Claimant. Respondents' counsel's office did not receive the mail returned.

7. On May 3, 2023, counsel for Claimant contacted the Colorado Division of Workers' Compensation. After searching by both Decedent's name and social security number, the customer service representative confirmed that only Claimant's claim for fatal benefits had been filed.

8. EV[Redacted] did not appear at the May 4, 2023, hearing.

9. Claimant and Decedent were married on June 3, 2000. Prior to his death, Decedent and Claimant cohabitated as husband and wife at [Redacted, hereinafter MA]. Decedent was the sole financial provider of the household.

10. Claimant credibly testified that Decedent had five biological children, but none of them were under the age of 21, Decedent had minimal contact with any of the adult children, and Decedent was not financially supporting any of his adult children prior to his death.

CONCLUSIONS OF LAW

1. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. A widow is presumed to have been wholly dependent on a decedent unless she was either "voluntarily separated and living apart from the spouse at the time of the

. . . death or was not dependent in whole or in part on the deceased for support." §8-41-501(1)(a), C.R.S.

Dependency

5. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

6. A widow is presumed to be wholly dependent on a decedent unless she was either "voluntarily separated and living apart from the spouse at the time of the . . . death or was not dependent in whole or in part on the deceased for support." §8-41-501(1)(a), C.R.S.

7. As found, Claimant has demonstrated by a preponderance of the evidence that she was married to Decedent at the time of his industrial fatality. Furthermore, Claimant has demonstrated that she and Decedent were living together at the time of Decedent's death and that she was financially dependent on Decedent prior to his death.

8. As found, the parties have provided appropriate and adequate notice to Decedent's other potential dependent and such dependent has failed to file a claim for benefits. As Claimant is the only individual that has filed a claim for death benefits and has established herself as a whole dependent under §8-41-501, C.R.S., she is the sole recipient of said benefits.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following Order:

1. Claimant is the whole dependent of Decedent and is hereby awarded death benefits at a weekly rate **$1,228.99**.

2. Respondents shall pay death benefits dating back to Decedent's death plus interest at a rate of 8% per annum.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 18, 2023.

Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-212-186-001

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the respondent.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his low back, including a surgery performed by Dr. Brian Witwer on September 13, 2022, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. The issues of average weekly wage (AWW), temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, and any related offsets were also endorsed for hearing. At the hearing, the ALJ determined that these issues shall be reserved and held in abeyance pending a determination of compensability.

FINDINGS OF FACT

1. The claimant worked for the respondent as a state trooper. The claimant's job duties included all aspects of law enforcement including speed enforcement, road safety, and crash investigation. This matter involves an alleged injury that occurred in October[1] 2021.

2. As a state trooper the claimant is required to wear a duty belt. The duty belt allows a trooper to attach the following: a flashlight, a radio, a taser, a firearm, two additional magazines for the firearm, handcuffs, and an expandable asp. When all of the items are attached to the duty belt, it weighs approximately 18 pounds. As a trooper, the claimant spent a significant amount of every shift driving. As a result, the claimant arranged the items of his duty belt around the front of the belt and on the sides. This allowed the claimant's low back to be free to rest against the back of his vehicle seat without obstruction.

3. In 2021, the claimant underwent four surgeries: a lumbar fusion, bilateral shoulder replacements, and cataract surgery. All of these surgeries were paid for by the claimant's personal health insurance, Cigna.

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[1] The First Report of Injury and later documents identify the date of injury as November 3, 2021. However, the ALJ is persuaded that this was the date the claimant reported his issues/symptoms to a supervisor, and not the date of the incident involving his duty belt. The ALJ finds that the date of the alleged injury was October 8, 2021.

4. The lumbar fusion was performed by Dr. Brian Witwer on February 16, 2021. That surgery involved an L4 to S1 anterior lumbar interbody fusion (ALIF) and an L4-L5 laminectomy. The claimant underwent the February 2021 surgery because he had a five to six year history of low back pain. The claimant testified that following that surgery, his pain symptoms were resolved.

5. The claimant was released to return to work from all of his 2021 surgeries by October 6, 2021. The claimant was released to full duty as a state trooper without restrictions. The claimant testified that as of October 6, 2021 he was pain free.

6. The claimant reported to work with the respondent on October 8, 2021. As he was preparing for his shift, he put on his duty belt. At that moment, he felt immediate pain in his back. The claimant described this pain as the same as that he experienced prior to the February 2021 surgery.

7. Following this onset of pain on October 8, 2021, the claimant attempted to work with the pain. However, the claimant continued to experience low back pain that radiates into his right hip and leg. In addition, the claimant began experiencing right foot numbness.

8. On November 3, 2021, the claimant informed his supervisor of his pain symptoms and requested to return to light duty. On November 1, 2021, the respondent prepared an Employer's First Report of Injury. The date of injury was identified as November 3, 2021. However, the ALJ is persuaded that the incident at issue occurred on October 8, 2021.

9. After reporting his low back symptoms to his supervisor on November 3, 2021, the claimant was placed on light duty and worked in dispatch out of the [Redacted, hereinafter ML], Colorado location from November 2021 until August 2022.

10. The claimant's authorized treating provider (ATP) for this claim is Dr. Craig Stagg. The claimant was first seen by Dr. Stagg on December 2, 2021. At that time, the claimant reported his history of low back pain and the success of the February 2021 surgery with Dr. Witwer. The claimant also described the incident involving his duty belt and the onset of immediate low back pain with radiating symptoms. At that time, Dr. Stagg referred the claimant to Dr. Witwer for consultation.

11. On December 2, 2021, the claimant was seen in Dr. Witwer's practice by Audrey Kramer, NP. At that time, the claimant reported that after wearing his duty belt he felt that all of his preoperative pain had returned. NP Kramer referred the claimant to physical therapy and ordered magnetic resonance imaging (MRI) of the claimant's lumbar spine.

12. On January 19, 2022 the claimant underwent a lumbar spine MRI. The results showed evidence of the prior interbody fusion at the L4-L5 and L5-S1 levels; persistent moderate spinal stenosis at the L4-L5 level; persistent right neural foraminal narrowing at the L5-S1 level due to a lateral disc bulge. The radiologist, Dr. Michael Neste, opined that there was likely impingement of the exiting L5 nerve root.

13. On January 31, 2022, the claimant was seen by Dr. Witwer. At that time, the claimant described the return of his preoperative low back and right leg symptoms. Dr. Witwer discussed the MRI findings and recommended an epidural steroid injection.

14. On February 18, 2022, the claimant underwent a right L5-S1 transforaminal epidural steroid injection (TFESI). The claimant testified that this injection provided approximately one month of relief.

15. On February 22, 2022, the claimant underwent computed tomography (CT) of his lumbar spine. The CT scan showed mild scoliosis and mild retrolisthesis at the L2-L3 level; mild anterolisthesis at the L4-L5 and L5-S1 levels; hardware from the prior lumbar surgery; a posterior disc bulge at the L4-L5 level; and multilevel facet arthrosis.

16. Based upon his review of the claimant's CT scan, Dr. Witwer recommended the claimant undergo a right L5-S1 laminectomy, lateral recess release and facetectomy with wide foraminotomies.

17. On July 25, 2022, Dr. Philip Stull authored a report following his review of the claimant's medical records. In his report, Dr. Stull opined that the symptoms the claimant experienced when returning to work in October 2021 are related to pre-existing chronic and advancing degenerative lumbosacral spondylosis and degenerative disc and facet joint disease. Dr. Stull further opined that the surgery recommended by Dr. Witwer would be reasonable and necessary to address the claimant's lumbar spine condition. However, it is Dr. Stull's opinion that the need for surgery is not related to the action of putting on a duty belt at work. Based upon the opinions of Dr. Stull, the respondents denied authorization for the recommended surgery.

18. On September 13, 2022, Dr. Witwer performed the recommended surgery. The surgical note of that date identifies the procedure as "wide facetectomy, completed removal of bone over the foramina at L5-S1 on the right, lumbar decompression decompressing the right L5 nerve root, microscope technique." This surgery was paid for by the claimant's private insurance, Cigna.

19. At the request of the respondent, on February 21, 2023 the claimant attended an independent medical examination (IME) with Dr. Anant Kumar. In connection with the IME, Dr. Kumar reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Kumar listed the claimant's diagnosis as a long history of degenerative disc disease, mild right lumbar scoliosis, gradually worsening multilevel arthrosis with facet effusion, and instability at the L4-L5 level. Dr. Kumar specifically noted that between 2018 and

November 17, 2020 there was "significant worsening of [the claimant's] facet degeneration with severe facet effusion at multiple levels with the worse facet effusion at the L4-5 level." Dr. Kumar also noted significant pathology at LS-S-1 level.

20. Dr. Kumar noted that the most recent MRI showed that the cage from the February 2021 fusion surgery has subsisted into the spine. It is Dr. Kumar's opinion that the claimant's need for the September 2022 surgery, while reasonable, is unrelated to any work injury. It is Dr. Kumar's opinion that the claimant did not suffer a compensable injury in October 2021. Dr. Kumar further opined that the claimant's need for surgery is solely related to the long-standing pre-existing degenerative changes in his lumbar spine.

21. On March 20, 2023, Dr. Kumar issued a supplemental report after his review of additional medical records. Dr. Kumar's opinion regarding the relatedness of the September 2022 surgery was unchanged.

22. On March 31, 2023, the claimant retired from his position as a state trooper.

23. Dr. Kumar's testimony was consistent with his IME reports. Dr. Kumar testified there is no medical explanation to support the claimant's claim that his duty belt caused an injury to his lumbar spine. Dr. Kumar explained that the duty belt does not put pressure on the lumbar spine because it sits on top of the wearer's trochanter (hip) bones. Dr. Kumar further testified that the surgery performed by Dr. Witwer in February 2021 did not properly stabilize the claimant's spine. It is this spinal instability that has resulted in the return of the claimant's low back and leg pain. It is Dr. Kumar's further opinion that the claimant's chronic low back pain and radiating leg symptoms were caused by multiple levels of facet effusion, foraminal stenosis, and degenerative disc disease.

24. Dr. Kumar testified that due to the lack of correct stabilization at the L5-S1 level, there is evidence of cage subsidence in the claimant's imaging studies. This subsidence has gradually worsened with time, which has resulted in incomplete fusion at the L4-S1 segment. Dr. Kumar testified that during the fusion surgery an additional plate should have been placed at the L5-S1 level to better stabilize the spine.

25. With regard to the surgery performed by Dr. Witwer on September 13, 2022, Dr. Kumar testified that the surgery was reasonable and necessary to correct issues caused by the April 2021 surgery. However, it continues to be Dr. Kumar's opinion that the need for the September 2022 surgery was not caused by the duty belt. Rather, the need for that surgery was the initial failed fusion.

26. The issues of claimant's entitlement to TTD benefits, TPD benefits, the calculation of his AWW and any offsets available to the respondent have been held in abeyance, as noted above.

27. The ALJ credits the medical records, the opinions of Dr. Stull, and the testimony and opinions of Dr. Kumar. The ALJ is not persuaded by the claimant's belief that the back and leg symptoms he felt in October 2021 were caused by the placement of his duty belt. Although there may have been a temporal relationship between the use of the duty belt and the onset of symptoms, the ALJ does not find that the use of the duty belt caused the symptoms. The ALJ specifically credits the testimony of Dr. Kumar that the duty belt does not put pressure on the lumbar spine, because it sits on top of the wearer's trochanter (hip) bones. The ALJ also credits the opinion of Dr. Kumar that the claimant's need for the September 2022 surgery was related to the failed 2021 fusion surgery, and not the act of using the duty belt. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that when he put on his duty belt in October 2021, that he suffered an injury necessitating medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); see a/so *Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is

compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the respondent. As found, the medical records, the opinions of Dr. Stull, and the testimony and opinions of Dr. Kumar are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits in this matter is denied and dismissed. All remaining endorsed issues are dismissed as moot.

Dated May 19, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.$. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-164-544-002

ISSUE

Whether Claimant has established by a preponderance of the evidence that the right shoulder surgery recommended by Authorized Treating Physician (ATP) Douglas A. Foulk, M.D. is reasonable, necessary and causally related to his November 24, 2020 admitted industrial injury.

FINDINGS OF FACT

1. Claimant works for Employer as a restaurant manager. He testified that as he was leaving work and walking to his truck on November 24, 2020, he slipped and fell on ice. Claimant stated he twisted his right knee and landed on his right side. He was able to drive himself home and reported the incident to Employer on the following day.

2. Claimant initially sought treatment for his injuries on November 28, 2020 at NextCare Urgent Care. He reported that he was walking at work and slipped on ice. Claimant complained of right knee pain. He noted that there was no other associated pain or injuries. Claimant was assessed with a sprain of the right knee and advised to follow-up with workers' compensation.

3. On November 30, 2020 Employer completed a First Report of Injury. The body part listed on the form is the "lower extremities – knee." Under "how the injury occurred," the form specifies, "I slipped and fell on a patch of ice in the parking lot, and twisted my knee trying not to fall." Employer's First Report of Injury does not mention any damage to the right shoulder or any other body part. Respondents subsequently filed a General Admission of Liability (GAL) on March 8, 2021.

4. On December 10, 2020 Claimant attended his first appointment at Midtown Occupational Health Services with Matthew Edwards PA-C/Larence Cedillo, D.O. Claimant reported that three weeks earlier he slipped on ice and injured his right knee. Claimant did not specify the exact mechanism of injury, but explained that his right leg went sideways. Claimant also reported that he was developing some left leg and mild low back soreness from compensation. He had no other concerns and did not report any right shoulder pain or symptoms. Claimant was diagnosed with a right knee sprain and referred for an MRI scan.

5. On December 15, 2020 Claimant attended his first physical therapy appointment at Midtown Occupational Health Services. Claimant reported that he slipped and fell at work and twisted his knee. He was unable to describe the specific mechanism of injury or how his knee twisted. Notably, Claimant again did not report any right shoulder symptoms.

6. Claimant followed-up with PA Edwards on December 22, 2020 for his right knee. He did not mention any right shoulder symptoms and the report specifically notes "no new concerns." Claimant subsequently attended two additional physical therapy sessions on January 5, 2021 and January 7, 2021 with no mention of any right shoulder symptoms.

7. Respondents' claims adjuster notes were admitted into evidence. For the entry on January 4, 2021 adjuster [Redacted, hereinafter CS] documented that Claimant's present symptoms included "Right knee: pain/swelling/sometimes difficulty walking. Right shoulder pain swelling/hard to move sometimes/pretty much sore all the time/has difficulty sleeping as he can't have pressure on his right shoulder. Thinks he had a torn R/C tear prior, got some PT about 10 years ago." Adjuster CS[Redacted] also noted that Claimant "[s]lipped on a patch of ice, twisted his right knee, and fell down on the right side. He said he fell down flat on his right side. Major concern was right knee, Right shoulder has been bothering him and he is concerned about that."

8. Claimant denied he was ever actually diagnosed with a rotator cuff tear. After a short period of time his shoulder healed and he never required any treatment besides a couple of physical therapy visits in the 1990's. Claimant also denied any other right shoulder injuries or treatment prior to November 2020.

9. On January 13, 2021 Claimant was evaluated by Joseph Hsin, M.D. at Orthopedic Centers of Colorado. Claimant reported that two months earlier he had slipped and fallen on ice at work. He did not report any right shoulder symptoms.

10. On February 18, 2021 Claimant underwent a right knee arthroscopy with partial medial meniscectomy and chondroplasty of the patella. Claimant followed-up with Orthopedic Centers of Colorado on February 23, 2021 and March 23, 2021. Notably, he still did not report any right shoulder symptoms. Claimant also underwent physical therapy at Orthopedic Centers of Colorado on March 2, 2021 and March 11, 2021. He again did not mention any right shoulder symptoms.

11. After undergoing right knee surgery and rehabilitation, Claimant returned to Midtown Occupational Health Services and was evaluated by Sadie Sanchez, M.D. on May 18, 2021. Claimant reported that on November 24, 2020 he was leaving work and slipped on ice. He twisted his right knee, fell onto his right side and landed on his right shoulder. Claimant alleged that during the entire period of time that he received medical treatment for his slip and fall he experienced right shoulder pain. He hoped the symptoms would improve. Dr. Sanchez recounted that Claimant did not state anything to his medical providers about his right shoulder but mentioned it to his adjuster. She could not find any reference to Claimant's right shoulder in the notes and wanted to confirm with the adjuster. Dr. Sanchez could not state with 51% or greater certainty that Claimant's right shoulder condition was causally related to the November 24, 2020 work injury.

12. On June 15, 2021 Claimant followed-up with Lon Noel, M.D. at Midtown. Dr. Noel documented that Claimant had been undergoing physical therapy and chiropractic treatments twice weekly based on Dr. Sanchez's recommendations.

Examination of the right shoulder revealed active range of motion deficits. Claimant also exhibited generalized shoulder girdle tenderness and tightness. Although there was no pain to direct palpation of the acromioclavicular joint, there was pain on palpation of the long head of the biceps tendon. Dr. Noel diagnosed status post right shoulder injury with chronic pain.

13. On June 29, 2021 Claimant underwent an MRI arthrogram of the right shoulder. The MRI revealed a remote osseous Bankart lesion injury and Hill-Sachs deformity. There was also an anterior labral tear and supraspinatus tendinosis with an interstitial type of tear of the distal supraspinatus tendon. Finally, there was a degenerative change of the acromioclavicular joint with acromial morphology predisposing to impingement.

14. On July 2, 2021 Claimant returned to Dr. Noel for an examination. Dr. Noel again reviewed Claimant's November 24, 2020 mechanism of injury in which he torqued his right knee and fell on his right shoulder. Claimant continued to exhibit right shoulder pain and decreased range of motion. Dr. Noel remarked that Claimant would continue physical therapy two times each week and undergo an orthopedic evaluation to be scheduled with Douglas A. Foulk, M.D.

15. On August 10, 2021 Claimant was evaluated by Dr. Foulk at Panorama Orthopedics. Dr. Foulk determined that the MRI imaging and physical examination were consistent with a rotator cuff tear. He recommended proceeding with a right shoulder arthroscopy including a rotator cuff repair, evaluation of the labrum, subacromial decompression, and debridement.

16. On August 30, 2021 William Ciccone, II, M.D. performed a medical records review at the request of Respondents. Dr. Ciccone determined the right shoulder surgery proposed by Dr. Foulk was reasonable, but not causally related to Claimant's November 24, 2020 work accident. He based his opinion on Claimant's failure to report shoulder symptoms to any medical provider until May 18, 2021 or approximately six months following his injury. Dr. Ciccone would have expected right shoulder complaints prior to six months after Claimant's date of injury.

17. On November 29, 2022 the parties conducted the pre-hearing evidentiary deposition of Dr. Ciccone. Dr. Ciccone maintained that the right shoulder surgery proposed by Dr. Foulk was not causally related to Claimant's November 24, 2020 work accident. He noted that Claimant's first mention of right shoulder pain in the medical records that could be associated with a shoulder injury occurred on May 18, 2021 or almost six months after the accident. Dr. Ciccone would have expected some complaints of shoulder pain prior to six months after the accident. He also remarked that it was not likely that the right knee pain overshadowed any right shoulder symptoms. Dr. Ciccone commented that, when sees patients with various injuries, they complain of multiple injuries.

18. Dr. Ciccone explained that Claimant's right shoulder MRI showed an anterior labral tear with a possible Hill-Sachs deformity, including partial-thickness rotator

cuff tearing and degenerative changes in the AC joint. He was unable to determine the age of the pathology in Claimant's right shoulder. Although a fall on the right side could produce the shoulder pathology documented on the MRI, Claimant would have experienced symptoms at the time of the incident and not six months later. Assuming Claimant mentioned his right shoulder symptoms to the claims adjuster about six weeks after the November 24, 2022 slip and fall, Dr. Ciccone did not change his opinion because Claimant would have experienced symptoms at the time of the accident.

19. On December 2, 2022 Dr. Noel responded to a letter from Claimant's counsel inquiring whether Claimant's right shoulder injury was causally related to his November 24, 2020 industrial accident. Counsel recounted the history of Claimant's claim and specified that Claimant sought medical treatment for his right shoulder after he had recovered from right knee surgery. Claimant reported that his right shoulder pain continued throughout his treatment and rehabilitation for his right knee and hoped it would resolve. Dr. Noel determined that the fall described by Claimant on November 24, 2020 caused, aggravated or accelerated his underlying right shoulder pathology as evidenced by the MRI of June 29, 2021. He noted that the MRI was consistent with an acute partial rotator cuff tear superimposed on chronic changes. Dr. Noel concluded that Claimant's need for right shoulder surgery as recommended by Dr. Foulk was caused, aggravated or accelerated by the work-related fall on November 24, 2020.

20. Claimant testified at the hearing in this matter. He commented that his major concern after the November 24, 2020 fall involved his right knee until he obtained treatment and underwent surgery. As Claimant proceeded through the treatment process, he continued to experience right shoulder symptoms that did not improve over time. Claimant remarked that he ultimately discussed his right shoulder with his Workers' Compensation physicians because he required treatment.

21. Claimant has failed to establish it is more probably true than not that the right shoulder surgery recommended by Dr. Foulk is reasonable, necessary and causally related to his November 24, 2020 admitted industrial injury. Initially, Claimant explained that, while leaving work and walking to his truck on November 24, 2020, he slipped and fell on ice. He stated he twisted his right knee and landed on his right side. Claimant sought treatment for his injuries on November 28, 2020 at NextCare Urgent Care. *He* complained of right knee pain and noted there were no other injuries. On November 30, 2020 Employer completed a First Report of Injury. The body part listed on the form states "lower extremities – knee." The document does not mention an injury to the right shoulder or any other body part.

22. Claimant subsequently obtained medical treatment and physical therapy over a lengthy period of rime with multiple providers but did not mention any right shoulder symptoms. The medical records are simply devoid of documentation that Claimant suffered a right shoulder injury during his slip and fall on November 24, 2020. Nevertheless, Claimant explained that his primary concern involved his right knee. As he proceeded through the treatment process, he noted he was experiencing right shoulder symptoms that he believed would improve over time. After undergoing right knee surgery and rehabilitation, Claimant finally mentioned right shoulder symptoms to Dr. Sanchez on

May 18, 2021. Notably, Dr. Sanchez could not state with 51% or greater certainty that Claimant's right shoulder condition was causally related to the November 24, 2020 work injury.

23. On August 10, 2021 Dr. Foulk determined that Claimant's right shoulder MRI and physical examination were consistent with a rotator cuff tear. He recommended proceeding with a right shoulder arthroscopy. On December 2, 2022 Dr. Noel responded to a letter from Claimant's counsel and determined that the fall described by Claimant on November 24, 2020 caused, aggravated or accelerated his underlying right shoulder pathology as evidenced by the MRI of June 29, 2021. He noted that the MRI was consistent with an acute partial rotator cuff tear superimposed on chronic changes. Dr. Noel thus agreed with the right shoulder surgery recommended by Dr. Foulk.

24. In contrast, Dr. Ciccone maintained that the right shoulder surgery proposed by Dr. Foulk was not causally related to Claimant's November 24, 2020 work accident. Dr. Ciccone noted that Claimant's first mention of right shoulder pain in the medical records that could be associated with a shoulder injury occurred on May 18, 2021 or almost six months after the accident. He would have expected some complaints of shoulder pain prior to six months after the event. Dr. Ciccone also remarked that it was not likely that the right knee pain overshadowed any right shoulder symptoms. He commented that, when he sees patients with various concerns, they complain of multiple injuries. Dr. Ciccone was unable to determine the age of the pathology shown on Claimant's right shoulder MRI. Although a fall on the right side could produce the shoulder pathology documented on the MRI, Claimant would have experienced symptoms at the time of the incident and not six months later. Assuming Claimant mentioned his right shoulder symptoms to the claims adjuster about six weeks after the November 24, 2022 slip and fall, Dr. Ciccone did not change his opinion because Claimant would have experienced symptoms at the time of the accident.

25. In Claimant's conversation with adjuster CS[Redacted] on January 4, 2021, adjuster notes document that Claimant "[s]lipped on a patch of ice, twisted his right knee, and fell down on the right side. He said he fell down flat on his right side. Major concern was right knee, Right shoulder has been bothering him and he is concerned about that." Despite recently expressing concerns to the adjuster, Claimant failed to mention any right shoulder symptoms at an evaluation with Dr. Hsin on January 13, 2021. Furthermore, after his right knee surgery, Claimant followed-up with Orthopedic Centers of Colorado on February 23, 2021 and March 23, 2021. Notably, he still did not report any right shoulder symptoms. Claimant also underwent physical therapy at Orthopedic Centers of Colorado on March 2, 2021 and March 11, 2021. He again did not mention any right shoulder symptoms. Although Claimant expressed concerns about his right shoulder to adjuster CS[Redacted] on January 4, 2020, the record demonstrates that he failed to mention any right shoulder symptoms to medical providers until May 23, 2021. The temporal delay in reporting pain to medical providers despite his expressed concerns to adjuster CS[Redacted] diminishes Claimant's assertion that his right knee pain overshadowed any right shoulder symptoms.

26. Despite Claimant's testimony and Dr. Noel's opinion, the medical records and persuasive medical opinion of Dr. Ciccone reflect that Claimant did not likely suffer a right shoulder injury during the course and scope of his employment on November 24, 2020. Moreover, although not determinative, the significant temporal delay in reporting any right shoulder symptoms to medical providers suggests that Claimant's right shoulder condition was not causally related to the November 24, 2020 accident. The medical records are simply devoid of any evidence that the slip and fall caused a right shoulder disability or the need for medical treatment. Claimant did not mention any right shoulder symptoms to medical providers until approximately six months after the incident. He has thus failed to demonstrate his work activities on November 24, 2020 aggravated, accelerated or combined with his pre-existing condition to produce a need for surgical intervention. The right shoulder surgery recommended by ATP Foulk is thus not causally related to the November 24, 2020 slip and fall. Accordingly, Claimant's surgical request is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence

before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

7. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

8. As found, Claimant has failed to establish by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Foulk is reasonable, necessary and causally related to his November 24, 2020 admitted industrial injury. Initially, Claimant explained that, while leaving work and walking to his truck on November 24, 2020, he slipped and fell on ice. He stated he twisted his right knee and landed on his right side. Claimant sought treatment for his injuries on November 28, 2020 at NextCare Urgent Care. *He* complained of right knee pain and noted there were no other injuries. On November 30, 2020 Employer completed a First Report of Injury. The body part listed

on the form states “lower extremities – knee.” The document does not mention an injury to the right shoulder or any other body part.

9. As found, Claimant subsequently obtained medical treatment and physical therapy over a lengthy period of rime with multiple providers but did not mention any right shoulder symptoms. The medical records are simply devoid of documentation that Claimant suffered a right shoulder injury during his slip and fall on November 24, 2020. Nevertheless, Claimant explained that his primary concern involved his right knee. As he proceeded through the treatment process, he noted he was experiencing right shoulder symptoms that he believed would improve over time. After undergoing right knee surgery and rehabilitation, Claimant finally mentioned right shoulder symptoms to Dr. Sanchez on May 18, 2021. Notably, Dr. Sanchez could not state with 51% or greater certainty that Claimant’s right shoulder condition was causally related to the November 24, 2020 work injury.

10. As found, on August 10, 2021 Dr. Foulk determined that Claimant’s right shoulder MRI and physical examination were consistent with a rotator cuff tear. He recommended proceeding with a right shoulder arthroscopy. On December 2, 2022 Dr. Noel responded to a letter from Claimant’s counsel and determined that the fall described by Claimant on November 24, 2020 caused, aggravated or accelerated his underlying right shoulder pathology as evidenced by the MRI of June 29, 2021. He noted that the MRI was consistent with an acute partial rotator cuff tear superimposed on chronic changes. Dr. Noel thus agreed with the right shoulder surgery recommended by Dr. Foulk.

11. As found, in contrast, Dr. Ciccone maintained that the right shoulder surgery proposed by Dr. Foulk was not causally related to Claimant’s November 24, 2020 work accident. Dr. Ciccone noted that Claimant’s first mention of right shoulder pain in the medical records that could be associated with a shoulder injury occurred on May 18, 2021 or almost six months after the accident. He would have expected some complaints of shoulder pain prior to six months after the event. Dr. Ciccone also remarked that it was not likely that the right knee pain overshadowed any right shoulder symptoms. He commented that, when he sees patients with various concerns, they complain of multiple injuries. Dr. Ciccone was unable to determine the age of the pathology shown on Claimant’s right shoulder MRI. Although a fall on the right side could produce the shoulder pathology documented on the MRI, Claimant would have experienced symptoms at the time of the incident and not six months later. Assuming Claimant mentioned his right shoulder symptoms to the claims adjuster about six weeks after the November 24, 2022 slip and fall, Dr. Ciccone did not change his opinion because Claimant would have experienced symptoms at the time of the accident.

12. As found, in Claimant’s conversation with adjuster CS[Redacted] on January 4, 2021, adjuster notes document that Claimant “[s]lipped on a patch of ice, twisted his right knee, and fell down on the right side. He said he fell down flat on his right side. Major concern was right knee, Right shoulder has been bothering him and he is concerned about that.” Despite recently expressing concerns to the adjuster, Claimant failed to mention any right shoulder symptoms at an evaluation with Dr. Hsin on January 13, 2021. Furthermore, after his right knee surgery, Claimant followed-up with Orthopedic

Centers of Colorado on February 23, 2021 and March 23, 2021. Notably, he still did not report any right shoulder symptoms. Claimant also underwent physical therapy at Orthopedic Centers of Colorado on March 2, 2021 and March 11, 2021. He again did not mention any right shoulder symptoms. Although Claimant expressed concerns about his right shoulder to adjuster CS[Redacted] on January 4, 2020, the record demonstrates that he failed to mention any right shoulder symptoms to medical providers until May 23, 2021. The temporal delay in reporting pain to medical providers despite his expressed concerns to adjuster CS[Redacted] diminishes Claimant's assertion that his right knee pain overshadowed any right shoulder symptoms.

13. As found, despite Claimant's testimony and Dr. Noel's opinion, the medical records and persuasive medical opinion of Dr. Ciccone reflect that Claimant did not likely suffer a right shoulder injury during the course and scope of his employment on November 24, 2020. Moreover, although not determinative, the significant temporal delay in reporting any right shoulder symptoms to medical providers suggests that Claimant's right shoulder condition was not causally related to the November 24, 2020 accident. The medical records are simply devoid of any evidence that the slip and fall caused a right shoulder disability or the need for medical treatment. Claimant did not mention any right shoulder symptoms to medical providers until approximately six months after the incident. He has thus failed to demonstrate his work activities on November 24, 2020 aggravated, accelerated or combined with his pre-existing condition to produce a need for surgical intervention. The right shoulder surgery recommended by ATP Foulk is thus not causally related to the November 24, 2020 slip and fall. Accordingly, Claimant's surgical request is denied and dismissed.

ORDER

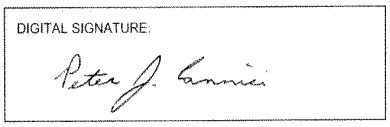
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for the right shoulder surgery recommended by ATP Foulk as a result of his November 24, 2020 slip and fall is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 19, 2023.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-200-468-003

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury on or about, August 20, 2021?

2. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury on or about, October 14, 2021?

3. If Claimant proved by a preponderance of the evidence that he sustained a compensable injury, is he entitled to temporary total disability benefits?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 47-year old man who worked for Employer. He was hired by Employer on or about April 17, 2019. Claimant had a Commercial Drivers' License (CDL), and was hired as a CDL driver. Claimant delivered shingles to roofing jobs. Claimant testified he would physically lift and move the materials to the roof. The ALJ finds this was a physically demanding job.

2. On March 10, 2021, Claimant established care with Anthony Doft, M.D. at Banner Health. Dr. Doft prescribed Claimant Lamotrignine for his depression/anxiety. Claimant returned to Banner Health a few months later, on May 1, 2021, for a Well Adult Examination. Robert Mason, M.D. conducted the examination. Dr. Mason noted that the Lamotrigine helped Claimant with his depression, but Claimant wanted to increase the dose. (Ex. P).

3. On July 12, 2021, Claimant saw Dr. Doft for a follow-up appointment, and he specifically wanted to "discuss his Adderall dose." Under the history of present illness it states "[e]xperimentation with Adderall 10 mg bid no help at all. Went to 30 mg bid and it was night and day difference. . . . . He stopped lamotrigine 3/5 weeks ago. Just on Adderall alone [and] he feels a hundred times better." Dr. Doft changed Claimant's Adderall prescription to 30 mg, twice a day. (Ex. P). It is not clear from the records who first prescribed Adderall to Claimant. Claimant testified he did not want to "cross reference" his medical records, so he played back and forth between UCHealth and Dr. Doft for his Adderall prescription.

4. Claimant went to Concentra on August 11, 2021, for his U.S. Department of Transportation examination and recertification of his CDL license. Despite the recent voluntary increase in his Adderall dosage on July 12, 2021, Claimant marked "no" when asked if he was taking any prescription medication during his DOT examination. (Ex. O).

5. Claimant testified he did not realize he could not drive on his CDL license while on Adderall, but later testified he allowed his CDL license to expire because of the Adderall. And he further testified he drove for a couple of months while on Adderall even though he knew it was not allowed. The ALJ finds that Claimant's assertion he did not realize he could not maintain his CDL while taking Adderall, not credible.

6. Claimant testified that on August 20, 2021, he returned from his morning shift at about noon. The flat-bed truck he was driving had a conveyor on the back. Claimant testified he was wearing a hard hat when he fell off the back of the truck and hit his left shoulder and then his head on the cement. Claimant testified his hard hat came off, he took a knee by his truck, and a co-worker came to check on him. There is no objective evidence in the record as to the name of this co-worker. Claimant testified that about 10 minutes later he told [Redacted, hereinafter KK], his supervisor, about his fall and KK[Redacted] asked if Claimant could keep doing his job. Claimant testified that he answered affirmatively, and continued working.

7. KK[Redacted] is the Operations Manager for Employer. He testified that he would lay out the game plan for Claimant every day, and directed Claimant where to deliver shingles for roofs. The ALJ infers that Claimant and KK[Redacted] were in regular communication with each other. KK[Redacted] credibly testified that he has no recollection of Claimant telling him that he fell on August 20, 2021.

8. KK[Redacted] credibly testified that if an employee is injured, they can report the injury directly to him, they can go to the safety manager, or call "[Redacted, hereinafter TN]." RA[Redacted], managing partner for Employer, also credibly testified that employees should report any injury to KK[Redacted], corporate, "TN[Redacted]," or to himself. Employer provided Claimant with materials specifying how to report an injury. (Ex. T).

9. Claimant testified that sometime in October 2021, he spoke with KK[Redacted] about his shoulder pain, and he asked KK[Redacted] if he could do a lighter job. Claimant testified that KK[Redacted] moved him to the warehouse.

10. KK[Redacted] testified that he moved Claimant to the warehouse in October or November 2021 because it was the slow season, and he wanted to give Claimant the opportunity to have more hours. RA[Redacted] also testified that Claimant was moved to the warehouse in 2021, during the slow season, to get him 40 hours of work. RA[Redacted] testified that he liked Claimant and wanted to help guarantee he would get 40 hours of work.

11. The ALJ finds the testimony of KK[Redacted] and RA[Redacted] to be credible and persuasive. The ALJ finds Claimant was moved to the warehouse sometime in October/November 2021 because it was the slow season, and Employer wanted to get Claimant more hours of work.

12. Claimant testified that on October 14, 2021, at approximately 5:30 p.m., he was working alone in the warehouse when he fell onto a pallet. According to Claimant, the fall

did not hurt, but about 30 minutes later he felt something like a racquet ball coming out of the soft tissue on his lower spine, and this scared him. Claimant testified he called KK[Redacted] and told him what happened. KK[Redacted] credibly testified he had no recollection of Claimant contacting him on October 14, 2021 regarding his alleged fall. The ALJ finds KK[Redacted] credible. Claimant further testified he took a shower and decided to go to the ED. Claimant testified that he was trying to jump over the sensor in his garage, but he only made it half way when he collapsed. He testified that 911 was called and he went to UC Health.

13. Claimant arrived at the emergency department (ED) of UC Health – Medical Center of the Rockies on October 14, 2021, at approximately 6:32 p.m. per the medical records. According to the records, Claimant arrived at the ED by car. Amongst Claimant's complaints were back pain, left-sided abdominal mass as well as the syncopal episode that occurred that day. According to the medical record "[p]atient says he does a lot of ***heavy lifting while at work***. He states that ***this is what caused his back pain***. He states this [has] been going on for several months but the worst of it has been today." (emphasis added). Claimant also reported feeling dehydrated so he went out to the garage to get something to drink. He bent over to get water out of the refrigerator and when he stood up he began to feel lightheaded and fainted. At the ED he was evaluated for his syncopal episode and a mass on the left side of his abdomen. There is nothing in the record to indicate Claimant fell onto a pallet at work that day. Upon examination, Claimant had "no reproducible tenderness to the midline or paraspinal muscles of the cervical, thoracic or lumbar spine. No CVA tenderness." (Ex. Q).

14. The providers at UC Health completed a WC 164 Form and noted that Claimant was lifting heavy shingles and developed worsening back and abdominal pain. Claimant was diagnosed with abdominal contusion, lumbar strain and dehydration. (Ex. Q). The "After Visit Summary" notes that Claimant was to call UC Health Occupational Medicine Clinic in one day. (Ex. 7). There is no objective evidence in the record that Claimant went to the UC Health Occupational Medicine Clinic the next day.

15. With respect to the fainting episode in his garage, Claimant testified he was beginning to get addicted to Adderall, but did not want to show the physician treating him his sporadic behavior. Claimant further testified that while in the ED he reported acute left shoulder pain, and reported his fall at work that day, but did not think about reporting the date of injury. The medical record at UCHealth makes no reference to Claimant having acute left shoulder pain. The medical record also has no reference to Claimant falling at work that day. Claimant testified that he "talked the nurse out of reporting it as a work injury" because he did not want to get KK[Redacted] in trouble for letting him work alone in the warehouse. Claimant's October 14, 2021 ED visit was billed to Medicaid.

16. The ALJ finds Claimant's account of the events on October 14, 2021 to be inconsistent and not credible.

17. On October 25, 2021, Claimant saw Dr. Doft for a general follow up, and for a refill of his medications, including his Adderall. Claimant did not complain of any shoulder or

back pain, nor did he report any work injuries. The medical record notes that Claimant was very busy with work, and working 12-14 hours per day. (Ex. P).

18. Claimant saw Dr. Doft on December 6, 2021 for a follow-up appointment. Claimant reported wanting to decrease his Adderall dosage primarily due to his weight loss. He also discussed getting a medical marijuana card so he could use edibles for calming at the end of work. Claimant did not report any work injuries, any shoulder pain, or any back issues. (Ex. P).

19. Claimant resigned from Employer, and according to Claimant, things between he and RA[Redacted] "ended on a horrible note." Claimant, however, further testified that he intended to go back to work for Employer in the spring of 2022.

20. Claimant notified Employer on or about March 10, 2022, of his alleged injury in the summer of 2021 when he alleged to have fallen from the truck bed. The First Report of Injury lists the date of injury as June 21, 2021. The body parts that were affected were "both shoulders and elbows." The correct injury date of August 20, 2021 was clarified and confirmed, at a July 1, 2022 prehearing conference. (Exs. B and D).

21. Claimant testified that in March 2022, he had not done anything for three months, and one day lifted one pound dumbbells and this is when he experienced pain in his left shoulder, so he decided to contact Human Resources. Employer directed Claimant to go to an authorized treating provider, and he went to Concentra.

22. Claimant was evaluated at Concentra on March 14, 2022. He reported falling five and a half feet off a truck on August 20, 2021. He reported hitting his head, causing his hard hat to come off and also injuring his left shoulder. Claimant reported going "in and out of consciousness." He reported that the pain in his left shoulder was 8/10 and radiates to his back. Claimant said he had not been working since December because it was the offseason. Claimant told the provider that a "[f]ew weeks ago [he] tried to lift 3 lb weight for a bicep curl and reports pain flared up." Claimant further reported memory loss, mood changes, and depression since the injury. Claimant made no mention of his alleged injury in October 2021. Claimant was referred for MRIs of his left shoulder and head. (Ex. O).

23. The ALJ finds that Claimant suffered from depression and anxiety as early as March 2021, which was prior to his alleged injury on August 20, 2021. Further, Claimant testified that he was lifting one pound weights.

24. The first time Claimant mentioned any shoulder pain to Dr. Doft was on March 23, 2022. Under "chief complaint" Dr. Doft noted Claimant "is here to discuss left shoulder pain. He has had an MRI done already and is needing a referral to ortho." Claimant reported "struggling with shoulder pain since August 20, 2021" when he fell off a flatbed truck. He also told Dr. Doft that a month prior he picked up some dumbbells to do curls and after about 15 reps, he noticed his left arm did not go up correctly, and had "severe" pain the next day. Claimant reported not being able to sleep on his left shoulder, and the pain kept him awake most nights. Dr. Doft referred Claimant to Dan Heaston, M.D. Again

Claimant did not mention any issues with his back, or the alleged injury he suffered on October 14, 2021. (Ex. P).

25. On March 25, 2022, Claimant was evaluated by Dr. Heaston at Banner Health Orthopedics. Claimant reported that "about a month ago []he got his arm caught in a chair and jerked forward and caused him quite a bit of pain." The record also states that workers' comp ordered the MRI showing a partial thickness tear of the left supraspinatus and an intrasubstance tear of the infraspinatus. Dr. Heaston diagnosed Claimant with a partial tear of his left rotator cuff. (Ex. R).

26. Claimant saw Dr. Doft on May 16, 2022 to follow up on his medications and shoulder pain. Claimant reported that the pain in his left shoulder was worse, and it was radiating to his arms and chest. According to the medical record, Dr. Heaston advised against surgery since it was a partial tear. (Ex. P).

27. Claimant returned to Banner Orthopedics on June 30, 2022, and saw Garrett Snyder, M.D. He reported left shoulder pain ongoing since January of 2022. Claimant reported throwing shingles for a living, and that he reached behind him at home to grab something and felt a pop in his shoulder, and has experienced significant pain since that time. According to the medical record, Claimant wanted to proceed with surgery and did not have a preference if Dr. Snyder or Dr. Heaston performed the surgery. (Ex. R).

28. At a prehearing conference in this matter on July 1, 2022, Employer first learned of Claimant's alleged injury on October 14, 2021. Claimant was advised to file a Worker's Claim for Compensation form with respect to the October 14 2021, injury. (Exs. B and D).

29. On July 11, 2022, Claimant saw Dr. Doft because he needed a letter of explanation "to give the court for income abilities." The records note that Claimant fell off a flatbed work truck almost a year ago, but Claimant did not lose consciousness. This is contrary to Claimant's report to Concentra. Dr. Doft noted Claimant had "worse shoulder pain over the next 45 days. Took a break in the winter and then in the spring when he started lifting again and doing the tossing motion the left shoulder started hurting again. Had to switch to throwing the other direction." (Ex. P). There is no indication in the record that Claimant was allegedly injured on October 14, 2021, or that Claimant quit working for Employer on December 13, 2021.

30. On July 11, 2022, Dr. Doft wrote a letter on behalf of Claimant stating that Claimant was about to undergo surgery for a torn supraspinatus muscle and a torn biceps tendon. He went on to write "[i]t is my medical opinions that this injury started on August 20th of 2021 when he fell off a flat bed work truck and landed on his left shoulder. Further, continued manual labor throwing large bundles (75 lbs) of shingles the rest of the summer undoubtedly worsened that immediate damage to the point of requiring the above mentioned surgery. Thus, this should definitely be considered a work related injury." Dr. Doft completed a WC164 Form and stated that Claimant had a left shoulder rotator cuff tear. (Ex. P).

31. On August 2, 2022, Dr. Snyder operated on Claimant and performed a left shoulder arthroscopic distal clavicle resection, open biceps tenodesis. (Ex. R).

32. While questioning Dr. Doft at hearing, Claimant asserted that he saw Dr. Heaston one time for surgery and never met Dr. Snyder. The medical records, however, indicate that Dr. Snyder not only met with Claimant before his surgery, but he is also the doctor who performed Claimant's surgery.

33. Claimant testified that Medicaid paid for his surgery and three months of physical therapy post-surgery. (Ex. 8). Claimant testified that he needed the surgery, so he had to present his injury differently (i.e. not presenting it as a workers' compensation injury) to be able to use Medicaid.

34. Dr. Doft testified on Claimant's behalf at the hearing. The ALJ notes that Dr. Doft was never offered as an expert by Claimant at hearing and he is not Level II accredited. Dr. Doft testified that it was highly likely that Claimant's work caused the injury to his left shoulder, particularly throwing shingles five days a week. On cross examination, Dr. Doft testified that the first time Claimant reported an alleged work injury to him was on March 23, 2022. Dr. Doft further testified that he did not have all of Claimant's medical records.

35. The ALJ finds Dr. Doft's testimony to be neither credible nor persuasive. Dr. Doft is Claimant's PCP, and his opinion was based upon Claimant's subjective reports and very limited medical records.

36. Jeffrey Raschbacher, M.D., completed an Independent Medical Examination (IME) on September 27, 2022, on behalf of Respondents. Dr. Raschbacher disagreed that Claimant sustained a cumulative trauma injury as there was no evidence to support such a conclusion. He likewise confirmed that the medical records failed to support an injury on either of the dates complained of. (Ex. S).

37. Dr. Raschbacher credibly testified in support of his IME. Dr. Raschbacher confirmed that Claimant's first mention of left shoulder pain was in March of 2022, despite his numerous medical appointments and physical examinations between the alleged dates of injury and March 2022. Dr. Raschbacher testified that Claimant's injury and the medical records where more consistent with an injury at home as opposed to an acute injury months prior. He did not believe Claimant could continue to work his extensive duties for multiple months had he injured his left shoulder in August 2021. Dr. Raschbacher concluded, in his expert opinion, that it was more likely than not that Claimant was not injured at work.

38. The ALJ finds Dr. Raschbacher's opinion to be credible and persuasive.

39. On multiple occasions, Claimant saw different medical providers, yet he never reported any shoulder pain until March 2022. When Claimant went to the ED on October 14, 2021, just a short time after allegedly injuring himself, he never mentioned the alleged work-injury, and there was no objective evidence of something like a racquet ball coming out of the soft tissue on his lower spine. Further, Claimant routinely changes his story. He asserts that he injured his left shoulder when he fell off a truck on August 20, 2021.

But he tells some medical providers that he reached behind him and something popped. Claimant attempts to clarify his multiple stories by testifying he had to present the injury differently to the physicians so he could use Medicaid. The ALJ finds Claimant's testimony throughout the hearing to be inconsistent. Furthermore, his testimony was neither credible nor persuasive.

40. Based on the totality of the evidence, the ALJ finds that Claimant did not suffer a compensable injury on August 20, 2021 or on October 14, 2021.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of, or natural progression of, a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 P.2d at 786; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant saw multiple medical providers, but he never reported the alleged August 20, 2021 work injury, until March 2022. When Claimant went to the ED on October 14, 2021, just a short time after allegedly injuring himself, he never mentioned the alleged work injury, and there was no objective evidence of something like a racquet ball coming out of the soft tissue on his lower spine. Further, Claimant routinely changes his story. He asserts that he fell off a truck on August 20, 2021 and this is how he injured his left shoulder. But he tells some medical providers that he reached behind him and something popped. Claimant attempts to clarify his multiple stories by testifying he had to present the injury differently to use Medicaid. As found, Claimant's description of his alleged injuries was inconsistent and not credible.

Dr. Doft opined that Claimant's work of throwing shingles five days a week likely caused the injury to his shoulder. This, in and of itself, is inconsistent with Claimant's alleged mechanism of injury. Dr. Doft is not Level II accredited, and he did not have a

complete set of medical records to rely upon. As found, Dr. Doft's opinion is neither credible nor persuasive.

Dr. Raschbacher disagreed that Claimant sustained a cumulative trauma injury as there was no evidence to support such a conclusion. He likewise confirmed that the medical records failed to support an injury on either of the dates complained of. Dr. Raschbacher credibly testified that Claimant's first mention of left shoulder pain was in March of 2022, despite his numerous medical appointments and physical examinations between the alleged dates of injury and March 2022. Dr. Raschbacher testified that Claimant's injury and the medical records where more consistent with an injury at home as opposed to an acute injury months prior. Dr. Raschbacher concluded in his expert opinion that it was more likely than not that Claimant was not injured at work. As found, Dr. Raschbacher's testimony is credible and persuasive. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury on either August 20, 2021 or October 14, 2021.

Medical Treatment

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Claimant is seeking reimbursement for his surgery. As found, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable industrial injury, so Respondents are not liable for any medical treatment.

Temporary Total Disability Benefits

Claimant has the burden of proving entitlement to temporary total disability benefits in the first place. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Temporary total disability benefits are payable if Claimant proves a causal connection between his industrial injury and the temporary loss of wages. As found, Claimant did not suffer a compensable injury, so he is not entitled to temporary total disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work injury on August 20, 2021. His claim for compensability is denied and dismissed.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work injury on October 14, 2021. His claim for compensability is denied and dismissed.

3. Claimant's request for reimbursement of medical expenses is denied and dismissed.

4. Claimant's request for temporary total disability benefits is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 19, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-202-694-001

ISSUE

1. Did Claimant suffer a compensable injury, or was his injury due to a pre-existing condition?

2. If Claimant suffered a compensable injury, is he entitled to medical benefits?

3. If Claimant suffered a compensable injury, is he entitled to TTD benefits?

4. If Claimant suffered a compensable injury, is he entitled to TPD benefits?

STIPULATION

The parties have stipulated to an average weekly wage of $1,537.86.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 25 year-old man who has worked for Employer as a fuel technician since 2018. Claimant's work involves installing fuel systems, as well as repairing and updating them.

2. On March 9, 2022, Claimant was working a job at the [Redacted, hereinafter SD]. [Redacted, hereinafter SS] was the supervisor on the job. Claimant testified he was helping install a fuel tank that was being lowered by a crane onto the tank platform. Claimant was kneeling down on the tank pad trying to get the fuel tank lined up when he felt a popping sensation in his left knee before it locked up. After a few minutes, Claimant was able to hyperextend his knee, and pop it back into place. Claimant's left knee was swollen and painful. Claimant credibly testified he immediately notified SS[Redacted] about his knee. Claimant was able to walk and over time the pain alleviated slightly.

3. Claimant previously injured his left knee playing lacrosse in 2014. Claimant received treatment from Orthopedic & Spine Center of the Rockies (OCR). He had a left knee arthroscopic ACL reconstruction and a partial lateral meniscectomy. (Ex. F).

4. Claimant credibly testified that he successfully recovered from his 2014 ACL surgery, and was able to play lacrosse again within six months. Claimant credibly testified his left knee had been asymptomatic up until March 9, 2022.

5. Claimant worked the next several weeks, but continued to have pain in his left knee. On March 28, 2022, Claimant was evaluated by Mark McFerran, M.D., at OCR.

Claimant told Dr. McFerran he injured his knee two weeks prior at work when he "was installing a fuel tank and was in an awkward position and felt a pop and locking sensation in the lateral part of the left knee. He moved his knee and felt it pop again." Dr. McFerran suspected Claimant had suffered a lateral meniscus tear in his left knee. Dr. McFerran noted that they would navigate through the workers compensation system because this occurred at work. (Ex. 2).

6. Claimant credibly testified that between March 9 and March 31, 2022, his knee would pop and lock at least daily. As more time passed, this progressed to two to three times a day. At times, Claimant would wake up in the middle of the night and have to manipulate his knee.

7. On March 31, 2022, Claimant called [Redacted, hereinafter DH], the Project Manager in the Refined Fuels Department, to report his left knee issue. Claimant testified he was driving home from work that day, and had to pull over because his knee was popping and locking. Claimant was concerned he was experiencing the same pain and problems with his knee while driving. DH[Redacted] and [Redacted, hereinafter MM], the Health & Safety Officer, recommended Claimant go to Concentra for an evaluation.

8. DH[Redacted] completed a "Supervisor's Accident/Incident Investigation Report." According to the report, under the section entitled "Description of Accident" it states "[w]hile working on hands and knees, knee seems to lock up. As movement continues, felt like tendon would snap back into place. Within an hour after the first time, swelling began around knee. [Redacted, hereinafter MZ] did not think it was necessary to see doctor right away. He wanted to see if it would work itself out." The witnesses to the event were SS[Redacted] and [Redacted, hereinafter BS]. Claimant, DH[Redacted] and MM[Redacted] all signed this document. (Ex. G).

9. MM[Redacted] completed a First Report of Injury on March 31, 2022. According to the report, Claimant reported that on or about March 9, 2022, his left knee would "lock up" and pop back into place. MM[Redacted] said Claimant was not able to define a specific incident or action where the problem began, but advised he works on his hands and knees. (Ex. N).

10. On March 31, 2022, Claimant was evaluated by Jeffrey Baker, M.D., at Concentra. Claimant reported injuring his left knee on March 9, 2022. He told Dr. Baker he started having sudden tightness, pain and numbness in his left knee. Claimant reported doing a lot of crawling at work. He also told Dr. Baker about the previous ACL surgery on his left knee. The medical record states "[t]here was no actual injury event." Dr. Baker noted that he needed to get Claimant's previous surgery notes to determine if this was a new injury or an exacerbation. Claimant was diagnosed with a left knee strain and given a referral for two weeks of physical therapy, three times a week. (Ex. 3).

11. Claimant returned to Concentra for a follow-up appointment on April 5, 2022. Claimant's left knee had not improved so he was referred for an MRI of his left knee. (Ex. 3).

12. Claimant underwent an MRI of his left knee on April 27, 2022. The MRI indicated "[e]vidence of prior partial meniscectomy with residual peripheral tear in the posterior horn and truncation of the body free edge." (Ex. 4).

13. Despite physical therapy and modified work duty, Claimant did not improve. On April 29, 2022, ATP, Dr. Baker, referred Claimant to an orthopedic specialist. (Ex. 3).

14. Claimant saw Dale Martin, M.D. at OCR on May 4, 2022. Dr. Martin reviewed the MRI and opined he thought Claimant was subluxating his popliteus tendon laterally. Dr. Martin kept Claimant on light-duty activities and added specific stretching to his physical therapy. (Ex. 2).

15. Claimant saw Dr. Martin on May 25, 2022, for a follow up appointment. Dr. Martin noted that therapy was not providing relief. Dr. Martin recommended a left knee arthroscopy and evaluation of the meniscal tear and percutaneous release of the popliteus. (Ex. 2).

16. Dr. Martin retired and Claimant was referred to his colleague, David Beard, M.D. On August 9, 2022, Dr. Beard examined claimant. He noted in the record that Claimant had an extensive course of physical therapy, used a knee brace, had modified duties, but had not improved. Dr. Beard agreed with the recommendation for surgery to repair Claimant's left lateral meniscus tear, and noted that the surgery had been reportedly denied by Insurer. (Ex. 2).

17. Claimant credibly testified he decided to proceed with the surgery because he needed to use his knee. On October 3, 2022, Dr. Beard performed a left arthroscopy with arthroscopic partial lateral meniscectomy to repair Claimant's left knee lateral meniscus tear. (Ex. 2).

18. Dr. Beard saw Claimant on October 14, 2022 to exam him post-surgery. Dr. Beard noted that Claimant only used crutches for one day, and was back to his regular activities. Dr. Beard further noted that in his professional opinion, Claimant's "lateral meniscus tear was not due to any type of residual laxity in his knee from his previous ACL reconstruction." (Ex. 2).

19. Claimant testified that he missed one week of work following surgery. He also testified that he was released to full duty work on October 14, 2022. This, however, is not specifically noted in Dr. Beard's October 14, 2022 medical record. Claimant further testified he has no current treatment recommendations.

20. The claimant took a DOT physical for Employer on January 14, 2022. The results of the physical reflect Claimant has no health problems or physical limitations. (Ex. 1).

21. The medical records document that Claimant fully recovered following the 2014 ACL repair and was able to work without restrictions until the March 9, 2022 incident. (Ex. F). This is consistent with Claimant's testimony that he did not experience any issues with his left knee until March 9, 2022, while kneeling and trying to install a fuel tank in the course of his employment.

22. DH[Redacted] prepared a letter regarding Claimant's report of the injury. The contents of the undated letter is consistent with Claimant's testimony regarding reporting of the injury to SS[Redacted], and the onset of pain dating back to March 9, 2022, and the progression of symptoms. (Ex. G).

23. MM[Redacted] credibly testified at hearing. He confirmed the incident report noted a specific time, date, location and cause of injury, and that these were consistent with Claimant's testimony.

24. Prior to having surgery, Claimants' physicians limited him to 40 hours of work per week. Claimant credibly testified that when he was on modified duty, he was unable to work overtime. There is no objective evidence in the record as to the frequency or availability of overtime for Claimant.

25. Claimant credibly testified that he needs and loves his job. He has continued to work for Employer and elected to proceed with surgery to expedite his recovery and return to work without restrictions.

26. Claimant incurred out-of-pocket expenses for medical treatment, including surgery, related to the March 9, 2022 work injury.

27. James Lindberg, M.D., testified at hearing on behalf of Respondents. Dr. Lindberg was admitted as an expert in orthopedic surgery, specializing in hips, knees, shoulders, and causation analysis. Dr. Lindberg is Level II accredited and has practiced as an orthopedic surgeon for 40 years.

28. Dr. Lindberg conducted a records review. He summarized this review in an October 31, 2022 letter to Respondent's counsel. Dr. Linberg opined that Claimant's injury was a continuation of his 2014 injury. He wrote "[o]n my reading of the MRI, it appears that there is a complete tear of the posterior horn of the lateral meniscus that was left in place at the time of his surgery in 2014. This is basically a continuation of his initial injury in 2014." He opined that since this happened occasionally at work, and there was no precipitating incident, this was not an acute injury but a continuation of his 2014 injury. (Ex. A). Dr. Lindberg never examined Claimant.

29. Dr. Lindberg testified in support of his report. He testified that during the 2014 surgery, they took 15% of Claimant's lateral meniscus, and did not repair the remaining portion of the meniscus or address the lateral meniscus tear. Dr. Lindberg testified that failing to repair that meniscus was an error of judgement by the initial surgeon because the meniscus has a terrible blood supply, and once it is torn, it is damaged and is not going to heal. Dr. Lindberg testified that the natural history of the knee following the 2014 injury was that the tear easily progressed over time and Claimant was "doomed." Dr. Lindberg explained that whether or not there was laxity, this situation would have happened with this meniscus after 2014. Dr. Lindberg further testified that there was no mechanism described by claimant occurring on March 9, 2022 that would cause a tear in the meniscus: no impact, no fall, no twisting of the knee. The ALJ finds Dr. Lindberg's testimony credible, but not persuasive.

30. As found, Claimant's left knee was asymptomatic until March 9, 2022. It was only when Claimant was kneeling on the tank pad and helping to get the fuel tank in place that his knee popped and locked up. The ALJ finds that Claimant suffered a compensable injury on March 9, 2022.

31. The ALJ finds that Claimant incurred medical expenses related to his March 9, 2022 work injury that he paid for out of pocket, including the October 3, 2022 surgery.

32. The ALJ finds that Claimant was out of work for at least a week following his October 3, 2022 surgery and is entitled to TTD benefits.

33. The ALJ finds that from March 10, 2022 until October 2, 2022, Claimant was restricted from working more than 40 hours per week, and was unable to earn overtime wages. The ALJ finds that Claimant is entitled to TPD benefits during the period of time he was on modified duty.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus the entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. ICAO*, 24 P.3d 29 (Colo. App. 2000).

It is undisputed that Claimant injured his left knee and underwent an ACL reconstruction and a partial lateral meniscectomy in 2014. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). But when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (I.C.A.O. Aug. 18, 2005).

As found, Claimant was performing his regular job duties for Employer on March 9, 2022. Claimant was kneeling and maneuvering a large fuel tanker into place when his left knee popped and locked up. He experienced an acute onset of pain and swelling. Claimant credibly testified that prior to March 9, 2022, his knee had been asymptomatic since his 2014 surgery. The medical records support Claimant's testimony that he had fully recovered following the 2014 ACL repair and was able to work without restrictions until March 9, 2022. Based on the totality of the evidence, Claimant proved by a preponderance of the evidence that he suffered a compensable injury on March 9, 2022 that aggravated his pre-existing condition.

Employer referred Claimant to Concentra for treatment of his injuries. As the ATP, Concentra subsequently made referrals to OCR, bringing them into the chain of referrals and also authorized to treat Claimant. Claimant underwent a course of conservative treatment that failed to resolve his symptoms. Claimant ultimately required surgery to repair the left meniscal tear. Based on the totality of the evidence, Claimant has proven by a preponderance of the evidence that treatment for the left knee, including surgery, is reasonable, necessary and related to cure and relieve the effects of the March 9, 2022, work injury.

TTD

To prove entitlement to TTD benefits, Claimant must prove (1) that the industrial injury caused a disability lasting more than three work shifts; (2) that he left work as a

result of the disability and; (3) that the disability resulted in an actual wage loss. *See* §§ 8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs v. Indus. Claim Appeals office*, 954 P.2d 637 (Colo. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" refers to the claimant's inability to perform his regular employment. *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. § 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant became temporarily and totally disabled for a short period of time, during which time he was unable to work because of his injury. Claimant credibly testified that he was not able to work for a week following his surgery. Claimant is entitled to TTD because his disability caused him to leave work, and to miss more than three regular working days. Claimant is entitled to TTD benefits beginning October 3, 2022 until terminated by operation of law.

TPD

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). As found, Claimant was under restrictions that limited his work to 40 hours per week. Claimant credibly testified this prevented him from earning overtime wages following the work injury. The ALJ finds claimant is entitled to TPD benefits from March 10, 2022 through October 2, 2022.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable work injury to his left knee, on March 9, 2022.

2. Claimant is entitled to medical benefits related to treatment of the March 9, 2022 work injury as recommended by his treating physicians.

3. Claimant is entitled to reimbursement for his out-of-pocket expenses related to the treatment and surgery to cure and relieve the effects of his March 9, 2022 work injury.

4. Claimant is entitled to TTD benefits beginning October 3, 2022 until terminated by operation of law.

5. Claimant is entitled to TPD benefits beginning March 10, 2022 until October 2, 2022.

6. Respondents shall pay statutory interest of eight percent on all sums ordered.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 1, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

STIPULATIONS

At the outset of the hearing, the parties stipulated that the surveillance video and corresponding reports contained at Respondents' Hearing Exhibits J, K, L, and M were admissible without foundational testimony, and that the person featured in the videos is Claimant on the dates referenced therein.

The parties also stipulated that if Claimant is awarded permanent total disability (PTD) benefits, Respondents are entitled to an offset against such benefits based on Claimant's receipt of social security disability income (SSDI) benefits. The parties agreed that the offset shall be based upon the original monthly SSDI entitlement of $1,964.80.

These stipulations were accepted and approved by the ALJ.

REMAINING ISSUES

I. Whether Claimant established that his need for ongoing opioid medication, specifically levorphanol is reasonable and necessary.

II. Whether Claimant established, by a preponderance of the evidence, that he is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of his admitted September 15, 2011 industrial injury.

III. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a disfigurement award pursuant to C.R.S. § 8-42-108.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted work-related accident on September 15, 2011. At the time of the September 15, 2011 injury, Claimant worked for Employer as a roofing salesperson. As Claimant stepped off a curb while carrying a ladder on the date of injury he "rolled" his right ankle. Claimant reported the injury and medical treatment was provided by the Respondents.

2. Claimant has treated with several authorized providers for the effects of his September 15, 2011 industrial injury, including Dr. Douglas Bradley, Dr. Michael Simpson, Dr. Michael Sparr, Dr. Scott Primack, Dr. Levi Miller, Dr. Haley Burk, Dr.

Tashof Bernton and others. He has also been evaluated in an independent medical evaluation (IME) setting by Dr. Allison Fall, Dr. Rachel Basse, and Dr. George Schakaraschwili. A medical records review has been completed by Dr. Joseph Fillmore and Dr. Kathrine McCraine, both experts in physical medicine and rehabilitation (PM&R). On September 12, 2022, Claimant completed an "Employability Evaluation" with Cynthia Bartmann. Ms. Bartmann authored a comprehensive report outlining her opinions regarding Claimant's ability to earn wages following her evaluation. Her report is dated December 5, 2022 and is found at Exhibit C of Respondents Hearing Exhibits.

3. As noted, Claimant has been treated by a number of physicians. His treatment post injury treatment has been lengthy and complicated by symptoms consistent with Complex Regional Pain Syndrome (CRPS). Indeed, Claimant has undergone three ankle/lower extremity surgeries and he has been diagnosed as having Complex Regional Pain Syndrome (CRPS) in the past.

4. Claimant underwent a functional capacity evaluation ("FCE") on February 27, 2014, during which he demonstrated the ability to stoop and kneel frequently, walk, balance, and climb stairs occasionally. His lifting activities were in the heavy exertional level and his push/pull activities were in the medium level. (Resp. Ex. A, p. 4).

5. On February 28, 2014, Dr. Bradley placed claimant at MMI. He noted that claimant's sural nerve and peroneal nerve had been operated upon. He recommended restrictions of 65 pounds lifting, 35 pounds carrying, 100 pounds pushing, and 50 pounds pulling. Dr. Bradley also recommended post-MMI medical care due to ongoing complaints of pain. (Resp. Ex. E, p. 127).

6. Claimant continued post-MMI care with Dr. Bradley for persistent symptoms in the right lower extremity associated with his September 15, 2011 industrial injury. On March 24, 2015, Dr. Bradley returned Claimant to Dr. Scott Primack for follow-up evaluation. Claimant was also referred to Dr. Tashoff Bernton for completion of autonomic testing.

7. On May 6, 2015, Dr. Scott Primack of Colorado Rehabilitation & Occupational Medicine ("CROM") issued a report noting that Claimant had been through autonomic testing with Dr. Bernton and that this testing was "consistent for someone with complex regional pain syndrome" (CRPS). Dr. Primack also noted that Dr. Bernton suggested that Claimant proceed with a lumbar sympathetic injection[1] and if that injection improved his function including the motion in his ankle, than Claimant would meet the diagnostic criteria for CRPS. Claimant would be diagnosed with CRPS and would receive maintenance medical treatment including additional injection therapy/blocks and prescriptions for levorphanol[2] for the next several years.

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[1] Claimant would go on to receive multiple lumbar sympathetic blocks on a maintenance basis as administered by Dr. Stephen Scheper.

[2] Dr. Miller first recommended Claimant be prescribed levorphanol on November 21, 2017. (Resp. Hrg. Ex. B, pg. 35).

8. On June 5, 2019, Dr. Primack opined that Claimant was not at MMI and needed more blocks (contrary to the opinion expressed by Dr. Rachel Basse in her February 27, 2018, IME report)[3] (Resp. Hrg. Ex. F, p. 135). In addition to addressing the appropriateness of continued injection/block therapy, Dr. Primack commented on the necessity/reasonableness of Claimant's ongoing need for levorphanol. (See generally, Resp. Hrg. Ex. F, p. 135).

9. Claimant has a long history of marijuana use which has complicated his concomitant use of opioid medication to relieve his persistent pain symptoms. Indeed, as far back as November 29, 2017, Dr. Joseph Fillmore, as part of his records review, raised concern about Claimant's "appropriateness for opioids given his regular marijuana use". (Resp. Hrg. Ex. B, pg. 35).

10. On February 13, 2018, Dr. Miller's office recommended that Claimant be weaned off levorphanol given his marijuana use. (Resp. Ex. B, p. 36). During this appointment Claimant reported that marijuana "helps" him sleep so he would rather continue using marijuana. *Id*. In her June 7, 2018 physician advisor report, Dr. McCraine opined that Claimant's use of levorphanol was contraindicated because he had "not shown significant functional gains" and it had not "allowed him to return to work". (Resp. Ex. H, p. 179). Moreover, Dr. McCraine noted that "because the [Claimant] is using marijuana, he should not be also using opioid medication", since these drugs should not be combined. *Id.* Dr. McCranie agreed with Dr. Miller that Claimant's levorphanol should be tapered and discontinued. *Id.*

11. In his June 5, 2019 report, Dr. Primack agreed with Dr. Miller that "opioids and marijuana, in combination, would not be considered reasonable or appropriate care". (Resp. Ex. F, p. 135). Dr. Primack found "no good rationale for the utilization of both substances", noting that "if [Claimant] wants to be maintained on levorphanol, he should test negative for marijuana". *Id*. Conversely, "if [Claimant] wants to just be maintained on marijuana, then he should have his levorphanol eliminated over a three-month timeframe". *Id*.

12. During a follow-up visit with Dr. Miller on June 18, 2020, Claimant reported that levorphanol was "quite beneficial for *pain* relief". (Resp. Hrg. Ex. F, p. 137)(emphasis added). Nonetheless, Dr. Miller noted that Claimant's drug testing was positive for THC raising concern for continued marijuana use. Although recognizing that CBD products (which Claimant's also uses) contain impurities, including THC, Dr. Miller indicated that any THC from CBD products should be at a level to produce trace amounts of THC in Claimant's urine sample and that his tested levels for THC were higher than that. *Id.* Claimant acknowledged an understanding that he needed to stop all THC containing products and Dr. Miller indicated that should future drug testing reveal the presence of THC in higher levels, the levorphanol would be tapered to a stop. *Id.* Claimant's levorphanol was continued at 2 mg. three times/day. *Id*. at p. 138.

[3] See Resp. Ex. B.

13. On January 13, 2021, the results of Claimant's 12/21/2020 urine drug screen were again reported as positive for elevated THC. (Resp. Hrg. Ex. 140). Dr. Miller reviewed the results and wrote that he would start a taper of Claimant's levorphanol prescription to a stop because he was no longer comfortable prescribing opioids. *Id.* Claimant promptly sought a different provider.

14. On January 21, 2021, Claimant visited Dr. Bernton. Claimant voiced "concerns" about Dr. Miller, but the only specific complaint documented was that Dr. Miller was allegedly not listening to him. (Resp. Hrg. Ex. F, p. 142). The ALJ finds it reasonable to infer that Claimant was upset that his subjective complaints had not convinced Dr. Miller to continue prescribing opioids in the face of his continued marijuana use. Although Dr. Bernton described his "full confidence" in Dr. Miller's skills as a physician trained in the "management of [Claimant's] condition," he disregarded Dr. Miller's decision to stop the levorphanol. *Id.* Dr. Bernton admitted "it would be better . . . to look at alternatives". *Id*. at p. 143. Nevertheless the record supports a finding that prescriptions for levorphanol continued.

15. On August 15, 2021, Dr. Haley Burke of CROM issued a detailed report after reviewing Claimant's records. She began treating Claimant in February 2021 after Dr. Miller decided to stop prescribing levorphanol and after Claimant's complaints to Dr. Bernton. Initially Dr. Burke maintained the levorphanol without a full understanding of Claimant's treatment history. (See Resp. Hrg. Ex. F, pp. 148-151). However, after reviewing many years of medical records concerning Claimant's treatment, Dr. Burke noted that there did not appear to be a "clear rationale" for continuing Claimant's levorphanol. Dr. Burke opined that Claimant's symptoms were not typical for CRPS and cited the "minimal to absent" physical examination findings as partial support for this conclusion. *Id.* at p. 150. She opined that levorphanol had not caused any meaningful functional improvement, nor did eliminating it decrease Claimant's function. *Id.* She recorded that using THC with levorphanol violated the practice's general clinical standards (presumably a reference to CROM's internal rules), that THC had provided no demonstrable reduction in pain, and Claimant was "adamant about continuing his marijuana use" and was "dismissive of the . . . risk of continuing marijuana with twice daily dosed levorphanol." *Id.* Dr. Burke recommended terminating the levorphanol after a 3-month taper. *Id.*

16. On September 2, 2021, Claimant told Dr. Burke that it took a long time to recover after doing things like "going out on his boat." (Resp. Hrg. Ex. F, p. 152). He also described having recently attended a concert and taking his children to school. *Id.* Dr. Burke observed that Claimant's reported current functional capacity "[did] not appear to substantially differ compared to his reported state prior to his monthly injections and levorphanol use," noting that his pain scores did not meaningfully change after the levorphanol and blocks were discontinued. *Id.* at p. 154. Claimant tried to convince Dr. Burke that she had agreed to prescribe him levorphanol indefinitely, but she adamantly denied this suggestion, wrote that she would never make such a promise, and refused his request for more opioids. *Id.* at p. 157.

17. On September 30, 2021, Claimant returned to Dr. Burke and reported being worse, but also disclosed walking 4 holes of golf the previous week and being able to cook dinner. (Resp. Ex. F, p. 155). Claimant admitted to continued marijuana use indicating that he uses it for "personal reasons", specifically to cope with past traumas rather than pain control. *Id*. Dr. Buke noted that there were "obvious concerns about behavioral health that may be contributing to [Claimant's] overall clinical picture", for which she recommended psychologic care. Dr. Burke informed Claimant that she was not comfortable continuing his current dose of levorphanol given his marijuana use and advised him that she planned to decrease his levorphanol to ½ tablet every 8 hours at his next visit. On October 1, 2021, Dr. Burke indicated that continued prescriptions for levorphanol were not reasonable or necessary and she recommended reducing and discontinuing this medication. *Id*. at p. 160.

18. On October 22, 2021, Claimant was examined by Dr. Bernton, who did not observe any swelling in his hands or any clinical changes since his prior evaluation. (Resp. Hrg. Ex F, p. 161). Dr. Bernton addressed Dr. Burke's levorphanol tapering recommendation by noting:

> I also reviewed Dr. Haley Burke's opinion dated 10/01/2021 recommending tapering and discontinuing the [Claimant's] levorphanol. While I believe that is an appropriate and clinically reasonable goal, my plan would be to first work on discontinuing blocks, and once that has been (hopefully) accomplished, then we will look at medication and tapering and hopefully discontinuing the levorphanol.

Id. at pp. 161-162.

19. On November 22, 2021, Claimant followed up with Dr. Bernton, and reported discomfort making a fist, but demonstrated full range of motion and the ability fully grip and open the hand. (Resp. Ex. F, p. 164). Claimant reported planning to spend a week in Mexico in December 2021. *Id.* Dr. Bernton reiterated his hopes of someday tapering the levorphanol, but only after seeing whether "we can get him stable without further blocks". *Id.* He then noted that the next block was cancelled due to the vacation. *Id.*

20. Claimant saw Dr. Bernton on January 7, 2022, and reported his "head [had] been ringing" since returning from vacation. (Resp. Hrg. Ex. F, p. 166). Claimant stated that his head symptoms "started on the way home from Mexico when . . . my ears popped and never stopped." *Id.* Physical exam was again negative for swelling, asymmetry of color, or restricted motion. *Id.* Dr. Bernton acknowledged the difficulty of ascribing Claimant's symptoms to CRPS without objective correlation. *Id.*

21. On April 7, 2022, Claimant underwent an IME with Dr. George Schakaraschiwili. After completion of a comprehensive medical records review and physical examination, Dr. Schakaraschiwili opined that most of Claimant's responses to the blocks were non-diagnostic, that Dr. Bernton had not commented on the non-

diagnostic responses. He also noted that Dr. Bernton's exam findings were "significantly greater than those of other evaluators." (Resp. Hrg. Ex. D pp. 89, 91, 92, 99). Finally, he noted that Dr. Fillmore had previously recommended that all blocks be ceased on March 19, 2020 because there was no sustained functional improvement with the blocks and that by March 4, 2022, Claimant's examinations no longer fit the Budapest Criteria for CRPS and the "blocks had not provided any significant long-term relief and that Dr. Burke had not recommended continuing them". *Id*. at p. 96, 105.

22. Dr. Schakaraschiwili's physical exam revealed no swelling, discoloration, temperature changes, tropic changes, hair changes, or nail changes, although there might have been mild swelling in the fingers. *Id*. at p. 106. Dr. Schakaraschiwili' documented that Claimant presented "as quite comfortable during the evaluation until the physical examination commenced," and no finger twitching occurred during the interview, but twitching was seen during the examination. (Resp. Hrg. Ex. D, p. 106). Dr. Schakaraschiwili explained that the previous CRPS diagnosis was questionable due to the prior thermogram findings being inconsistent, the reportedly positive autonomic testing battery results being confounded by peripheral nerve injuries, and the lack of meaningful symptomatic or functional improvement from the blocks. Id. at p. 107. Nonetheless, Dr. Schakaraschiwili performed repeat autonomic battery and infrared stress thermogram testing. The thermogram of the upper extremities and an autonomic testing battery "failed to reveal any evidence of significant sympathetic dysautonomia". *Id*. at p. 108. Similarly, lower extremity testing revealed no clinical signs of CRPS other than potentially decreased range of motion (ROM) in the toes, although Dr. Schakaraschiwili was uncertain whether the decreased ROM was voluntary or due to a peroneal motor injury. *Id.* The thermogram revealed no evidence of temperature asymmetry except in the toes, which showed paradoxical warming (rather than asymmetry), the clinical significance of which Dr. Schakaraschiwili explained is uncertain. *Id.*

23. Based upon Claimant's autonomic and thermogram testing results in combination with the non-diagnostic response to the majority of the blockades directed to the upper/lower extremities, Dr. Schakaraschiwili concluded that Claimant did not meet the Division criteria for CRPS in any extremity at this time. (Resp. Hrg. Ex. D, p. 108).[4] He opined that Claimant's finger twitching is likely "functional, as it has been inconsistently reported in the records and inconsistently observed on [his] evaluation when [Claimant] was distracted." *Id*. at p. 109. Dr. Schakaraschiwili further opined that there is "evidence of significant psychological overlay to the Claimant's presentation and reporting of symptoms", that the record demonstrates that Claimant has "magnified and multiplied symptoms", has an unusual presentation for CRPS, and that there is scant evidence to support Claimant's reports of functional improvement with very "extensive and prolonged treatment". *Id*. In short, Dr. Schakaraschiwili opined that Claimant's reported symptoms "far exceed any objective findings reported on multiple physical examinations," and he was "engaging in activities which would appear inconsistent with his reported functioning, such as traveling to Mexico for vacation . . ." *Id.* Rather than a

[4] As noted in Dr. Basse' February 27, 2018, CRPS can and does burn itself out. (See Resp. Hrg. Ex. B, p. 40).

case of CRPS, Dr. Schakaraschiwili opined that Claimant's lower extremity and toe symptoms "can be almost completely explained by" the peroneal nerve injury and "right ankle sprain, superficial peroneal neuritis, and right sural resection with neuropathic pain." *Id.*

24. Dr. Schakaraschiwili recommended against additional blocks and levorphanol. (Resp. Hrg. Ex. D, p. 109). He opined that the blocks "are operating as placebos," and Claimant's pain scores for the peripheral nerve blocks and the majority of sympathetic blocks are either non-diagnostic or borderline. *Id.* He also concluded that Claimant is likely "psychologically and physically dependent on levorphanol" and that there is "insufficient evidence that the use of this medication is resulting in any functional gains". *Id*. Accordingly, Dr. Schakaraschiwili recommended that Claimant's use of levorphanol be tapered and discontinued. *Id.* Dr. Schakaraschiwili predicted that Claimant would strenuously object and report increased pain and decreased function if the blocks and levorphanol were discontinued, but pointed out that treatment should still be guided by objective clinical findings. *Id.*

25. On May 30, 2022, Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Jack Rook. He told Dr. Rook "it is very painful to walk barefoot," but in the July 2022 surveillance, less than 2 months after the DIME, Claimant is seen walking in stocking feet on a concrete surface on two separate occasions. (See Resp. Hrg. Ex. I, p. 194 and Ex. L). Claimant also reported to Dr. Rook that his blocks had been discontinued (seven months prior to the DIME) by Dr. Burke because of the radiation involved with the fluoroscopy and his continued marijuana use. (Resp. Hrg. Ex. I, p. 194). Dr. Rook also documented that Dr. Bernton had decreased Claimant's levorphanol from three 2 mg tablets per day to two 2 mg tablets per day. *Id.*

26. Claimant and his wife reported to Dr. Rook that during the time his blocks had been discontinued and his levorphanol dosage cut, he had an increase in body pain and a decrease in function. (Resp. Hrg. Ex. I, p. 194). According [Redacted, hereinafter MST], Claimant was so tired throughout the day that that he would just lay around dosing off intermittently. *Id*. at p. 195. In contrast to Drs. Miller, Burke, Primack, McCraine and Schakaraschiwili, Dr. Rook recommended *increasing* Claimant's levorphanol dosage to compensate for the discontinuation of additional blocks. Dr. Rook opined that Claimant's use of THC and CBD products were not contraindicated as these "medications" were not causing adverse side effects and were providing benefits for Claimant including, "some degree of analgesia, improvement in his mood, and [helping] him to deal with his chronic pain condition and associated functional limitations. (See generally, Resp. Ex. I, p. 208-210). Dr. Rook also assigned sedentary-level restrictions and noted that Claimant could lift, carry and push and pull up to 10 pounds occasionally. (Resp. Ex. I, p. 212, 215).

27. On May 31, 2022, Dr. Bernton reviewed Dr. Schakaraschiwili's report. He noted that Dr. Schakaraschiwili performed a repeat autonomic battery and a stress thermogram which he had previously recommended and requested permission to complete. (Resp. Hrg. Ex. F, p. 169). He discussed the negative testing results for CRPS with Claimant and agreed with Dr. Schakaraschiwili that Claimant's levorphanol

should be tapered and he be referred to psychology.[5] *Id*. According to the note from this date of visit, Dr. Bernton left the exam room to prepare the psychology referral and the prescription for a lower levorphanol dose to 3 mg total per day (rather than 2mg twice per day), and upon returning discovered that Claimant had abruptly departed. *Id.* Dr. Bernton also recommended a trial of laser therapy as a "non-habituating, safe and cost effective" alternative to medication to treat Claimant's persistent complaints.

28. On June 14, 2022, respondents filed a final admission, which included an admission for $1,800.00 in disfigurement benefits. (Resp. Hrg. Ex. I, p. 184).

29. On June 21, 2022, Claimant returned to Dr. Bernton. He presented as "quite distraught." (Resp. Hrg. Ex. F, p. 171). Consistent with Dr. Schakaraschiwili's prediction, Claimant reported decreased function and increased pain in response to Dr. Bernton's attempt to taper the opioids. *Id.* Claimant reported recently visiting an ER where he obtained ketamine. *Id.* After treating alleged CRPS for years with unhelpful blocks and opioids, Dr. Bernton admitted he did "not have a diagnosis and that makes it very difficult to continue, particularly narcotic treatment." *Id.* Nevertheless, Dr. Bernton increased the levorphanol dose back to 2 mg twice per day until completion of Claimant's psychological evaluation, which he noted could not be completed with Dr. Hawkins until early August. *Id.* While he did not have frank evidence of malingering, Dr. Bernton noted that he was uncertain to what extent somatoform versus physiologic factors were playing a role in Claimant's presentation. *Id*. at p. 172. In the absence of a psychological evaluation and because of Claimant's reported increase in symptoms and decrease in function, Dr. Bernton opined that it was "medically necessary" to increase Claimant's levorphanol to the level he was taking before the most recent reduction in dosage, at least until Claimant's psychological examination had been completed. *Id*

30. From July 21, 2022, through July 27, 2022, Claimant was surveilled outside of his home over the course of seven (7) consecutive days. During this time, Claimant demonstrated the ability to stand and walk for long periods of time (while wearing tennis shoes, Crocs, and occasionally in stocking feet), drive a large truck and a minivan, lift and carry large boxes and bags with his hands/arms, bend at the waist, push a wheelbarrow, open and close a tailgate on a truck, and use a power washer, garden hose, lift buckets of water and push and pull a small pick-up truck in and out of a garage using his arm and legs. At least on one occasion Claimant push the truck into the garage without the assistance of anyone. (See, generally, Resp. Hrg. Exs. J, L). All of the aforementioned activity was performed without apparent difficulty or overt pain. *Id.*

31. On August 23, 2022, Dr. Bernton noted that Claimant's THC use may cause sleep disruption. (Resp. Hrg. Ex. F, p. 173). He noted that Claimant had been evaluated by psychologist Rebecca Hawkins who opined that somatoform complaints alone did not explain Claimant's ongoing pain. *Id*. Instead, she noted that both a combination of physiologic with secondary psychologic factors were a more probable driver of Claimant's persistent pain complaints. She recommended an evaluation by

[5] Dr. Bernton recommended a referral to psychologist Rebecca Hawkins.

psychiatrist Stephan Moe for pharmacologic management of depression. *Id*. at p. 174. Accordingly, Dr. Bernton opined that he would not "further taper narcotics, as based on all the information available, [Claimant] does have a probable physiologic cause for his pain". *Id*. Contrary to Dr. Schakaraschiwili conclusions, Dr. Bernton opined that the "most likely cause" of Claimant's pain is CRPS. *Id.* Dr. Bernton referred Claimant to Dr. Moe for recommendations of medication management for anxiety and depression and he switched his focus on providing low side effect treatments, including a trial of laser therapy to treat Claimant's reported pain complaints. *Id.*

32. Claimant failed to attend his virtual appointments with Dr. Moe. (Resp. Hrg. Ex. G, p. 178). Dr. Bernton has made no further attempts levorphanol.

33. Claimant underwent an IME with Dr. Allison Fall on September 7, 2022. During this examination, Claimant reported that he is prescribed 2 mg. of levorphanol two times a day. (Resp. Hrg. Ex. A, p. 1). According to Claimant, "[i]t definitely helps". *Id*. He also reported pain relief with laser therapy. *Id*. Claimant reported that he could "work half-a-day doing physical labor such as pulling weeds and cutting grass with a lawnmower," but that he would "pay for it" and have to lay in bed the next day. *Id*. at p. 2. He also reported that while receiving injections/blocks he could work a full day doing things like "[working] on his rental homes, fixing things, and painting." *Id*. at p. 2. Claimant reported that prolonged standing causes his leg to go numb and that walking increases his pain. *Id*. His hands, arms and legs are always achy, he cannot get comfortable and had to change position every five minutes while sleeping. *Id*.

34. Claimant listed his occupation as disabled and reported to Dr. Fall that he has not looked for any type of part time or volunteer work. (Resp. Hrg. Ex. A, p. 8). As noted above, he is receiving social security disability benefits. Physical exam of the hands revealed no hair, skin, color, or temperature changes. *Id.* at p. 9. There was no loss of balance during ambulation and while ambulating, Claimant sometimes favored the right leg and other times the left. *Id*.

35. Dr. Fall reviewed the surveillance from July 2022. She commented that Claimant wore tennis shoes and Crocs sandals, went barefoot, and did a lot of walking with a non-antalgic gate. *Id.* She noted that his activities in the video were inconsistent with the capabilities he reported to her, in that he ambulated much more hesitantly during the IME than in the surveillance video. She also noted that he was not bedridden despite back-to-back days of activity including prolonged standing and walking. (Resp. Hrg. Ex. A, p. 3). Dr. Fall also noted that Claimant's activities in the surveillance seemed to exceed the lifting, pushing and pulling of 10 pounds recommended by Dr. Rook. *Id.* at p. 8.

36. Based upon the discrepancies between Claimant's in-person presentation and his demonstrated capabilities on surveillance video, Dr. Fall opined that his "subjective presentation to providers is not reliable". (Resp. Hrg. Ex. A, p. 9). Dr. Fall also opined that work restrictions are not necessary based upon the activities demonstrated in the video. *Id*. In support, she pointed to the lack of any medical

indication for restrictions and the heightened capacity Claimant demonstrated during the 2014 FCE and in the July 2022 surveillance. *Id.* at pp. 9-10.

37. Dr. Fall agreed with Drs. Miller, Burke, Primack, McCraine and Schakaraschiwili that Claimant's levorphanol should be discontinued. (Resp. Hrg. Ex. A, p. 10). She endorsed a tapering schedule consistent with that recommended by Dr. Burke. *Id.*

38. On September 12, 2022, Claimant underwent a vocational evaluation by Cynthia Bartmann. He again reported getting worse. (Resp. Hrg. Ex. C, p. 61, 66). Claimant told Ms. Bartmann he feels comfortable only at home, which appears demonstrably inconsistent with participation in cruising, vacationing, concert going, fair going and driving. Claimant told Ms. Bartmann he cannot stand or walk for more than 10 minutes "before developing increased pain," which she noted was inconsistent with his activities depicted in the surveillance video. *Id.* at p. 69. Claimant tried convincing Ms. Bartmann he could only drive for 20 minutes, but she noted that Dr. Hawkins documented that he drives from Pueblo to Denver and the January 2023 surveillance confirms that he sometimes drives for more than 90 minutes without apparent difficulty. *Id.* Claimant told Ms. Bartmann he does outdoor work in the morning because heat bothers him. In contrast to this statement, the July 2022 video submitted into evidence shows Claimant active in the midday summer heat. Claimant also reported to Ms. Bartmann that he needs to be in bed following a day of activity, but she noted that he was active on several consecutive days in July 2022 based on the surveillance. He also tried convincing Ms. Bartmann that he has fine motor skill deficits involving the hands, but she observed that Dr. Hawkins has documented his ability to use a pen, a touchscreen, and a smartphone to timely complete MMPI-II-RF testing. *Id.* Ms. Bartmann also pointed out that Claimant handled several items in the surveillance video with no obvious issues. *Id. at 70.*

39. Claimant described several physical capabilities to Ms. Bartmann, including taking his kids to school and completing light chores such laundry and making meals. (Resp. Hrg. Ex. C, p. 66). Notably, he did not disclose owning and managing rental properties to Ms. Bartmann. He did describe being able to perform basic math and needing to do math as a roofing salesman. He told Ms. Bartmann the only modification he needed with [Redacted, hereinafter TR] after his injury, until he stopped working in 2014, was to have a co-worker carry ladders. *Id.* at p. 68. He also confirmed the ability to read, but alleged that his mind wanders after reading about half a page of information. *Id*. at p. 67.

40. Ms. Bartmann observed that all of Claimant's providers have released him to return to work with varying restrictions: Drs. Primack and Fall released him to full duty, Dr. Fillmore released him to "sedentary to light" work, and Drs. Bradley and Rook released him to sedentary duty. (Resp. Hrg. Ex. C, p. 65). Ms. Bartmann observed that Claimant could return to his salesman job within the restrictions recommended by Drs. Sparr, Primack, and Fall. *Id*. at p. 68. She expressed uncertainty regarding why Claimant did not return to work in 2015 after Dr. Sparr released him. *Id.* Ms. Bartmann explained the importance of relying upon objective information in cases like this where

Claimant's subjective reporting has been called into question by medical providers and surveillance. *Id.* at p. 69. She also noted that Dr. Fall is the only physician who reviewed the surveillance. *Id*. at p. 70.

41. As part of her vocational evaluation into whether Claimant was capable of earning wages, Ms. Bartmann performed vocational research. In performing her research, Ms. Bartmann utilized the sedentary-level restrictions recommended by Drs. Rook and Bradley to be conservative. (Resp. Hrg. Ex. C, p. 70). She concluded that Claimant has retained the capacity to earn wages despite his industrial injury. Moreover, she found several suitable jobs, including night auditor, front desk monitor, cashier, and customer service representative. *Id*. at pp. 70-72. She also found a "budtender" position with [Redacted, hereinafter DC], although noted that Claimant would need to lift up to 25 pounds (before any potential accommodations). *Id.* The night auditor position would allow Claimant to sit and stand intermittently, and the cashier position would allow him to use a stool. *Id.* The customer service, night auditor, and front desk monitor positions did not require prior experience. *Id.* Each employer had positions available immediately in Pueblo, except for [Redacted, hereinafter CS] which had an open job in Colorado Springs. *Id.* Ms. Bartmann wrote that these jobs were simply examples of opportunities available to Claimant within his skills and physical abilities as opposed to being an exhaustive list of potential employment opportunities for Claimant. *Id.*

42. On October 4, 2022, Claimant visited Dr. Bernton and described increased pain in both his hands and feet. (Resp. Hrg. Ex. F, p. 176). He reported seeing an ENT for the alleged tinnitus, who concluded there is "nothing wrong with" his ears. *Id.* Dr. Bernton again recorded alleged "slight swelling of the hands," but no discoloration or hyperalgesia. *Id.*

43. On December 1, 2022, Claimant visited Dr. Bernton and reported significant improvement following a recent session of laser therapy. He described a 50% decrease in his pain levels, better sleep, and significant functional improvement regarding the ability to stand and engage in unspecified activities outside of the house. (Clmt's. Hrg. Ex. 1, p. 5).

44. On January 12, 2023, Claimant was re-evaluated by Dr. Bernton, who noted that with additional laser therapy, Claimant enjoyed a "significant reduction in pain levels from a 7-8/10 to a 3-4/10 and that he was able to "do some raking outside with a friend", which is something he had been unable to do since his blocks had been stopped. (Clmt's. Hrg. Ex. 1, p. 9). Dr. Bernton recommended that Claimant move forward with rental or purchase of a laser unit and once Claimant had the laser in hand, he (Dr. Bernton) anticipated moving forward with a tapering of Claimant's levorphanol. *Id*.

45. Procurement of a laser for home use was authorized and on January 20, 2023, Claimant was instructed on its use.

46. Claimant was surveilled on his trip from Pueblo to Denver on January 20, 2023. (See generally, Resp. Hrg. Ex. K, M). The ALJ has reviewed this video in its entirety. In the video, Claimant is seen moving fluidly without any assistive devices or signs of pain. (Resp. Hrg. Ex. M). Claimant operated his vehicle for over 3 hours on this date. (Resp. Hrg. Ex. K, p. 227).

47. On February 23, 2023, Claimant visited Dr. Bernton and described decreased pain and increased function with use of his home laser. (Clmt's. Hrg. Ex. 1, p. 15). He also reported to Dr. Bernton that Dr. Hawkins had released him from her care as she "could not help him anymore". *Id.* In reading Dr. Hawkins note, Dr. Bernton opined that it did not seem to indicate that she was unwilling to see Claimant, but rather that he needed to utilize the coping skills she had covered with him in previous sessions and when he was willing to try this she would see him again. *Id.* at p. 15-16.

48. On February 27, 2023, Claimant reported "significant" improvement with the use of his home laser. (Clmt's. Hrg. Ex. 1, p. 17). Although his sleep pattern had improved, Claimant reported that he did not feel "a lot" better emotionally. *Id*. He continued to struggle with anxiety and he had not changed his medication regime. *Id.* Dr. Bernton recommended another referral to Dr. Moe. *Id*. He also indicated that he would not "change medications at this point". *Id.* at p. 18.

49. Claimant testified that he has tried to wean himself from his levorphanol, noting that if he does not take his medications he experiences severe pain and a decrease in his function. Claimant testified that he becomes irritable if his pain increases and he is afraid of the impact that a tapering and discontinuation of levorphanol will have on his mental state. Claimant testified that he trusts Dr. Bernton as he believes that Dr. Bernton is looking out for his best interests. Claimant testified that he is afraid that he will not be able to treat with Dr. Bernton in the future if he is tapered from levorphanol.

50. Claimant testified that his pain symptoms are unpredictable but that he always has some kind of symptoms. He estimated that he could currently perform a desk job up to 8 hours per day 3 days per week meaning that he would likely have to call off work up to a minimum of two times a week. Claimant described swelling in his hands that impairs his ability to grip and grasp items, but he reported that he is ambidextrous so he can use his left hand to write for 5-10 minutes.

51. Claimant testified that he cannot tolerate anything touching the area surrounding the location of his injury and subsequent surgeries. Consequently, Claimant testified that he wears shorts, even in the wintertime. This is confirmed by the admitted surveillance video tape. He also testified that he experiences symptoms in his feet. Consequently, he wears tennis shoes or Crocs for footwear.

52. Claimant admitted on cross-examination that he has not applied for any job positions since leaving his employment with Respondent-Employer. He also admitted that he continues to take levorphanol 3 times daily (which indicates that he is

actually taking 6 mg per day, not 4 mg as reported by Dr. Bernton) and uses marijuana daily.

53. Claimant vaguely testified that the large boxes he lifted and carried on July 24, 2022, were allegedly filled with light items like paper plates "or something like that." He had an uncertain memory of what exactly was in the box, which the ALJ finds demonstrates a general lack of concern for specific weights and lifting restrictions. He also testified that his driveway slopes away from his garage about 2 inches per 12 feet, which indicates that on one point he pushed the small pick-up truck slightly uphill by himself.

54. At the hearing, Respondents' counsel asked Claimant if he owns and manages rental property. Claimant admitted that he owes three rental properties but maintained that his involvement with these properties is limited to oversight of maintenance issues. Indeed, Claimant testified that his wife fields calls from their tenants and the oversight of their issues is his responsibility. He denied working on the properties. Instead, Claimant testified that he might assist by buying project supplies or by touching up a painted wall or sweeping a floor, or otherwise assisting a "tiny bit". Claimant testified that the last time he worked for the rental business was in October 2022, when he drove a friend to [Redacted, hereinafter HD] to purchase a thermostat. According to Claimant, his friend installed the new thermostat. Finally, Claimant admitted to overseeing a central air/furnace replacement project which he described as going by and looking at the repairs/replacement after they were completed. Claimant testified that he does not do yardwork for his rental properties, but uses a riding mower to mow his lawn, most recently 2 weeks prior to the hearing. Claimant testified that he uses his smartphone to make purchases with [Redacted, hereinafter AZ].

55. Dr. Fall testified that work restrictions should be assigned on a medical safety basis and Claimant does not need any. She also testified that Claimant has the capacity to drive, lift up to 25 pounds, and perform all of the jobs described in Ms. Bartmann's report. Dr. Fall explained that she takes subjective complaints into account, but restrictions should generally not be assigned based on subjective reports of pain or limitation. Dr. Fall testified that there is no medical reason that Claimant cannot work 8 hours per day or several days in a row.

56. Dr. Fall testified that CRPS sometimes resolves over time, which she has personally observed in several cases. Dr. Fall testified that she completed a standard physical exam of Claimant, which took longer than the 5 minutes he alleged. She further testified that Claimant's physical examination findings do not support a current diagnosis of CRPS, but she would not assign him restrictions regardless. She explained that she has experience treating CRPS and ankle injuries similar to Claimant's, and assigning work restrictions to CRPS patients goes against treatment protocol where activity and exercise is promoted, so it is often worse to assign CRPS and chronic pain patients restrictions.

57. Dr. Fall testified that levorphanol is an opioid prescribed for moderate to severe pain and can result in irritability, tolerance, dependence, and addiction. She

further testified that Claimant is likely dependent on levorphanol based on the increased symptoms he reported when his doctors attempted to taper this opioid, which she explained is an expected reaction. Dr. Fall opined that doctors do not understand how opioids interact with THC, so most physicians do not recommend them together. Dr. Fall recommended a slightly different tapering schedule than the one set forth in her report because Claimant's daily dosage had increased after her IME from 2mg twice daily to 2mg three times daily. Dr. Fall testified that she now recommends tapering Claimant from 3 doses of 2mg per day to 2 doses of 2mg per day over 2 weeks, and then moving forward with the tapering schedule in her report.

58. In the face of potential psychological overlay and Claimant's continued daily marijuana use, the ALJ finds continued prescriptions for levorphanol problematic and contraindicated. In this case, the totality of the evidence supports a finding that Claimant's need for ongoing levorphanol is no longer reasonable or necessary. Indeed, the evidence presented persuades the ALJ that Claimant has likely become dependent upon levorphanol over the course of 5 years without receiving any objectively perceivable benefit from it. Contrary to the warnings set forth in the Medical Treatment Guidelines and CROM's internal standards, the evidence presented supports a finding that Claimant has continued to receive prescriptions for opioids (levorphanol) despite his daily marijuana use and a lack of improvement in his function state. Indeed, while Claimant has reported that the levorphanol helps his pain, there has been little overall improvement in function. Consequently, it appears that Claimant's use of levorphanol is currently being prescribed solely for pain control.

59. While Claimant's fear that his treatment with Dr. Bernton will cease if he is tapered from levorphanol appears sincere, his adamant refusal to stop using marijuana while also using opioids, and doctor-swapping whenever his access to opioids is threatened, bolster the conclusion that additional prescriptions for levorphanol are inappropriate. Nearly every doctor who has treated or evaluated Claimant has recommended that the levorphanol be tapered and terminated. Indeed, Drs. Miller, Burke, Fillmore, Primack, McCraine, Basse and Schakaraschiwili all agree that levorphanol should ultimately be discontinued. Dr. Bernton has repeatedly acknowledged the validity of these colleagues' opinions, but he has failed to commandeer this goal for over 2 years while Claimant adjusted to the cessation of his blocks and more recently a trial of laser therapy. Given that Claimant has not had any injection/block treatment for a lengthy period of time (at least 7 months prior to his May 30, 2022 DIME with Dr. Rook) and has experienced "significant" symptom improvement with laser therapy, Dr. Bernton again anticipated, as recently as January 12, 2023, moving forward with tapering of Claimant's levorphanol. Nonetheless, Dr. Bernton has not initiated a tapering schedule.

60. Based upon the evidence presented, the ALJ is convinced that the anticipated tapering has probably not occurred because of Claimant's reported emotional state and anxiety (according to Dr. Bernton's February 27, 2023, report). Nonetheless, the record presented supports a finding that Claimant has failed to employ the full range of emotional coping strategies suggested by Dr. Hawkins and has failed to

follow through with his referrals to Dr. Moe. Accordingly, it does not appear that Claimant is interested in addressing his emotional dysregulation.

61. Based upon the evidence presented, the ALJ is convinced that Claimant's continued use of levorphanol is no longer reasonable and should be discontinued. Nonetheless, as Claimant has been using opioid medications for a lengthy period of time, the ALJ credits the opinions of Drs. Miller, Burke, Fillmore, Primack, McCraine, Basse and Schakaraschiwili to find that it is medically contraindicated to abruptly cut him off of this opioid altogether. Rather, per the opinions of his doctors, including Dr. Bernton, Claimant will require a reasonable period of time to wean himself from his levorphanol. The ALJ defers to the medical expertise of Dr. Bernton in setting a tapering schedule to ensure that discontinuation of this medication is accomplished safely. Nevertheless, the tapering shall commence.

62. The ALJ credits the unrebutted testimony of Ms. Bartmann to find that Claimant retains the capacity to earn wages. Ms. Bartmann was the only vocational expert to render opinions and found several suitable jobs within the most restrictive limitations assigned by Drs. Bradley and Rook, including some jobs which can be done from home. Ms. Bartmann's opinions are supported by the record evidence, including Claimant's testimony that he retains the physical capacity to work a desk job up to 8 hours per day 3 days per week. Moreover, it is difficult to reconcile Claimant's reports of balance problems, fatigue, tinnitus, and an inability to stand or walk for more than a few minutes with his observed capacity on surveillance video. Indeed, the video tape clearly demonstrates that Claimant is active and over the course of several consecutive days during which he demonstrated the capacity to push/pull a truck, power wash this vehicle, lift and carry large boxes, bags and buckets of water, stand and walk for prolonged periods, bend and drive a motor vehicle for extended periods. Based upon the evidence presented, the ALJ finds the 2014 FCE and the July 2022 and January 2023 video the most objective evidence of Claimant's capacities, which appear much greater than he admits.

63. The ALJ finds that as a result of his admitted industrial injury, Claimant was awarded $1,800.00 in disfigurement benefits by Respondents. (Resp. Ex. I, p. 180, 184). At hearing, the ALJ observed the claimed disfigurement, specifically swelling of the hands bilaterally. During visual inspection the ALJ noted a perceptible swelling about the hands/fingers bilaterally, especially over the dorsum of the hands. Although mild to moderate in nature, this swelling is noticeable and alters the appearance of Claimant's hands. Accordingly, the ALJ finds that Claimant is entitled to a disfigurement award.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado (Act) §§8-40-101, *et seq*. C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section* 8-40-102(1), C.R.S. The claimant bears the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-43-301(1), C.R.S.; *Faulker v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of a claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. A workers' compensation claim is decided on its merits. Section 8-43-201, *supra*.

B. In accordance with §8-43-215, C.R.S., this decision contains specific findings of fact, conclusions of law and an order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Claimant's Entitlement to Ongoing Prescriptions for Levorphanol

C. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

D. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due

to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the ALJ credits the opinions of Drs. Miller, Burke, Fillmore, Primack, McCraine, Basse and Schakaraschiwili to find and conclude that the current open ended prescriptions for levorphanol are unreasonable. Here, there is a dearth of objective evidence to support a conclusion that Claimant's continued use of levorphanol has produced an adequate analgesic effect to improve Claimant's functional status. Consequently, Drs. Miller, Burke, Fillmore, Primack, McCraine, Basse and Schakaraschiwili make a convincing argument that Claimant should be weaned from this medication. The relief Respondents seek, a tapering schedule for levorphanol, is not unique. In *Wesley v. King Soopers, Inc.*, W. C. No. 3-883-959 (ICAO Nov. 28, 2003), the ALJ "determined the claimant should be tapered from Oxycontin," and therefore issued an order which tapered the respondent's liability for the opioid. A Panel of the Industrial Claims Appeals Office affirmed because the ALJ's order "merely determined the respondent's liability to pay for medication" pursuant to a tapering schedule rather than restricting the doctor's ability to prescribe. Similar results were reached in *Cortez v. Mostek*, W.C. No. 3-378-336 (ICAO Mar. 12, 2007) and *Freeman v. Platte Valley Medical Center*, W.C. No. 4-942-096-01 (ICAO May 4, 2016).

E. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); *See also*, *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: "All health care providers shall use the Guidelines adopted by the Division". *Hall v. Industrial Claims Appeals Office,* 74 P.3d 459 (Colo.App. 2003). "Accordingly, compliance with the Guidelines is mandatory for medical providers." *Chrysler v. Dish Network*, W.C. No. 4-951-475-002 (ICAO, July 15, 2020). In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. Section 8-43-201(3)(C.R.S. 2020). Indeed, Rule 17-4 (A) acknowledges that "reasonable medical care may include deviations from the Guidelines in individual cases." *Chrysler v. Dish Network*, *supra.* Nonetheless, the Guidelines carry substantial weight and should be adhered to unless there is evidence justifying a deviation. *See Hall v. Industrial Claim Appeals Office, supra*; *See Logiudice v. Siemans Westinghouse*, W.C. No. 4- 665-873 (ICAO, January 25, 2011).

F. The ALJ may also consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse, supra.* Guidelines concerning the assessment and treatment of complex regional pain syndrome and chronic pain have been prepared by the Colorado Department of Labor and Employment, Division of Worker's Compensation (Division) and are enforceable under the Division's Rules of Procedure. *See* 7 CCR 1101-3.

G. These Guidelines contain several warnings regarding the use opioids to treat chronic pain. The guidelines provide that opioid use should be "clearly linked to improvement of function, not just pain control," including the ability to work, remain alert for 10 hours per day, and participate in normal social activities. Rule 17, Exhibit 9, p.169; Rule 17, Exhibit 7, p. 95. Patients should usually be tapered unless reasonable levels of activity are maintained. *Id.* Reasons for termination of opioid management, referral to addiction treatment, or for tapering opioids (tapering is usually for use longer than 30 days) include, but are not limited to: "Lack of functional effect at higher doses, non-compliance with other drug use, drug screening showing use of drugs outside of the prescribed treatment or evidence of noncompliant use of prescribed medication, excessive sedation, or lack of functional gains. Rule 17, Exhibit 9, p. 103.

H. Marijuana is illegal under federal law and cannot be recommended under the Guidelines. Rule 17, Exhibit 9, p. 83. Dependence is a physiological phenomenon which is expected with continued use of opioids. *Id. at p.95.* Opioid use for over 90 days is associated with significantly increased risk of developing opioid use disorder. *Id. at p.96.* No long-term studies establish the efficacy of using opioids for more than one year. *Id. at p.95.* There is no evidence that any particular long-acting opioid is more effective than another, or more effective than other types of medications, in improving function or pain. *Id. at p.95.* Generally, tapering is accomplished by decreasing the dose by 10% per week over 6 to 12 weeks. *Id. at 105.* Crucial to this case, the Guidelines explain that a patient's dependence need not deter physicians from appropriate use of opioids. *Id.*

I. As found, Claimant continues to use marijuana daily and his increased doses of levorphanol have not been linked to an improvement in function. Moreover, the ostensible reasons for waiting to taper Claimant's continued use of levorphanol, i.e. waiting for an adjustment to the cessation of injection therapy (blocks) and the procurement and use of a laser for home treatment have been accomplished. Claimant's concern over the tapering and discontinuation of the opioid he has been taking for several years is understandable. Nonetheless, Claimant has not taken full advantage of the resources available to him to address the emotional components, including his anxiety surrounding his condition and the tapering of his opioid medication. Based upon the evidence presented, the ALJ is persuaded that tapering Claimant's levorphanol is appropriate because Claimant's use of levorphanol no longer meets the conditions for continued consumption the under the Medical Treatment Guidelines. In short, continued prescriptions for levorphanol no longer appear reasonable or proper.

Claimant's Entitlement to Permanent Total Disability Benefits

J. Under the applicable law, a claimant is permanently and totally disabled if he/she is unable to "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo.App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo.App. 1995). In *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from

receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also, Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997).

K. Moreover, there is no requirement that Respondents locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc*., W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995). Nonetheless, when determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The crux of the test is the "existence of employment that is reasonably available to the claimant under his or her particular circumstances." *Id*. at 558. This determination must be made on a "case-by-case basis," and "will necessarily vary according to the particular abilities and surroundings of the claimant (e.g. whether and how far the claimant is able to commute)." *Id*. at 557.

L. For example, in *Duran*, the court considered various factors, including the claimant's education, work history, transferable skills, physical restrictions and level of day-to-day activities. *Duran v. MG Concrete Inc.*, *supra*. In *Duran*, the ALJ credited the respondents' vocational expert, who identified jobs available to the claimant within his restrictions, and concluded that he was capable of earning wages as a janitor or deliverer. *Id*. Therefore, the ALJ denied Claimant's claim for PTD. Similarly, in *Hazard-Ross v. HIS of Colorado Springs, W.C. Nos.* 4-2321-227 & 4-279-308 (ICAO June 6, 2005), the ALJ credited the vocational expert, who testified that numerous jobs were available to the claimant, and concluded that the claimant failed to show that she was unable to earn wages in employment reasonably available to her. Accordingly, the ALJ denied her claim for PTD benefits.

M. Considering the human factors involved in the instant case[6], the ALJ is not convinced that Claimant is incapable of earning any wages in other employment.

[6] Claimant is 44 years-old, speaks English, attended school through the 8th grade and lives in the Pueblo area, which is a large metropolitan area with a variety of employment options according to Ms. Bartmann.

Rather, while it is probably true that Claimant would need accommodation (carrying ladders and heavy materials) in returning to his former occupation and similar positions, the representative sampling of sedentary to light duty type positions identified by Ms. Bartmann as falling within Claimant's physical capabilities present a number of perspective job positions existing in the local labor market affording Claimant the opportunity to earn a wage. Furthermore, the ALJ is not persuaded that Claimant's age and education, in combination with his physical restrictions completely preclude his ability to earn a wage. Outside of a failed attempt to return to roofing work, it does not appear that Claimant has submitted any applications for employment. As such, the ALJ finds that Claimant has not attempted even a rudimentary job search. In this regard, the ALJ credits the report and unrebutted testimony of Ms. Bartmann to conclude, that while it may not be easy for Claimant to secure employment, his human factors combined with his work experience will help him compete for and secure employment as identified by Ms. Bartmann. Accordingly, Claimant has failed to demonstrate, by a preponderance of the evidence, that he is permanently totally disabled as a consequence of his September 15, 2011 work injury.

Disfigurement

N. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement", as used in the statute, contemplates that there be an "observable impairment of the natural person." In this case, the ALJ concludes that there is an observable alteration in the natural appearance of the structure and skin covering the hands bilaterally. Accordingly, the ALJ concludes that Claimant has suffered a visible disfigurement entitling him to additional benefits pursuant to Section 8-42-108 (1), C.R.S. Respondents recognized the alteration in the appearance of Claimant's hands and accounted for a $1,800.000 disfigurement award in the Final Admission of Liability (FAL) filed June 14, 2022. The ALJ concludes that this disfigurement award is reasonable and appropriately compenses Claimant for the visible disfigurement described above.

ORDER

It is therefore ordered that:

1. Additional prescriptions for levorphanol are no longer reasonable or necessary. However, Respondents shall provide and pay for continued levorphanol based on a tapering schedule to be determined by Dr. Bernton. Respondents' liability to provide and pay for such opioid medication upon completion of Claimant's tapering schedule will terminate.

2. Claimant's request for permanent total disability benefits is denied and dismissed.

3. Claimant has proven that he is entitled to a disfigurement award. The ALJ concurs with Respondents award of $1,800.00 in disfigurement benefits. If not already paid, Respondents shall pay said disfigurement award forthwith.

4. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 23, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-731-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on June 28, 2021.

2. Whether Claimant established by a preponderance of the evidence an entitlement to reasonably necessary medical benefits to cure or relieve the effects of a compensable industrial injury.

3. Whether Claimant established by a preponderance of the evidence that cervical facet injections recommended by Dr. Sacha are reasonably necessary to cure or relieve the effects of a compensable industrial injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a PET/CT Technologist. Part of Claimant's job duties involve working in and around a mobile PET unit (essentially, a large trailer). The Mobile PET unit has a motor-driven garage-style door on one end with a lift. On June 28, 2021, Claimant was walking backward pulling a wheelchair into PET unit through the garage door from the lift when she was struck in the back of the head by the closing door. Claimant testified that she was "folded forward" by the force of the door. Claimant testified that she was immediately dizzy, disoriented, and nauseous from the incident.

2. Claimant sought treatment that day at the Swedish Medical Center emergency room, and was evaluated for head and neck pain. Claimant reported she felt her neck was hyperextended, and that she was experiencing nausea and tenderness in her neck and thoracic areas. Claimant reported a history of migraines with nausea and vomiting, and chronic pain. Imaging studies were negative for acute issues. She was diagnosed with a head injury and neck pain and advised to follow up with her primary care provider. (Ex. 4)

3. On June 30, 2021, Claimant began treatment with authorized treating provider Carol Dombro, M.D., at Concentra. At the initial visit, Claimant reported experiencing headaches, dizziness, photophobia, memory issues, neck pain and left posterior shoulder pain. Claimant reported a medical history significant for multiple prior concussions (the last being in 2009). Dr. Dombro diagnosed Claimant with a closed head injury, cervical strain, acute thoracic strain, and post-concussion syndrome. She recommended Claimant start physical therapy for her neck and upper back. (Ex. 6).

4. Over the next two to three weeks, Claimant returned to Concentra reporting improvement in her neck and upper back with physical therapy, and continued

headaches, with photophobia, nausea and vomiting. On July 13, 2021, Claimant was referred to John Sacha, M.D., for a physiatry evaluation. (Ex. 6).

5. Claimant saw Dr. Sacha on July 19, 2021, reporting headaches into the occipital and periorbital areas, intermittent dizziness, nausea and vomiting, intermittent light sensitivity, some forgetfulness and feeling "foggy." Based on his examination, Dr. Sacha diagnosed Claimant with cervical facet syndrome, whiplash associated disorder, occipital neuralgia, and adjustment disorder. He found no evidence of a closed head injury, but noted he could not rule out the possibility of a mild concussion. He recommended adjusting Claimant's medications, a trial of chiropractic treatment, and adding IMS needling to her physical therapy. He indicated that a cervical MRI should be considered if Claimant did not improve. (Ex. 8).

6. Claimant continued to see Dr. Dombro in July, August and September 2021, reporting continued post-concussion symptoms, including headaches, nausea and dizziness. Claimant reported her dizziness and neck pain had improved with treatment, and her headaches were less intense. Claimant was referred for chiropractic care on July 19, 2021. By August 24, 2021, Claimant reported dizziness only when she changed positions rapidly, and that physical therapy and chiropractic were helping her neck pain. (Ex. 6). Dr. Dombro placed Claimant on work restrictions, gradually increasing from four hours per day to six hours per day at the beginning of September 2021. (Ex. 6).

7. On September 13, 2021, Claimant saw Dr. Dombro, reporting essentially unchanged symptoms. Claimant indicated that she was "trying to get back into normal life" and wanted to restart kickboxing and kayaking. At this visit, Dr. Dombro indicated under the heading "Functional Restoration and Status of Healing" that Claimant "is approximately 50% of the way toward meeting the physical requirements of her job." She recommended continued physical therapy for Claimant's neck, and to continue treatment with chiropractic and Dr. Sacha. Dr. Dombro recommended increasing Claimant's work hours to eight hours per day at the following visit, but continued to impose work restrictions including limiting patient care to three hours per day, and remaining seated for the remainder of the day. Dr. Dombro also indicated Claimant "may not work in safety sensitive position." (Ex. O).

8. During July and August 2021, Claimant saw Dr. Sacha for telemedicine visits. Claimant reported continuing headaches, and improving with therapy. (Ex. 8).

9. On September 9, 2021, Claimant saw Dr. Sacha reporting ongoing dizziness and nausea when her neck was in extension. Dr. Sacha recommended a cervical MRI, that was performed on September 14, 2021. Dr. Sacha reviewed Claimant's MRI on September 16, 2021, and opined that it was consistent with post-traumatic cervical facet syndrome. He recommended bilateral C2-5 facet injections, which he characterized as both diagnostic and therapeutic. (Ex. 8 & 5).

10. On September 28, 2021, Insurer submitted Dr. Sacha's request for authorization for C2-5 facet injections to Edie Sassoon, M.D. Dr. Sassoon opined the requested injections were supported for Claimant's clinical presentation, and "reasonable to help

identify the pain generator and assist with a plan of care for diagnostic and therapeutic purposes." (Ex. 3). Notwithstanding Dr. Sassoon's certification of the reasonableness of the treatment, Insurer did not authorize the treatment.

11. On October 11, 2021, Claimant saw Dr. Dombro. At that time, Claimant had returned to work up to 6 hours per day, and reported "near daily headaches," feeling unsteady when she looks down, persistent nausea and dizziness when she tipped her head backward. Dr. Dombro noted that the "adjustor has directed us to close the case," and placed Claimant at MMI effective October 11, 2021, without work restrictions. Dr. Dombro opined that Claimant was "at functional goal, not end of healing," and recommended Claimant follow up with a neurologist "about her post concussive [headaches] and other symptoms." The ALJ finds Dr. Dombro's determination of MMI to be based on directive from Insurer, rather than an assessment of Claimant's condition. Her statement that Claimant was at MMI is inconsistent with Claimant's continued report of symptoms, and the recommendation that she seek further care for post-concussive headaches. (Ex. 6).

12. On November 11, 2021, Respondents filed a Notice of Contest, asserting that Claimant's injuries were not work-related. (Ex. A).

Claimant's Medical History

13. Claimant has a significant medical history for migraine headaches, Ehlers-Danlos syndrome, motor vehicle accident, and a prior worker's compensation claim after she was assaulted at work in May 2017.

14. Claimant testified that Ehlers-Danlos is a connective disorder that causes her a constant level of pain. She testified that the symptoms she experiences from flare-ups of Ehlers-Danlos are typically extra pain in one joint, lasting 2 to 3 days. She testified that she has not had Ehlers-Danlos-related symptoms in her neck. Claimant has been treated with medications and therapy for flareups, and did not have any work restrictions due to Ehlers-Danlos on June 28, 2021. Claimant testified, credibly, that following her June 28, 2021 injury, she experienced symptoms that she did not have previously, including balance and stability issues, memory and recall issue, nausea, pain in her head, neck and upper spine, photophobia, and visual hallucinations. She testified that while she does experience nausea with migraines, it is different than she experienced after June 28, 2021. With respect to her desire to kayak and kickbox, Claimant testified that she floated in a kayak and her husband towed her with a rope. She also testified that when she did attempt kickboxing, it was limited, and she did "side activities" and did not actually "kickbox." Claimant's testimony was credible.

15. From May 25, 2017 through September 7, 2017, Claimant was treated at Gonzaba Occupational Medicine & Therapy Center in San Antonio, Texas, for neck, back, shoulder and wrist pain following her work-related assault. At her final visit, September 7, 2017, the treating physician noted no tenderness or pain, and full range of motion. Claimant was released from care and released to full duty at work. (Ex. I).

16. From June 3, 2016 to January 30, 2019, Claimant received chiropractic care from Keith Taylor, D.C. and Brad Chudnik, D.C., at Pecan Valley Chiropractic in San Antonio, Texas. The chiropractic records from Pecan Valley are nearly word-for-word the same for each of the 59 visits Claimant attended, regardless of the provider. The records do not document specific subjective complaints, and the objective findings, assessment and plan are identical at nearly every visit. The ALJ finds the chiropractic records are not reliable and are not credible evidence of the symptoms Claimant reported or the treatment performed, if any. (Ex. J).

17. On May 21, 2018, Claimant saw Bernice Gonzalez, M.D., at Vital Life Wellness Center., for a minor petechial hemorrhage, back pain caused by Ehlers-Danlos syndrome and arthritis, migraines, and GERD. She did not examine or treat Claimant for neck pain. (Ex. N).

18. On May 6, 2020, Claimant began seeing Emily Aaron, M.D., at Denver Internal Medicine. At the initial visit, Claimant was seen for back pain and review of medication for her migraines. Claimant reported a history including Ehlers-Danlos, migraines, slipping on ice in April 2020, a prior car accident, and being attacked at work several years earlier. Dr. Aaron diagnosed Claimant with migraines and low back pain and referred Claimant for physical therapy. Claimant returned to Dr. Aaron on June 3, 2020 for a follow up, regarding her migraines, low back pain, and experiencing heart palpitations. Claimant's next documented visit with Dr. Aaron was January 27, 2021, where Claimant reported chronic pain and joint pain due to Ehlers-Danlos, increasing for the previous 3 months, TMJ pain, and chronic fatigue. She reported a change in her migraines (experiencing different visual sensations). Dr. Aaron adjusted Claimant's migraine medication, and prescribed Celebrex and tramadol for Claimant's chronic Ehlers-Danlos-related pain. Dr. Aaron did not diagnose complaints of neck pain at any visit. (Ex. H).

19. Claimant's most recent documented visit with Dr. Aaron was on October 14, 2021. At that visit, Dr. Aaron diagnosed claimant with intractable migraine, cervical radiculopathy, post concussive syndrome, and dizziness. Dr. Aaron referred Claimant to Dr. Sacha, and for physical therapy. (Ex. H).

Carlos Cebrian, M.D. (Record Review)

20. On October 7, 2022, Carlos Cebrian, M.D., performed a record review at Respondents' request, and issued a report. (Ex. F). Based on his review, Dr. Cebrian opined that Claimant had a work-related scalp contusion and cervical strain, but also opined that Claimant's cervical spine pain was unrelated, indicating her cervical spine pain was preexisting. He further opined that Claimant did not have a traumatic brain injury. He indicated that "[s]hort-term treatment under the 6/28/2021 claim was appropriate, however the persistence of complaints is no longer proximately related to the 6/28/2021 claim but is due to her preexisting conditions." He found Claimant was at MMI by October 11, 2021, indicating that her report of wanting to try kickboxing and kayaks "is a reflection that she was feeling better." He then opined that Claimant's ongoing complaints were "very similar to" and causally related to her preexisting conditions. He indicated that

claimant required no maintenance care and that the facet injections recommended by Dr. Sacha were not causally related to the Claimant's work injury. (Ex. F).

21. Dr. Cebrian's opinion is not persuasive or credible. Dr. Cebrian based his MMI opinion primarily on a notation in Dr. Dombro's medical record that Claimant wanted to try kickboxing and kayaking, indicating that "this desire is a reflection that she was feeling better." He also indicated Claimant's congoing complaints were "very similar" to her preexisting conditions. However, his opinion fails to account for the fact that Dr. Dombro placed Claimant at MMI because she was directed to do so by Insurer, despite also noting that Claimant "was not at end of healing" and recommended additional treatment with a neurologist about her then-existing post-concussive headaches and other symptoms. In this context, the need for ongoing medical treatment for headaches is inconsistent with MMI, and was not a medical decision by Dr. Dombro, but a decision by an insurance adjuster.

22. Dr. Cebrian's opinion that Claimant's symptoms after October 11, 2021 were "very similar" to her post-June 28, 2021 symptoms, is neither credible nor supported by credible evidence. The evidence reflects that Claimant's medical treatment in the year before June 28, 2021 with Dr. Aaron was for wrist pain, migraine treatment, evaluation of heart palpitations, weight loss counseling, and chronic joint pain due to her Ehlers-Danlos syndrome. No credible evidence was admitted that Claimant reported experiencing ongoing neck pain on June 28, 2021, or that she had reported neck pain to any provider in the three years before her injury.

23. On November 21, 2022 Dr. Dombro responded to a letter from an unidentified party, indicating that she agreed with Dr. Cebrian's assessment that Claimant had reached MMI, noting that Claimant's case was "closed" in October 2021. Dr. Dombro further opined that Claimant had no permanent impairment. No evidence was admitted indicating Dr. Dombro saw or examined Claimant at any time between October 11, 2021, and November 21, 2022. (Ex. G).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

Claimant has established by a preponderance of the evidence that she sustained a compensable work-related injury arising out of the course of her employment with Employer on June 28, 2021. Claimant was struck by the mobile unit door on June 28, 2021, and immediately reported the incident and timely sought treatment. The admitted medical records demonstrate Claimant was not actively treating for neck pain or head-injury related symptoms when she was injured, and that she had not been treated or complained of similar symptoms for more than three years. The last credible evidence of Claimant reporting and receiving treatment for neck pain was September 2017, at Gonzaba. Although Claimant has a history of migraines and Ehlers-Danlos syndrome, no credible evidence was admitted demonstrating that Claimant's post-June 28, 2021 symptoms were the same or caused by her preexisting conditions. Moreover, no physician has credibly opined that Claimant did not sustain a work-related injury.

Medical Benefits (General & Specific)

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence and entitlement to authorized medical benefits that are reasonable and necessary to cure or relieve the effects of her industrial injury. Claimant has further established that the cervical injections recommended by Dr. Sacha are reasonable and necessary to cure or relieve the effects of her injury. Insurer's "peer reviewer," Dr. Sassoon agreed that the treatment was indicated, reasonable and necessary. As found, Dr. Cebrian's opinion is neither credible nor persuasive. The ALJ finds more persuasive the opinions of Dr. Sacha and Dr. Sassoon that the treatment is reasonable, necessary, and related to her work injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury arising out of the course of her employment with Employer on June 28, 2021.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's injury.

3. Respondents shall pay for the C2-5 facet injections recommended by Dr. Sacha.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 23, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether the Division Independent Medical Examiner's (DIME) opinion has been overcome clear and convincing evidence regarding maximum medical improvement.

II. Whether Claimant has shown by a preponderance of the evidence that Claimant's permanent partial impairment should be converted to a whole person impairment.

III. Whether Claimant proved by a preponderance of the evidence that his average weekly wage should be increased.

IV. Whether Claimant has proven by a preponderance of the evidence that he has a disfigurement.

STIPULATIONS

The following Stipulations were approved and accepted by the Administrative Law Judge:

1. The issue of Permanent Total Disability was bifurcated and the issue preserved for a future determination.

2. The record would be held open for the parties to take the deposition of Dr. Brian Mathwich later in the day on April 6, 2023.

3. If Claimant was determined to be at MMI, the impairment rating of 21% left upper extremity determined by Cathy Smith, M.D and accepted by Dr. Mathwich, was accepted by the Respondents. However, Respondents continued to dispute that the 21% extremity impairment should be converted to the 13% whole person impairment.

4. If Claimant was determined to be at MMI, Respondents accepted liability for maintenance medical care pursuant to the recommendations of the primary authorized treating physician, Dr. Cathy Smith.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Generally

1. Claimant started working for Employer beginning on June 8, 2020. On July 8, 2020, when one of the cows jumped before Claimant was in position with the chain at the piston, a piece called a shackle, fell on him, specifically hitting his head, left ear, and clavicle on the left side. Claimant is left hand dominant.

2. Claimant sustained a left clavicle fracture. He received medical care including a surgery which involved a plate and six screws. He was also provided physical therapy and injections for neck pain.

3. After approximately a year, they took the plate and screws out since there was a lump causing an abscess. When they took the plate out, they filed down the protrusion in order for it to help with the pain and allow it to fuse.

4. Claimant described that he had pain from the base of his ear, down the neck, going down the curve of his shoulder and into his shoulder blade. Claimant also motioned from the shoulder joint to approximately mid bicep or halfway down between the shoulder joint to the elbow. Claimant stated that he also had pain in the upper chest area up to the height of the clavicle.

5. Claimant continued to have problems with lifting weight with the left upper extremity and he avoids doing it. He overcompensates with this right upper extremity. For example, he has to make up to four different trips to the laundromat when he goes to wash clothes, as he can lift with the right but when he is required to lift with both hands, he cannot lift very much with the left upper extremity. When doing activities of daily living, he sometimes has to push his left arm up with his right hand just to be able to reach for something, like to wash his hair. He also has limitations caused by pain in his arm and there are some parts of his back, he just cannot reach. He also explained that he had problems driving, he has to move his whole body to see if there are any vehicles on his left side in order to change lanes. He does not have the same problems moving his head to the right. He also has problems sleeping on his left side, which is the side he usually slept on, due to the pain. It has forced him to have to start sleeping on his back. He also has to put a pillow beneath his left arm to minimize the pain.

6. Claimant continued to perform his home therapy or exercise program, continued using the TENS Unit and also used a pulley system to exercise his arm. He stated that he would like to get the care recommended by Dr. Mathwich in the hopes that it would be more aggressive and help him with his upper extremity. Claimant stated he had not returned to either Dr. Smith or Dr. Bear since the last injection that they did for his neck. He recently had an incident where the pain was so bad he went to the emergency room at UCHealth in Greeley.

B. Medical Records

7. On July 8, 2020 Claimant was taken to the Greeley UCHealth emergency freestanding clinic where Claimant reported a meat hook fell on his shoulder, which caused significant pain to the left collar bone. He denied any head injury, or other associated injuries. Dr. Nicklaus Brandenhoff, a consulting physician, noted that Claimant had a left closed, minimally displaced midshaft clavicle fracture.

8. The CT taken on the same day and read by Dr. Paul Johnson, showed a minimally displaced fracture of the mid left clavicle with a distal fracture fragment displaced inferiorly by 3 mm and a small amount of adjacent soft tissue hemorrhage.

9. Dr. Brandenhoff noted that the wound overlying the clavicle was superficial and not a deep wound and it did not extended to the fracture. Claimant denied numbness, tingling, shortness of breath, hitting his head or other injuries. Dr. Brandenhoff stated

Claimant was limited to no lifting with the left upper extremity until cleared by orthopedics. Claimant was sent home with a sling and medication.

10. Claimant was first seen by Dr. Robert Bear, orthopedic surgeon, on July 10, 2020 and examined Claimant's x-rays that showed a displaced midshaft clavicle fracture. He recommended an open reduction and internal fixation surgery, which Claimant agreed to.

11. Dr. Bear performed surgery on July 21, 2020, an open reduction with internal fixation of the clavicle. The major fragments were aligned and secured anatomically with a reduction clamp. A plate was applied to the superior aspect of the clavicle and secured with multiple screws compressing across the fracture site.

12. Dr. Bear saw Claimant in follow up on August 1, 2020. Claimant reported having a lot more pain than what he anticipated, and reported diffuse numbness around the incision, and while he demonstrated fairly normal range of motion of the elbow, wrist and hand, Claimant was very guarded about moving the shoulder beyond 45° in any direction. He ordered x-rays and stated that the left clavicle showed the fracture was in anatomic alignment with no sign of hardware loosening.

13. Claimant was evaluated at the UCHealth Occupational Med Clinic on August 4, 2020. They took a history that Claimant was assigned to the "shackled position" when a shackle jammed on the chain, which caused the shackle to fall approximately 6 feet. Dr. Smith documented as follows:

> He [Claimant] reports he heard the jam in the chain and attempted to get out of the way but was struck on the left side of his hard hat, then the left ear with the shackle landing forcefully against his left clavicle.
>
> He reports he experienced immediate pain following the incident but had to "keep working" since the chain was continuing to move. This was a witnessed event and when it became obvious he was having difficulty using his left arm his supervisor was notified and he was taken to health services for further evaluation. Per the records from health services he was found to have swelling and deformity over the clavicle associated with an abrasion. At that point the arm was immobilized and he was sent for further evaluation at the UCH emergency room.…. [Claimant] reports he continues to have pain over the clavicle which she (sic.) rates as a 6/10 at best and an 8/10 at worst he is continuing to use hydrocodone 4 times per day. He has been unable to ice the area on a consistent basis due to his living situation. Pain at this point is reported to be localized over the left clavicle, left axilla, left upper anterior chest wall. Pain is reported to increase with deep breathing, motion of the shoulder greater than a few degrees. He is continuing to use the sling for comfort. [Claimant] reports he is noticing some numbness and tingling into the left hand over the index, middle and ring fingers. He also reports he has noted some discomfort and "soreness" at his left ear but specifically denies any headache or neck discomfort.

Dr. Smith noted that Claimant did not exhibit pain behavior. She documented Claimant had discomfort with palpation of the upper anterior chest wall and into the left axilla, but did not notice specific tenderness with palpation of the left shoulder however range of motion was restricted to only a few degrees in all planes due to pain over the clavicle. She provided instructions to continue his home exercise program, ice the chest/shoulder

twice a day, and use narcotics sparingly and ibuprofen for most pain. He was returned to work with restrictions of using a sling at work and no use of the left hand and arm. They also discussed return to work issues and he was specifically advised if he was asked by his supervisor to do activities that were outside of his restrictions he was to contact health services for further clarification. They also discussed Dr. Smith's request to health services to ice his left upper chest at least twice during his work shift.

14. By September 10, 2020 Dr. Smith referred Claimant to Dr. Reichhardt for a physiatric consult for possible EMG/NCV to determine whether Claimant's complaints could be due to trauma at the brachial plexus, as Claimant had continued swelling in the area of the brachial plexus in conjunction with numbness and tingling and pain in his left hand. Dr. Smith also stated that she had counsel Claimant.

> We reviewed at length continued severe complaints in the area of his clavicle fracture with increased swelling both in the supraclavicular, infraclavicular areas and in the left hand associated with numbness and tingling. We again reviewed anatomy and physiology and he was advised there may be multi-factorial reasons for his continued significant pain complaints. Due to the area of the fracture and continued swelling in the area of the brachial plexus in conjunction with numbness… significant pain and restriction in range of motion of his shoulder may not only be due to the clavicle fracture but also due to developing adhesive capsulitis which he will be more susceptible to developing due to his diabetes. We reviewed Dr. Baer's report and recommendations to begin physical therapy to improve his range of motion at the shoulder and hopefully release adhesions. If he is indeed felt to have adhesive capsulitis and therapy is not helpful in reducing the adhesions advised may require injections at the shoulder or possible manipulation under anesthesia once his clavicle fracture has healed to the point the procedure would not cause additional problems at the fracture site. Again he was advised of the importance of continuing with passive[1] range of motion exercises at home in an attempt to prevent these adhesions from worsening. We discussed his continued complaints of pain at the left ear and he was advised since his physical exam is completely normal…

15. Dr. Bear saw Claimant on October 1, 2020 noting that Claimant had a very slow recovery and far more pain that he expected or anticipated, though better than the prior month. He noted that Claimant was very sensitive to palpation, but could elevate and abduct beyond 90°. The x-rays showed a healing fracture and intact hardware. He stated that Claimant needed to be aggressive with range of motion and strengthening. He also recommended that Claimant stop using the sling and try to use his arm as normally as possible.

16. On October 5, 2020 Dr. Smith stated Claimant did feel pain and range of motion of the shoulder had improved after 6 visits of physical therapy. On exam she noted that he had no pain behavior, his alignment of the head, neck and mid back showed a slight forward chin thrust but position of the left shoulder had improved, with significantly decreased trigger points, discomfort with palpation of the upper anterior chest wall and into the left axilla, mild pain is reported over the AC joint, CC joint, subacromial space and

[1] This ALJ infers that passive range of motion is motion that is carried out with the assistance of another individual or therapist, or through use of mechanical or assistive devices. Active range of motion is that which an individual carries out on their own.

anterior lateral shoulder. Active range of motion was restricted. He continued to have restrictions and physical therapy. Claimant stated he was "very pleased with my progress." Dr. Smith noted on exam that Claimant had improved range of motion.

17. Claimant was first evaluated by Gregory Reichhardt, M.D. for a physiatric evaluation on October 8, 2020. He performed an EMG/NCV exam, which should results consistent with mild median neuropathy at the wrist without axonal involvement. The study was negative for left ulnar neuropathy at the wrist or elbow, left axon loss cervical radiculopathy or brachial plexopathy. His impressions were of left clavicular facture, left arm numbness related to mild carpal tunnel syndrome which was not likely related to the work injury and depression. He recommended a cervical MRI to rule out cord compression, considering urinary symptoms of incontinence or lack of full voiding.

18. However, by the following exam on October 29, 2020, Claimant had increasing symptoms and pain behaviors, but thought muscular spasm and tightness was decreased. He was counselled to obtain an air mattress as sleeping on a couch was not sufficiently supportive and likely the reason for increase in subjective symptoms. They reviewed his improved ROM and she continued physical therapy. He was also counselled to see his primary physician regarding his diabetes since his A1C level was at 13.

19. Dr. Smith continued to report that on exam Claimant exhibited decreased triggers on palpation of the left side of the neck, upper back and periscapular area with minimal bracing and decreased muscle tone. On November 23, 2020 Claimant continued to report symptoms over the upper anterior chest wall, but had increased ROM to approximately 120°flexion up from 90° of previous exams. Since Dr. Bear had recommended an MRI of the shoulder due to Claimant's continued unexplained complaints, and Dr. Reichhardt recommended one of the cervical spine, she ordered them. She also, again, counselled Claimant to see his primary care provider for his uncontrolled diabetes.

20. On November 11, 2020 Claimant's passive range of motion was 145° for flexion, 145° for abduction, 45° for internal rotation and 65° for external rotation.

21. On November 27, 2020 Dr. Andrew Mills at UCHealth read the MRI scan of the cervical spine as showing moderate diffuse disc bulge with superimposed right paracentral disc extrusion causing significant mass effect on the thecal sac at the C5-6 level with mild to moderate central stenosis as well as moderate to severe right-sided neural foraminal narrowing and moderate left-sided neural foraminal narrowing. He also noted mild diffuse disc ossified bulge and facet arthropathy that resulted in mild to moderate central stenosis at the C6-7 level with mild left sided and moderate right sided neural foraminal narrowing.

22. By December 15, 2020 Claimant had made some functional progress in physical therapy. Mr. Todd Smith, Claimant's physical therapist at Pro Active Physical Therapy, noted that Claimant had made progress in PT, showing active flexion at 125° and passive flexion to 150°, with passive internal rotation at 47°and external rotation at 67° (compared to the September 16, 2020 numbers of active flexion of 25°, passive flexion to 50°, passive internal rotation at 25° and external rotation of 15°).

23. By December 17, 2020 Claimant reported that the pain was not constant and on exam he had minimal discomfort with palpation of the shoulder and upper chest. By January Dr. Smith sent Claimant for a functional capacity evaluation in anticipation of maximum medical improvement and an impairment rating being performed. Around this time, Employer terminated Claimant due to having been on modified duty in excess of 180 days. Despite being off work, Claimant reported on February 10, 2021 that he was approximately 15% worse, including radiating pain into his neck and behind his ear, especially with rotating his head to the left and difficulty with colder temperatures. Dr. Smith found limitation of motion of the cervical spine and the shoulder as well as tenderness to palpation over the left clavicle tough it was not associated with any swelling. Dr. Smith noted as follows:

> It does appear he is performing his independent home exercise program as instructed by the therapist and can reproduce these exercises. We reviewed possible aggravating factors for his increased perception of pain and loss of range of motion. He was advised electrical stimulation in therapy may have been keeping the symptoms under much better control and now that he is at home and has not received his home unit may be experiencing increase in myofascial tightness. After shared decision making agreed he will continue with his independent home exercise program on a daily basis as instructed by his physical (sic.) to maintain range of motion and we will again contact his claims adjuster as to authorization for the home trial of the e-stim. We reviewed his recent follow-up evaluation with Dr. Reichhart (sic.) and recommendation for cervical spine injections by Dr. Quickert. I placed a telephone call to Dr. Reichhart (sic.) to discuss the epidural steroid injections in the cervical spine. His opinion and I agree is to determine whether his continued shoulder symptoms are related to his neck or related to his fracture at the clavicle. If he does not respond to the injections with decreased pain and increased function at the shoulder periscapular area then would determine continued dysfunction in this area is related to his clavicle fracture. I therefore agree with Dr. Reichart's (sic.) recommendations for the cervical spine injections for diagnostic as well as therapeutic clarification.

24. The December 19, 2020 MRI scan of the left shoulder was positive for mild subscapularis tendinosis, mild supraspinatus tendinosis and mild partial-thickness articular surface fraying in the infraspinatus. Dr. Joseph Carabetta noted that there was no effusion or bursitis noted and no significant osteoarthritis in the glenohumeral joint or acromioclavicular osteoarthritis.

25. Dr. Bear reevaluated Claimant on December 23, 2020 noting that Claimant continued to show a slow recovery outside the norm, with decreased sensation diffusely about the incision and even extending to the lateral shoulder. On exam he recorded Claimant had pain with abduction beyond about 115°, though passively, Dr. Bear could get up to 140° or 150° fairly well. He was also tight to internal rotation beyond about L3. He also reviewed the MRI of the shoulder that showed very mild degenerative tears in the supraspinatus and infraspinatus, but no labral tear, and no significant intraarticular pathology. He stated that Claimant's symptoms were more likely coming from his neck than the shoulder. Dr. Bear opined that "[H]e really has no reason to be limited related to his shoulder. I would recommend he obtain follow up with a spine specialist and we can see him back as needed."

26. Several of Dr. Smith's reports noted that Claimant continued working through 2020 and discussed his work restrictions. On January 20, 2021 Dr. Smith specifically mentioned that Claimant was no longer working as there was no available work for him within his work restrictions. She specifically documented that he had been "sent home" weeks ago having reached his 180 days of modified duty work. This language is repeated multiple times in reports that followed including February 10, March 10, April 7, May 12, June 17, 2021 and so on.

27. On February 8, 2021 Claimant returned to Dr. Reichhardt to discuss the MRI results. Claimant reported that Dr. Bear had discharged him and had recommended that he return to have a cervical spine evaluation. Examination of the cervical spine revealed tenderness to palpation about the cervical and periscapular area, decreased cervical range of motion, and Spurling's sign resulted in pain radiating along the upper trap into the shoulder, but not further down the arm. He had tenderness to palpation over the left shoulder, and decreased left shoulder range of motion. Dr. Reichhardt reviewed the findings of the cervical MRI and opined that they needed to rule out C5 or C7 radiculopathy and possible brachial plexopathy associated with Claimant's clavicle facture and a negative EMG. Ultimately they agreed on a cervical epidural steroid injection. Dr. Reichhardt referred Claimant to Dr. Quickert for consideration of the ESIs at multiple levels. On February 23, 2021 Dr. Reichhardt recommended a left C5-6 ESI. He stated that "[I]f this is nondiagnostic, I would recommend consideration of a left C6-7 ESI. If these are both negative, that would suggest that his left arm and hand symptoms are related to a brachial plexus injury associated with the clavicle injury."

28. Claimant was evaluated by Dr. John Raschbacher on March 5, 2021 upon Respondents' request for an independent medical evaluation. He took a history consistent with Claimant's testimony and reviewed the available medical records. Upon exam, Dr. Raschbacher noted poor effort with left shoulder internal and external rotation against resistance and a positive Tinel's. Claimant had tenderness of the AC and SC joints and ROM testing showed 160° flexion on the right and only 91° on the left, internal rotation at 53° on the left and external rotation at 29°.

29. Dr. Reichhardt attended Claimant on March 16, 2021 noting that Claimant continued to have pain over the neck and parascapular area with pain radiating down the later aspect of the upper arm. On physical exam, he noted Claimant demonstrated multiple periscapular trigger points. He noted that Claimant did not have much tenderness over the neck itself, but primarily over the periscapular area. He had significant tenderness to palpation over the clavicle. He had decreased shoulder range of motion, and positive Hawkins' impingement sign. Dr. Reichhardt proceeded with a trial of trigger point injections to see if he could help Claimant keep some of his symptoms calmed down while waiting for approval of the TF ESIs.

30. Claimant returned to Dr. Smith on April 7, 2021. He continued to have unchanging ongoing symptoms of the neck, left shoulder and chest anteriorly with increasing pain when he was sleeping, reaching with his arm and with cold weather. Claimant continued to report loss of range of motion, compared to when he was in a formal physical therapy program. However, on exam, Dr. Smith noted that his active range of motion continued to be approximately 110° flexion and 90° abduction, though painful. Dr. Smith continued to emphasize the importance of his HEP, which he seemed

to be performing as he was able to reproduce the exercises as well as applying ice and heat to the shoulder followed by stretching to relieve tightness.

31. On May 10, 2021 Dr. Reichhardt noticed on exam that Claimant had tender ness to palpation over the distal clavicle and a bony prominence just inferior to the distal clavicle. He also noted decreased range of motion of the left shoulder. Dr. Reichhardt ordered a left clavicle x-ray and stated he would have Claimant follow up with Dr. Bear.

32. The x-ray, as read by Dr. Scott Campbell at Banner Imaging Greeley on May 10, 2021, showed ORIF of left mid clavicle fracture performed chronically, with a healed fracture, mild degenerative arthrosis of the AC and CC joints and a humeral head that appeared to be aligned with the glenoid but did not find any acute osseous abnormalities.

33. Claimant was evaluated by Dr. Smith again on May 12, 2021. On exam she continued to note that Claimant had a trigger with palpation over the left stemocleidomastoid musculature from the clavicle to the posterior auricle, over the mid left cervical spine and at the tip of his left scapula. He had limitations of range of motion of the cervical spine more pronounced to the left side. Claimant had left shoulder pain with palpation over the AC joint, CC joint[2] and subacromial space with pain reported over the lateral upper arm. Active range of motion was approximately 120° flexion and 90° abduction which were reported to be painful. On this day, Dr. Smith reported that Claimant was able to shrug his shoulders, pinch his shoulder blades and rotate his shoulders with less restriction and discomfort. Dr. Smith diagnosed closed displaced fracture of shaft of left clavicle with delayed healing, adhesive capsulitis of left shoulder, numbness and tingling in left hand, contusion of auricle of left ear.

34. Dr. Smith continued to recommend alternating ice and heat to the left clavicle and periscapular area, continue exercises, medications, e-stim use, follow his restrictions and should follow up with Dr. Reichhardt. His symptoms were worse at the following visit on June 17, 2021, the day right after his hardware removal surgery.

35. Claimant was evaluated by Julie Quickert, APRN on June 2, 2021 who diagnosed cervical region radiculopathy. She noted that Claimant was referred for evaluation and consideration of left cervical ESI. On exam, she noted that Claimant had tenderness with palpation of the left cervical spine and shoulder area, generally reduced ROM of C-spine and had limited upward extension of the left shoulder, had increased pain with all movements, weakness on left upper extremity compared to right and a positive Spurling's on the left. Dr. Quickert recommended a left C5-6 TF ESI. She proceeded to administer a fluoroscopy guided transforaminal epidural steroid injection at the left C5-6 level.

36. On June 3, 2021 Dr. Reichhardt stated that Claimant continued with left infraclavicular area pain, and tenderness to palpation over the left cervical area, extending out over the left shoulder. They discussed the findings on the clavicle x-ray, which did not demonstrate concerning findings, though he was tender definitely over the area of his

[2] This ALJ infers from the medical records that AC is acromiclavicular ligament and CC is the coracoclavicular ligament which support and stabilize the acromioclavicular joint.

fracture and subsequent ORIF. He noted Claimant had hardware removal planned with Dr. Baer which he opined was reasonable in light of the exam.

37. Dr. Bear noted on June 16, 2021 at the OCR Loveland Surgery Center that Claimant's left shoulder has a well-healed incision, with some prominence of the hardware over the clavicle. Claimant had pain with passive or active motion of the shoulder beyond about 90° and even some pain with rotation with the elbow at his side. Passively, could get the shoulder almost to full elevation and abduction. There was no impingement or mechanical block of motion. At that point, Dr. Bear stated the he did not know what else to do to help Claimant other than remove the hardware, and proceeded with the left clavicle hardware removal.

38. On June 28, 2021 Dr. Bear noted that Claimant continued to have symptoms out of proportion, recommended physical therapy and discharged Claimant from his care to return only on an as needed basis.

39. One month post-op, on July 20, 2021 Dr. Smith report Claimant continued to hold his left shoulder in a very rounded position and guarded, with increased forward chin thrust. The pain was from the left side of the neck to the upper back, periscapular area and the upper anterior chest wall over the clavicle at the pectoralis and axilla. Claimant's range of motion was significantly restricted with only 45° of flexion and abduction and passive motion to 120°, though grip strength was improved from the prior visit. These numbers further deteriorated as noted by Mr. Smith, the Pro Active therapist, who was unable to get Claimant to do active ROM and passive ROM for flexion was only 45°, abduction of 55°, internal rotation of 15° and external rotation of only 10°.

40. Dr. Reichhardt evaluated Claimant on August 25, 2021 noting that Claimant reported doing about 40% better, with less pain and numbness of his left arm though he noted pain over the left shoulder primarily with overhead activities. On physical exam he noted improved range of motion, with tenderness to palpation over the lateral aspect of the left shoulder, periscapular and left clavicle. He continued to recommend the ESIs.

41. On August 31, 2021 Dr. Smith noted on exam, which was a significant improvement over the prior month's visit:

> No pain behavior is exhibited during the evaluation today. And alignment has significantly improved and he is no longer holding the left shoulder in a rounded and guarded position and has much less forward chin thrust. His gait is normal. No pain is reported today with palpation at his neck, upper back, periscapular area and the upper anterior chest wall. He does complain of discomfort with palpation over the left clavicle, but previous triggers over the pectoralis and in the axilla have resolved. Range of motion or the cervical spine is essentially full except for restriction with left rotation which is painful. Range of motion of the left shoulder is significantly improved and he now has active forward flexion to approximately 160° and abduction to approximately 140°.

Dr. Smith stated that she disagreed with Dr. Raschbacher's conclusions that Claimant sustained a "usual" injury to the clavicle. She did, however agree that typically loss of range of motion at the shoulder is not associated with clavicle fractures. However due to Claimant's underlying diabetic condition he was more prone to developing adhesive capsulitis due to immobilization of his shoulder following the surgery.

42. Dr. Reichhardt noted on September 27, 2021 that Claimant again reported improvement in symptoms, with less pain at 3/10. He noted that Claimant had roughly a normal cervical spine range of motion.

43. By September 28, 2021 Claimant had regained some motion showing passive ROM only at 180° for flexion, abduction of 180°, internal rotation of 65° and internal rotation of 86°.

44. On October 7, 2021 Dr. Smith found that Claimant's range of motion of the left shoulder was again much improved showing active forward flexion to approximately Range of motion of the left shoulder was significantly improved and he now showed active forward flexion to approximately 180° forward flexion and abduction to approximately 170°.

45. It was not until December 2, 2021 that Claimant had increased and recurrent problems with triggers over the left pectoralis and in the axilla as well as a nodule over the clavicle in the area of his previous hardware. He had more restricted range of motion of the cervical spine and less range of motion of the left shoulder with 80° forward flexion and abduction to approximately 90°. Dr. Smith reviewed at length with Claimant his independent home exercise program and it appeared he had been performing up to 60 repetitions for each of his exercises at one time. He was advised that the significant amount of repetitions may have been contributing to his escalation of myofascial pain. After shared decision making and review of his exercises they agreed he would decrease repetitions to no more than 15-20 at one time and complete more sets throughout the day to reach his 60 repetitions in 1 day.

46. Then, by January 24, 2022[3], Mr. Smith tested Claimant's ROM and the numbers again declined to 105° flexion, abduction of 90°, internal rotation of 40° and external rotation of 70°--all passive range of motion only.

47. Claimant was attended by Eric Hoffman, PA-C on February 3, 2022, who noted that Claimant had finished 4 visits with physical therapy since the last visit. His symptoms had not improved since then and noted that physical therapy had been beneficial since he reported worsening of his pain since his last visit. Upon consulting Dr. Smith, Mr. Hoffman advised Claimant to finish out his last 2 visits and then return for an impairment rating.

48. Dr. Smith conducted an impairment evaluation on April 12, 2022 noting that Claimant was at maximum medical improvement. They discussed his continued escalation of symptoms at that time with no particular aggravating factors. She determined that therapy and work hardening were not of benefit at that time. She provided a 21% extremity impairment that converted to a 13% whole person impairment rating after adjustment for the contralateral side.

49. Dr. Smith also set out that Claimant required maintenance care including alternating ice and heat, frequently, continue with the e-stim treatment and to continue his home exercise program. She provided restrictions of no lifting greater than 15 lbs. No carrying, pulling, pushing greater than 15 lbs. She also cautioned Claimant that he

[3] With a hiatus of PT for approximately four months, from September 28, 2021 to January 24, 2022.

should avoid reaching overhead, away from the body and no use of the left arm for prolonged or repetitive reach away from the body or above chest level.

50. On May 20, 2022 Respondents filed a Notice and Proposal and Application for a DIME to challenge the ATP's rating.

51. On September 21, 2022 Dr. Brian Mathwich issued a Division Independent Medical Evaluation report regarding Claimant. Claimant reported to Dr. Mathwich that he had pain in the left anterior neck along "sternocleidomastoid, the posterior left trapezius and deltoid muscle, and along the clavicle area. He also states he has numbness in the first three fingers of the left hand which he reports began immediately after the injury." He noted on exam that there was some deformity of the clavicle bone consistent with fracture, a well healed surgical scar, and mild atrophy of the supraspinatus muscle. He noted a somewhat inconsistent exam given examination and distracted pain responses. Dr. Mathwich diagnosed left clavicle status post ORIF and subsequent hardware removal left shoulder adhesive capsulitis, resolved ear contusion, and myofascial neck pain. At the time of the DIME Dr. Mathwich recommended Claimant be afforded the choice of proceeding with manipulation under anesthesia for the left shoulder adhesive capsulitis or hydrodilatation injections. He noted that, if Claimant chose to proceed with the treatment then he was not at MMI, otherwise MMI and impairment were as established by Dr. Smith, as range of motion was inconsistent.

52. Dr. Mathwich noted that Claimant had exhibited significant pain behaviors and pain avoidance throughout his treatment and cited this avoidant behavior likely caused the adhesive capsulitis. He made recommendations of work restrictions of no extended reach or overhead work with the left arm and no lifting greater than five pounds. He further recommended a maintenance program as assigned by Dr. Smith.

53. Claimant medical records were reviewed a second time by Dr. Raschbacher on January 9, 2023 specifically addressing Dr. Mathwich's DIME report. Dr. Raschbacher opined that Claimant's lack of range of motion as mentioned by Dr. Mathwich were tantamount to malingering behavior. He stated that it was not medically reasonable to expect a positive response on a subjective basis, or on a functional basis, to further intervention or treatment of the shoulder for adhesive capsulitis or any other condition.

54. On January 30, 2023 Dr. Bear stated that Claimant did not do well post operatively as he had an abnormally slow recovery and much higher than expected pain. Following work up he found there was no neuropathy or radicular nerve compression. Claimant continued to be significantly stiff despite physical therapy and release of all restrictions. He opined that manipulation under anesthesia would not offer Claimant any significant benefit as he would likely re-experience post-manipulation stiffness due to ongoing pain and lack of effort to regain motion. He further opined that much of his stiffness came from lack of effort due to low pain tolerance, though he could have had compounding neurogenic pain and nerve injury.

C. Deposition Testimony

55. Dr. Brian Mathwich testified by deposition on April 6, 2023. Dr. Mathwich was designated by the Division of Workers' Compensation as the DIME physician in this matter, which was conducted on September 21, 2022. Dr. Mathwich explained that

Claimant suffered a clavicular fracture, left comminuted.[4] Claimant underwent surgical repair with an open reduction with internal fixation with some hardware. Claimant continued to have pain after the procedure. Claimant was placed at maximum medical improvement (MMI) as of April 12, 2022 with a 21% extremity rating that converted to 13% whole person impairment. After reviewing the medical records, conducting an examination, Dr. Mathwich found Claimant not to be at MMI as he should be offered either hydrodilatation injection or manipulation under anesthesia to treat the adhesive capsulitis, but deferred to the treating orthopedist as to which procedure to offer.

56. Dr. Mathwich received supplemental record just immediately before the deposition took place, including a report from Dr. Beard stating that he recommended against any treatment of the adhesive capsulitis as he would likely re-experience postmanipulation stiffness due to ongoing pain and likely lack of effort to regain shoulder motion.

57. Following review of Dr. Bear's report, Dr. Mathwich changed his opinion as Dr. Beard knew Claimant better and since Claimant had showed significant issues with delayed recovery, lack of improvement, and pain behaviors during exam. He stated that Claimant would then be at MMI on April 12, 2022 as Dr. Smith placed him at MMI. He also agreed with Dr. Smith's rating.

58. The DIME physician explained that Dr. Bear did not specifically address the hydrodilatation, which is injecting a saline solution into the shoulder joint specifically. He noted that the recommendation was to have aggressive physical therapy immediately after the procedure. He noted that Clamant had a history of avoidance so if Claimant did not put full effort into the mobilization of the shoulder, he would be in the exact same place he was at the time of his exam, the treatment being of little benefit. He noted that physicians work under the policy of "do no harm" and sometimes that means being careful that they do not over treat.

59. When asked about Dr. Beard's note that stated Claimant might have a compounding neurologic pain and nerve injury, he questioned the diagnosis as the EMG did not show any sign of brachial plexus nerve branch injury, which are the nerves flowing just underneath the surgical site. Further, Claimant did not respond to the C5-6 transforaminal epidural steroid injection, which also indicated that it was not likely Claimant had a nerve injury.

60. Dr. Mathwich opined that because the injury was to the clavicle itself, which is connected to the trunk of the body and Claimant had neck complaints so it made sense that Claimant's rating be considered a whole person impairment.

61. He also agreed that maintenance care was appropriate as recommended by Dr. Smith, including continuing his home exercise program, e-Stim three to four times per day for two years and then just taking Ibuprofen and Tylenol for pain control.

D. Wage Records

57. Wage records provided by Respondents do not show whether the wages are gross wages or net wages paid to Claimant. Neither do they specify whether the "End

[4] Dr. Mathwich described this as fractured in pieces and displaced.

of IN period" denoted the day an employee was paid or the end of the pay period. Claimant began working on June 8, 2020, a Monday. Because wages are often paid with one week kept in arrears and neither party had a witness testify one way or the other what the appropriate wage calculation should be, this ALJ has had to analyze multiple payment methods.

58. If the wages are considered from check dated June 14, 2020 through July 5, 2020, the wages could be averaged to $686.54. Also, other holidays were paid except July 4, 2020, so this ALJ presumes that the records provided were not complete wage record.

59. If the wages are considered without that first period, as it is unusually smaller, the average wage would be $783.68.

J	K	
End of IN period	Amount	
6/14/2020	$	387.60
6/21/2020	$	637.44
6/28/2020	$	646.00
7/5/2020	$	646.00
6/21/2020	$	4.36
6/14/2020	$	3.15
6/21/2020	$	9.69
6/28/2020	$	19.38
7/5/2020	$	16.23
6/14/2020	$	4.36
6/21/2020	$	31.50
6/28/2020	$	273.07
7/5/2020	$	67.36
Total earnings	$	2,746.14
Averaged Wage	$	686.54

H	I	
End of IN period	Wages	
6/21/2020		$637.44
6/28/2020		$646.00
7/5/2020		$646.00
6/21/2020		$4.36
6/21/2020		$9.69
6/28/2020		$19.38
7/5/2020		$16.23
6/21/2020		$31.50
6/28/2020		$273.07
7/5/2020		$67.36
Total earnings	$	2,351.03
Averaged Wage	$	783.68

60. This ALJ also calculated the wages Claimant potentially earned from June 8, 2020 through the last pay period shown on the wage records of December 27, 2020. This was most likely the last pay period because there are mentions in the medical records that Claimant had exhausted his 180 days of modified work and was terminated. The cumulative wages show Claimant earned a total of $21,864.46, which divided by 202 days and multiplied by 7 days of the week would average out $757.68. However, this does not account for the days Claimant was off work due to his two surgeries, if any, and nothing in the general admission stated the time he was off or if he was off for any considerable period of time in 2020 after his work injury.

Disfigurement

61. During the hearing, Claimant showed his surgical scar, which was approximately four and one half inches long, with the scar going from the top of the clavicle midway from the neck and the glenohumeral joint, toward the upper chest area along the bottom of the clavicle. One portion of approximately two inches of the scar was raised and discolored and approximately one quarter inch wide at the widest. There was a significant indentation below the clavicle, perpendicular to the surgical scar. Lastly, comparing the left injured side to the right, there is significant muscle tone on the right and significant lack of muscle tone on the left injured shoulder.

E. Ultimate Findings

62. As found, the DIME physician's, Dr. Mathwich's, "true opinion" was that Claimant was at maximum medical improvement as of April 12, 2022. This occurred after the second surgery to remove the hardware and after he participated in two different sessions of physical therapy from July 22, 2021 through September 30, 2021 and January 24, 2022 to February 9, 2022. Dr. Mathwich agreed with Dr. Smith's opinion that Claimant's symptoms continued to escalate at that time with no particular aggravating factors. This opinion was bolstered by Dr. Smith's determination that therapy and work hardening were not of benefit at that time. While Dr. Mathwich stated originally that Claimant required treatment for the adhesive capsulitis, upon seeing Dr. Bear's report noting that Claimant would not benefit from manipulation under anesthesia and would likely re-experience post-manipulation stiffness due to ongoing pain and lack of effort to regain motion, Dr. Mathwich changed his mind and found that Claimant was at maximum medical improvement. Claimant, not Respondent, had the burden to prove by clear and convincing evidence and overcoming Dr. Mathwich's true opinion that Claimant had reached MMI as of April 12, 2022. Claimant failed in that regard.

63. Dr. Smith provided an impairment of 21% upper extremity impairment which converted to a 13% whole person impairment rating after adjustment for the contralateral side. Claimant argued that the impairment should appropriately be a whole person impairment. Respondents deny that is the case. As found, in this case, from the totality of the evidence, there is a wide variety of testimony and medical records clearly documenting that Claimant continuously complained of pain in the chest area, the clavicle area, the neck and the upper back. As also found, what was more persuasive was that Dr. Mathwich explained the physiology of the clavicle, the attachments and the location as well as stating that Claimant's impairment was appropriately located on the upper body and torso. Claimant has shown by a preponderance of the evidence that Claimant has

an impairment of the whole person and is appropriately set out as 13% of the whole person.

64. Average weekly wage is hard to calculate given the limited information provided in this matter. As found, based on the totality of the evidence, this ALJ determines that the fair approximation of the Claimant's wages is to calculate the period of June 8, 2020 through December 27, 2020, for an average weekly wage of $757.68. Claimant has proven by a preponderance of the evidence that Claimant's AWW is $757.68.

65. Claimant has a significant scar that is normally exposed to the public. His scar is on his clavicle and includes the surgical scar, a significant indentation below the clavicle and loss of muscle tone as compared to the right shoulder and upper torso. Claimant has proven by a preponderance of the evidence that he is entitled to an award for his disfigurements.

66. Testimony and evidence inconsistent with the above findings is not credible and not persuasive, or is not relevant to the issues heard.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See

Bodensieck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming the DIME

The DIME physician's findings concerning the date of MMI and the degree of permanent medical impairment are binding on the parties unless overcome by clear and convincing evidence. Sections 8-42-107(8)(b) (III) & (8)(c), C.R.S. Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. See *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo.App. 1998).

If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000); In *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175 (May 25, 2005) aff'd, *Resources One, LLC v. Industrial Claim Appeals Office,* 148 P.3d 287 (Colo.App. 2006); *Stephens v. North & Air Package Express Services,* W. C. No. 4-492-570 (February 16, 2005); *Clark v. Hudick Excavating, Inc.,* W. C. No. 4-524-162 (November 5, 2004). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998). A DIME physician's findings of MMI, permanent impairment, and causation consist not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330-331 (Colo.App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); J*arosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo.App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities

inconsistent with the symptoms and disabilities she had reported); *In re Claim of Fabjancic*, 112118 WC 5-050-580-01, ICAO (November 21, 2018)

Once the ALJ determines the DIME physician's true opinion concerning MMI and impairment, then the party seeking to overcome that "true opinion" bears the burden of proof by clear and convincing evidence. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra; In re Claim of Jones*, WC 5-034-047-001, ICAO (August 27, 2019).

Once the ALJ determines the DIME physician's true opinion, it may be appropriate to reassign the burden of proof to overcome by clear and convincing evidence the DIME physician's finding of MMI. *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339 (June 17, 2005); *Gurule v. Western Forge,* W. C. No. 4-351-883 (December 26, 2001); *In re Claim of Gagnon*, WC 4-971-646-03, ICAO (February 6, 2019).

Here, it is undisputed that the DIME physician had originally stated that Claimant was not at MMI as Claimant should be afforded the opportunity to have treatment for the adhesive capsulitis of the left shoulder. However, during the deposition, and after considering Dr. Bear's, the surgeon's, January 2023 assessment, Dr. Mathwich changed his opinion and stated that Claimant had reached MMI as of April 12, 2022. Dr. Bear's opinion was that manipulation under anesthesia was not an appropriate treatment for Claimant, as it would not offer Claimant any significant benefit since he would likely re-experience post-manipulation stiffness due to ongoing pain and lack of effort to regain motion. Considering this opinion and when considering his unsuccessful surgeries and his inability to progress in his functional abilities were also persuasive. Dr. Mathwich's opinion is supported by Dr. Smith's opinion that Claimant's uncontrolled diabetes made Claimant more susceptible to developing adhesive capsulitis and during treatment Claimant failed to cooperate and obtain care from his PCP for his diabetes. Beginning on October, 2020 Dr. Smith counselled Claimant to see his primary physician regarding his diabetes since his A1C level was at 13[5], and he had run out of medication. This did not promote the idea that Claimant was proactive in his care and treatment. Further, the physical therapy notes from Mr. Smith (therapist) showed that Claimant was not benefiting from care as the range of motion numbers continued to get worse. As found, Claimant's January 24, 2022 passive range of motion was significantly worse than those measurements taken over a year before on November 11, 2020. Therefore, the burden of proving by clear and convincing evidence that Dr. Mathwich was incorrect, shifted from Respondents to Claimant as the opinion provided by Dr. Mathwich at his deposition is found to be his true opinion.

Claimant continued to argue that Dr. Mathwich's original opinion was correct as Claimant continued to worsen and required further medical care including but not limited to manipulation under anesthesia or hydrodilatation injections which involves injecting saline in the injured area. It is clear here that Dr. Bear was provided the report from the DIME physician for his consideration, which he answered on January 23, 2023, specifically stating that no further treatment would alleviate Claimant's symptoms and could make it worse. The DIME physician deferred to the orthopedic surgeon's opinion, in this regard and this ALJ is not persuaded to do otherwise. It is clear from the medical

[5] An A1C of 6 or higher is considered uncontrolled.

records that whenever Claimant started a new treatment modality, that he would have significant worsening before he began getting better. As found, the single factor that has been most significant in the Claimant recovery has been time, not the treatment provided and this ALJ is not persuaded that any further formal treatment by the providers would be intended to relieve the Claimant of his injuries, but would only maintain the progress he has made thus far. This ALJ finds and concludes that Claimant was at MMI as of April 12, 2022 and continues to be at MMI. Claimant has failed to prove by clear and convincing evidence that Claimant was is not at MMI.

C. Conversion

Claimant seeks to convert his 21% left upper extremity impairment rating to a 13% whole person rating. When evaluating whether a claimant has sustained a scheduled or a whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a), C.R.S. If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under Sec. 8-42-107(8), C.R.S.

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. E.g., *Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's,* W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius or scapular area can functionally impair an individual beyond the arm. E.g. *Steinhauser v. Azco*, Inc., W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC,* W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). Limitations on overhead reaching can also constitute functional impairment beyond the arm in appropriate cases. E.g., *Brown v. City of Aurora*, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.,* W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved he suffered functional impairment not listed on the schedule. The surgery performed by Dr. Bear was directed to anatomical structures proximal to the "arm," including the open reduction and internal fixation of the displaced midshaft clavicle fracture. Dr. Bear performed the surgery on July 21, 2020, and the major fragments of the clavicle were aligned and secured anatomically with a reduction clamp. A plate was applied to the superior aspect of the clavicle and secured with multiple screws compressing across the fracture site. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. See, e.g., *Martinez v. Albertson's LLC*, supra at ("The [claimant's] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint"); see also *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021). This is supported by multiple medical records of Claimant's complaint to providers of pain and limitations of the neck, and upper back and chest muscles. More important, Claimant credibly described pain and associated functional limitation in areas proximal to his arm such as the pain in the neck that was caused by simple movements of the arm. This pain affects his ability to engage in various activities, including overhead reaching or simply sleeping on his left side and Claimant is left hand dominant. Claimant also explained that he has problems driving, he has to move his whole body to see if there are any vehicles on his left side in order to change lanes. This is a function of the neck being restricted by his injury not his upper extremity. The preponderance of persuasive evidence shows Claimant's functional impairment extends beyond his "arm at the shoulder."

Dr. Smith provided a 21% scheduled rating, which converts to a 13% whole person impairment. This opinion, with regard to impairment, is affirmed by the DIME physician as he believed that the rating provided by Dr. Smith was appropriate considering Claimant's injuries. Claimant has clearly and convincingly shown that Claimant's impairment is not a scheduled injury or impairment, and that Claimant is entitled to a whole person impairment rating. Claimant is entitled to PPD benefits based on Dr. Smiths' and Dr. Mathwich's impairment of 13% whole person rating.

D. Average weekly wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid to the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to

alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993).

The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007). An AWW calculation is designed to compensate for total wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *Sec.* 8-42-102, C.R.S.

Respondents argued that Claimant is not entitled to the increased average weekly wage as a strict view of the wage records of the four weeks prior to his work related injury would be most representative. However, this ALJ declines to view Claimant's wages in that manner. Claimant persuasively argued that the first week is not representative of his wages in the following three weeks. Neither, in this ALJ's view, is it representative of the wages Claimant earned following his injury, while Claimant was working in the break room, cleaning tables while under work restrictions for approximately 180 days until his modified work time was terminated. Considering that Claimant continued to earn wages while on modified duty at a rate that was closer to Claimant's calculation than respondents' calculation, this ALJ made the determination that the manner to fairly calculate Claimant's average weekly wage was to take the full time Claimant worked dividing that by the amount of days and multiplying it by the week for an average weekly wage of $757.68. Claimant has proven that he is entitled to an increase in the calculation of his average weekly wage to $757.68 and a temporary total disability rate of $505.12.

E. Disfigurement

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." A disfigurement is an observable impairment of the natural appearance of a person, including a limp. See *Arkin v. Industrial Commission*, 358 P.2d 879, 884, 145 Colo. 463, 472 (Colo. 1961); *Piper v. Manville Products Corp*., W.C. No. 3-745-406 (July 29, 1993); *Josefiak v. Green and Josefiak, P.C.,* W.C. No. 3-783-081 (March 12, 1987); Marcelli v. Echostar Dish Network, W.C. No. 4-776-535, ICAO (August 30, 2012); *In re Claim of Nagle,* W.C. No. 5-105-891 (July 24, 2020). Claimant has an observable disfigurement of the left shoulder caused by both the surgical scar and the deformity of the indention immediately below the clavicle bone. He further has disfigurement caused by loss of muscle tone on the left side compared to his right shoulder. Claimant testified consistent with this ALJ's observations. This ALJ finds and concludes that Claimant is entitled to compensation due to the observable disfigurements. Claimant has proven by a preponderance of the evidence that Claimant's disfigurements caused by the July 8, 2020 should be compensated and Claimant is entitled to $3,000.00 for the disfigurement.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant reached maximum medical improvement as of April 12, 2022 as opined by both Dr. Mathwich and Dr. Smith. Claimant failed to overcome Dr. Mathwich's opinion.

2. Respondents shall pay medical benefits, pursuant to the stipulation of the parties, to maintain Claimant at maximum medical improvement pursuant to Sec. 8-42-107(8)(f), C.R.S. This is a general award of benefits pursuant to *Grover*.

3. Respondents shall pay for permanent partial disability benefits based on Dr. Smith's 13% whole person impairment beginning as of April 12, 2022.

4. Claimant's average weekly wage is $757.68 and his temporary total disability benefit rate is $505.12. Respondents shall pay any retroactive TTD benefits due.

5. Respondents shall pay Claimant $3,000.00 for his disfigurement award.

6. Respondents are entitled to offset any overpayment from permanent partial disability benefits.

7. Respondents shall pay interest of eight percent (8%) on all amounts that were not pay when due.

8. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 24th day of May, 2023.

Digital Signature

By: Elsa Martinez Tenreiro

Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

Elsa Martinez Tenreiro

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-222-305-001

ISSUES

- Did Claimant prove entitlement to Temporary Disability Benefits?
- Did Respondents prove Claimant was responsible for termination of his employment?
- The issue of Average Weekly Wage was reserved pending a potential stipulation.

FINDINGS OF FACT

1. Claimant was employed by [Redacted, hereinafter TT] for approximately seven years prior to his date of injury. He sustained admitted injuries on October 18, 2022 while prying a bearing out of a wheel. At the time of the injury he was the store manager. He sought treatment at Concentra on November 3, 2022. He reported pain in his lower back, the base of his neck, his right pectoral muscle and his left knee. He was given restrictions of clerical work only, no lift, carry, push or pull greater than 5 pounds. (Claimant's Exhibit 4, p. 16).

2. Claimant was seen at Concentra on November 8, 2022 and November 14, 2022 and his restrictions did not change. The restrictions were later change to 15 pounds, approximately on December 6, 2022. Claimant's normal job duties normally entail lifting parts that weigh more than 15 pounds. He testified that "There's not much in the store as far as selling parts that weighs under 15 pounds".

3. Following his injury, the Claimant was scheduled to go on vacation for about a week and he took the vacation at his home.

BACKGROUND

4. [Redacted, hereinafter ST] owned two auto parts stores. One in [Redacted, hereinafter RF], Colorado and one in [Redacted, hereinafter LJ] Colorado. He bought the LJ[Redacted] store from [Redacted, hereinafter CT] in October of 2004. He opened the RF[Redacted] store in January 2015.

5. Claimant was initially hired to be a counter person at the LJ[Redacted] store. He had previous experience working for [Redacted, hereinafter NA] for 15 or 16 years and also had experience working for [Redacted hereinafter CA].

6. After "not too long", ST[Redacted] approached Claimant to be the manager of the LJ[Redacted] store so he could go back and forth between the two stores. He did in fact promote him to store manager. As a manager, he oversaw personnel, made sure

the store was open and closed, checked the inventory when it came in every weekday, handled returns, and special orders. According to ST[Redacted], Claimant ". . . did a very good job, honestly."

7. Prior to Claimant's injury, ST[Redacted] had a situation at the RF[Redacted] store where he had a lot of inventory missing. Because of this missing inventory, he dismissed all of his employees at that store. He testified "I told them I was missing product, so I let them all go. I couldn't – I couldn't pinpoint any one of them. I had my suspicion, but I just let them all go". Because of this incident, ST[Redacted] had all the employees sign the form contained in Respondents' Exhibit which included the rule that "NO PRODUCT OR EQUIPMENT BELONGING TO THE STORE TO LEAVE STORE WITHOUT AN INVOICE (WILL FIRE ON SPOT)".

8. Sometime prior to his work injury, ST[Redacted] had a suspicion that Claimant was involved in a missing case of Freon. However, he could not prove it.

TERMINATION

9. When he went back into work after his vacation, he told ST[Redacted], the owner, that his work-related injuries were still hurting and he needed to go see a doctor. At that time, ST[Redacted] confronted him and asked if he had removed an item from the store. The Claimant admitted he did and ST[Redacted] said "You did it without my authorization." Claimant didn't know he had to have authorization since he was the manager. ST[Redacted] said "your penalty for taking this item out of the store without my authorization will be one-week suspension without pay." ST[Redacted] testified that when confronted about the item, which was identified as an electronic distributor, Claimant said he F-ed up and repeatedly apologized. Claimant denied that he said this during their conversation, but did admit that he took the distributor and returned it when asked.

10. Sometime after his injury, Claimant was terminated by his employer. He testified that he was unaware he had been terminated from his employment until he was notified by a representative of the insurer on November 8, 2022.

11. After he was told of his termination by the [Redacted, hereinafter TS] agent, he went in on November 9th and said "You know, you could have called me and let me know that I was terminated." According to Claimant, ST[Redacted] forgot to tell him but did confirm he was terminated. Contrary to his unverified Answers to Interrogatories, he did not voluntarily resign his employment.[1]

12. Claimant had taken a distributor home to see if it would work on a vehicle. Claimant testified that it was not uncommon to take a part home as long as the employees were honest and brought it back or put it on their bill. Prior to his termination, he was unaware of anyone being terminated for taking parts out of the store.

[1] In addition to this discrepancy between the unverified Answers to Interrogatories and Claimant's testimony is the reference to prior right shoulder surgeries which occurred 8 years ago and 12 years ago. Claimant denied any prior right shoulder surgeries.

13. Respondents' Exhibit F is a documents dated November 2, 2018 with numerous "Rules". Claimant was shown Exhibit F of Respondents' exhibits. He denied that it contained his signature.[2] He did not recall the rule contained on the exhibit that employees were not to remove items from the store. Claimant later elaborated with respect to whether this was the store policy not to take parts home without an invoice that "It had never been before". (Transcript p. 35, l. 19). When he previously took parts home, such as a water pump on one occasion and two sets of brakes on another occasion, he would write the part down on a piece of paper at his terminal. If he kept the part, he would add the cost to his bill/sales invoice and pay for the part.

14. When Claimant was asked about how inventory was handled, he said it was an ongoing process that the employees would do when they were not busy with other duties. Everybody in the store would do inventory. Sometimes there would be overages or minuses. They would adjust the inventory sheet to reflect the actual parts inventory.

15. ST[Redacted] also testified that sometimes there were discrepancies between the computer inventory and the stock on the shelf. There were multiple reasons for the discrepancies including incorrect warehouse scans, mix-ups in product numbers, delivery of incorrect totes containing product to his store, glitches in the system including product actually in Claimant's RF[Redacted] store instead of his LJ[Redacted] store, and theft.

16. Respondents' Exhibit K is a Part Ledger Report for two distributors, one that was added and one that was deleted on October 15, 2022. Although not explicit, ST[Redacted] implied that that Claimant changed the inventory information for the one distributor to the other model since it was only ST[Redacted] or the Claimant would change the inventory count. (Transcript pp. 78 - 79, ll. 24 – 22). When asked about Exhibit K, ST[Redacted] testified that his initials appear as the employee who changed the inventory for the part in question. His initials appear on every inventory change regardless of which employee made the change. I find that based on this testimony, it is impossible to determine with any probability if Claimant made the inventory change from T1845 to the T1829 distributor as implied by Respondents.

17. ST[Redacted] testified that he could have accommodated the restrictions that Claimant had of no lifting, carrying, pushing or pulling greater than 5 pounds, clerical work had he not been terminated. (Transcript pp. 100 to 101, ll. 25 – 4). ST[Redacted] did not actually offer any modified job to Claimant within these restrictions.

18. Claimant received unemployment benefits of $426 per week beginning 24 days prior to the hearing. Claimant was uncertain of the period the unemployment benefits covered.

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[2] ST[Redacted] said this document came from Claimant's personnel file, but did not provide any testimony that the signature on the form was the Claimant's.

CONCLUSIONS OF LAW

A. Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

B. Temporary Total Disability

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." A claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the

separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

It is well established that a claimant who voluntarily resigns his job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (April 24, 2002). I conclude that on Claimant's testimony, which is credible, Claimant did not voluntarily resign his job.

Claimant proved that he was unable to return to work due to his restrictions and is entitled to temporary disability beginning on November 3, 2022. Following his treatment at Concentra on November 3, 2023 he received restrictions which prevented him from performing his usual job duties. He was not offered modified job duties following the imposition of these restrictions.

Respondents have failed to sustain their burden of proof that Claimant was responsible for his termination of employment. I find the Claimant's testimony regarding the permissibility of taking parts home without first billing themselves to be credible. Due to the inaccurate inventory records and lack of persuasive direct evidence that Claimant intended to take the distributor without paying for it, I conclude that Claimant was not responsible for his termination. I also conclude that Respondents' Exhibit F is suspect since it does not contain Claimant's name on the document and Claimant denies that it contains his signature, despite the testimony from ST[Redacted] that the document came from his personnel file. It is also questionable from the perspective that it contains many rules that are unrelated to removal of product from the stores if it was intended to primarily address the missing inventory from the RF[Redacted] store, as testified by ST[Redacted]. I conclude that it does not credibly prove that Claimant was prohibited from removing any parts from the store without an invoice. Claimant's testimony regarding the routine practice of routinely taking parts home and then later returning the part or paying for it to be more credible.

ORDER

It is therefore ordered that:

1. Claimant is entitled to TTD from November 3, 2022 until terminated by law.

2. The award of TTD is subject to any applicable offset including unemployment benefits.

3. Respondents are liable for interest at the rate of 8 percent per annum on all benefits not paid when due.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 24, 2023

Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-131-773-003

ISSUE

Whether Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent Spinal Cord Stimulator (SCS) implant as requested by Authorized Treating Physician (ATP) Charles Sisson, M.D. will be reasonably necessary to relieve the effects of her July 18, 2019 admitted industrial injury or prevent further deterioration of her condition.

FINDINGS OF FACT

1. Claimant worked for Employer as a teacher's aide for special needs children. On July 18, 2019 Claimant was on a field trip with students. She was playing miniature golf with a seven-year-old buy. The child threw a golf ball at Claimant that struck her on the right cheek. He then punched her in the chest and right wrist. Claimant put her hands up to protect herself but was struck on the wrist five or six times. She immediately noticed pain in her face and right wrist, and later developed pain in her chest.

2. Later on July 18, 2019 Claimant visited UCHealth Urgent Care for an examination. Her right wrist was tender, swollen, and exhibited limited range of motion. X-rays of Claimant's right wrist did not show any evidence of fracture or dislocation.

3. Claimant subsequently received medications and underwent physical therapy. Although her face and chest pain resolved after approximately one month, she continued to suffer right wrist symptoms.

4. On August 19, 2019 Claimant visited Timothy Prater, M.D. at Front Range Orthopedics and Spine for an evaluation of her right wrist. Claimant reported moderate to severe right wrist pain that felt dull and achy. Although Claimant had been using a wrist splint, movement aggravated her symptoms. Dr. Prater assessed possible Complex Regional Pain Syndrome (CRPS) in the absence of objective testing. He specified that Claimant exhibited significant pain that was out of proportion to physical findings with profound hypersensitivity. Dr. Prater prescribed medications and recommended continued physical therapy.

5. After additional physical therapy and diagnostic testing, Claimant visited ATP Eric Shoemaker, D.O. at Ascent Medical Consultants on September 17, 2019. Dr. Shoemaker reviewed Claimant's medical records and conducted a physical examination. He noted that Claimant's right wrist MRI demonstrated only some soft tissue edema along the dorsum of the wrist in the region of the blunt impact. Examination demonstrated allodynia without evidence of pseudomotor changes. A triple bone scan revealed some findings consistent with CRPS. Dr. Shoemaker recommended desensitization training

exercises in addition to continued physical therapy. He also suggested QSART and objective CRPS testing.

6. Claimant was subsequently diagnosed with CRPS. She underwent stellate ganglion blocks on November 21, 2019, January 16, 2020, and March 12, 2020. Based on the success of the first two injections, there was discussion of a possible Spinal Cord Stimulator (SCS) trial.

7. Claimant received psychological care and cognitive behavioral therapy for her adjustment disorder with mixed anxiety, depressed mood and pain. She was ultimately referred to psychiatry for her Post Traumatic Stress Disorder (PTSD). An initial psychiatric evaluation was completed March 3, 2020.

8. On May 18, 2020 Claimant attended a telehealth evaluation with ATP Charles Bradley Sisson, M.D. He diagnosed Claimant with CRPS and chronic pain syndrome. Dr. Sisson recommended an SCS trial. He discussed the risks and benefits of an SCS trial with Claimant and answered her questions.

9. On May 19, 2020 Dr. Sisson requested authorization for a SCS trial. Respondents denied the request.

10. On June 23, 2020 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian determined Claimant's testing was not consistent with a diagnosis of CRPS. Furthermore, he reasoned that, even if Claimant suffers from CRPS, a SCS is not warranted. Dr. Cebrian explained that Claimant is quite functional and does not meet the clinical indications for SCS placement based on her low pain levels and good functional activities. He also commented that implantation of an SCS is a major surgery with possible complications.

11. On August 6, 2020 Claimant reached Maximum Medical Improvement (MMI) for her July 18, 2019 industrial injuries. On August 17, 2020 Claimant received a 4% psychological impairment rating from Gary Gutterman, M.D.

12. On August 13, 2020 Claimant returned to Dr. Shoemaker for an examination. After explaining that Claimant satisfied the criteria for a CRPS diagnosis under the Colorado Division of Workers' Compensation Medical Treatment Guidelines (*Guidelines*), he referenced that Robert Watson, M.D. disagreed with the diagnosis. Dr. Shoemaker then noted that the question of whether Claimant suffers from CRPS is distinct from whether a SCS trial is appropriate. He explained that Claimant "clearly has significant and functionally limiting chronic upper extremity pain that has been recalcitrant to all forms of conservative care. A spinal cord stimulator trial is appropriate and reasonable in this setting regardless of the presence or absence of CRPS."

13. On October 1, 2020 Dr. Shoemaker determined that Claimant should have received an impairment rating for her CRPS. He thus assigned an 8% whole person impairment. Claimant's maintenance medical care included medications and psychiatric follow-up with Dr. Gutterman. Dr. Shoemaker also continued to recommend a SCS trial.

14. On December 10, 2020 Claimant returned to Dr. Shoemaker for an evaluation. Dr. Shoemaker reiterated that Claimant was a candidate for a SCS trial based on her "functionally limiting chronic upper extremity pain that has been recalcitrant to all forms of conservative care." He continued to recommend a SCS trial "as has been recommended and offered by Dr. Sisson though this has apparently been denied by the insurance carrier."

15. Respondent challenged Claimant's impairment rating and sought a Division Independent Medical Examination (DIME).

16. On February 4, 2021 Claimant underwent a DIME with David Orgel, M.D. Dr. Orgel determined that she satisfied the criteria for CRPS based on a positive bone scan and a stress thermogram. He also remarked that Claimant's good response to sympathetic blocks was suggestive of CRPS. Dr. Orgel noted that Claimant's activity level was affected by her pain complaints, especially with more extensive use of her right hand such as baking or making crafts. He reasoned that Claimant reached MMI on August 6, 2020. Dr. Orgel agreed with the 8% whole person impairment rating for CRPS assigned by Dr. Shoemaker and the 4% psychological impairment rating given by Dr. Gutterman.

17. Based on Claimant's limited ability to engage in hand-intensive activities, Dr. Orgel concluded a SCS trial was reasonable. He explained that "if she is fully counseled on the pros and cons of the spinal cord stimulator a trial is reasonable. She should have significant improvement in function not pain related to this intervention for it to be placed permanently." He noted that Claimant's condition precluded hand-intensive activities. However, based on her overall improvement, he questioned "whether she would really benefit from the spinal cord stimulator."

18. On August 3, 2021 Claimant visited Dr. Sisson for an evaluation. Dr. Sisson recounted that he discussed treatment options with Claimant including a SCS trial implant for her CRPS. He then referred Claimant for a psychological evaluation prior to a SCS trial. Dr. Sisson specifically noted "[t]enatively consider SCS however need to rule out any secondary gain issues with pre op clinical psyche formal evaluation."

19. In March of 2022 Respondent approved Claimant's request for a SCS trial. Dr. Sisson subsequently placed the SCS and Claimant commenced the trial.

20. On April 15, 2022 Claimant attended a permanent SCS pre-op call with Dr. Sisson. He remarked that Claimant had obtained approximately 80-90% symptom-relief with the SCS trial. Dr. Sisson discussed the risks and benefits of a permanent SCS with Claimant. He then sought authorization for placement of a permanent SCS.

21. Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent SCS implant as requested by ATP Dr. Sisson is reasonably necessary to relieve the effects of her July 18, 2019 admitted industrial injury or prevent further deterioration of her condition. Initially, Claimant injured her right wrist while on a field trip with students. She received

conservative medical care that did not relieve her symptoms. Objective testing subsequently revealed Claimant suffered from CRPS.

22. On May 19, 2020 ATP Dr. Sisson sought authorization for a SCS trial but Respondents denied the request. On August 13, 2020 Dr. Shoemaker noted that the question of whether Claimant suffers from CRPS is distinct from whether a SCS trial is appropriate. He explained that Claimant "clearly has significant and functionally limiting chronic upper extremity pain that has been recalcitrant to all forms of conservative care. A spinal cord stimulator trial is appropriate and reasonable in this setting regardless of the presence or absence of CRPS." On December 10, 2020 Dr. Shoemaker continued to recommend an SCS trial "as has been recommended and offered by Dr. Sisson though this has apparently been denied by the insurance carrier." Based on Claimant's limited ability to engage in hand-intensive activities, DIME Dr. Orgel also concluded a SCS trial was reasonable. He explained that "if she is fully counseled on the pros and cons of the spinal cord stimulator a trial is reasonable. She should have significant improvement in function not pain related to this intervention for it to be placed permanently."

23. On August 3, 2021 Dr. Sisson referred Claimant for a psychological evaluation. In March of 2022 Respondents approved Claimant's request for an SCS trial and Dr. Sisson placed the device. On April 15, 2022 Dr. Sisson remarked that Claimant had obtained approximately 80-90% relief during the trial. He then sought authorization for placement of a permanent SCS.

24. In contrast to the opinions of ATP's Dr. Sisson and Dr. Shoemaker as well as DIME Dr. Orgel endorsing a SCS trial, Dr. Cebrian reasoned that, even if Claimant suffers from CRPS, a SCS is not warranted. Dr. Cebrian explained that Claimant is quite functional and does not meet the clinical indications for SCS placement based on her low pain levels and good functional activities. He also commented that implantation of an SCS is a major surgery with possible complications.

25. Despite Dr. Cebrian's opinion, the record reveals that Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent SCS will be reasonably necessary to relieve the effects of her industrial injury or prevent further deterioration of her condition. The record reveals that Claimant received conservative care that did not reduce her CRPS pain or improve her right arm function. Specifically, Claimant suffers functionally limiting chronic upper extremity pain that has been refractory to conservative care. As noted by Dr. Sisson, Claimant obtained approximately 80-90% relief during the SCS trial. Based on Claimant's dramatic symptom-relief, there is much less of an impediment in her functional ability to engage in hand-intensive activities. Because the SCS trial was successful, implantation of a permanent SCS is warranted. Accordingly, Claimant's request for implantation of a permanent SCS is granted.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of her condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988).

5. The *Guidelines* were propounded by the Director pursuant to an express grant of statutory authority. *See* §8-42-101(3.5)(a)(II), C.R.S. It is appropriate for an ALJ to consider the *Guidelines* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); *see Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying diagnostic criteria). The *Guidelines* are regarded as accepted professional standards of care under the Workers' Compensation Act. *Rook v. Indus. Claim Appeals*

Off., 111 P.3d 549 (Colo. App. 2005). In *Hall v. Indus. Claim Appeals Off.*, 74 P.3d 459 (Colo. App. 2003) the court noted that the *Guidelines* shall be used by health care practitioners when furnishing medical treatment under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S. Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

6. The *Guidelines* specify that a "SCS may be most effective in patients with CRPS I or II who have not achieved relief with oral medications, rehabilitation therapy, or therapeutic nerve blocks, and in whom the pain has persisted for longer than 6 months." W.C.R.P. 9(H)(1)(a). The *Guidelines* provide a list of surgical indications for a SCS. A SCS is appropriate for patients who exhibit the following:

> persistent functionally limiting radicular pain greater than axial pain who have failed conservative therapy including active and/or passive therapy, pre-stimulator trial psychiatric evaluation and treatment, medication management, and therapeutic injections.

W.C.R.P. 17 Exhibit 9(H)(1)(c). Moreover, before surgical intervention, the patient and treating physician should identify functional goals and the likelihood of improving the ability to perform activities of daily living or work duties. W.C.R.P. 17 Exhibit 9(H).

7. The *Guidelines* note that "[i]t is particularly important that patients meet all of the indications before a permanent neurostimulator is placed because several studies have shown that workers' compensation patients are less likely to gain significant relief than other patients." W.C.R.P. 17 Exhibit 9(H)(1)(a). A trial is considered successful if the patient experiences a 50% decrease in radicular or CRPS pain and "demonstrates objective functional gains or decreased utilization of pain medications." Functional improvement includes: "standing, walking, positional tolerance, upper extremity activities, increased social participation, or decreased medication use." W.C.R.P. 17 Exhibit 9(H)(1)(c)(iii).

8. As found, Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent SCS implant as requested by ATP Dr. Sisson is reasonably necessary to relieve the effects of her July 18, 2019 admitted industrial injury or prevent further deterioration of her condition. Initially, Claimant injured her right wrist while on a field trip with students. She received conservative medical care that did not relieve her symptoms. Objective testing subsequently revealed Claimant suffered from CRPS.

9. As found, on May 19, 2020 ATP Dr. Sisson sought authorization for a SCS trial but Respondents denied the request. On August 13, 2020 Dr. Shoemaker noted that the question of whether Claimant suffers from CRPS is distinct from whether a SCS trial is appropriate. He explained that Claimant "clearly has significant and functionally limiting chronic upper extremity pain that has been recalcitrant to all forms of conservative care. A spinal cord stimulator trial is appropriate and reasonable in this setting regardless of the presence or absence of CRPS." On December 10, 2020 Dr. Shoemaker continued to recommend an SCS trial "as has been recommended and offered by Dr. Sisson though

this has apparently been denied by the insurance carrier." Based on Claimant's limited ability to engage in hand-intensive activities, DIME Dr. Orgel also concluded a SCS trial was reasonable. He explained that "if she is fully counseled on the pros and cons of the spinal cord stimulator a trial is reasonable. She should have significant improvement in function not pain related to this intervention for it to be placed permanently."

10. As found, on August 3, 2021 Dr. Sisson referred Claimant for a psychological evaluation. In March of 2022 Respondents approved Claimant's request for an SCS trial and Dr. Sisson placed the device. On April 15, 2022 Dr. Sisson remarked that Claimant had obtained approximately 80-90% relief during the trial. He then sought authorization for placement of a permanent SCS.

11. As found, in contrast to the opinions of ATP's Dr. Sisson and Dr. Shoemaker as well as DIME Dr. Orgel endorsing a SCS trial, Dr. Cebrian reasoned that, even if Claimant suffers from CRPS, a SCS is not warranted. Dr. Cebrian explained that Claimant is quite functional and does not meet the clinical indications for SCS placement based on her low pain levels and good functional activities. He also commented that implantation of an SCS is a major surgery with possible complications.

12. As found, despite Dr. Cebrian's opinion, the record reveals that Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent SCS will be reasonably necessary to relieve the effects of her industrial injury or prevent further deterioration of her condition. The record reveals that Claimant received conservative care that did not reduce her CRPS pain or improve her right arm function. Specifically, Claimant suffers functionally limiting chronic upper extremity pain that has been refractory to conservative care. As noted by Dr. Sisson, Claimant obtained approximately 80-90% relief during the SCS trial. Based on Claimant's dramatic symptom-relief, there is much less of an impediment in her functional ability to engage in hand-intensive activities. Because the SCS trial was successful, implantation of a permanent SCS is warranted. Accordingly, Claimant's request for implantation of a permanent SCS is granted.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for implantation of a permanent SCS is granted.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it

within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 24, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-197-757

ISSUES

I. Whether Respondents proved by a preponderance of the evidence the General Admissions of Liability ("GALs") filed by the Respondents may be withdrawn.

II. Whether Claimant proved by a preponderance of the evidence the left hip replacement requested by the authorized treating medical providers at Panorama Orthopedics is reasonable, necessary and causally related treatment.

FINDINGS OF FACT

1. Claimant is 74 years of age. Claimant has worked for Employer for three years as a delivery specialist. Claimant's job entails driving a truck and delivering parts to customers.

2. Claimant testified that while working for Employer on November 3, 2021, he stepped out of his delivery truck, walked a few feet, and slipped on ice, which caused him to do the splits. Claimant testified he stood up and again slipped and did the splits. Claimant testified he reported the incident to his manager that same day and requested to see a doctor. He testified Employer made an appointment for him for November 8, 2021. Claimant continued to work leading up to his initial appointment.

3. Claimant presented to authorized provider AFC Urgent Care on November 8, 2021. He completed a Worker's Compensation Registration Form for AFC Urgent Care on that date. In the section titled "Specific Details of Accident" Claimant wrote "Stepped Wrong." (R. Ex. K). Claimant testified he wrote he "stepped wrong" on this document because that was what essentially happened. Claimant reported to Devin Pinaroc, NP that he "stepped wrong" at work twice last Wednesday and that his pain was gradually worsening. Claimant complained of pain in the left groin radiating to the anterior left thigh along with some pain below the left gluteus. NP Pinaroc noted there was no trauma or fall. On examination, NP Pinaroc noted decreased range of motion in the right hip with pain. His assessment was unspecified injury of the left hip. NP Pinaroc completed a Physician's Report of Worker's Compensation Injury stating that the objective findings were consistent with a history and/or work-related mechanism of injury/illness. Claimant was prescribed a muscle relaxer and released to modified duty.

4. On November 9, 2021 [Redacted, hereinafter MM] completed an Employer's First Report of Injury in which she listed the body part affected listed as "abdomen" and the nature of the injury/illness as "strain". She wrote, "TM slipped on gravel, didn't fall to the ground. TM almost did the splits, strained his L leg/upper thigh." (R. Ex. J). Claimant testified he did not provide that information to MM[R and that and the First Report of Injury is inaccurate.

5. Claimant returned to AFC Urgent Care on November 15, 2021 with continued left hip and left leg pain. On examination NP Pinaroc noted decreased range of motion to left hip and tenderness to touch of the iliac crest. Claimant underwent an intra-articular injection to his left hip. His temporary work restrictions were increased to no lifting, no crawling, and short drives. NP Pinaroc referred Claimant for a left hip MRI.

6. On November 29, 2021 NP Pinaroc noted that a recent MRI of the left hip showed degenerative changes of the hip, strains of muscles in the left hip/pelvis/glute, and 6cm aneurysm in L common iliac artery. He noted the MRI showed grade 2 and grade 1 strain of the muscle in hip/glute. Exam again demonstrated decreased range of motion in the left hip. NP Pinaroc assessed Claimant with an aneurysm of the iliac artery and strain of muscle, fascia and tendon of the left hip, and unspecified injury of the left hip. He referred Claimant to the Vascular Institute of the Rockies for evaluation of the aneurysm of the iliac artery.

7. Claimant saw Lauren Eller, PA-C at Vascular Institute of the Rockies on December 2, 2021. She noted a history of abdominal aortic aneurysm repair in May 2016. PA-C Eller noted that approximately one month ago Claimant slipped and fell onto his left leg. Claimant complained of left hip pain secondary to an iliopsoas strain during the fall. PA-C Eller's assessment was an abdominal aortic aneurysm without rupture and aneurysm of the left iliac artery. She sent Claimant for CT scan of the abdomen and pelvis for surgical disposition.

8. Claimant presented to Alan Y. Synn, M.D. at Vascular Institute of the Rockies on December 13, 2021. Dr. Synn noted that the CT scan showed a large left distal common iliac artery aneurysm, small right distal common iliac artery aneurysm and an incidental pancreatic mass. He scheduled Claimant for surgery for the aneurysm.

9. Claimant continued to report left hip and groin pain. He underwent a second intra articular injection to his left hip on January 3, 2022.

10. On February 8, 2022 Claimant underwent a bifurcated iliac endograft repair of left common iliac artery aneurysm, performed by Dr. Synn.

11. On February 16, 2022 Claimant saw Kevin Ralls, FNP at AFC Urgent Care. He complained of pain in his left hip and left knee. FNP Ralls noted a prior medical history of knee replacement. He referred Claimant to an orthopedic surgeon for evaluation of the left hip.

12. On the referral of FNP Ralls, Claimant presented to Abby Price PA-C at Panorama Orthopedics & Spine Center on February 25, 2021. PA-C Price noted Claimant's pain began in September 2021, at which time he had an aneurysm and sustained a fall at work. Claimant reported pain in his groin radiating into his buttock. He stated he had no pain prior to his work injury. PA-C Price noted that x-rays of the left hip and pelvis demonstrated severe narrowing of the femoroacetabular joint with an area of what appeared to be avascular necrosis at the rim of the acetabulum within the femoral head. Left knee x-rays demonstrated a stable left knee total arthroplasty. PA-C Price

diagnosed Claimant with primary osteoarthritis of left hip and avascular necrosis of bone of the left hip. She wrote,

> Given the patient's acute groin pain following his injury at work in September 2021, I would recommend that we proceed with left total hip arthroplasty in the future. With the acuity of his symptoms we also discussed the option of an ultrasound guided intra-articular injection into the left hip to postpone operative intervention, providing that he receives good symptom relief from this injection. He will follow up with Dr. Patel following this injection to discuss further treatment options. He will maintain his current work restrictions per his work comp provider.

(Cl. Ex. 8, p. 160).

13. On March 15, 2022 Claimant underwent an intraarticular cortisone injection of the left hip for osteoarthritis.

14. Claimant returned to PA-C Price on April 1, 2022. He reported that his groin pain had fully resolved following the injection on 3/15/2022, but that he developed a new pain in his lower back and left SI joint. Given Claimant's recent CT scan showing degenerative changes of the lumbar spine and his prevalent symptoms, PA Price recommended that Claimant follow-up with a member of spine team for evaluation of the lumbar spine. She noted, "We discussed that we can continue to perform cortisone injections into his left hip joint every 4+ months providing that he experiences symptoms relief for 4 months or longer. He will likely be a candidate for a left total hip arthroplasty in the future." (Cl. Ex. 8, p. 170).

15. On July 20, 2022 Claimant reported to FNP Ralls that physical therapy was helping a little and that he reported feeling stronger in the hip and could now stand without needing the arm rest assistance and could stretch a little bit further.

16. At a follow-up evaluation with PA-C Price on July 29, 2022, she noted that the last injection performed on 3/15/2022 provided Claimant with significant symptom relief but only for two days. Claimant had been attending physical therapy and performing home exercises without significant improvement and wanted to discuss having a left total hip arthroplasty. X-rays of left hip demonstrated end-state joint space narrowing of the femoroacetabular joint with collapse of the femoral head. PA-C Price's impression was grade IV osteoarthritis of the left hip.

17. On July 29, 2022 Claimant was scheduled to undergo a left total hip arthroplasty on October 7, 2022 with Nimesh Patel, M.D.

18. On September 30, 2022 Timothy S. O'Brien, M.D. performed an Independent Medical Evaluation ("IME") at the request of Respondents. Regarding the mechanism of injury, Dr. O'Brien noted, "on November 3, 2021, he was walking on [Employer's] icy parking lot and slipped twice. He did the splits both times and went to the ground both times. He states at the fall was witnessed not only by customers but also by fellow staff members." (R. Ex. A, p. 001). Claimant reported that he was completely pain free prior

to the incident and never had treatment for any left hip pain. Dr. O'Brien examined Claimant and reviewed medical records, including undated radiographs on Claimant's telephone of what appeared to be bone-on-bone contact and a significant area of osteolysis or bony defect in the superior femoral head on the left hip.

19. Dr. O'Brien opined that Claimant did not sustain any left hip injury and that Claimant's onset of left hip pain while at work on November 3, 2021 was a manifestation of his personal health. Dr. O'Brien explained that the work incident was minor. He wrote,

> The only type of injuries to accelerate and (*sic*) osteoarthritic hip and result in the premature need for a total hip replacement are those that cause and (*sic)* intra articular fracture or a dislocation. Merely slipping on the ice and having one leg move laterally is not an injury mechanism. There's simply not enough energy generated as the result of this incident such that its dissipation into the hip joint would overcome the injury threshold and result in new tissue breakage or yielding. Therefore, no injury could occur.

(R. Ex. A, p. 006).

20. Dr. O'Brien opined that it was expected for Claimant to experience hip pain when his left leg moved laterally after slipping, considering Claimant's significant pre-existing osteoarthritis and avascular necrosis of the left hip. Dr. O'Brien explained that it takes years for such radiographic appearance to become evident. Dr. O'Brien stated that osteoarthritis always manifest itself with gradually progressive symptoms over the course of years. He opined that, while it is possible Claimant truly did not note left hip pain until his slipping episode on November 3, 2021, it was so unlikely in his experience that it is virtually impossible. Dr. O'Brien noted that records from Panorama prove Claimant has a long-standing history of osteoarthritis of multiple musculoskeletal areas in his body, including age-appropriate degenerative spondylolisthesis of his low back, a total ankle replacement, and a total knee replacement. He opined that Claimant thus has a genetic predilection for developing arthritis in his musculoskeletal joints. Dr. O'Brien noted that it was highly likely prior medical records mentioned some history of prior left hip pain.

21. Dr. O'Brien further opined that, even if Claimant did not have hip pain until November 3, 2021, the reason for total hip replacement is due to Claimant's longstanding degenerative process and not the November 3, 2021 work incident. Dr. O'Brien opined that Claimant was an inconsistent historian, noting that at different times Claimant reported falling to the ground and not falling to the ground. He concluded that Claimant was a candidate for a left total hip replacement long prior to the work incident, which did not accelerate or aggravate Claimant's underlying arthritis or the need for surgery. Dr. O'Brien opined Claimant is a candidate for a total hip replacement but that the need for surgery is unrelated to the work incident.

22. On October 19, 2022 Claimant was evaluated by FNP Ralls at AFC Urgent Care, who still gave the opinion that Claimant's mechanism of injury was work-related, noting:

> Pt states that he received results of Independent Ortho review which suggests that he should not have his recommended THA covered by WC ins Pt was able to bring records in for copy as they were not in the chart initially. The rationale by the reviewing provider was that the pt likely had OA/DJD prior to his injury and since that is a chronic process, it is not part of his injury. Pt still doing PT. …

(Cl. Ex. 6, pp.117-119).

23. On October 27, 2022 Claimant filed an Application for Hearing requesting left hip replacement requested by ATP Abby Price at Panorama Orthopedics.

24. On November 23, 2022 Respondents filed a Response to the October 27, 2022 Application for Hearing challenging the requested surgery and moving to withdraw their previously filed GALs.

25. Respondents filed two general admissions on the claim. One was filed on March 3, 2022, and the other was filed on October 10, 2022. As reflected in these general admissions, temporary total disability and medical benefits were admitted. Respondents paid $11,584.62 in temporary total disability between the time of February 8, 2022 through the period of August 15, 2022.

26. At a physical therapy appointment with & Sport Physical Therapy on December 27, 2022, Claimant reported that he hurt his hip while playing indoor basketball with his grandson. Claimant reported that he checked his grandson with his left hip and pivoted and was very sore.

27. On February 15, 2023 Claimant saw Justin Burkhardt, PA at AFC Urgent Care reporting persistent left hip/groin symptoms. He was doing well with current work restrictions. Exam revealed mild diffuse tenderness to palpation/stiffness on range of motion and ambulation of the left hip. Claimant ambulated with the assistance of a cane. Claimant was to continue physical therapy and modified duty.

28. Claimant testified at hearing that prior to the work injury, he had no left hip complaints, limitations or treatment. Claimant testified that his 2009 work injury did not involve his hips. He testified that he has been experiencing pain since the work injury and now walks with a cane, which he did not use prior to the work injury. Claimant stated he experienced only a couple days of relief from the injections. He testified he understands the risk of the recommended surgery and wants to undergo the surgery to relieve his pain and improve his function.

29. Dr. O'Brien testified at hearing on behalf of Respondents as Level II accredited expert in orthopedic surgery. He testified consistent with his IME report and continued to opine Claimant did not sustain any injury to his left hip on November 3, 2021 and that the need for a hip replacement is not work-related. Dr. O'Brien testified that Claimant's diagnoses are avascular necrosis and severe end-stage arthritis, which he explained takes many months or years to develop and are not work-related. Dr. O'Brien testified that to confirm a work-related injury, we would need imaging obtained right before and

after the work injury to confirm any objective changes. He explained that intraarticular fractures and dislocations are the only events traumatic enough to accelerate the Claimant's condition. Dr. O'Brien testified that Claimant's initial examination did not suggest a true injury in terms of tissue breaking or yielding. He testified that prior aneurysms, multiple arthritic joints and replacements indicate a genetic predilection unrelated to Claimant's employment. Dr. O'Brien opined that there was no objective contemporaneous evidence of any injury. He testified that Claimant was a candidate for hip replacement prior to the work incident.

30. Dr. O'Brien further testified that the recommended surgery is reasonable and indicated. He acknowledged that there are no medical records indicating prior left hip complaints and that Claimant was able to perform his job prior to the work incident. Dr. O'Brien testified that the November 29, 2021 MRI was likely overread as muscle strains and, even if Claimant did sustain muscle strains as a result of the November 3, 2021 work incident, there was no evidence on MRI or CT scan of any injury to the hip joint. He explained that a strain is self-healing and would not require treatment.

31. The only prior medical records offered as evidence were an October 13, 2010 Division Independent Medical Examination ("DIME") report by Stanley Ginsburg, M.D. regarding an August 10, 2009 work injury to left shoulder and left knee, and a November 16, 2017 Colorado Heart & Vascular record. Neither record documents any prior left hip complaints, diagnoses or treatment.

32. The ALJ finds the opinions of Claimant's treating providers at AFC Urgent Care and Panorama Orthopedics, as supported by Claimant's credible testimony and the medical records, more credible and persuasive than the opinions and testimony of Dr. O'Brien.

33. Respondents failed to prove it is more probable than not Claimant did not sustain a compensable work injury entitling Respondents to withdraw their GALs.

34. Claimant proved it is more probable than not the total left hip replacement recommended by the medical providers at Panorama Orthopedics is causally related to the November 3, 2021 work injury and reasonably necessary to cure and relieve its effects.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case

must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Withdrawal of an Admission of Liability

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-838-01 (ICAO, Oct. 1, 2013).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an

employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017).

Respondents argue Claimant did not sustain a compensable work injury resulting in the need for treatment. Respondents point to a "minor" mechanism of injury, inconsistencies in Claimant's reports regarding the mechanism of injury, and Claimant's significant pre-existing degenerative conditions. As found, the preponderant evidence does not establish Claimant did not sustain a compensable work injury. The ALJ is not persuaded that Claimant's description of the mechanism of injury as documented in the records and testified by Claimant is so disparate that it completely undermines his credibility. Claimant credibly testified that he did not have any prior left hip complaints, treatment or limitations. No persuasive evidence was offered to the contrary. Assuming, arguendo, Claimant did suffer from some form of prior left hip pain, he was not undergoing any treatment and able to perform his job duties without restrictions for multiple years leading up to the work injury. There is no evidence of a prior recommendation for left hip treatment or surgery.

Claimant's treating providers at AFC Urgent Care have opined that Claimant's condition and need for treatment are work-related. While Claimant has significant pre-existing left hip conditions, the totality of the evidence demonstrates it is more likely than not the work injury caused disability and the need for treatment. Accordingly, Respondents are not entitled to withdraw their GALs.

Medical Treatment

Respondents are liable for related medical treatment that is reasonable and necessary relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S.; *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant proved it is more probably true than not the recommended total left hip replacement is causally related to the work injury and reasonably necessary to cure and relieve its effects. Claimant has undergone conservative treatment in the form of diagnostic injections and physical therapy with no significant relief. The recommended surgery is to relieve the ongoing symptoms in Claimant's left hip, which were caused by the work injury and have been present since such time. While Dr. O'Brien disagrees the surgery is causally related, he did opine that the surgery is reasonable and indicated. The opinions of Claimant's treating providers regarding the causal relatedness of Claimant's condition are more credible and persuasive than that of Respondents' IME physician Dr. O'Brien in this matter. Based on the totality of the evidence, Claimant has met his burden to prove that the recommended left hip surgery is reasonably necessary and causally related medical treatment.

ORDER

It is therefore ordered that:

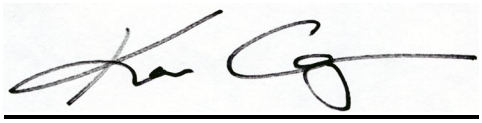
1. Respondents failed to prove by a preponderance of the evidence Claimant did not sustain a compensable work injury. Respondents' request to withdraw the their General Admissions of Liability is denied and dismissed.

2. Claimant proved preponderance of the evidence that the recommended left hip replacement is reasonable, necessary and causally related to Claimant's November 3, 2021 work injury. Respondents are liable for the recommended surgery.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 25, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-150-929-002

ISSUES

- Whether Respondents have proven by a preponderance of the evidence that Claimant committed a willful violation of a safety rule pursuant to Section 8-42-112(1)(b) that resulted in his industrial injury?

FINDINGS OF FACT

1. Claimant was involved in a motor vehicle accident ("MVA") on October 14, 2020 in the course and scope of his employment with Employer. Claimant was taken from the accident scene to St. Mary's Hospital Emergency Room ("ER") via ambulance. At the ER, Claimant reported he was driving his semi-trailer on 1-70 at about 70 miles per hour and he did not remember what happened, but he went off the road, flipped and the vehicle caught on fire. Claimant was referred for a computed tomography ("CT") scan of his cervical spine and head along with a CT scan of his chest and abdomen. Claimant's urine drug screen was positive for opiates and benzodiazepines, but Claimant reported he had a prescription for these due to prior back pain from a week ago.

2. According to the police report, Claimant was the driver of the truck and lost control of the truck and raveled off the right side of the road, colliding with a guardrail and a concrete barrier along with a light pole. The trailer rolled ¼ times and became disconnected from the semi-truck before coming to a final rest on its right side on the right side of the roadway. The accident report indicates that the semi caught fire and came to a final rest facing east inside a tunnel. According to a witness report, the semi drifted to the right and struck the guard rail and concrete wall, then bounced back toward the left lane before the trailer swiped the wall causing it to slam into the side of the tunnel.

3. Claimant completed a "Driver's Statement and Exchange of Information" form from the Colorado State Patrol that stated, "No clue what happened." According to the Palisade Police Department Emergency Medical Service ("EMS") report, Claimant reported he was taking a drink from his Pepsi and then he hit the brakes and the truck crashed. The EMS report further indicated that Claimant reported that all of his medications were in his truck.

4. Claimant was taken to St. Mary's Hospital Emergency Room ("ER") where the responding Colorado State Patrol Officer, Officer [Redacted, hereinafter NN], spoke to Claimant. Claimant reported to Officer NN[Redacted] that he had not consumed any alcohol or illegal drugs, but had taken a lot of medications. Officer NN[Redacted] noted that Claimant's speech was slurred and incoherent and Claimant was falling asleep between talking to Officer NN[Redacted].

5. Officer [Redacted, hereinafter JN] secured a blood draw to test for medications at the emergency room. According to the results of the blood draw, Claimant had carisoprodol, meprobearnate, 7-Aminoclonazepam, clonazepam, alprazolam and hydrocodone in his system. No alcohol or illegal drugs were noted in Claimant's system. The blood draw was taken a bit under 2 hours after the MVA.

6. According to Claimant's medical records from Primary Care Partners, Claimant was being prescribed alprazolam, amlodinpine, clonazelpam, fluticasone, hydrocodone-acetaminophen, ibruprofen, narcan, omeprazole, rizatriptan benzoate, sumatriptan succinate, and tizanidine. Claimant was not prescribed carisoprodol by Primary Care Partners. Ms. Lintemoot, a senior forensic scientist for the Colorado Bureau of Investigation testified at hearing that she did not see a prescription in Claimant's medical records for the carisoprodol.

7. On October 15, 2020, following the MVA, Claimant's wife called Primary Care Partners and reported that all of Claimant's medications were in the cab of his truck and had caught fire and requested that the medications be refilled.

8. Testimony was presented from Ms. Lintemoot at hearing. Ms. Lintemoot testified that Claimant's levels of medications were on the upper therapeutic level according to the results of the blood draw. Ms. Lintemoot testified that based on the levels demonstrated in the blood draw, if Claimant had taken only the prescription drugs the day prior to the accident, and not the day of the accident, Claimant would have had a lethal level of Clarisoprodal in his system. Ms. Lintemoot testified she reviewed the witness statements which described Claimant's vehicle drifting out of his land as it went into the tunnel and struck a stationary object (the concrete wall). Ms. Lintemoot opined that this would be consistent with a driver operating a motor vehicle after consuming central nervous system depressants. Ms. Lintemoot testified on cross-examination that she could not testify conclusively as to what caused the accident.

9. Ms. Lintemoot testified that Claimant's report that he took the medication only at bedtime was inconsistent with the instructions for taking the prescriptions from Claimant's primary care physician.

10. The medical records from Primary Care Partners establish that Claimant's wife called July 21, 2020 and reported that Claimant's new depression medication was working fine but causing Claimant to be drowsy. Claimant was advised to decrease his medication to 10mg four times per day.

11. Claimant testified at hearing in this matter that on the date of the accident, he left his house at approximately 5:00 a.m. and drove one hour and fifteen minutes to the work site at the Rifle Airport to pick up his load. Claimant denied taking medications on the date of the MVA and testified he only took the prescription drugs while off duty. Claimant testified he did not believe he had all of his medications in the cab of his truck.

Claimant testified he did not report to the emergency room that he did not know what caused the accident.

12. Claimant testified he did not know that he was not allowed to take prescription medications while operating a tractor trailer truck. Claimant testified he did receive the Employee Personnel and Safety Program from Employer. Claimant acknowledged that it was his responsibility to know the laws pertaining to federal motor carriers.

13. Claimant testified the accident occurred when the brakes on the truck locked up due to an automated braking system. Claimant testified he had complained to the employer about the automated braking system prior to the MVA, as the braking system would be applied on any bump in the road.

14. Claimant presented the testimony of Dr. Guess, a pharmacist. Dr. Guess testified he had reviewed the hospital reports and Dr. Scott's IME report. Dr. Guess testified that based on the medication levels contained in the blood draw, he could not say when Claimant took the medications. Dr. Guess testified that the fact that Claimant's hydrocodone level was significantly his, but there was no detection of hydromorphone (which is metabolized from hydrocodone), he could not explain why Claimant's hydrocodone levels were so significantly high.

15. Dr. Guess testified that it was his opinion that the results of the blood test showed medication levels consistent with when Claimant said he had taken the medications. Dr. Guess noted that Claimant's high levels of hydrocodone were not consistent with Claimant's testimony that he took the medications the night before, but noted that he would trust the patient's report of having taken the medication the night before. Dr. Guess further testified that while the level of the other prescription drugs were not necessarily consistent with Claimant's testimony of when he consumed the drugs, he could not state that Claimant would have been impaired at the time of the MVA.

16. On cross-examination, Dr. Guess noted that based on the results of the blood draw, Claimant was not within the therapeutic level with regard to the hydrocodone. Dr. Guess testified that this did not mean that the use of hydrocodone affected Claimant's level of consciousness. Dr. Guess testified that the level of hydrocodone would most likely not be intoxicating for an opioid dependent user, but could be intoxicating for an opioid na'ive patient.

17. Dr. Guess further testified that the Carisoprodol levels were consistent with Claimant having taken the prescribed drugs within 10 hours of the accident and Claimant had these drugs in his system while driving, but that did not mean that Claimant was impaired at the time of the accident.

18. Respondents presented the testimony of [Redacted hereinafter DA], the terminal manager for Employer. DA[Redacted] testified that after Claimant was hired and passed a

drug test, Claimant was provided with a copy of Employer's safety handbook. DA[Redacted] testified that Employer's safety policy would have required Claimant to report to Employer any prescription drugs that represent a controlled substance Claimant was taking while employed with Employer. DA[Redacted] testified he was never made aware that Claimant was being prescribed controlled substances by his physician.

19. DA[Redacted] testified that under the Employer's safety policy, along with the Federal Motor Carrier Safety Association regulations, a driver is not allowed to operate a vehicle if he has taken a controlled substance identified as a non-scheduled I substance unless the substance is prescribed by a licensed medical practitioner who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

20. There is no credible evidence that Claimant was ever advised by a physician with Primary Care Partners, or from anywhere else, that he could safely operate a commercial motor vehicle while taking the prescribed medications. In fact, in a follow up appointment with his primary treating physician at Primary Care Partners, Dr. Hulst noted that he was unaware that Claimant was driving a semi-truck while on the medications that were prescribed to him. On that date, Claimant reported to Dr. Hulst that Claimant never takes his medication during the day or while driving and did not believe they impact his driving or function.

21. Claimant's testimony that he was not taking the medical while operating the semi-truck is found to be not credible. The ALJ credits the testimony of Ms. lintemoot that the levels of narcotic medication in Claimant's system at the time of the blood draw was inconsistent with Claimant's report of taking the medications the previous evening.

22. Notably, Claimant reported that to the EMS immediately after the accident that his medications were inside the truck when it caught on fire. Claimant's wife contacted Primary Care Partners the day after the accident and reported that all of Claimant's medications were inside the truck that had caught on fire. Claimant's testimony that he did not believe that all of his mediations were in the truck is found to be not credible in light of the reports to Primary Care Partners and the EMS after the accident. The fact that the Claimant's medications were inside the cab of his truck at the time of the accident represents further evidence that Claimant was taking the medication while operating the semi-truck. Otherwise, there would be no logical reason that Claimant would have the medications in the cab of his truck at the time of the accident.

23. The ALJ credits the testimony of Ms. Lintemoot over the testimony of Dr. Guess and Claimant and finds that Claimant violated a safety rule by consuming schedule I medications without the instruction from a licensed medical professional that the use of the medication would not adversely affect Claimant's ability to safely operate a commercial motor vehicle.

24. Claimant also argues at hearing that there is insufficient evidence that consumption of the narcotic medication led to Claimant's MVA and subsequent injury. The ALJ is not persuaded. The ALJ notes that the police reports from Officer JN[Redacted] indicate that Claimant's speech at the hospital was slurred and incoherent. The ALJ credits the testimony of Ms. Lintemoot that Claimant's presentation at the emergency room was consistent with Claimant having consumed central nervous system depressants as being credible. The ALJ further credits the testimony of Ms. Lintemoot that the description of Claimant's accident as veering out of the lane of travel and striking a stationary object as being consistent with operating a motor vehicle after consuming central nervous system depressants as being credible and persuasive and finds that Respondents have proven by a preponderance of the evidence that Claimant violated a safety rule which resulted in Claimant sustaining the injury in this case.

25. The ALJ also credits the testimony of Ms. Lintemoot and notes that the evidence establishes that Claimant had in his system carosopridol, for which Claimant did not have a prescription. The ALJ therefore finds that in addition to the prescription medications that Claimant was being prescribed, Respondents established that it is more probable than not that Claimant had also consumed a non-prescribed prescription medication at the time of the accident. The ALJ finds that the presence of non- prescribed prescriptions in Claimant's system is further credible evidence of the willfulness of Claimant's conduct.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* WC 4-559- 275 (ICAO, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimanfs conduct. *See In re Heien;* WC 5-059-799-01 (ICAO, Nov. 29, 2018). However, a safety rule that is not enforced by the employer will not be enforced by the Workers' Compensation system. *Burd v. Builder Services Group Inc.,* WC 5-085-572 (ICAO, July 9, 2019).

5. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* WC 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately per1ormed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer,* WC 4-495-198 {ICAO, Oct. 20, 2003). 'Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez,* WC 4-561-352 (ICAO, Apr. 29, 2004). An employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric,* WC 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.; see* 2 *Larson's Workers' Compensation Law,* §35.04. Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.,* 907 P.2d at 719.

6. As found, the ALJ credits the testimony of Ms. Lintemoot and finds that Respondents have established that Claimant violated a safety rule by consuming level I controlled substance medications and operated a commercial motor vehicle which led to the MVA resulting in Claimant's injuries. As found, the medical reports and accident reports entered into evidence at hearing establish that it is more probable than not that Claimant's prescription medications were in the cab of the semi-truck when the accident occurred.

7. As found, the testimony of Ms. Lintemoot that Claimant consumed prescription medications before operating the commercial vehicle is found to be credible. As found, the testimony of Ms. Lintemoot that Claimant's actions resulting in the accident, drifting out of the lane of traffic and colliding with a stationary object, are consistent with operating a motor vehicle after consuming central nervous depressants is found to be credible and persuasive.

8. Due to the fact that Respondents have established that Claimant volitionally violated a safety rule which led to Claimant's injury, Respondents may reduce Claimant's non-medical benefits by 50% pursuant to Section 8-42-112(1)(b), C.R.S.

ORDER

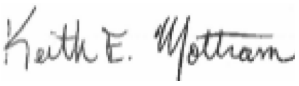
It is therefore ordered that:

1. Respondents may reduce Claimant's non-medical benefits by 50% based on Claimant's failure to follow a safety rule adopted by the employer for the saftety of the employee pursuant to Section 8-42-112(1)(b), C.R.S.request to overcome the finding of the DIME physician that Claimant is not at MMI is denied.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: May 26, 2023



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant provided clear and convincing evidence to overcome the opinion of Division Independent Medical Examination ("DIME") physician Dr. Orgel regarding maximum medical improvement ("MMI") and permanent impairment.

II. Whether Claimant proved by a preponderance of the evidence treatment of the cervical spine, thoracic spine, abdomen, vision or psychological conditions is reasonable, necessary and causally related.

III. Whether Claimant proved by a preponderance of the evidence post-MMI medical treatment he received at UC Health and with various other providers is authorized treatment.

ISSUES HELD IN ABEYANCE

Claimant endorsed permanent total disability ("PTD") as an issue on his Application for Hearing. At the start of the hearing, Claimant represented to the Court he was unprepared to proceed on the PTD issue. Over Respondents' objection, the ALJ placed the issue of PTD in abeyance.

FINDINGS OF FACT

1. Claimant is a 43-year-old male who worked for Employer as a carpenter.

2. Claimant has a prior diagnosis of bipolar disorder. On December 7, 2015, Claimant was admitted to the Medical Center of Aurora for unspecified psychosis. Marita Keeling, M.D. documented a past medical history of chronic neck pain, noting Claimant had a biking injury in 2004. She noted that, despite Claimant's chronic pain, he remained able to work as a carpenter and did not take any medication for his pain. Diagnoses included bipolar disorder, other chronic pain and cervicalgia. (*R. Ex. H*).

3. Claimant sustained an admitted industrial injury to his lumbar spine while working for Employer on November 11, 2020.

4. Claimant underwent treatment at authorized provider Concentra. On December 4, 2020 Claimant presented to Hanna Bodkin, PA-C with an injury to his lower back. Regarding the mechanism of injury, Claimant reported that while working on November 11, 2020 he leaned over, felt a pop in his lower back, and collapsed. He further reported that on December 2, 2020 he experienced another painful right lower back pop while working. No thoracic or cervical spine complaints were noted. PA Bodkin gave an

assessment of a lumbar sprain and derangement of the right sacroiliac ("SI") joint. She referred Claimant for physical therapy and an x-ray of the lumbar spine. (*R. Ex. D, Bates 25-28*).

5. Claimant underwent a lumbar x-ray on December 4, 2020, which Maximina Boutelis, M.D. interpreted. Dr. Boutelis noted findings were normal and the examination was unremarkable. (*R. Ex. I, Bates 175*).

6. Claimant began physical therapy at Concentra on December 7, 2020. Janice Scott, PT noted Claimant's chief complaint as right lumbar spine pain. PT Scott noted 20 degrees active range of motion of left thoracolumbar side bending and 15 degrees active range of motion of right thoracolumbar side bending. No thoracic or cervical spine complaints are noted. Treatment was administered to Claimant's lumbar spine. Claimant attended additional physical therapy sessions at Concentra on December 9, 11, 18, and 28, 2020, focused on Claimant's lumbar spine. (*R. Ex. D*).

7. Claimant continued to complain of low back pain to PA Bodkin at a follow-up evaluation on December 9, 2020. Claimant was worried he sustained more than just a muscle sprain. No thoracic or cervical spine complaints are noted. (*Id. at Bates 30*).

8. On December 24, 2020 Claimant presented to Carrie Burns, M.D. at Concentra with complaints of lower back pain and right SI joint pain radiating into his buttocks. Claimant reported suffering a thoracic injury with compression fractures in 2004. Exam of the thoracic spine was normal. Dr. Burns referred Claimant for a lumbar MRI and chiropractic care. (*Id. at Bates 36-38*).

9. Claimant attended another physical therapy appointment with Darwin Abrams, PT at Concentra on December 28, 2020. Claimant alleges he sustained a hernia while performing exercises during this physical therapy appointment. The record from this session contains no note of any reported abdominal issue. (*Cl. Ex. 4, PDF-1 p. 27 of 368*). Claimant testified he reported the issue to the physical therapy office after PT Abrams had already completed the session and left.

10. Claimant underwent a lumbar spine MRI on December 30, 2020. Only one page of the MRI report is located in the record. Stanislav Poliashenko, M.D. interpreted the MRI and noted trace degenerative retrolisthesis of L5 on S1 with otherwise anatomic alignment, no aggressive osseous lesions, intact vertebral body heights, mild degenerative disc height narrowing and L4-L5 and L5-S1, and not suspicious paraspinal soft tissue lesions or ligamentous edema. (*Id. at PDF-1 pg. 29 of 368*).

11. The physical therapy record from December 30, 2020 notes Claimant reported that at his last physical therapy session a leg lift exercise seemed to cause pain in his abdomen like an abdominal strain. *(Id. at PDF-1 p. 30 of 368*).

12. Claimant attended a follow-up evaluation with PA Bodkin on January 11, 2021. Claimant reported decreased back pain but that he experienced severe anxiety his first

night back on medication. He informed PA Bodkin that, on December 24, 2020, he vomited so hard it made his stomach muscles hurt. He further reported that during physical therapy on December 26, 2020 he felt a tearing and upper abdominal pain and developed a ripple in his upper stomach. Claimant's abdominal pain had since decreased. On examination PA Bodkin noted mild tenderness of the abdomen. She referred Claimant for physiatry and psychological evaluations. (*R. Ex. D, Bates 40-43*).

13. On January 15, 2021 PT Abrams noted Claimant reported slight improvement but continued complaints regarding his upper abdominal area. Claimant thought it might be a strain or a tear from stretching. PT Abrams noted he encouraged Claimant to consider going to a physician to clarify the issue but Claimant stated he did not have insurance. (*Cl. Ex. 4, PDF-1 pp. 44-45 of 368*).

14. On January 20, 2021 Claimant presented to the emergency department at the Medical Center of Aurora with complaints of insomnia, anger and anxiety. The provider noted a history of bipolar affective disorder. Claimant reported recent stressors included a back injury and work issues. He further reported that he had been undergoing physical therapy for his back injury and developed abrupt epigastric abdominal pain while doing leg lifts. On examination, Eric Hill, M.D. noted tenderness over xiphoid with no palpable hernia. Dr. Hill opined there was no evidence of hernia on exam. Dr. Hill discharged Claimant. (*Id. at PDF-1 pp. 46-62 of 368*).

15. On January 21, 2021 Claimant saw his primary authorized treating physician ("ATP") Frederic Zimmerman, D.O. at Concentra. Dr. Zimmerman noted a similar mechanism of injury as reported to PA Bodkin. Claimant reported having an abdominal strain that occurred during one of his physical therapy sessions, with some paresthesias and abnormal feeling in the abdominal region. Claimant's current symptoms were right-sided lumbosacral pain radiating to the upper buttock and perisacral region. There was no radiating pain in the lower extremity. Standing pain was greater than sitting pain. Dr. Zimmerman noted an MRI of the lumbar spine dated 12/30/2020 identified minimal disk degeneration at L4-L5 and L5-S1 level with minimal disk bulge on the left side of L4-L5 with no central or neural foraminal stenosis. Facet arthrosis was noted at L4-5 and L5-S1 levels bilaterally and mild to moderate bilateral neural foraminal stenosis was noted at the L5-S1 level. There was no spinal canal stenosis at any level. Dr. Zimmerman provided the following assessment: lumbar strain with standing extension based pain; minimal degenerative changes noted on MRI with no neurologic compromise; situational anxiety and adjustment/anger disorder with previous history of mood disorder; and acute worsening of chronic insomnia. Dr. Zimmerman referred Claimant for a right L5-S1 facet injection plus right SI joint steroid injection for diagnostic and therapeutic purposes. He also referred Claimant for psychological counseling. (*Id. at PDF-1 pp. 63-66 of 368*).

16. On January 28, 2021 Claimant presented to clinical neuropsychologist J. Edward Cotageorge, Ph.D. for a psychiatric diagnostic evaluation. Dr. Cotageorge noted Claimant reported chronic and ongoing pain in his upper back that was primarily due to an old injury. Dr. Cotageorge did not note any review of Claimant's prior records

or any history of bipolar disorder. Dr. Cotageorge gave the following presumptive diagnoses: chronic pain disorder due to trauma, and adjustment disorder with anxiety and depressed mood. He recommended Claimant undergo further psychological evaluation and begin cognitive behavioral therapy. (*Id. at PDF-1 pp. 75-80 of 368).*

17. On February 3, 2021 Claimant underwent a right L5-S1 intraarticular facet steroid injection and right SI joint steroid injection performed by Dr. Zimmerman. (*Id. at PDF-1 p. 81 of 368*).

18. On February 17, 2021 Claimant attended his third chiropractic session at Denver Sport & Spine for low back treatment. The record from this appointment indicates two prior sessions had occurred, the notes from which were not offered as evidence. Claimant complained of low back pain, neck pain, SI pain and upper back pain. Jason Gridley, D.C. noted, *inter alia*, intersegmental fixation, restricted motion, adjacent paraspinal hypertonicity, asymmetry, stiffness in right T10-11, L1, thoracolumbar region and right SI, bilateral L3-5, S1. Restricted motion was found bilateral at C5-7. There was mild restriction and discomfort with thoracic and lumbar facet load. He diagnosed Claimant with segmental and somatic dysfunction of the cervical, thoracic and lumbar regions and muscle spasm of the back. (*Id. at PDF-1 pp. 89-90 of 368*).

19. Claimant attended a follow-up evaluation with Dr. Zimmerman on February 18, 2021. Dr. Zimmerman noted Claimant had a diagnostic response to the injections as well as a greater than 50% therapeutic response to the injections. Claimant also saw PA Bodkin on February 18, 2021, reporting that he felt 60-70% better but that he now noticed constant pain on the left, with numbness and tingling down his left leg. (*Id. at PDF-1 pp. 91-95 of 368*).

20. On March 18, 2021 PA Bodkin referred Claimant to an orthopedic spine physician. (*Id. at PDF-1 p. 103 of 368*).

21. On March 31, 2021 Claimant presented to Maria Kaplan, PA at Orthopedic Centers of Colorado for low back pain with radiation into the right lateral hip as well as intermittent left lower extremity numbness and tingling. PA Kaplan reviewed x-rays and an MRI of the lumbar spine. She referred Claimant for bilateral L5-S1 translaminar lumbar epidural steroid injection to help with his back and leg pain. PA Kaplan noted that the majority of Claimant's symptoms were right-sided, however there was foraminal narrowing on the left-hand side at L4-L5 and L5-S1. (*Id. at PDF-1 pp. 106-107 of 368*).

22. Claimant attended a second psychological evaluation with Dr. Cotageorge on April 7, 2021. His report again does not note any reported history of bipolar disorder. Dr. Cotageorge noted that his screening showed no evidence of bipolar disorder symptoms at that time. He recommended Claimant attend eight sessions of cognitive behavioral therapy. (*Id. at PDF-1 pp. 110-115 of 368*).

23. At a follow-up evaluation with PA Bodkin on May 3, 2021, PA Bodkin noted Claimant's reported frustrations with his progress and what he felt was a lack of

treatment. She referred Claimant to Evalina Levina Burger, M.D. at UC Health for a second opinion regarding Claimant's lower back area and derangement of the right SI joint. (*Id. at PDF-1 pp. 114-119 of 368*).

24. Claimant continued to attend multiple physical therapy sessions at Concentra at which ongoing low back pain was noted. (*Cl. Ex. 4, PDF-1*).

25. On July 14, 2021 Claimant presented to Dr. Burger and Emily Broeseker, NP at Orthopaedic Spine Center at UC Health. The record notes NP Broeseker saw and examined Claimant with Dr. Burger. Claimant endorsed pain in his back, SI joint, hip and right leg. NP Broeseker reviewed lumbar spine x-rays obtained that same day noting no dynamic listhesis, no instability and possible mild degenerative disc disease at L4-L5 and L5-S1. She noted she was unable to review Claimant's lumbar MRI because the system was down. NP Broeseker opined Claimant's clinical picture did not indicate a nerve injury and, with his response to dry needling, it was likely muscle inflammation. She provided Claimant handouts regarding stretching and muscle strengthening and noted a referral to pain psychology may be needed. (*Id. at PDF-1 pp. 147-156 of 368*).

26. On July 14, 2021 Claimant underwent lumbar x-rays interpreted by Michael Durst, M.D. Dr. Durst's impression was lower lumbar disc degeneration with associated facet arthrosis and no sagittal listhesis or dynamic listhesis. (*R. Ex. I, Bates 179*).

27. PA Bodkin continued to note Claimant's reports of frustration with his symptoms and treatment. On August 18, 2021 she referred Claimant to a physiatrist for evaluation of his low back pain and to Dr. Disorbio for a psychological evaluation. (*Cl. Ex. 4, PDF-1*).

28. On August 18, 2021 Claimant underwent a repeat lumbar MRI at UC Health. Mary Kristen Jesse, M.D. provided the following impression: (1) slight interval worsening L4-L5 degenerative disc disease with more prominent central annular fissure and broad-based disc bulge; moderate left neural foraminal narrowing at this level; and (2) L5-S1 degenerative disc disease with posterior annular fissure and disc bulge causing moderate narrowing of the bilateral neural foramen similar to previous. (*R. Ex. I, Bates 183-184*).

29. On August 20, 2021 Stephen Pehler, M.D. at Orthopedic Centers of Colorado evaluated Claimant. He reviewed Claimant's recent lumbar MRI, noting bilateral neuroforaminal stenosis at L5-S1. Dr. Pehler gave an assessment of lumbar spondylosis with radiculopathy and lumbar degenerative disc disease. He recommended Claimant proceed with bilateral L5-S1 transforaminal epidural steroid injections. (*Cl. Ex. 4, PDF-1 pp. 184-185 of 368*).

30. On September 15, 2021 Claimant underwent a comprehensive biopsychosocial psychomedical evaluation with John Mark Disorbio, Ed.D. Dr. Disorbio issued a report dated September 18, 2021. He noted he reviewed records from PA Bodkin and Dr. Burns at Concentra. No history of bipolar disorder is documented in Dr. Disorbio's

medical note. Dr. Disorbio diagnosed Claimant with generalized anxiety disorder, pain disorder with related factors of anxiety and depression, and major depressive disorder-single episode mild. Dr. Disorbio also evaluated Claimant on September, 22, 2021 and referred Claimant to Sababa Health Group for cognitive behavioral therapy. (*Cl. Ex. 4, PDF-1*).

31. On the referral of Dr. Pehler Claimant underwent bilateral L5-S1 transforaminal epidural steroid injections on September 21, 2021, performed by Lauren McLaughlin-Abrams, D.O. at Peak Anesthesia and Pain Management. (*Id. at PDF pp. 200-201 of 368*).

32. On September 24, 2021 Claimant reported to PA Bodkin that the recent injections provided lower back relief. He continued to complain of pain in his right lateral spine and SI joint. (*Id. at PDF-1 p. 203 of 368*).

33. Claimant returned to Dr. McLaughlin-Abrams on October 5, 2021. Dr. McLaughlin-Abrams opined that the injection provided more than 85% ongoing relief to Claimant and recommended Claimant follow-up with Dr. Pehler. (*Id. at PDF-1 p. 214 of 368*).

34. Claimant attended multiple sessions of cognitive behavioral therapy at Sababa Health Group beginning on October 14, 2021. Joel Misler, LPC noted Claimant was in the depressed/distressed category. The records from these visits records do not document a reported history or diagnosis of bipolar disorder. LPC Misler's notes indicate Claimant was making progress at each session. (*Cl. Ex. 4, PDF-1*).

35. At a follow-up evaluation on October 25, 2021 Claimant reported to PA Kaplan his pain decreased from 6-8/10 to 3-4/10 following his most recent injections. PA Kaplan noted minimal lower extremity radiculopathy or tingling with some continued back pain that was currently manageable. She opined that if Claimant's symptoms returned she would refer him for a right-sided joint injection or possible consideration of a L5-S1 microdiscectomy or possibly discogram. (*Id. at PDF-1 pp. 240-242 of 368*).

36. Claimant also saw PA Bodkin on October 25, 2021, reporting that the injections helped for 2-3 weeks but his pain subsequently returned at a level 2-4/10. Claimant reported he was not working but was able to tolerate more activity for longer periods. (*Id. at PDF-1 pp. 244-247 of 368*).

37. At a return evaluation with PA Kaplan on November 24, 2021 Claimant reported continued low back pain without significant lower extremity radiculopathy. He rated his pain 4-7/10. Claimant reported he was unable to do any physical activities due to his pain. PA Kaplan referred Claimant for a lumbar discogram. She noted that they would discuss a possible lumbar disc arthroplasty should the results indicate L5-S1 as his pain generator. (*Id. at PDF-1 pp. 290-293 of 368*).

38. LPC Misler discharged Claimant from his care on November 30, 2021, noting Claimant had successfully completed the functional acceleration program at Sababa Health Group. (*Id. at PDF-1 pp. 299-302 of 368*).

39. Dr. Pehler reviewed surveillance video of Claimant obtained by Respondents and issued a letter dated December 22, 2021. Dr. Pehler stated that the activity levels, range of motion, and lifting capacity demonstrated by Claimant on the surveillance video was inconsistent with Claimant's most recent complaints in his office. He remarked that Claimant's documented activity levels were inconsistent with continued low back pain and SI joint instability affecting his quality of life and ability to work. Dr. Pehler opined that, although it is possible Claimant continues to suffer from a lumbar radiculopathy with his documented activity levels, it would be reasonable to consider his lumbar radiculopathy mild. (*R. Ex. C*).

40. Claimant returned to PA Bodkin on December 27, 2021 reporting feeling a little better. PA Bodkin continued to note Claimant's frustrations and stated loss of trust in his providers. He reported continued L4 tender pain with some radiation into the bilateral hips and thighs. Claimant further reported no numbness and tingling but numbness in the ball of his left foot. (*Cl. Ex. 4, PDF-1 pp. 315-319 of 368*).

41. On January 4, 2022 Dr. McLaughlin-Abrams noted Claimant was experiencing some "increased left knee and upper back and neck pain that is becoming more pronounced over the past month without an inciting event, he has just started to notice it more consistently." (*Id. at PDF-1 p. 320 of 368*). Dr. McLaughlin further noted Claimant mentioned that after a previous epidural injection in February 2021 he experienced ongoing vision changes a week later and has needed reading glasses. Dr. McLaughlin ordered x-rays of the left knee and neck.

42. On January 6, 2022 PA Bodkin notified Claimant via telephone that, upon Dr. Pehler's review of the surveillance footage, it was determined no further treatment was indicated. She informed Claimant that he was scheduled for an impairment rating evaluation and if he did not agree he could speak with his attorney regarding his options such as pursuing a DIME or seeking further treatment on his own. (*Id. at PDF-1 pp. 323-325 of 368*).

43. Dr. Burns also reviewed surveillance video of Claimant. In e-mail correspondence dated January 6, 2022, Dr. Burns stated that in the surveillance video, Claimant was clearly able to walk, climb stairs, carry heavy objects up and down stairs, squat for a prolonged time and kneel for a prolonged time with completely normal biomechanics. Dr. Burns remarked that the surveillance video was inconsistent with Claimant's presenting complaints when at evaluations. She opined Claimant's overall response to the January 2021 and September 2021 injections were favorable, that Claimant's current exam was benign, and that his complaints surrounded discomfort, not functional deficits. Dr. Burns further noted she corresponded with Dr. Pehler who no longer believed a discogram or disc replacement was necessary. She opined Claimant was approaching MMI. (*Id. at PDF-1 pp. 326-328 of 368*).

44. Claimant subsequently sought treatment outside of the worker's compensation system at Stride Community Health Center. Claimant first presented to Elizabeth Sabella, NP on January 7, 2022 with depression, anxiety and a significant history of back injury, including chronic bilateral low back pain without sciatica. She noted Claimant was involved in a complicated worker's compensation case and would return for further evaluation in one week for further assessment. (*Cl. Ex. 4, PDF-2 p. 38 of 516*).

45. On January 9, 2022 Brian Mathwich, M.D. performed a Physician Advisor Review regarding the causal relatedness of Claimant's left knee and neck complaints. Dr. Mathwich opined that Claimant's left knee and neck pain were not causally related to his work injury. In support of his opinion he noted Claimant's left knee and neck complaints did not begin until 1/4/2022, that there was no mechanism of injury consistent with Claimant's current complaints, and no physiologic justification for pain in the left knee and cervical spine beginning one year after the original injury. (*R. Ex. G*).

46. At a follow-up evaluation with NP Sabella on January 11, 2022 Claimant complained of back symptoms and abdominal wall discomfort that he reported began after a physical therapy session in December 2020. NP Sabella ordered an abdominal ultrasound. (*Cl. Ex. 4, PDF-2 pp. 60-82 of 516*).

47. Claimant underwent an abdominal ultrasound at UC Health on January 11, 2022. Gerald D. Dodd III, M.D. interpreted the results of what he deemed to be a negative study. He stated there was no evidence of an abdominal wall hernia. He noted 1.3cm wide linea alba in the upper abdominal wall with no protrusion of abdominal contents or accentuation of the distance with Valsalva. No underlying intra-abdominal abnormality was identified. (*Id. at PDF-2 pp. 57-58 of 516).*

48. At a follow-up examination with NP Sabella on January 13, 2022 Claimant reported upper back pain. NP Sabella noted Claimant had sustained trauma to his upper back in the form of multiple vertebrae fractures 15 years prior. She referred Claimant for an x-ray and MRI of the thoracic spine. (*Id. at PDF-2 pp. 83-98 of 516*).

49. An MRI and x-rays of the thoracic spine were performed on January 21, 2022. Michael Kershen, M.D. provided the following impression of the thoracic MRI: multilevel disc dessication and height loss with a few associated small bulges and protrusions most notable protrusion is seen centrally at the T7-T8 level with mild spinal stenosis and mild flattening of the spinal cord; no significant neural foraminal stenosis; no acute or aggressive bone lesion. Chronic Schmori's nodes noted. Kevin Wooley, M.D. provided the following impression of the thoracic x-rays: chronic T5 vertebral compression deformity similar to previous thoracic spine MRI; scoliosis and mild degenerative change. (*Id. at PDF-2 pp. 99-104 of 516*).

50. On January 22, 2022 Dr. Woolley issued addendums to his x-ray report stating that the compression deformity identified on the current examination is at the T4

vertebral level as shown on the MRI study from the same date. He noted that upon comparison with the thoracic spine x-rays, there is a chronic compression deformity of the T4 vertebra with 20% loss of the vertebral body height. (*Id. at PDF-2 pp. 105-106 of 516*).

51. On January 25, 2022 Dr. McLaughlin-Abrams noted Insurer denied authorization of the requested left knee and neck x-rays. Claimant reported right lateral and anterior hip pain, left knee pain, mid back pain, low back pain and neck pain. Dr. McLaughlin-Abrams again noted Claimant was also experiencing some increased left knee and upper back and neck pain that was becoming more pronounced over the past few months without an inciting event. (*Id. at PDF-2 pp. 331-334 of 368*).

52. On January 26, 2022 NP Sabella reviewed Claimant's thoracic x-ray and MRI and remarked that the MRI showed possible reasons for Claimant's pain. She referred Claimant to a spine specialist, noting Claimant may benefit from injections if indicated by the specialist. (*Id. at PDF-2 pp. 117-128 of 516*).

53. Authorized treating physician ("ATP") Dr. Zimmerman performed an impairment rating evaluation on January 27, 2022. Claimant reported to Dr. Zimmerman nothing had changed over the course of his treatment and that he had experienced a year of chronic pain. Claimant further reported that his low back pain returned and that he had since underwent a new MRI which Claimant claimed discovered a herniated disc. Dr. Zimmerman noted that the lumbar injections in September 2021 only provided Claimant three weeks of relief before his symptoms returned. On examination, Dr. Zimmerman noted motion and sensation were grossly intact in both lower extremities, deep tendon reflexes were 2+/4 in the bilateral lower extremities, and straight leg raise and neural tension were negative bilaterally. He performed lumbar range of motion measurements with 2 standard inclinometers, detailing his three sets of measurements and determining the measurements were valid. (*R. Ex. B*).

54. Dr. Zimmerman's final assessment was: (1) lumbar strain with extension based pain, temporary therapeutic response to facet steroid injections; (2) MRI evidence of mild-to-moderate disk degeneration and bilateral neuroforaminal stenosis at L5-S1 based on MRI dated 12/30/2020; (3) history of situational anxiety, adjustment disorder, and previous history of mood disorders. Unreliable with regard to antidepressant medication use; (4) history of insomnia; and (5) no further medical treatment offered after Dr. Pehler reviewed surveillance video. (*Id.).*

55. Dr. Zimmerman placed Claimant at MMI. Using the AMA Guides, Dr. Zimmerman assigned a combined 16% whole person impairment rating. The rating consisted of 7% rating under Table 53(II)(C) for a lumbar strain with mild-to-moderate spondylitic changes and ongoing symptoms, along with 10% impairment for deficits in lumbar range of motion. He recommended permanent restrictions as outlined by PA Bodkin, and 6-12 months of maintenance medical treatment in the form of medication. (*Id.*).

56. On January 31, 2022, Claimant saw Barry Alan Ogin M.D. at Colorado Rehabilitation & Occupational Medicine on a previous referral from Dr. Pehler for Claimant's chronic axial low back pain. Dr. Ogin noted Claimant's current main complaint was axial lower lumbar pain with some occasional radiation down the left leg. Claimant had secondary complaints of mid back pain radiating up to the upper back and lower neck region, which Dr. Ogin noted became more prominent since about mid-October when Claimant had a flareup. Dr. Ogin further noted Claimant attributed those symptoms to physical therapy and Claimant was unsure if his mid and upper back pain was related to his initial occupational injury. On examination, Dr. Ogin noted lumbar tenderness and pain with flexion and extension, mild tenderness in lower thoracic region, full cervical range of motion without pain. While supine, straight leg raise increased pain in his back and buttocks bilaterally with no pain in the hip on internal or external rotation. When seated straight leg raise was negative bilaterally with no pain with hip internal or external rotation. (*Cl. Ex. 4, PDF-1 pp. 340-344 of 368*).

57. Dr. Ogin referenced Claimant's August 18, 2021 lumbar MRI and prior psychological testing. He assessed Claimant with a lumbar disc herniation, low back pain, lumbar degenerative disc disease and a lumbar sprain. He noted a lumbosacral discography had been scheduled for 1/31/2022 but was cancelled due to the request for the discography being withdrawn by the surgeon. Dr. Ogin noted there were obvious concerns as to whether would be a good surgical candidate, including psychosocial issues, and reviewed with Claimant that a discogram would only be appropriate if he is already been deemed a surgical candidate should he have a positive discogram. He opined that, in the event Claimant had a positive discogram and Dr. Pehler determined Claimant is a good surgical candidate, he would first need to be cleared by a psychologist prior to any interventional care. Claimant was to return on an as-needed basis. (*Id.).*

58. Claimant saw PA Bodkin for a final appointment on February 1, 2022. PA Bodkin noted Claimant was not happy and disagreed with the outcome of his case and had many remaining questions along with concerns that many of the medical reports needed amending. She further noted Claimant's report that he did not trust any of his providers despite her telling him she does not work for Employer or Insurer. On examination, PA Bodkin noted no tenderness and full range of motion of the thoracic spine, mild tenderness in the left and right paraspinals of the lumbosacral spine with bilateral muscle spasms and limited range of motion. The final assessment noted was: 1) Lumbar disc herniation; 2) Derangement of right SI joint; 3) Acute stress reaction; and 4) Lumbar sprain. Claimant was placed at MMI as of February 1, 2022 with 16% whole person impairment and permanent restrictions of no lifting greater than 50 lbs. PA Bodkin recommended 12 months of maintenance medications. Dr. Burns completed a Physician's Report of Worker's Compensation Injury on February 1, 2022 consistent with the reports of PA Bodkin and Dr. Zimmerman. (*Id. at PDF-1 pp. 345-349 of 368*).

59. On the referral of NP Sabella, Claimant saw NP Broesker at UC Health Spine Center on February 14, 2022. Claimant reported experiencing three weeks of relief from injections with subsequent return of low back pain and left leg numbness. Claimant also

endorsed thoracic spine muscle spasms and discomfort, as well as an abdominal hernia that worsened in physical therapy. NP Broesker assessed Claimant with lumbar degenerative disc disease and myofascial pain syndrome of the thoracic spine. She noted that options included repeat left L4-L5 and L5-S1 injections versus obtaining an updated lumbar MRI. NP Broesker further noted that the January 2022 thoracic showed multilevel disc degeneration with no concern for instability, central stenosis or foraminal stenosis. She discussed with Claimant that there is not a surgery that would make his upper back feel better and that he likely had a muscle strain and spasm. She further discussed stretching and exercises for his upper back. (*Cl. Ex. 4, PDF-2 pp. 128-150 of 516*).

60. Upon review of surveillance video of Claimant taken in the summer of 2021, Dr. Zimmerman issued a letter dated February 18, 2022. Dr. Zimmerman agreed with Dr. Pehler's opinion dated December 22, 2021 that the video surveillance activity is inconsistent with the complaints Claimant has in office. He further agreed with Dr. Burns' January 6, 2022 opinion that the surveillance video showed physical abilities that are inconsistent with Claimant's complaints in clinic and that Claimant was MMI at the time. Nonetheless, Dr. Zimmerman opined that the surveillance video did not provide any conclusive evidence that his impairment rating should be changed. He explained that the impairment rating he assigned under Table 53(II)(C) of the AMA Guides is for Claimant's underlying lumbar spondylosis confirmed by MRI and his ongoing symptoms. Dr. Zimmerman further explained that the video surveillance did not conclusively demonstrate Claimant's ability to extend beyond what was seen on his examination. Dr. Zimmerman remarked that Claimant has established himself as a very unreliable historian and repeatedly embellished his pain symptoms in the clinic. He continued to opine Claimant is at MMI with no further medical treatments indicated other than the maintenance medications for 6 to 12 months as documented in the impairment rating evaluation. (*R. Ex. B, Bates 23*).

61. On the referral of NP Sabella, Claimant presented to Angela Bohnen, M.D. at NeurosurgeryONE Clinic on February 28, 2022. Dr. Bohnen noted that a 2005 mountain biking accident revealed a T4 compression fracture resulting in mid back pain between Claimant's shoulder blades which improved over time. Dr. Bohnen documented Claimant's report of the 11/11/2020 work injury in which he felt a pop in his back and radiating pain into his lower extremity with pain ever since. Claimant reported that the February 2021 injections resulted in significant improvement in his right lower back and buttocks pain but no change in his other pain. Dr. Bohnen noted that the lumbar injection in September 2021 may have helped Claimant's left lower extremity pain but not his back. Claimant's primary complaint was low back pain radiating up to the base of his neck. Claimant reported subjective right lower extremity weakness and also neck pain radiating down into his arms. Dr. Bohnen noted Claimant did not feel like he had gotten a definitive answer for his pain. On examination Dr. Bohnen noted no tenderness to palpation to cervical and thoracic spine. Straight leg raise, FABER's and Spurling's tests were all negative bilaterally. (*Cl. Ex. 4, PDF-2 pp. 151-155 of 516*).

62. Dr. Bohnen reviewed the January 2022 thoracic MRI and x-rays as well as the August 2021 lumbar MRI. She diagnosed Claimant with thoracic compression fracture and back pain. Dr. Bohnen remarked,

> Overall, there is no structural cause for his pain. That being said, he does have symptoms. He is quite honed in on the symptoms and is frustrated with the process that he has gone through and does not understand how he can still be in pain if all of his imaging is negative. Overall, he does have an old impression fracture and some degenerative changes in his thoracic spine. I talked to him about doing CT spectroscopy to evaluate for any 1 potential inflammatory ictus, that could be then targeted. I think we should do this in the thoracic and lumbar. Somebody has brought up to him a potential lumbar disc replacement; however, the patient has not undergone a disco gram and ultimately schedule for the end of the month but then canceled for a reason I cannot understand. At this point the patient is not a surgical candidate.

(*Id. at PDF-2 pp. 154-155 of 516*).

Dr. Bohen noted she needed to look into potential pain generators and then determine next steps. She referred Claimant for a CT spectroscopy of the thoracic and lumbar spine and a L4-L5, L5-S1 discogram.

63. Respondents filed a Final Admission of Liability ("FAL") on March 2, 2022, admitting to 16% whole person impairment and reasonable, necessary and related medical treatment and/or medications after MMI. (*R. Ex. AA*).

64. Claimant objected to the FAL and filed an Amended Notice and Proposal and Application for a DIME on March 18, 2022, requesting evaluation of the following body parts/conditions: psychological, cervical spine, thoracic spine, lumbar spine, hernia, and vision.

65. On April 4, 2022, David Orgel, M.D. was selected and confirmed as the DIME physician. A DIME appointment was scheduled for June 9, 2022.

66. Claimant appeared for the DIME appointment with Dr. Orgel on June 9, 2022 after having provided additional records to Dr. Orgel that had not been exchanged in accordance with WCRP 11. Accordingly, Dr. Orgel was unable to proceed with the DIME as scheduled on June 9, 2022.

67. The parties attended multiple prehearing conferences regarding various issues, including, inter alia, requests to terminate the DIME process, payment of DIME cancellation and rescheduling fees, documents to be provided to the DIME physician, and body parts to be examined by the DIME physician. The orders from these conferences are incorporated herein by reference. Claimant was represented by

counsel at some of these prehearings, including the prehearing most recent to the rescheduled DIME appointment. (*Cl. Ex. 4, Ex. 6*).

68. The parties negotiated additional material to be considered by the DIME physician. Ultimately, the body parts and conditions to be considered by the DIME physician were the cervical, thoracic and lumbar spine, SI joint, hernia, psychological and visual. (*R. Ex. W*).

69. Claimant underwent a bone spectroscopy/CT on March 9, 2022 that was compared to his August 2021 lumbar MRI and January 2022 thoracic MRI. Olrin Hopper, M.D. interpreted the results and provided the following impression: No scintigraphic evidence of abnormal osteoblastic tibia involving the thoracic or lumbar spine on the planar or spectroscopy or CT images. (*Cl. Ex. 4, PDF-2 pp. 166 of 516*).

70. On March 15, 2022 Claimant saw Thomas Christopher Sanders, PA-C at the Colorado Comprehensive Spine Institute. Claimant presented with diffuse spinal pain, most severe at the lumbosacral junction and base of the cervical spine. PA Sanders noted Claimant's neck became a greater issue after he was involved in a mild motor vehicle Collison ("MVC"). PA Sanders reviewed Claimant's July 2021 lumbar x-rays, August 2021 lumbar MRI, and January 2021 thoracic x-rays and MRI. He noted that x-rays obtained the day of his examination revealed focal degeneration at C5-6 with advanced disc space collapse and associated facet arthrosis. There was osteophytic spurring present along both the dorsal and ventral vertebral body at the level of the disc space. Cervical lordosis was 30 degrees. PA Sanders diagnosed Claimant with spondylosis of cervical region without myelopathy or radiculopathy; cervicalgia; spondyloarthropathy of the lumbar spine; chronic bilateral low back pain; and cervical degenerative disc disease. He recommended Claimant undergo a medial branch block at L5-S1 bilaterally and referred Claimant for a cervical spine MRI. (*Id. PDF-2 at pp. 174-181 of 516*).

71. Claimant underwent a cervical spine MRI on March 23, 2022. Benjamin Aronovitz, M.D. interpreted the results and provided the following impression: moderate degenerative changes including multilevel severe neural foraminal narrowing. (*Id. at PDF-2 pp. 224-225 of 516*).

72. On March 29, 2022 PA Sanders noted that the clinical reviewer with Claimant's primary health insurance provider, Bright HealthCare, denied his request for a medial branch block/facet procedure because Claimant's pain was too diffuse. PA Sanders disagreed with the denial, noting Claimant had focal pain at the lumbosacral junction consistent with facet mediated pain. (*Id. at PDF-2 p. 252 of 516*).

73. On April 5, 2022 Claimant saw Audrey Beth Sindic, PA-C at the Colorado Comprehensive Spine Institute. Claimant's chief complaint was gradually worsening neck pain with bilateral upper extremity numbness. PA Sindic reviewed Claimant's cervical x-rays and MRI, which she noted demonstrated degenerative disc disease and bilateral facet arthropathy. Given Claimant's ongoing complaints of neck pain, she

concluded it was reasonable to begin with a potent anti-inflammatory and physical therapy. Surgical intervention for cervical spine was not recommended at that time. PA Sindic noted Claimant also vocalized concern for his lumbar spine pain. She encouraged him to gather his medical records for her review to determine next steps. (*Id. at PDF-2 pp. 257-262 of 516*).

74. On the referral of PA Sindic, Claimant began physical therapy for his cervical spine at Accelerate Physical Therapy on April 8, 2022. The record of this session documents that Claimant began to note the onset of neck pain in May 2021. Claimant reported he underwent injections for his low back in September 2021 and noted increased complaints of neck pain two weeks later. The physical therapist noted Claimant was involved in a MVC on 10/8/2021 in which he was the third car involved in a rear-end collision on the highway. Claimant underwent approximately 27 sessions of physical therapy at Accelerate Physical Therapy from April 8, 2022 through August 23, 2022. (*Cl. Ex. 4, PDF-2*).

75. On April 13, 2022 Claimant requested that NP Sabella provide a referral to the Colorado Comprehensive Spine Institute for evaluation of his lumbar spine. (*Id. at PDF-2, p. 282 of 516*).

76. On May 17, 2022 PA Sindic noted Claimant's continued neck and back complaints. She remarked that x-rays obtained on the day of this examination demonstrated mild evidence of osteoarthritis in the bilateral hips, well-maintained vertebral disc height spaces in the lumbar and thoracic spine, and evidence of degenerative disc disease mild at C3-C4 and moderate at C4-C5 and C5-C6. There was also mild degenerative disc disease at L5-S1. PA Sindic referred Claimant to Kevin Schmidt, M.D. for cervical facet injections at C4-C5 and C5-C6. (*Id. at PDF-2 pp. 322-337 of 516*).

77. On May 19, 2022 PA Sindic recommended proceeding with a right L5-S1 intra-articular facet steroid injection given Claimant's complaints of axial low back pain and his positive response to previous lumbar injections. She noted Claimant's lumbar MRI demonstrated evidence of facet arthropathy at L4-L5 and L5-S1 in addition to mild to moderate foraminal narrowing noted on the left at L5-S1. (*Id. at PDF-2 pp. 341-343 of 516*).

78. On May 22, 2022 Claimant wrote a note to PA Sindic in his online health record at Colorado Comprehensive Spine Institute. He wrote, "I verbally stated and from all past medical history that I have pain in my SI joint, numbness in my foot, sharp pains in my SI joint and L5-S1 since 11/20, pain in spine above L5-S1 feels catering to injury, upper back and neck bothersome since 3/21." (*Id. at PDF-2 p. 346 of 516*).

79. On May 23, 2022 PA Sindic issued an addendum to a May 17, 2022 lumbar x-ray noting retrolisthesis appreciated at L5-S1 with dynamic instability appreciated on flexion-extension views. There was subtle retrolisthesis at L4-L5 with no dynamic instability. (*Id. at PDF-2 p. 346 of 516*).

80. At a follow-up evaluation with PA Sindic on June 2, 2022 Claimant's chief complaint was a decreased ability to tolerate a standing position secondary to back pain. PA Sindic placed an order for injections. (*Id. at PDF-2 pp. 352-358 of 516*).

81. On June 14, 2022 Claimant underwent bilateral C4-C5 and C5-C6 facet injections performed by Dr. Schmidt. During a follow-up telephone call with Dr. Schmidt's office on June 15, 2022, Claimant reported improvement in his pain following the injections. He rated his pain at level 2-3/10. (*Id. at PDF-2 pp. 366 & 425 of 516*).

82. On June 17, 2022 [Redacted, hereinafter LG] at Colorado Comprehensive Spine Institute noted Claimant called the clinic asking why he was escorted off the hospital site the day prior. Claimant stated he wanted someone to be held accountable for the situation. (*Id. at PDF-2 p. 428 of 516*).

83. On June 20, 2022 NP Sabella referred Claimant to the pain clinic for evaluation of his back and to general surgery for evaluation of an abdominal wall bulge. (*Id. at PDF-2 pp. 433-436 of 516*).

84. On June 21, 2022 Farah L. Broomandi at the Colorado Comprehensive Spine Institute noted she spoke with Claimant and informed him that he would be allowed into Dr. Schmidt's clinic for care, but that he would need to sign a behavior plan with set expectations. (*Id. at PDF-2 p. 439 of 516*).

85. On June 28, 2022 Ms. Broomandi noted that a discharge letter would be sent to Claimant due to changes in the June 21, 2022 decision regarding allowing Claimant's care at Dr. Schmidt's clinic. (*Id*.).

86. Claimant returned to NP Broesker on July 11, 2022. He was scheduled to undergo L5-S1 right facet and right SI joint injections that day for diagnostic purposes. (*Id. at PDF-2 pp. 447-463 of 516*).

87. On the referral of NP Sabella, Claimant presented to Kevin Bradley Rothschild, M.D. at University of Colorado Medicine Surgery Department on August 8, 2022. Claimant complained of left upper quadrant abdominal pain. Claimant reported that approximately 1.5 years prior he was in the process of performing a core exercise in physical therapy and felt something pop. He further reported that he lived for a year and a half with something bulging and flopping out of his abdomen, and then over the last year or six months or so it improved. Dr. Rothschild noted a January 2022 abdominal ultrasound showed essentially a small rectus diastases with just a very modest separation of the rectus musculature without any hernia. On examination, Dr. Rothschild noted that with Valsalva he could appreciate a very small rectus diastases without any appreciable bulge. He did not feel a hernia. Dr. Rothschild further noted that Claimant pointed several times to the left costal margin just off the midline of his abdomen indicating there was a bulge, but after repeating the examination for a total of three

times, Dr. Rothschild did not appreciate a bulge and in fact felt normal rectus musculature with no sign at all of any hernia. (*Id. at PDF-2 pp. 485-492 of 516*).

88. Dr. Rothschild provided an assessment: of rectus diastases. He wrote,

> I spent about 10 minutes talking to the patient about the fact that I do not appreciate a hernia in that area that I have never really found any hernia in that area in my practice and that it's not an area that I am familiar with for someone to develop a defect. I talked to him about the nature of her (*sic*) rectus diastasis and that this is not a true hernia and in his case he has a very small one that is actually is (*sic*) not even bulging with Valsalva. After this he insisted that he had a defect and asked me on several occasions to repeat his exam and after several request I refused and told him that the visit was over as I did not see any surgical indication here. Patient absolutely refused to leave his clinic visit at this point insisting that both the MAs or anyone in the area repeat his exam for a quote 'second opinion'. I explained again my opinion and asked him to please leave and he refused. Sitting the (*sic)* exam room and demanding that he get a second opinion and another ultrasound. I eventually asked for security to escort the patient out (he asked the security guard to examine his abdomen).

(*Id. at PDF-2 p. 488 of 516*).

89. Claimant returned to NP Sabella on August 22, 2022. NP Sabella noted she deferred examination because Claimant was recording the appointment without her consent or prior notice. She noted a diagnosis of a strain of the rectus abdominis muscle. Claimant requested that NP Sabella order another abdominal ultrasound. (*Id. at PDF pp. 505-507 of 516*).

90. On August 31, 2022 Claimant underwent a x-rays of his cervical spine, ordered by Dr. Burger. MK Jesse, M.D. interpreted the results and gave the following impression: degenerative disc disease greatest at C5-C6 with no pathologic listhesis. (*Id. at PDF-2 pp. 513-514 of 516*).

91. On August 31, 2022 Claimant also saw Lisa Allison Malyak, M.D. at the Orthopaedic Spine Center. Claimant reported being frustrated with different opinions from different physicians. He further reported that he could not stand for more than 10 minutes without experiencing significant pain. Dr. Malyak noted she had extensive discussion with Claimant and Dr. Burger regarding Claimant's old prior thoracic disc herniation. She noted that the prior thoracic disc herniation had since healed but still appeared abnormal on imaging, which is to be expected. She further noted that Claimant does not have any pathology on his cervical or lumbar spine MRIs concerning for cord compression or abnormal signal changes. Dr. Malyak opined no surgical intervention was indicated at that time. Dr. Burger noted she saw and evaluated

Claimant and discussed the case with Dr. Malyak and agreed with the findings and plan as documented. (*Id. at PDF-2 pp. 498-501 of 516*).

92. On September 8, 2022 Claimant presented to Mile High Spine and Pain Center with complaints of low back pain radiating down his left side for the past two years. Claimant reported that the pain wrapped around the front of his groin on the left. Claimant also reported neck pain that began the same time two years ago with radiation down both sides of his neck and shoulders. Diagnoses included other low back pain, muscle spasm of the back, right and left side sciatica, lumbar radiculopathy, right and left leg pain, cervicalgia, cervical radiculopathy, other cervical disc degeneration, other lumbar disc degeneration, and thoracic spine pain. Courtney Williams, M.D. recommended Claimant undergo lumbar and SI trigger point injections, physical therapy, chiropractic treatment, platelet rich plasma injections, and a lumbar decompression. (*Cl. Ex. 7*).

93. Dr. Orgel conducted the DIME on October 20, 2022, noting the scope of his exam as the cervical, thoracic, and lumbar spine, sacroiliac joint, hernia, psychological and visual. Dr. Orgel spent two hours and six minutes with Claimant reviewing his history and performing a physical examination and impairment rating. Dr. Orgel reviewed over 360 pages of records in the initial DIME packet, along with 516 pages in the supplemental DIME packet. Dr. Orgel issued a report using Division form WC201 in which he detailed his records review, his physical examination, and Claimant's reported subjective history. He further identified and discussed several issues he deemed pertinent to his analysis, providing explanations for his conclusions. (*R. Ex. A*).

94. Dr. Orgel noted Claimant's reported dissatisfaction and frustration with his course of treatment. Claimant complained of chronic pain in his axial low back, left lateral hip and leg, and left upper quadrant. Claimant also complained of midthoracic back pain, which Dr. Orgel noted Claimant,

> [a]dmits to having pain in this area before this injury, but he states that this midthoracic pain and cervical pain began sometime in mid February or March, he's not sure why but there was no incident, he feels this may be related to his ongoing low back complaints and lack of treatment for the back pain or his posture."

(*Id. at Bates 9*).

Claimant further reported experiencing changes in his vision after receiving a back injection on February 3, 2021.

95. On examination, Dr. Orgel noted palpation of the abdominal wall did not reveal significant diastases recti or ventral hernias. Claimant pointed to his upper lateral rectus abdominis as the area of the original swelling and reported that it was not currently present and had improved. There was limited range of motion of the neck in all planes without axial cervical spine tenderness or significant trigger points or spasm.

Compression test was negative. Dr. Orgel noted scoliosis in the thoracic spine without tenderness, and full range of motion of the thoracic back without pain and trigger points. There was flattened lumbar lordosis with bilateral paraspinal muscle spasms, without sacroiliac discomfort or swelling, and no axial lumbar spine tenderness. Babinski, straight leg raising and Faber tests were negative. There was no weakness noted in either extremity. He documented three sets of lumbar range of motion measurements, which he noted were valid. (*R. Ex. A*).

96. Dr. Orgel detailed the findings of Claimant's multiple diagnostic tests in his records review. In a separate section of his report he specifically noted that the August 18, 2021 lumbar spine MRI "indicated some worsening of the degenerative disc disease at L4 5 with a more prominent central annular fissure and moderate left neuroforaminal narrowing. At L5 S1 there was a posterior annular fissure and disk bulging causing moderate bilateral neuroforaminal narrowing similar to the prior MRI." (*Id. at Bates 11*). He further noted that diagnostic testing revealed moderate bilateral cervical facet arthritis as well as bilateral foraminal narrowing throughout the cervical spine. Regarding the January 21, 2022 thoracic MRI, he remarked that it showed:

> [m]ultilevel disc desiccation and height loss with a few associated small bulges in protrusions most notable T7 T8 with mild spinal stenosis and mild flattening of the spinal cord. A compression deformity is noted at T4 with 20% loss of vertebral height characterizes a chronic depression deformity. There is no significant foraminal stenosis. There are chronic Scmorl's nodes noted. An x-ray of the thoracic spine suggest a mild compression deformity of the T5 vertebrae was 20% loss of height.

(*Id*.)

97. Dr. Orgel noted that a biopsychosocial psychomedical evaluation on September 18, 2021 did not document a history of bipolar disorder and deemed Claimant's condition work-related. He opined, however, that recurrent behavioral issues were noted in the record and appeared to be long-standing and stable, consistent with a personality disorder, as well as Claimant's diagnosed bipolar disease. Dr. Orgel therefore concluded that Claimant's psychological assessment was based on insufficient and incomplete information and was not correct. (R. Ex. A).

98. Dr. Orgel provided the following clinical diagnoses:

> Work-related lumbar strain
>
> Non-work-related cervical and thoracic pain, presbycusis and diastases recti
>
> Significant pre-existing psychological condition. He apparently was placed on an involuntary one week hold in the past. In addition, the behaviors as outlined in the record and in the office on my 1st meeting with him suggest

> some element of thought disorder, delusion, or more likely personality disorder. This is not work-related.

(*Id. at Bates 12*).

99. Dr. Orgel opined Claimant reached MMI on January 27, 2022. Using the AMA Guides, Dr. Orgel assigned Claimant a combined 20% whole person impairment, consisting of 7% impairment under Table 53(II)(C) and 14% impairment for lumbar range of motion deficits. Dr. Orgel explained that the record supported a work-related back injury, and despite his lack of improvement and expanding complaints, his exam of Claimant was consistent with ongoing back pain. He opined there was no separate impairment for the sacroiliac joint, as Claimant's primary complaint is related to the lumbar spine and the results of the Faber test on his examination was negative. Dr. Orgel explained there was no impairment for the cervical or thoracic spine for reasons discussed in his reports, noting Claimant had a prior thoracic injury, there was a lack of mechanism of injury, there no temporal relation, and there was an intervening cervical event in terms of the MVC. He noted he did not assign any abdominal or visual impairment as those conditions were not work-related. He further opined Claimant did not have any psychological impairment as his current psychological condition was preexisting and non-work related. (*R. Ex. A).*

100. As medical maintenance care Dr. Orgel recommended one year of follow-up with a physiatrist for medication management and as needed injections. He did not recommend any permanent restrictions. (*Id.*).

101. On October 26, 2022 Claimant presented as a new patient to Dallas Melvin Bogner, M.D. at Centura Health. Claimant reported that on November 11, 2020 he was smashing concrete with a sledgehammer and experienced back issues in which he felt a pop in his low back that radiated to his buttock and SI joint. Dr. Bogner noted Claimant underwent injection therapy to his low back in February 2021 and had an "odd complaint of vision issues, blurred." (*Cl. Ex. 7*). Claimant further reported cervical and thoracic pain and alleged an injury on the left rectus abdominal muscle from physical therapy. Dr. Bogner noted Claimant had been evaluated by the surgery department, who found mild rectus diastasis, but no hernia. He further noted an ultrasound did not reveal a hernia. Dr. Bogner provided an assessment of chronic midline low back pain without sciatica and referred Claimant for physical therapy and pain management.

102. On October 25, 2022 the DOWC issued a notice to the parties stating the DIME Unit was in receipt of Dr. Orgel's sufficient DIME report and the DIME process had thus concluded. (*R. Ex. Q*).

103. Respondents filed a FAL on October 26, 2022 consistent with Dr. Orgel's DIME report, admitting for 20% whole person impairment and reasonable, necessary and related medical treatment and/or medications after MMI. (*R. Ex. R*).

104. Claimant attended multiple physical therapy sessions at Select Physical Therapy between November 4, 2022 and February 13, 2023, reporting back and leg pain. (*Cl. Ex. 7*).

105. On November 8, 2022 Claimant filed an Objection to the FAL and an Application for Hearing challenging Dr. Orgel's DIME report and endorsing the issue of maintenance medical benefits. (*R. Ex. O, Ex. P*).

106. On November 22, 2022 Claimant saw Erin Colleen Zahradnik, M.D. at Centura Health on the referral of Dr. Bogner. Claimant reported mid and low back pain, as well as neck pain, left greater than right, with numbness in the left index finger and bilateral shoulders. Dr. Zahradnik requested to review of all of Claimant's records before determining if he would benefit from any further procedures, including additional cervical injections. (*Cl. Ex. 7*).

107. On December 29, 2022 Claimant presented to Todd F Vanderheiden, M.D. at Panorama Orthopedics & Spine Center for evaluation of his neck and back pain. Claimant reported that his symptoms began in November 2020 while slamming concrete with a sledge hammer at work, and that he then exacerbated his lower back symptoms three weeks later while working on a different project. Claimant complained of ongoing neck, mid back and low back pain and slight pain radiating down the legs mainly on the right. Dr. Vanderheiden noted that a March 23, 2022 cervical MRI demonstrated multilevel degenerative disc disease, a January 21, 2022 thoracic MRI demonstrated multilevel thoracic degenerative disc disease with evidence of Schmorl's nodes and Scheuermann's discs without kyphosis, and a December 30, 2020 lumbar spine MRI demonstrated degenerative changes from L4-S1. Dr. Vanderheiden's primary diagnoses were cervicalgia and cervical degenerative disc disease; his secondary diagnoses were thoracalgia, thoracic degenerative disc disease, multiple thoracic Schmorl's nodes, thoracic Scheuemann's discs without kyphosis; his tertiary diagnoses were L4-S1 degenerative disc disease and lumbago; and his quaternary diagnosis was work injury 11/2020. He opined there were no surgical indications, noting there was no malalignment, instability, or significant neurological compression. He recommended Claimant consult with a nonoperative spine specialist. (*Id.*).

108. Claimant returned to Dr. Zahradnik on January 4, 2023. Claimant reported experiencing relief from the right SI joint injection and right L5-S1 facet injections with Dr. Zimmerman in February 2021. He further reported experiencing 60% relief of his pain for three months after undergoing cervical injections in June 2022. Dr. Zahradnik noted Claimant's pain on her examination was consistent with both facet mediated pain and right SI joint mediated pain. She recommended starting with L4-5 and L5-S1 medical branch blocks for consideration of radiofrequency ablation, and then considering a right SI joint injection. (*Id.*).

109. On January 19, 2023 Claimant underwent bilateral L3, L4 and L5 medial branch blocks performed by Bryan Gary Wernick, M.D. at Centura Health. Claimant

reported significant alleviation of his pain for several hours after the medical branch blocks. (*Id.*).

110. Claimant's Exhibit 3 contains portions of audio recording of his evaluations with Dr. Zimmerman on January 27, 2022, PA Bodkin on February 1, 2022, NP Broesker on February 14, 2022 and Dr. Orgel on June 9, 2022. Claimant recorded and edited the recordings. Claimant is heard on the recordings vocalizing continued symptoms and concerns that his conditions were not fully addressed or resolved.

111. Claimant testified at hearing regarding his frustrations and dissatisfaction with his injury, course of treatment, providers, Employer, Insurer, counsel, the workers' compensation system and his personal physicians. Claimant testified that some of the medical records do not accurately reflect his reports to his providers or the true nature of his symptoms and condition. Claimant testified there are missing medical reports, which he identified as an x-ray from his December 4, 2020 evaluation, an incomplete MRI report from December 30, 2020, and two chiropractic reports from February 2021 in which the provider noted back and neck issues. Claimant alleges Respondents destroyed some other records, which he did not identify. He further testified that on March 31, 2021 he completed a written intake form indicating neck issues but that it was deleted by a third party and replaced with a digital copy that does not reflect his reported neck and other issues. Claimant testified Respondents delayed in, but ultimately provided, other records. Claimant stated he has been seeking real answers to, and resolutions for, his symptoms and he feels he has been written off.

112. Claimant further testified that, despite his prior thoracic spine injury in 2004 or 2005, he has worked ever since. He stated the symptoms he developed after the November 11, 2020 work injury were not present prior to the work injury. Claimant denies a history of bipolar disorder or psychological problems. He testified that Dr. Cotageorge, Dr. Disorbio, LPC Misler did not note any diagnosis of bipolar disorder in their notes. Claimant testified Dr. Orgel "distorted" everything and erred in his DIME opinion by placing him at MMI. He testified Dr. Orgel attributed everything to pre-existing conditions and failed to give an impairment rating for his cervical spine, thoracic spine, vision issues and abdomen. Claimant further testified Dr. Orgel referenced a December 2020 physical therapy record, but did not note the included findings and diagnoses regarding his cervical and thoracic spine. He testified that he is entitled to an impairment rating for his cervical spine based on having objective evidence of pathology on his imaging and over six months of treatment to his neck. Claimant testified that the October 2021 MVC in which he was involved was very minor and did not result in any neck issues. Claimant additionally testified that the medical records support a diagnosis of rectus diastases, which he believes is related to the work injury. He further stated that he suffered from vision issues which were not documented when he reported them to his providers, and that physicians subsequently incorrectly attributed the vision issues to old age. Claimant testified he is immobile and continues to experience symptoms and require treatment.

113. The ALJ finds the opinions of DIME physician Dr. Orgel and treating physicians Drs. Zimmerman, Burns, and Pehler, as supported by the medical records as well as the opinions of Claimant's multiple personal physicians, more credible and persuasive than Claimant's testimony and any other conflicting opinions.

114. Dr. Orgel properly applied the AMA Guides in his determination of MMI and permanent impairment.

115. Claimant failed to provide clear and convincing evidence demonstrating Dr. Orgel erred in his DIME opinions on MMI and permanent impairment.

116. Claimant failed to prove by a preponderance of the evidence treatment of the cervical spine, thoracic spine, SI joint, abdomen, vision or psychological condition is reasonable, necessary and causally related.

117. Claimant failed to establish by a preponderance of the evidence the post-MMI treatment Claimant sought with various providers outside of his ATPs and specific referrals from ATPs for maintenance care was authorized medical treatment.

118. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance*

Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

The party seeking to overcome the DIME physician's finding regarding MMI and permanent whole person impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S.

A determination of MMI and permanent medical impairment requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury and the losses resulting from that injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017); *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services*, W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016).

Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Offic*e, 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

A DIME physician is required to rate a claimant's impairment in accordance with the AMA Guides. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the AMA Guides do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* WC 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the AMA Guides in determining the weight to be accorded the DIME physician's findings. Deviations from the AMA Guides constitute evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Vuksic v. Lockheed Martin Corporation* WC 4-956-741-02 (ICAO, Aug. 4, 2016). Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In re Goffinett,* WC 4-677-750 (ICAO, Apr. 16, 2008).

Claimant contends Dr. Orgel erred in determining Claimant reached MMI, finding that only his lumbar spine work-related, and failing to give permanent impairment ratings for his other conditions. As found, Claimant failed to prove it is highly probable Dr. Orgel's DIME opinions on MMI and permanent impairment are incorrect.

Dr. Orgel opined Claimant reached MMI on January 27, 2022 with a 20% whole person impairment rating. As part of his determination regarding MMI and impairment, Dr. Orgel specifically addressed each of the following body parts/conditions as agreed upon by the parties: cervical, thoracic and lumbar spine, SI joint, hernia, as well as psychological and visual conditions. He ultimately concluded that only Claimant's lumbar spine condition is related to the November 11, 2020 work injury.

Each body part/condition addressed by Dr. Orgel is discussed below.

<u>Cervical and Thoracic Spine</u>

Dr. Orgel found Claimant's cervical and thoracic pain unrelated to the work injury, noting a history of a prior thoracic injury, a lack of mechanism of injury and temporal relation to the thoracic spine, and an intervening cervical spine event. Dr. Orgel's conclusion is consistent with the medical records.

Dr. Orgel specifically noted that, per the history Claimant provided at his evaluation, as well as his review of the medical records, Claimant's thoracic and cervical spine complaints began occurring several months after the initial injury. Initial medical records do not document any mechanism of injury to the cervical or thoracic spine, nor any cervical or thoracic spine complaints or findings. Claimant argues that a December 7, 2020 physical therapy note documents limited range of motion with thoracolumbar side bending. This is not dispositive of a work-related cervical or thoracic injury. The first documentation in the medical records of reported upper back pain is in Dr. Cotageorge's January 28, 2021 note, in which Claimant reported chronic and ongoing upper back pain that was primarily due to an old injury. A February 17, 2021 chiropractic note does reference neck complaints as well as findings of segmental and somatic dysfunction of the cervical and thoracic regions. Even assuming, arguendo, that the two prior missing chiropractic notes referenced in the February 17, 2021 chiropractic note also document cervical/thoracic complaints and findings, such documentation would have occurred several weeks after the initial injury and is not dispositive, in light of the totality of the evidence, of any causal relationship to the work injury.

Evidence demonstrates Claimant's differing reports to providers regarding the onset of his neck and upper back pain. On January 4, 2022, Claimant reported to Dr. McLaughlin-Abrams increased upper back and neck pain that became more pronounced over the past month without an inciting event. On January 31, 2022, Dr. Ogin noted Claimant's secondary complaints of mid back pain radiating to Claimant's upper back and lower neck region which had become more prominent since about mid-October 2021. On March 15, 2022, PA Sanders noted that Claimant's neck became a greater issue after involvement in a MVC. An April 8, 2022 physical therapy record documents an onset of neck pain in May 2021. On May 22, 2022, Claimant himself wrote in his online records at the Colorado Comprehensive Spine Institute that his upper back and neck had been bothersome since March 2021. As noted by Dr. Orgel, Claimant reported to him that his cervical and thoracic pain began in mid-February or March 2021 without incident.

It is undisputed Claimant suffered a prior injury to his thoracic spine that resulted in compression fractures. Dr. Malyak credibly explained that Claimant's prior thoracic disc herniation had since healed but still appeared abnormal on imaging, which she stated is to be expected. Claimant underwent extensive workup of his cervical and thoracic spine, including thoracic x-rays and an MRI prior to MMI, as well as multiple cervical x-rays, MRIs, and a bone spectroscopy/CT post-MMI. Multiple providers in this matter, including the workers' compensation providers and Claimant's personal physicians, have opined that the imaging and testing demonstrated chronic and degenerative findings. While Claimant was able to perform his job as a carpenter prior to the November 11 2020 work injury despite his previous thoracic injury, there is insufficient objective evidence of any acute injury, aggravation, acceleration or exacerbation to Claimant's cervical or thoracic spine related to the work injury. There is no clear and convincing evidence establishing Dr. Orgel erred in finding Claimant's cervical spine and thoracic spine unrelated to the work injury, and thus concluding

Claimant does not require further work-related treatment or permanent impairment to such body parts.

Abdomen/Hernia

Claimant contends he sustained a work-related hernia during a physical therapy session for the work injury and that his providers ignored his complaints and failed to provide proper evaluation and treatment. Claimant's allegation he sustained a hernia during a December 28, 2020 physical therapy session is documented on December 30, 2020 and in various records thereafter. Dr. Orgel concluded Claimant suffered from non-work related diastases recti. Dr. Orgel's opinion is corroborated by the medical records and the opinions of other physicians. On January 20, 2021, an emergency room physician specifically noted Claimant's abdominal complaints, examined Claimant, and found no evidence of a hernia. This examination took place a few weeks after Claimant's reports of the onset of abdominal pain that he relates to the physical therapy session. Claimant also underwent an abdominal ultrasound on January 11, 2022, which was negative without evidence of an abdominal wall hernia.

Subsequently, Dr. Rothschild, a physician outside of the workers' compensation system, specifically evaluated Claimant for his abdominal condition. He reviewed the abdominal ultrasound, interviewed Claimant and performed a physical examination. Dr. Rothschild agreed there was no hernia and diagnosed Claimant with rectus diastases. Dr. Orgel's physical examination did not reveal significant diastases recti or ventral hernias. That Claimant felt abdominal pain during a physical therapy session and believes he sustained a hernia is insufficient, in light of the totality of the evidence, to establish that he sustained a work-related abdominal injury that caused disability or necessitated medical treatment. Accordingly, the evidence does not show that Dr. Orgel's opinion on the relatedness of Claimant's abdominal condition, MMI and impairment is highly probably incorrect.

Vision

Claimant argues he suffered vision problems as a result of the work injury. Dr. Orgel opined Claimant suffers from non-work related presbycusis. Dr. Orgel's opinion is consistent with the medical records. Vision complaints are not documented in the records until January 4, 2022, when Claimant reported to Dr. McLaughlin-Abrams that he experienced ongoing vision changes after undergoing an injection in February 2021. On October 26, 2022 Dr. Bogner referred to Claimant's complaints of vision issues after a February 2021 as "odd". No provider, whether an authorized provider or one of Claimant's personal physicians, has opined that Claimant's purported vision changes are the result of the work injury. No objective evidence was offered to even suggest a causal relationship between Claimant's purported vision issues and the work injury. That Claimant experienced changes to his vision during a period of time while he was also treating for a work injury is not dispositive of the fact the work injury caused his vision issues. The evidence, therefore, does not establish that Dr. Orgel's opinion on the

relatedness of Claimant's vision issues, MMI and impairment is highly probably incorrect.

Psychological

Claimant disagrees he had any prior history of bipolar disorder or psychological disorder and effectively argues that Dr. Orgel's references in his DIME report to psychological and behavioral problems represent bias against Claimant and are in error. There is not clear and convincing evidence Dr. Orgel's opinion regarding Claimant's psychological condition is highly probably incorrect.

A 2015 medical record documents Claimant was admitted to the hospital for psychosis and the record clearly notes a diagnosis of bipolar disorder. A January 20, 2021 medical record again documents a history of bipolar disorder. That Drs. Cotageorge and Disorbio and LPC Misler did not document a prior history or current diagnosis of bipolar disorder does not render Dr. Orgel's opinion highly probably incorrect. There is no indication those providers reviewed Claimant's prior medical records or were otherwise aware of his prior diagnosis. The ALJ is not persuaded Dr. Orgel's references to Claimant's recent behavioral episodes he either personally witnessed or reviewed in the medical records are biased or inappropriate, as Dr. Orgel was specifically asked to evaluate Claimant's psychological condition as part of his DIME. Additionally, per the AMA Guides, the DIME physician is to consider the current clinical status of the individual along with the findings of previous clinical evaluations in reaching their conclusions.

Prior to being placed at MMI, Claimant underwent authorized psychological evaluation and treatment. Drs. Cotageorge and Disorbio recommended Claimant undergo cognitive behavioral therapy for his work-related psychological conditions. Claimant participated in multiple CBT sessions with LPC Misler, who noted Claimant's progression at each session. LPC Misler ultimately discharged Claimant from his care, noting Claimant had successfully completed his program. Claimant's treating providers did not recommend additional work-related psychological treatment. Accordingly, the totality of the evidence does not establish that Dr. Orgel's opinion Claimant is at MMI with no psychological impairment or need for further work-related psychological treatment is highly probably incorrect.

Lumbar Spine and SI Joint

Dr. Orgel diagnosed Claimant with a work-related lumbar strain, for which Claimant reached MMI on January 27, 2022 with a 20% whole person impairment. Dr. Orgel's opinion is consistent with the medical records and the opinions of multiple treating physicians. On December 22, 2021 Dr. Pehler concluded that Claimant's documented activity levels were inconsistent with continued low back pain and SI joint instability affecting his quality of life and ability to work. He opined that, while it was possible Claimant had lumbar radiculopathy, it was mild, based on Claimant's demonstrated activity levels. Dr. Pehler no longer recommended that Claimant undergo

a discogram or disc replacement. On January 6, 2022, Dr. Burns opined that Claimant's current exam was benign, his complaints surrounded discomfort and not functional deficits, and that Claimant was approaching MMI. Dr. Zimmerman opined Claimant reached MMI at an evaluation on January 27, 2022. His final diagnoses included a lumbar strain, for which he gave Claimant 16% whole person impairment. Dr. Burns completed a Physician's Report of Worker's Compensation Injury on February 1, 2022 consistent with the reports of PA Bodkin and Dr. Zimmerman.

Prior to being placed at MMI, Claimant underwent a thorough workup of his lumbar spine, including multiple x-rays and MRIs, which revealed degenerative changes with minimal disc bulging and no neurologic compromise. Claimant also underwent treatment to his lumbar spine and SI joint, including physical therapy, chiropractic treatment and injections. That Claimant continued to experience lumbar complaints at the time he was placed at MMI does not negate the finding of MMI. A finding of MMI does not mean complete resolution of an individual's condition and symptoms, but that the physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition. See §8-40-201(11.5), C.R.S. An authorized treating physician shall make a determination as to when the injured employee reaches MMI. §8-42-107(8)(b)(I), C.R.S.

None of Claimant's authorized treating physicians recommended further diagnostic or curative treatment for Claimant's lumbar condition. Several of Claimant's personal physicians have opined that there are no surgical indications. Dr. Orgel's opinion that Claimant reached MMI for his work-related lumbar condition is consistent with the medical records and opinions of Claimant's authorized treating physicians that Claimant's condition was stable with no further treatment reasonably expected to improve his condition.

Moreover, as found, Dr. Orgel properly applied the AMA Guides when determining impairment. Using the AMA Guides, Dr. Orgel assigned Claimant a combined 20% whole person impairment, consisting of 7% impairment under Table 53(II)(C) and 14% impairment for lumbar range of motion deficits. Table 53(II)(C) of the AMA Guides provides for 7% permanent impairment of the lumbar spine for an "Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with moderate to severe degenerative changes on structural test; includes an operated herniated nucleus pulposus with or without radiculopathy." Here, Claimant had an unoperated, medically documented lumbar strain with a minimum of six months of medically documented pain, and moderate to severe degenerative changes on structural tests. Accordingly, Dr. Orgel's lumbar spine rating under Table 53(II)(C) was appropriate. Dr. Orgel's Table 53(II)(C) rating is also consistent with that of Dr. Zimmerman, who credibly explained that the impairment rating he assigned under Table 53(II)(C) of the AMA Guides is for Claimant's underlying lumbar spondylosis confirmed by MRI and ongoing symptoms.

There is no allegation of or evidence indicating Dr. Orgel did not properly perform or calculate his lumbar range of motion measurements. Dr. Orgel documented three sets of lumbar range of measurements, which he deemed valid. He properly calculated the corresponding impairment rating for Claimant's decreased lumbar range of motion under the AMA Guides. Dr. Orgel's range of motion measurements are consistent with findings documented in prior medical records and his impairment rating for lumbar range of motion deficits is even higher than that of Dr. Zimmerman. Dr. Orgel specifically explained he provided no separate impairment for the SI joint because Claimant's primary complaint is related to the lumbar spine and the results of the Faber test on his examination was negative. This is also largely consistent with prior examinations and the opinions of treating physicians. As such, there is not clear and convincing evidence Dr. Orgel's opinion on Claimant's lumbar spine impairment and MMI is incorrect.

Generally

In summation, Claimant has expressed substantial frustration with his course of treatment and various aspects of the workers' compensation system, including the DIME procedure. He continues to experience multiple symptoms and continues to seek medical treatment. The record reflects that Claimant's treating physicians, as well as Dr. Orgel, were aware of Claimant's continued reported complaints, that they assessed his conditions, and ultimately determined Claimant reached MMI for his work injury with impairment to his lumbar spine. Claimant essentially contends that any pathology documented in the medical records and any symptoms he experienced subsequent to the work injury are the direct result of the work injury. The existence of pathology and symptoms by itself is not dispositive of a causal relationship with the work injury. There must be a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). That Claimant has continued to seek and undergo treatment for his lumbar spine as well as other non-work related conditions subsequent to being placed at MMI does not disprove Dr. Orgel's opinion that Claimant has reached MMI for his work-related condition.

To the extent Claimant contends there are missing records, the ALJ is not persuaded, based on the totality of the evidence, including Claimant's own testimony, that the identified missing records, or other purported unidentified missing records, renders Dr. Orgel's opinion highly probably incorrect. Dr. Orgel performed a thorough review of the records he was provided, including not only the initial DIME packet of 316 pages, but an additional packet of 516 pages Claimant specifically requested be reviewed. Dr. Orgel took an extensive subjective history from Claimant, analyzed the history and course of Claimant's medical condition, assessed the clinical and diagnostic findings, and physically examined Claimant, addressing each body part identified by the parties to be within the scope of his evaluation. Dr. Orgel's findings and opinions were largely consistent with the findings of prior and subsequent evaluations as well as the opinions of multiple other treating physicians and Claimant's personal physicians. Dr. Orgel provided an accurate report including a thorough explanation of his review, impressions and ultimate opinions. The totality of the evidence demonstrates Dr. Orgel

followed proper DIME protocol and procedure pursuant to the Act, WCRP, AMA Guides and Impairment Rating Tips.

Based on the totality of the evidence, Claimant failed to prove it is highly probable Dr. Orgel's opinions on MMI and impairment are incorrect. Claimant's opinion and any medical opinions that could be deemed conflicting represent mere differences of opinion that do not rise to the level of clear and convincing evidence to overcome the DIME.

Maintenance Medical Treatment

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003).

Respondents filed a FAL admitting for reasonable, necessary and related medical treatment and/or medications after MMI. There are no recommendations from claimant's authorized treating physicians for specific maintenance medical treatment, other than 6-12 months of medication for the lumbar spine after January 27, 2022. Post-MMI, Claimant elected to continue to seek evaluation and treatment from UC Health and various other personal providers through his private insurance including multiple evaluations, injections, physical therapy, and diagnostic tests, for body parts and conditions other than the lumbar spine. As discussed above, Claimant's need for continued medical treatment to the cervical spine, thoracic spine, abdomen, vision and psychological conditions/body parts are not causally related to the work injury. Claimant failed to prove by a preponderance of the evidence that medical treatment for these conditions was reasonable, necessary and causally related treatment for the work injury.

Authorized Treatment

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the

claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that the surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

Subsequent to being placed at MMI, Claimant continued to treat at UC Health on his own accord, as well as with various other personal providers. As found, the post-MMI treatment Claimant sought with various providers outside of his ATPs and referrals from ATPs for maintenance treatment was unauthorized treatment. As such, Respondents are not required to pay for such treatment.

ORDER

1. Claimant failed overcome Dr. Orgel's DIME opinion on MMI and permanent impairment by clear and convincing evidence. Claimant is at MMI as of January 27, 2022 with a 20% whole person impairment of the lumbar spine.

2. Claimant failed to prove by a preponderance of the evidence he is entitled to medical benefits for the cervical spine, thoracic spine, abdomen, vision, or psychological conditions. Claimant's claim for benefits associated with those body parts and conditions is denied and dismissed.

3. Claimant failed to prove by a preponderance of the evidence the post-MMI medical treatment he received by others than his ATPs or referrals of his ATPs for maintenance treatment was authorized. Respondents are not liable for the unauthorized medical treatment.

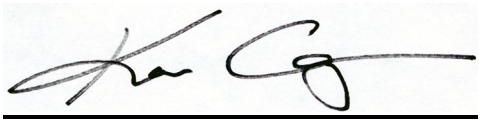
4. Claimant shall file an Application for Hearing on the issue of PTD benefits within 30 days of the final order in this matter, including any appeals.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 26, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to maintenance medical treatment to cure or alleviate the ongoing effects of his October 9, 2019 admitted industrial injury and/or prevent deterioration of his current condition.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a disfigurement award and if so, the amount of said disfigurement benefit.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant injured his left shoulder on October 9, 2019, when his arm became tangled in a building truss moving down a conveyor belt. According to Claimant, his arm was bent awkwardly and caught between the truss and the rollers of the assembly line causing immediate pain.

2. Claimant initiated treatment at Concentra Medical Centers (Concentra) and was referred to physical therapy. (See generally, Ex. A). Therapy and modified work duties failed to resolve Claimant's persistent pain or improve his range of motion loss. Accordingly, Claimant was referred for an MRI.

3. An MRI of the left shoulder was obtained on December 27, 2019. This MRI demonstrated a rotator cuff tendinosis, high grade partial thickness tear of the anterior supraspinatus footplate and probable partial thickness tearing of the bands of the subscapularis tendon along with a suspected longitudinal split tear of the interarticular long head of the biceps and effusion and hypertrophic osteoarthritic changes of the left AC joint. (Ex. A, bates 10).

4. Claimant was referred to Dr. Michael Simpson for a surgical consultation. Dr. Simpson concluded that Claimant required surgical intervention. Thus, on February 6, 2020, Dr. Simpson performed an arthroscopic assisted left rotator cuff repair, a left biceps tenodesis and a subacromial decompression to address what was discovered to be a longitudinal tear of the mid subscapularis tendon, a full thickness and retracted tear of the supraspinatus tendon, a longitudinal split tear of the biceps tendon and subacromial impingement. (Ex. A, bates 23).

5. Claimant experienced significant post-surgical shoulder pain and dysfunction. Consequently, he underwent additional injection therapy to include an interarticular subacromial steroid injection and two platelet rich plasma (PRP) injections.[1] (Ex. A, bates, 76, 102, 112). Unfortunately, this supplementary injection therapy seemingly worsened Claimant's symptoms prompting a referral for a repeat MRI. *Id.* at bates 116.

6. A repeat MRI of the left shoulder completed September 30, 2020, demonstrated "probable high-grade bursal and articular surface fibrillation [and] fraying of the proximal supraspinatus tendon". While no recurrent tearing was visualized distally in the area of the preoperative abnormality, there was a "[s]mall volume of fluid within the subacromial bursa" along with "moderate hypertrophic osteoarthritic change in the AC joint". (Ex. A, bates 129).

7. Dr. Simpson recommended a second operative procedure. He took Claimant to the operating room on November 10, 2020 for completion of a left shoulder "[a]rthroscopic-assisted revision rotator cuff repair with Regeneten augmentation", an [a]rthroscopic distal clavicle excision", and an arthroscopy with "extensive" debridement of the "anterior rotator interval, anterior subscapularis tendon, and bursal-sided adhesions" followed by a "manipulation under anesthesia". (Ex. A, bates 145).

8. Claimant experienced slow post-surgical progress following this procedure. After some initial confusion regarding his participation in physical therapy (PT), Claimant started PT on February 25, 2021. (EX. A, bates 248). By March 23, 2021, Claimant was noted to be "doing well". *Id*. at bates 270. While he had made significant improvement with respect to his left shoulder strength and was "increasing his job duties", Claimant reported persistent 7/10 left shoulder pain. *Id*.

9. Claimant continued to make progress over the next several weeks. Nonetheless, he had persistent pain and impaired range of motion. Ultimately, Claimant was released from care by Dr. Simpson's practice on April 21, 2021.

10. Claimant returned to Concentra for a follow up appointment with his authorized treating physician (ATP), Dr. Daniel Peterson on April 30, 2021. (EX. A, bates 306). Claimant was evaluated by Physician Assistant (PA) Wendi Kleppinger in lieu of Dr. Peterson at this appointment. PA Kleppinger noted that Claimant had made substantial improvement and had been released from "ortho" on April 21, 2021 and from PT "after meeting [his] goals". (Ex. A, bates 318). Claimant was returned to modified duty work with restrictions of no lifting over 50 pounds, carrying 30 pounds, pushing/pulling 100 pounds and a repetitive lifting restriction of 30 pounds. PA Kleppinger anticipated that maximum medical improvement (MMI) would be reached on May 10, 2021, with maintenance treatment needs. *Id*. at bates 322.

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[1] Although a medical record signed by Physician Assistant Kimberly Shenuk reflects that Claimant "tired" three PRP injections, the record evidence supports a finding that only two PRP injections were administered. (See, Ex. A, bates 116, 102, 112).

11. Claimant returned to Concentra on May 10, 2021, where he was evaluated by PA Michael Gottus. PA Gottus noted that Claimant reported feeling as though he was performing regular duty work but that he was still having "residual weakness with abduction". (Ex. A, bates 325). A return appointment was set for Claimant to be evaluated by Dr. Peterson. Dr. Peterson would not evaluate Claimant until May 25, 2021.

12. During the May 25, 2021, follow-up appointment, Dr. Peterson noted that Claimant was "as good as he is going to get". (Ex. A, bates 334). Examination of the left shoulder revealed "[t]enderness in the bicipital groove" and the anterior portion of the shoulder, but not in the AC joint. *Id*. at bates 338. Claimant also demonstrated reduced range of motion in the left shoulder but provocative testing maneuvers were reportedly negative. *Id*. at bates 338-339. Dr. Peterson opined that Claimant had reached "functional goal" and was ready for discharge. *Id*. at bates 339. He placed Claimant at MMI with 19% upper extremity impairment. *Id*. at bates 333, 339. According to Dr. Peterson, Claimant had "no need [for] medical maintenance care". *Id.*

13. Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Peterson's opinions regarding impairment and maintenance care on June 10, 2021. (Ex. 1, bates 1-8).

14. Claimant objected to Respondents FAL and requested a Division Independent Medical Examination (DIME). Dr. William Watson was designated as the DIME doctor and he completed his independent medical examination on January 25, 2022. (Ex. A; Ex 4).

15. Dr. Watson agreed with Dr. Peterson that Claimant reached MMI on May 25, 2021. After obtaining range of motion measurements, Dr. Watson also agreed that, as a consequence of his October 9, 2019, work-injury, Claimant had sustained 19% scheduled impairment of the left upper extremity, which, converts to 11% whole person impairment. (Ex. A, bates 15).

16. Although he opined that Claimant reached MMI on May 25, 2021, Dr. Watson raised concern that Claimant continued to present with signs of adhesive capsulitis. (Ex. A, bates 15, ¶ L). Accordingly, Dr. Watson documented the following with regard to maintenance care:

> As noted above, [Claimant] has had decreased range of motion since his final date of MMI as outlined by Dr. Peterson. I feel as part of maintenance care he should return to see his surgeon Dr. Michael Simpson and be reevaluated. Dr. Simpson can make a decision of whether he feels another MRI is indicated. I believe Dr. Simpson's recommendation should be followed. If he feels no more care is indicated he would continue to be at maximum medical improvement.

(Ex. A, bates 16, ¶ N).

17. Insurer filed an Amended Final Admission of Liability admitting to Dr. Watson's opinions concerning MMI and impairment on February 23, 2022. (Ex. 2). Although in agreement with Dr. Watson's opinions regarding MMI and impairment, Insurer elected to deny maintenance care after MMI "per the treating physician's original MMI report". *Id*. at bates 9 (emphasis added). Despite indicating in the remarks section of the February 23, 2022 FAL that the denial of maintenance care was based on Dr. Peterson's May 25, 2021 report of MMI/impairment, the claims representative, Lori Watson noted that maintenance treatment was being denied "pursuant to Dr. Watson's medical report dated 1/25/2022. *Id*. (emphasis added). As noted at ¶ 16 above, Dr. Watson recommended maintenance care in the form of a return appointment to Dr. Simpson for a follow-up evaluation in light of the evidence of persistent adhesive capsulitis. Based upon the evidence presented, the ALJ finds the denial of maintenance treatment predicated on Dr. Watson's January 25, 2022 DIME report inconsistent with the statement contained at ¶ N of the DIME report itself.

18. Claimant underwent a third MRI of the shoulder on January 17, 2023 for what is documented as "[w]orsening left shoulder pain with limited ability to lift and carry heavy objects". (Ex. 5). This MRI revealed the possibility of a "tiny interstitial tear" of the supraspinatus tendon along with subacromial and subdeltoid bursitis. *Id*. at bates 39. On January 18, 2023 Dr. Simpson commented on the MRI as follows:

> The MRI shows the rotator cuff repair is intact. There may be a very small interstitial tear but nothing that would require surgery. There is a little subacromial bursitis but in all the repair looks very good. When we see him back I think [it] would be reasonable to do a corticosteroid injection.

(Ex. 5, bates 38).

19. Claimant testified that he had undergone an injection with Dr. Simpson one day before his hearing. According to Claimant, the injection provided some pain relief, most importantly it was enough for him to finally get a good night's sleep. *Id*. at p. 17, ll. 12-14. Claimant also indicated he was scheduled for a follow-up visit with Dr. Simpson on March 15, 2023. Id. at ll. 15-23.

20. Claimant also testified that once he had completed his post-surgical care following his second surgery he returned to work for Employer. According to Claimant, he was placed at the "heaviest" work station and had to carry materials weighing 100 pounds. ([Redacted, hereinafter AP] Hrg. Trans. p. 15, ll. 14-16). Claimant testified that within a week and a half of returning to work his shoulder "popped". *Id.* at ll. 17-21. Claimant experienced swelling and was dropping things so he reported this to the "office". *Id.* at ll. 21-23. Per Claimant, he was told there was nothing more they could do for his shoulder. *Id*. at l. 24.

21. During cross-examination, Claimant clarified that shortly after he had returned to work following his second surgery, he went to Employer's office and reported his swelling and increased pain at which time he was told by the "manager" that he had been released from care and that Employer could not send him to a doctor "any more to get checked for your shoulder". (AP[Redacted] Hrg. Trans. p. 19, ll. 4-9. Claimant conceded that he abruptly left his employment but could not recall when this occurred. *Id*. at ll. 1-9. Rather, he testified that his niece encouraged him to apply for a different position with a temporary agency. *Id*. at ll. 10-18.

22. Claimant secured a position through the temporary agency running a machine that spray coats vitamins with color and/or wax. (AP[Redacted] Hrg. Trans. p. 20, l. 1). He commenced this work around August 2021 and testified at hearing that he continues to work in this capacity eight hours per day.[2] *Id*. at p. 19, ll. 21-24. According to Claimant, his job involves having to move barrels that weigh 55-70 kilograms. He moves the barrels by using a floor jack and rolling them into position using his right arm only. *Id*. at pp. 20-21, ll. 1-7. Additional duties associated with Claimant's current work as a pill coater include cleaning the spray guns, scooping pills into the machine, monitoring the machine and temperatures and documenting outcomes. *Id*.

23. Claimant testified that he continues to experience pain similar to that he had when he was placed at maximum medical improvement, both in intensity and location. He has popping and locking in the left shoulder. (AP[Redacted]Aapex Legal Services, LLC Hrg. Trans. p. 23, ll. 1-12).

24. As noted, Dr. Simpson testified by deposition on April 25, 2023. Dr. Simpson testified as a board certified orthopedic surgeon. (Depo. Dr. Simpson, p. 5, ll. 14-25). Dr. Simpson testified that Claimant did well after his second surgery with improved range of motion, despite the delay in getting him in for post-operative therapy. *Id*. at p. 8, ll. 20-23. Dr. Simpson saw Claimant on December 15, 2022, more than 1.5 years after being placed at MMI, and more than a year after Dr. Watson made the recommendation for Claimant to return to Dr. Simpson. *Id.* at p. 9, ll. 6-11. Dr. Simpson's note from the visit reflected Claimant reported his shoulder started bothering him shortly after returning to work moving trusses for the Employer. *Id*. Dr. Simpson had no record or knowledge of the work Claimant performed after he left his employment with the Employer. *Id*. at p. 10, ll. 9-14. He did recall that Claimant returned for follow-up appointments partly because he was in pain and partly because it was standard clinical procedure for his medical practice. *Id*. at p. 14, ll. 8-13.

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[2] Although Respondents indicate that Claimant's testimony regarding his permanent hire date by [Redacted, hereinafter NN] and other information about his job duties was lost due to a "break" in the audio recording, the ALJ has listened to the entire audio recording of the January 26, 2023 hearing and finds no break in the soundtrack. Details surrounding the asserted break in the audio as asserted by [Redacted, hereinafter LR], the Court Reporter hired by Respondents, are unknown. Perhaps she received a defective copy of the audio recording or she experienced a glitch in the recording while transcribing the record. Nonetheless, the Courts audio recording and the transcript of that recording as prepared by [Redacted, hereinafter CS] of AP[Redacted] appear complete and consistent with each other. Accordingly, the ALJ finds and concludes that the transcript prepared by LR[Redacted] is not an accurate record of the proceedings recorded on January 26, 2023.

25. Dr. Simpson testified that as of May 25, 2021, Claimant would have had osteoarthritis of his left acromioclavicular (AC) joint. (Depo. Dr. Simpson, p. 13, ll. 6-16). However, he added that the distal clavicle resection performed as part of Claimant's revision (second) surgery, would have mitigated that arthritis and it "no longer existed after the excision of the distal clavicle. *Id.* at ll. 17-25, p. 14, ll. 1-4.

26. Dr. Simpson testified that he recommended that Claimant undergo an MRI as part of the December 15, 2022 appointment. (Depo. Dr. Simpson, p. 14, ll. 14-17). Dr. Simpson testified that the results of that MRI demonstrated, some "subacromial subdeltoid bursitis, that the rotator cuff repairs were essentially intact, and that his biceps tenodesis was intact". *Id*. at ll. 20-22. He added that Claimant had a "small" interstitial tear, which could cause pain but was not significant enough to warrant additional surgery. *Id.* at p. 15, ll. 4-8. Given the MRI findings, Dr. Simpson recommended a subacromial injection. *Id*. at ll. 9-12.

27. Dr. Simpson testified that a cause of bursitis is overuse and he "assumed" that the cause of Claimant's bursitis was overuse and "probably somewhat related to his underlying rotator cuff kind of tendonitis, tendinopathy . . ." (Depo. Dr. Simpson, p. 15, ll. 15-25).

28. Dr. Simpson generally agreed that the job duties Claimant was performing after June 2021, could affect whether Claimant's condition, and need for treatment, is related to the original injury or an aggravation from his new employment. (Depo. Dr. Simpson, p. 16, ll. 6-14). Nonetheless, it is clear from the content of Dr. Simpson's deposition testimony that he did not take a work history from the Claimant at the appointment on December 15, 2022. Rather, it was his assumption the Claimant had gone back to full duty for Employer and was involved in heavy lifting of trusses and that was giving him issues. *Id*. at p. 9, ll. 12-23. Accordingly, the ALJ finds it unlikely that Dr. Simpsons is fully aware of the exact nature of Claimant's job duties with NN[Redacted] or how he performs those duties. Indeed, in response to the question of whether the condition he was treating was still related to Claimant's underlying work injury or an aggravation of that condition by subsequent employment, Dr. Simpson testified: "Probably without seeing Dr. Peterson's report, and . . . without having that complete work history, and the timeline of [the] job change, and development of symptoms, and whether symptoms persisted up to that point [it] is hard to say. So it is kind of indeterminate at this point". *Id.* at p. 18, ll. 14-25; p. 19, l. 1. Nonetheless, Dr. Simpson testified that there is "treatment we have to offer him, whether that is compensable under the original injury or whether that might be compensable as an overuse injury", adding "I guess that - - perhaps that's why we're here." *Id.* at p. 17, ll. 9-12. Dr. Simpson then discussed potentially performing additional corticosteroid injections or attempting PRP injections for Claimant's condition. *Id*. at ll. 16-25.

29. Based upon the content of Dr. Simpson's deposition testimony, the ALJ is not convinced he definitively answered the question of whether Claimant current need for treatment is related to Claimant's October 9, 2019 industrial injury. Nonetheless, the

totality of the evidence presented, persuades the ALJ that, more probably than not, Claimant's October 9, 2019 industrial injury is the proximate cause of his persistent symptoms and need for probable maintenance care, including additional corticosteroid or PRP injections, rather than a subsequent intervening cause.

30. Visual inspection of Claimant's left shoulder reveals the following disfigurement: Four (4) arthroscopic surgical scars located about the left shoulder, i.e. the front, side, top and back aspect of the shoulder. These scars are all semi-circular in shape and approximately ⅜ of an inch in diameter. The scar located on the posterior aspect of the shoulder is light pink in color while the remaining three scars located on the front, side and top of the shoulder all appear lighter than the surrounding skin. The scars on the front, side and top of the shoulder also appear to be the same contour as the surrounding skin, while the scar located on the upper back aspect of the left shoulder is slightly depressed resulting in a pock like appearance when compared to the contour of the adjacent skin.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to Assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo.App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or

unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo.App. 1990). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo.App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Claimant's Entitlement to Maintenance Medical Treatment

D. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement (MMI) where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*."

E. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra.* Indeed, a claimant is only entitled to such future benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); C.R.S. § 8-41-301(1)(c). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those, which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

F. The question of whether Claimant's symptoms and need for treatment are the natural and proximate result of his prior industrial injury, or the result of an efficient

intervening cause is one of fact for determination by the ALJ. See *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). In this case, there is scant evidence to support Respondents' suggestion that Claimant's current need for treatment may related to possible repetitive activities associated with his current employment. Although Dr. Simpson opined that the cause of Claimant's current need for treatment is "kind of indeterminate", he did indicate that Claimant's bursitis was "probably somewhat related to his underlying rotator cuff kind of tendonitis, tendinopathy." This, combined with the stated cause for the January 17, 2023, i.e. "[w]orsening left shoulder pain with limited ability to lift and carry heavy objects", persuades the ALJ that the condition of Claimant's left shoulder has deteriorated with the passage of time and that his current pain/symptoms are probably related to the original October 9, 2019 industrial injury and subsequent surgery.

G. The ALJ credits Claimant's testimony to find that his present condition will likely deteriorate further and he will experience greater functional decline without maintenance care, including additional injection therapies. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that he is entitled to a general award of maintenance medical care. Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for future medical treatment is reasonable, necessary and related to Claimant's industrial injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

Claimant's Entitlement to Disfigurement Benefits

H. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement", as used in the statute, contemplates that there be an "observable impairment of the natural appearance of [the] person." In this case, the ALJ finds and concludes that as a result of his August 26, 2020 work injury, Claimant has visible disfigurement to the body consisting of surgical scarring as described in Finding of Fact, paragraph 30 above.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for reasonably necessary post-MMI medical treatment, including additional corticosteroid or PRP injections from authorized providers to relieve Claimant from the ongoing effects of his industrial injuries and/or prevent deterioration of his condition.

2. Respondents retain the right to challenge future requests for maintenance treatment on the grounds that such care is not reasonable, necessary or related to Claimant's October 9, 2019 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,*

916 P.2d 609 (Colo.App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc., supra.*

3. Respondents shall pay Claimant $1,200.00 in disfigurement benefits.

4. All matters not determined herein are reserved for future determination.

DATED: May 26, 2023

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-130-124-001

ISSUES

- Whether Claimant has overcome the findings of the Division-sponsored Independent Medical Examination ("DIME") physician that Claimant is at maximum medical improvement ("MMI") for his November 26, 2019 work injury?

- Whether Claimant is entitled to an award for disfigurement related to his compensable work injury pursuant to Section 8-42-108, C.R.S.?

FINDINGS OF FACT

1. Claimant was employed by Employer as an acting supervisor building townhomes for Employer. Claimant testified that on November 26, 2019 he was headed up a ladder while working on a roof of a townhome when the ladder slipped and Claimant began to fall. Claimant testified he put his left arm on another ladder that was set up to the roof of the townhome in an attempt to catch himself, but still fell to the ground landing on his wrist and hip. On the employee accident report dated November 27, 2019, Claimant reported landing on his stomach on the ground.

2. Claimant testified he stayed at work to meet with a building inspector who was scheduled to arrive that day and after meeting with the building inspector, went to Mercy Medical Center Emergency Room ("ER"). At the ER, Claimant reported falling from a ladder just prior to arrival. X-rays taken at the ER showed a minimally displaced distal radius fracture. Claimant reported pain in the left shoulder and right forearm. Claimant reported a little bleeding from his nose that had since resolved. Claimant was provided with a sling and instructed to follow up with orthopedics.

3. Claimant was examined by Dr. Furry on December 2, 2019 with regard to his fractured distal radius. Dr. Furry recommended surgery which could include a bridging plate. Dr. Furry also noted Claimant had impingement syndrome of his left shoulder.

4. Claimant was evaluated at Animas Surgical Hospital on December 4, 2019 for follow up of his right wrist fracture. Claimant reported that he had minimal pain to his right forearm and only slight pain to his left shoulder with movement that he believed was improving. Claimant also reported some left hip pain which was not present until the past few days which Claimant attributed to increased sitting. The medical report was later corrected to note that Claimant was complaining of right hip pain.

5. Surgery consisting of open reduction and internal fixation ("ORIF") of Claimant's right distal radius fracture eventually took place on December 16, 2019 under the auspices of Dr. Furry.

6. Following surgery on his right arm, focus of Claimant's treatment switched to his left shoulder. Claimant was examined by Dr. Furry on December 27, 2019 and Claimant was diagnosed with traumatic incomplete tear of the left rotator cuff. Dr. Furry recommended a magnetic resonance image ("MRI") of his left shoulder.

7. Claimant was examined by Dr. Furry on January 24, 2020. Dr. Furry was performing a follow up examination from Claimant's surgery. Dr. Furry noted Claimant also complained of right hip pain in the area proximal to his greater trochanter in the region of his gluteus medius as the area of his greatest pain.

8. The MRI of Claimant's left shoulder was eventually performed on February 3, 2020. The MRI showed predominantly full-thickness irregular degenerative tearing of the supraspinatus and interior infraspinatus; full-thickness tear of the subscapularis with associated medial subluxation of the long head of the biceps; tendinosis with interstitial tearing involving the infraspinatus; intermediate grade tearing of the intra-articular long head of the biceps; anterior inferior labral tear involving the inferior labrum with more complex degenerative tearing seen at the posterior superior labrum; moderate glenohumeral joint osteoarthritis and moderate acromioclavicular ("AC") joint degeneration.

9. Claimant underwent surgery of the left shoulder on March 12, 2020. The left shoulder surgery included an arthroscopy with arthroscopic biceps tenodesis and repair of the subscapularis; arthroscopic repair of the supraspinatus and infraspinatus; subacromial decompression and extensive glenohumeral debridement.

10. Claimant was eventually referred to Dr. Smith for treatment of the hip. Claimant underwent an MRI of the hip on May 7, 2020 which showed a complex tear of the right anterior superior labrum. Based on the MRI results, Claimant underwent a right hip injection on May 27, 2020. Claimant testified that after injections and physical therapy did not provide him with relief of his hip pain, he was referred to Spine of Colorado for further evaluation.

11. Claimant underwent an x-ray of the lumbar spine on July 16, 2020 which showed L4-5 and L5-S1 moderated degenerative disc disease, L3-4, 3 mm listehesis, and mild retrolistheses at the L4-5 level. No instability was noted.

12. Claimant underwent an MRI of the lumbar spine on July 29, 2020 which showed moderate to large right paracentral dis extrusion at L4-5, moderate multilevel facet arthropathy, and foraminal stenosis at L3-4, L4-5 and L5-S1.

13. Claimant was examined at Spine of Colorado by Dr. Orndorff and was diagnosed with lumbar radiculopathy. Dr. Orndorff noted Claimant had significant L4-5 and L5-S1 lumbar spondylosis with retrolisthesis of L4-5 and L5-S1. Dr. Bohachevsky

provided Claimant with a series of transforaminal steroid injections ("TFSI"). Dr. Orndorff noted that Claimant reported good transient relief from the injection.

14. Respondents obtained an independent medical examination ("IME") with Dr. Rauzzino on October 14, 2021. Dr. Rauzzino reviewed Claimant's medical records, obtained a medical history and pertormed a physical examination in connection with his IME. Dr. Rauzzino opined that Claimant's July 28, 2020 MRI showed a clear acute disc herniation at L4-L5 with marked impingement of the exiting nerve root. Dr. Rauzzino opined based on his review of the medical records that the Claimant did not develop right lower extremity pain and radiculopathy until at least seven months after the injury.

15. From a causation analysis, Dr. Rauzzino opined that the disc herniation at L4-L5 and the radiculopathy and back pain that came later would not be occupationally related. Dr. Rauzzino noted that Dr. Orndorff had recommended a two-level fusion surgery and opined that absent a clearly defined pain generator or severe radiculopathy, the surgery would not be an ideal situation. Dr. Rauzzino also opined that based on Claimant's failure to respond to the injections, and the lack of overt instability along with the fact that Claimant's symptoms were getting better, the surgery would not be consistent with the Medical Treatment Guidelines.

16. Dr. Rauzzino opined that Claimant was at MMI for the shoulder and wrist injuries and based on his opinion that the lumbar spine was not related to the work injury, Claimant was at maximum medical improvement for his claim.

17. Dr. Rauzzino testified by deposition in this matter consistent with his IME report.

18. Respondents sought a 24 month Division-sponsored Independent Medical Examination ("DIME") of Claimant which was pertormed by Dr. Green on September 28, 2022. Dr. Green reviewed Claimant's medical records, obtained a medical history and pertormed a physical examination in connection with his DIME. Dr. Green noted that Claimant was scheduled for spine surgery this upcoming December that was to be covered by his personal insurance. Dr. Green noted that Claimant's "Hip surgeon concerned that his spine/surgery/back pain may be causing his hip pain (radicular pain)". Dr. Green noted Claimant reported it was difficult to bend over, secondary to right buttock and lower back discomfort.

19. Dr. Green diagnosed Claimant with (1) status post ORIF right wrist for right wrist fracture, work related; (2) status post left rotator cuff tear and operative repair, work related; (3) right hip labral tear, more likely than not, work related; (4) multiple-level lumbosacral degenerative changes, with resolving right L4-5 disc herniation, not clearly work-related; and (5) right L5 radiculitis, not clearly work-related. Dr. Green agreed in his opinion with Dr. Rauzzino's October 1, 2020 date of MMI and provided Claimant with an impairment rating of 6% of the upper extremity for the right wrist (converted to a 4% whole person impairment), 16% of the upper extremity for the left shoulder (converted to a 10% whole person impairment) and 10% range of motion impairment of the right hip

(which converts to a 4% whole person impairment). Dr. Green combined the impairments to equal a 16% whole person impairment.

20. Dr. Green further noted that based on his review of the medical records, it was not definitively clear that the clinical presentation, including review of pertinent records, location or distribution of hip pain complaints immediately following the reported work-related fall can more likely than not be attributed to the subsequently diagnosed L4-5 disc herniation seen on MRI, or reported right L5 radiculitis noted approximately 8 months following the date of injury. Dr. Green opined that there did not appear to be a clear documentation of ongoing radicular symptoms within the first one to two months following the reported fall, or clear documentation to support an isolated lumbar disc herniation clinical presentation. Dr. Green further noted that Claimant did not report the onset of radiating leg pain immediately following the fall and on examination, there appeared to be inconsistencies with provocation of pain that are not typical of Claimant's pain that Dr. Green would usually associate with lumbar discogenic pain. Dr. Green noted that based on his review of the records, he believed the onset of radiating right leg pain appeared to be in July 2020. Dr. Green provided Claimant with a 20 pound lift/carry restriction.

21. Respondents filed a final admission of liability ("FAL") based on the 24 month DIME report from Dr. Green admitting for the scheduled impairment benefits.

22. Claimant subsequently filed an application for hearing contesting the finding of MMI along with disfigurement.

23. At hearing, Claimant testified that immediately after the accident, he knew he had injured his wrist and shoulder and sought treatment for this from the ER on the date of the injury. Claimant testified that he then developed pain in his right hip and reported this to his treating physicians in early December 2019. Claimant noted that the medical provider initially recorded the wrong side of his complaints of pain, mentioning the left hip instead of the right hip which was subsequently corrected.

24. Claimant testified that his right hip pain was minor at that time and the focus of his medical providers was initially on the wrist and shoulder injuries. Claimant testified he underwent an MRI of the hip which showed the torn labrum which was treated with injections and physical therapy.

25. Claimant testified that he was eventually referred to Dr. Orndorff who recommended an MRI of his back. Claimant testified that after treating with Dr. Orndorff, Claimant believed that the hip pain was coming from his lumbar spine issues. Claimant testified that he continued to treat with Dr. Orndorff and eventually underwent lumbar fusion surgery on December 6, 2022. Claimant testified that after surgery, his hip pain that developed after his work injury resolved. Claimant's testimony regarding the onset of his pain complaints and the resolution of his hip issues following the lumbar fusion surgery is found to be credible and persuasive by the ALJ.

26. Claimant testified that he sought the medical treatment with Dr. Orndorff under his personal health insurance due to the fact that the surgery was not covered by his workers' compensation claim.

27. The ALJ credits Claimant's testimony at hearing and finds that Claimant has overcome the opinion of Dr. Green that his lumbar spine injury is not related to the work injury by clear and convincing evidence. The ALJ notes that the medical documentation shows that Claimant first complained of hip pain to a medical provider 8 days after his November 26, 2019 injury (December 4, 2019). The ALJ further finds Claimant's testimony that his hip pain that developed in connection with his November 26, 2019 fall was resolved by the lumbar surgery performed by Dr. Orndorff on December 6, 2022 to be credible and persuasive.

28. The ALJ finds that Claimant has demonstrated that it is highly probable and free from substantial doubt that the fall on November 26, 2019 resulted in an injury to his lumbar spine that necessitated the need for treatment including the surgery performed by Dr. Orndorff on December 6, 2022.

29. The ALJ credits Claimant's testimony at hearing and finds that the opinion of Dr. Green that the lumbar spine injury was not related to Claimant's fall on November 26, 2019 to have been overcome by clear and convincing evidence. Because the ALJ finds that the lumbar spine injury is a compensable component to the November 26, 2019 injury, Claimant has established that it is highly probable and free from substantial doubt that he was not at MMI as of October 1, 2020, as Claimant was still under active treatment for the lumbar spine component of his injury.

30. Because Claimant is not at MMI for the November 19, 2019 injury and due to the fact that Claimant had a lumbar surgery that is related to the November 19, 2019 injury, the issue of disfigurement is not yet ripe for adjudication and will be reserved for later determination. Claimant's eventual disfigurement in this case will need to take in any potential disfigurement resulting from Claimant's lumbar surgery.

31. Because the ALJ finds that Claimant's lumbar spine condition was causally related to the November 26, 2019 work injury, Respondents are liable for reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury related to the lumbar spine.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-

43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving* & *Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado,* W.C. No. 4-350-356 (March 22, 2000).

5. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

6. As found, the ALJ credits the testimony of Claimant at hearing along with the records from Dr. Orndorff and finds that Claimant has overcome the finding that he was at MMI as of October 1, 2020 by clear and convincing evidence. Specifically, the ALJ credits the testimony of Claimant regarding the onset of his symptoms in his hip and back as being related to the November 26, 2019 fall. The ALJ further credits Claimant's testimony that his symptoms that developed shortly after his November 26, 2019 fall resolved after the lumbar spine fusion performed by Dr. Orndorff on December 6, 2022. The ALJ determines that Claimant's testimony was supported by the medical records entered into evidence at hearing, including the records of Dr. Furry, Dr. Smith and Dr. Orndorff.

ORDER

It is therefore ordered that:

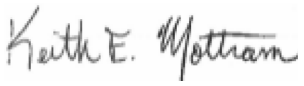
1. Claimant has overcome the finding that he was at MMI for the November 26, 2019 work injury as of October 1, 2020 by clear and convincing evidence.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury, including the medical treatment for Claimant's lumbar spine provided by physicians that are authorized to treat Claimant for his work injury, including, but not limited to, the medical treatment provided by Dr. Orndorff, pursuant to the Colorado Medical Fee Schedule.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: May 20, 2023



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6^{1h} Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-110-083-003

ISSUES

I. Whether Claimant overcame the opinion of Division Independent Medical Examination ("DIME") physician Douglas Scott M.D. on permanent impairment.

II. Whether Claimant is entitled to an award of disfigurement benefits.

III. Medical maintenance benefits.

FINDINGS OF FACT

1. Claimant is a 41-year-old who works for Employer as a teacher's assistant.

2. Claimant sustained an admitted industrial injury while working for Employer on February 21, 2019. Claimant's right knee landed on a small wooden toy on the floor while she was crawling to attend to a child. When Claimant stood she felt a pop in her right knee, her knee gave way and she twisted her right ankle.

3. On February 25, 2019 Claimant sought treatment at the emergency department of Denver Health with complaints of swelling, bruising, and pain in the right knee. Candace Daughtery, PA noted Claimant also had "mild pain in the right lateral ankle but is far less concerned about this" (Cl. Ex. 4, p. 31). On examination PA Daughtery noted mild ecchymosis over the anteromedial right knee. Regarding the right ankle, there was tenderness to palpation over and immediately anterior to the lateral malleolus, no joint effusion, and near full active range of motion. X-rays of the right knee and right ankle revealed no definite acute fractures. Claimant was diagnosed with a right knee injury and right ankle sprain. PA Daughtery noted there was no evidence of fracture, traumatic malalignment or neurovascular compromise of the ankle. She recommended Claimant wear a knee sleeve and ankle splint, rest, ice and elevate her right extremity, and treat with NSAIDs.

4. On March 6, 2019 Claimant established care with authorized provider Concentra. Claimant initially presented to Janelle Tittalfitz, PA-C and Jerald Solot, D.O. Examination of the right knee revealed tenderness and limited range of motion. Appearance of the right ankle was normal. There was tenderness in the ATFL and CFL and deltoid ligament along with limited range of motion. Claimant was assessed with a right knee strain and right ankle sprain and referred for physical therapy for the right knee.

5. Claimant attended approximately 33 physical therapy sessions at Concentra from March 6, 2019 to October 1, 2019. All but three physical therapy records from these appointments reference right ankle findings or complaints. On March 6, 2019, Claimant

reported right knee pain and numbness down to her ankle. On March 8, 2019, full right ankle range of motion is noted. A May 2, 2019 note documents Claimant's reports of a little pain on the outside of the right ankle. No ankle findings are documented at this appointment.

6. On March 8, 2019 Claimant reported right knee and ankle pain. On examination of the right ankle, Dr. Solot noted mild pain with range of motion and no swelling or ecchymosis. He prescribed Claimant an ankle double strap.

7. On March 21, 2019 Claimant saw authorized treating physician ("ATP") Amanda Cava, M.D. at Concentra with complaints of pain in the right knee, right ankle and back. On examination of the right ankle, Dr. Cava noted mild tenderness to palpation over the anterior ankle/dorsal mid foot and mildly limited painful range of motion. There was no ecchymosis, swelling, or crepitus Dr. Cava's assessment was right ankle sprain, right knee strain and muscle spasm. She prescribed Claimant Medral for the ankle and knee, and other medications for muscle spasms.

8. On April 1, 2019 Dr. Cava noted mild tenderness over the anterior tibialis tendon on examination of the right ankle.

9. On April 12, 2019 Claimant reported to Dr. Cava that her ankle pain was improving and now occurred just with certain movements. On examination of the right ankle Dr. Cava noted no tenderness with full range of motion and normal strength. She remarked that Claimant's right ankle symptoms were resolving. Dr. Cava ordered an MRI of the right knee and referred Claimant to a chiropractor.

10. Claimant underwent six chiropractic sessions at Concentra with Richard Mobus, D.C. from April 15, 2019 through May 13, 2019. Dr. Mobus' treatment focused on reported symptoms in the low back, sacroiliac joint, hip, gluteal and hamstring. No ankle symptoms, findings or treatment are documented in his notes.

11. On April 26 and May 10, 2019, Dr. Cava noted Claimant's reports of continued back and right knee pain but improving ankle pain. No ankle exam is documented. Dr. Cava referred Claimant to an orthopedic specialist for evaluation of her right knee.

12. Claimant underwent an orthopedic evaluation of the right knee by Cary Motz, M.D. on May 21, 2019. Dr. Motz noted that a right knee MRI demonstrated grade 4 chondral defect in the lateral femoral condyle posteriorly as well as some grade 3 changes of the lateral patellar cartilage. There was no evidence of a loose body and no meniscal tear. The impression was right knee posterior lateral femoral condyle grade 4 defect and patellofemoral chondromalacia. Dr. Motz noted that Claimant had some degenerative changes per the MRI report and that she suspected Claimant aggravated this with the twisting injury at work. Dr. Motz administered a steroid injection to Claimant's right knee and recommended Claimant continue physical therapy. Dr. Motz did not address the right ankle.

13. At a follow-up evaluation on May 28, 2019 Claimant reported to Dr. Cava that her right knee pain was unchanged since undergoing the injection. She complained of hip and low back pain as well as issues with her left knee. Ankle complaints and exam are not documented. Dr. Cava's assessment was chondromalacia, right knee strain and low back strain.

14. On June 11, 2019 Dr. Motz noted Claimant had persistent symptoms despite chiropractic treatment, physical therapy and injections. She discussed proceeding with surgery of the right knee.

15. On June 14, 2019 Claimant complained of back pain radiating to her right buttock, right thigh, right calf and right lateral foot. No ankle complaints or exam are documented. Dr. Cava assessed Claimant with back pain of the lumbosacral region with sciatica and a right knee strain. She referred Claimant for a lumbar MRI.

16. On July 1, 2019 Claimant underwent a right knee arthroscopy with osteochondral plug placement and chondroplasty of medial femoral condyle and patella, performed by Dr. Motz. Dr. Motz' preoperative diagnosis was right knee chondral defect, lateral femoral condyle. Her postoperative diagnoses were right knee chondral defect, lateral femoral condyle and grade III chondromalacia of the patella and medial femoral condyle.

17. Claimant continued to see Dr. Cava and Dr. Motz postoperatively. On August 13, 2019 Claimant reported 7/10 right knee pain and no pain of the right ankle. Dr. Motz subsequently ordered a repeat right knee MRI and referred Claimant to John D. Papilion, M.D. for concern that the osteochondral plug failed.

18. Claimant presented to Dr. Papilion on November 5, 2019. Dr. Papilion assessed Claimant with right knee pain and chondromalacia and recommended proceeding with a mini open fresh osteochondral allograft. Dr. Papilion performed a right knee scope with osteochondral graft to lateral femoral condyle on December 16, 2019.

19. Claimant attended approximately 32 sessions of physical therapy at Lowry Now from January 16, 2020 through June 9, 2020. The notes from these appointments contain no right ankle complaints or findings with the exception of a February 6, 2020 note documenting tenderness across the midfoot and distal to the lateral malleolus with no pain with passive range of motion and a May 12, 2020 note documenting Claimant's report that she also twisted her ankle on the day of injury. nothing else documented re: ankle.

20. On January 28, 2020 Claimant reported to Dr. Cava experiencing pain in the right anterior-lateral ankle with weight bearing, as well as continued knee pain and swelling. No ankle exam is documented. Dr. Cava's assessment was chondromalacia and s/p right knee surgery.

21. On April 28, 2020 Dr. Papilion noted that a repeat right knee MRI revealed intact osteochondral graft with incorporation, normal cartilage surface and joint space with some patellar chondromalacia.

22. Claimant continued to complain of right knee pain. On May 22, 2020 Claimant reported 7/10 right knee pain with pain radiating to the right lower leg and occasional pain shooting down her right lateral lower leg to the ankle and dorsal foot. No ankle exam is documented.

23. On June 9, 2020 Claimant reported to Dr. Papilion experiencing no relief from a steroid injection. She complained of sciatic-type pain radiating from her right buttock down to her lateral foot and ankle.

24. On June 15, 2020 Claimant saw Dr. Cava with complaints of back pain radiating to her right lower leg and foot since undergoing an injection. No ankle complaints or findings are noted. Dr. Cava referred Claimant for massage therapy for her back and to an orthopedic specialist for her back and right knee.

25. On July 6, 2020 Dr. Cava noted Claimant's complaints of worsening back pain and increased pain and swelling in the right knee radiating to the lateral right lower leg and foot. No ankle examination is documented.

26. On July 16, 2020 Claimant presented to orthopedic surgeon Rachel Frank, M.D. at UC Health for a third opinion on her right knee pain. Claimant reported 7-8/10 knee pain and swelling and lower back and sciatic nerve discomfort radiating from her buttock down the posterior aspect of her leg with paresethesias in the middle toe. Examination of the right knee revealed tenderness and range of motion 0 to 130 symmetric to the left knee. She noted the appearance of femoral external rotation and ankle mortis varus changes compared to the left side. Dr. Frank reviewed a May 2020 MRI and opined that much of Claimant's pain may be coming from her lateral and patellofemoral cartilage wear and prior cartilage graft, which had significant edema on MRI suggestive of having not appropriately incorporated. She considered a CT of the hip and knee to assess for femoral rotation and recommend a series of hyaluronic acid injections. No ankle exam or complaints are documented.

27. On August 13, 2020 Kevin Shinsako, PA-C at UC Health noted Claimant's reports of significant anterior lateral and lateral-sided knee pain walking with a significant antalgic gait. Claimant underwent third hyaluronic injection of the right knee.

28. As of September 1, 2020 Dr. Cava's assessment was chondromalacia, S/P right knee surgery, and back pain of lumbosacral region with sciatica. No ankle findings or complaints were noted.

29. At a follow-up evaluation with Dr. Frank on September 10, 2020, Claimant reported experiencing no significant change after undergoing the knee injections. Claimant complained of knee pain radiating down to the foot. Dr. Frank noted that

Claimant also reported ankle complaints relating back to the original injury. No ankle exam is documented. Dr. Frank recommended that Claimant undergo a CT scanogram to assess for bilateral hip anatomy and knee anatomy. She referred Claimant to foot and ankle specialist Dr. Moon for evaluation of her ankle complaints and also referred Claimant for pain management.

30. On September 28, 2020 Claimant complained to Dr. Cava that she never had any evaluation or treatment of her right ankle complaints. Dr. Cava noted that the record from Claimant's initial emergency room visit documented a normal ankle x-ray and mild findings on ankle exam. She wrote,

> Per my early notes, her ankle strain was continually improving in the first few months, she had a normal ankle exam on 4/12/19, and her symptom complaints were nearly resolved by May 2019. Symptoms are unchanged. Symptoms are located in the right lateral ankle. Associated symptoms include tingling lateral ankle to lat and dorsal foot, but no instability.

(Cl. Ex. 5, p. 43).

31. On examination, Dr. Cava noted antalgia on the right and limping on the right. She did not document any examination of the ankles. Her assessment now included right ankle sprain. Dr. Cava referred Claimant for an MRI of the right ankle.

32. Claimant presented to Daniel Kyeongtaek Moon, M.D. on September 30, 2020. Clamant reported that she twisted her ankle at work and had some continued right ankle pain with activities. She reported that her pain increased after undergoing a knee injection in Spring 2020. Claimant complained of pain radiating down the side of her leg to her foot as well as pain when lying down. Her pain was perifibular in the dorsal lateral foot. On examination, Dr. Moon noted that Claimant had an altered gait where her right knee and foot seemed somewhat externally rotated. There was decreased sensation and positive Tinel's. Dr. Moon did not document ankle range of motion. X-rays of the right ankle obtained that day demonstrated posterior enthesophyte in the calcansus and small rounded ossific body at the medial malleolus tip. There were some minimal degenerative changes and OS peroneum. Dr. Moon's impression was peroneal nerve sensitivity and swelling. He recommended that Claimant wear a compression stocking and undergo physical therapy focusing on the ankle.

33. Dr. Frank reevaluated Claimant on October 8, 2020. Dr. Frank opined, "At this point I do not think her knee is the primary source of her pain. She is having more radiating lower leg pain down into the ankle. Pain also appears to be more nervelike in nature. No additional knee surgery are injections warranted at this time. May continue to use knee brace." (Cl. Ex. 9, p. 732). On examination, Dr. Frank noted "gross genu valgum appearance of right compared to left with external rotation of the entire right lower extremity that seems to be coming from the hip." (Id). She did not document specific measurements of the degree of gross genu valgum appearance.

34. On October 26, 2020 Dr. Cava noted Claimant had a normal ankle MRI and saw Dr. Moon, who ordered physical therapy. Claimant reported pain and swelling in the right foot with difficulty wearing shoes other than sandals. She reported no change in her ankle and foot symptoms. Claimant complained of right knee pain, swelling, clicking and instability. On examination, Dr. Cava noted diffuse tenderness of the right knee with limited range of motion. Claimant's foot/ankle was not tender. Dr. Cava did not document ankle range of motion.

35. Claimant attended approximately nine physical therapy sessions at CACC Physical Therapy from November 2, 2020 through July 13, 2021. On November 2, 2020, Claimant presented with pain in the right lateral ankle with limitations in range of motion, flexibility and endurance. On December 4, 2020 and February 19, 2021 the physical therapist noted slight improvement in ankle range of motion, pain and strength measurements. On May 26, 2021 Claimant reported a burning pain in her right ankle. The physical therapist noted decreased ankle and knee range of motion and an antalgic gait pattern on the right. Claimant continued to report right ankle pain at each subsequent session through July 13, 2021. The physical therapist recommended Claimant return to her physician before continuing with physical therapy as Claimant's gains had been very slow.

36. On December 29, 2020 Claimant reported to Dr. Cava pain up and down her leg with no improvement. Dr. Cava assessed Claimant with numbness of the right lower extremity. No knee or ankle exam is documented. Dr. Cava referred Claimant for an EMG of the right lower extremity and physical therapy for her chondromalacia, right ankle sprain and right knee.

37. Claimant underwent an EMG of the right lower extremity on January 18, 2021, performed by Kathy McCranie, M.D. The EMG was mildly abnormal with findings of a mild right sural neuropathy. Dr. McCranie opined that the mild right sural neuropathy did not explain the more diffuse nature of Claimant's complaints.

38. On January 26, 2021 Dr. Cava referred Claimant for continued physical therapy as well as massage therapy for her lumbar spine. On examination Dr. Cava noted swelling, diffuse tenderness and limited range of motion of the right knee. She further noted no tenderness or crepitus on palpation of the right ankle, with limited range of motion in all planes. Specific range of motion measurements were not specified.

39. On February 10, 2021 Kathleen D'Angelo, M.D. performed an Independent Medical Examination ("IME") at the request of Respondent. Claimant reported low back, right knee, sciatica and foot complaints. On examination of the right knee Dr. D'Angelo noted no tenderness over the knee anteriorly or to the quadriceps tendons distally and that range of motion was "actually very good." There was some atrophy of the VMO. On examination of the right ankle she noted range of motion was almost full in inversion, eversion and plantar flexion, but limited in dorsiflexion. There was no tenderness over the Achilles Tendon or the medial and lateral malleolus. Dr. D'Angelo remarked that Claimant's post-injury course was one of metastasizing and expanding complaints and

that Claimant's claims were inconsistent with her presentation in Dr. D'Angelo's office where she was observed sitting comfortably without display of pain behaviors. Dr. D'Angelo opined that all diagnostic and therapeutic interventions should be stopped until Claimant completes a forensic psychological evaluation. She concluded that Claimant would require an impairment rating only for her right knee, as there was no other objective evidence of work-related abnormalities to her lumbar spine, right ankle, hips, contralateral knee or ankle, and her head. She explained that the only reason to provide an impairment rating for the right knee was for the surgical interventions performed as Claimant's findings of chondromalacia were not causally related to the work injury.

40. On February 26, 2021 Claimant reported continued pain in her back, right knee and right ankle. Dr. Cava noted antalgia on the right and limping on the right, with no specific knee or ankle findings documented. She referred Claimant to an orthopedic specialist for the numbness of the right lower extremity and right ankle sprain and to a physiatrist for back pain. She also referred Claimant for additional physical therapy for her back and knee as well as a psychological evaluation.

41. Claimant underwent a neuropsychological evaluation with Kevin J. Reilly, Psy.D. on March 17, 2021. Dr. Reilly opined that Claimant's clinical presentation was consistent with a chronic pain syndrome, noting that her clinical history was one of increasing pain complaints and decreasing functional abilities. Dr. Reilly noted that Claimant's psychological testing was invalid due to minimization and inconsistencies in responding. He diagnosed Claimant with pain disorder with related psychological factors and adjustment disorder with depressed mood. He recommended Claimant undergo eight sessions of psychological and biofeedback therapies which were to be discontinued if Claimant did not report benefit after four sessions.

42. Walter J. Torres, Ph.D. performed a psychological evaluation of Claimant on March 18, March 23 and April 1, 2021. He issued a report dated April 6, 2021. Dr. Torres noted Claimant's testing was largely invalid due to a mixture of underreporting and insufficient completion of items; however, there were no indications of overreporting of symptomatology. Claimant attended teletherapy sessions with Dr. Torres on April 15, May 13, June 3, and July 21, 2021. As of last session, Dr. Torres noted that Claimant presented with no significant psychological impairment stemming from her situation.

43. Dr. D'Angelo reviewed Dr. Reilly's report and issued an addendum to her IME report on April 19, 2021. She opined Claimant was at maximum medical improvement ("MMI") if she did not show any subjective improvement in pain complaints from her psychological sessions.

44. Claimant returned to Dr. Moon on April 21, 2021. On examination he noted Claimant's right foot and right knee were externally rotated. There was tenderness to palpation of the peroneal tendons. He did not document ankle range of motion. Dr. Moon's impression was right peroneal tendinitis and superficial peroneal nerve sensitivity. He recommended Claimant restart physical therapy to work on her peroneal

tendon strength and gait and gave Claimant an ankle brace. Dr. Moon advised Claimant to focus on walking with the knee and foot in a straight position instead of externally rotated.

45. On April 22, 2021 Claimant complained to Dr. Cava of constant knee pain. Dr. Cava noted Claimant had seen Dr. Moon for her right foot/ankle. No examination of the ankle was noted. Dr. Cava remarked that Claimant's symptoms continued to worsen and migrate throughout her course of treatment and that Claimant did not seem to have a realistic understanding or expectation of Dr. Moon's recommendation for her treatment for her ankle/knee.

46. On May 18, 2021 Claimant continued to complain of pain in the right knee, back, hips and right ankle, along with pain in her left knee. On exam of the right knee Dr. Cava noted no apparent swelling of the right knee compared to the left, diffuse tenderness over the anterior knee, and limited range of motion with pain. Exam of the right lower leg was normal with the exception of increased sensitivity to light touch over the lateral lower leg to anterior-lateral ankle. The right ankle appeared normal. There was tenderness in the peroneal tendons and anterior ankle but full range of motion. Dr. Cava noted antalgia on the right with limping. Her assessment was chondromalacia, numbness of right lower extremity, emotional stress reaction and right ankle sprain. She referred Claimant for a repeat right knee MRI. Under the Discussion/Summary section of her medical note she remarked,

> [r]ight knee injury (and initially right ankle sprain that resolved) with persistently worsening/migrating symptoms and subjective complaints more than objective findings…Gait training/practice is important for her, as she has been frequently positioning her right lower extremity (and sometimes left) in external rotation and abduction for more than a year now.

(Cl. Ex. 5, p. 90).

47. On June 17, 2021 Dr. Cava noted on examination diffuse tenderness, weakness and limited range of motion of the right knee. There was increased/abnormal sensitivity to light touch over the lateral lower leg to anterior-lateral ankle. No ankle exam findings are documented. Claimant demonstrated antalgia on the right. Dr. Cava noted that a recent right knee MRI of right demonstrated a well-incorporated osteochondral graft and unchanged arthritis changes in the knee compared to a prior exam. She remarked that, despite Claimant completing an extensive course of physical therapy, as well as six chiropractic sessions and massage therapy, her symptoms and function had not improved but instead migrated and worsened. She referred Claimant to Dr. Frank for a maintenance visit for the right knee.

48. On July 16, 2021 Dr. Cava placed Claimant at MMI. On examination of the right knee, Dr. Cava noted no swelling, diffuse medial tenderness and tenderness to palpation inferior to the patella with no tenderness over the patella, mild lateral

tenderness, and no crepitus with passive knee motion but a small click/catch with the patella moved distally. Active right knee range of motion was 130 degrees flexion and 0 degrees extension. Left knee active range of motion was 135 degrees flexion and 0 degrees extension. Dr. Cava made no findings of any valgus deformity at the time of her examination. No examination of the right ankle is documented.

49. Dr. Cava's final assessment was right knee strain and s/p right knee surgery. Using the AMA Guides, she assigned Claimant 13% combined lower extremity impairment. The total combined impairment rating consisted of 2% lower extremity impairment for range of motion deficits in the right knee (using the left knee as a baseline), 10% lower extremity impairment for chondromalacia under Table 40 of the AMA Guides, and 1% lower impairment for mild right sural neuropathy that developed postoperatively. Dr. Cava referred Claimant for a functional capacity evaluation ("FCE") for the right knee and released Claimant to modified duty with permanent restrictions as determined by a valid FCE. Regarding maintenance treatment, Dr. Cava recommended Claimant complete her eight total visits with Dr. Torres, and one maintenance visit with Dr. Frank for the right knee in the next eight weeks.

50. Dr. Scott performed a DIME on November 30, 2021, taking Claimant's subjective history, reviewing medical records and performing a physical examination. The parties requested Dr. Scott evaluate Claimant's right ankle, right knee, right hip, lumbar spine and digestive issues. On examination of the right knee, Dr. Scott noted no swelling, popping or crepitus. Ligaments of the knee were stressed and stable with good patellar tracking. There was no MCL or LCL gapping with varus and valgus stress at 0 and 30 degrees. McMurray's testing was negative. Active range of motion of the right knee was measured by goniometer to 119 degrees of flexion and limited to -30 degrees in extension while sitting. Claimant was able to place her right knee in 0 degrees of extension or neutral position. There was no right calf tenderness. Claimant reported decreased sensation to light touch over the right lateral leg. Examination of the right ankle showed no swelling and no tenderness over the lateral or medial malleolus. Regarding right ankle range of motion Dr. Scott noted Claimant had "good passive range of motion without resistance she noted some Achilles tendon tightness with dorsiflexion of the foot." (R. Ex. E, p. 109). There was no pain with inversion or eversion stress and no ligamentous instability with inversion or eversion stress. There was negative anterior posterior drawer sign of the right ankle. Dr. Scott did not note any valgus deformity of the right knee.

51. Dr. Scott provided the following clinical diagnoses: (1) Contusions of the right knee resolved; (2) Twist of the right ankle with mild strain/sprain, resolved; (3) Aggravation of pre-existing chondromalacia of the patella and femoral condyle, with two arthroscopic surgeries and cartilage allograft placement; (4) Claimed low back pain due to altered gait from pain in the right knee; and (5) Possible mild sural nerve neuropathy due to regional block at time of second knee surgery on 12/16/2019. He agreed with Dr. Cava that Claimant reached MMI as of July 16, 2021.

52. Dr. Scott opined that the medical record and structural testing clearly demonstrated Claimant probably had pre-existing right knee chondromalacia that was aggravated by the February 21, 2019 work injury. Using the AMA Guides and the Impairment Rating Tips, Dr. Scott assigned Claimant combined 16% lower extremity impairment for the right knee. The rating consisted of 11% lower extremity impairment for range of motion deficits in the right knee under Section 3.2c and Table 39 of the AMA Guides, 5% lower extremity impairment under Section 5 of Table 40 of the AMA Guides for chondromalacia, and 1% lower extremity impairment for mild sural nerve impairment. Dr. Scott did not assign any impairment of the right ankle or right hip, stating the following: "By my examination [Claimant] has no permanent dysfunction of her right ankle for her presumed mild sprain of the right ankle on 2/21/2019. [Claimant] did not report an injury to her right hip nor did she report to me problems with her right hip." (R. Ex. E, p. 111). Dr. Scott explained that his impairment rating differed from Dr. Cava's as Claimant's right knee active range of motion was less on his examination. He further explained that he chose a 5% rating for chondromalacia versus 10% because of his belief that the work injury aggravated Claimant's chondromalacia.

53. Dr. Scott did not assign any permanent impairment for the lumbar spine, opining that there was no evidence Claimant suffered any work-related structural injury to her lumbar spine. He also did not assign any permanent impairment for any digestive issues, concluding that Claimant presented no evidence she suffered a permanent structural or physiologic impairment of the digestive system as a result of the work injury. Regarding maintenance care, Dr. Scott recommended Claimant continue wearing the unloader knee brace, take Tylenol for and ice/heat the knee as needed, and continue a strengthening program for the muscles surrounding the knee.

54. It is undisputed Respondent filed a Final Admission of Liability consistent with Dr. Scott's DIME report. Respondent admitted for reasonable, necessary and related medical maintenance treatment. Claimant did not offer evidence as to any specific maintenance medical treatment Claimant has requested and Respondent has failed to authorize or denied.

55. On October 20, 2022 Caroline Gellrick, M.D. performed an IME at the request of Claimant. Dr. Gellrick's record review did not include Dr. Scott's DIME report. On examination Dr. Gellrick noted Claimant walked with her right foot outward. There was mild positive McMurray's testing medially and laterally on the right and tenderness medially and laterally on the right knee. Right knee active range of motion using goniometer was 131 degrees flexion and -5 degrees extension. Claimant was intolerant of range of motion measurements of the left knee due to cramping in her left leg. Dr. Gellrick noted the following right ankle range of motion measurements: 10 degrees dorsiflexion, 40 degrees plantar, 30 degrees inversion and 20 degrees eversion. No measurements of the valgus deformity are documented.

56. Dr. Gellrick agreed with the MMI date assigned by Dr. Cava of July 16, 2021. She noted she agreed in part with Dr. D'Angelo's notation that Claimant symptoms of pain in the number of body parts kept spreading from the initial encounter of a right

knee sprain and ankle sprain. Dr. Gellrick opined that there was no surgical indication for further surgery of the right knee or surgery of the right ankle.

57. Using the AMA Guides Dr. Gellrick assigned a combined lower extremity impairment of 29%. Her rating consisted of:

a. 21% impairment for the right knee, comprised of: (1) 2% lower extremity impairment for range of motion deficits of the right knee, using Dr. Cava's left knee measurements for normalization, as Claimant was intolerant of left knee measurements during her exam; (2) 10% impairment for chondromalacia under Table 40 of the AMA Guides; and (3) 10% impairment for posttraumatic valgus deformity;

b. 9% impairment of the right ankle for range of motion deficits; and

c. 1% impairment for damage to the sural nerve under Table 51 of the AMA Guides.

58. Regarding maintenance care, Dr. Gellrick recommended further neuropsychological testing with a bilingual neuropsychologist, orthotics to correct Claimant's leg length discrepancy, aquatic and land physical therapy, and knee brace replacements.

59. Dr. Gellrick testified at a deposition as Level II accredited expert in family medicine and addiction medicine. Dr. Gellrick testified consistent with her IME report. She confirmed that, at the time of issuing her IME report she had not reviewed Dr. Scott's DIME report. Dr. Gellrick explained that she provided 10% impairment for chondromalacia because the two surgeries resulting from Claimant's work injury aggravated the condition. She testified that she assigned 10% impairment for posttraumatic valgus deformity, which she explained is a deformity of the leg in which Claimant's right knee bent inward. Dr. Gellrick opined that the valgus deformity most likely developed after Claimant's work-related surgeries, noting that the initial medical records did not document any valgus deformity. She did not address measurements of the degree of valgus deformity. Dr. Gellrick testified she assigned 2% impairment for range of motion deficits of the right knee after normalization, as well as 1% impairment for mild right sural neuropathy that was likely caused by Claimant's knee surgeries. Dr. Gellrick testified that Claimant's ankle was part of her original work injury and that she assigned 9% impairment of the right ankle after normalization compared to the left ankle.

60. Dr. Gellrick continued to recommend the maintenance care detailed in her IME report, including a follow-up with Dr. Torres, an evaluation with a neuropsychologist like Dr. Rieffel who speaks Spanish, orthotics, a knee brace as well as possibly a brace for her right ankle. On cross-examination Dr. Gellrick acknowledged that, by the time she examined Claimant approximately 13 months post-MMI, Claimant's range of motion could have worsened with the passage of time, body habitus and inactivity.

61. Claimant testified at hearing that she did not have any prior right knee or right ankle injuries. She testified that after undergoing the right knee surgeries her right foot began to turn outward and she experienced numbness from her hip down to her foot. Claimant testified she developed a limp after sustaining the injury in March 2019 and has had the limp since such time. She testified her right knee currently feels like it will give out 2-3 times per day, and has 9/10 pain. She wears a knee brace prescribed by Dr. Frank and an ankle brace that was prescribed by Dr. Moon. She testified that since being placed at MMI by Dr. Cava almost two years ago her condition has worsened, with more pain and stiffness.

62. The ALJ finds the opinions of Drs. Scott and Cava, as supported by the medical records, more credible and persuasive than the opinion of Dr. Gellrick and Claimant's testimony.

63. The ALJ finds Dr. Scott properly applied the AMA Guides. Claimant failed to prove by a preponderance of the evidence Dr. Scott's DIME opinion on permanent impairment is incorrect.

64. As a result of Claimant's February 24, 2019 work injury and related surgeries, Claimant has a visible disfigurement to the body and is entitled to award for disfigurement. The disfigurement consists of the following:

a. A noticeable limp on the right side.

b. A scar on the front of Claimant's right knee measuring approximately 2 inches in length and ½ inch in width. The scar is discolored and textured.

c. A knee brace Claimant testified she wears almost daily but not in the house.

d. An ankle brace Claimant testified she wears when driving and standing for a long period of time.

e. Two arthroscopic scars on Claimant's inner right knee which are slightly discolored.

f. An arthroscopic scar on Claimant's out right knee that is slightly discolored.

65. Claimant's disfigurement does not entail extensive facial scars or facial burn scars, extensive body scars or burn scars; or stumps due to loss or partial loss of limbs.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

The party seeking to overcome the DIME physician's finding regarding MMI and whole person impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP,

Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The Court of Appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of §8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* WC 4-971-646-03 (ICAO, Feb. 6, 2018). Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indeminity Care ESIS Inc*., WC 4-777-882 (ICAO, Nov. 5, 2010); *see Morris v. Olson Heating & Plumbing Co.,* WC 4-980-171 (ICAO, May 20, 2019) (whether the claimant sustained a whole person or extremity impairment is one of fact for the ALJ and the DIME opinion on the issue is not entitled to any enhanced weight).

If a party has carried the initial burden of overcoming the DIME physician's impairment rating, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence." *Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004). An ALJ's statutory power to render evidentiary decisions does not disappear merely because the ATP and the DIME doctor agree that a claimant has not reached MMI. An ALJ may thus determine whether a claimant has reached MMI and assign an impairment rating as a question of fact. *Destination Maternity and Liberty Mutual Insurance Company v. Burren*, 19SC298 (Colo. May 18, 2020); *see Niedzielski v.*

Target Corporation, WC 5-036-773-001 (ICAO, Mar. 9, 2020) (when an ALJ determines that a DIME opinion has been overcome, the issue of the claimant's correct impairment rating becomes a question of fact and the ALJ may calculate the impairment based upon a preponderance of the evidence).

A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* WC 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. Deviations from the *AMA Guides* constitute evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Vuksic v. Lockheed Martin Corporation* WC 4-956-741-02 (ICAO, Aug. 4, 2016). Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In re Goffinett,* WC 4-677-750 (ICAO, Apr. 16, 2008).

Claimant argues Dr. Scott erred in his DIME opinion by failing to assign impairment of the right ankle and failing to assign a higher lower extremity impairment rating for the right knee. As part of his work-related diagnoses, Dr. Scott opined that Claimant sustained resolved contusions of the right knee, a resolved mild right ankle strain/sprain, and aggravation of pre-existing chondromalacia of the patella and femoral condyle. Dr. Scott included the right ankle as part of his work-related diagnoses and specifically determined Claimant did not sustain any permanent impairment of the right ankle. As Claimant is attempting to challenge the DIME physician's opinion on scheduled impairment of body parts Dr. Scott deemed related to the work injury (the right knee and right ankle), the correct burden of proof to overcome the DIME is a preponderance of the evidence.

As found, Claimant failed to prove it is more probably true than not Dr. Scott's DIME opinion was incorrect. Dr. Scott determined Claimant sustained a combined 16% lower extremity impairment, consisting of 11% impairment for right knee range of motion deficits, 5% for right knee chondromalacia under Table 40 of the AMA Guides, and 1% for mild sural nerve impairment. Claimant does not argue that Dr. Scott's 1% rating for sural nerve impairment is incorrect. Dr. Scott's 1% impairment for sural nerve impairment is consistent with the impairment assigned by Drs. Cava and Gellrick and is supported by the medical records. The crux of Claimant's challenge to the DIME - the impairment ratings of the right knee and right ankle - is discussed below.

<u>Right Knee</u>

Claimant does not allege Dr. Scott erred in his right knee range of motion measurements or calculations. Claimant argues Dr. Scott erred by assigning 5% impairment instead of 10% impairment for Claimant's chondromalacia and that he

provided no basis for doing so. Claimant further argues Dr. Scott erred by failing to rate Claimant's valgus deformity. Claimant contends she is entitled to 21% lower extremity impairment for her right knee, as determined by Dr. Gellrick.

Claimant's argument that Dr. Scott did not explain the basis for his rating for chondromalacia is inaccurate. Dr. Scott specifically stated in his DIME report that he assigned 5% impairment instead of 10% impairment because he believed Claimant aggravated a condition of chondromalacia. That Dr. Scott did not provide a more extensive explanation of his reasoning does not render his opinion probably incorrect in light of the totality of the circumstances. The preponderant evidence demonstrates Dr. Scott's impairment rating for chondromalacia was discretionary and within the parameters established by the AMA Guides. Section 5 of Table 40 of the AMA Guides provides for 0-20% impairment of the lower extremity for arthritis due to any cause including trauma. Neither the AMA Guides nor the Impairment Rating Tips specify that a physician is required to give a particular rating between 0-20%. The AMA Guides only note that the impairment of 0-20% under Section 5 of Table 40 is "according to deformity." (AMA Guides, p. 68).

Claimant relies on the fact that Dr. Gellrick's 10% impairment for chondromalacia is the same as Dr. Cava's. While Dr. Gellrick's 10% impairment for chondromalacia is consistent with that of Dr. Cava, the preponderant evidence does not demonstrate Dr. Scott's opinion was probably in error. Drs. Scott, Cava and Gellrick all opine Claimant had pre-existing chondromalacia that was aggravated by the work injury. Claimant's imaging confirms what was likely pre-existing chondromalacia. A right knee MRI obtained prior to Claimant's first right knee surgery noted grade III chondromalacia, while those obtained after her two surgeries demonstrated grade III and grade IV chondromalacia. Dr. Scott determined that the extent of work-related aggravation and deformity qualified for a 5% rating instead of 10%, which was within his discretion and within the parameters of the AMA Guides.

Similarly, the preponderant evidence does not establish Dr. Scott erred in failing to assign impairment for valgus deformity. On October 8, 2020, Dr. Frank did note the appearance of right gross genu valgum as compared to the left. Nonetheless, neither Dr. Cava, who treated Claimant for more than two years, Dr. D'Angelo, or Dr. Scott noted any valgus deformity related to the work injury or gave any impairment for such condition. Section 10 of Table 40 of the AMA Guides provides for 10% lower extremity impairment for posttraumatic valgus deformity *if over 20 degrees*. (Emphasis added). The medical records, including Dr. Gellrick's IME report, do not document measurements with respect to the degree of valgus deformity. Dr. Gellrick testified that she attributes the valgus deformity to the work injury, but did not address any degree of deformity. The existence of a valgus deformity is not dispositive that Dr. Scott likely erred in not assigning permanent impairment for such condition under the totality of the circumstances.

<u>Right Ankle</u>

Claimant further contends Dr. Scott erred in failing to assign permanent impairment for the right ankle, based on documentation in the records of limited ankle range of motion and right ankle pain, as well as failure by Drs. Cava and Scott to take specific range of motion measurements of the right ankle. Claimant argues she is entitled to 9% impairment of the right ankle due to range of motion deficits as determined by Dr. Gellrick.

The preponderant evidence does not demonstrate Dr. Scott erred in failing to assign permanent impairment for the right ankle. Documentation of ankle range of motion and complaints are present in the record, although somewhat inconsistently. While there are references to limited or decreased ankle range of motion at certain points throughout Claimant's evaluation and treatment, specific ankle range of motion measurements are not documented. Dr. Scott performed an examination of the right ankle noting "good" passive range of motion. He specifically explained that his exam revealed no permanent dysfunction of the right ankle. Dr. Scott's clinical diagnoses included a mild right ankle strain/sprain that had resolved.

His opinion that Claimant did not sustain any impairment to her ankle is consistent with that of Dr. D'Angelo, as well as ATP Dr. Cava. On September 28, 2020, Dr. Cava specifically addressed Claimant's complaint that her right ankle had gone untreated, noting that initial emergency room records documented mild ankle findings and a normal x-ray. Dr. Cava further noted that Claimant's ankle strain was continually improving in the first few months, she had a normal ankle exam on April 12, 2019, and that the strain nearly resolved by May 2019. On May 18, 2021, two months prior to being placed at MMI, Dr. Cava noted full right ankle range of motion on examination. Her final assessment was right knee strain and s/p right knee surgery.

Dr. Gellrick assigned an impairment for the right ankle based on deficits in range of motion obtained 13 months subsequent to Claimant being placed at MMI. Claimant testified that, since MMI she has experienced more pain and stiffness. Dr. Gellrick acknowledged during her testimony that, by the time she examined Claimant, Claimant's range of motion could have worsened with the passage of time, body habitus and inactivity. With respect to impairment of the right ankle, Dr. Scott's opinion, as corroborated by Drs. Cava and D'Angelo and the medical records, is more credible and persuasive than that of Dr. Gellrick. To the extent Dr. Scott was required under the AMA Guides to document specific ankle range of motion measurements and did not do so, such deviation did not materially impact his rating, in light of his ultimate conclusions that Claimant's right ankle sprain/strain resolved without permanent dysfunction.

Based on the totality of the evidence, the preponderant evidence does not demonstrate Dr. Scott erred in his DIME opinion on permanent impairment.

Maintenance Medical Treatment

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further

deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003).

As found, Respondent admitted liability for reasonable, necessary and related medical benefits. Claimant does not contend, nor was any evidence offered, that Respondent denied or otherwise failed to authorize a specific medical maintenance benefit requested by Claimant. Accordingly, any determination of whether specific medical treatment is reasonable, necessary and related maintenance treatment is premature. The issue shall be reserved for future determination as applicable.

Disfigurement

Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

As found, as a result of the work injury and related surgeries, Claimant sustained a serious permanent disfigurement in an area of the body normally exposed to public view. Based on Claimant's disfigurement, that ALJ concludes she is entitled to the disfigurement maximum for her date of injury, $5,229.68.

ORDER

1. Claimant failed overcome Dr. Scott's DIME opinion permanent impairment by a preponderance of the evidence.

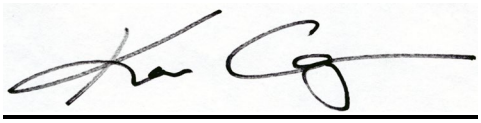
2. Respondent shall pay Claimant $5,229.68 for her disfigurement. Respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 30, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-183-740-003

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive an accounting demonstrating proof of reimbursement of medical expenses.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is permitted to receive interest on her Workers' Compensation indemnity benefits.

3. Whether Claimant has established by a preponderance of the evidence that she is eligible for reimbursement of mileage and other expenses.

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to recover penalties.

FINDINGS OF FACT

1. On August 19, 2021 Claimant sustained a work-related injury to her right shoulder during the course and scope of her employment with Employer.

2. A First Report of Injury was filed on September 29, 2021. Respondents filed a Notice of Contest on October 4, 2021.

3. On October 25, 2021 Claimant filed an Application for Hearing regarding compensability, medical benefits and Temporary Total Disability (TTD) benefits.

4. On December 16, 2021 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged Claimant was entitled to receive medical benefits and TTD benefits.

5. On April 21, 2022 John J. Raschbacher, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI). Respondents filed a Final Admission of Liability (FAL) on May 24, 2022.

6. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME). On June 6, 2022 Claimant filed an Application for Indigent Determination with the Office of Administrative Courts. On June 29, 2022 ALJ Nemechek determined Claimant's liquid assets totaled $22,100.00 and thus exceeded the $1,500.00 limit. He concluded Claimant was not indigent pursuant to WCRP 18-10(A)(1). Claimant thus paid the $1000 DIME fee.

7. On October 10, 2022 DIME physician John D. Douthit, M.D. determined Claimant had reached Maximum Medical Improvement (MMI) on April 21, 2022 and assigned a 13% right upper extremity impairment rating. On October 27, 2022 Respondents filed a FAL consistent with Dr. Douthit's MMI and impairment determinations. The FAL also acknowledged that Claimant was permitted to receive medical maintenance benefits in the form of pain management including a second opinion on her right shoulder with an orthopedic surgeon.

8. On November 3, 2022 Respondents filed an Amended FAL. The Amended FAL reiterated that Claimant was authorized to receive medical maintenance benefits in the form of pain management including a second opinion on her right shoulder with an orthopedic surgeon. The document specified that Respondents had paid $4349.40 in medical benefits The FAL noted that it had been amended to include the payment of TTD benefits for the period April 21, 2022 through October 9, 2022 based on Dr. Douthit's DIME opinion. The FAL stated that Claimant had received TTD benefits totaling $18,799.04 for the period August 20, 2021 through October 9, 2022. Claimant also received Temporary Partial Disability (TPD) benefits for the period October 10, 2022 through April 16, 2023 totaling $9,834.45. The FAL reveals that Respondents did not make any interest payments to Claimant.

9. Claimant objected to the FAL and filed an Application for Hearing regarding multiple issues, including the following:

> [a]ccurate accounting showing proof of reimbursement of all medical expenses, maintenance care and treatment as recommended by DIME physician, penalties for requiring me, as well as, all Colorado instructors, to perform tasks "off the clock" without pay and then using the argument that I wasn't on the clock to justify denial of a Workers' Comp claim, penalties for handling my claim incorrectly and violating workers' compensation rules/deadlines, interest on TTD for four months of non-payment while waiting for court date, interest on PPD for six months of non-payment while waiting for DIME, reimbursement for $1000 DIME since their first doctor was wrong, reimbursement for mileage, reimbursement for paper, ink, postage, etc. required to fight the denial, PTO and holiday pay that I used up when wasn't receiving TTD but should have been, unpaid wages for 100s of times loading and unloading equipment from my vehicle. They have admitted this was done 'off the clock.' If submitted this time on my timesheets it brought down my "efficiency rating" which prompted discipline at performance reviews.

10. Claimant testified at the hearing in this matter. She recounted that she reported her August 19, 2021 injury to Employer but was not apprised that the claim might involve Workers' Compensation. She thus went to an emergency room and later underwent physical therapy under private insurance. Claimant noted Employer did not

timely file a First Report of Injury or supply a designated provider list. Respondents initially denied liability, but eventually accepted the claim and filed a GAL.

11. Claimant explained that, after Respondents accepted liability, she was required to attend additional medical appointments through Workers' Compensation providers but never received mileage reimbursement. Because she initially reached MMI with a 0% impairment rating, she was required to pay for a DIME and received a 13% upper extremity rating. Claimant remarked that she still suffers right arm limitations as a result of her August 19, 2021 work injury.

12. Claimant seeks an "accounting showing proof of reimbursement of all medical expenses, maintenance care and treatment" as recommended by DIME Dr. Douthit. However, Respondents' counsel has stated that a copy of the medical payment log has been provided to Claimant. Moreover, on November 3, 2022 Respondents filed an Amended FAL reiterating that Claimant was entitled to receive medical maintenance benefits in the form of pain management including a second opinion on her right shoulder with an orthopedic surgeon. The document specified that Respondents had paid $4349.40 in medical benefits for Claimant's injury.

13. Importantly, the record reflects that Respondents have requested medical provider SCL Health to cease billing Claimant and submit their bills to Insurer for payment. Specifically, on January 27, 2022 Respondents' counsel authored a letter advising medical providers SCL Health Saint Joseph Hospital and Western Orthopaedics and Sports Medicine that a FAL had been filed "which indicates that all medical costs incurred for treatment of the claimant's work-related injuries are the sole responsibility of the employer. As such, any attempt to collect against the claimant will be in direct violation of Colorado law." The letter also specified that an injured worker is never required "to directly pay for admitted or ordered medical benefits covered under the Workers' Compensation Act." Notably, if the injured worker has directly paid for medical treatment that is later admitted, "the payer shall reimburse the injured worker for the amounts actually paid for authorized treatment within 30 days of receipt of the bill." On June 27, 2022 Respondents authored an identical letter to SCL Health Saint Joseph Hospital.

14. The preceding documentation reflects that Respondents have admitted liability for and paid Claimant's reasonable, necessary and related medical benefits. To the extent that medical providers seek payment directly from Claimant, Respondents have advised the providers that their requests violate Colorado law. Instead, Respondents have acknowledged that they are required to reimburse Claimant for the amounts actually paid for authorized treatment within 30 days of receipt of the bill. Finally, there is no evidence in the record that Respondents have denied any requested maintenance medical treatment. Because Respondents have acknowledged liability for medical benefits and advised providers they are responsible for payment, Claimant's request for an accounting and reimbursement of medical expenses is denied and dismissed.

15. Claimant seeks four months of interest payments on TTD benefits while awaiting a court date. Claimant also requests six months of PPD benefits while waiting for a DIME. The FAL reveals that Respondents did not make any interest payments to Claimant. However, the indemnity benefits for which Claimant seeks interest were not due and owing until after Dr. Douthit's DIME opinion was issued on October 10, 2022. Respondents then timely issued an Amended FAL on November 3, 2022 based on Dr. Douthit's determination. The Amended FAL noted that it had been revised to include the payment of TTD benefits for the period April 21, 2022 through October 9, 2022. The Amended FAL detailed that Claimant had received TTD benefits totaling $18,799.04 for the period August 20, 2021 through October 9, 2022. Claimant also received TPD benefits for the period October 10, 2022 through April 16, 2023 totaling $9,834.45. Because the record reveals that Respondents timely filed an Amended FAL and did not delay indemnity benefit payments to Claimant, no interest is due. Claimant's request for interest payments is thus denied and dismissed.

16. In Claimant's Application for Hearing she sought reimbursement for mileage expenses. DOWC Rule of Procedure 18-7(E) specifies that "the injured worker shall submit a request to the Payer showing the date(s) of travel and mileage, and explain any other reasonable and necessary travel expenses incurred or anticipated." However, the record is devoid of evidence that Claimant requested mileage reimbursement for medical expenses from Respondents. Accordingly, Claimant's request for mileage reimbursement is denied as unripe.

17. Claimant also seeks reimbursement for expenses in the form of paper, ink, and postage to challenge the denial of her claim for benefits. However, there is no evidence in the record regarding the amount Claimant seeks. Furthermore, there is no provision in the Workers' Compensation Act for reimbursement of expenses for paper, ink and postage incurred in challenging a denied claim. Accordingly, Claimant's request for reimbursement of costs for paper, ink and postage is denied and dismissed.

18. Claimant requests "reimbursement for $1000 DIME since their first doctor was wrong." However, the record reflects that Claimant was responsible for the DIME fees. Initially, Claimant objected to the FAL and sought a DIME. On June 6, 2022 Claimant filed an Application for Indigent Determination with the Office of Administrative Courts. On June 29, 2022 ALJ Nemechek determined that Claimant's liquid assets totaled $22,100.00 and exceeded the $1,500.00 limit. He thus concluded that Claimant was not indigent pursuant to WCRP 18-10(A)(1). Claimant then paid the $1000 DIME fee. Pursuant to WCRP 11-5(B) the requesting party is liable for payment of DIME fees absent a finding of indigence. Accordingly, Claimant's request for reimbursement of the DIME fee is denied and dismissed.

19. In her Application for Hearing, Claimant sought penalties for "handling my claim incorrectly and violating workers' compensation rules/deadlines." The Application did not state with specificity the grounds on which Claimant was seeking penalties. Although Claimant testified that Employer did not timely file a First Report of Injury or

supply a designated provider list, Respondents did not receive adequate notice of the factual or legal bases for her penalty claims.

20. Regardless of Claimant's testimony at hearing, the Application for Hearing simply identified that Respondents had failed to correctly handle her claim and violated deadlines. However, Respondents were entitled to reasonable notice of the specific legal and factual bases of the penalty claims so they had a fair opportunity to prepare appropriate defenses. Based on a review of the record, Respondents did not receive a fair opportunity to present contrary evidence at the time of the hearing or receive sufficient notice of the bases of the claims for penalties to satisfy standards of due process. Accordingly, Claimant's request for penalties is denied and dismissed.

21. Claimant also seeks penalties for work performed "off the clock" and unpaid wages for loading equipment. The preceding issues seek compensation for employment duties and do not involve work injuries. Because requests exceed the jurisdiction of the Office of Administrative Courts they will not be addressed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Reimbursement for Medical Expenses

4. Section 8-43-203(2)(b)(II), C.R.S. provides that a claim will automatically close after the date of the FAL unless the claimant contests the FAL in writing and requests a hearing on any disputed issues that are ripe for hearing. *See Stefanski v. Indus. Claim Appeals Off.,* 128 P.3d 282 (Colo. App. 2006). One purpose of the procedures enumerated in §8-43-203(2)(b)(II) is to provide the claimant with formal notice of the issues admitted and denied by the respondents as well as the bases for those actions. The claimant may then make an informed decision regarding whether to contest the FAL. The purpose of procedures surrounding the filing of FAL is for the respondents to notify the claimant regarding admitted and denied issues and for the claimant to determine whether the claim should close or be contested. *Olguin v. Rent a Center*, W.C. No. 4-714-364 (ICAO, Apr. 13, 2010). The statutory automatic closure provisions are designed to "promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." *Dyrkopp v. Indus. Claim Appeals Off.,* 30 P.3d 821, 822 (Colo. App. 2001).

5. As found, Claimant seeks an "accounting showing proof of reimbursement of all medical expenses, maintenance care and treatment" as recommended by DIME Dr. Douthit. However, Respondents' counsel has stated that a copy of the medical payment log has been provided to Claimant. Moreover, on November 3, 2022 Respondents filed an Amended FAL reiterating that Claimant was entitled to receive medical maintenance benefits in the form of pain management including a second opinion on her right shoulder with an orthopedic surgeon. The document specified that Respondents had paid $4349.40 in medical benefits for Claimant's injury.

6. As found, importantly, the record reflects that Respondents have requested medical provider SCL Health to cease billing Claimant and submit their bills to Insurer for payment. Specifically, on January 27, 2022 Respondents' counsel authored a letter advising medical providers SCL Health Saint Joseph Hospital and Western Orthopaedics and Sports Medicine that a FAL had been filed "which indicates that all medical costs incurred for treatment of the claimant's work-related injuries are the sole responsibility of the employer. As such, any attempt to collect against the claimant will be in direct violation of Colorado law." The letter also specified that an injured worker is never required "to directly pay for admitted or ordered medical benefits covered under the Workers' Compensation Act." Notably, if the injured worker has directly paid for medical treatment that is later admitted, "the payer shall reimburse the injured worker for the amounts actually paid for authorized treatment within 30 days of receipt of the bill." On June 27, 2022 Respondents authored an identical letter to SCL Health Saint Joseph Hospital.

7. As found the preceding documentation reflects that Respondents have admitted liability for and paid Claimant's reasonable, necessary and related medical benefits. To the extent that medical providers seek payment directly from Claimant, Respondents have advised the providers that their requests violate Colorado law. Instead, Respondents have acknowledged that they are required to reimburse Claimant for the amounts actually paid for authorized treatment within 30 days of receipt of the bill.

Finally, there is no evidence in the record that Respondents have denied any requested maintenance medical treatment. Because Respondents have acknowledged liability for medical benefits and advised providers they are responsible for payment, Claimant's request for an accounting and reimbursement of medical expenses is denied and dismissed.

8. As found, Claimant seeks four months of interest payments on TTD benefits while awaiting a court date. Claimant also requests six months of PPD benefits while waiting for a DIME. The FAL reveals that Respondents did not make any interest payments to Claimant. However, the indemnity benefits for which Claimant seeks interest were not due and owing until after Dr. Douthit's DIME opinion was issued on October 10, 2022. Respondents then timely issued an Amended FAL on November 3, 2022 based on Dr. Douthit's determination. The Amended FAL noted that it had been revised to include the payment of TTD benefits for the period April 21, 2022 through October 9, 2022. The Amended FAL detailed that Claimant had received TTD benefits totaling $18,799.04 for the period August 20, 2021 through October 9, 2022. Claimant also received TPD benefits for the period October 10, 2022 through April 16, 2023 totaling $9,834.45. Because the record reveals that Respondents timely filed an Amended FAL and did not delay indemnity benefit payments to Claimant, no interest is due. Claimant's request for interest payments is thus denied and dismissed.

Reimbursement for Mileage and other Expenses

9. Section 8-42-101(1)(a), C.R.S. requires the respondents to pay for expenses that are incidental to obtaining reasonable and necessary medical treatment. Specifically, mileage expenses are compensable if "incidental" to obtaining medical treatment. *Country Squire Kennels v. Tarshsis*, 899 P.2d 362 (Colo. App. 1995); *Sigman Meat Co. v. Indus. Claim Appeals Off.*, 761 P.2d 265 (Colo. App. 1988). Similarly, Colorado Division of Workers' Compensation (DOWC) Rule of Procedure 16-10(G) specifies that "payers shall reimburse injured workers for mileage expenses as required by statute or provide written notice of the reason(s) for denying reimbursement within 30 days of receipt." Finally, DOWC Rule of Procedure 18-7(E) provides that "[t]he Payer shall reimburse the injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments.

10. As found, in Claimant's Application for Hearing she sought reimbursement for mileage expenses. DOWC Rule of Procedure 18-7(E) specifies that "the injured worker shall submit a request to the Payer showing the date(s) of travel and mileage, and explain any other reasonable and necessary travel expenses incurred or anticipated." However, the record is devoid of evidence that Claimant requested mileage reimbursement for medical expenses from Respondents. Accordingly, Claimant's request for mileage reimbursement is denied as unripe.

11. As found, Claimant also seeks reimbursement for expenses in the form of paper, ink, and postage to challenge the denial of her claim for benefits. However, there is no evidence in the record regarding the amount Claimant seeks. Furthermore, there is no provision in the Workers' Compensation Act for reimbursement of expenses for paper,

ink and postage incurred in challenging a denied claim. Accordingly, Claimant's request for reimbursement of costs for paper, ink and postage is denied and dismissed.

12. As found, Claimant requests "reimbursement for $1000 DIME since their first doctor was wrong." However, the record reflects that Claimant was responsible for the DIME fees. Initially, Claimant objected to the FAL and sought a DIME. On June 6, 2022 Claimant filed an Application for Indigent Determination with the Office of Administrative Courts. On June 29, 2022 ALJ Nemechek determined that Claimant's liquid assets totaled $22,100.00 and exceeded the $1,500.00 limit. He thus concluded that Claimant was not indigent pursuant to WCRP 18-10(A)(1). Claimant then paid the $1000 DIME fee. Pursuant to WCRP 11-5(B) the requesting party is liable for payment of DIME fees absent a finding of indigence. Accordingly, Claimant's request for reimbursement of the DIME fee is denied and dismissed.

Penalties

13. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015). The purposes of the specificity requirement are to both: (1) provide notice of the basis of the alleged violation so the putative violator can have an opportunity to cure the violation and (2) provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Insurance Fund v. Indus. Claim Appeals Off.*, 77 P.3d 867 (Colo. App. 2003). The notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015). Nevertheless, the statute does not prescribe a precise form for pleading penalties and an ALJ may consider the circumstances of the individual case to ascertain whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, WC 4-493-641 (ICAO Apr. 28, 2004).

14. The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *See Hendricks v. Indus Claim Appeals Off,* 809 P.2d 1076, 1077 (Colo. App. 1990); *In Re Claim of Campbell*, W.C. No. 5-050-078-02 (ICAO, Dec. 18, 2018).

15. As found, in her Application for Hearing, Claimant sought penalties for "handling my claim incorrectly and violating workers' compensation rules/deadlines." The Application did not state with specificity the grounds on which Claimant was seeking penalties. Although Claimant testified that Employer did not timely file a First Report of

Injury or supply a designated provider list, Respondents did not receive adequate notice of the factual or legal bases for her penalty claims.

16. As found, regardless of Claimant's testimony at hearing, the Application for Hearing simply identified that Respondents had failed to correctly handle her claim and violated deadlines. However, Respondents were entitled to reasonable notice of the specific legal and factual bases of the penalty claims so they had a fair opportunity to prepare appropriate defenses. Based on a review of the record, Respondents did not receive a fair opportunity to present contrary evidence at the time of the hearing or receive sufficient notice of the bases of the claims for penalties to satisfy standards of due process. Accordingly, Claimant's request for penalties is denied and dismissed. *See In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015) (setting aside ALJ's order assessing penalties because claimant's application for hearing did not sufficiently notify the respondents of the legal or factual bases of the claims for penalties ultimately imposed).

17. As found, Claimant also seeks penalties for work performed "off the clock" and unpaid wages for loading equipment. The preceding issues seek compensation for employment duties and do not involve work injuries. Because requests exceed the jurisdiction of the Office of Administrative Courts they will not be addressed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for an accounting and reimbursement of medical expenses is denied and dismissed.

2. Claimant's request for interest payments is denied and dismissed.

3. Claimant request for reimbursement of mileage is denied as unripe and her request for other expenses is denied and dismissed.

4. Claimant's request for penalties is denied and dismissed.

5. Claimant's other issues will not be addressed because they exceed the jurisdiction of the Office of Administrative Courts.

6. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2)

That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 30, 2023.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-997-495-004

ISSUES

1. Whether Claimant established by a preponderance of the evidence that [Redacted, hereinafter KO] is authorized to provide Claimant massage therapy and homecare services.

2. Whether Respondents established by a preponderance of the evidence that the care ordered by ALJ Martinez Tenreiro is no longer reasonable, necessary, and related to Claimant's work injury.

FINDINGS OF FACT

1. Claimant sustained injuries arising out of the course of his employment with Employer on October 23, 2015. Claimant's injuries were previously found compensable by ALJ Margot Jones on September 21, 2016. On February 21, 2018, ALJ Edwin Felter issued a Final Order granting Claimant permanent total disability benefits. On June 9, 2022, ALJ Elsa Martinez Tenreiro issued a Final Order ("June 2022 Order") requiring Respondents to pay for home health services to assist Claimant with activities of daily living up to 8 hours a day that are reasonable, necessary, and related to his work injury, including "both therapy and attendant care services to relieve him from the effects of the October 23, 2015 work related injury." (Ex. 7). In the June 2022 Order, ALJ Martinez Tenreiro found that "Claimant's partner or an outside provider should be providing for at least 5 hours a day seven days a week of attendant care service, which is found to be reasonably necessary and related to the injury. In addition, Claimant should be attended by a professional massage therapist up to twice a day for up to one and one-half hours per session, which is also found to be reasonably necessary and related to the injury. This would provide for approximately eight total hours of care per day." The June 2022 Order further provides that "continuing home health care should include attendant care services, and deep tissue massage services, if available. If they are not available, Respondents shall pay Claimant's life partner [*i.e.*, KO[Redacted]] for the services she is currently providing." (Ex. 7).

2. Although the June 2022 Order does not specifically define the term "attendant care service," the Order indicates that Claimant requires assistance getting "to into the tub, bathing his lower extremities, dressing his lower body, travel to his medical appointments, and performing most activities of daily living, including shopping, making meals other than simple fare, washing his clothes and bedding." The ALJ infers that "attendant care services" is intended to encompass these tasks.

3. Claimant's domestic partner, KO[Redacted], assists Claimant by massaging areas of his body in their home and as he requests. Claimant testified that KO[Redacted]

massages various parts of his body between 8 to 12 times per day, and that her assistance provides him relief. He further testified that no one other than KO[Redacted] has performed massages since he previously received massage from physical therapist Rachel Moore, P.T. Claimant testified that Ms. Moore instructed KO[Redacted] on how to perform massage on Claimant. Claimant further testified that because he experiences spasms in his groin area, he prefers that KO[Redacted] attend to these areas to avoid embarrassment. He also testified that he believes KO[Redacted] knows the locations on his body to the massages, and that she is caring and compassionate.

4. In February 2019, Claimant's physician, Bennett Machanic, M.D., recommended that Claimant receive a massage table for his home for relief. (Ex. 4). Insurer authorized the purchase of the massage table, which Claimant testified KO[Redacted] uses to perform massages in their home.

5. Claimant testified that KO[Redacted] has assisted him with activities around his house, such as assistance using the bathroom, assisting in getting into the bathtub or shower, and bathing him. He further testified that no other person has assisted him in this fashion. KO[Redacted] also assists Claimant with dressing, preparing his meals, washing his clothes, cleaning, child care "and basically all the chores he used to do around the house." (Ex. 7).

6. Claimant requests that KO[Redacted] be deemed an "authorized treating provider" and that Respondents' compensate KO[Redacted] for performing massages and "attendant care" services, such as assisting Claimant with bathing, using the restroom, and performing other activities of daily living and household chores.

7. Allison Fall, M.D. testified at hearing and was admitted as an expert in her specialty -- physical medicine and rehabilitation. On February 3, 2022, Dr. Fall performed an independent medical examination (IME) and medical record review at Respondents' request, and issued a written report. (Ex. H). Dr. Fall testified at Claimant's March 31, 2022 hearing before ALJ Martinez Tenreiro. In that hearing, Dr. Fall opined that Claimant did not require massage therapy or home health attended care services, because Claimant needed to learn and use self- management techniques. She further opined that she saw no evidence that massage therapy relieved or alleviated Claimant's spasms from his injury. ALJ Martinez Tenreiro found Dr. Fall's opinion's unpersuasive and issued her order as described above. (Ex. 7).

8. On February 25, 2022, Dr. Fall reviewed additional records regarding Claimant and issued a report. (Ex. I). Dr. Fall's report indicates she reviewed a report from Craig Hospital dated January 27, 2023. Dr. Fall opined that the findings from Craig Hospital supported her previous opinion that Claimant did not require maintenance care, and that no ongoing medical care was needed. She also indicated that the updated record did not change her previously-expressed opinions.

9. At hearing, Dr. Fall testified consistent with the opinions expressed in her reports. Dr. Fall testified that no medical reason exists for Claimant to receive assistance with activities of daily living, and that he does not require attendant care. She described

"attendant care" as including both assistance with activities of daily living and assistance with medical-related services, such as monitoring medical conditions, wound management, safety issues, bathing, grooming, dressing, feeding and household chores. She opined that there is no medical reason for Claimant to receive these types of services. This is because Claimant does not need assistance with medication management, blood pressure or wound care, and he is able to bathe himself, ambulate throughout his home, drive a vehicle, and has no cognitive impairment. Dr. Fall's opinions were not persuasive.

10. [Redacted, hereinafter AA] was a "resolution manager" for [Redacted, hereinafter GB], until March 28, 2023. In this role, AA[Redacted] handled workers' compensation claims, including Claimant's claim for a period of time. AA[Redacted] testified that after the June 2022 Order was issued, Insurer identified a provider to provide attendant home services for Claimant five hours daily. AA[Redacted] testified that Claimant was offered this care on November 30, 2022. This offer was conveyed to Claimant's counsel by a letter dated November 30, 2022. (Ex. L). Claimant has not accepted that offer.

11. AA[Redacted] also testified that Insurer identified multiple providers who could provide Claimant professional massage therapy, and that this service was offered to Claimant on January 17, 2023. This offer was conveyed to Claimant's counsel by a letter dated January 17, 2023, indicating that Respondents had found five professional massage therapy services who could massage therapy at Claimant's home consistent with the June 2022 Order. (Ex. N). No evidence was admitted indicating Claimant has accepted this offer. Claimant testified that he was not aware the services had been offered.

12. No credible evidence was admitted indicating KO[Redacted] is a licensed massage therapist, or has received any formal training in massage therapy.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it

is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

KO[Redacted] as an "Authorized Provider"

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer (*i.e.*, the authorized treating physician or ATP), as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Providers within this chain of referrals from the ATP are not limited to physicians, and may include other non-physician medical providers. *See e.g.*, *In re Claim of Petrich*, W.C. No. 4-766-673-02 (ICAO May 3, 2013). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO Oct. 16, 2018).

Massage Therapy

Claimant requests that KO[Redacted] be "authorized" to provide to Claimant the massage therapy ordered in the June 2022 Order. Claimant has failed to establish that KO[Redacted] should be authorized to perform massage therapy. No credible evidence was admitted that any of Claimant's physicians referred Claimant specifically to KO[Redacted] for massage therapy. Thus, she is not within the chain of referrals. Notwithstanding, even if an ATP had referred Claimant to KO[Redacted], such a referral would not be permissible.

First, the June 2022 Order directs that Claimant receive massage therapy from a "professional massage therapist." No evidence was admitted indicating KO[Redacted] is a professional massage therapist. Thus, she does not meet the criteria required by the June 2022 Order.

Second, although KO[Redacted] has provided Claimant with "massages,"[1] she is statutorily prohibited from performing massage therapy without a license. The Massage Therapy Practice Act, § 12-235-101, *et seq.*, ("MTPA") and regulations enacted by the Office of Massage Therapy Licensure govern the practice of massage therapy in Colorado. § 12-235-107, C.R.S. The MTPA and associated regulations require that any person who practices massage therapy in Colorado possess a valid license, which may be granted if one meets the education and training requirements set forth in 3 CCR 722-1. The MTPA also provides that "a person who practices or offers or attempt to practice massage therapy without an active license" is subject to penalties under section 12-20-407 (1)(b), which makes the unlicensed practice of massage therapy a class 2 misdemeanor. § 12-235-115, C.R.S. Because no credible evidence was admitted establishing that KO[Redacted] is a licensed massage therapist, or that any exception to the statutory requirements exist, KO[Redacted] cannot legally provide massage therapy, and therefore cannot be an "authorized provider" for the treatment Claimant requires.

Claimant's contention that Respondents have waived of any objection to KO[Redacted] providing massage therapy services is not persuasive. The present case is not analogous to *Wielgosz v. Denver Post Corp., W.C. No. 4-285-153 Dec. 3, 1998)* as Claimant contends. In *Wielgosz*, the insurer paid for initial treatment an injured worker obtained from a provider who was not authorized at the time. Based on Insurer's payment, the injured worker continued to see the provider. Later, the insurer denied payment for additional treatment. The ALJ found the insurer's payment for the unauthorized physician's initial services induced the injured worker to rely on the insurer's conduct and obtain further treatment from the physician. Thus, the ALJ concluded, the insurer had waived any objection to payment of the provider's bills.

The circumstances here are different. Claimant contends that by authorizing and paying for a massage table, with knowledge that KO[Redacted] was providing massages, Insurer is now obligated to pay KO[Redacted] for providing massages. Although Insurer authorized and paid for a massage table, no credible evidence was admitted indicating that the authorization induced Claimant to utilize KO[Redacted] for massages with the expectation that she would be compensated. No credible evidence was presented that KO[Redacted] has previously sought compensation for massaging Claimant, that Insurer has ever paid or agreed to pay KO[Redacted]. Claimant has failed to establish that Insurer implicitly consented to paying KO[Redacted] for massage therapy services. Regardless, even if Insurer's conduct could be deemed as a waiver of the right to object to KO[Redacted] as a provider, the ALJ cannot order such relief as KO[Redacted] is

[1] The ALJ's use of the term "massage" colloquially to describe the actions Claimant has described KO[Redacted] performing. The ALJ makes no findings as to whether the "massages" KO[Redacted] has performed to date constitute the practice of "massage therapy" as defined under Colorado law.

statutorily prohibited from providing massage therapy without a license, which she does not possess.

For these reasons, Claimant's request to have KO[Redacted] deemed an authorized provider to perform massage therapy for Claimant is denied.

Attendant Care

The June 2022 Order found Claimant was entitled to "attendant care services" for five hours per day, which consist primarily of assistance with activities of daily living. "Attendant care" services "may encompass assisting the claimant with activities of daily living, including matters of personal hygiene." *Cross v. Microglide, Inc.*, WC No. 4-355-764 (ICAO Sep. 9, 2003), *citing Suetrack v. Indus. Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). The June 2022 Order demonstrates that ALJ Martinez Tenreiro considered the many household tasks and other assistance KO[Redacted] provides for Claimant when issuing the order. The June 2022 Order provides that these services should be provided by either Claimant's partner (KO[Redacted]) or an outside provider, and that Respondents' should pay KO[Redacted] for the services if not available from an outside provider. Specifically, the June 2022 Order states: "continuing home health care should include attendant care services, and deep tissue massage services, if available. If they are not available, Respondents shall pay Claimant's life partner [*i.e.*, KO[Redacted]] for the services she is currently providing." (Ex. 7, p. 12). By its terms, the June 2022 Order requires Respondents to pay KO[Redacted] for attendant care services only if they are not otherwise available from an outside service.

The evidence establishes that, in November 2022, Insurer identified an "attendant care services" provider who is able to perform the services Claimant requires. Respondents offered this service to Claimant, through counsel in November 2022. Thus, the services are "available" to Claimant at Insurer's expense. Claimant has not presented any credible evidence that attendant care services cannot be provided by an outside service or that KO[Redacted] is the only person capable of performing the ordered attendant care services. Accordingly, the ALJ finds and concludes Respondents are not obligated to pay KO[Redacted] for "attendant care services" and that she is not an "authorized provider" for such services.

CLAIMANT'S CONTINUED CARE

Respondents have failed to establish by a preponderance of the evidence that the care awarded Claimant in the June 2022 Order is no longer reasonable, necessary, or related to his industrial injury. Claimant credibly testified that he continues to require massage to function properly and assistance with "attendant care services." No credible evidence was admitted indicating Claimant's physical condition has improved since the June 2022 Order, or that the services are no longer reasonable, necessary, or related to his industrial injury. Respondents rely on Dr. Fall's opinion that Claimant does not require these services. However, Dr. Fall merely restated the opinions she previously offered, and which were rejected by ALJ Martinez Tenreiro. Dr. Fall has not personally examined Claimant since her initial IME in February 2022, and the only new information she has

reviewed was a single treatment visit from January 2023. She offered no credible testimony or opinions establishing that the treatment and care Ordered by ALJ Tenreiro is no longer reasonable, necessary, or related to his industrial injury. Respondents' request to terminate the care authorized by ALJ Martinez Tenreiro's June 2022 Order is denied.

ORDER

It is therefore ordered that:

1. Claimant's request to deem KO[Redacted] an "authorized" provider for massage therapy and attendant care services is denied.

2. Respondents request to terminate the care ordered in the June 2022 Order is denied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 30, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Respondent has proven by a preponderance of the evidence that they are entitled to penalties against Claimant of up to $1,000 per day pursuant to Sec. 8-43-304(1), C.R.S. from December 9, 2022 to May 11, 2023 for Claimant's violation of WCRP 5-4(C) for failing to provide requested signed releases, medical provider list, and employer list within 15 days of Respondent's November 23, 2022 request, with each day to be considered a separate offense pursuant to Sec. 8-43-305, C.R.S.

II. Whether Respondent has proven by a preponderance of the evidence that they are entitled to penalties against Claimant of up to $1,000 per day pursuant to Sec.8-43-304(1), C.R.S. from January 10, 2023 to May 11, 2023 for Claimant's failure to obey the December 30, 2022 Order of PALJ Zarlengo which ordered Claimant to provide Respondent with the requested signed releases and lists of medical providers and employers within 5 business days or by January 9, 2023 with each day to be considered a separate offense pursuant to Sec. 8-43-305, C.R.S.

III. Whether Respondent has proven by a preponderance of the evidence that they are entitled to penalties against Claimant of up to $1,000 per day pursuant to Sec. 8-43-304(1), C.R.S. from January 6, 2023 and ongoing for Claimant's failure to comply with the Workers' Compensation Rule of Procedure (W.C.R.P.) Rule 9-1(B)(2) for failing to provide responses to interrogatories within 20 days of the December 16, 2022 date of service, with each day to be considered a separate offense pursuant to Sec. 8-43-305, C.R.S.

IV. Whether Respondent has proven by a preponderance of the evidence that they are entitled to penalties against Claimant of up to $1,000 per day pursuant to Sec. 8-43-304(1), C.R.S. from February 24, 2023 and ongoing for Claimant's failure to obey the February 16, 2023 order of PALJ Zarlengo which ordered Claimant to provide Respondent with verified responses to its discovery request within seven days of the February 16, 2023 order, with each day to be considered a separate offense pursuant to Sec. 8-43-305, C.R.S.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. This is an admitted claim for date of injury of October 13, 2020. Claimant lived in Gran Lake, CO and was 61 years old at the time of the hearing.

2. Claimant was initially evaluated for an impairment rating by Dr. John Sacha on July 13, 2022. Dr. Sacha concluded that Claimant had an impairment of the cervical spine, with 11% for specific disorder of the spine per Table 53IIB and 8% for loss of range

of motion of the cervical spine for a combined rating of 18% whole person. He also assessed a 28% upper extremity rating for the left shoulder which converted to a 17% whole person rating. Both ratings combined to a 32% whole person impairment rating.

3. Claimant was placed at maximum medical improvement on August 3, 2022 by Hanna Bodkin PA-C of Concentra. At that time she made multiple referrals to massage therapy to continue in Kremmling, Colorado, which is close to Claimant's home, a follow up with Dr. John Sacha for an EMG, and stated that they were awaiting authorization for a follow up MRI of the cervical spine as well as a follow up with Ortho Steamboat. Claimant was provided with work restrictions of lifting 15 lbs. maximum, no climbing, no overhead activity with the left arm, and maintenance medical benefits to continue with Dr. Sacha. She adopted Dr. Sacha's rating.

4. Multiple Final Admissions of Liability were filed by Respondent, including on October 20, 2022 for an 18% whole person impairment related to the cervical spine and 32% upper extremity impairment related to the left shoulder injury, which was later amended on November 9, 2022 pursuant to Dr. Sacha's rating from July 13, 2022 for 28% upper extremity rating, and 18% whole person impairment related to the cervical spine.

5. Claimant filed an Objection to the FAL and a Notice and Proposal and Application for a Division Independent Medical Examination (DIME).

6. On November 23, 2022 Respondent sent Claimant's counsel a letter pursuant to Rule 5-4(C) & (D), enclosing several releases for Claimant to execute and requested that Claimant provide a list of all medical providers and employers. This request was sent by email to Claimant's counsel directly attaching the authorizations, including a two page release for medical information, an employment information release, an insurance authorization, a release to Standard Insurance, an unemployment authorization, a Unum authorization, a social security authorization, a PERA authorization, and lastly, a form to obtain the list of providers and employers. The releases and lists of providers and employers were due on or before December 8, 2022.

7. On November 30, 2022 Claimant was seen by Dr. Sacha for a bilateral C7 transforaminal epidural injection.

8. On December 9, 2022, Respondent's counsel contacted Claimant's counsel requesting Claimant provide the signed releases and the lists of medical providers and employers by December 14, 2022 or Respondent would move forward with the filing of a motion to compel the production. (See Exhibit B).

9. On December 9, 2022 Respondent followed up by email requesting the status of the releases and list of medical providers

10. On December 16, 2022, Respondent sent Claimant, through counsel, Interrogatories and Requests for Production of Documents.

11. On December 16, 2022 Respondent filed a Motion to Compel Executed Releases and list of Medical Providers and employers.

12. Claimant followed up with Dr. Sacha on December 19, 2022. Dr. Sacha noted that Claimant had a diagnostic response and quite good lasting relief. He discussed

doing trigger point injections for the continuing headaches and neck symptoms. He continued prescribing medications including narcotic and was under a narcotic agreement. Dr. Sacha prescribed eight sessions of massage therapy at Spine Fix.

13. Claimant returned to see Dr. Sacha for trigger point injections on December 30, 2022. He noted that Claimant's massage therapy had still not been authorized.

14. On December 30, 2022 Prehearing Administrative Law Judge (PALJ) Marcus Zarlengo issued an order stating that Claimant had five business days to comply and provide the executed medical and employer releases as well as the list of medical providers.

15. On January 6, 2023, Respondent's counsel sent an email to Claimant's counsel inquiring as to the status of Claimant's Interrogatory responses and to confer regarding the filing of a motion to compel, if responses were not received within five days.

16. On January 11, 2023 Respondent's counsel reached out to Claimant's counsel that the order signed by PALJ Zarlengo had been issues and that Respondent still did not have the releases or the provider list. Respondent explained that Claimant's failure prevented Respondent from obtaining the necessary medical records to send to the DIME physician. Respondent specifically stated:

> Please provide the requested information as soon as possible, and no later than 1/18/23. If not received by 1/18/23, Respondent will have no choice but to seek an order holding the DIME process in abeyance until medical records can be obtained.

17. Claimant sent Respondent an email on January 18, 2023 purportedly attaching some medical releases and requesting that any records received should be sent to Claimant. Claimant mentioned a prehearing conference scheduled on the issue of holding the DIME in abeyance, to which Claimant did not object. It further made demands for authorization of medical care recommended by authorized treating providers including a CT of the spine as well as physical therapy and massage therapy.

18. On January 18, 2023 Respondent advised that they could not open the attached authorizations, requesting that they be sent as PDF documents.

19. Again on January 18, 2023 Claimant sent Respondent another attachment but did not specify what it was.

20. Respondent's counsel again advised Claimant on January 23, 2023 that they could not open the attached releases and to resend them as PDF documents.

21. Claimant's counsel immediately responded stating that he was attaching the releases in pdf format. He confirmed that he was aware that Claimant had not provided the list of providers but that his client was outside the state attending a funeral. The authorizations provided were a release for employment information, a release for standard insurance, an unemployment insurance release, an illegible PERA benefits authorization, an illegible medical release, what seems to be the signature page of the social security authorization, which was also illegible.

22. On January 24, 2023 Respondent informed Claimant that the releases were not legible and requested they be resubmitted.

23. On January 25, 2023 Claimant acknowledged that the authorizations were not usable by stating that counsel would have Claimant come into his office and resign them.

24. On February 2, 2023 Respondent sent Claimant a Motion to Compel Claimant's Responses to Interrogatories and Request for Production of Documents. The motion indicated that a Final Admission of Liability was most recently filed on December 14, 2022, Claimant timely filed an objection, and the claim was currently in the DIME process. Respondent reminded Claimant that per WCRP Rule 9-1(B)(2), discovery responses were due within 20 days of mailing, on or before January 5, 2023.

25. Respondent, again, followed up on February 3, 2023 to inquire regarding the status of claimant's releases, provider list (5 yrs. prior to DOI to present), and employer list.

26. Claimant was seen by Dr. Sacha on February 3, 2023. He remarked that Claimant's surgeon had recommended a CT to be assured that the hardware had not failed, which had not been authorized. Dr. Sacha noted that the massage therapy had not yet been authorized either as the parties were still awaiting a DIME evaluation. Dr. Sacha refilled Claimant's medications, performed trigger point injections and noted Claimant was to follow up in a month.

27. Again, on February 8, 2023 Respondent followed up. This time Respondent provided the next step, stating as follows:

> What is the status of providing signed releases, provider list, and employer list? Per order, this information was supposed to have been provided by 1/9/23. As Respondent has not received this information, it would appear that claimant is in violation of the court order.
>
> Please provide this information as soon as possible, and no later than Monday, February 13, 2023. If the information is not provided by close of business on Monday, February 13th, Respondent will have no choice but to seek penalties against claimant for failure to comply with the order. Please consider this Respondent's attempt to confer should that become necessary.

28. Respondent filed the Application for Hearing on the issue of multiple penalties on February 15, 2023 listing as issue penalties as follows:

> 1) Respondent seeks penalties against Claimant of up to $1,000 per day pursuant to §8-43-304(1), C.R.S. from 12/9/22 and ongoing for Claimant's violation of WCRP 5-4(C) for failing to provide requested signed releases, medical provider list, and employer list within 15 days of Respondent's 11/23/22 request for same. Each day to be considered a separate offense pursuant to §8-43-305, C.R.S.
>
> 2) Respondent seeks penalties of up to $1,000 per day pursuant to §8-43-304(1), C.R.S. from 1/10/23 to ongoing for Claimant's failure to obey the 12/30/22 lawful Order of PALJ Zarlengo which ordered Claimant to provide Respondent with the requested signed releases and lists of medical providers and employers within 5 business days or by 1/9/23. Each day to be considered a separate offense pursuant to §8-43-305, C.R.S.

29. On February 16, 2023 PALJ Zarlengo issued an Order Granting Respondent's Presumed Opposed Motion to Compel Claimant's Responses to Interrogatories and Request for Production of Documents. The order specifically stated that "Claimant shall provide Respondent with *verified responses* to its Interrogatories and Requests for Production of Documents within seven (7) days of the date this Order is served on Claimant." (*Emphasis added*.)

30. On March 3, 2023 Claimant was attended by Dr. Sacha in Greenwood Village, CO. He noted that Claimant had two or more conditions that were chronic. He proceeded with trigger point injections into the neck and shoulder that had given at least four weeks of relief previously.

31. Respondent's counsel reached out to Claimant on March 6, 2023 advising that the responses to discovery were due on February 23, 2023 pursuant to the order, had not been received and that it was Respondent's intention to add the issue of penalties for violation of the rule as well as violation of the order.

32. On March 7, 2023 Respondent filed a formal notice with regard to the addition of the penalty issues stating as follows:

> Pursuant to Office of Administrative Courts Rule of Procedure (O.A.C.R.P.) 12, "issues for hearing shall be listed on the Application for Hearing, the Response to Application for Hearing, or may be added before the hearing date is confirmed by written notice to the OAC and the opposing party."
>
> …
>
> 3. The hearing date in this matter has not yet been confirmed.
>
> 4. Respondent hereby provides Notice of endorsement of additional issues to be addressed at the upcoming hearing in the interest of judicial economy.
>
> 5. Respondent hereby also seeks penalties against Claimant of up to $1,000 per day pursuant to §8-43-304(1), C.R.S. from January 6, 2023 and ongoing for Claimant's failure to comply with the Workers' Compensation Rule of Procedure (W.C.R.P.) 9-1(B)(2) for failing to provide responses to interrogatories within 20 days of the December 16, 2022 date of service.
>
> 6. Additionally, Respondent seeks penalties against Claimant of up to $1,000 per day pursuant to §8-43-304(1), C.R.S. from February 24, 2023 and ongoing for Claimant's failure to obey the February 16, 2023 lawful order of PALJ Zarlengo which ordered Claimant to provide Respondent with responses to its discovery request within seven days of the February 16, 2023 order.

33. Claimant was seen by Dr. Sacha on March 31, 2023 for a maintenance visit in Greenwood Village, CO. He proceeded to provide trigger point injections and continued to diagnose cervical facet syndrome, cervical discectomy, radiculopathy, post-laminectomy syndrome, and total shoulder replacement.

34. Finally, on April 1, 2023, Claimant emailed Respondent stating that the authorizations and interrogatory responses were attached but that the interrogatory responses were unsigned. The medical release was signed on March 30, 2023, as well as the employment release, the insurance releases, the UI release, the Unum release, the social security release, and the PERA release. The form requesting medical providers

was completed by stating that Claimant had not seen any providers regarding Claimant's injured body parts in the claim.

35. On April 11, 2023 Respondent followed up, again requesting the corrected list of providers.

36. Respondent sent a follow up on April 18, 2023 stating as follows:

> In reviewing the information you provided, it appears claimant did not provide a list of all medical providers he has seen in 5 years prior to the date of injury to the present. The list says "N/A" and he gave us blank releases which does not help us determine from whom medical records are needed.
>
> Claimant would appear to still be in violation of the court order which required him to provide signed releases and a medical provider list.
>
> Please provide the provider list ASAP.

37. Claimant's counsel responded on April 21, 2023 noting that Claimant had seen Dr. Kenneth Allen at Injury Solutions.

38. On May 5, 2023 PALJ Zarlengo issued a third prehearing order. He specifically found as follows:

> Claimant sustained compensable work injuries on 10/13/20. Respondents filed an Amended Final Admission of Liability (FAL) most recently on 12/14/22. Claimant timely objected and applied for a DIME. Dr. Matthew Brodie was selected as the DIME physician. On 1/20/23, Respondents asked to hold the DIME process in abeyance to allow additional time to gather medical records. Judge Sandberg granted the motion and held the DIME in abeyance for 60 days.
>
> Additionally, Respondents applied for a hearing with the OAC on 2/15/23 endorsing the issue of statutory penalties against Claimant for discovery and other violations. That hearing is set to commence on 5/17/23.
>
> Respondents now request that Claimant schedule the DIME with Dr. Brodie. The parties agree the necessary records or releases have now been received and the DIME is ready to proceed.

39. PALJ Zarlengo ordered Claimant to schedule the DIME with Dr. Brodie to take place 45-75 days of the date of the order.

40. Respondent stated at the time of the hearing that the medical records were not received until May 11, 2023 and that should be the end date of penalties.

41. The parties disclosed that the DIME was currently set to proceed on June 21, 2023.

42. Respondents asserted that Claimant had still not provided the verified response to discovery as of the date of the hearing. Claimant's counsel disclosed that would be provided within the week.

43. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v.*

Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Penalties generally

Whether statutory penalties may be imposed under Sec. 8-43-304(1) C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1,000.00 per day where the employee "does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel." Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995).

Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of a parties' action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). Whether the violator's actions were objectively unreasonable, is a question of fact based on rational argument. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995); *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312 (Colo. App. 1997*); Dean v. NGL Energy Partners*, WC 5-095-928, ICAO (September, 8, 2022); *Housley v. Circle K Stores Inc.*, WC, 5-143-923, ICAO (February 27, 2023). There is no requirement that the violating party know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the Claimant's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that Claimant violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If Respondent makes a prima facie showing the burden of persuasion shifts to Claimant to prove their conduct was reasonable under the circumstances. *Pioneers Hosp. v. Indus. Claim Appeals Office, (supra); Human Res. Co. v. Indus. Claim Appeals Office, 984 P.2d 1194 (Colo. App. 1999).*

Once a violation of a statute or rule is established, penalties are mandatory, whether or not actual damages are established. See *Martinez v. Flying J., Inc.,* W.C. No. 4-374-856 (June 22, 2000)(insurer may be penalized for failing to comply with a Rule when it unilaterally terminated benefits even if it is ultimately determined that no benefits were due; the unreasonableness of insurer's actions is not dependent on relative harm to claimant).

Damage to the non-violating party is not an element of penalties under Sec. 8-43-304(1). The reasonableness of the violator's actions depends on whether the actions were predicated on rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). In *Associated Business Products v.*

Indus. Claim Appeals Office, 126 P.3d 323, 326 (Colo. 2005), the Supreme Court held that imposition of penalties did not violate the excessive fines clause even though "the financial harm suffered by this one claimant may have been relatively small."

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals* Office, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020). When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019).

The gross disproportionality test was clarified by the Colorado Supreme Court in *Colorado Dep't of Labor & Empl. v. Dami Hospitality, LLC,* 442 P.3d 94 (Colo. 2019) when determining whether the penalty imposed under Sec. 8-43-304(1), C.R.S. violated the Excessive Fines Clause. See *Gallego v. Wizbang Solutions*, WC 5-026-699-003, ICAO (April 13, 2022). The burden of proof in applying the gross disproportionality test is properly placed on the party being assessed the fine. *Associated Bus. Prods. v. Indus. Claim Appeals Office, (supra.)* ("Once the right to impose a fine has been proved, the party upon whom the fine is levied has the burden of proving the fine is 'grossly disproportionate'"). See also *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (overruled by statute on other grounds); *Gallego v. Wizbang Solutions, (supra).*

C. Curing a Violation

Section 8-43-304(4), C.R.S. permits an alleged violator 20 days from the date of mailing of an Application for Hearing that asserts penalties to cure the violation. If the violator cures the violation within the 20 day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App. 2003). Section 8-43-304(4), C.R.S. modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties

must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *see In re Tadlock*, WC 4-200-716, ICAO (May 16, 2007).

D. Penalty for failure to comply with WCRP Rule 5-4(C).

W.C.R.P. Rule 5-4(C) specifically states as follows:

> A party shall have 15 days from the date of mailing to complete, sign, and return a release of medical and/or other relevant information. If a written request for names and addresses of health care providers accompanies the medical release(s), a claimant shall also provide a list of names and addresses of health care providers reasonably necessary to evaluate/adjust the claim along with the completed and signed release(s). Medical information from health care providers who have treated the part(s) of the body or conditions(s) alleged by the claimant to be related to the claim, during the period five years before the date of injury and thereafter through the date of the request, will be presumed reasonable. Any request for information in excess of the presumption contained in this rule shall include a notice that the insurer is requesting information in excess of what is presumed reasonable and that providing the information is not required. If a party disputes that a request within the presumption is reasonable or that information sought is reasonably necessary, that party may file a motion with the Office of Administrative Courts or schedule a prehearing conference. Requests for release of medical information as well as informal disclosures necessary to evaluate/adjust the claim are not considered discovery.

Respondent seeks penalties from December 9, 2022 through May 11, 2023 for Claimant's failure to comply with W.C.R.P. Rule 5-4(C) to provide the releases and list of medical providers. It is undisputed that Respondent sent the releases and request for providers to Claimant on November 23, 2022. Respondent's followed up on December 9, 2023. Since they did not receive a response, they filed a motion to compel on December 16, 2022, which was granted on December 30, 2022 by PALJ Zarlengo. On January 11, 2023 Respondent again contacted Claimant stating that Claimant's failure to provide the releases and information was hampering their ability to obtain records needed for the DIME packet. On January 18, 2023 Claimant sent Respondent a document with releases but no medical provider list. Respondents advised that they were insufficient as they were unable to open the document. On the same day Claimant sent the document again. On January 24, 2023 Respondents informed Claimant that the releases were unusable, requesting that they be resubmitted. On February 3, 2023 Respondents followed up again. Respondents filed the AFH on February 15, 2023. This provided Claimant a 20 day window to cure. Claimant failed to cure. Finally, Claimant complied with providing the list of providers and releases on April 1, 2023, which was supplemented on April 21, 2023. Respondent argues that the delay, caused the DIME process delay, holding the DIME process in abeyance until Claimant complied.

Claimant argued that Claimant was unable to travel from Grand Lake, Colorado to Denver, in order to sign the releases considering his multiple physical problems related to the claim and the cost of travel. Claimant also argued that they provided the releases by January 18, 2023. Further, Claimant argued that there was no harm to Respondent as they were not paying temporary total disability benefits only permanent partial disability

and had received a favorable order from PALJ Sandberg in response to their January 20, 2023 Motion to Hold the DIME Process in Abeyance.

As found, holding the DIME process in abeyance was a contemplated non-monetary and appropriate penalty for Claimant's failure to comply with the rule requiring the provision of the releases and the list of providers and employers.

E. Penalty for failure to comply with December 30, 2022 Order

Respondent next argued that Claimant's failure to comply with PALJ Zarlengo's December 30, 2022 order requiring Claimant to provide, within five business days of the order, the executed medical and employer releases as well as the list of medical providers should be the subject of another penalty. It has already been established that there was a violation of the order as laid out above. The issue is not whether the claimant had a reasonable explanation for his actions. Instead, the issue is whether the claimant's failure to comply with the PALJ order was predicated on a rational argument in law or fact that he was not required to comply with the PALJ order. See *Porras v. World Service Co., Inc*., W.C. No. 155-161 (October 12, 1995); *Dean v. NGL Energy Partners*, (*supra*).

The legislative intent of the Workers' Compensation Act is "to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation." This goes both ways. Claimant's actions as listed above, in not responding to Respondents inquiries until it forces them to resort to an ALJ and then disregarding the order itself is not promoting the quick and efficient delivery of disability benefits to Claimant. In this case, Claimant's benefits were being delayed by Claimant's failure to act so that Respondent could obtain records that might have been pertinent to the claim. In fact, Respondent argued that they were relevant medical records as they had to do with prior injuries to his neck/cervical spine, which is the same body part injured in this claim. Claimant did not object to this argument or state that it was incorrect. Claimant's statements that counsel was trying to have claimant avoid driving to the Denver area to sign the releases is also not a persuasive argument as Claimant had attended multiple medical appointments after November 23, 2022 through the January 18, 2023 date when Claimant attempted to provide releases to Respondent, specifically was in the Denver area to see Dr. Sacha on November 30, December 19, and December 30, 2022. And after realizing on January 25, 2023 that the releases were not usable, Claimant was seen in the Denver area by Dr. Sacha on February 3, March 3, and March 31, 2023.

Because this is a violation of a specific judicial order, the gravity of the offense is enlarged exponentially. A reasonable Claimant would have obtained Respondent's agreement to enlarge the time to respond or scheduled a prehearing conference before a PALJ on the issue of obtaining more time to comply. Claimant did not provide evidence that would persuade this ALJ to not penalize Claimant for the failure to comply with the order. Further, Claimant did not provide any information that would lead this ALJ to conclude that Claimant would not have the ability to pay the penalty fine. Therefore, this ALJ determines that Claimant failed to comply with PALJ Zarlengo's order of December 30, 2022. The order provided for five business days to comply. As January 2, 2023 was the observed state holiday, Claimant had until January 9, 2023 to comply. Claimant

attempted to comply with the order on January 18, 2023, a period of 9 days. Then Claimant realized that the information was not legible as of January 25, 2023. Therefore, Claimant was in clear violation of the order from January 25, 2023 through April 1, 2023, when the list and releases were produced. That is another 66 days of non-compliance for a total of 75 days.

While Respondent's argued that penalties for failure to comply was due and owing through May 11, 2023, this ALJ reviewed little evidence to support that position. There were arguments of Respondent regarding whether the records from Injury Solutions were or not relevant, but none of the records were submitted in evidence for this ALJ's consideration to determine the relevance in this case, and this ALJ offered to allow the record to remain open for further submissions. In fact, the record was left open and Claimant submitted Exhibits 1 and 2 and Respondents submitted Exhibits G and H, which this ALJ considered. Neither did Respondent's specifically request to make an offer of proof.

In comparing this matter to others of similarly situated parties, a penalty of $10.00 per day is found reasonable. Claimant provided little information regarding his ability to pay other than counsel's arguments that Claimant was having financial difficulties. Claimant did not indicate that he would have a difficult time paying a penalty award other than general allegations. As found, Respondent showed that they are entitled to a penalty for failure to comply with ALJ Zarlengo's December 16, 2022 order from January 9, 2023 through January 18, 2023 and January 25, 2023 through April 1, 2023 a period of 75 days.

F. Penalty for failure to comply with WCRP Rule 9-1

Respondent next argued that Claimant violated W.C.R.P. Rule 9-1(B)(2), which states as follows:

> (B) Interrogatories and requests for production
>
> (2) The responses to the interrogatories and production of documents shall be provided to all opposing parties within 20 days of mailing of the interrogatories and requests.

Respondents propounded three interrogatories to Claimant on December 16, 2022. Discovery responses were due on January 5, 2023. Respondent requested a status of the discovery on January 6, 2023, stating that they would seek an order compelling the discovery if they were not received within five days, providing through January 11, 2023 to provide them.[1] Respondent acknowledge that they had received discovery on responses on April 1, 2023, when they also received the releases and list of providers/employers form. Claimant's counsel indicated that the responses were unsigned.

Sec. 8-43-207(e), C.R.S. (Cum. Supp. 2022) states that "[T]he director or administrative law judge may rule on discovery matters and impose the sanctions

[1] This is taken as Respondent's offer to extend the deadline.

provided in the rules of civil procedure in the district courts for *willful* failure to comply with permitted discovery." (*Emphasis added.)*

Trial courts have broad discretion to manage the discovery process, including the ability to impose sanctions. *Warden v. Exempla, Inc*., 2012 CO 74, ¶ 32, 291 P.3d 30 (Colo. App. 2012); *Reed v. Industrial Claim Appeals Office*, 13 P.3d 810, 813 (Colo. App. 2000). In order for a discovery violation to be considered "willful" the ALJ must determine that the conduct was deliberate or exhibited "either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations." C.R.C.P. 37 governs sanctions for a party's failure to cooperate in discovery. The trial court may impose a variety of sanctions under that rule, including "orders requiring payment of attorneys' fees and costs, orders staying proceedings until discovery orders are complied with, orders prohibiting a disobedient party from introducing designated matters into evidence, orders striking pleadings, and orders entering default judgment." See 8-43-207(1)(p), C.R.S.; *Sheid v. Hewlett Packard,* 826 P.2d 396 (Colo. App. 1991); *Anderson v. Anderson Distributing,* WC 4-722-115 (April 8, 2008).

The ALJ has wide discretion in determining whether a discovery violation has occurred and, if so, the appropriate sanction to be imposed. *Pinkstaff v. Black & Decker (U.S.) Inc*., 211 P.3d 698, 702 (Colo. 2009). Whether to impose sanctions and the nature of the sanctions to be imposed are matters for the sound exercise of the trial court's discretion, and the courts are given flexibility in choosing the appropriate sanction." *Nagy v. Dist. Court*, 762 P.2d 158, 160 (Colo. 1988). A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, *Pinkstaff* @ 702 and the trial court's broad discretion is not without limits. *Id.* at 703. The Supreme Court has outlined the following guidelines for determining which sanction are appropriate. Generally, sanctions under C.R.C.P. 37 "should be applied in a manner that effectuates proportionality between the sanction imposed and the culpability of the disobedient party." If Rule 37 sanctions are warranted in a case, "the trial judge must craft an appropriate sanction by considering the complete range of sanctions and weighing the sanction in light of the full record in the case." When discovery abuses are alleged, courts should carefully examine whether there is any basis for the allegation and, if sanctions are warranted, impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party. *Id .* at 702 (citations omitted); *Kallas v. Spinozzi*, 2014 COA 164, 342 P.3d 607 (Colo. App. 2014).

The Supreme Court has generally disfavored litigation-ending sanctions, emphasizing that "litigation should be determined on the merits and not on formulistic application of [procedural] rules." *Id.* at 703. The Supreme Court has not altogether foreclosed the possibility of and need for litigation-ending sanctions, but has cautioned that such harsh sanctions should be imposed "only in extreme circumstances." *Nagy*, 762 P.2d at 161 ; see also *Pinkstaff* at 702; *Cornelius v. River Ridge Ranch Landowners Ass'n,* 202 P.3d 564, 571 (Colo. 2009); *Prefer v. PharmNetRx, LLC*, 18 P.3d 844, 850 (Colo. App. 2000) (Dismissal may be imposed as a sanction "for willful or deliberate disobedience of discovery rules, flagrant disregard of a party's discovery obligations, or a substantial deviation from reasonable care in complying with those obligations.")...

Respondents sent Claimant interrogatories on December 16, 2022. The interrogatories are were either appropriate or tangentially relevant to the issues set for hearing. Claimant had an obligation to provide the information requested by Respondents. On January 6, 2023, Respondent's counsel sent an email to Claimant's counsel inquiring as to the status of Claimant's Interrogatory responses and to confer regarding the filing of a motion to compel, if responses were not received within five days. On February 2, 2023 Respondents filed a motion to compel discovery, which was granted by PALJ Zarlengo on February 16, 2023 stating that verified responses were due within seven days. The purpose of verification of discovery is in order to cross examine Claimant and potentially impeach Claimant if he does not respond in the same manner as he provided responses to discovery.

Respondent did not subpoena Claimant to attend the hearing so was not intending to utilize the responses to question and challenge Claimant's testimony in any manner. The penalty here is Respondent's subsequent act of moving to compel claimant to respond to the discovery which was a reasonable next step to take when discovery violations neither affected Claimant nor Respondent in any significant manner. It did not delay the process or the timeline in which Respondent's prosecuted the case. Neither did Respondent's prove that the failure to complete discovery was willful.

G. Penalty for failure to comply with Order of February 16, 2023

W.C.R.P. Rule 9-1(G) states that "Once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful." Therefore, once Respondent's filed the Motion to Compel and an order was issued by PALJ Zarlengo on February 16, 2023 to be provided within 7 days.[2] This deadline was February 23, 2023. Claimant failed to provide responses to discovery until April 1, 2023 a 37 day period. Respondents have shown that Claimant willfully disregarded to his discovery obligations in this matter. Therefore, the penalty, when considering other similar cases, is $25.00 per day beginning as of February 23, 2023 and ending as of April 1, 2023 when Claimant provided responses to discovery. This is a period of 37 days.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant shall pay $10.00 per day beginning January 9, 2023 through January 18 and January 25, 2023 through April 1, 2023 a period of 75, in the amount of 750.00

2. Claimant shall pay Respondent $25.00 per day from February 23, 2023 to April 1, 2023, a period of 37 days, in the amount of $925.00.

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[2] This ALJ considered the fact that Respondents did not file to provide notice of their pursuit of penalties for failure to respond to discovery until February 15, 2023, which would entitle Claimant to a 20 days to cure. That deadline was March 7, 2023 and Claimant failed to avail himself of this relief.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 31st day of May, 2023.

Elsa Martinez Tenreiro

Digital Signature

By: Elsa Martinez Tenreiro

Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that neuropsychological testing with Dr. Treihaft is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement?

- At the commencement of the hearing, Respondent noted that they had previously agreed to pay for Claimant's return to Dr. Stakiw, the audiologist, as maintenance medical treatment.

- Claimant raised issues at the commencement of the hearing that included penalties against Respondent that were not endorsed on Claimant's application for hearing. The ALJ sustained Respondent's objection to the issues being addressed at hearing. While Claimant has again raised those issues in her post-hearing submissions, the ALJ will not address those issues as they were not properly before the court.

FINDINGS OF FACT

1. Claimant sustained a compensable work related injury on April 1, 2013 when she fell at work. The medical records indicate Claimant lost consciousness and woke up on the ground. Claimant underwent a course of medical treatment for various issues related to the fall including persistent headache and loss of hearing.

2. On June 13, 2013, Claimant was examined by Dr. Treihaft for a neurological evaluation. Dr. Treihaft noted Claimant reported a history of head injuries and concussions predating her work injury. Dr. Treihaft noted that Claimant was evaluated by a neurologist for episodes associated with right-sided numbness and complicated migraines that pre-dated her work injury.

3. Dr. Treihaft reviewed Claimant's brain MRI which showed several nonspecific frontal white matter lesions. Dr. Treihaft opined that these may relate to the Claimant's prior concussion or may represent age-related microvascular change. Dr. Treihaft opined that the brain MRI did not explain Claimant's current presentation.

4. Dr. Treihaft diagnosed Claimant with multiple neurologic symptoms, including memory loss, imbalance, panic attacks, anxiety and difficulty sleeping that Dr. Treihaft noted appeared to be related to Claimant's underlying depression. Dr. Treihaft noted that these were being addressed by medications and psychiatric evaluation. Dr. Treihaft opined that from a neurological standpoint, these represent a pseudodementia

rather than a neurologically related cognitive disorder. Dr. Treihaft noted that no further evaluation was recommended related to Claimant's work injury.

5. Claimant returned to Dr. Treihaft on April 2, 2018 for a neurological evaluation. According to the note, Claimant was referred to Dr. Treihaft by Dr. Strahan. Dr. Treihaft noted that Claimant had previously been evaluated in 2013 for a possible concussion secondary to traumatic brain injury. Dr. Treihaft noted that her neuro behavioral symtpoms included headaches and cognitive difficulties and had resolved over the next several months, but she continued to be followed by Dr. Strahan for tinnitus and hearing loss.

6. Dr. Treihaft noted that Claimant was complaining of increased memory loss and diminished cognitive dysfunction over 2 years, greatest over the past 6 months. Claimant reported slow processing at work; writing, researching and analyzing. Claimant reported individuals tell her she does not understand what they are saying and writing. Claimant also reported she doesn't transition well from "up to down". Claimant reported falling a lot for indeterminate reasons, but denied losing consciousness or tripping over objects. Dr. Treihaft also noted that Claimant occasionally experiences migraines, but could not quantify or identify the most recent migraine.

7. Dr. Treihaft noted his prior examination on June 14, 2013 along with a review of Claimant's medical records from June 2013 up to the present time. On physical examination, Dr. Treihaft noted Claimant was in no apparent distress and oriented to time, place and person. Dr. Treihaft reported Claimant's attention and concentration were normal and Claimant's recent and remote memory were intact to conversation. Dr. Treihaft noted Claimant's recurrent neurobehavioral symptoms had developed over the past 2 years, greatest over the past six months, and noted the etiology and relationship to the April 1, 2013 work injury was underdetermined.

8. Dr. Treihaft recommended neuropsycholgical battery tests, but noted that the work relatedness of this evaluation needed to be determined.

9. Dr. Treihaft issued a letter dated April 3, 2018 noting that Claimant's original fall appeared to be from a syncopal spell or fall, the cause of which was never identified, but Claimant experienced no further spells. Dr. Treihaft noted that during the June 14, 2013 evaluation, Claimant focused the neurological evaluation on a 2 year history of multiple neurological and psychological symptoms "on the setting of a divorce, anteceding the presumed head injury." Dr. Treihaft noted that the recurrance of symptoms in 2016-2017 does not fit the typical course of a post-concussive syndrome. Dr. Treihaft reported that post-concussive symptoms may remain the same or more commonly improve. Dr. Treihaft opined that recurrence or deterioration of symptoms reflects alterative medical or psychological problems. Dr. Treihaft opined that Claimant's current symptoms do not appear related to the 2013 accident. Or. Treihaft noted that there was a possibility of a cumulative trauma encephalopathy which would require clarification with the neuropsychological battery and additional medical and work history. Dr. Treihaft opined that if the symptoms are considered work related, Claimant

would require additional treatment for a mild traumatic brain injury including cognitive and behavioral therapy, counseling and social service intervention.

10. Claimant underwent a Division-sponsored Independent Medical Evaluation ("DIME") on May 29, 2019 with Dr. McLaughlin. Dr. McLaughlin reviewed Claimant's medical records, obtained a medical history and pertormed a physical examination in connection with the DIME. Dr. McLaughlin noted Claimant's medical treatment with Dr. Strahan and Dr. Treihaft documenting Claimant's symptoms from her concussion, including ongoing memory problems, tinnitus, sensorineural hearing loss in both ears and health problems.

11. Dr. McLaughlin noted that Claimant did report a history of migraines. Claimant also reported ongoing tinnitus. Claimant reported the hearing aids she received in 2016 had helped somewhat but she still has difficulty hearing background noises and understanding people.

12. Dr. McLaughlin noted Claimant's past audiograms and performed an audiogram on the day of the DIME appointment. Dr. McLaughlin noted that the audiogram did show consistent high frequency hearing loss, left greater than right, without significant change from the date of injury.

13. Claimant reported to Dr. McLaughlin that she had one prior concussion at age 25 when she was riding a bicycle and fell. Claimant reported to Dr. McLaughlin that she did not think she was even treated for the concussion and had no symptoms the next day. Dr. McLaughlin reviewed Claimant's April 3, 2013 MRI and noted that it showed no evidence for an acute intracranial abnormality such as recent infarct, hemorrhage, mass or hydrocephalus. With regard to the small foci of white matter signal abnormality in the frontal lobe, Dr. McLaughlin noted that this was nonspecific but most likely represented minimal chronic small vessel ischemic disease or the sequelae of prior migraine headaches or remote head trauma. Dr. McLaughlin explained later in his report that MRI showed some preexisting change not attributable to the fall and may be leading to neurological issues.

14. Dr. McLaughlin noted that Claimant was put at MMI on August 22, 2013 and opined in his report that this was the correct date of MMI. Dr. McLaughlin performed audiology testing and determined that the medical records were consistent with Claimant developing tinnitus since the reported April 1, 2013 injury. Dr. McLaughlin provided Claimant with a permanent impairment rating of 5% for the hearing loss. Dr. McLaughlin noted that this hearing loss rating converted to a whole person rating of 2%.

15. Dr. McLaughlin further opined that it would be prudent under post-MMI maintenance care to have a neuropsychological battery of testing performed to see if the testing indicates that there are cognitive issues that are sequelae from the reported April 1, 2013 injury. Dr. McLaughlin opined that if there were cognitive issues, they should be treated per the Division guidelines for traumatic brain injuries.

16. Respondents filed a final admission of liability ("FAL") on June 28, 2019 admitting for the impairment rating provided by Dr. McLaughlin and post-MMI maintenance medical treatment.

17. The ALJ credits the medical reports and opinions expressed by Dr. Treihaft in his reports and finds that Claimant has failed to establish that the neuropsychological testing is reasonable medical treatment related to Claimant's April 1, 2013 work injury. Additionally, Claimant has failed to establish that the neuropsychological testing is necessary to maintain Claimant at MMI.

18. Notably, in Dr. Treihaft's reports, Dr. Treihaft does not opine that the neuropsychological testing is related to Claimant's work injury. As noted by Dr. Treihaft, Claimant's neuro behavioral symptoms following her work injury resolved by the June 13, 2013 examination. Claimant then had an additional onset of reported neuro behavioral symptoms she reported in the April 2, 2018 evaluation that had developed two years prior. As noted by Dr. Treihaft, this is not the typical course of a post- concussive syndrome and the record contains no credible evidence that the recurrence of symptoms was related to the April 1, 2013 fall.

19. Likewise, Dr. McLaughlin while noting that neuropsychological testing would be appropriate, Dr. McLaughlin at no time relates the need for the neuropsychological testing to the April 1, 2013 work injury.

20. Notably, Claimant testified at hearing that she had concussions at age 6, age 24, age 43 and age 48. However, Claimant only reported to Dr. McLaughlin a concussion she had at age 25. Both Dr. McLaughlin and Dr. Treihaft opined that the abnormalities shown on the MRI of Claimant's brain were not related to the work injury and could be causing Claimant's current need for medical treatment. Neither Dr. McLaughlin nor Dr. Treihaft provided an opinion that indicated that Claimant's neuro behavioral symptoms for which Dr. Treihaft evaluated Claimant for in April 2018 were related to her work injury. As noted by Dr. Treihaft, Claimant's initial neuro behavioral symptoms had resolved shortly after her April 1, 2013 injury. Dr. Treihaft also opined that the development of symptoms years after the injury does not fit the typical course of post-concussive syndrome.

21. Claimant argued at hearing that the Colorado Treatment Guidelines Rule 17 involving traumatic brain injuries establish that she is entitled to the medical treatment referenced by Dr. Treihaft. However, those guidelines only come into play if Claimant has proven that it is more likely than not that the medical treatment is related to Claimant's work injury. In this case, the ALJ credits the reports of Dr. Treihaft and finds that Claimant has failed to establish that the medical treatment is related to her April 1, 2013 work injury.

22. The ALJ would further note that Claimant's testimony at hearing regarding her prior concussions was inconsistent with the report of prior concussions Claimant provided to Dr. McLaughlin. The ALJ notes that Dr. McLaughlin appeared to be only

aware of one prior concussion as opposed to the multiple concussions Claimant testified to at hearing.

23. Based on the credible evidence that was presented at hearing in this case, the ALJ finds that Claimant has failed to prove that it is more likely than not that the neuropsychological testing referenced by Dr. Treihaft in his April 2, 2018 report and by Dr. McLaughlin in his May 29, 2019 DIME report, is reasonable medical treatment related to Claimant's April 1, 2013 work injury. Moreover, Claimant has failed to establish that it is more probable than not that the neuropsychological treatment is necessary to maintain Claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the 'Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App**.** 1990).

4. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an

order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. As found, Claimant has failed to establish by a preponderance of the evidence that the neuropsychological testing is reasonable medical treatment related to Claimant's industrial injury and necessary to maintain Claimant at MMI. As found, the ALJ credits the reports of Dr. Treihaft regarding the cause of Claimant's neuro behavioral symptoms and the recurrence of the symptoms in 2016-2017 and finds that Claimant has failed to establish that her symptoms are causally related to the April 1, 2013 work injury. Therefore, Claimant's request for an order requiring Respondent to pay for neuropsychological testing is denied and dismissed.

ORDER

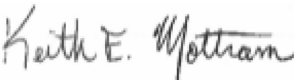
It is therefore ordered that:

1. Claimant's request for a return evaluation with Dr. Stakiw, the audiologist, is GRANTED pursuant to the agreement of the parties.

2. Claimant's request for an Order requiring Respondent to pay for neuropsychological testing is denied and dismissed.

NOTE: If you are dissatisfied with the **ALJ's** order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@ state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

DATED: May 31, 2023



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant proved Respondents failed to pay Claimant permanent partial disability (PPD) benefits pursuant to a settlement agreement.

PROCEDURAL MATTERS

Claimant's Application for Hearing ("AFH") dated October 11, 2022 and Case Information Sheet ("CIS") dated March 30 2023 endorse, inter alia, penalties under section 8-43-204(7), C.R.S. for Respondents' failure to timely pay benefits in accordance with the settlement agreement signed on August 31, 2022 and approved on September 1, 2022. At the commencement of the hearing in this matter, the ALJ asked the parties to identify the issues. Claimant's counsel stated that, as of the day prior, he and opposing counsel had "narrowed down the issue" and Claimant no longer sought to "negate or cancel" the settlement agreement. He stated that the dispute had been narrowed to a dispute of the amount of the PPD award that should have been issued and that he was seeking to enforce the settlement agreement as Claimant believed the full amount of PPD was not paid pursuant to the settlement agreement. Respondents' counsel agreed as to the issue identified. Neither party identified any other issues, including penalties. The parties did not call witnesses and rested their respective cases on exhibits admitted into the record.

Both parties submitted post-hearing position statements. Claimant identified the following issues in her position statement: (1) Remaining PPD owed to Claimant by Respondents pursuant to the June 22, 2022 FAL and September 1, 2022 Settlement Agreement; (2) Penalties pursuant to 8-43-204(7) and 8-43-304(1); and (3) Interest pursuant to C.R.S. 8-43-410(2). Respondents did not address penalties in their position statement.

Despite endorsing penalties in her AFH and CIS, Claimant did not identify penalties as an issue at hearing nor did Claimant argue the issue at hearing. Respondents did not try to the issue by consent. Accordingly, the issue of penalties is reserved for future determination.

FINDINGS OF FACT

1. Claimant is a 47-year-old banquet server who was employed with Employer since December 5, 2017.

2. Claimant sustained a work injury to her right knee while working for Employer on September 12, 2019.

3. Respondents filed a General Admission of Liability ("GAL") dated April 3, 2020 admitting for medical benefits and temporary total disability ("TTD") benefits at a rate of $562.51 per week, commencing on March 16, 2020.

4. On May 20, 2022 authorized treating physician ("ATP") Carrie Burns, M.D. placed at maximum medical improvement ("MMI") with 31% lower extremity impairment rating.

5. Dr. Burns' report placing Claimant at MMI was faxed to Insurer on June 21, 2022.

6. As Claimant was paid TTD every two weeks, on May 26, 2022, Insurer issued Clamant a check for $1,125.02 in TTD for the period of May 14 – 27, 2022 and another check on June 9, 2022 in the amount of $1,125.02 in TTD for the period of May 28 – June 10, 2022.

7. Insurer filed a Final Admission of Liability ("FAL") on June 22, 2022 consistent with Dr. Burn's report placing Claimant at MMI on May 20, 2022. The FAL admits for 31% scheduled impairment and reasonable, necessary and related post-MMI medical treatment. The FAL admitted for a total of $63,885.06 in TTD benefits for the period of 3/16/2020 through 5/19/2022, a total of $20,691.63 in permanent partial disability ("PPD") benefits for the period of 5/20/2022 through 8/13/2023, and disfigurement benefits in the amount of $1,000.00. The "Amount Overpaid" section states "$0.00". (R. Ex. B, p. 5). The FAL further states, "Insurer reserves the right to claim any and all offsets, recover any and all overpayments, and recover all advances made on account of the claimants indigency, whether specifically referenced in this admission or not". (Id. at p.7).

8. Claimant filed an Objection to FAL and Notice and Proposal and Application for Division Independent Medical Examination ("DIME") on June 28, 2023.

9. Prior to the DIME, the parties engaged in settlement negotiations. On August 10, 2022, the claims adjuster for Insurer, [Redacted, hereinafter AS], responded to a settlement demand from Claimant. In his response, AS[Redacted] stated,

> Thank you for your settlement demand in this case. Which I understand is $60,000 total, inclusive of the PPD amount owed. Please correct me if I am wrong. I show the remaining PPD balance as $15,348.00. At this time I can make an offer of $15,000 plus the remaining PPD due to settle the claim fully and finally.

10. As of August 10, 2022, Claimant had been paid $3,575.74 in PPD benefits ($1,650.34 on June 22, 2022 for the period of 5/20/2022 through 6/24/2022, plus $641.80 on July 5, 2022, $641.80 on July 19, 2022, and $641.80 on August 2, 2022). Claimant was also paid $1,000.00 in disfigurement benefits on June 22, 2022.

11. Claimant was also paid $641.80 in PPD on August 16, 2022 and $641.80 in PPD on August 30, 2022.

12. On August 31, 2022 the parties entered into a settlement agreement (the "Settlement Agreement"). Paragraph 2 of the Settlement Agreement provides,

> In full and final settlement of all benefits, compensation, penalties and interest to which Claimant is or might be entitled to as a result of these alleged injuries or occupational diseases, Respondents agree to pay and Claimant agrees to accept the following **Twenty Five Thousand Dollars and No Cents ($25,000.00)**, and payment of any remaining unpaid permanent partial disability benefits in one lump sum without discount, in addition to all benefits that have previously been paid to or behalf of the Claimant.

(R. Ex. H, p. 49).

13. The Settlement Agreement does not specify the amount of remaining unpaid PPD benefits, specifically refer to the amount of PPD identified in the FAL, nor otherwise reference the FAL. The parties stipulated and agreed that the claim would never be reopened except on the grounds of fraud or mutual mistake of material fact. The Director of the Division of Workers' Compensation approved the Settlement Agreement on September 1, 2022.

14. On September 2, 2022 Insurer issued Claimant a settlement check for $25,000.00 as well as a check for $14,064.40 lump sum remaining unpaid PPD benefits pursuant to the Settlement Agreement.

15. On September 19, 2022 Claimant's counsel contacted AS[Redacted] regarding a "missing" $1,767.89 in payments. AS[Redacted] responded that Insurer's payout log reflected Claimant was fully paid. On September 20, 2022, Claimant's counsel stated, "The FAL shows benefits totaling $21,691.63, and then we have the $25,000 settlement, totaling $46,691.63. It looks like the ledger only shows $44,923.74 as paid out for PPD + settlement. The difference is the $1,767.89 I listed below. Are we able to get those funds issued?" (Cl. Ex. 8, p. 54).

16. On September 22, 2022 AS[Redacted] informed Claimant's counsel that the "missing" amount referred to by Claimant was the amount paid in TTD past the date of MMI. He wrote,

> Date of MMI was 5/20/22. We paid TTD through 6/10/22. Which you can verify in the ledger. That overpayment for 22 days of TTD (until the FA was filed) = $1,767.89. When the FA is filed it reconciles the balances due and payable and credits any overpayments. That, plus the benefits paid (balance) in PPD and the settlement equal out.

(Id. at p. 52).

17. Claimant alleges Respondents owe her $1,767.89 in remaining unpaid PPD benefits under the Settlement Agreement, as Respondents admitted to $20,691.63 in PPD benefits on the FAL and have only paid $18,923.74 in PPD benefits.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Enforcement of a Settlement Agreement

Section 8-43-201, C.R.S. authorizes the ALJ to hear and decide all matters arising under the Workers' Compensation Act. This includes the authority to interpret a settlement agreement entered into and approved pursuant to the Act. *See* §8-42-101(1)(a), C.R.S.; *McCord v. Nabors Drilling U.S.A. Inc.,* WC 4-347-186 (ICAO, Feb. 7, 2000).

A settlement agreement may only be reopened upon a showing of fraud or mutual mistake of material fact. § 8-43-204(1) and § 8-43-303(2)(a) & (b) C.R.S.

Claimant does not seek to reopen the Settlement Agreement but, rather, requests that the ALJ enforce the terms of the Settlement Agreement. Claimant argues she was not paid the entirety of remaining unpaid PPD benefits pursuant to the Settlement Agreement and is owed $1,767.89 in PPD benefits, representing the difference between $20,691.63 in PPD listed in the FAL and $18,923.74 in PPD benefits she has received. Claimant contends that any credit Respondents may have been entitled to for overpayment of TTD was waived by their failure to indicate the credit on the FAL. Claimant relies on Cibola Construction v. ICAO, 971 P.2d 666 (Colo.App.1998).

In *Cibola*, the claimant received an award of $25,869.84 in PPD benefits. The claimant's condition later worsened, requiring additional surgery. The employer voluntarily reopened the claim and filed a GAL notifying the claimant of its intent to apply the PPD benefits already paid against any future award of permanent benefits. After reaching MMI for his worsened condition, the claimant received a whole person impairment rating of 16%, equivalent to PPD benefits in the amount of $36,568.90. The employer subsequently filed a FAL for PPD benefits in the amount of $36,568.90, stating that benefits had been or would be paid in that amount. The employer paid the claimant only $8,222.10, representing the difference between the earlier award of PPD and the total amount of benefits due. The Court of Appeals concluded that, in accordance with the requirements of § 8-43-203(2)(b)(I), C.R.S., the employer was obligated expressly to inform claimant of any credit or set off in the final admission. The Court of Appeals reasoned that notification of the credit in the previously filed general admission did not adequately preserve the employer's right to a reduction because it is the final admission which dispositively settles an employer's liability when uncontested. The Court of Appeals held that the final admission was legally insufficient to preserve the claimed credit and that the employer was bound to pay benefits in accordance with the amount represented in that document.

Cibola is distinguishable in that it involved the disposition of a case pursuant to a closed FAL whereas the case at bench involves the disposition of a case pursuant to an enforceable settlement agreement. The Settlement Agreement does not specify a particular amount of remaining unpaid PPD benefits nor does it specifically reference or incorporate the FAL. The terms of the Settlement Agreement provides for "payment of any remaining unpaid permanent partial disability benefits."

It is undisputed Claimant was paid TTD benefits beyond the date of MMI. WCRP Rule 5-6(D) provides "an insurer shall receive credit against permanent disability benefits for any temporary disability benefits paid beyond the date of maximum medical improvement." Accordingly, Respondents were entitled under WCRP Rule 5-6(D) to take a credit of $1,767.89. of overpaid TTD against Claimant's PPD. Additionally, Respondents preserved the right to claim any and all offsets and recover any and all overpayments specifically referenced in the FAL or not.

Prior to entering into the Settlement Agreement, Claimant was made aware of Respondents' calculations regarding the amount of unpaid remaining PPD benefits, which took into account the credit of TTD against PPD. The Settlement Agreement required Claimant to pay $25,000 and payment of any remaining unpaid PPD benefits. At the time of entering into the Settlement Agreement, the amount of remaining unpaid PPD benefits was $14,064.40 ($18,923.74 minus $4,859.34 paid prior to August 31, 2022). Claimant was paid $25,000 and a lump sum of $14,064.40 in remaining unpaid PPD benefits. Accordingly, Claimant was paid all remaining unpaid PPD benefits pursuant to the Settlement Agreement.

ORDER

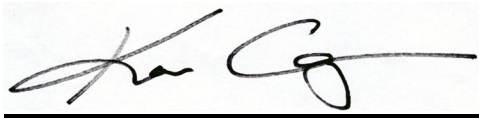
It is therefore ordered that:

1. Claimant's claim for $1,767.89 in unpaid PPD benefits pursuant to the Settlement Agreement is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, insurOACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 31, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable work injury on June 23, 2022.

II. Whether Claimant proved by a preponderance of the evidence she is entitled to temporary total disability ("TTD") benefits.

III. Determination of long-term disability benefit offsets against any TTD to which Claimant is entitled.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is a 60-year-old woman who has worked for Employer for approximately six years as an Institution Food Stewart. Claimant is responsible for preparing and serving food to [Redacted, hereinafter IE]. Claimant's job description indicates her position requires the ability to lift no more than 50 lbs., and includes standing, walking, carrying, pulling, pushing, and performing repetitive motions.

2. Claimant alleges she sustained a work injury on June 23, 2022. While performing her regular work duties, Claimant picked up a heavy pan, turned and felt a sharp pain in her right shoulder. She finished the food service and reported the incident to her supervisor and Employer's "Ouchline."

3. Claimant presented to the emergency department at Presbyterian St. Luke's Medical Center on June 23, 2022 with complaints of right-sided neck and shoulder pain radiating down her right arm and into her right chest. A chest x-ray was normal. A cervical spine x-ray revealed moderate degenerative disc disease at C5-C6, mild degenerative disc disease at C6-C7 and mild diffuse facet arthritis. There was no evidence of fracture or dislocation.

4. On June 24, 2022 Claimant presented to Cynthia Rubio, M.D. at Concentra. She reported feeling a sharp pain in her right shoulder while turning with a 20-30 lb. pan at work. Claimant further reported she experienced a needle sensation in her arm and pain in her chest, and later developed a headache and pain in her right lateral neck, as well as numbness in her fingers. Dr. Rubio assessed Claimant with a cervical strain and referred her for physical therapy. She released Claimant to modified duty. The medical note admitted into the record does not specify the specific restrictions imposed on this date.

5. On June 28, 2022 Dr. Rubio placed Claimant on modified duty restrictions of lifting/carrying/pushing/pulling no more than 20 lbs., no repetitive lifting, and no repetitive activity with the right arm more than five times per hour. Objective findings were noted to be consistent with history and/or work-related mechanism of injury.

6. Claimant spoke to Eric Chau, M.D. at Concentra by telephone on July 5, 2022. Claimant reported that she had been unable to work July 3-4, 2022 due to headaches, dizziness and pain. Dr. Chau removed Claimant from work July 3-5, 2022. Objective findings were noted to be consistent with history and/or work-related mechanism of injury.

7. Claimant presented to Nancy Strain, D.O. at Concentra on July 8, 2022 for a recheck of her right shoulder and neck. Claimant complained of stiffness in her neck and shoulder, with sharp shooting pain into her right arm and intermittent numbness into the 4th and 5th digits of her right hand. Claimant also complained of headaches and dizziness. Claimant reported that she saw Jason Gridley, D.C. for her knee and he did some acupuncture on her neck and it helped. Dr. Strain noted, "They put her on night duty which she has never done since working there for 5 yrs. She feels uncomfortable to drive at night with her stiff neck and dizziness." (Cl. Ex. 4, p. 31). She diagnosed Claimant with a cervical strain and right shoulder strain. She released Claimant to modified duty with restrictions of lifting no more than 20 lbs., pushing and pulling no more than 40 lbs., and 50% seated duty with no night shift work. Objective findings were noted to be consistent with history and/or work-related mechanism of injury.

8. Respondent filed a Notice of Contest on July 11, 2022.

9. On July 15, 2022 Claimant underwent MRIs of the cervical spine and right shoulder. The impression of the cervical spine MRI was, in relevant part: multilevel degenerative changes with no high-grade spinal canal stenosis and mild left neural foraminal stenosis at C3-C4. The findings noted small disc protrusions at C2-C3 and C3-C4 and C4-C5, C5-C6, C6-C7. The right shoulder MRI demonstrated a partial thickness tear of the distal supraspinatus and mild to moderate degenerative joint changes of the AC joint.

10. On July 26, 2022 Claimant saw Dr. Chau, who reviewed the neck and shoulder MRIs. He noted the results indicated tendinosis, a partial tear of the supraspinatus with degenerative changes, degenerative changes of the neck, and mild foraminal narrowing. He continued Claimant on modified work restrictions.

11. Claimant returned to Dr. Chau on September 27, 2022. Dr. Chau's assessment was right shoulder strain and cervical strain. Dr. Chau renewed Claimant's medications and referred her for acupuncture, massage therapy and evaluation by an orthopedic specialist. Claimant's work restrictions were lifting no more than 20 lbs., pushing and pulling no more than 40 lbs., and no reaching overhead.

12. A Concentra massage therapy note dated October 11, 2022 documents that Claimant was under prior treatment for a different, unrelated injury to her low back and knee.

13. On October 18, 2022 Claimant presented Cary Motz, M.D. at Concentra for an orthopedic evaluation of her right shoulder. Dr. Motz noted that the July 15, 2022 right shoulder MRI showed a small partial thickness interstitial tear of the supraspinatus tendon with some AC joint degenerative changes and subacromial bursitis. On examination, Dr. Motz noted full range of motion of the neck, tenderness about the trapezius and parascapular muscles, mild AC joint tenderness, limited right shoulder range of motion, and positive impingement and Hawkins tests. Her impression was: right shoulder impingement, partial thickness interstitial supraspinatus tear and acromioclavicular joint arthritis. Dr. Motz opined that it was reasonable to consider a steroid injection.

14. On November 29, 2022, J. Tashof Bernton, M.D. performed an independent medical examination ("IME") at the request of Respondent. Claimant reported being about 40% better with continued complaints of right shoulder pain radiating into the right neck and down the right arm, with numbness into all five fingers on the right hand. He noted, "The patient states that she tried to return to work and asked to move 'back to [Redacted, hereinafter DJ],' which has fewer IE[Redacted] than the other position she had previously been in and thus was, by her report, lighter work." (R. Ex. B, p. 9). On examination, Dr. Bernton noted fairly marked decreased range of motion and marked weakness on rotator cuff testing, with some collapse characteristic consistent with potential poor effort. There was non-dermatomal decreased sensation throughout the entire right upper extremity and generalized weakness on testing of the right upper extremity which Dr. Bernton noted was likely non-physiologic. Claimant had diffuse tenderness over the anterior shoulder without specific focal anatomic landmark tenderness.

15. Dr. Bernton opined that Claimant clearly had a significant functional overlay to her persistent symptoms. He remarked,

> There is no objective basis that would explain the patient's reports of decreased sensation for the entire right arm, certainly no objective physiologic basis that could explain such a finding on a work-related basis. The differential for non-dermatomal numbness of the entire right upper extremity is either neuropathy (which appears unlikely and in any case would not be a work-related issue), central nervous system issues (for which there is no evidence in the history or examination, or functional (nonphysically based) symptoms. While there is some remote possibility of a non-work related issue such as Parsonage-Turner resulting in this type of sensory distribution and weakness, it is most likely that this represents functional overlay.
>
> The patient's persistent decrease in range of motion and apparent weakness on multiple muscle testings in the upper extremity again could

> be consistent with an idiopathic acute-onset plexopathy such as Parsonage-Turner (which would be non-work related). The weakness that the patient has is not really consistent with a partial tear of the rotator cuff such as was noted on MRI, but if there was progression to a complete rotator cuff tear, the patient's decreased range of motion and weakness could be understandable on that basis. (Id. at p. 11).

16. Dr. Bernton concluded that the cervical spine MRI demonstrated no findings of nerve root compression that explain Claimant's symptoms and there is no evidence of a cervical injury that is responsible for her persistent symptoms. He recommended that Claimant undergo a repeat right shoulder MRI to rule out a complete rotator cuff tear as well as an EMG to rule out acute idiopathic plexopathy, which would be non-work related. Dr. Bernton noted that, if the EMG results are normal and the repeat MRI showed only the presence of the partial tear of the rotator cuff previously noted, Claimant's diagnosis is a partial rotator cuff tear and associated symptoms magnification. In that event, Dr. Bernton recommend PRP injection of the partial tear and a period of up to a maximum of six weeks of further physical therapy, at which point he opined Claimant would be at maximum medical improvement ("MMI").

17. On January 30, 2023 Dr. Bernton issued an addendum to his IME report after reviewing a repeat right shoulder MRI performed on January 24, 2023. Dr. Bernton noted that the repeat MRI did not demonstrate the presence of a complete rotator cuff tear and essentially revealed the same findings from the previous MRI, including some mild tendinitis and AC joint arthritis and a small partial tear of the distal supraspinatus tendon. He opined that the MRI findings, including the small partial tear, are degenerative and do not explain Claimant's reported symptoms including sudden severe right-sided neck pain radiating down her right arm to her right fingers and into her right chest. He reiterated that if EMG results were negative, a single PRP injection and brief period of physical therapy may be appropriate.

18. Claimant returned to Dr. Chau on February 1, 2023, who noted he was awaiting Claimant's decision regarding undergoing a right shoulder injection. He continued Claimant's work restrictions.

19. On February 24, 2023 Claimant presented to John Sacha, M.D. at Concentra for evaluation and EMG/NCV testing. The EMG/NCV was normal with no evidence of radiculopathy, plexopathy or neuropathy. Dr. Sacha's impression was rotator cuff tendinitis with no evidence of cervical radiculopathy or brachial plexopathy. He remarked that Claimant's testing, history, mechanism of injury and examination demonstrated no evidence of neuropathic process. Dr. Sacha recommended that Claimant undergo a corticosteroid injection of the shoulder and some strengthening and conditioning.

20. Claimant testified she continues to undergo massage therapy, for which she pays. Claimant testified she has not been placed at MMI.

21. Claimant has continued on modified work restrictions. Claimant remains employed by, but is not currently working for Employer. As of the date of injury, Claimant had concurrent employment as a caregiver with [Redacted, hereinafter SC]. Claimant has worked for SC[Redacted] for approximately 10 years. The work injury did not affect Claimant's concurrent employment. Subsequent to the injury Claimant continued to work her concurrent employment with SC[Redacted] and did not incur any lost wages from such employment.

22. Claimant testified she earns $24.25 per hour from Employer, plus overtime, and works an average of 40 hours per week. Claimant testified Employer also provided her one free meal a day, which she values at $8.00 per meal. Claimant calculates her AWW for Employer to be $1,010.00, including meals. Claimant calculates her AWW with SC[Redacted] as $332.40.

23. Claimant's pay records from Employer reflect that, at the time of the injury, she earned $24.62 per hour. Claimant's wage records indicate Claimant's total earnings per pay period varied based on hours worked. From June 6, 2021 to June 18, 2022 Claimant earned an average of $2,220.10 per biweekly pay period, corresponding with average weekly earnings of $1,110.05.

24. Claimant submitted three paystubs from SC[Redacted], indicating she earned gross pay of $2,513.52 from October 1, 2022 to October 31, 2022; $2,325.38 from November 1, 2022 to November 30, 2022; and $2,501.60 from December 1, 2022 through December 31, 2022.

25. Claimant is receiving long-term disability benefits in the amount of $2,556.56 per month ($589.74 per week) through [Redacted, hereinafter SI] under a disability insurance policy. Claimant's pay records demonstrate the insurance premiums under the policy were contributed to 100 percent by Respondent. Claimant did not make any contributions to the SI[Redacted]. SI[Redacted] specified a date of disability of July 2, 2022.

26. The ALJ credits the opinions of Drs. Rubio, Chau, Strain, Motz, Sacha and Bernton, as supported by the medical records and Claimant's credible testimony, and finds Claimant proved it is more probably true than not she sustained a compensable work injury to her right shoulder and neck on June 23, 2022. Claimant is entitled to reasonable necessary, and related medical treatment to cure and relieve the effects of the June 23, 2022 work injury.

27. Claimant proved it is more probably true than not she is entitled to TTD benefits from July 3, 2022 and ongoing, until terminated by operation of law.

28. Based on Claimant's pay records, an AWW of $1,110.05 (with a TTD rate of $740.03) represents a fair approximation of Claimant's wage loss and diminished earning capacity.

29. Respondents are entitled to offset Claimant's TTD award by $589.74 per week for long-term disability payments.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant

demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

As found, Claimant proved it is more probably true than not she sustained a compensable work injury to her right shoulder and neck on June 23, 2022. Claimant was in the course of her employment performing her regular work duties when she experienced an onset of symptoms. Each of Claimant's providers at Concentra have diagnosed Claimant with a work-related right shoulder condition and opined Claimant requires right shoulder treatment. Even Respondent's IME physician, Dr. Bernton, opined Claimant sustained a work-related partial rotator cuff tear, for which he recommended a PRP injection and some physical therapy prior to being placed at MMI. Additionally, Drs. Chau, Rubio and Strain credibly diagnosed Claimant with a work-related cervical strain. To the extent the record references lumbar or bilateral knee conditions, the preponderant evidence does not establish any causal nexus between such claimed disability and the June 23, 2022 work injury.

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As Claimant met her burden to prove she sustained a compensable work injury to her right shoulder and neck, Claimant is entitled to reasonable and necessary treatment to cure and relieve the effects of such injury.

TTD

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Claimant testified she is not currently working for Employer, but offered no evidence regarding what date she specifically stopped working for Employer and began incurring lost wages. Claimant's position statement states Claimant ceased working for Employer on June 25, 2023. In its position statement, Respondent alleges Claimant worked modified duty until July 2, 2023 and then subsequently elected to "keep herself off" of work for Employer because she wanted to go back to the DJ[Redacted] with fewer IE[Redacted] and lighter work. SI[Redacted] determined a date of disability of July 2, 2022.

The medical records indicate Claimant was released to modified duty on June 24, 2022 and returned to working modified duty for Employer on a night shift until July 3, 2022. Dr. Chau subsequently removed Claimant from work from July 3-5, 2022 due to symptoms associated with her June 23, 2023 work injury. Subsequently, on July 8, 2022, Dr. Strain released Claimant to modified duty but restricted her from working night shifts. The totality of the evidence demonstrates Claimant ceased working for Employer on July 3, 2022 due to a disability caused by the June 23, 2022 work injury, resulting in lost wages. Claimant has missed more than three work shifts due to her disability. Accordingly, Claimant is entitled to TTD benefits from July 3, 2022 and ongoing, until terminated by operation of law. The reference in Dr. Bernton's IME report to Claimant asking to move back to the DJ[Redacted] for lighter work does not, in light of the totality of the evidence, establish Claimant is not entitled to TTD.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc.*, WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

Claimant asserts an AWW of $1,342.40, consisting of an AWW for Employer of $1,010.00 and SC[Redacted] of $332.40. Subsequent to the work injury, Claimant continued working her concurrent employment and did not sustain any lost wages from SC[Redacted]. Accordingly, including wages from such concurrent employment would not be a fair approximation of Claimant's wage loss and diminished earning capacity. As found, Claimant's AWW is $1,110.05, based on her employment for Employer.

Offsets

Section 8-42-103(1)(d)(I), C.R.S. provides,

In cases where it is determined that periodic disability benefits are payable to an employee under a pension or disability plan financed in whole or in part by the employer, hereinafter called "employer pension or disability plan", the aggregate benefits payable for temporary total disability, temporary partial disability, and permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to the employer pension or disability plan benefits, with the following limitations:

(A) Where the employee has contributed to the employer pension or disability plan, benefits shall be reduced under this section only in an amount proportional to the employer's percentage of total contributions to the employer pension or disability plan.

(B) Where the employer pension or disability plan provides by its terms that benefits are precluded thereunder in whole or in part if benefits are awarded under articles 40 to 47 of this title, the reduction provided in this paragraph (d) shall not be applicable to the extent of the amount so precluded.

As found, the record demonstrates Respondent paid 100 percent of total contributions to Claimant's SI[Redacted] disability plan. The pay records do not indicate Claimant made any contributions to the disability premiums. Claimant is receiving disability benefits from SI[Redacted] in the amount of $2,556.56 per month, or $589.74 per week. Respondent is thus entitled to offset Claimant's TTD award by $589.74 per week.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence she suffered a compensable work injury within the course and scope of employment on June 23, 2022.

2. Respondent shall pay for reasonable, necessary and causally related medical care from authorized providers.

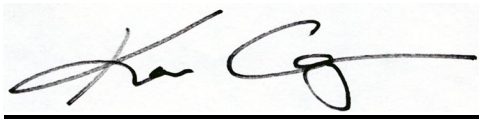
3. Claimant's AWW is $1,110.05, with a corresponding TTD rate of $740.03.

4. Respondent shall pay Claimant TTD benefits beginning July 2, 2022 and ongoing, until terminated by operation of law, subject to applicable offsets, including an offset of $589.74 per week for benefits paid through SI's[Redacted] long-term disability plan.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-176-476-001

ISSUES

I. Whether Claimant is entitled to a change of physician to Dr. Dupper.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On June 17, 2021, the claimant suffered a compensable back injury while working for the employer.
2. The next day, June 18, 2021, the caimant presented to the University of Colorado Health Emergency Department. He complained of low back pain that radiated down his left leg and down to his foot. He also complained of some numbness in his left foot and upper thigh. Based on his symptoms, an MRI was performed. The MRI demonstrated disc pathology at the L2-L3 level with a 1.7 cm free disc fragment that appeared to be from the L2-L3 disc. Based on the findings and the claimant's symptoms, the emergency room physician discussed the case with the on-call neurosurgeon.
3. On approximately June 18th or 19th, Physician Assistant Nicois, who appears to be from Dr. Tracey Stefanon's office, called the emergency department to discuss the case and arrange for a follow-up appointment for the claimant.
4. On June 21, 2021, the claimant was evaluated Dr. Stefanon. Based on her findings, Dr. Stefanon consulted a neurosurgeon and then referred the claimant to be seen by a neurosurgeon within the next few days.
5. On June 25, 2021, the claimant was seen by Sheree Bower, M.D., a neurosurgeon. Based on the MRI, Dr. Bower concluded that the claimant had an extruded disc fragment at the L2-L3 level. Therefore, based on the claimant's symptoms and the MRI findings, Dr. Bower recommended a microdiscectomy to reduce and decompress the disc, which was causing nerve root impingement. The claimant was agreeable to undergoing surgery. As a result, surgery was tentatively scheduled for July 20, 2021.
6. On June 28, 2021, the claimant followed up with Dr. Stefanon. At this appointment, he still had weakness, numbness, and tingling in his left leg. It was noted that he had seen a neurosurgeon and they discussed surgery. Dr. Stefanon stated that the plan was to proceed with surgery by July 20, 2021. There is no indication Dr. Stefanon was against the surgery recommended by Dr. Bower.
7. On July 20, 2021, the claimant underwent back surgery, with Dr. Bower. Dr. Bower performed a left microdiscectomy at the L2-L3 level.

8. On August 10, 2021, the claimant returned to see Dr. Bower. At this visit, the claimant stated that he initially had some improvement, but over the last week he started to develop worsening left-sided low back pain and left lower extremity pain. Dr. Bower noted that if there was no improvement, she would get a new MRI.

~~9.~~ On August 16, 2021, the claimant saw Dr. Stefanon and complained of continuing pain and radicular symptoms in his left leg. Therefore, a new MRI was ordered. ~~The claimant did not appear to report symptoms in his right leg at this time.~~

10. On August 28, 2021, about two months after his work injury and the first MRI, the claimant underwent the second MRI. The second MRI demonstrated:

    i. Interval discectomy at L2-3 with decreased left lateral recess stenosis compared with the June 18, 2021 MRI, and

    ii. New right central disc extrusion with superior migration at L3-L4 with worsened right-sided spinal canal and right lateral recess stenosis compared with the June 18, 2021, MRI.

    Thus, the claimant appeared to have new, or progressive, findings at the L3-L4 level, in the form of an extrusion or herniation, that developed over 2 months.

11. On September 7, 2021, the claimant returned to Dr. Bower. Dr. Bower reviewed the second MRI and compared it to Claimant's preoperative MRI. Dr. Bower noted that the most recent MRI showed that the prior L2-3 disc herniation was gone, with the lateral recess decompressed, but yet showed a new right sided disc herniation at the L3-4 level causing right lateral recess stenosis. She also noted that the nerve appears to be just past the disc and may not be fully compressed by the disc. Dr. Bower then noted that the claimant did not get any relief from the prior surgery-microdiscectomy. Because the claimant did not get any pain relief from the surgery, Dr. Bower concluded that the claimant's pain might be coming from his sacroiliac joint or his hip. She also stated that pain from the sacroiliac would overlap with the pain expected from the L2-3 disc. And while she did not think Claimant's pain complaints were coming from the L3-4 disc herniation, she could not say for sure. Thus, she recommended physical therapy and a referral to a pain specialist for another opinion about the pain generator as well as the provision of diagnostic and therapeutic injections.

12. On September 8, 2021, the claimant returned to Dr. Stefanon. At this visit, the claimant stated that his symptoms had still not improved after the surgery. Thus, the claimant was directed to follow up with Dr. Bower to determine whether she had any other recommendations.

13. On October 12, 2021, after attending several physical therapy appointments, the claimant returned to Dr. Stefanon. At this appointment, the claimant stated that his symptoms were stable. Dr. Stefanon did, however, note objective improvement.

14. On October 26, 2021, Dr. Stefanon notes indicate that the claimant has "left lower extremity weakness in the right side." The ALJ finds that this finding relates to the right side of the left leg, and not the right leg.

15. On November 9, 2021, the claimant returned to Dr. Stefanon. At this appointment, it was noted that the claimant had been consistent with his home exercises and

demonstrated improvement, but yet he still had left lower extremity weakness in the right side.

16. On November 23, 2021, the claimant reported to Dr. Stefanon that his left lower extremity was about 10% worse and that he still had pain in his thigh, leg, and knee.

17. On December 14, 2021, the claimant returned to Dr. Stefanon. At this visit, it was noted that he continued to improve functionally, and she thought the claimant would reach MMI by the next visit.

18. On January 25, 2022, Dr. Stefanon placed the claimant at MMI, even though Dr. Bower had recommended Claimant consult a pain management physician for possible injections and Claimant had not consulted one yet.

19. On June 10, 2022, the claimant underwent an IME with Anjmun Sharma. Dr. Sharma evaluated the claimant and determined that he was not at MMI. Dr. Sharma concluded that the new disc herniation/extrusion at the L3-L4 level was a direct result of the first surgery. Dr. Sharma was clear that the new herniation/extrusion was not due to any error on behalf of the surgeon, Dr. Bower, but that it was merely a common complication from surgery.

20. On August 24, 2022, Claimant underwent a Division Independent Medical Examination with Alicia Feldman, M.D. Dr. Feldman addressed the claimant's new L2-3 disk herniation and left sided complaints. She noted that after Dr. Stefanon placed claimant at MMI on January 25, 2021, the claimant continued to have pain and functional limitations. She also noted that his neurosurgeon, Dr. Bower, recommended that the claimant should consult a pain management specialist and possibly undergo some injections. After evaluating the claimant, she concluded that he was not at MMI for his left sided complaints. It was her opinion that the claimant would benefit from a consultation with a pain management specialist for evaluation for possible injections to locate the source of the claimant's pain and symptoms. Lastly, she concluded that if the claimant did not improve, he should return to his surgeon for further evaluation before being placed at MMI. While Dr. Feldman did note the claimant's new right sided disc herniation at the L3-4 level, and right sided symptoms, she did not address the cause of the herniation and his right sided symptoms.

21. On October 4, 2022, after the DIME physician determined the claimant was not at MMI, the claimant returned to Dr. Stefanon. At this appointment Dr. Stefanon reviewed the DIME report of Dr. Feldman as well as the IME from Dr. Sharma. Dr. Stefanon concluded that the claimant's ongoing back tightness and left leg symptoms were related to his June 17, 2021, work injury. She also noted that the claimant's ongoing symptoms could be sciatica, SI involvement, facet involvement, piriformis syndrome, or a combination of those conditions. Therefore, she agreed with the DIME physician that the claimant was not at MMI and required additional treatment. As a result, Dr. Stefanon recommended physical therapy, an MRI, and a referral to a pain management specialist to determine whether injections might be appropriate.

22. At the October 4, 2022, evaluation, Dr. Stefanon also evaluated the claimant's new disc herniation at the L3-4 level and his right sided leg complaints. She did not think the new disc herniation, and associated symptoms, were related to his June 17, 2021,

work injury because the herniation and symptoms occurred after (or "remote" from) his work injury. She stated that "the patient did not develop any right-sided symptoms throughout the course of his treatment for his work-related condition and not until 3-4 months after MMI determination."

23. On October 12, 2022, the claimant underwent a third MRI. Interestingly, the MRI demonstrated that at the L3-4 level there was resorption or resection of the small disc herniation at that level seen on the second MRI. But there was now a disc protrusion at the L5-S1 level that had become more prominent. Thus, there appeared to be improvement at the L3-L4 level and worsening, or more degeneration, at the L5-S1 level.

24. On October 14, 2022, the claimant started the physical therapy that had been recommended.

25. On October 25, 2022, Dr. Stefanon evaluated the claimant and went over his most recent-third-MRI findings with him. She noted that the MRI demonstrated multilevel degenerative changes and that the findings seemed to be unchanged since the second MRI, except for the interval progression of a central and right disc protrusion at the L5-S1 level. She again concluded that the claimant's right-side leg problems were unrelated to his work injury. She stated that:

> I did review the MRI results with the patient using an anatomical model. He has multilevel degenerative changes which are mild to moderate in nature and appear to be unchanged since the prior MRI with the exception of interval progression of central and RIGHT central disc protrusion at L5-S1. We did discuss how this may be contributing to his current, new onset, right leg symptoms. I did again discuss with the patient that I do not feel that his right leg symptoms are related to his work injury of 6/17/2021. Please refer to discussion at prior evaluation on 10/4/2022. I do feel that this is likely the natural progression of his chronic underlying condition with multilevel degenerative changes. I did discuss with the patient that any further evaluation and/or treatment should be pursued through his primary insurance/primary care manager for this new abnormality and right leg symptoms as again my opinion is that it is not related to his work injury of 6/1 7/2021.

26. On January 19, 2023, the claimant was seen by a pain management specialist, Dr. Pouliot, and underwent an L5-S1 transforaminal epidural steroid injection. Based on Dr. Pouliot performing an epidural steroid injection at the L5-S1 level, it appears that he thinks the claimant's right sided symptoms are coming from the L5-S1 level, which was not seen until the third MRI taken on October 12, 2022.

27. The claimant contends that he does not believe Dr. Stefanon has his best interests in mind. He also contends that it is his opinion Dr. Stefanon's attitude towards him changed after the DIME physician reversed Dr. Stefanon's MMI finding. As a result, the claimant contends that it is his opinion that Dr. Stefanon merely wants to get him off workers' compensation.

28. While Dr. Stefanon did place the claimant at MMI before he was evaluated by a pain specialist, which was recommended by Dr. Bower, based on the totality of the evidence submitted at hearing, the ALJ finds that Dr. Stefanon is providing the claimant adequate as well as reasonable and necessary medical treatment. This is based on the following factors. First, based on Dr. Stefanon's evaluation of the claimant and reviewing his MRI findings, she immediately referred the claimant to a neurosurgeon, Dr. Bower, who saw the claimant within about a week of his accident. Second, after Dr. Bower recommended surgery, Dr. Stefanon did not disagree with the surgical recommendation made by Dr. Bower. Third, although Dr. Stefanon prematurely placed the claimant at MMI, she reviewed the findings of the DIME physician and has followed many of the recommendations of the DIME physician by restarting physical therapy and referring claimant to a pain specialist. Fourth, Dr. Stefanon ordered a third MRI, even though that was not recommended by the DIME physician. Fifth, while the second MRI demonstrated findings at the L3-L4 level, the claimant did not have the onset of right sided symptoms at the time of the MRI, but according to Dr. Stefanon, he developed the right sided symptoms after being placed at MMI. Based on the timing of the onset of the claimant's right-sided symptoms, Dr. Stefanon's opinion seems reasonable. Thus, Dr. Stefanon has not restricted the claimant from receiving the care that she thinks is reasonably necessary to treat the conditions she thinks are work related.

29. The ALJ finds that the primary reason the claimant wants to change physicians is because he disagrees and is dissatisfied with Dr. Stefanon's opinion that the new MRI findings and his right sided pain complaints are unrelated to his work injury. The ALJ, however, finds that this is a reasonable conclusion by Dr. Stefanon under the facts and circumstance of this case.

30. The ALJ finds that the claimant's disagreement with Dr. Stefanon's conclusion about causation, and thus his dissatisfaction with her, under the facts and circumstances of this case, does not support a finding that the claimant is entitled to a change of physician at this time.

31. The ALJ further finds and concludes that this disagreement of causation has not resulted in the breakdown of the relationship between the claimant and the treating physician to warrant a change of physician.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers'

compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant is entitled to a change of physician to Dr. Dupper.[1]

Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary

[1] In his proposed order, the claimant also contends that because he believes the subsequent disc herniation(s) are related and because Dr. Stefanon does not believe they are related, she is refusing to treat for non-medical reasons and therefore the right to select a physician has passed to the Claimant. However, it appears that the claimant is putting the cart before the horse. Before the claimant can request a change of physician under those circumstances, the claimant has to establish the subsequent disc herniation(s) and right leg symptoms are related. But the compensable nature of the subsequent disc herniation(s) and need for treatment is not before this ALJ. The only issue before this ALJ is the claimant's request to change physicians based on his contention that he does not think Dr. Stefanon has his best interests in mind and is trying limit his workers' compensation benefits by prematurely placing him at MMI because she does not think the claimant's subsequent disc herniation(s) and right sided leg symptoms are related to his industrial injury. Therefore, a change of physician based on the claimant's contention that Dr. Stefanon refused to treat a related condition for non-medical reasons is not before this ALJ.

medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.*

Moreover, an ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). On the other hand, the claimant can be entitled to a change of physician based on the breakdown of the relationship between the claimant and the treating physician. *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 16, 1995).

But because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO Nov. 19, 2014).

The ALJ finds that Dr. Stefanon is providing the claimant adequate, reasonable and necessary medical treatment for his work injury. This is based on the following factors. First, based on Dr. Stefanon's initial evaluation of the claimant and reviewing his MRI findings, she immediately referred the claimant to a neurosurgeon, Dr. Bower, who saw the claimant within about a week of his accident. Second, after Dr. Bower recommended surgery, Dr. Stefanon did not disagree with the surgical recommendation made by Dr. Bower, and claimant underwent surgery. Third, although Dr. Stefanon prematurely placed the claimant at MMI, she reviewed the findings of the DIME physician and has followed many of the recommendations of the DIME physician by restarting physical therapy and referring claimant to a pain specialist. Fourth, Dr. Stefanon ordered a third MRI, even though that was not recommended by the DIME physician. Fifth, while the second MRI demonstrated findings at the L3-L4 level, the claimant did not have the onset of right sided symptoms at the time of the MRI, but appears to have developed those symptoms after being placed at MMI. Thus, it is found and concluded that Dr. Stefanon has provided adequate as well as reasonably necessary medical treatment for the conditions she thinks are work related.

As found, the primary reason the claimant wants to change physicians is because he disagrees and is dissatisfied with Dr. Stefanon's opinion that the new MRI findings and his new right sided pain complaints are unrelated to his work injury. A disagreement regarding causation between a physician and claimant can support a change of physician. (*See Clark v. Excel*, WC 4-437-891, (ICAO June 23, 1999),(Change of physician allowed when claimant disagreed with physician regarding the cause of the osteoarthritis and the close relationship between the physician and employer). But a disagreement regarding causation between a claimant and their physician does not automatically warrant a change of physician.

The ALJ finds and concludes that the disagreement and dissatisfaction, under the facts and circumstances of this case, does not support a finding that the claimant is entitled to a change of physician. The ALJ further finds and concludes that this disagreement of causation has not resulted in the breakdown of the relationship between the claimant and the treating physician to warrant a change of physician.

As a result, the ALJ finds and concludes that the claimant has failed to establish by a preponderance of the evidence that he is entitled to a change of physician.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The claimant's request for a change of physician is denied.
2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 4, 2023.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-199-498-001

ISSUES

I. Whether the Claimant established, by a preponderance of the evidence, that he suffered a compensable injury.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment, including treatment provided by Parker Adventist Hospital, Sky Ridge Medical Center, and Wake Forest Baptist Medical Center.

III. Whether the Claimant established, by a preponderance of the evidence, that he is entitled to an award of TTD/TPD benefits from February 17, 2021, and ongoing.

IV. Whether the Respondents established, by a preponderance of the evidence, that the Claimant was responsible for the termination of his employment.

STIPULATIONS

- In their position statements the parties stipulated that if the claim is deemed compensable the Claimant's average weekly wage is $1,082.32.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. The Claimant is a 41-year-old man with a June 16, 1981, date of birth. The Claimant was hired by the Respondent Employer on November 10, 2020, to work as a coax splicer foreman. **RHE B, Bates 2.**

2. After being hired by the Employer, the Claimant underwent an onboarding process with a company provided laptop. As a part of the Employer's onboarding process, the Claimant reviewed the Employer's employee handbook and electronically acknowledged receipt and review of the same. **December 9, 2022, Tr. 38, 9-22.** The Employer's employee handbook includes the Employer's policies and procedures relating to reporting a workplace injury. **December 9, 2022, Tr. 38, ll. 23-25, Tr. 39, l. 1.** The Employer's accident and injury reporting policy includes six bullet point topics, the first of which requires the employee to immediately report the accident to their supervisor. **December 9, 2022, Tr. 39, ll. 21-25, Tr. 40, ll. 1-15.** The Claimant's direct supervisor, splicing manager, [Redacted, hereinafter DS], testified at the December 9, 2022, continuation

hearing. DS[Redacted] credibly testified the Claimant would not have been permitted to work in the field if he had not completed the Employer's onboarding process, including acknowledging review of the employee handbook. **December 9, 2022, Tr. 40, ll. 16-22.** The Employer also has posted in the Employee breakroom, Colorado's required poster advising workers of their obligation to report any work injury, in writing, within four business days.[1] **December 9, 2022, Tr. 41, l.25, Tr. 42, ll. 1-6.**

3. On May 7, 2022, the Claimant filed his Worker's Claim for Compensation, alleging a January 6, 2021, date of injury. The Claimant described the injury as occurring when, "[H]e went to work hit the ground on [his] knees and a little lump appeared on his abdomen." **RHE A, Bates 2.**

4. The Claimant testified to his work duties at the Employer as splicing coax, carrying tools back and forth from [electrical] pedestal to pedestal, putting in taps, using drills, corers, hand tools, bolts and nuts. The Claimant described using a 30 to 40 pound tool belt in his work, as well as carrying buckets full of taps and other items, with the bucket weighing up to 30 pounds. **September 8, 2022, Tr. 34, ll. 21-23, Tr. 35, ll. 11-21, Tr. 36, ll. 1-18.**

5. At 10:44 a.m., on January 6, 2021, the Claimant presented to Parker Adventist Hospital Emergency Room complaining of bilateral flank pain at a level 10/10, which started "about an hour ago while at work". The Claimant gave a history of multiple prior kidney stones. **RHE D, Bates 84.** The Claimant was treated with IV fluids, IV Toradol, and IV Dilaudid. The treating provider noted the Claimant had been seen at the Parker Adventist ER eight times in the last year for various complaints, including flank pain. **RHE D, Bates 104.** The discharge diagnosis was flank pain. The Claimant's labs and ultrasound were read as normal. There was no evidence of an obstructing kidney stone. **RHE D, Bates 96.**

6. At the time of hearing, the Claimant testified he was confused about the date of injury when completing his Worker's Claim for Compensation. According to his testimony, the Claimant remembered, "all too well," the February 17, 2021, date of injury, and could easily distinguish the pain of kidneys stones from hernia pain. **September 8, 2022, Tr. 39, ll. 18-20, Tr. 40, ll. 22-25, Tr. 41, l 1.** In his testimony, the Claimant reiterated the injury occurred when he was "hitting the ground in front of a pedestal, on [his] knees . . . and [he] felt a pain in [his] right lower abdominal area. And when [he] stuck [his] hand underneath the tool belt, it felt like a little egg had popped out of [his] ab." **September 8, 2022, Tr. 42, ll. 14-21.** After the alleged injury, the Claimant went back to work and finished the four to five hours remaining in his shift. **September 8, 2022, Tr. 45, ll. 11-13.** The Claimant testified the next day, he showed DS[Redacted] the hernia. However, he "couldn't recollect" whether he told DS[Redacted] the hernia was work-related. **September 8, 2022, Tr. 46, ll. 14-19.** After February 17, 2022, the Claimant kept working his regular job.

7. The Claimant returned to the Parker Adventist ER on February 21, 2021, with three complaints, pain in his left thumb, with mild numbness, right inguinal pain, and right lower quadrant abdominal pain at a level 6/10. The Claimant reported the inguinal pain began

[1] On February 17, 2021, the statute, which was subsequently amended, included the four-business day reporting requirement.

a week prior and was intermittent. He felt a bulge and was concerned he had a hernia. The evaluating provider noted, "Potentially there is a mild reducible hernia on palpation. CT scan of the abdomen was notable for a small, reducible fat-containing hernia. The CT scan was discussed with radiology over the telephone. The radiologists believed there was a very mild to minimal fat containing hernia, that they would not have commented on unless they were aware of the doctor's concern. **RHE D, Bates 107.** The final CT result was read as, "No acute CT abnormality…small bilateral fat containing hernias, nonobstructing left renal stones measure up to 0.4 in diameter." **RHE D, Bates 110.** No mechanism of injury is included in the February 21, 2021, treatment note. The Claimant testified that his "pain was too excruciating" on February 21, 2021, to give the providers a mechanism of injury. **September 8, 2022, Tr. 48, ll. 24-25, Tr. 49, ll. 1-2.** After leaving the ER on February 21, 2021, the Claimant returned to work, as the pain "wasn't that bad that [he] couldn't continue working". **September 8, 2022, Tr. 49, ll. 3-10.**

8. The Claimant again presented at the Parker Adventist ER on March 2, 2021. The evaluating physician noted, "This is a 39-year-old male who presents to the Emergency Department for evaluation of continued right groin pain. Patient has had intermittent pain in his groin ***for some time*** and was last seen one week ago at which point in time he had an ultrasound that showed a fat-containing right inguinal hernia. . . ." The Claimant reported his pain was worse with urinating and sometimes with bowel movements. The Claimant presented for "further evaluation and in hopes of having surgery to have this fixed. Patient has not seen surgery in follow-up, yet he did see his primary care physician". **RHE D, Bates 139.** The March 2, 2021, discharge instructions were provided by Allison W. Stroh, PA-C. PA Stroh noted the Claimant was evaluated for recurrence reducible right fat-containing inguinal hernia. Regarding the Claimant's bloody stools, PA Stroh believed they were coming from the Claimant's hemorrhoids, caused by constipation." **RHE D, Bates 148-149.** RN Allyson R. Agerton also educated the Claimant on discharge instructions and the need to consult with surgery to help alleviate the hernia discomfort. She inquired of the Claimant whether he had any further questions regarding discharge instructions. The Claimant responded, "So she's not going to give me any prescriptions for pain?" RN Agerton responded that the PA had instructed the Claimant to take over-the-counter Tylenol and Ibuprofen, as needed. The Claimant responded, "Well, what the hell am I supposed to do? I don't have any insurance. I can't go to my job with this pain. I'm gonna *(sic)* lose my job and then my kid because I won't be able to pay my child support". The Claimant then leapt up from the bed, "with ease and proceeded to get dressed easily without any signs of discomfort nor difficulty moving around as he said, 'So, great! I'm just gonna *(sic)* die from this, I guess! That's a great solution!'" **RHE D, Bates 148.** There is no mechanism of injury documented in the March 2, 2021, treatment note. However, Dr. Nathan Scherer provided the Claimant with a note restricting the Claimant from working from March 2, 2021, through March 8, 2021, and limiting him to light duty, avoiding heavy lifting. **RHE D, Bates 147.** When the Claimant returned to work on March 9, 2021, the Employer accommodated the Claimant's restrictions imposed by Dr. Scherer. **September 8, 2022, Tr. 52, ll. 13-16.**

10. The Claimant returned to Parker Adventist Hospital on March 18, 2021, for the same complaints reported on March 2, 2021, when he had "unremarkable imaging studies", an indirect fat-containing hernia was appreciated, the Claimant was referred to

Denver Health. The physician opined emergent imaging studies were not warranted as the Claimant had a nonsurgical abdomen. Control of constipation was discussed. The provider declined to complete the requested form outlining the Claimant's work restrictions and advised the Claimant he must follow-up with a surgical provider or PCP for completion of the form. **RHE D, Bates 154.** No mechanism of injury is given in the March 18, 2021, treatment note.

11. On March 30, 2021, the Claimant sought treatment at the Sky Ridge Hospital Emergency Room for a worsening right inguinal hernia. The Claimant expressed concern that he would lose his job because he cannot work secondary to pain. **RHE E, Bates 163, 164.** The provider noted the Claimant would eventually need a surgical consult, but he did not then have any insurance. The Claimant was put in the process for Medicaid. **RHE E, Bates 166.** There is no mechanism of injury documented in the March 30, 2021, Sky Ridge treatment note.

12. DS[Redacted], the Claimant's supervisor, credibly testified that the Claimant did show him a lump on his abdomen. Shortly after being shown the lump, DS[Redacted] pulled the Claimant aside and asked him whether it was work related. The Claimant did not say it was work related. The Claimant did not tell DS[Redacted] that he injured himself at work in either January or February 2021 and that he needed medical treatment. DS[Redacted] credibly testified he specifically asked the Claimant if his hernia was work-related, on more than one occasion, and the Claimant did not say it was work-related. **December 9, 2022, Tr. 32, ll. 3-21, Tr. 33, ll. 4-11.** DS[Redacted] credibly testified that, had the Claimant related his hernia to his work activities, he would have:

- Immediately had the Claimant fill out an employee injury report, which is in each employee's vehicle, to provide him the details of the accident/injury.
- Immediately call his manager, the safety manager, and the HR manager to advise them of the injury.
- Taken the Claimant to Concentra for a urinalysis.
- Visited the site of the accident and performed his own investigation.
- Provided his investigative report to the safety manager.

December 9, 2022, Tr. 33, ll. 12-25.

13. The extent of the Employer's procedure for handling work injuries, as described by DS[Redacted], which indicates the actions that would have been taken had the Claimant reported a work injury, are credible. Thus, had the Claimant reported a work-related injury, the Employer would have followed the procedure outlined by DS[Redacted] and there would be documentation of the Claimant's alleged injury consistent with the Employer's procedure for handling work injuries. As a result, the ALJ finds that the Claimant did not report a work injury to DS[Redacted].

14. The Claimant was provided work restrictions due to his hernia. DS[Redacted] credibly testified that the Employer was able to accommodate the Claimant's work restrictions, and modified employment was offered to the Claimant within those restrictions. **December 9, 2022, Tr. 34, ll. 12-25.** The Claimant initially accepted the modified employment offered to him by the Employer.

However, after two days of modified work, the Claimant stopped presenting for work. When the Claimant stopped presenting to work, he was in possession of Employer property including a company bucket truck, a company laptop, a company phone, and company tools. Once the Claimant stopped appearing for work, the Employer made multiple attempts to contact him. **December 9, 2022, Tr. 35, ll. 1-25.** The Employer's Human Resources Manager was finally able to contact the Claimant. On April 9, 2021, the Claimant returned the Employer's property and advised DS[Redacted]he was leaving for North Carolina to be with his parents. **December 9, 2022, Tr. 36, ll. 10-22.** Although the Employer never advised the Claimant his employment was terminated, the Employer had moved to terminate the Claimant's employment on April 5, 2021, for no call/no show. DS[Redacted] credibly testified that had the Claimant returned to work before April 5, 2021, the Employer would have continued to accommodate the Claimant's work restrictions. **December 9, 2022, Tr. 37, ll. 1-14.**

15. After returning to North Carolina, the Claimant sought treatment at the Wake Forest Medical Center on April 14, 2021, with a complaint of right lower abdominal pain worsening over the past five days, after being diagnosed with a hernia in Colorado, "about one month ago". On physical exam, the provider noted swelling and tenderness to the right pelvis, but no appreciable hernia. **RHE F, Bates 182, 183.** The April 14, 2021, treatment note does not set forth any alleged mechanism of injury.

16. The Claimant again presented to Wake Forest Medical Center on March 29, 2022. On physical exam, the Claimant had a large right inguinal hernia descending into the scrotum. CT of the abdomen showed a right inguinal hernia containing minimal fat but appearing mildly inflamed. No herniated bowel was detected. **RHE F, Bates 190, 195.** The Claimant was referred for a surgical consult. Dr. Chandler Cox took a history of the Claimant's injury, documenting the Claimant was a 40-year-old male with a past medical history of kidney stones and IV drug use on suboxone. The Claimant stated he had a known inguinal hernia for the past two years, which is normally easily reducible. The Claimant provided no mechanism of the development of the hernia. **RHE F, Bates 199.** The Claimant was taken to surgery at 8:15 p.m., March 29, 2022, for an open right hernia repair with mesh. Surgical findings included right inguinal hernia with no contents and moderate size cord lipoma. **RHE F, Bates 203.** The surgeon dictated her operative report and subsequently signed the transcribed report at 9:59 p.m., March 29, 2022. **RHE F, Bates 204.**

17. Dr. J. Carlos Cebrian performed a review of the Claimant's pre- and post-accident medical records and prepared a July 15, 2022, report, at the Respondents' request included in the record as **RHE G**. In his report, he concluded that the Claimant's contention that he suffered a work-related hernia on January 6, 2021, was not supported by the medical records he reviewed. Dr. Cebrian also indicated that the fact that a hernia was not diagnosed until February 21, 2021, is contrary to a finding that the Claimant suffered a hernia at work on January 6, 2021. Dr. Cebrian also concluded that the medical records do not support a work-related hernia because the Claimant's medical records he reviewed from January 6, 2021, forward do not mention a work-related mechanism of injury. The ALJ finds Dr. Cebrian's opinions and conclusions, as set forth in his July 15,

2022, report, to be credible and persuasive. The judge is most persuaded by the fact that the Claimant's medical records do not document that the Claimant injured himself at work.

18. Dr. Cebrian subsequently prepared a December 16, 2022, supplemental report included in the record as **Deposition Exhibit 1.** In his report, he addressed the fact that the Claimant changed the date of injury from January 6, 2021, to February 18, 2021. **Deposition Exhibit 1**. In light of the Claimant changing the date of injury, Dr. Cebrian issued additional opinions as to whether the Claimant's work caused his hernia. In his report, he concluded the following:

- The mechanism of injury is not consistent with a work-related hernia.
- The wearing of a tool belt does not affect the intraabdominal pressure. A tool belt is worn on the hips, which takes the pressure off of the abdomen.
- Although [Redacted, hereinafter MF] did some lifting of buckets of tools/supplies, this lifting was not done constantly, and although he may have carried his supplies to the different job areas, the primary work that he was doing was splicing and using tools at the pedestals between houses.
- The mechanism of going down on his knees would not cause or aggravate a hernia.
- MF[Redacted] indicated that as soon as he went down on his knees on the ground, he felt a lump in his right groin area. Hernias do not present immediately, as once the weakness in the abdominal wall and inguinal canal has developed, the passage of the abdominal contents can take several weeks to be obvious as a lump.
- Hernias develop due to congenital weakness in the abdominal wall muscles. Although problems may present early in life, it may take many decades for the hernia to develop. There was nothing particularly strenuous about the lifting that MF[Redacted] engaged in, the frequent up and down, or going down onto his knees. The mechanisms as described would not cause a hernia.

Deposition Exhibit 1.

19. Dr. Cebrian also discussed medical literature that he contends supports his opinion that a single lifting event is unlikely to cause a hernia. Dr. Cebrian stated that:

> Medical literature has reviewed whether the frequent patient claim of a single lift or event resulting in a hernia is accurate. Patterson et al in 2018 performed a systematic review of multiple studies to determine whether there was an association between a single strenuous event and the development of an inguinal hernia. They indicated that evidence for causation regarding occupational and physical exposures is limited. They determined that only 4% of patients who reported an acute inguinal hernia actually had an inguinal hernia which could be attributed to a strenuous event. They concluded that although patients associate hernias to a single episode, upon application of stringent criteria, a much smaller

percentage are deemed to be actually attributable to a single strenuous event.

Deposition Exhibit 1.

20. Dr. Cebrian also testified at both hearings and in a February 17, 2023, post-hearing evidentiary deposition. Dr. Cebrian testified that the Claimant's described mechanism of injury, hitting the ground on his knees with the immediate onset of pain, and an egg-shaped lump appearing on his abdomen, is inconsistent with a traumatically induced inguinal hernia. Dr. Cebrian testified the reason a lump does not present immediately, or within a very short period of time, is because when there is a traumatically induced hernia, you have to tear through abdominal wall layers, fascia layers, and go through the inguinal canal. That process is "essentially impossible" to happen in an immediate situation if there has been a traumatically induced hernia. The ALJ finds this testimony to be persuasive. **Dr. Cebrian Depo. Tr. 4, ll. 14-25, Tr. 5, ll. 1-5.**

21. Dr. Sander Orent reviewed the Claimant's medical records and issued a report on January 27, 2023. In his report, Dr. Orent addressed Dr. Cebrian's opinions set forth in his December 16, 2022, report. Dr. Orent provided literature that was allegedly contrary to the literature cited by Dr. Cebrian. For example, Dr. Orent stated that he found an article from 2007 by Sanjay that concluded that "this study supports the hypothesis that the appearance of inguinal herniation may be attributed to a single strenuous event. Indirect hernias are more likely to present following such an event." Dr. Orent also cited another article. In his report he stated that "In addition, from the European Journal of Epidemiology in 1992, they discuss the risk factors that physical effort is "closely related to the appearance of inguinal hernias. A person whose work involves lifting or other strenuous exertion is at a higher risk than those whose jobs are less strenuous." In the end, Dr. Orent concluded that the most likely cause of the Claimant's hernia was either the repetitive lifting of his job or what occurred right before the single event described by the Claimant, which Dr. Orent described as when the Claimant was lifting and suspending the bucket just before he dropped to his knees. **CHE 19, Bates 665-669; Dr. Cebrian Depo. Tr. 16,17.**

22. In his testimony, Dr. Cebrian relied on the fact that on October 19, 2020, the Claimant was diagnosed with small bilateral hydroceles and a small left varicocele. **RHE D, Bates 41.** Dr. Cebrian testified that hydroceles are known risk factors for the development of hernias. Dr. Orent did not dispute Dr. Cebrian's opinion that hydroceles are a risk factor for hernias as the hernia travels down the same location that the fluid travels in a hydrocele. **Dr. Cebrian Depo. Tr. 10, ll. 12-25, Tr. 11, ll. 1-10.** Dr. Cebrian and Dr. Orent agree that increased intra-abdominal pressure is a risk factor for the development of hernia. Dr. Cebrian testified that straining to defecate or urinate causes increased intra-abdominal pressure. **Dr. Cebrian Depo. Tr. 14, ll. 1-22.** Dr. Cebrian testified it is not medically probable the Claimant's inguinal hernia was caused by his work activities on February 17, 2021. **Dr. Cebrian Depo. Tr. 18, ll. 6-9.**

23. Dr. Cebrian also commented on the Sanjay article relied upon by Dr. Orent. Dr. Orent relied on the Sanjay article to support his opinion that the appearance of inguinal hernias may be attributed to a single traumatic event. However, Dr. Cebrian testified that the findings of the study were based on the self-reports of the patients. In other words,

the patients were asked whether they thought their hernias were caused by a single traumatic event and then their opinions were used to conclude that they were. On the other hand, Dr. Cebrian relied on a 2018 study where they did a systematic review of the literature for single strenuous events leading to hernias and such study determined only 4% of hernias are due to an acute traumatic event. **Dr. Cebrian Depo. Tr. 16,17.**

24. Both doctors provide opinions that are reasonably supported by their interpretation of the record, which includes the statements of the claimant, the medical records, and the medical literature. That said, in the end, the ALJ finds Dr. Cebrian's opinions and conclusions to be more persuasive based on the underlying facts of this case and the articles he cites.

25. A co-worker, [Redacted, hereinafter WW] also testified at the hearing. He did remember the Claimant stating at work that he had abdominal pain and that he had a bulge in his abdomen. He did not, however, recall the Claimant telling him it happened at work and that it was due to work on the day of the alleged accident. On the other hand, he did remember the Claimant calling him just before he spoke with the Claimant's attorney. During this conversation, which occurred on July 5, 2022, WW[Redacted] remembers the Claimant telling him during this phone call that he injured himself at work. Therefore, WW[Redacted] told the Claimant's attorney on July 5, 2022, after the phone call with the Claimant, that the Claimant said he injured himself at work. As a result, the ALJ finds that the Claimant called WW[Redacted] to get him to tell his attorney that the Claimant said he hurt himself at work-insinuating the Claimant said it on the day of the alleged accident. In essence, the Claimant was telling WW[Redacted] what to tell the Claimant's attorney, regardless of what happened or what WW[Redacted] remembered. The ALJ credits WW's[Redacted] testimony regarding the call that he received from the Claimant and finds that the Claimant tried to get WW[Redacted] to testify that an incident happened at work and that the Claimant hurt himself at work, even though WW[Redacted] does not remember the Claimant stating that he got hurt at work while they were working together. In other words, the ALJ finds that the Claimant was trying to shape WW's[Redacted] testimony in his favor. **September 8, 2022, Tr. 76-79.**

26. Overall, the ALJ does not find the Claimant's testimony to be credible, reliable, or persuasive for several reasons. First, the ALJ finds that the Claimant called WW[Redacted] to get him to testify that the Claimant injured himself at work, even though WW[Redacted] did not remember the Claimant injuring himself at work. Second, the Claimant previously had a workers' compensation claim in North Carolina and admitted that he knew he had to file a workers' compensation claim to receive benefits. But even though he knew he had to file a claim, the claimant did not file his claim until March 7, 2022, which is over a year after his injury and after seeking medical treatment, including surgery, for his alleged work injury. **RHE A, Bates 2.** Third, the initial medical records from the emergency departments do not document the Claimant stating that he injured himself at work. The ALJ finds that the lack of such information reflects that the Claimant did not believe he injured himself at work when he was seeking treatment and therefore did not mention such to his medical providers. Fourth, the Claimant testified that DS[Redacted] did not ask him if his hernia was work related. But DS[Redacted] credibly testified that he pulled the Claimant aside and asked him if it was work related and the Claimant did not say it was work related.

27. Based on the totality of the evidence, the ALJ finds insufficient evidence to establish that it is more likely than not Claimant suffered a right inguinal hernia due to his work activities.

28. Claimant failed to prove by a preponderance of the evidence that he suffered a right inguinal hernia due to his employment.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the Claimant established, by a preponderance of the evidence, that he suffered a compensable injury.

A compensable injury is one which requires medical treatment or causes a disability. It is well established that it is the claimant's initial burden to prove a compensable injury. *City of Boulder v. Payne, supra; Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The determination of whether the claimant proved an injury which required medical treatment or resulted in disability is one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Moreover, the ALJ's findings may be based on reasonable inferences from circumstantial evidence. *Ackerman v. Hilton's Mechanical Men, Inc.*, 914 P.2d 524 (Colo. App. 1996).

It is the claimant's burden to prove a causal connection between his employment and the resulting condition for which medical treatment and indemnity benefits are sought. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The determination of whether the claimant sustained that burden of proof is factual in nature. The claimant bears the burden of proof, by a preponderance of the evidence, to establish that an injury arising out of, and in the course of the employment, was the cause of the disability and need for treatment.

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this claim, the Claimant alleges he developed a right inguinal hernia from very specific work activities performed on February 17, 2021 (initially reported as January 6, 2021). At hearing, the Claimant testified:

> Q. [By [Redacted, hereinafter MP]: At any point, was there ever a doubt in your mind as when this hernia first occurred? And I don't mean the specific date, but I mean when you first noticed it and what caused it?
>
> A. [By Claimant]: There's no doubt in my mind what caused it.
>
> Q. And what was that?
>
> A. When I hit the ground to go to work.

As found, Dr. Cebrian credibly and persuasively testified it is not medically probable the Claimant developed a traumatically induced inguinal hernia when the Claimant dropped to his knees at work, felt the immediate onset of pain, and noted an egg-shaped lump in his abdomen.

Dr. Orent's report does not challenge Dr. Cebrian's opinion that the described mechanism is inconsistent with causation of a traumatically induced hernia. Instead, Dr. Orent offers other potential mechanisms of injury, such as the repetitive nature of his work or carrying the buckets. Moreover, some of the medical literature relied upon by Dr. Orent to support his contention that hernias are caused by single events seems to be of questionable quality since the findings and conclusions appear to rely on the opinions of the patients. Thus, the ALJ does not find the opinions of Dr. Orent to be persuasive.

Lastly, and most importantly, the ALJ does not find the Claimant's testimony to be credible, reliable, or persuasive. As addressed above, the Claimant called WW[Redacted] to get him to testify that the Claimant injured himself at work, even though WW[Redacted] did not remember the Claimant injuring himself at work. In addition, the Claimant previously had a workers' compensation claim in North Carolina and admitted that he knew he had to file a workers' compensation claim to receive benefits. But even though he knew he had to file a claim, the claimant did not file his claim until March 7, 2022, which is over a year after his injury and after seeking medical treatment, including surgery, for his alleged work injury. Furthermore, the initial medical records from the emergency departments do not document the Claimant stating that he injured himself at work. The ALJ finds that the lack of such information reflects that the Claimant did not believe he injured himself at work when he was seeking treatment and therefore did not mention such to his medical providers. Lastly, the Claimant testified that DS[Redacted] did not ask him if his hernia was work related. However, DS[Redacted] credibly testified that he pulled the Claimant aside and asked him if it was work related and the Claimant did not say it was work related. The ALJ finds the testimony of DS[Redacted], that he asked the Claimant on multiple occasions if his injury was work-related, without receiving a direct response, credible and persuasive. DS's[Redacted] testimony is bolstered by the Claimant's own testimony that he "could not recollect" if he told DS[Redacted] his injury happened at work. Thus, the ALJ finds and concludes that the Claimant did not report a work-related injury to DS[Redacted] because he did not think his hernia was caused by his work activities.

An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to *causation*. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

In this case, the ALJ finds and concludes that the Claimant has failed to prove, by a preponderance of the evidence, that he suffered a hernia as a result of his work activities with this Employer.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 10, 2023

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-064-370-003

ISSUES

I. Whether the claimant overcame the opinion of the Division Examiner and established by clear and convincing evidence that she is not at maximum medical improvement.

II. Whether the respondents are responsible for the CRPS testing, consisting of a QSART and thermogram, that was performed by Dr. Reinhard.

III. Whether the respondents are responsible for stellate ganglion blocks.

IV. Temporary total disability benefits if the claimant is not at maximum medical improvement.

V. Whether the respondents may offset previously paid permanent partial disability benefits against temporary disability benefits if the claimant is not at MMI. (See stipulation)

VI. If the claimant is at maximum medical improvement, whether her scheduled impairment rating should be converted to a whole person impairment rating.

VII. Disfigurement benefits.

STIPULATION

1. Following the hearing, and as set forth in the claimant's proposed order, the respondents' counsel advised claimant's counsel that they would not be seeking an order compelling claimant to pay the alleged overpayment. The parties further agreed that any alleged overpayment would act as a credit against future indemnity benefits and the parties would be able to properly calculate and apply the claimed overpayment or credit.[1]

[1] As set forth in the claimant's proposed order, any overpayment will be offset or credited against future indemnity benefits. Therefore, the ALJ has not addressed the overpayment, offset, or credit issue against any indemnity benefits awarded under this order since the parties will calculate such. If for some reason the parties cannot resolve the issue, either party may file an application for hearing to resolve the matter.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. The claimant suffered an admitted work-related injury to her right upper extremity on July 13, 2017.
2. The claimant was injured while repetitively using an iron press at work. At the time of the injury, the claimant developed pain in her right biceps, right shoulder, and neck. (Resp. Ex., p. 249)
3. On July 31, 2017, the claimant was evaluated by Michael Dietz, PAC. At this appointment, she complained of pain in her right biceps, right shoulder, and the right side of her neck. Based on his assessment, Mr. Dietz assessed the claimant as suffering from a right shoulder strain, with a possible rotator cuff tear, and a biceps strain, with a possible full tear. Therefore, Mr. Dietz recommended an MRI of the claimant's right biceps and shoulder. (Resp. Ex., pp. 249-253)
4. On August 4, 2017, the claimant underwent an MRI. The MRI revealed the presence of mild insertional supraspinatus tendinosis, a small amount of fluid in the subacromial region, and a non-displaced tear of the labrum. Thus, the claimant's pain complaints were supported by objective findings on the MRI.
5. On September 8, 2017, the claimant was evaluated by Dr. James Rafferty. During this visit, she stated that her pain was about 50% better. But she still had pain over the anterolateral portion of her shoulder that radiated into her arm and sometimes her forearm. Based on her presentation, the claimant was referred to Dr. Snyder for a subacromial injection, which she had on September 15, 2017. (Resp. Ex., p. 272)
6. On November 7, 2017, the claimant returned to Dr. Rafferty. The subacromial injection reduced her symptoms by about 50%. She had also undergone about 15 physical therapy appointments. That said, the claimant still had mild to moderate shoulder pain over the anterolateral shoulder when she elevated her arm. (Resp. Ex., p. 272)
7. On December 19, 2017, the claimant returned to Dr. Rafferty. At this appointment, his assessment included right sided shoulder impingement syndrome and a right sided labrum tear. Since the claimant failed to improve, Dr. Rafferty referred her back to the surgeon, Dr. Snyder. Dr. Snyder ultimately concluded that the claimant was a surgical candidate.
8. On January 22, 2018, and due to ongoing pain and symptoms, the claimant underwent surgery with Dr. Snyder. He performed a biceps tenotomy with superior labral debridement and subacromial decompression. (Resp. Ex., p. 284)
9. On March 13, 2018, the claimant was seen by Dr. Rafferty. At this appointment, the claimant stated that her condition had improved since the surgery and that she was very happy with her overall progress. (Resp. Ex., p. 288)
10. In any event, on June 12, 2018, the claimant went to Dr. Rafferty and still had shoulder pain with some cramping over the anterior aspect of her shoulder, the biceps region, and her AC joint. Due to her ongoing symptoms, the claimant wanted to see Dr. Snyder one

last time for further evaluation and consideration of an AC joint steroid injection. (Resp. Ex., pp. 297-298)

11. On July 10, 2018, the claimant was seen by Dr. Snyder for her ongoing symptoms. At that appointment, the claimant received a steroid injection into the bicipital groove and the subacromial space. Although the claimant did well for two days, her symptoms returned. (Resp. Ex., p. 301)

12. On July 24, 2018, the claimant returned to Dr. Rafferty. At this time, her symptoms persisted, and she also had right sided pain over the base of her neck. Therefore, Dr. Rafferty referred her to have another MRI. (Resp. Ex., pp. 301, 306)

13. On August 16, 2018, the claimant saw Dr. Snyder. At that time, the only additional treatment he recommended was a PRP injection. (Resp. Ex., p. 309)

14. The claimant returned to see Dr. Rafferty on August 28, 2018. Dr. Rafferty noted that based on her new MRI, the claimant suffered from a high-grade bursal surface tear as well as a longitudinal split tear of the biceps tendon. He noted that the claimant would proceed with the PRP injection recommended by Dr. Snyder. Thus, the PRP injection was scheduled for September 5, 2018. (Resp. Ex., pp. 309-312)

15. On September 19, 2018, the claimant saw Dr. Sanders. At this appointment, Dr. Sanders noted that the due to ongoing shoulder complaints and the MRI findings, it was recommended that the claimant undergo another orthopedic evaluation for surgery, but that the claimant wanted to try to avoid undergoing a second surgery. It was also noted that the PRP injection was denied. Based on the denial of the PRP injection, and the claimant's desire to avoid a second surgery, Dr. Sanders appealed the denial of the PRP injection. (Resp. Ex., pp. 314, 315, 324, 325)

16. On October 22, 2018, the claimant returned to Dr. Sanders. Because of ongoing shoulder pain, the claimant decided that she would consider undergoing another surgery. Therefore, Dr. Sanders referred the claimant to Dr. Hatzadakis for a second opinion about possible surgery. (Resp. Ex., p. 331)

17. On December 13, 2018, Dr. Hatzadakis stated that additional diagnostic testing was needed to determine the etiology of the claimant's shoulder pain. This included an advanced MRI to evaluate the claimant's labrum, lab work, and an EMG to evaluate the claimant's suprascapular and axillary nerves. (Resp. Ex., pp. 359, 360)

18. On January 29, 2019, the claimant was evaluated by Dr. Hatzidakis for her ongoing shoulder pain. At this appointment, the claimant had sensitivity to very light touch across the superior, posterolateral, and anterior regions of her shoulder, paraspinal muscles, and her neck. She also had tenderness over the greater tuberosity and intertubercular groove. The claimant did, however, have full active range of motion and full strength, but with diffuse pain in all planes. Based on his evaluation, he assessed the claimant with possible complex regional pain syndrome (CRPS) and a possible low-grade infection. Therefore, he referred claimant to Dr. "Checa or Brone" (most likely Dr. Brown) for a CRPS consultation. (Clamant Ex. 1, p. 3)

19. On March 6, 2019, the claimant was evaluated by Robert Brown, M.D. at Rocky Mountain Pain Solutions for her chronic shoulder pain. At this appointment, the claimant rated her pain at 8/10. Dr. Brown evaluated the claimant and diagnosed her with CRPS 1 of the

right upper extremity. He prescribed Lyrica and recommended additional testing that included a triple phase bone scan and a QSART. He also considered a stellate ganglion block depending on the test results of the bone scan and QSART testing. (Resp. Ex., pp. 32-33)

20. On March 25, 2019, the claimant returned to Dr. Sanders. At this visit, it was noted that Dr. Brown was concerned that the claimant suffered a nerve injury secondary the interscalene nerve block she received during shoulder surgery. (Resp. Ex., p. 395)

21. On April 30, 2019, the claimant returned to Dr. Hatzidakis. At this appointment she rated her shoulder as being 20% of normal. He noted that the EMG performed by Dr. Feldman was normal. His assessment at that time was persistent right shoulder pain, post-surgery, with recent diagnosis of CRPS, and a possible low-grade infection. At this point, he recommended an MRI and aspiration of her right shoulder, which might result in debridement or actual biopsies and cultures to assess for infection. He also concluded that she might need a distal clavicle resection. (Claimant's Ex. 1, pp. 4-5)

22. On June 19, 2019, an MRI of the claimant's right shoulder was taken. It showed a "New large focal intermediate lesion – mass - as the axillary recess within the glenohumeral joint that could relate to focal nodular synovitis or possibly secondary to other debris, including hemorrhage." The radiologist also concluded that the lesion – mass - was most likely new because it was not present in the July 2018 study.

23. On August 15, 2019, the claimant returned to Dr. Hatzidakis. At this appointment he noted that the claimant had undergone an MRI and it demonstrated a supraspinatus tendinopathy without tear but yet a possible full-thickness tear in the biceps tendon, as well as synovitis within the glenohumeral joint. He also noted that he could not assess her shoulder strength due to pain. His assessment at that time was persistent right shoulder pain, post-surgery, with recent diagnosis of CRPS with tendinosis. He recommended either continuing with conservative treatment or proceeding with surgery, which included an arthroscopic debridement, possible subacromial decompression with biopsies for cultures, a distal clavicle resection with possible long head biceps tenodesis, and a synovectomy. At the appointment, the claimant stated that she wanted to proceed with surgery. Thus, authorization for surgery was requested.

24. On September 6, 2019, Dr. Erickson reviewed the request for surgery. Based on his review, the surgery recommended by Dr. Hatzidakis was denied, pending a psychological evaluation. As a result, the claimant was referred to Health Psychology Associates for a psychological evaluation. Soon after, the claimant was evaluated by Dr. Bruns, a psychologist. (Resp. Ex., pp. 427-437)

25. On September 21, 2019, Dr. Bruns' diagnostic impression was adjustment disorder with depression and a chronic pain disorder that were attributable to the claimant's work injury. (Resp. Ex., p. 611)

26. On October 1, 2019, the claimant returned to see Dr. Brown. However, rather than seeing Dr. Brown, she saw Shannon Bock, PA-C. At this visit, the claimant rated her pain at 4/10. Ms. Bock noted that the claimant's shoulder range of motion was limited in all planes due to pain. She also noted that the claimant had significant pain complaints and behaviors upon inspection and to very light touch of her right upper extremity. At this appointment,

Ms. Bock could not tell if the triple phase bone scan and QSART had been performed. Regardless, she diagnosed the claimant with CRPS and recommended the claimant proceed with a stellate ganglion block. (Claimant's Ex. 3, pp. 34-36)

27. On February 21, 2020, Dr. Erickson performed an internal review for the respondents of Dr. Hatzidakis' authorization request for surgery. Dr. Erickson concluded that the surgery recommended by Dr. Hatzidakis was not indicated at this time given the reported findings noted on the claimant's psychological evaluation by Dr. Bruns. It was noted that Dr. Hatzidakis' primary concern was regarding a potential occult infection and as a result, Dr. Erickson recommended the claimant only undergo additional aspiration cultures of the shoulder joint at this time. (Resp. Ex., p. 467)

28. On May 7, 2020, Dr. Hatzidakis evaluated the claimant and noted that she had been diagnosed with CRPS and recommended repeating the evaluation for a potential low-grade infection with repeat lab work. He also recommended proceeding with another MRI, which was scheduled for June 2, 2020. (Resp. Ex., p. 468) Claimant underwent another MRI. The new MRI showed a chronic full-thickness intra-articular long head biceps tear, mild tendinosis of the supraspinatus and subscapular without tearing, plus some other findings that were uncertain. (Resp. Ex., p. 476)

29. On September 9, 2020, the claimant underwent an independent medical examination with Dr. Erickson where he physically evaluated the claimant. In essence, he was asked to address several questions, which included the claimant's current work-related diagnoses, the actual pain generator(s), and whether additional treatment was reasonable and necessary to treat the claimant from the effects of her work injury. Dr. Erickson concluded the following:

    a. There did not appear to be any objective findings in the medical records to support claimant's ongoing pain complaints.

    b. A specific pain generator has not been identified.

    c. The claimant does not have an infection in her shoulder.

    d. There is no basis to support another MRI.

    e. Referral to a specialist to perform an excisional biopsy of the axillary lesion is appropriate and related at this time, until proven otherwise.

    f. There is not a chronic full thickness tear of the long head of the biceps. Instead, the finding is the result of the surgery performed by Dr. Snyder.

    g. Claimant's ongoing shoulder pain is likely due to her underlying psychological condition, which Dr. Erickson described as a "factitious pain disorder." Thus, he stated that he agreed with Dr. Bruns that any surgical procedures should be undertaken with caution, especially to address subjective pain complaints.

    (Resp. Ex., pp. 201-224)

30. In the end, Dr. Erickson used the psychological report from Dr. Bruns to characterize the claimant's pain complaints as being unreliable and being psychologically based instead of physically based.

31. On October 13, 202, Dr. Kelly evaluated the claimant for assessment of the lesion-mass - in her right shoulder. She did state that after reviewing the MRI the claimant had a soft tissue mass in the inferior recess of the glenohumeral joint that appeared to be synovial based. She did not, however, indicate that the mass was related to the claimant's work injury or shoulder surgery. (Resp, Ex., p. 74)

32. On November 13, 2020, the claimant underwent surgical resection of the mass in her shoulder with Dr. Kelly. The biopsy was unremarkable. (Resp. Ex., p. 508)

33. On February 15, 2021, the claimant saw Dr. Sanders. At this appointment, Dr. Sanders explained that the surgery performed by Dr. Kelly was to remove a fatty mass and that it had no histopathologic abnormalities. He also stated that although Dr. Hatzidakis has recommended a repeat arthroscopy, the procedure has been denied by the insurer. Thus, he concluded that the claimant was approaching MMI. Dr. Sanders did not discuss the cause of the fatty mass that was removed. (Resp. Ex., p. 520)

34. On April 19, 2021, Dr. Sanders evaluated the claimant and stated that he was concerned the claimant may have developed CRPS. At this visit, he noted the claimant's persistent symptomatology that included hypersensitivity, decreased range of motion, and numbness. Based on the claimant's symptoms, and his evaluation, he referred her to Dr. Reichhardt. He also noted that the claimant had developed dysesthesias of the right hand that may be secondary to carpal tunnel syndrome. (Resp. Ex., p. 526)

35. On April 26, 2021, Dr. Erickson performed a medical record review. Dr. Erickson was asked to supplement his prior opinion that the lesion, or mass, in the claimant's shoulder was unrelated to her work injury. In his report, he concluded that since the mass has been removed and it has been identified as a benign mass, the mass is unrelated to her work injury. (Resp, Ex., p. 229)

36. On May 3, 2021, per a referral from Dr. Sanders, the claimant was evaluated by Dr. Reichhardt. Dr. Reichhardt evaluated the claimant. He noted the claimant had allodynia throughout the right upper extremity. Based on his examination of the claimant, he was concerned that the claimant might have CRPS. In order to rule out CRPS, he recommended bilateral shoulder x-rays, QSART, and a thermogram. He added that if the tests were negative, it was unclear whether it would be medically advisable for the claimant to have a stellate ganglion block or a bone scan. Thus, he wrote a prescription, and sought authorization, for the claimant to undergo a QSART and thermogram with Dr. Schakaraschwili (Resp. Ex., pp. 91-98)

37. On May 28, 2021, Dr. Reichhardt reevaluated the claimant. He noted that his request for a QSART and thermogram were denied. He also noted that the claimant did meet the Budapest criteria set forth in the Colorado Medical Treatment Guidelines and was therefore a candidate for additional diagnostic testing for CRPS - a QSART and thermogram. (Resp. Ex., p. 100).

38. The Complex Regional Pain Syndrome / Reflex Sympathetic Dystrophy Medical Treatment Guideline, (Guidelines), is set forth in Rule 17, Exhibit 7. The Guidelines indicate that the diagnosis of CRPS continues to be controversial. (Guidelines, p.18) Regardless, the Guidelines set forth a framework to help diagnose and treat CRPS. The first part of the framework contains the Budapest criteria. If the claimant meets the

Budapest criteria, then it is presumed that the claimant meets the clinical components of CRPS. Once the clinical components of CRPS are met, the Guidelines set forth testing that can be done to help confirm a diagnosis of CRPS. The additional testing that can be done to confirm a diagnosis of CRPS includes, but is not limited to, a QSART and a thermogram. Under the Guidelines, if the claimant meets the Budapest criteria, and also has a positive QSART and thermogram, then the claimant has a confirmed diagnosis of CRPS under the Guidelines. Then, once the claimant has a confirmed diagnosis of CRPS, additional treatment can be provided. The additional treatment can include a sympathetic block such as a stellate ganglion block-which can also be diagnostic. (Guidelines, p. 24)

39. On June 24, 2021, Dr. Reichhardt evaluated the claimant and performed another physical examination. He noted on physical examination that the claimant had a tremor of her right upper extremity. He also noted mild swelling of her right hand, which was not noted in a prior examination, but he did not find any color changes that day. He also did not notice any sweat, hair, or nail trophic changes. Dr. Reichhardt stated that, despite his findings, the QSART and thermogram were still being denied based on the opinion of Dr. Fillmore, a [Redacted, hereinafter PL] Advisor. According to Dr. Reichhardt, the primary reason the testing was denied was based on Dr. Fillmore's interpretation of Dr. Bruns' psychological assessment, which purportedly indicated that the claimant is at significant risk for poor treatment response. Thus, Dr. Reichhardt called Dr. Bruns to discuss whether there would be any psychological contraindications to proceeding with the QSART and thermogram. (Resp. Ex., pp. 104, 105)

40. On August 12, 2021, Dr. Reichhardt evaluated the claimant and again noted swelling in her right hand as well as an intermittent tremor of her right arm. He also noted that the QSART and thermogram continued to be denied. (Resp. Ex., pp. 117, 118)

41. On August 23, 2021, Dr. Reichhardt discussed the matter with Dr. Bruns and Dr. Bruns said that there were no psychological contraindications to proceeding with the QSART and thermogram and workup for CRPS. (Resp. Ex., p. 121). Then, on September 1, 2021, Dr. Reichhardt again requested authorization for the QSART and thermogram based on his conversation with Dr. Bruns.

42. On September 9, 2021, Dr. Reichhardt evaluated the claimant. At this visit he noted that he discussed the claimant's case with Dr. Bruns and Dr. Bruns did not think her psychological condition is a contraindication for the QSART and thermogram and also indicated that a referral had been put in for it. (Resp. Ex., p.125)

43. On September 21, 2021, Dr. Bruns issued a report indicating that his initial evaluation has been taken out of context and misused to deny the claimant medical treatment. Dr. Bruns rebuked Dr. Erickson's conclusion that Dr. Bruns diagnosed claimant with a factitious pain disorder. In his report, Dr. Bruns stated that he has never diagnosed claimant with a factitious pain disorder. He specifically noted that factitious disorders are severe characterological disturbances, characterized by "primary gain" of being a patient and that there is no indication the claimant is suffering from a factitious disorder. (Resp. Ex., p. 611)

44. On October 6, 2021, the claimant was evaluated by Dr. Primack. Dr. Primack physically evaluated the claimant and reviewed her medical records. Based on his assessment, he stated and concluded that:

> There is no need whatsoever for a thermogram and QSART. The patient does not meet Budapest criteria. In fact, her tremor would go away with easy distraction. There are also profound nonphysiologic findings. Her perceptions of her shoulder pain are such that if there is pressure on her right leg, she has referred pain to the shoulder. When one pushed on her left shoulder, causing no encroachment to the right shoulder, she would have "right shoulder pain." In fact, when touching the top of her ears, she would have referred pain going into the trapezius muscles. There is also some diffuse pain at the level of the right scapula. This can be seen with cervical spondylosis, which again is not work related.

Dr. Primack also stated in his report that:

> The patient has been through 2 EMGs. The 2nd EMG did demonstrate components of carpal tunnel syndrome. This would not be considered work related. This in and of itself can give numbness, tingling, and pain ascending to the shoulder. It can also be the etiology of the periodic "tremor." However, as [Redacted, hereinafter MH] points out, she has good range of motion. She just has "pain." She has reached a stable and stationary level of functioning where further [treatment] will not alter her outcome. Therefore, her MMI status is reasonable and appropriate.

(Resp. Ex., pp. 67-82)

45. In his October 6, 2021, report. Dr. Primack also addressed the cause of the mass in the claimant's shoulder. He concluded that the mass was not work-related because the biopsy demonstrated mature adipose tissue and synovial tissue with no histopathologic abnormalities. It was one of synovial proliferation. Thus, Dr. Primack concluded that the mass was unrelated to the claimant's work injury.

46. On October 8, 2021, the claimant returned to Dr. Reichhardt. At this visit, the claimant's right hand was not swollen, as in prior visits, but yet she still had a tremor. She also had tenderness to palpation of the hand, but no true allodynia. Still, Dr. Reichhardt still recommended the QSART and thermogram, but did not think additional diagnostic testing for CRPS would be warranted if those tests were negative. (Resp. Ex., pp. 131,132)

47. On November 23, 2021, the claimant returned to Dr. Reichhardt. At this appointment, the claimant stated that her condition seems to have gotten worse. She reported intermittent swelling of her hand, tremors, and increased warmth. She also noted intermittent increased sensitivity to light touch of her hand and forearm. Dr. Reichhardt examined the claimant and noted a tremor, right hand swelling, and mild allodynia of the right upper extremity. (Resp. Ex., pp. 134-136)

48. On January 9, 2022, Dr. Erickson again reviewed the request for the QSART and thermogram testing. In his report, he relied on Dr. Bruns' psychological report which he concluded demonstrated that the claimant's pain is somatic, and thus psychologically based. He therefore concluded that the claimant's complaints, which could support a finding of CRPS, were not supported by any pathology. (Resp. Ex., pp. 234, 235).

49. On February 1, 2022, the claimant was evaluated by Dr. Sanders. At this visit, he mentioned the claimant's ongoing hypersensitivity and swelling. Based on his assessment, he continued to conclude that the claimant should undergo the CRPS testing recommended by Dr. Reichhardt and that she was not at MMI because she still required the CRPS testing. (Resp. Ex., pp. 657, 664)

50. On February 24, 2022, the claimant underwent a Division of Workers' Compensation Independent Medical Examination, which was performed by Brian Mathwich, M.D. On physical examination Dr. Mathwich noted that due to the claimant's inconsistent behaviors, he could not adequately evaluate the claimant. For example, he stated that on initial palpation of the anterior of her shoulder, the claimant jerked her shoulder away crying out in pain. At the same time, once he talked with her and distracted her, he could palpate more deeply and touch/rub her entire shoulder and arm without any reaction from her. He also noted that every test he tried to perform resulted in the claimant crying out in pain and pulling away. However, again, with distraction, he stated that he could elicit 5/5 strength in all shoulder muscle groups as well as the biceps and triceps. Dr. Mathwich also indicated that on physical examination he did not notice any color changes in her right upper extremity when compared to the left. Nor did he see any skin changes, temperature differential, nail changes, or hair changes.

51. Dr. Mathwich also applied the Budapest criteria set forth in the Colorado Medical Treatment Guidelines. The Budapest criteria is basically broken down into two categories. The first category involves primarily the subjective symptoms of the claimant, and the second category involves primarily objective findings or signs noted by the examiner. Dr. Mathwich concluded that the symptoms reported by the claimant were not reliable, therefore, he rejected the claimant's self-reported symptoms in determining whether the claimant met the Budapest criteria. He also concluded that the claimant did not have CRPS and was at MMI as of October 6, 2021.

52. On March 16, 2022, after the claimant was placed at MMI by Dr. Mathwich as of October 6, 2021, the respondents filed a Final Admission of Liability (FAL). The respondents admitted for temporary total disability (TTD) benefits from January 20, 2018, through October 5, 2021. The respondents also admitted for $3,094.62 for the claimant's 5% scheduled impairment rating. The respondents also asserted an overpayment of $4,319.59.

53. On April 14, 2022, the claimant returned to Dr. Reichhardt. At this appointment he noted that the claimant had undergone a Division IME with Dr. Mathwich and that Dr. Mathwich did not think the claimant met the Budapest criteria and concluded that the claimant was at MMI. Based on Dr. Reichhardt's assessment, he again concluded that the claimant met the Budapest criteria based on her subjective complaints and his examination and that the QSART and thermogram were still reasonably necessary. He also noted that

since the tests continued to be denied, the claimant said she would pursue those tests on her own. (Resp. Ex., pp. 138, 139)

54. On May 2, 2022, Dr. Sanders continued to recommend the claimant undergo the QSART and thermogram to rule out CRPS. (Resp. Ex., p. 714.)

55. On May 18, 2022, Dr. Reichhardt again evaluated the claimant and again concluded that she met the Budapest criteria and that the QSART and thermogram were still appropriate. (Resp. Ex., pp. 141, 142)

56. On May 27, 2022, Dr. Sanders referred the claimant to Dr. Schakaraschwili for QSART and thermogram testing.

57. On June 21, 2022, the claimant saw Dr. Reichhardt. At this appointment, Dr. Reichhardt noted that Dr. Schakaraschwili would not perform the QSART and thermogram for the claimant because she would be paying for it herself, a self-pay patient, since it appears the respondents denied the testing. Therefore, Dr. Reichhardt referred her to CROM for the testing. (Resp. Ex., pp. 145,146; Resp. Ex., p. 20)

58. On July 21, 2022, and pursuant to a referral from Dr. Reichhardt, the claimant underwent a QSART and thermogram testing with David Reinhard, M.D., at CROM. Because the respondents would not pay for this testing, the claimant paid for this testing. Dr. Reinhard performed the thermogram. The thermogram demonstrated significant thermal asymmetry involving the lateral arm, dorsal and volar forearm, dorsal wrist and hand, and dorsal aspect of digits 2, 3, and 4. Thus, he concluded that the thermogram demonstrated diffuse thermal asymmetry that was present in a non-dermatomal distribution and was consistent with CRPS. According to Dr. Reinhard, this was "a positive thermogram for CRPS type 1." (Resp. Ex., pp. 20-25)

59. Dr. Reinhard also performed the QSART – Autonomic Testing Battery. He examined the claimant, performed the test, and found the following:

    a. Moderate swelling in the distal right upper extremity that was unexplained.

    b. Visible asymmetry of skin coloration.

    c. Asymmetrical sweat output with the use of acetylcholine. He found that there was a 141% asymmetry measured at the proximal sensors and a 60% asymmetry at the distal sensors.

60. Based on his examination and testing, Dr. Reinhard concluded that both the autonomic testing battery (QSART) and the cold stress test thermography were positive for CRPS. Therefore, he also concluded that the claimant was a candidate for additional medications as well as a sympathetic blockade with a right stellate ganglion block. (Resp. Ex., pp. 20-26)

61. The ALJ finds that the QSART and thermogram results from the tests performed by Dr. Reinhard provide highly persuasive objective evidence that the claimant might have CRPS and that the testing was reasonably necessary to determine the extent of the claimant's work injuries and to define the need for future diagnostic treatment, and therapeutic treatment, such as a stellate ganglion block. The ALJ further finds that the

tests and results, which support a stellate ganglion block, are inconsistent with a finding that the claimant is at MMI.

62. On July 27, 2022, Dr. Reichhardt evaluated the claimant after she underwent her QSART and thermogram with Dr. Reinhard at CROM. He noted that the testing was positive, and that the claimant has a diagnosis of "probably complex regional pain syndrome." Thus, he prescribed additional medication and referred claimant to UC Health Pain Medicine for a stellate ganglion block. (Resp. Ex., pp. 149,150)

63. On July 29, 2022, Dr. Orent issued a short report. In his report, he concluded that based on his review of some of the claimant's medical records, he disagreed with Dr. Mathwich, the DIME physician, that the claimant was at MMI and did not have CRPS. Dr. Orent concluded that the claimant did meet the Budapest criteria and has CRPS.

64. On August 1, 2022, Dr. Sanders also recommended the claimant have a stellate ganglion block. (Resp. Ex., p. 725)

65. On September 13, 2022, after the positive results of the QSART and thermogram performed by Dr. Reinhard, the respondents requested the claimant to undergo the same testing with Dr. Schakaraschwili. Thus, Dr. Schakaraschwili examined the claimant and performed the QSART and thermogram testing. His physical examination did not find any swelling, skin discoloration, trophic, skin, hair, or nail changes. The thermogram found mild relative hypothermia at the lateral shoulder, but otherwise no significant areas of temperature asymmetry. Thus, he concluded that there were no diffuse temperature asymmetries consistent with a diagnosis of CRPS. He also concluded that while the autonomic QSART testing indicated that there was greater than 50% stimulated sweat output symmetry at the proximal site, overall findings were low for the presence of CRPS. In his assessment, he also stated that based on his examination, the clinical findings were not consistent with the Budapest criteria. In the end, he concluded that the test results were consistent with a "low probability" of CRPS. Thus, the testing could not rule out the claimant did not have CRPS. He could only state that there was a low probability of CRPS. (Resp. Ex., pp. 4-8)

66. Dr. Schakaraschwili also testified at the hearing. Although he testified consistently with his report, he did indicate that CRPS can wax and wane and that people can look different on different days. Thus, the fact that Dr. Reichhardt and Reinhard saw swelling and/or skin color differences when others did not, and that the claimant met the Budapest criteria when they evaluated the claimant is consistent with a diagnosis of CRPS and provides highly persuasive evidence that the claimant met the Budapest criteria and had positive test results with Dr. Reinhard that supports a diagnosis of CRPS. In other words, the findings of Dr. Schakaraschwili are not inconsistent with a finding or CRPS since the symptoms can vary from day to day.

67. On September 26, 2022, Dr. McCranie performed a medical records review to determine whether the request for a stellate ganglion block was reasonably necessary. Based on her review of some of the medical records, which included the QSART and thermogram findings of Dr. Schakaraschwili, which only found a low probability of CRPS, and doctor Mathwich's findings that the claimant did not meet the Budapest criteria, she concluded that the claimant "clearly does not have CRPS" and because "CRPS has been definitely been ruled out, a stellate ganglion block is not indicated." Dr. McCranie did not, however,

adequately address the positive QSART and thermogram findings of Dr. Reinhard, nor the findings that the claimant did meet the Budapest criteria when evaluated by Drs. Reichhardt and Reinhard. Thus, she did not consider all of the relevant data when rendering her opinion. As a result, the ALJ does not find her opinion to be persuasive. (Resp. Ex., pp. 182, 183)

68. On October 3, 2022, Dr. Reichhardt reviewed the findings of the QSART and thermogram that were performed by Dr. Schakaraschwili. He noted that Dr. Schakaraschwili's testing revealed a low probability of CRPS. Despite Dr. Schakaraschwili's findings, Dr. Reichhardt still concluded that the claimant probably had CRPS. He also concluded that even if the claimant did not meet the criteria for CRPS under the testing, he still thought, and recommended, the stellate ganglion block for diagnostic and therapeutic purposes. (Resp. Ex., pp. 160, 161) As a result, the ALJ finds that the stellate ganglion block is reasonably necessary to continue to help diagnose whether the claimant has CRPS and provide therapeutic relief of the claimant's chronic pain.

69. On November 8, 2022, the claimant returned to see Dr. Reichhardt. At this appointment, he noted that the stellate ganglion block had been denied. But he again noted that the claimant still met the Budapest criteria for CRPS and that she also met the Division of Workers' Compensation Criteria (Guidelines) for CRPS as she had two positive tests. While he noted that some of her symptoms have partially normalized, he still recommended the stellate ganglion block as another diagnostic, and possibly therapeutic, procedure. The ALJ finds that the waxing and waning of the claimant's symptoms aligns with the testimony of Dr. Schakaraschwili and Dr. Orent - that the findings and symptoms of CRPS can vary. (Resp. Ex., p. 165, 166)

Testimony of Dr. Schakaraschwili:

70. Dr. Schakaraschwili testified at the hearing. His testimony tracked with his report. That said, he did add that the signs and symptoms of CRPS can wax and wane and look different on different days. The ALJ finds his testimony to be credible and reliable. The ALJ finds that he honestly reported his findings and provided an honest opinion about his conclusion. But his opinion that the signs and symptoms of CRPS can wax and wane supports Dr. Reinhard's findings-which include the claimant's physical signs of CRPS and the positive QSART and thermogram test results that were performed by Dr. Reinhard. Thus, Dr. Schakaraschwili's testimony provides the missing link that explains why Dr. Reinhard's testing for CRPS was positive and his was not. It also explains why some doctors, such as Dr. Erickson, did not see objective signs of CRPS, but yet others, like Drs. Reichhardt and Reinhard did.

Testimony of Dr. Primack:

71. Dr. Primack also testified at the hearing and testified consistent with his report. Dr. Primack testified that he does not think you can have two diametrically different QSART and thermograms. But in this case, the claimant did.

72. The ALJ has considered Dr. Primack's report and testimony. On the one hand, Dr. Primack says in his report that the claimant's responses to his physical examination are nonphysiologic and therefore the claimant's subjective complaints should not be taken into consideration when determining whether the claimant meets the Budapest criteria,

whether she might have CRPS, and whether additional testing in the form of the QSART or thermogram were reasonable and necessary. Yet on the other hand, he states that many of the claimant's symptoms could be due to carpal tunnel syndrome, which he concludes is an unrelated condition. Thus, the ALJ finds that Dr. Primack has concluded that some of the claimant's symptoms are not physiologically based, but yet some are physiologically based. Moreover, Dr. Primack failed to consider that even if the claimant might be overstating her symptoms, she could still have CRPS. In other words, they are not mutually exclusive. Both can be true. As a result, the ALJ does not find Dr. Primack's opinions to be persuasive as it relates to whether the QSART and thermogram were reasonable and necessary to treat the claimant from the effects of her work injury and whether she has CRPS. But the ALJ does credit his opinion that the lesion/mass that was removed is unrelated to her industrial injury.

Testimony of Dr. Orent:

73. Dr. Orent was qualified as an expert in internal medicine as well as occupational and environmental medicine. He is also Level II accredited. During his deposition, Dr. Orent was asked several questions about CRPS. Based on his answers to several questions, the ALJ finds that Dr. Orent is familiar with the assessment, diagnosis, and treatment of CRPS. Dr. Orent also testified that diagnosing CRPS can be difficult based on the transient nature of the symptoms. He stated that:

> [T]he trouble with CRPS is it's an extremely variable disease in its manifestations. On one day, a patient can be extremely symptomatic with profound allodynia, hyperpathia, swelling, and color changes. And another day, it might be much calmer and not manifest in that way. So, it is often a serial kind of clinical diagnosis, because these change literally hour to hour, even minute to minute sometimes, the swelling. CRPS can change, so it is a serial kind of diagnosis.
>
> I think it's real important, and I think one of the things that I encourage patients to do with CRPS is I want to see them in the middle of a flare. I want to know what they look like. I want to see what their hand or foot looks like when they are flaring because CRPS calms and it flares. And so it's very instructional to see a patient who is having a CRPS flare. You will see both the subjective and objective findings of CRPS frequently in those situations.
>
> (Deposition, p. 11)

74. The ALJ finds Dr. Orent's testimony to be highly persuasive. Dr. Orent's testimony about the transient nature of CRPS persuasively explains, and also provides the necessary link, to explain why the QSART and thermogram testing performed by Dr. Reinhard was positive for CRPS, but yet the same testing performed by Dr. Schakaraschwili was not. Plus, his testimony about the transient nature of CRPS symptoms is consistent with Dr. Schakaraschwili, who also stated that CRPS symptoms can wax and wane.

Whether Claimant is at MMI:

75. Before Dr. Mathwich, the DIME physician, placed the claimant at MMI, as of October 6, 2021, numerous medical providers thought the claimant had CRPS due to her work injury.

76. Before being placed at MMI by Dr. Mathwich, Dr. Reichhardt concluded that the claimant needed diagnostic treatment, in the form of a QSART, thermogram, and possibly a stellate ganglion block, to help determine whether she has CRPS and therefore needed additional treatment to cure and relieve her from the effects of her work injury.

77. The QSART and thermogram are objective diagnostic procedures that offered a reasonable prospect for defining the claimant's condition – whether she has CRPS - as well as suggesting further diagnostics and/or treatment, such as a stellate ganglion block, to cure and relieve the claimant from the effects of her work injury.

78. At the time Dr. Mathwich placed the claimant at MMI - on October 6, 2021 - the QSART and thermogram – which had not been provided - were reasonable and necessary medical treatment to help define the scope of the claimant's work injury and to suggest future medical treatment to cure and relieve the claimant from the effects of her work injury.

79. The need for diagnostic treatment that is intended to define the scope of a work injury and help determine future medical treatment to cure and relieve the claimant from the effects of the work injury is inconsistent with a finding of MMI.

80. The positive QSART and thermogram provides a quality of evidence that makes it highly probable and free from serious or substantial doubt that the claimant was not at MMI on October 6, 2021, which is before the testing was performed. As a result, the positive test results further establish that it is highly probable the DIME physician's finding concerning MMI is incorrect.

81. After the claimant was placed at MMI by Dr. Mathwich, the claimant underwent the QSART and thermogram with Dr. Reinhard. The QSART and thermogram were positive. The positive findings of the QSART and thermogram that were performed after the claimant was placed at MMI by Dr. Mathwich provide clear and convincing evidence that the claimant was not at MMI as of October 6, 2021. Again, the QSART and thermogram were tests to determine the extent of the claimant's work injury and also help define future treatment to cure and relieve the claimant from the effects of her work injury. Thus, Dr. Mathwich was mistaken about the claimant's MMI status and erred when he placed the claimant at MMI as of October 6, 2021.

82. As a result, the ALJ finds and concludes that the Claimant has established by clear and convincing evidence that Dr. Mathwich, the DIME physician, erred by placing the claimant at MMI on October 6, 2021, before the QSART and thermogram were performed.

Whether the QSART and thermogram are reasonable and necessary.

83. The ALJ credits the opinions of Drs. Reichhardt and Reinhard as explained in their reports that the claimant may have CRPS and that the QSART and thermogram were needed to help provide a diagnosis and guide future treatment for the claimant's chronic shoulder pain and upper extremity symptoms. The ALJ also credits their opinions that the claimant met the Budapest criteria for a clinical diagnosis of CRPS under the Guidelines.

84. The Guidelines indicate that if a claimant meets the Budapest criteria, then a QSART and thermogram are reasonable tests that can be used to determine whether a claimant has CRPS. The ALJ finds that based on the opinions of Dr. Reichhardt, and the findings of Dr. Reinhard, the thermogram and QSART were reasonable and necessary medical

treatment meant to diagnose the extent of the claimant's work injuries and determine future treatment to cure and relieve the claimant from the effects of her work injury. As a result, the ALJ finds that the QSART and thermogram are reasonably necessary and related to the claimant's work injury.

85. Moreover, even if the claimant did not meet the Budapest criteria, the ALJ still finds that the QSART and thermogram were reasonable and necessary to treat the claimant from the effects of her work injury based on the positive findings obtained by Dr. Reinhard.

Whether the stellate ganglion block is reasonable and necessary.

86. Dr. Reichhardt referred the claimant for a stellate ganglion block for diagnostic and therapeutic purposes. The Guidelines also provide that a stellate ganglion block can also assist in the diagnosis and treatment of CRPS. Based on the disagreement as to whether the claimant has CRPS, the ALJ finds that the stellate ganglion block is reasonably necessary to diagnose the extent of the claimant's work injury - whether she has CRPS – and may also be therapeutic. Therefore, the stellate ganglion block is reasonable and necessary as well as related to the claimant's work injury.

Disfigurement benefits.

87. The ALJ finds that the claimant failed to establish that the lesion/mass that was surgically removed by Dr. Kelly is related to her work injury, or that the surgery was ancillary care that was reasonably necessary to treat her work injury or was required to achieve optimum treatment of her compensable work injury. As a result, the surgery to remove the lesion/mass was not reasonably necessary to treat the claimant from the effects of her work injury. The fact that the respondents paid for this surgery does not make the lesion/mass a compensable and related condition or procedure for which the respondents are liable for the scar from the surgery.

88. The ALJ credits Drs. Primack and Erickson's opinion that the lesion/mass is unrelated to the claimant's work injury. Thus, the surgery that was performed, and paid for by the respondents, was for an unrelated condition and was not ancillary to treating the work injury. As a result, the scar from the surgery to remove the lesion/mass is unrelated to the work injury and is not a compensable consequence of the work injury. Thus, the claimant is not entitled to a disfigurement award for the scar, which is approximately 2 inches long and ¼ of an inch wide, associated with that surgery.

89. The claimant did, however, undergo surgery for her work-related shoulder injury. As a result of that surgery, the claimant has sustained scarring, a visible disfigurement to the body, on her right shoulder that consists of three arthroscopic surgical port scars. Each scar is approximately ¼ inch in diameter.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the claimant overcame the opinion of the Division Examiner and established by clear and convincing evidence that she is not at maximum medical improvement.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties

unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As found, before Dr. Mathwich, the DIME physician, placed the claimant at MMI, on October 6, 2021, numerous medical providers thought the claimant had CRPS due to her work injury and needed additional medical treatment in the form of additional diagnostic testing for CRPS. For example, Dr. Reichhardt concluded that the claimant needed diagnostic treatment in the form of a QSART, thermogram, and possibly a stellate ganglion block, to help determine whether the claimant had CRPS and needed additional treatment to cure and relieve her from the effects of her work injury.

As found, the QSART and thermogram are objective diagnostic procedures that offered a reasonable prospect for defining the claimant's condition – whether she had CRPS - as well as suggesting further diagnostics and/or treatment, such as a stellate ganglion block, to cure and relieve the claimant from the effects of her work injury.

At the time Dr. Mathwich placed the claimant at MMI - on October 6, 2021 - the QSART and thermogram – which had not been provided - were reasonable and necessary medical treatment to help define the scope of the claimant's work injury and determine future medical treatment to cure and relieve the claimant from the effects of her work injury. The need for diagnostic treatment that is intended to define the scope of a work injury and is reasonably expected to help determine future medical treatment to cure and relieve the claimant from the effects of the work injury is inconsistent with a finding of MMI.

After the claimant was placed at MMI by Dr. Mathwich, the claimant underwent the QSART and thermogram with Dr. Reinhard. The QSART and thermogram were positive. The positive findings of the QSART and thermogram that were performed after the claimant was placed at MMI by Dr. Mathwich provide clear and convincing evidence that the claimant was not at MMI as of October 6, 2021. Again, the QSART and thermogram were tests to determine the extent of the claimant's work injury and were reasonably expected to help define future treatment to cure and relieve the claimant from the effects of her work injury. Thus, Dr. Mathwich was mistaken about the claimant's MMI status and erred when he placed the claimant at MMI as of October 6, 2021.

The ALJ has considered the opinion of Dr. Primack that the claimant did not meet the Budapest criteria and does not have CRPS. The ALJ has also considered the findings by Dr. Schakaraschwili in which the claimant did not have a positive QSART or thermogram test results. That said, this conflict is resolved based on the testimony of Dr. Schakaraschwili and Dr. Orent in which they both said the signs and symptoms of CRPS can wax and wane. Thus, the waxing and waning nature of CRPS explains the different findings of the various physicians involved here.

Thus, the ALJ finds and concludes that the positive QSART and thermogram provides a quality of evidence that makes it highly probable and free from serious or substantial doubt that the claimant was not at MMI on October 6, 2021, which is before the testing was performed. As a result, the positive test results establish that it is highly probable the DIME physician's finding concerning MMI is incorrect.

As a result, the ALJ finds and concludes that the claimant has established by clear and convincing evidence that Dr. Mathwich erred when he placed the claimant at MMI as of October 6, 2021.

II. Whether the respondents are responsible for the CRPS testing, consisting of a QSART and thermogram, that was performed by Dr. Reinhard on July 21, 2022.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation

cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*: Section 8-43-201(3), C.R.S.

The ALJ credits the opinions of Drs. Reichhardt and Reinhard as stated in their reports that the claimant met the Budapest criteria for a clinical diagnosis of CRPS under the Guidelines. In essence, the Guidelines indicate that if a claimant meets the Budapest criteria, then a QSART and thermogram are reasonable tests that can be used to help determine whether a claimant has CRPS. The ALJ finds that based on the opinions of Dr. Reichhardt, and the findings of Dr. Reinhard, the thermogram and QSART were reasonable and necessary medical treatment meant to diagnose the extent of the claimant's work injuries and determine future treatment to cure and relieve the claimant from the effects of her work injury. Even if the claimant did not meet the Budapest criteria, the ALJ finds and concludes that the fact that the tests were positive independently establishes that the tests were reasonably necessary to treat claimant from the effects of her work injury in order to cure and relieve the claimant from the effects of her work injury.

As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that the QSART and thermogram were reasonable and necessary and related and that the respondents are responsible for paying for the tests the claimant underwent with Dr. Reinhard.

III. Whether the respondents are responsible for a stellate ganglion block.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*: Section 8-43-201(3), C.R.S.

In this case, Dr. Reichhardt has recommended the claimant undergo a stellate ganglion block to help confirm whether the claimant has CRPS as well as for therapeutic purposes. Such treatment is also supported by the Guidelines which specify that such blocks are generally accepted procedures to aid in the diagnosis and treatment of CRPS. Therefore, since it is still not clear whether the claimant has CRPS, the block is found to be reasonable and necessary treatment to cure and relieve her from the effects of her injury. Thus, the ALJ finds and concludes that the claimant has established by a preponderance of the evidence that the stellate ganglion block is reasonably necessary and related to treat the claimant from the effects of her work injury.

IV. Temporary total disability benefits if the claimant is not at maximum medical improvement.

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. § 8-42-105(3)(a)-(d), C.R.S.

In this case, the claimant's TTD benefits were terminated on October 6, 2021, because she was placed at MMI by the DIME physician. However, because the claimant has overcome the DIME opinion, and is thus not at MMI, the claimant is entitled to TTD until terminated by law. Thus, the claimant's TTD shall be reinstated as of October 6, 2021.

V. Disfigurement benefits.

A respondent can be required to provide ancillary treatment for non-industrial conditions if the evidence establishes that such ancillary care is a reasonably necessary prerequisite to achieve optimum treatment of the compensable injury. *Public Service Co. v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999).

The claimant failed to establish by a preponderance of the evidence that the lesion/mass that was surgically removed by Dr. Kelly is related to her work injury, or that the surgery was ancillary care that was reasonably necessary to treat her work injury or was required to achieve optimum treatment of her compensable shoulder injury.

As found, the claimant's larger scar is due to the removal of the unrelated lesion/mass that was in her shoulder. The ALJ finds and concludes that the claimant is not entitled to a disfigurement award due to scarring from a surgery done for an unrelated condition – even if the respondents paid for the surgery.

As further found, the claimant underwent surgery for her work-related shoulder injury. As a result of that surgery, the claimant has sustained scarring, a visible disfigurement to the body, on her right shoulder that consists of three faint arthroscopic surgical port scars. Each scar is approximately ¼ inch in diameter.

Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles claimant to additional compensation under Section 8-42-108 (1), C.R.S., in the amount of $375.00.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The claimant is not at MMI.

2. The respondents shall reimburse the claimant for the cost of the QSART and thermogram testing performed by Dr. Reinhard.

3. Respondents shall pay for claimant to undergo the stellate ganglion block.

4. The respondents shall reinstate the claimant's TTD benefits as of October 6, 2021.

5. The respondents shall pay the claimant $375.00 for her disfigurement.

6. All issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 11, 2023

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-294-001

ISSUES

1. Whether Claimant established by a preponderance of evidence that a C5-6 transforaminal epidural steroid injection recommended by Dr. Pehler is reasonable and necessary to cure or relieve the effects of Claimant's March 9, 2022 industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer for approximately three years. On March 9, 2022, Claimant slipped and fell on a snow and ice-covered bridge while leaving Employer's facility and walking into the parking lot.

2. Claimant testified that he has a history of lumbar and cervical conditions, and underwent surgery on his cervical spine in March 2020. Claimant credibly testified that he was not experiencing active cervical symptoms before March 9, 2022. He testified that he had no recent treatment for his neck, was not taking pain medications for his neck and felt good. He credibly testified that following the injury, he experienced pain in his neck and into his shoulder blades and left arm. He further testified, credibly, that he is currently experiencing pain in his neck, shoulder blades and numbness and tingling into his left arm and thumb, that he was not experiencing immediately prior to March 9, 2022. Claimant's testimony was credible.

Claimant's Medical History Before March 9, 2022

3. Claimant has a significant medical history, including prior injuries to his neck and lower back, dating to at least 1998, including an automobile accident in October 2019 which necessitated surgery on his lower back in March 2020.

4. For several years prior to his March 9, 2022 fall, Claimant was under the treatment of John Serak, M.D., at CarePoint for chronic lower back and cervical pain. On or before February 2020, Claimant was diagnosed with cervical radiculopathy and cervical disc disorder following a motor vehicle accident. A January 7, 2020 MRI demonstrated C5-6 foraminal stenosis due to a disc herniation compressing the C6 nerve root, and causing left-sided cervical radiculopathy. Claimant underwent a C5-6 left foraminotomy in March 2020, which resulted in significant improvement of pain, but some continued tingling and numbness. (Ex. C).

5. After surgery, Claimant had multiple follow-ups with Dr. Serak during 2020. During these visits, Claimant reported his left-sided radiculopathy had improved significantly. From August through November 2020, Claimant had no documented complaints of neck or cervical pain.

6. In December 2020, Claimant suffered a fall, and his neck pain and radicular symptoms returned. (Ex. C). An MRI performed on December 29, 2020 showed no new changes in the cervical spine compared to the January 7, 2020 MRI. (Ex. E). Claimant underwent a cervical epidural steroid injection on January 21, 2021 at Mountain View Pain Specialists (MVPS), which temporarily relieved his cervical pain. (Ex. F).

7. On February 26, 2021, Dr. Serak performed an L5-S1 decompression and foraminotomy for Claimant's lower back pain and lumbar radiculopathy. (Ex. G). Claimant received physical therapy and follow-up evaluations with Dr. Serak over the following two months, and did not report cervical pain during this time. (Ex. C & D).

8. Claimant's next documented report of cervical pain was on May 5, 2021, at MVPS when he reported minimal (1-2/10) cervical pain radiating into his left arm. (Ex. F).

9. On May 20, 2021, Claimant underwent a sacroiliac radiofrequency ablation procedure at MVPS. He followed up with MVPS on June 2, 2021, when he reported minimal (1-2 out of 10) cervical pain at MVPS, and improved lumbar pain at 3-4/10. (Ex. F).

10. Claimant's next documented medical visit was on October 26, 2021, when he saw Larry Lee, M.D., a neurosurgeon at CarePoint, who had assumed Claimant's care from Dr. Serak. At that visit, Claimant reported sacroiliac joint pain, and had no current neck or upper extremity complaints. Dr. Lee documented Claimant's prior history of neck pain and C5-6 foraminotomy, and his previous fall. He documented Claimant's neck range of motion, and included diagnoses of cervical radiculopathy, neck pain, and cervical disc disorder. However, he did not recommend treatment for Claimant's cervical spine. (Ex. C).

11. Over the following month, Claimant received hip and sacroiliac injections at MVPS, and underwent a lumbar MRI. During this time, no complaints of cervical or neck pain were documented. (Ex. F &E).

12. Claimant returned to Dr. Lee on December 1, 2021 for follow up on his lower back pain. No active complaints of cervical symptoms were documented. Dr. Lee's documentation of Claimant's neck and cervical symptoms on December 1, 2021 is a verbatim repetition of his documented exam on October 26, 2021. Dr. Lee recommended a right SI joint fusion, and made no treatment recommendations for Claimant's cervical spine. (Ex. C).

13. On February 4, 2022, Claimant saw Larry Lee, M.D., for a post-surgical evaluation following a right SI joint fusion surgery.[1] Claimant did not report active cervical symptoms, and Dr. Lee's documented neck examination was a verbatim repetition of his neck examinations on October 26, 2021 and December 1, 2021. Although Dr. Lee's record included within his assessment "cervical radiculopathy," neck pain and cervical disc disorder, the record does not indicate these were then-active diagnoses. (Ex. C).

[1] No surgical report of the Claimant's right SI joint fusion surgery was offered into evidence.

Claimant's Medical Treatment After March 9, 2022

14. On March 11, 2022, Claimant returned to Dr. Lee who noted Claimant had fallen backward and landed with his rear end on his left foot two days earlier. Claimant reported tailbone pain, but did not report cervical pain. Dr. Lee's documented neck evaluation was identical to his previous three examinations. (Ex. C).

15. Claimant's next evaluation was at Concentra on March 25, 2022, when he saw Michael Pete, P.A. Claimant reported a burning sensation into his right posterior leg and discomfort in the tail bone area. Examination of Claimant's cervical spine was normal, with the exception of tenderness in the left trapezius muscle. He was diagnosed with a neck strain, coccyx injury, and lumbar back pain with radiculopathy, and referred for physical therapy. (Ex. H).

16. Claimant began physical therapy at Concentra on March 25, 2022. Claimant reported increased radicular symptoms in his right leg, pain in his back and neck, and tingling into his left thumb. (Ex. I). Claimant continued physical therapy through April 6, 2022. (Ex. I & 2).

17. On March 28, 2022, Claimant saw Kathryn Bird, D.O., at Concentra. Claimant reported pain radiating from his tailbone to lateral right thigh, and a left shoulder strain with some tingling into his left thumb. On exam, Dr. Bird noted left trapezius tenderness, with muscle spasms, and slight altered mechanics when flexing and extending. She diagnosed Claimant with a neck strain, and lumbar back pain with radiculopathy. (Ex. H).

18. On April 14, 2022, Claimant saw Hanna Bodkin, PA-C at Concentra and reported his neck had "flared" since his March 9, 2022 fall, and that he was continuing to experience numbness and tingling into the radial forearm and thumb. On exam, Ms. Bodkin noted tenderness and spasms in the left paraspinal and trapezius muscles, but not the cervical spine. She also noted that flexion increased the numbness and tingling into the left arm. Ms. Bodkin referred Claimant for a physiatry consultation. (Ex .H).

19. On April 20, 2022, Claimant saw John Sacha, M.D., at Concentra for a physiatry evaluation. Dr. Sacha indicated that Claimant reported his cervical symptoms had resolved. He also noted that Claimant had cervical pain with Spurlings' testing[2] and some limited range of motion bilaterally. Dr. Sacha noted that Claimant's prior injuries and surgeries increased the risk of further injuries, and referred Claimant for a cervical MRI. (Ex. H).

20. Claimant also saw Dr. Lee on April 20, 2022, however, Dr. Lee's evaluation focused on Claimant's lumbosacral spine, and his neck evaluation was identical to his previous documented examinations. (Ex. C).

[2] Spurlings' test is a test for possible radiculopathy. See W.C.R.P. Rule 17, Ex. 8, p. 11.

21. Claimant returned to Dr. Bird on April 26, 2022. Dr. Bird did not document any complaints of neck or upper extremity pain, and her diagnosis included only lumbar back pain with radiculopathy. (Ex. H).

22. On May 5, 2022, Claimant had a cervical MRI, which showed "multilevel chronic degenerative disc disease and degenerative facet arthropathy resulting in multilevel foraminal narrowing at C3-C4, C4-C5, C5-C6 levels." (Ex. E).

23. On May 11, 2022, Claimant saw Dr. Sacha again. On examination of Claimant's cervical spine, Dr. Sacha noted cervical paraspinal spasms, segmental dysfunction, and pain with extension and extension rotation. He diagnosed Claimant with cervical facet syndrome, but did not recommend any specific cervical spine treatment. He did recommend a right L5-S1 transforaminal epidural injection for Claimant's continued lumbosacral pain, which was performed on June 9, 2022. (Ex. H).

24. Claimant returned to Dr. Sacha on June 22, 2022, reporting ongoing neck and left arm pain. Dr. Sacha documented that he "felt this was a preexisting problem and not work-related and not compensable." He indicated Claimant felt his neck pain was work-related, and Dr. Sacha decided to perform EMG testing of the neck and left arm to assist in determining causality. Dr. Sacha documented his thought process as follows: "With the fall, usually this will cause a cervical facet syndrome, not a cervical radiculopathy, so we will do the EMP of the left upper extremity too and then I will comment on what I think is going on with this gentleman and also compensability, but at this point, does not appear to be compensable." (Ex. H).

25. On July 29, 2022, Dr. Sacha performed an EMG of Claimant's left upper extremity, which he interpreted as showing chronic changes in the left C6 distribution, and no evidence of acute or subacute findings. Dr. Sacha concluded that Claimant's cervical radiculopathy was not work-related, stating "patient has pre-existing cervical spine surgery with ongoing symptoms up to the time of the injury." (Ex. K). Dr. Sacha also referred Claimant for an orthopedic spine evaluation for his lower back condition, which he deemed work-related. Dr. Sacha's opinion on causation of Claimant's spine condition is not persuasive. No credible evidence was admitted that Claimant was having ongoing cervical spine symptoms at the time of his injury. Claimant's medical records indicate his last report of active neck pain prior to his March 9, 2022 injury was on June 2, 2022 when he was seen at MVPS, and was not "ongoing" at the time of his injury.

26. On August 19, 2022, Claimant saw orthopedic spine surgeon Stephen Pehler, M.D., at Concentra. Dr. Pehler is an authorized treating physician within the chain of referral. Dr. Pehler evaluated Claimant's lumbar and cervical spine. As relevant to the present issues, Dr. Pehler noted Claimant had decreased sensation in the left C-6 distribution, and a positive Spurlings' test. Dr. Pehler indicated it was reasonable to perform a left-sided C5-6 transforaminal epidural steroid injection (TFESI) for diagnostic and therapeutic purposes. He indicated that Claimant has "very real and significant foraminal stenosis on his left-hand side at the C5-6 level. The patient is adamant that his symptoms did increase and change following his work-related injury in March 2022." Dr. Pehler further noted that the "EMT that shows chronic left-sided radiculopathy does not

make him immune from having a potential aggravation of a pre-existing degenerative condition after his work-related injury in March 2022." Dr. Pehler referred Claimant for a C5-6 TFESI to be performed by Robert Kawasaki, M.D. (Ex. M & N).

27. Alicia Feldman, M.D., performed a review of Claimant's medical records at Respondents' request and issued a report dated September 2, 2022, in which she addressed the reasonableness, necessity and relatedness of the request for cervical epidural injections. Dr. Feldman was admitted as an expert in physical medicine and rehabilitation, and epidural steroid injections, and testified at hearing. Dr. Feldman opined that while the C5-6 TFESI may be reasonable and necessary, she did not believe it was related to his March 9, 2022 injury. Dr. Feldman reasoned that Claimant had nearly identical symptoms on May 5, 2021, when he saw Ms. Bailey, and that he had received a cervical epidural steroid injection in January 2021 for this condition. She further stated in her report that "Should he need ongoing epidurals for his cervical spine, this would be related to his pre-existing condition for which he was actively treating prior to the work-related injury and not the work-related injury." Dr. Feldman's opinions are not persuasive.

28. While Dr. Feldman is accurate that Claimant reported similar symptoms from his cervical spine in May 2021, the medical records indicate Claimant was not actively treating for his cervical spine at the time of his March 9, 2022 injury. Claimant's last documented report of active neck pain prior to March 9, 2022 was on June 2, 2021. However, after June 2, 2021 Claimant saw multiple health care providers and did not report cervical or neck pain again until being seen at Concentra on March 25, 2022.

29. Dr. Feldman's testimony that Dr. Lee's records demonstrate an active cervical spine condition is not credible or supported by the medical records. She testified that Dr. Lee's February 4, 2022 medical record, which included diagnoses of cervical radiculopathy, neck pain, and cervical disc disorder was evidence Claimant had active neck pain, at that time, and that the diagnoses would not be included in the medical record if Claimant was not having neck pain. However, she also testified that Claimant's medical records from Dr. Lee for March 11, 2022, and April 20, 2022 did not demonstrate any evidence of neck pain, despite the fact that both records contain identical references to Claimant's cervical condition, including identical range of motion findings, and including cervical radiculopathy, neck pain, and cervical disc disorder in the assessment section of the record. No explanation was offered to explain this inconsistency in her testimony.

30. Claimant credibly testified that he was not experiencing active cervical symptoms before March 9, 2022. He testified that he had no recent treatment for his neck, was not taking pain medications for his neck and felt good. He credibly testified that following the injury, he experienced pain in his neck and into his shoulder blades and left arm.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to

injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. Page v. Clark, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. University Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. Id. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. Prudential Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); Bodensieck v. Industrial Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. Colorado Springs Motors, Ltd. v. Industrial Commission, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Specific Medical Benefits (TFESI Recommended by Dr. Pehler)

The Act imposes upon respondents the duty to furnish medical treatment "as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App.

2002). *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Claimant has established by a preponderance of the evidence that the C5-6 cervical transforaminal epidural steroid injection recommended by Dr. Pehler is reasonably necessary to cure, or relieve the effects of Claimant's industrial injury. Although Claimant has a significant history of cervical pain and radicular symptoms, Claimant had no documented report of active cervical symptoms in the nine months preceding his March 9, 2022 work injury. Claimant's last documented report of cervical pain was on June 2, 2021 when he reported minimal (1-2/20) pain at MVPS. During the intervening nine months, Claimant saw multiple health care providers for lumbosacral issues, but did not report active cervical symptoms. The admitted medical records are consistent with Claimant's testimony that he was not experiencing cervical symptoms prior to March 9, 2022. Although Dr. Lee included neck pain and cervical radiculopathy in his medical records, there is no documentation of active cervical complaints, and the documentation of cervical symptoms is listed under the heading "Previous Complaints Include," Dr. Lee's documented cervical examinations (if actually performed), are each identical and do not document active problems.

As found, both Dr. Sacha and Dr. Feldman based their opinions on the incorrect notion that Claimant was actively experiencing cervical radicular symptoms as of March 9, 2022, or was in active treatment for those symptoms at that time. The ALJ finds more persuasive Dr. Pehler's opinion that a C5-6 TFESI is reasonable, and related to Claimant's March 9, 2022 work injury. The ALJ concludes it is more likely than not that the TFESI recommended by Dr. Pehler is causally related to Claimant's March 9, 2022 injury, and that such treatment is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the left C5-6 transforaminal epidural steroid injection recommended by Dr. Pehler is granted.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 27, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-126-362-001 & 5-165-280-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a general award of maintenance treatment after maximum medical improvement (MMI) under W.C. 5-126-362-001 and/or W.C. 5-165-280-001.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of [Redacted, hereinafter ERL], the ALJ enters the following findings of fact:

Workers' Compensation Claim No. 5-126-362

1. On October 28, 2019, Claimant was working for Respondent-Employer as a Correctional Officer when she injured her neck during a training exercise. According to Claimant, she was participating in defensive tactics training when an instructor, who was demonstrating a takedown technique forcefully slammed her onto a training mat. The incident was reported and assigned Workers' Compensation Claim No. 5-126-362.

2. Claimant initiated treatment with Dr. Thomas Centi at the Southern Colorado Clinic (Clinic) on November 5, 2019. During her initial visit on this date, Claimant reported a chief complaint of "pain in [her] neck, shoulder and spine" along with numbness in her arm and hand. (Ex. 9, p. 74). Claimant was diagnosed with a "[s]prain of ligaments of cervical spine, given a prescription for Naproxen and Flexeril, referred to physical therapy (PT) and returned to modified work duty with a 5 pound weight restriction, no management of inmates/offenders and no lifting overhead. *Id.* at p. 73, 75. A Comprehensive Outcome Management Technologies (COMT) assessment, to include psychological testing, was completed and demonstrated Claimant to have "good function" and no need for psychological counseling. *Id*. at p. 77. Nonetheless, Claimant's Distress Risk Assessment Method (DRAM) testing placed her in the "At risk" psychological category regarding the Modified Zung Depression Index and the Modified Somatic Pain Questionnaire. *Id.*

3. Claimant returned to the Clinic on December 19, 2019 where she was evaluated by Nurse Practitioner Valerie Joyce. During this encounter, Claimant reported a worsening of her symptoms which she attributed to "looking up at monitors frequently and repetitively for modified duties". (Ex. 9, p. 80). She also reported back pain with radiation into the leg and feeling as though her shoulders were "dislocated" in addition to "lots" of neck pain. *Id*. An MRI of the cervical spine had been completed and the results were noted as "pending". *Id.* at p. 80-81. Claimant was noted to have a "negative" attitude towards the provider's recommendation for continued PT and was

"difficult" with staff and the PT scheduler when attempting to schedule future appointments. *Id*. at p. 82.

4. The results of Claimant's December 18, 2019 MRI revealed "mild reversal of the normal cervical lordosis" but otherwise normal vertebral body and disc height space, anatomic posterior alignment and normal signal intensity in the cervical spinal cord. (Ex. 9, p. 84).

5. Claimant was seen in follow-up by Dr. Centi on January 9, 2020 during which appointment, Dr. Centi documented that Claimant continued to report neck and low back pain without improvement from medications; however, she did note some improvement with PT. Dr. Centi commented further that Claimant's MRI was normal and that she felt her problem was "stable". (Ex. 9, p. 88). Claimant was placed at maximum medical improvement without impairment on this date and released to full duty work. *Id*. at p. 87, 89. Dr. Centi recommended that Claimant "continue her physical therapy to completion" and continue her home exercise program. *Id.* at p. 89. He did not recommend additional maintenance care after MMI. *Id*. at p. 87.

6. On February 4, 2020, Claimant presented to the Emergency Room (ER) at Evans Army Medical Center requesting a second opinion regarding her chronic neck pain and paresthesias. (Ex. 12, p. 193). Claimant was evaluated by Dr. Jessica Walsh. During this encounter, Claimant reported that since she was taken down forcefully on October 28, 2019, she had "neck pain, bilateral shoulder pain and intermittent paresthesias to both arms". *Id.* She also reported that for the three days prior to her presentation to the ER, she had a warm sensation to the lateral aspect of her right hand which she informed Dr. Walsh felt "swollen". She complained that her right shoulder had been "rotated in and dropped for over a month". *Id*. According to Dr. Walsh's ER note, Claimant advised Dr. Walsh that she notified her workman's compensation physician (Dr. Centi) about these problems, but "nothing was done". *Id*. Claimant stated she was requesting a second opinion regarding her condition "because she [did] not feel like she should be cleared to return to work as a corrections officer. *Id.*

7. Claimant's February 4, 2020, physical examination revealed "no evidence of weakness to the fingers, hand, wrist, elbow or shoulder. (Ex. 12, p. 195). Dr. Walsh could not explain the posture of Claimant right arm/shoulder noting: "As far as holding her right shoulder in a slightly internally rotated, dropped position, it is unclear if this is a position of comfort versus intentional positioning". *Id.* According to Dr. Walsh, [w]ith pure shoulder extension, [Claimant] appeared to have significant difficulty [with] both arms, right greater than left and was very tremulous". *Id*. However, when asked by Dr. Walsh to "reach over her head as though she were scratching her back, [Claimant] was easily able to do this with each hand and had a fully extended shoulder during this maneuver". *Id.* Claimant was discharged in stable condition with instructions to follow-up with her primary care physician and/or her workers' compensation doctor. *Id.*

8. Claimant requested a Division Independent Medical Examination (DIME) and was evaluated by Dr. Dwight Caughfield on June 23, 2020. (Ex. 13). Physical

examination revealed diffuse guarding of the cervical paraspinal musculature but no localized spasms. *Id*. at p. 204. Active trigger points were present in the trapezius muscles extending into the neck and outward to the shoulder and Claimant demonstrated "very guarded" cervical range of motion during observation and range of motion testing. *Id.* Shoulder examination was positive for soft tissue tenderness and Hawkins testing revealed "some anterior shoulder pain bilaterally but no subacrominal pain. *Id.* Active range of motion of the shoulders was limited and passive range of motion was constrained by guarding. *Id.*

9. Dr. Caughfield provided a clinical diagnosis of "cervicalgia with myofascial pain. (Ex. 13, p. 205). He did not feel that Claimant's low back, thoracic and shoulder pain were injury related. *Id*. Noting that Claimant's initial COMT assessment scores placed her in the "at-risk" category and that her January 9, 2020 COMT anxiety/depression score suggested worsening anxiety/depression (Ex. 9, p. 90), Dr. Caughfield opined that Claimant had not reached MMI. (Ex. 13, p. 205). He recommended formal psychological testing/treatment before consideration of MMI. Indeed, Dr. Caughfield noted:

> Cervical treatment guidelines section E.2.c state "Formal psychological or psychosocial evaluation should be performed on patients not making progress within 6 to 12 weeks following injury and whose subjective symptoms do not correlate with objective signs and tests." [Claimant's] increasing pain complaints, escalating anxiety scores, as well as conflict with PT noted in the record suggests potential underlying psychosocial issues that need evaluation and potential treatment if deemed related to her injury. The presence of anxiety/depression and potential somatization may explain her escalating pain complaints and reports of functional impairments. I recommend formal psychosocial testing be completed and any injury related treatment be addressed before placement at MMI. I do not feel any further imaging studies, analgesics, or physical therapy is appropriate based upon her past responses.

(Ex. 13, p. 205).

10. Approximately one year after being evaluated in the ER on February 4, 2020, Claimant followed up with her personal physician, Samantha Uriguen-Ashby on February 10, 2021. (Ex. G, p. 73). During this visit, Claimant reported that her symptoms had continued since the time of her 2019 on the job injury and that she wanted to "pursue [an] evaluation for pain that radiates in both upper extremities and causes numbness and tingling (beginning in shoulders and radiating down to hands). *Id*. Claimant reported 7/10 pain in both arms and her upper neck. Physical examination revealed tenderness and an abnormally anteriorly rotated right shoulder. There was pain on movement of the arms/shoulder bilaterally but no tenderness of the left shoulder. *Id.* Bilateral shoulder strength was documented as normal as was strength of

the forearms. *Id*. Claimant was assessed with "cervicalgia". *Id*. A discussion was had about "anatomy and potential actions that may have caused pain. Id. Claimant was "[e]ncouraged to keep a symptom journal – with symptoms and potential triggers". *Id.* Moreover, "[a]larm signs/symptoms" were discussed with Claimant and she verbalizing her understanding to obtain immediate re-evaluation if such signs/symptoms became apparent. *Id*. Finally, Claimant was instructed to follow up with her PCM as needed. *Id*. at p. 76. There is no reference in the treatment record from this visit that Claimant was informed that she could not treat with her primary care manager (PCM) or that future care would be denied because Claimant's symptoms were associated with a work-related injury. This record appears to contain the last reference to Claimant seeking assistance from her primary care physician to evaluate/treat the symptoms she associated with her October 28, 2019 work injury.

11. Claimant returned to Dr. Centi's care on February 16, 2021. (Ex. 9, pp. 95-105). Dr. Centi referred Claimant for mental health counseling. *Id*.

12. Before she could initiate counseling, Claimant sustained injuries to her low back on February 20, 2021, after falling from a chair when the seat back unexpectedly broke off causing the chair to roll forward and Claimant to fall to the floor. The incident was reported and assigned Workers' Compensation Claim No. 5-165-280. The details surrounding this claim number are outlined below.

13. Claimant initiated counseling with SABABA Health Group on March 16, 2021. She was felt to have "some emotionality associated with her pain". (Ex. 11, p. 116). A treatment program to develop "concrete skills to reduce intensity and frequency of reported pain and distress" related to her injuries was proposed as a means to help Claimant's ability to relax and reduce stress and improve her physical functioning. *Id*.

14. Claimant completed 12 counseling sessions and was discharged from care on June 1, 2021 after "successfully" completing her treatment program. (Ex. 11, p. 184). At discharge, Claimant recognized that she had made improvement and was able to "identify areas that would require continual time and attention". Id. at p. 188. Moreover, Claimant was able to "discuss tools and techniques she learned and those she would continue to use as need". *Id.*

15. Upon completion of her counseling program, Claimant returned to Dr. Caughfield for a follow-up DIME on August 30, 2022. Dr. Caughfield noted that Claimant had been discharged from her psychological counseling program with a diagnosis of "mood disorder with known physiological condition with improvement across all scales". (Ex. 14, p. 212). Nonetheless, he did not find any support for a "functionally impairing mood disorder". *Id.* He placed Claimant at MMI noting that the final therapy session documented that Claimant had been "trained in appropriate self management skills and did not recommend further active treatment". *Id.* at p. 213. He did not recommend maintenance counseling. Indeed, Dr. Caughfield did not recommend any maintence care. *Id.* Rather, he simply noted: Having completed the appropriate diagnostic studies and treatment [Claimant] is at MMI but with persisting

neck pain and referred paraesthesia meriting impairment. Accordingly, Dr. Caughfield assigned a 19% whole person impairment for Claimant's cervical spine condition. Id. at pp. 214-215.

16. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Caughfield's opinions concerning MMI and impairment on October 4, 2022. (Ex. 1) The FAL specifically denied liability for maintenance care after MMI pursuant to Dr. Caughfield's August 30, 2022 DIME report. *Id*. at p. 2.

17. Claimant objected to the October 4, 2022 FAL and requested a hearing to adjudicate her entitlement to maintenance care after MMI. The objection and Application for Hearing were filed on November 2, 2022. (Ex's. 3 & 5).

Workers' Compensation Claim No. 5-165-280

18. As noted at ¶ 11 above, Claimant suffered injuries to her low back on February 20, 2021, when the back of a chair she was sitting in failed and she was cast to the floor. Following this incident, Claimant proceeded to the ER at St. May Corwin Hospital where she was evaluated by Physician Assistant (PA-C) Andrew James Kretovic. Upon presentation, the following history was obtained from Claimant:

> Patient is a 31 year old female that presents with injuries from a fall. She reports today she went to sit on a chair at work and the back broke, causing her to fall backwards. She reports she hit the middle of her back on the ground and on a screw. She reports she somehow hit the front her (sic) of (sic) forehead but denies significant headache and denies LOC, nausea, vomiting, neck pain or speech/vision changes. She reports back [pain] that radiates up into shoulder blade area. She denies bowel/bladder incontinence/retention, saddle paresthesias, weakness in legs or difficulty ambulating.

(Ex. 10, p. 108).

19. X-rays of the lumbar spine were obtained and revealed "[n]o definite acute fractures". (Ex. 10, p. 112). Claimant was subsequently discharged home in stable condition. *Id*. at p. 107.

20. Following her ER visit, Claimant established care with Concentra Medical Centers (Concentra) on February 22, 2021. While a significant portion of the medical reports outlining Claimant's early care at/through Concentra for this incident are missing from the record, the available records support the following:

- Claimant established care at Concentra on February 22, 2021 when she was evaluated by PA Michael Gottus.

- Claimant was evaluated by Dr. Daniel Peterson on February 24, 2021. Dr. Peterson noted that Claimant was hurting across her low back and while she had bruising on her back, there was no evidence of a puncture wound. Dr. Peterson also noted a large bruise on the medial side of the right elbow.

- On March 1, 2021, PA Gottus noted that Claimant was reporting persistent low back pain with radiation into the left leg.

- Dr. Peterson evaluated Claimant on March 8, 2021 during which appointment he noted that Claimant had seen Dr. Finn who recommended an MRI of the lumbar spine to rule out a lumbar transverse process fracture. The MRI was ordered.

- Claimant returned to Dr. Peterson for reevaluation on March 24, 2021. Dr. Peterson noted that Claimant had her first chiropractic appointment and that her MRI was "totally" normal.

(Ex. 8, pp. 62-63).

21. Claimant was seen by her chiropractor on April 20, 2021. Dr. Knoche noted that Claimant demonstrated essentially "full" range of motion during thoracolumbar movements, lateral bending, bilateral rotation and extension and forward flexion. (Ex. 8, p. 58). While Claimant was mildly tender to the left of midline at T7 and T10 and in the quadratus lumborum musculature, her thoracolumbar flank pain had resolved and as noted, she exhibited full range of motion in the lumbar spine. Moreover, Claimant had a negative Kemps and straight leg raising test result. *Id.* Dr. Knoche discharged Claimant from treatment noting that she had reached MMI. *Id.*

22. On April 28, 2021, Claimant was examined by Dr. Leah Johansen at Concentra. (Ex. D, pp. 37-43). During this encounter, Claimant reported that her back was "doing awesome." *Id.* at pp. 37, 38. She denied any pain or radiculopathy, and reported that she was "[r]eady to go back to work full time." *Id.* at p. 38.

23. Dr. Johansen's physical examination of Claimant was unremarkable. (Ex. D, pp. 40-41). Claimant's cervical, thoracic, and lumbosacral spine all presented as normal with full range of motion. *Id.* at p. 41.

24. Dr. Johansen determined that Claimant was at her functional goal but not yet at the end of healing. (Ex. D, p. 41). Accordingly, Dr. Johansen instructed Claimant to follow up in one week, but released her to return to work full-duty without restriction as of April 28, 2021. Dr. Johansen opined that Claimant would be at MMI one-week later *without need for maintenance care*. *Id.* at p. 42 (emphasis added).

25. Claimant failed to follow up with her authorized treating physicians after her April 28, 2021 appointment with Dr. Johansen. Consequently, Claimant was

returned to Concentra on February 22, 2022 for a demand appointment with Dr. Peterson. (Ex. D, pp. 32, 44).

26. Included in the note from the demand appointment is a notation by Dr. Peterson that Claimant had failed to follow-up on her injury after her April 28, 2021 visit with Dr. Johansen. Dr. Peterson noted further that Claimant was "working full duty with no issues". (Ex. 8, p. 67). He also documented that Claimant reported that her back felt "fine" and that her MRI was "normal". *Id*. Dr. Peterson deemed Claimant to be at MMI as of February 22, 2022. *Id*. at p. 66. He released Claimant from care without impairment and without maintenance care needs. *Id.*

27. Following her placement at MMI without impairment by Dr. Peterson, Claimant requested a DIME and the same was performed by Dr. John Tyler on August 19, 2022. Dr. Tyler issued his DIME report on August 22, 2022. As part of his DIME, Dr. Tyler obtained and documented the following history regarding Claimant's February 20, 2021 injury: "On the date of injury, [Claimant] was sitting in a swivel chair that had no arm rests. [Claimant] states that when she leaned backwards, the back support broke off and she fell backwards and landed on her lower and mid back regions". (Ex. 15, p. 218).

28. Dr. Tyler recognized the lengthy gap between Claimant's last documented appointment from April 28, 2021 and the February 22, 2022 demand appointment. He asked Claimant why there had been a long gap in the continuum of care to which Claimant reportedly responded that she had contacted Concentra prior to her scheduled follow-up appointment (to occur one week after her April 28, 2021 visit) and reported that she was symptom free with regard to the injuries she sustained on February 20, 2021. According to Dr. Tyler's report, Claimant was then informed by Concentra that it was not then necessary to follow-up with them. (Ex. 15, p. 218).

29. Following his physical examination, Dr. Tyler concluded that Claimant had reached MMI as of February 22, 2022, without impairment or maintenance treatment needs. (Ex. 15, pp. 219-220).

30. Respondents filed a FAL consistent with Dr. Tyler's opinions concerning MMI and impairment on October 4, 2022. (Ex. 2) The FAL specifically denied liability for maintenance care after MMI pursuant to Dr. Tyler's August 22, 2022 DIME report. *Id*. at p. 21.

31. Claimant objected to the October 4, 2022 FAL and requested a hearing to adjudicate, her entitlement to maintenance care after MMI. Claimant's objection and her Application for Hearing were filed on November 2, 2022. (Ex's. 4 & 6).

The Deposition Testimony of ERL[Redacted]

32. ERL[Redacted] testified as a long time Correctional Officer for Employer. She has worked for the [Redacted, hereinafter DC] for approximately 12 years.

(ERL[Redacted] Depo. Tr., p. 5, ll. 24-25, p. 6, line 1). ERL[Redacted] testified that she and Claimant met while they were working the swing shift. (ERL[Redacted] Depo. Tr., p. 6, ll. 8-12). While they have worked together, ERL[Redacted]l testified that Claimant is currently working in "visiting" while she works in security so they don't currently see each other or work together, unless Claimant is assigned to work a security post. (ERL[Redacted] Depo. Tr., p. 6, ll. 19-24).

33. ERL[Redacted] testified that she was present during both of the incidents leading to Claimant's injuries. (ERL[Redacted] Depo. Tr., p. 9, ll. 7-13). According to ERL[Redacted], Claimant's first injury occurred when they were partners during PPCT class (defensive tactics) and were not getting a maneuver right. (ERL[Redacted] Depo. Tr., p. 9, ll. 16-20). ERL[Redacted] testified that the PPCT instructor then demonstrated the maneuver on Claimant causing her injury. *Id.* Regarding Claimant's second injury, ERL[Redacted] testified that she was with Claimant in a conference room when Claimant fell off a chair. *Id*. at p. 9, ll. 21-22.

34. ERL[Redacted] testified that she has not witnessed any conduct to suggest that Claimant is having difficulty performing her job duties since her October 28, 2019 or February 20, 2022 injuries. (ERL[Redacted] Depo., p. 11, ll. 16-23). Nonetheless, ERL[Redacted] admitted during cross examination that Claimant's current position with Employer is less strenuous. *Id*. at p. 26, l. 25; p. 27, ll. 1-2.

Claimant's Hearing Testimony

35. Claimant testified that on October 28, 2019, she and Officer ERL[Redacted] were partners during defensive tactics training. According to Claimant, Officer ERL[Redacted] was having trouble understanding a particular defensive maneuver so the instructor demonstrated the movement on her. Claimant testified that the instructor grabbed her by the back of the neck, pulled her into his chest and forcibly "slammed" her down to the floor mat.

36. Claimant testified that she developed bruising and pain in her neck on the evening of October 28, 2019. She also testified that her right shoulder "fell and rolled inwards." Despite her condition, Claimant testified that she did not miss much time from work after this injury. Moreover, she continued to work in her regular capacity as a Corrections Officer.

37. Claimant testified that she subsequently developed shoulder pain and has constant "numbing" through her arms and has recently developed sharp pain on the left side of her neck radiating up into her skull similar to her right sided neck pain.

38. Claimant testified that at the time she last saw Dr. Caughfield, i.e. during her follow-up DIME she was experiencing continued symptoms including "severe" neck and shoulder pain. She testified that her persistent neck pain and numbness in her arms combined with the apprehension she had about her ability to use a shotgun or handle use of force situations lead to her decision to change positions from a security

officer to a housing officer. According to Claimant, her current housing office position is mostly clerical in nature and has helped "control" her pain.

39. Concerning the February 20, 2021 injury, Claimant testified that as she leaned backward in a chair the seat back fell off causing her to fall backwards and hit her head on another chair and land on the left side of her low back.

40. Claimant testified that she proceeded through treatment for the injuries she sustained as a consequence of falling from the chair. She testified that she was ultimately seen by Dr. Tyler who spent approximately 10 minutes with her. Accordingly to Claimant, Dr. Tyler palpated her low back which caused "discomfort". She testified that he also showed her some stretches to help correct some postural distortion in her low back. Claimant testified that she did not tell Dr. Tyler that she was having ongoing pain/problems with her low back.

41. Claimant testified that the symptoms related to the injuries she sustained in the October 28, 2019 incident have worsened with the passage of time; however, she did not quantify how or to what extent her symptoms have worsened. Instead, she simply testified that it was her "desire" to seek additional treatment for her ongoing symptoms. Claimant conceded that she has not sought treatment for her work related injuries/symptoms at Concentra in the past year. She also confirmed that her primary care provider ("PCP") is Evans Army Medical Center/Hospital (Evans) and that she has not secured treatment for her neck through Evans in the past year. Accordingly, Claimant admitted that she has not seen any provider, i.e. either her PCP or her authorized treating providers under her work related neck injury for the past year. Finally, Claimant confessed that she has not sought treatment for her low back through Evans.

42. During redirect, Claimant clarified that she attempted to secure treatment for her neck at Evans but was denied because the injuries arose out of an open workers' compensation case. While Claimant testified that she tried to get treatment for her neck complaints at Evans, she did not specify when she made such attempt. Instead, she simply testified that she "initially" attempted to obtain treatment at Evans, but was refused because her injuries/symptoms were related to an open workers' compensation claim. In this case, the only evidence suggesting that Claimant tried to obtain treatment through Evans for her neck complaints is contained in the reports from Claimant's February 4, 2020 and February 10, 2021 visits through Evans when she requested a second opinion and an evaluation concerning the condition of her neck/shoulders after being placed at MMI by Dr. Centi on January 9, 2020. Outside of these reports, there is a dearth of persuasive evidence to support any suggestion that Claimant attempted to secure additional treatment for her neck complaints through Evans in the months following her February 10, 2021 appointment/evaluation with Dr. Uriguena-Smith, even though she was instructed during her February 10, 2021 appointment that she should follow-up with her PCM on an as needed basis. (See Ex. G, p. 76).

43. Careful review of the Evans records reveals that after Claimant's February 10, 2021, appointment, she was seen at Evans on the following dates, for the following conditions/reasons:

- Claimant visited her the Evans emergency room on June 19, 2022 after being involved in a high-speed motor vehicle collision. (Ex. G, pp. 57-63). While traveling at 75 miles per hour, Claimant swerved to avoid hitting a deer on the highway and instead struck the guardrail. *Id.* at p. 57. Although the vehicle's airbags deployed, Claimant was able to extricate herself from the vehicle and get to the ER. *Id.* Upon arriving in the emergency department, Claimant reported that she was sore all over but "had no particular neck pain . . . ." *Id.* Physical examination revealed that her neck was "supple and without particular pain. *Id*. at pp. 57-58. Claimant reported history of a great toe fracture which occurred while she was "working out" otherwise she reported taking no medications on a daily basis and "no underlying medical issues", specifically denying asthma, hypertension [and] diabetes. Based upon the content of the record, the ALJ finds that outside of her toe fracture, Claimant probably did not mention neck, shoulder or low back injuries related to the present claims, or other underlying medical issues. (*See id.*).

- Claimant was seen by her PCP for a "well women exam" on September 22, 2022, during which it was discovered that she had an elevated blood-pressure reading without having a diagnosis of hypertension. Claimant was advised to limit her dietary sodium and caffeine and monitor her blood-pressure outside of the clinic. Despite her current complaints of persistent and worsening neck symptoms, the record from this encounter notes that Claimant had "no other concerns" and "no complaints were offered". (Ex. G, p. 66). Careful review of the noted from this date of visit reveals that Claimant had no reports of headache or back pain. *Id*. at p. 67. Physical examination revealed a "Well-appearing" individual with a normal appearing neck without tenderness. *Id.*

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence

is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. In accordance with C.R.S. § 8-43-215, this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant's current pain complaints are likely emanating from both an injury to the rotator cuff and an aggravation of a pre-existing cervical spine condition caused directly by Claimant's fall to a concrete floor on August 6, 2020 after slipping in a puddle of water.

Claimant's Entitlement to Maintenance Medical Care

D. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). An award for maintenance medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo.App. 1999); *Hastings v. Excel Electric*, W.C. No. 4-471-818 (ICAO, May 16,

2002). Rather, in *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra.* The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the Claimant reaches this threshold, the Court in *Milco* stated that the ALJ should then, as a second step, enter a "general order similar to that described in Grover." Thus, while a claimant does not have to prove the need for a specific medical benefit, he/she must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra*. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for future medical treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

E. In this case, the record evidence persuades the ALJ that Claimant has failed to prove she needs/requires maintenance care. Here, none of Claimant's authorized treating physicians, under either claim, have indicated that she requires further care to relieve her from the effects of her injuries or prevent deterioration of her condition. Moreover, both Dr. Caughfield and Dr. Tyler specifically opined that Claimant does not require maintenance care. Claimant's contrary testimony that she requires ongoing care for persistent and worsening neck and back symptoms is unpersuasive. Indeed, Claimant's testimony that her symptoms have worsened is uncorroborated and her claim that she needs treatment is largely contradicted by the content of her medical records and her actions. Indeed, there is a lack of evidence indicating that Claimant has attempted to secure treatment with her PCP since February 10, 2021. Finally, the record is replete with admissions from Claimant which support a finding that any back or neck pain related to her work injuries has resolved. In fact, Claimant has been evaluated by her PCP at least twice since her most recent date of MMI (2/22/22), but she *never* during either appointment reported pain or ongoing complaints related to either of her work injuries (neck or low back), despite having no treatment for her work injuries in the years since being discharged by Dr. Centi and evaluation by Dr. Johansen on 4/28/21. (*See* Ex. G). Even after enduring a car crash on June 19, 2022, while traveling 75 miles per hour, Claimant's ER records from Evans noted, "[n]o particular neck pain (sic) back pain (sic) rib pain (sic) arm pain with the exception of the left distal forearm." *Id.* at p. 57. In addition, when Claimant visited her PCP on September 22, 2022, a review of her musculoskeletal system indicated neither back pain nor neck tenderness. *Id.* at p. 67. This supports a reasonable inference that Claimant's work-related neck and low back injuries are stable, despite not having any treatment for years. Claimant has presented no evidence that any physician, including her PCP, has recommended future or ongoing treatment for her neck strain or low back

strain injuries. Accordingly, the ALJ concludes that Claimant has failed to establish a need for future or ongoing medical treatment related to either her October 28, 2019 or February 20, 2021 work injuries.

F. Although Claimant testified at hearing that she began to experience numbing in her arms sometime after the first 10/28/19 injury, Dr. Caughfield, repeatedly found no evidence to connect Claimant's reported shoulder pain to her admitted neck injury and twice opined it was not work-related. Section 8-42-107(8), C.R.S. provides that a DIME's findings concerning MMI are binding unless overcome by clear and convincing evidence. The determination of MMI inherently requires a DIME to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are causally related to the work injury. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo.App. 1998). As such, a DIME's opinions regarding causation are entitled to presumptive weight. *See Laprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo.App. 2005); *see also Egan v. Indus. Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998). Absent a timely objection to the DIME physician's findings, an ALJ lacks jurisdiction to resolve a dispute as to those findings. *Leprino Foods Co. v. Indus. Claim Appeals Office*, *supra.*; *see also Schneider Nat'l Carriers, Inc. v. Indus. Claim Appeals Office*, 969 P.2d 817 (Colo.App. 1998).

G. To the extent that Claimant seeks maintenance care for injuries/conditions that have been determined to be unrelated by a DIME, and considering that Claimant has not timely challenged Dr. Caughfield's MMI/causality opinions, the Court views Claimant's position as an unripe, constructive challenge to the DIME's binding opinion. Since the Court lacks jurisdiction to resolve such disputes, this order does not address Claimant's entitlement to continued treatment for her shoulders/arms.

ORDER

It is therefore ordered that:

1. Claimant's request for additional maintenance medical in both WC 5-126-362 and WC 5-165-280 is denied and dismissed.

2. All matters not determined herein are reserved for future determination

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is

emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-177-356-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that specific maintenance treatment in the form of vestibular therapy and visual therapy is reasonable, necessary and related to her admitted work injury?

2. What is Claimant's average weekly wage (AWW)?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 29 year-old woman who worked part-time for Employer, which was her mother's company. Claimant testified she cleaned and painted properties after a tenant moved out.

2. Claimant was paid $18.00 per hour, and $27.00 per hour, for overtime. (Ex. J). Claimant testified she only worked a few days a week. There is no objective evidence in the record as to what constituted overtime work for Claimant.

3. On July 13, 2021, Claimant suffered an admitted work injury. Claimant credibly testified she was seated on the floor painting floor boards. When she stood up, she hit her head on an open cabinet door. Claimant did not lose consciousness, did not fall, and she had no immediate nausea or vomiting, but felt dazed and foggy. Claimant reported that she cleaned her paint brushes, as she would always do, and then drove home. (Ex. A).

4. Later that day, Claimant went to CareNow Urgent Care (CareNow) and presented with a chief complaint of a headache. Claimant reported having light sensitivity and nausea. Claimant did not present with vomiting, dizziness, syncope, slurred speech, weakness, muscle pains, numbness or tingling. Claimant was diagnosed with a mild concussion without loss of consciousness. She was to follow up in three days for a recheck, but she was to return sooner if she suffered new or worsening symptoms. (Ex. H).

5. Claimant returned to CareNow on July 16, 2021 for a follow-up visit. She reported no longer having nausea, but having ringing in her ears. (Ex. H). On July 21, 2021, Claimant had a CT scan of her brain. The impression was "normal CT of the head." (Ex. G).

6. Jennifer Tetrault, PA-C, referred Claimant to Yusuke Wakeshima, M.D., for a comprehensive physiatric consultation. Dr. Wakeshima evaluated Claimant on August 4,

2021. Claimant reported suffering a closed head injury on July 13, 2021. She further reported experiencing intermittent headaches, dizziness with mild balance issues, sensitivity to bright lights and noise, photophobia, phonophobia, emotional lability and forgetfulness. She was not reporting any tinnitus. Dr. Wakeshima explained he would refer Claimant for a neuropsychological assessment if she continued to have cognitive issues. He also told Claimant she should proceed with the vestibular rehabilitation arranged by the providers at CareNow. (Ex. F).

7. Claimant returned for a follow-up appointment with Dr. Wakeshima on August 13, 2023. According to Dr. Wakeshima's medical records, Claimant found vestibular therapy beneficial. She reported having continued issues with focusing and concentrating, so Dr. Wakeshima referred Claimant to Suzanne Kenneally, M.D., for a neuropsychological assessment. (Ex. F).

8. On or about, August 19, 2021, Claimant suffered a second head injury, and she sought emergency treatment three days later, on August 22, 2021. Claimant told the medical providers she slightly lost her balance, and struck the right side of her head on a wooden post. She reported experiencing a slight worsening of her symptoms and had some new symptoms. The ER triage notes state Claimant complained of "tingling all over after hitting her head 72 hours ago." Claimant was concerned because her sister noted her left pupil looked slightly larger than the right. According to the medical records, Claimant's "pupils are unequal (very subtle but left pupil is < 1mm larger than right, but both reactive and round). (Ex. E).

9. On September 29, 2021, Dr. Kenneally conducted testing on Claimant to determine if she suffered a traumatic brain injury on July 13, 2021. Dr. Kenneally concluded, based on the testing, that there was "no residual brain-based cognitive impairment association with the 07/13/2021 work-related injury." (Ex. D).

10. On October 22, 2021, Dr. Wakeshima discharged Claimant due to a "breakdown in doctor patient relationship." (Ex. F).

11. Brian Mathwich, M.D., conducted an IME on behalf of Respondents on November 23, 2021. He obtained a history from Claimant and reviewed her CT scan and neuropsychological testing results. He noted that Claimant's CT scan was normal, and her neuropsychological results indicated she had no cognitive impairment. Dr. Mathwich also noted that Claimant's injury did not include loss of consciousness, retrograde or anterograde amnesia. He concluded Claimant was at MMI as of August 13, 2021, and no further medical treatment was medically reasonable or necessary to cure and relieve the effects of the work injury. He believed that the mechanism of injury was not consistent with Claimant's ongoing subjective complains or with the diagnosis of mild traumatic brain injury/concussion. In his opinion, Claimant did not meet the diagnostic criteria for mild traumatic brain injury within the Colorado Division of Workers' Compensation Traumatic Brain Injury Medical Treatment Guidelines. (Ex. C).

12. Elizabeth Rosenberg, M.D., was Claimant's ATP. Dr. Rosenberg evaluated Claimant on December 3, 2021, and recorded Claimant's diagnoses as a concussion

without loss of consciousness and bilateral tinnitus. Dr. Rosenberg noted in Claimant's medical record that she disagreed with Dr. Mathwich's conclusion that Claimant had no objective findings of impairments. She noted Claimant's objective deficits in eye and vision function. Dr. Rosenberg, however, described Claimant's injury as minimal, and of a very mild nature. She further explained Claimant was "slowly but steadily" improving with vestibular and visual therapy, and Claimant was to "continue vestibular and vision therapy as scheduled for now." On the December 3, 2021, M164 Form, Dr. Rosenberg marked "therapy" in the treatment plan, and specifically listed vestibular and vision therapy. (Ex. 2).

13. Claimant saw Dr. Rosenberg a few weeks later, on December 16, 2021, for a follow-up appointment. According to the medical record, Claimant was "doing really well [with] lots of improvement." Dr. Rosenberg placed Claimant at MMI as of December 16, 2021. She also opined Claimant had no permanent impairment. In the medical record, Dr. Rosenberg stated "[f]rom my medical standpoint, you are still benefitting objectively from visual and vestibular therapy, I would recommend you continue with these therapies." Dr. Rosenberg completed another M164 form. Unlike the prior M164, Dr. Rosenberg did not mark that therapy was necessary. Further, she marked "no" for maintenance care, and wrote nothing in the section "if yes, specify care." (Ex. H).

14. The ALJ finds that while Dr. Rosenberg ***recommended*** Claimant continue with vestibular and vision therapy, Dr. Rosenberg did not opine Claimant needed this therapy to remain at MMI, and she found that no maintenance care was necessary.

15. On January 3, 2022, Respondents filed a Final Admission of Liability (FAL) based upon Dr. Rosenberg's December 16, 2021, evaluation of Claimant and the completed M164 Form. Respondents did not admit to medical treatment and/or medications after MMI. (Ex. P).

16. Claimant objected to the FAL and requested a DIME. The specific regions to be evaluated in the DIME were "Traumatic Brain Injury, Hearing, Vestibular Disorder and Visuals". Thomas Higgenbotham, M.D., conducted a DIME evaluation of Claimant on May 12, 2022. (Ex. A).

17. Dr. Higgenbotham agreed with Dr. Rosenberg that Claimant reached MMI on December 16, 2021. He provided an 8% whole person impairment rating based upon a 5% rating for a traumatic brain injury manifesting as persistent headaches, and a 3% rating for tinnitus. With respect to a vestibular disorder, Dr. Higgenbotham noted he could not objectively assess disturbances of equilibrium. Claimant had no abnormality of gait, and her balance was reasonable on examination. He did not give Claimant a rating for a vestibular disorder. Similarly, Dr. Higgenbotham did not give Claimant a rating for a visual impairment. According to his report, he could not objectively assess disturbances of the vision system for impairment purposes from the medical records. Claimant's pupils were of equal size and reactivity, extraocular muscles were intact and there were no visual midline deficits. (Ex. A).

18. Even though Dr. Higgenbotham did not give Claimant impairment ratings for vestibular or visual disorders, under maintenance care he wrote "[t]he vestibular and visual therapies since the date of MMI are considered maintenance care. The vestibular and visual therapies are to continue for another 4 sessions each, whereby a self-directed care program should be undertaken." (Ex. A).

19. Respondents filed another FAL on June 14, 2022, based upon Dr. Higgenbotham's DIME opinion. Respondents admitted to the December 16, 2021 MMI date and a whole person impairment rating of 8%. Respondents denied maintenance treatment based upon the M164 form completed by Dr. Rosenberg. (Ex. O).

20. Claimant testified she received about 31 vestibular therapy treatment sessions before December 16, 2021, and she still receives occasional vestibular therapy.

21. Claimant testified she received multiple visual therapy treatment from Alexandra Talaber, O.D., before December 16, 2021. Claimant testified she completed her visual therapy with Dr. Talaber. Claimant had a six month evaluation pending.

22. Claimant further testified she finds the vestibular and visual therapy helpful and does not feel like she has fully recovered. The ALJ finds Claimant's testimony to be credible, but not persuasive.

23. Dr. Mathwich credibly testified that neither vestibular therapy nor visual therapy are reasonable or necessary for Claimant to maintain maximum medical improvement. Dr. Mathwich's opinion is consistent with Dr. Rosenberg's opinion that maintenance treatment was not reasonable or necessary. The ALJ finds this testimony of Dr. Mathwich to be credible and persuasive.

24. Based on the totality of the evidence, the ALJ finds that vestibular therapy is not reasonable nor necessary for Claimant to maintain MMI. The ALJ also finds that visual therapy is not reasonable nor necessary for Claimant to maintain MMI.

25. Respondents admitted to an AWW of $94.57. (Ex. O). But in 2021, Claimant's gross wages between January 7, 2021 and to July 8, 2021 (a 27-week period), were $2,842.20. This equates to an average weekly wage of $105.27 ($2,842.20 / 27 = $105.27).

26. Claimant seeks an increase in her average weekly wage based upon other income, outside of her work with Employer. Claimant credibly testified that she is a self-published author, selling her books on [Redacted, hereinafter AN], and she spends 25-30 hours per week writing.

27. Claimant received royalties from AN[Redacted] in the amount of $2,418.99 in 2020, and $2,977.42 in 2021. (Ex. 4). But according to Claimant's tax records, she claimed negative income from her writing in 2020 of <$2,656.00> and in 2021 of <$1,598.00>. (Ex. K). There is no objective evidence in the record to increase Claimant's AWW based upon Claimant's self-published books during the relevant periods of time.

28. The ALJ finds that Claimant's AWW was $105.27.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Maintenance Treatment

Claimant has the burden of proving entitlement to medical treatment after MMI by a preponderance of the evidence. Claimant must prove that maintenance benefits are related to her work injury and that they are reasonable and necessary to maintain MMI. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Claimant seeks specific maintenance treatment of eight additional visual and

vestibular therapy appointments.[1] Claimant testified she finds vestibular and visual therapy helpful, and does not feel she has fully recovered. Claimant also testified she has completed visual therapy.

Claimant relies upon the DIME physician, Dr. Higginbotham, to support her claim for maintenance benefits. In his May 20, 2022 DIME report, Dr. Higginbotham concluded that vestibular and visual therapy should continue for another four sessions each. A DIME physician's opinions concerning MMI and permanent medical impairment are binding unless overcome by clear and convincing evidence. § 8-42-107(8), C.R.S. There are no disputes regarding Claimant's date of MMI or her impairment ratings. But a DIME physician's opinion regarding what medical treatment is reasonable, necessary, or related does not carry additional weight. *Yeutter v. ICAO,* 487 P.3d 1007 (Colo. App. 2019). When a party is not challenging a DIME physician's MMI determination or impairment rating, the Courts have held that the heightened burden of proof does not apply. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002) (where issue was cause of worsened condition on reopening, DIME physician's opinion not entitled to presumptive effect); *Wilkinson v. Walmart Stores*, W.C. No. 4-674-582 (October 26, 2007)(DIME physician's causation opinion has no presumptive weight on the issue of *Grover* medical benefits); *Moore v. American Furniture Warehouse*, W.C. No. 4-665-024, (June 27, 2007)(the increased burden required by the DIME report did not apply to the claimant's entitlement to a particular medical treatment).

Dr. Higginbotham agreed with Claimant's ATP that Claimant reached MMI on December 16, 2021. He opined Claimant had 3% impairment rating for hearing (binaural tinnitus) and a 5% impairment rating related to persistent headaches. Dr. Higginbotham specifically found Claimant had no abnormality of gait, and her balance was reasonable, so he did not give her an impairment rating for a vestibular disorder. Similarly, Dr. Higgenbotham did not give Claimant a rating for a visual impairment. Despite these findings, Dr. Higgenbotham recommended vestibular and visual therapy on a very limited basis (four sessions each). Dr. Higginbotham's opinion regarding the need for limited additional therapy is credible, but not persuasive.

Claimant's ATP, Dr. Rosenberg, concluded Claimant was at MMI as of December 16, 2021, and that Claimant did not require maintenance medical care. This is evidenced by the December 16, 2021, M164 form, where Dr. Rosenberg specifically noted that maintenance medical care after MMI was ***not*** necessary. As found, Dr. Rosenberg's recommendation that Claimant continue with vestibular and visual therapy was simply that, a recommendation. (Findings of Fact § 14). The ALJ finds Dr. Rosenberg's opinion that maintenance treatment in not necessary to maintain MMI, to be credible and persuasive. Dr. Mathwich also opined that no maintenance treatment is reasonable or necessary to maintain MMI. The ALJ finds Dr. Mathwich's opinion regarding maintenance treatment to be credible and persuasive. Based on the totality of the evidence, neither vestibular nor visual therapy are reasonable or necessary for Claimant to maintain MMI.

[1] It is unclear from Claimant's position statement whether Claimant is seeking eight total treatments, or eight visual treatments and eight vestibular therapy treatments.

AWW

Respondents admitted to an AWW of $94.57. (Ex. O). As found, Claimant earned $2,842.20 between the dates of January 7, 2021 to July 8, 2021 (a 27-week period). This equates to an AWW of $105.27 ($2,842.20 / 27 = $105.27). Claimant's AWW with Employer was $105.27.

Claimant seeks to increase her AWW based upon her assertion that book sales from her self-published books should be included for a fair calculation of AWW. Section 8-42-102(2) of the Colorado Revised Statutes sets forth the method for calculating the average weekly wage. This section states that AWW shall be calculated upon the monthly, weekly, daily, hourly or other remuneration that the claimant was receiving at the time of the injury. The overall purpose of the statutory scheme is to calculate "a fair approximation of the claimant's wage loss and diminished earning capacity."

Section 8-42-102(3) of the Colorado Revised Statutes allows the ALJ to use discretion when the usual methods of calculating AWW "will not fairly compute the average weekly wage." If separate self-employment income is to be considered to increase AWW, the case law requires that the net income be the basis used in those calculations. In *Elliott v. El Paso Cnty*, 860 P.2d 1363 (Colo. 1993), the court held that depreciation claimed on a self-employed truck driver's tax return could be considered in calculating the driver's AWW. The court reasoned that the "cost of earnings must be considered in measuring those earnings." *Id.* at 1366; *see also Osman v. Colo. Cab Co.,* W.C. 4-905-869-01 (ICAO October 30, 2014) (a cab driver's net revenue after deductions for expenses should be the basis for his AWW calculation); *Hunterson v. Colo. Horseracing Assoc*., W.C. Nos. 4-552-585, 4-576-683 (Sept. 29, 2004) (if the ALJ determined the claimant was self-employed, then the ALJ may consider the claimant's expenses and include that reduction in calculating AWW).

A review of the decisions issued in other states are in conjunction with *Elliot, Osman,* and *Hunterson*. The cases consistently hold that a self-employed individual's average weekly wage should be based on gross income and the individual's business expenses, or "the cost of earnings." *See Vite v. Vite*, 377 S.W.3d 453 (Ark. App. 2010); *Appeal of Carnahan*, 821 A.2d 1122 (N.H. 2003); *Hull v. Aetna Ins.*, 541 N.W.2d 631 (Neb. 1996); *State ex rel. Richards v. Indus. Comm*., 673 N.E.2d 667 (Ohio App. 1996); *Meredith Construction Co. v. Holcombe*, 466 S.E.2d 108 (Va. App. 1996) *Christian v. Riddle & Mendenhall*, 450 S.E.2d 510 (N.C. App. 1994).

Here, Claimant received royalties in 2020 and 2021 from AN[Redacted] for her self-authored books, but claimed a negative income on her tax returns from this endeavor of <$2,656.00> in 2020, and <$1,598.00>, in 2021. (Ex. K). There is no objective evidence in the record to increase Claimant's AWW based upon her self-published books during the relevant periods of time. As found, Claimant's AWW is $105.27.

ORDER

It is therefore ordered that:

1. Claimant's claim for maintenance treatment in the form of vestibular therapy is denied and dismissed.

2. Claimant's claim for maintenance treatment in the form of visual therapy is denied and dismissed.

3. Claimant's AWW is $105.27.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 19, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-162-468-004

PROCEDURAL HISTORY

The parties were provided through November 29, 2022 to submit post hearing positions statements, briefs or proposed orders. Respondents' Position Statement was timely filed. Claimant's brief was not available at the time this ALJ issued the Findings of Fact, Conclusions of Law and Order dated December 7, 2022 and was not considered.

Respondents timely filed a Petition to Review on December 27, 2022. The Transcript of the hearing was lodged with the OAC on February 10, 2023 and a Notice and Briefing Schedule was issued by the OAC on February 16, 2023. Respondents filed a Brief in Support of Petition to Review on March 8, 2023. Respondents' March 8, 2023 Brief in Support of Petition to Review presented two questions for determination, as follows:

> 1. Whether the determinations made in ALJ Tenreiro's (sic.) December 7, 2022 Findings of Fact, Conclusion of Law, and Order were supported by substantial evidence, and specifically, whether the "actual date of incident" of April 30, 2020 is supported by substantial evidence.
>
> 2. Whether ALJ Tenreiro erred as a matter of law in finding that Respondents were responsible for medical treatment obtained by Claimant in 2020, given that Claimant did not report a potential claim until February of 2021.

Claimant filed Claimant's Response to Respondents' March 8, 2023 Brief in Support of Petition to Review on March 28, 2023. This Supplemental Findings of Fact, Conclusions of Law and Order follows:

ISSUES

Issued heard for hearing on September 12, 2022 were as follows:

I. Whether Claimant has shown by a preponderance of the evidence he sustained a work related injury in the course and scope of his employment with Employer on April 30, 2020.

IF COMPENSABAILITY IS PROVEN, THEN:

II. Whether Claimant has shown by a preponderance of the evidence that Claimant is entitled to medical benefits that are reasonably necessary and related to the injury.

III. Whether Claimant has shown by a preponderance of the evidence who is the authorized treating physician.

IV. Whether Claimant has shown by a preponderance of the evidence he is entitled to a change of physician.

V. Whether Claimant has shown what is his average weekly wage.

VI. Whether Claimant has shown by a preponderance of the evidence that he is entitled to temporary disability benefits from May 27, 2020.

STIPULATION

The parties stipulated that Claimant's average weekly wage was $1,041.40. The stipulation of the parties was approved and incorporated in the Order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 68 years old at the time of the hearing. Claimant was the head of public works for Employer and started working there in 2019. He would care for the grounds, performing maintenance of machinery, and road and park maintenance with the machines he maintained. He had multiple different duties including maintenance of equipment and machinery, including a tractor, street sweeper (which was the biggest piece of equipment), dump truck, motor grader, and pickup with a plow. He was the only public works employee for Employer and used all of the machinery.

2. On or about April 30, 2020, it was springtime in the area and Claimant had to sweep the streets, to get rid of the sand and debris that had accumulated on the streets during the winter months. He was not certain of the exact day the incident occurred, but within a day or so on either side of April 30, 2020 is when the accident happened. He stated that, to the best of his recollection, April 30, 2020 was the correct date of his injury. The sweeper picked up the sand and dirt left over from the winter snow treatment of the roads. He had to do maintenance checks and adjust each machine before use and had to make sure the sweeper was ready to do the street sweeping. He had to perform preventative maintenance on the sweeper, including on the chains that held up the attachment, or hopper. Several parts needed lubrication because it had dried up over the winter, which was caused by the sand and dirt in the hopper (stores the sand and dirt). He also had to spray water on it to clear the filter of the clogged hoses. The sweeper would barely fit through the shop 12 foot doors. He would have to get on the ground to get under it. He had to sit on the ground because the machine was too big to use a mechanical lift to get to the underside.

3. On April 30, 2020, right before lunch when he was getting up from servicing the chain, he struck his head. He was on his side under the machine, he had just fastened the chain, and he tried to get up, from underneath. He struck his head on the metal bar of the car lift just proximal to the sweeper, about one foot away from the sweeper. It was a very solid strike, as he immediately had a headache, felt goofy, and dizzy. When he stood up, he was wobbly and could not walk in a straight line, feeling the pain. He was not paying attention to how he was walking. He sat for one or two minutes. But he had a lot of work on his schedule to do, so he pushed forward to get everything done despite the headache. At the time he said some curse words, but no one was in the shop to hear him. He worked alone.

4. He struck his head on the right temple, above his right ear. He thought he was wearing regular glasses, not his protective goggles, because they were bifocal, and he could not see without them. The glasses did not fall off of him. The area on his head felt bruised for one to two (1-2) days following the incident. While he continued working the full day, because he had a long list of machinery maintenance to complete, he had problems completing the work due to how he was feeling.

5. Following this accident, he started to have cognitive issues, difficulty with memory, word search problems. He did not notice right away, as he was by himself most of the time. At the end of day he would go into the office around quitting time. He did not recall reporting the injury to anyone that day, but did mention it to his wife who worked for Employer. After this accident, he would get dizzy and feel fuzzy, and had memory problems. The medical records mentioned cognitive issues, problems with cognition and memory. He first noticed the cognition problems because he was told by family members. Then he started seeing small things that he would normally do but he did not recall doing them.[1]

6. In the days following the accident Claimant noticed he had continual problems remembering things at work and at home. For example, he had to perform a sprinkler system job and could not work out how to get it done, though it was something he was very familiar with completing. He knew the controller wiring was off. He was also very frustrated that he could not get to the wires he needed to work on because his hands would tremble excessively. This was also after the accident.

7. Claimant ended up going to the hospital on May 26, 2020. That day, the office manager and Town Administrator[2] had sent Claimant home because of the memory problems and the shaking as well as dragging his foot. He remembered he had only wanted to go to his primary care provider at Franktown Family Health, but his wife took him to the emergency room (ER) at Parker Adventist instead.

8. Claimant knows he had a craniotomy. Now he cannot drive safely anymore, anywhere. He lives in a community of approximately 600 people, and few residents drive the roads. He had been driving to the store, but he had the shakes, sometimes severely, though some days were better than others. A lot of the time he simply went with his wife everywhere. His symptoms were multiple, such as his limbs shaking, right hand worse than the left; balance issues, would drag his left foot; serious attention issues, it was hard to focus and to stay focused; memory issues, he would forget what he would be doing on a regular basis and fail to complete tasks. Claimant emphasized that there was no way that he could return to work. He continued working after April 30, 2020, but from May 26, 2020 he stayed at home after his surgery. He did not recall what happened for some months following the surgery. He was frequently fatigued and would sleep a lot. He has not returned to work.

9. Claimant confirmed that either he or his wife likely reported to the emergency room personnel that there were three potential incidents that involved his head, though he did not specifically recall giving the information but they were

[1] The ALJ infers from this that he would complete everyday tasks and have no recollection of actually performing the tasks.

[2] The title of Town Administrator is noted on the unsigned designated provider list, Exhibit K.

documented in the medical records. In fact, he did not recall any of the conversations that happened that day at the emergency room on May 26, 2020. The first incident documented in the records was at work (Work incident) the month prior.[3]

10. The second one was approximately one week before going to the hospital, when he scraped his head on the door frame of his shed, which was approximately one inch shorter than he was. It scrapped his forehead at about the hair line. He had had the shed for 20 years and never hit or scraped his head before that time. The scrape on his head was not very serious as it did not cause any bleeding, it was just surprising. He did not recall exclaiming in pain, cursing or bleeding from the scrape but he did mention it to his wife. (Shed incident).

11. The third incident occurred the day before he was hospitalized. He was in the boat, in the process of getting out. He had one foot over the rail, or side of the boat, and felt very weak, he could barely get the other foot over. He recalled he was holding onto the side of the boat, could not push himself up, so he got kind of stuck. He had a grip on the edge of the boat and as he had a foot on the ground and could not stay up, though he thought he had a firm grip on the side of the boat. He did not recall hitting his head. (Boat incident).

12. Of the three incidents, the injury at work was a lot more serious by far. He had never had shaky hands before the April work incident. He had not suffered from any cognitive issues before, and had no prior problems with memory issues, loss of focus or attention.

13. There were no other significant incidents that he could recall. He stated that he had hit his head a work before as he had worked around heavy machinery in his early career, but it was a long time ago, long before he started working for Employer. There was certainly nothing in the last 5 years before this work incident. He had never been diagnosed with a hematoma before May 26, 2020.

14. Claimant did not recall immediately reporting the incident to Employer. If he did, he certainly did not complete any formal report himself. He did mention the incident to the Town Administrator but never received a list of doctors to see. His wife also worked for Employer and may have also mention the incident to the Town Administrator.

15. Claimant stated that he was foggy when he was admitted to the hospital, and he noted that his wife likely answered a good portion of the questions he was asked. He was having problems with thought process. He went to look for a bathroom in the hallway and was disoriented and urinated on himself. He was dragging his left foot too.

16. Claimant's wife (Wife) testified at the hearing. She noted that she and Claimant had been married for 33 years. She was employed by Employer as a Utility Clerk at the Town Hall, working part time, and part time as a realtor. Outside of work she would spend a significant amount of time with Claimant, and occasionally had lunch with

[3] There was mention of a fourth incident at work, three months prior to admission, which occurred when Claimant hit his head on the mirror of the motor grader as he was getting into the motor grater. Claimant had been using the motor grater to pop ice. This ALJ determines that this incident is inconsequential to the facts of the accident of April 30, 2020.

Claimant, while at work. She stated that she did not recall that Claimant reported the incident to Employer or when exactly Claimant told her about the incident. Around the beginning of May, 2020, she noted that Claimant was having shaking in his left arm. She noted that other strange things were happening to Claimant, such as he could not open a bag of chips. This ALJ infers that he did not have any problems doing that activity before. He could not find the light switch in his bedroom, and he was doing everyday things in a slow-motion kind of way. He was very tired and things just started progressively getting worse after that point. She kept telling Claimant he needed to go to a doctor as he was acting weird, but he insisted that he was fine. Claimant's wife stated that Claimant, prior to the injury at work, was very strong, and had a very high work ethic.

17. Claimant's wife stated that they had to remove their windmill, as Claimant was unable to pound the stakes into the ground, and she had to do it for him. This ALJ infers that it was an activity that he would perform frequently before. She journaled everything and put a timeline together of things that Claimant would not remember. She became very alarmed by what was happening to her husband as he had problems remembering things he had done or said. He had weakness of his limbs. On one occasion, they were out to breakfast with one of their daughters and his arm kept shaking so hard that it caused him to slam a glass full of juice on the table and it splashed everywhere.

18. On the day that Claimant went to the emergency room, May 26, 2020, Claimant's wife spoke with the Town Administrator as well as another coworker who did the financial matters for the town. The Town Administrator advised the wife Claimant had been sent home because the Town Administrator had noticed Claimant not doing well, was dragging his left foot, and was alarmed by the symptoms he was displaying. Claimant's wife told the Town Administrator that she was taking Claimant into the hospital emergency room. Wife thought that Claimant was having a stroke or something because his speech was impaired. She stated that she read the clinical notes from that day but did not think they were accurate. She personally witnessed the boat incident and denied that Claimant hit his head that day, stating that any clinical notes or medical records to the contrary were incorrect. She was aware of the four different incidents, but not when they happened. The work incident with the grader she may have been told while working in the Town Hall.

19. The day Claimant was admitted to the hospital on May 26, 2020, Wife spoke with several people at Employer about the hospital admission. She recalled that she did not formally report the claim in writing until January 28, 2021, including to the Town Manager and the Town Attorney. Wife understood from that conversation that she should consider filing a workers' compensation claim on behalf of Claimant.

20. She did not see any designated provider list and she did all the paperwork for Claimant as he was dealing with memory loss problems. Claimant continued to see his personal providers and the providers referred by the emergency room providers. She stated that Claimant attempted to return to work, but it was not successful and was against provider instructions. He was prohibited from driving, and she had to spend all her time with Claimant as he needed supervision. She had to quit her job because of Claimant's impairments and need for help.

21. Wife noted that she now had to go behind Claimant and finish his tasks because he was unable to focus and complete tasks. Even simple things like, flushing the toilet after going to the bathroom. She stated that Claimant was very good with math and now could not do math without help. She testified that Claimant, after the surgeries, would sleep a lot and was advised that it was because his brain was trying to heal. She also stated she took Claimant to all his medical appointments and none of the providers had suggested that alcohol had anything to do with the SDH.

22. When questioned about the date of injury, Claimant's wife explained that April 30, 2020 was probably a very accurate date. She noted that the Town offices were only open four days a week, and that maintenance ran on a schedule. It was a Thursday and the following week Claimant would probably have started the street sweeping.

23. Wife also started taking down notes in from early May 2020 on her phone when she started noticing things like Claimant's memory loss, physical weakness, walking slow, talking slow. Then, when they were in the hospital on May 26, 2020 she also started journaling a timeline. Further, Claimant's wife denied that Claimant was dependent on alcohol or that he drank every day prior to the SDH.

24. Claimant assumed that there would be a time of recovery, that would allow an occasional drink, but he had not had any alcohol since the hospitalization and brain surgery. Claimant stated he did not continue having his evening drinks after the initial admission to the hospital. This was confirmed by Claimant's wife.

25. The parties submitted over 2,200 pages of records in this matter, which are summarized below only in pertinent part, addressing only those records that might be relevant to the issues to be addressed in this matter.

26. Employer issued a First Report of Injury (FROI) completed by an administrative assistant for Employer on January 28, 2021. The FROI specifically noted that Claimant had reported the incident on April 30, 2020. It also noted that Claimant was inspecting the brushes of the street sweeper. He was getting up off the floor when he stood up, striking the right temple against the "A frame" steel dual post car lift.

27. Claimant stated that he was working for Employer as a salaried employee. He thought he was earning around $50,000.00 per year. The FROI indicated that Claimant was earning an average weekly wage of $1,014.40 and Claimant agreed that it was probably accurate.

28. Claimant filed a Workers' Claim for Compensation on February 4, 2021. It noted that, as he was standing up after leaning over to repair a chain, he hit his head on a car lift and reported it to the Town Administrator. It noted that Claimant was being treated at Franktown Family Medicine.

29. Employer issued a February 9, 2021 document entitled Employer's First Report of Injury.[4] This document also stated that Employer was notified on April 30, 2020 and that Claimant's disability began on May 26, 2020. This form also lists Insurer's information and notes that Insurer received notice of the claim from Employer on January 28, 2021.

[4] Not a Division of Workers' Compensation standard form.

30. Employer submitted Exhibit K, with a designated provider list (DPL), and a cover letter dated February 11, 2021 from Respondents' counsel to Claimant's counsel. The DPL was undated and unsigned.

31. Insurer filed a Notice of Contest on February 11, 2021, denying that Claimant's injuries were work related.

32. Claimant was attended by Reiner Kremer, PA-C of Franktown Family Medicine, LLC, (supervised by Paula Castro, M.D.) beginning October 14, 2015 for multiple conditions including cardiology issues, cervical spine issues, dizziness, myalgias and cervicalgia. On April 2, 2020 Claimant was seen for a regular follow-up. PA Kremer assessed hypercholesterolemia, hypertension, lumbalgia, hip pain, coronary arteriosclerosis, and aortic arteriosclerosis. Other prior records indicate maintenance and cardiology concerns as well as lifestyle concerns such as weight, regular exercise, diet and proper sleep.[5]

33. Claimant was admitted to Parker Adventist emergency room on May 26, 2020 with a history of headaches for the last week in the right parietal and base of his neck. The medical records highlighted that Claimant's wife noted that Claimant had bilateral arm weakness that was fairly equivalent and left leg weakness which was most prominent. She noted that over the last 3 days he would be dragging his left foot toward the end of the day though seems to be better in the morning. He had had some difficulty walking because of this. She noted that his speech was slow, and he seemed to be moving in "slow motion." Claimant denied vertigo or imbalance, but his wife reported his complaints of a sensation of lightheadedness and his tendency to fall towards the left.

34. The discharge notes noted that Claimant reported that he would drink two beers and one shot of whiskey daily before the hospital admission, but denied any withdrawal symptoms or seizures, and upon discharge, medical providers noted that there was no evidence of alcohol withdrawal. Claimant and his wife were cautioned with the risk of alcohol withdrawal which could dramatically complicate the course of his SDH. As found, no records after discharge, nor persuasive evidentiary testimony, showed any evidence of alcohol withdrawal.

35. The discharge records noted that "[I]n hindsight," Claimant and wife noted that Claimant had an injury at work "3 months ago" but did not make anything of it. Then a week ago "he had (sic.)[6] his forehead on the door of the shed." Symptoms may have started shortly thereafter. Then the day prior to admission, he rolled out of their boat, falling, one foot to the ground and hit the left side of his head but denied associated loss of consciousness (LOC). As found, Dr. Rauzzino's opinion that the history obtained by the emergency medical providers on May 26, 2020 while Claimant was under the influence of the severe SDH was not reliable. Following the surgery, Claimant had regained some of his cognitive function and explained a timeline to Dr. Rauzzino that made medical sense and this is more persuasive.

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[5] There was no mention of dizziness or other cognitive issues on April 2, 2020.

[6] There are several possibilities regarding this mistake, it could mean that a word was missing like "he had scrapped/hit/struck his forehead" or that that there was a typo as in "he hit his forehead." This ALJ declines to make any assumptions in this regard like Dr. Morgenstern in his report.

36. Dr. Michael Rauzzino performed a right craniotomy for evacuation of a subdural hematoma with microscopic technique on May 26, 2020. He stated that indications for the surgery were Claimant's right sided headaches and altered mental status. He noted that diagnostics showed a large right sided holohemispheric subdural hematoma with significant mass effect and midline shift without any unresolved problems. Claimant also had a speech and language evaluation as Claimant reported confusion when he awoke from a brief nap, not knowing where he was. He was able to reorient himself after a couple minutes. His wife noted slower processing than normal. Upon assessment of the Montreal Cognitive Assessment (MoCA) screening, Claimant had mild cognitive deficiencies overall with most significant deficits noted with immediate and delayed recall, verbal fluency, and calculations. During his stay, therapists noted that Claimant demonstrated decreased insight into deficits and mild impulsivity.

37. Claimant was discharged from Parker Adventist on May 29, 2020. The primary diagnosis was acute on chronic intracranial subdural hematoma, daily consumption of alcohol, coronary artery disease, tobacco use disorder, Class 1 obesity with a body mass index (BMI) over 32, benign prostatic hyperplasia and prediabetes. The discharge addressed in-hospital care, including physical therapy and occupational therapy evaluations with gait training and lower extremity strengthening, range of motion exercises and neuromuscular reeducation. As found, upon discharge on May 29. 2020, considering all the records from admission through discharge, there was no persuasive evidence of alcohol withdrawal and three days had passed from the May 26, 2020 admission.

38. The discharge note described the findings of the at least five CT scans performed while in the care of Parker Adventist. The comparison from the CT performed on May 26, 2020, which showed a large mixed attenuation nearly holohemispheric right convexity SDH with areas that may reflect acute on chronic hemorrhage. Near the cranial vertex it measured 3.2 cm. Substantial mass-effect and right hemisphere with sulci that were effaced, right lateral ventricle was effaced, approximately 1.2 cm right greater than left midline shift (MLS). While the CT post craniotomy and evacuation of the SDH on May 26, 2020 showed smaller than on prior diagnostics, measuring 15 mm, there was increased acute hemorrhage within the collection anteriorly. The May 29, 2020 CT showed a decreased mass-effect with left MLS down to 7 mm with residual mixed density right hemispheric subdural collection measuring 1.3 cm in thickness with 7 mm subfalcine midline shift, which was an improvement from the prior day's head CT, with no new intracranial hemorrhage, cortical infarct, mass or other new or acute intracranial pathology. He was discharged with multiple recommendations for outpatient PT/OT/SLP, and medications.

39. Claimant returned to the emergency room on May 29, 2020 and was readmitted on May 30, 2020 with left arm movement suspicious for secondary focal seizure. The CT on readmission showed a recurrent SDH with new loculation of acute SD blood along the anterior and superior margins of the prior craniotomy, with a 13 mm defect. Overall, the size of the residual mixed right SDH was unchanged, measuring 14 mm. There was no change in the 9 mm MLS. They assessed that Claimant had a "recurrent subdural hematoma for which he had craniotomy 4 days ago by Dr. Rauzzino." Dr. Rauzzino was consulted, and he wanted Claimant to be admitted to the hospital. After

he reviewed the CT scan, Dr. Rauzzino would see him in the morning to decide if any other interventions were needed.

40. On June 2, 2020 Claimant was prepped for surgery as following the prior procedure he had done well but after a week, he had worsening symptoms. Diagnostics indicated that Claimant had a recurrent subdural and epidural[7] hematoma. Dr. Rauzzino proceeded with a revision right craniotomy with evacuation of epidural hematoma and recurrent subdural hematoma. The head CT postoperatively on June 3, 2020 showed a right mixed density smaller SDH with maximum thickness 0.7 cm (compared to 1.4 cm), showed less mass-effect, decreased leftward MLS, now only 0.5 cm (compared to 0.9 cm) and a decreased overall size of right posterior falx SDH with maximum thickness 0.4 cm.

41. By discharge, on June 5, 2020, Claimant was showing cognitive linguistic skills within functional limits. In the Discharge Summary Claimant had instructions to schedule a follow up with Dr. Rauzzino within one week and with Reiner Kremer, PA-C as soon as possible (within 1 week). The discharge records did no mention that Claimant had alcohol withdrawal symptoms after spending another week in the hospital. As found, this ALJ gives no credence to the argument that the Claimant was alcohol dependent or a serious alcoholic or that alcohol caused Claimant's SDH.

42. Claimant was evaluated by Derrick Winckler, PA-C from Dr. Rauzzino's office, on June 8, 2020 at Front Range Spine and Neurosurgery. PA Winckler took a history and noted that Claimant continued to have tingling in the fingertips of his left hand, but otherwise improved since the June 2, 2020 craniotomy. He had some drainage at the site of a staple. It was replaced and the drainage stopped. He was advised to return the following week for a wound check.

43. On June 11, 2020 PA Kremer of Franktown Family Medical noted Claimant's recent release from the hospital with subdural bleed that was repaired twice by Dr. Rauzzino. PA Kremer noted Claimant's use of a cane and that he was on short term disability (STD). It noted a referral to neurology for further evaluation. Claimant's physical exam was unremarkable.

44. Claimant started physical therapy with Fyzical Therapy & Balance Centers on June 16, 2020 pursuant to Dr. Rauzzino's referral. They noted complaints of balance and residual left sided strength deficits, with limited ambulation outside the home and with an assistive device. He was discharged on November 24, 2020 due to Claimant's inability to get to his appointments as he was having increased cognitive therapy visits.

45. He returned to Dr. Rauzzino's office on June 17, 2020. Claimant no longer had issues with tingling extremity sensations but continued to ambulate with a cane and continued with his seizure medications. On July 16, 2020 Claimant reported to PA Winckler that he had taken a turn for the worse with worsening headaches and problems with confusion and lethargy. PA Winkler noted that the July 2, 2020 CT scan showed no recurrent hemorrhage and only a small residual subdural hygroma.[8]

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[7] Epidural hematoma is a blood accumulation between the dura and the skull, while subdural hematoma means a bleed between the dura and brain matter.

[8] A hygroma is a collection of spinal fluid without blood.

46. Pamela Kinder, M.D., a neurologist, first saw Claimant on August 4, 2020 for evaluation and continued seizure medications management, which were increased after his June 2, 2020 admission. The headaches had abated but he continued having fatigue and increased symptoms with stress. Dr. Kinder noted that Claimant would frequently drink nightly except that since his first hospitalization, he had stopped that altogether. Neurological exam was essentially within normal limits except for gait, as Claimant had a tendency to sway to the left. Dr. Kinder noted that Claimant would not be able to drive for approximately one year, recommended a change in medication and gradual exposure to aggravating factors. On August 24, 2020 Claimant indicated to Dr. Kinder that he had almost immediate change in mood with the new medication. She diagnosed localization-related (focal) (partial) idiopathic epilepsy and epileptic syndromes with seizures of localized onset without status epilepticus and traumatic subdural hemorrhage without loss of consciousness.

47. At a follow-up on September 21, 2020 PA Stephen Ladd of Dr. Rauzzino's office, noted that Claimant was recovering fairly well still with complaints of fatigue and shakiness towards the end of the day, but improving strength. Claimant also reported that towards the end of the day he had increasing speech difficulties. PA Ladd recommended continued follow up with the neurologist for control of seizure medications and continued physical therapy. He also reviewed the last CT scan.

48. On October 29, 2020 Dr. Kathryn Polovitz, M.D. conducted an EEG with a finding of persistence of amplitude asymmetry with overlying frequencies appreciated throughout the right frontoparietal region consistent with a breath rhythm, seen in the setting of skull manipulation or underlying skull defect, as well as mild intermittent focal slowing appreciated in the right frontoparietal region suggestive of a mild focal dysfunction in the region. Claimant followed up with Dr. Kinder who noted that Claimant suffered a significant injury to his brain, his studies were still reflecting ongoing impairment at his right frontal/parietal area that could cause confusion, risk of accident and could impair his judgement.

49. The CT of the head and brain from December 31, 2020, as read by David Solsberg, M.D., showed a nearly isodense subdural fluid collection deep to the craniotomy site, that measured 4 mm. There were no mass effects or acute hemorrhage or progression of the hemorrhage since the prior study. Dr. Solsberg noted, at this time, some cerebral atrophy.[9]

50. On January 25, 2021 Claimant was readmitted to Parker Adventist after suspicion of a seizure. EEG and EKG were normal without indication of continued seizures. CT showed an acute 4 mm right frontoparietal subdural hemorrhage with no midline shift. Dr. Rauzzino, from neurosurgery, was notified, he reviewed the films then called back and stated that he felt this was likely old. However, after discussion with the patient's family and wife, they were more comfortable with Claimant staying overnight for evaluation, therefore he was admitted to the medicine service unit. He was discharged and was recommended further neurologist evaluation with Dr. Kinder as well as continued with antiseizure medications.

[9] This was the first CT report to document any atrophy of the brain.

51. Dr. Kinder reevaluated Claimant on February 1, 2021 noting he was alert but could not recall recent events, had a slightly ataxic gait and immediately lost his balance with eye closure. Dr. Kinder again explained to both Claimant and his wife the extent of the brain injury, that blood had "clotted", but remained an irritant to his brain, noting that both Claimant and his wife only now comprehended the extent of the Claimant's disability, finally realizing Claimant would not be fit to drive or work for some time. Dr. Kinder also stated that Claimant should be on long-term disability as he was not able to meet the demands of his job.

52. On February 24, 2021 Claimant followed up with PA Kremer who noted that Claimant continued to follow up with neurology and was disabled as a result of the brain hemorrhage. He was enrolled in a cognitive rehabilitation program in Parker, Colorado. He complained of left sided shoulder problems as well as right sided headaches. PA Kremer ordered a new CT to evaluate whether there were any new brain bleeds. In addition to his prior diagnosis, he was diagnosed with shoulder pain and right sided headaches. Prior exams were also similar and provided no other insightful notations other than Claimant had frequent lab workups.

53. Dr. Bruce L. Morgenstern performed a medical records review independent medical evaluation (IME) at Respondents' request on April 28, 2021. He did not examine Claimant. The records provided to Dr. Morgenstern included Dr. Rauzzino's at Front Range Spine, Franktown Family Medicine, Neurology of the Rockies, Parker Adventist and the FROI. Dr. Morgenstern specifically associated use of alcohol as a possible cause of the subdural hematoma in Claimant as alcohol consumption or abuse leads to both atrophy of the brain, which stretches the bridging cerebral vein tissue and may lead to increased risk of SDHs, and risks of falls due to intoxication. Dr. Morgenstern heavily relied on discrepancies regarding whether the work incident occurred one month or three months prior to the May 26, 2020 admission. He, erroneously, assumed that Claimant filled out the FROI instead of Employer's representative. Dr. Morgenstern stated that "[I]n summary, significant discrepancies exist both in the documented time course as well as the severity of any associated work-related injury," questioning Claimant's credibility as a historian in his final analysis and opinion.

54. Dr. Rauzzino wrote a letter dated January 31, 2022. He stated as follows:

> I treated Mr. [Claimant] directly including having performed surgery and having assessed the hematoma. I have also looked at the images at length. This was a large hematoma, mostly chronic and likely present for at least one month. It is not something that would have occurred from an injury five days earlier. The vast majority of the hematoma, or perhaps all of it, was relatable to the event that occurred one month earlier. There were chronic membranes found at the time of surgery; these membranes take time to develop over the course of weeks, not a few days. It is therefore my opinion as a level II accredited physician that the etiology of his hematoma and the need for surgery had to have been caused by an event that had occurred at least one month prior to his presentation. If he struck his head at work and if this can be documented, it would be my opinion that this was an occupational injury and not related to the minor trauma that may have occurred one week prior to his presentation.

55. Dr. Michael Rauzzino testified as an expert in neurosurgery and as a Level II accredited physician by deposition on October 17, 2022 on behalf of Claimant, as a treating provider. Dr. Rauzzino was Claimant treating neurosurgeon since his first admission in May 2020, when he treated Claimant at Parker Adventist Hospital. Dr. Rauzzino first evaluated Claimant in the emergency room at Parker Adventist, where Claimant was complaining of headaches, left sided weakness, trouble with thinking, and diagnosed Claimant with an "acute on chronic subdural hematoma." This was based on the CT study of Claimant's head. The CT showed a large fluid collection on the right side of his head compromising or compressing the right side of the brain down. Dr. Rauzzino explained that a subdural hematoma is a blood clot or an area of bleeding between the skull and the dura, and the brain. He could tell that it was acute on chronic because of the size of the hematoma. The brain would not have been able to tolerate an acute hematoma the size Claimant had, because it was several centimeters, comprised of the whole side of the brain. The radiologist measured it at 3 centimeters and noted that the brain had shifted approximately one centimeter pushing the brain to the middle. All of which lead Claimant to have neurologic deficits.

56. Dr. Rauzzino testified that Claimant's symptoms were consistent with a subdural hematoma, he recommended surgery and performed the surgery on May 26, 2020. Claimant then had recurrence of blood clotting, so Dr. Rauzzino performed a second surgery on June 2, 2020 to clean out the recurrent clot. Dr. Rauzzino noted that most (greater than 90%, nearly 100%) subdural hematomas are caused by trauma to the head. To assess the causality of the hematoma, he would normally take a history, generally traumatic, viewed the imaging, looking for color and size of the hematoma, and reviewed past records.

57. In this case, Dr. Rauzzino took a history from Claimant that he struck his head at work, which was consistent with the history Claimant provided at hearing, of an incident where he was getting up after working on the sweeper and had a solid hit on his head on a car lift bar. Dr. Rauzzino stated that this type of hit was more than sufficient to have caused the subdural hematoma, even if Claimant had been wearing a helmet. He stated of the three incidents Claimant had, the one the day before had no probability of causing the hematoma of the size Claimant had because not enough time had transpired. The one where Claimant scrapped his head on the frame of the shed, could not have caused it either, because the type of hematoma noted was older than a week prior. Dr. Rauzzino stated that "the only of those three incidents, the only one that had the potential to have caused this was the one that occurred about a month prior." He went on to state:

> Having an injury about a month prior would have been enough time for the bleeding to occur, the hematoma to expand, and the blood to have lysed. So while I try -- you know, very rare in life you can say absolutely, a hundred percent, I can actually say a hundred percent that the injury didn't occur a week prior, and it didn't occur a day prior.
>
> The analogy that I would give you is if you took an oyster and you dropped it to the ground and the pearl rolled out, we know that that pearl didn't develop just from hitting the ground, and it didn't develop a week prior. It takes time for a pearl to develop. It starts with a grain of sand, it grows, and you know, that sort of thing.

> The hematoma he had was like that. That is something that took weeks to develop, you know, to occur. So I can say with surety that of those three incidents, the one that is most plausible is -- or the only one that is plausible would be the injury he described at work.

58. Dr. Rauzzino noted that it takes time for a subdural hematoma to grow and individuals don't always present with symptoms right away because it takes time for the blood clot to form, to a point where the brain can no longer tolerate the change. At the beginning, right after the head trauma, Claimant could not have expected to have any symptoms other than the fact that he hit his head.

59. Dr. Rauzzino opined that individuals, generally, that abuse alcohol, have a tendency to fall and suffer trauma to the head, but Claimant did not provide a history of alcohol abuse to Dr. Rauzzino or any other history separate from the three instances, the shed, the boat and the work incident. Dr. Rauzzino noted that alcohol can cause the brain to shrink and atrophy but not to create a subdural hematoma. Further, in this case, Claimant's brain showed no signs of shrinkage. As found, there was no shrinkage of the brain at the time Claimant had his craniotomies in May and June 2020.

60. When performing the brain surgery to remove the clot, Dr. Rauzzino noted a chronic membrane which had encased the blood and stated that chronic membranes take several weeks to form, not just a week or days.

61. Dr. Rauzzino also noted that the color of the blood on CT showed that most of the blood was isodense, meaning that it had already broken down after clotting and showed as a gray color. He noted that there was only very little blood that showed any acute findings, as a very white color. He explained that:

> …someone with a chronic subdural hematoma, they can have bleeds into it and, you know, sometimes it happens spontaneously. That is how a subdural hematoma develops. You have a little bit of bleeding.
>
> I don't know if Dr. Morgenstern went through this. But there are veins on the surface of the brain that connect to the dura. And if you have an injury and you shear one of those veins, blood will start to ooze out. And as the blood oozes out, it presses against the brain, and since it can't push the skull out, it pushes the brain down, and as the brain gets pressed down, other veins can stretch and they can tear and they can bleed.
>
> So sometimes you can catch it right after one of the other veins has gone, started the bleed, you will see acute blood on top of the other blood, which is more chronic in nature.

62. Dr. Rauzzino stated that within a week after the head trauma, an individual could show signs of weakness, confusion. But as time passes, the symptoms become more pronounced as the subdural hematoma continues to grow over the next weeks. "People hit their head, they don't realize how hard they hit it, they shake it off, they just go about things, and they didn't realize they started a process which is going to lead, you know, to potential death, which is what happens if these things aren't treated."

63. Dr. Rauzzino testified that while the patient was suffering from symptoms of the SDH that his mind could be cloudy but once he had been treated, his mind would have cleared from the effects of the SDH and may have been able to provide a more

detailed or accurate history of the trauma. He stated that "it is hard to get an accurate history when your brain is under so much pressure."

64. Dr. Rauzzino stated that Claimant "almost died. His brain was so compressed that he was having neurologic symptoms, and to ask him to give an accurate history is difficult in that situation." Dr. Rauzzino noted that following the surgery, when Claimant was recovering, he obtained a history of the three incidents and that of the three, his opinion was that Claimant's injury at work more likely than not, caused the initial bleed, which started the hematoma and that it continued to bleed up until he was seen in the hospital emergency room. At that time, the hospital called him in as they had detected a large, acute on chronic intracranial subdural hematoma.

65. On November 7, 2022 Respondents deposed Dr. Bruce L. Morgenstern, a Board-Certified expert in neurology who conducted a record review. Dr. Morgenstern noted that most SH are caused by trauma and that it was rare for a SH to be spontaneous or not have a history of trauma. He explained as follows:

> The -- the blood forms, as we said, between the inter table of the skull below a membrane called the dura and the brain. So it basically squeezes the brain between the skull and the brain. When one leads (sic.) acutely certainly into the brain, or around the brain, blood has iron in it. And on a CAT scan, iron is white. So acute blood looks hyperdense or white.
>
> After about three days, the blood begins to deteriorate. So it goes from bright to kind of gray, which we call isodense. It's about the same color -- same shade of the brain itself. And then beginning about a week or so after that, the blood further deteriorates and becomes hypodense or dark. So we have acute blood, which is white; subacute blood, which is isodense, so sort of gray; and chronic blood, which is dark.
>
> Mr. -- on his CAT scan, Mr. [Claimant] had a combination of -- of hypodense, that is, dark blood, which was chronic, but also areas of acute blood, which were bright white. So it was interpreted as acute superimposed upon chronic.

66. Dr. Morgenstern testified that there were multiple possible causes for Claimant's SH, including excessive alcohol consumption which could have caused a fall, such as the "shed incident:" and the "boat incident" or shrinking of the brain which could have sheered the blood vessels leading to the skull. He also noted that three months as noted in the ER visit report was the outside limit for symptoms to occur from a SDH. He also criticized Claimant's change in reports from the ER visit of three months to the FROI report of approximately one month. Lastly, he noted that because Claimant was wearing a helmet, it was less likely the cause of the SDH, that "it would blunt the injury." The ALJ infers from this statement that it was also his opinion that it could occur.

67. Dr. Morgenstern questioned Claimant's credibility because of the three-month notation taken during the May 26, 2020 emergency room visit. He stated that individuals with SHs can suffer or develop cognitive difficulties as a result of the SDHs and that Claimant was reporting cognitive issues, and that he had presented to the ER with a history of headaches for the last week in the right parietal side.

68. As found, Dr. Rauzzino's opinions are more credible and persuasive than the opinions of Dr. Morgenstern. Dr. Rauzzino was the one to perform the craniotomies in this case and *found that there was no brain atrophy* present at the time of the craniotomies. He studied the CT imaging, not just the reports from the radiologists, both prior to surgery and after surgery and Dr. Rauzzino *found no shrinkage* of the brain, which was Dr. Morganster's explanation for the bleeds causing the SDH.

69. Dr. Rauzzino credibly explained that Claimant was under the influence of the SDH, that showed a midline brain shift, which caused brain damage, affecting cognitive awareness, memory, and speech. He noted specifically that the SDH could not have been caused by the boat incident because the imaging showed isodense, hypodense and hyperdense material. This combination of blood deterioration indicated to Dr. Rauzzino that the shed incident, which occurred approximately one week before the May 26, 2020 admission was not the cause of the SDH.

70. Lastly, Dr. Rauzzino credibly opined that whether the work accident was one month or three, that the CT scan indicated that it was greater than two weeks old but certainly could have been up to three months old due to the isodense blood (degradation of the blood).

71. Dr. Rauzzino's opinion persuasively established that the head trauma was probably caused by the work injury on April 30, 2020. Dr. Rauzzino's opinions are more persuasive over the contrary opinion of Dr. Morgenstern. As found, the fact that Dr. Rauzzino viewed the actual CT scans, not just the reports, as well as performed the surgeries on Claimant's brain and viewed firsthand the condition of the SDH and the surrounding brain tissue showed that it was more likely than not that the SDH was caused by an incident greater than one week before the admission, any time around three weeks to three months. Lastly, Dr. Rauzzino spoke with Claimant in person and obtained a history from Claimant after the surgeries took place, consistent with Claimant's testimony at hearing, noting that any history of present illness taken on the date of admission, would have likely not been fully reliable, not because Claimant was not credible, but because Claimant had a large SDH deforming his brain matter, which was causing brain injury, and causing both physical and cognitive deficits.

72. Further, as found, Claimant's testimony was credible and persuasive. Claimant described the incident which occurred on or about April 30, 2020, where he was getting up after working on the sweeper's chains and hitting his head on the car lift that was immediately adjacent to the sweeper and described it as a "very solid hit." The incident was so traumatic that he immediately had a headache, felt goofy, and dizzy. When he stood up, he was wobbly and could not walk in a straight line, feeling the pain. He sat there for one or two minutes. But he had a full schedule so pushed forward to get everything done. At the time he said some curse words, but no one was in the shop to hear him. While the medical records documented that Claimant "did not think anything of it," as found, Claimant did not have the experience or expertise to recognize that the significant hit to the head would or could cause trauma or injury to his blood vessels sufficient enough to cause bleeding in his brain and eventually causing the midline shifting of the brain on the right.

73. Dr. Rauzzino credibly explained that the slow bleed would have caused symptoms to be gradual. As found, Claimant's detailed description of the work incident was not casual or transient or fleeting but was very memorable, which in and of itself was very persuasive. Claimant has proven by a preponderance of the evidence that it was more likely than not that the traumatic event at work on April 30, 2020 caused the SDH and brain injury. This is in conjunction with Dr. Rauzzino's opinion that the SDH, which was isodense upon admission to the ER, was probably caused by the trauma at work which was approximately four weeks prior to admission.

74. The fact that Claimant did not specifically take notice of or write down the particular date of the injury was not unexpected, as, while he had a solid hit to his head, he was able to continue working, though with some difficulty. As stated previously in this analysis, Claimant did not have the expertise to know that there was a cerebral brain vein that was bleeding in his head. Claimant was persuasive in explaining that the accident at work would have been on or about April 30, 2020 because it was springtime and he needed to do maintenance on the sweeper in order to be able to use it to pick up all the debris on the roads from the winter road maintenance. It is less likely that the documented medical record on admission on May 26, 2020 of a work incident "three months" prior to admission was correct, as Dr. Rauzzino explained Claimant would have been cognitively impaired. Therefore, as found the date of injury is determined to be April 30, 2020.

75. As found, Respondents had notice of the work injury, as the FROI established that Claimant advised his employer of the work incident on April 30, 2020. There was no credible testimony to contradict this as Claimant suffered a SDH and could not remember what he told his Employer. Further, Claimant's wife testified that, the day Claimant was admitted to the hospital on May 26, 2020, she spoke with several people at work about Claimant's admission, including the Town Manager who is the same individual he had notified on April 30, 2020. From those conversations, Claimant's wife proceeded to subsequently report the injury on January 28, 2021. A written Workers' Compensation Claim was filed on behalf of Claimant by his counsel.

76. As found, Respondents failed to designate a medical provider in a timely manner in this matter and Claimant selected his provider, Franktown Family Medicine, and PA Kremer as his authorized treating physician. By the time a DPL was issued on February 11, 2021, Claimant had already selected his ATP and had been in treatment for many months. Further, any provider within the chain of referral were also authorized. PA Kremer referred Claimant to the neurologist, Dr. Kinder, as well as to the neurosurgeon, Dr. Rauzzino, that performed the June 2, 2020 craniotomy for follow up. PA Kremer also made referrals to multiple other providers, including physical therapy and speech therapy. As found, these providers are authorized. Further, as found Claimant was attended on both May 26, 2020 and again on May 29, 2020 in an emergency situation at Parker Adventist Hospital due to severe symptoms due to the SDHs which resulted in admissions and emergency surgeries and are found to be reasonably necessary and related to the April 30, 2020 work related injury.

77. Claimant received appropriate care in this matter. Claimant sought treatment, after the initial emergency care, with Franktown Family Medicine. They referred Claimant to multiple other providers, back to his neurosurgeon, Dr. Rauzzino, for neurologic consultation with Dr. Kinder, for physical therapy with Fyzical Therapy, and to

a speech therapist. All these are reasonably needed care to address the work-related subdural hematoma and the sequelae of the SDH, including possible seizure disorder and care. Claimant has shown that the medical treatment was authorized, reasonably necessary and related to the injury. Claimant has failed to show that a change of provider is proper in this matter as no persuasive testimony was tendered on this issue, a new physician identified or a plausible reason for requesting a change of physician.

78. Lastly, Claimant has shown by a preponderance of the evidence that he was disabled due to the work-related injury, SDH and the diagnosed seizure disorder and was unable to return to work from May 26, 2020 to the present. Claimant is entitled to temporary disability benefits. This is supported by Dr. Rauzzino, Dr. Kinder and PA Kremer's opinions as set forth above.

79. Any evidence or possible inferences contrary to the above findings, were specifically found not persuasive or not relevant.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See

Bodensieck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Dr. Rauzzino, Dr. Kinder, and PA Kremer are more persuasive than the contrary opinions of Dr. Morgenstern. The record shows that Claimant clearly was at work on April 30, 2020, within the course and scope of his

employment, when he hit his head on the metal bar of the car lift, which was immediately adjacent to the large industrial sweeper. As found, Claimant was not positive that the event took place on April 30, 2020, a day earlier or a day later. But the fact that Employer noted they were notified of the incident on April 30, 2020 is persuasive and the date of injury is found to be April 30, 2020.

Regardless of whether Claimant had a helmet on or not, the hit was sufficient to cause the trauma and the damage to a vein in his brain, which in turn caused a slow bleeding and the eventual severe subdural hematoma and the right midline shift of the brain, necessitating surgery. Claimant and his wife started to notice the effects and symptoms of the SDH shortly after this incident, including changes in speech, slowness of reactions or actions, memory loss and loss of function in his upper extremities. Clearly, even the Town Administrator noticed that something was not right as she was the one to send Claimant home the day he was admitted to the emergency room at Parker Adventist on May 26, 2020. It was not until a CT of his head was performed at the ER that anyone realized that Claimant had a SDH causing midline shift of the brain, which was significant and life threatening.

Dr. Rauzzino was also persuasive and credible in stating that the two incidents one week before being admitted to the ER and one day before (shed incident and boat incident respectively) were probably not the cause of the SDH. Dr. Rauzzino's testimony that because most of the blood was not bright white (hyperdense), it was actually isodense and some that was hypodense was extraordinarily persuasive. Dr. Rauzzino's opinions were credible and persuasive. Dr. Rauzzino convincingly opined that the incident at work approximately four weeks before his admission, whether he was using a helmet or not, was the probable cause of the trauma to Claimant's head and the proximate cause of the subdural hematoma and subsequent seizure disorder and this ALJ agrees.

Claimant credibly testified that he was immediately dizzy after the April 30, 2020 event and had an immediate headache. The fact that he continued working was only a sign that he had a great work ethic, as his wife testified. Claimant has shown that the proximate cause of Claimant's injuries to his head and brain was the work-related accident of April 30, 2020. Claimant's injuries arose from the accident at work in the course and scope of his employment on April 30, 2020.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951).

A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). As found, the emergent treatment Claimant received on May 26, 2020 and May 29, 2020 as the immediate admissions into Parker Adventist Hospital as well as the subsequent brain surgeries performed by Dr. Rauzzino on May 26, 2020 and June 2, 2020 were "bona fide emergencies" in this case as therefore authorized pursuant to statute.

Pursuant to Section 8-43-404(5) (a) (I) (A) the employer or insurer must provide "a list of at least four physicians or four corporate medical providers …**in the first instance**, from which list an injured employee may select the physician who attends the injured employee." Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

Pursuant to W.C.R.P. Rule 8-2 (A) "[w]hen an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers from which the injured worker may select a physician or corporate medical provider." Further, pursuant to Rule 8-2(A)(1) "[a] copy of the written designated provider list must be *given to the injured* worker in a verifiable manner within seven (7) business days following the date the employer had notice of the injury." (*Emphasis added*.) Pursuant to Rule 8-2(E) "[I]f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing." Both *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006) and *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984) are instructive because they deal with the issue of failure of the employer to designate a physician "in the first instance." See also *Ries v. Subway Of Cherry Creek, Inc*., W.C. 4-674-408, I.C.A.O. (August 4, 2011). These cases are instructive on the Respondents' duty to designate a medical provider when triggered by knowledge of facts that would lead a reasonably conscientious person to believe that the claimant would require medical treatment. Here, Claimant clearly required treatment beginning May 26, 2020.

An employer is deemed notified of an injury when employer has "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." See 3 A. Larson, Workmen's Compensation Law § 78.31(a) at 15-105 (1983); *Jones v. Adolph Coors Co., supra*. Also, verbal notice to a company

superintendent has been held sufficient to inform an employer of an injury. See Frank v. Industrial Commission, 96 Colo. 364, 43 P.2d 158 (1935). As Respondents acknowledged in their FROI they were provided notice as early as April 30, 2020 and subsequently on May 26, 2020 when he was in the hospital, this triggered Respondents' duty to provide a designated provider list. As Respondents failed to do so, selection passed to Claimant and after he was released from Parker Adventist on June 5, 2020, Claimant was free to select a provider of his own choosing, which he did, in choosing Franktown Family Medicine and its referrals.

Respondents argue that they did not issue the FROI until January 28, 2021, that Claimant did not file a formal Workers' Claim for Compensation until February 4, 2021 and that Respondents had the right to designate a provider at that time. However the FROI notes that Respondents' had notice as of April 30, 2020, which this ALJ finds credible. They also noted in the subsequent FROI file by employer, on a non-Division form, that Claimant's disability began on May 26, 2020. This form lists Insurer's information and notes that Insurer received notice of the claim from Employer. All of these facts, lead this ALJ to conclude and find that Employer knew about the injury and knew when Claimant became disabled and needed medical treatment, which triggered their obligation to file a designated provider list. As found, Respondent failed to do so on May 26, 2020 or immediately subsequent to that date, or within seven business days. Respondents knew Claimant had been seen at the hospital for a serious condition and failed to send the DPL.

Claimant had follow ups with his providers immediately after he was released from the hospital on June 5, 2020 and Respondents knew or should have known he continued to have a disability and needed medical treatment as he did not return to work after having brain surgery. Further, Claimant's wife worked for Employer in the Administration office and this ALJ makes the reasonable inference that she was in communication with Employer regarding her inability to work as well as Claimant's inability to work. All of this information should have lead a reasonably conscientious person to believe that the claimant would require medical treatment. A reasonable administrator knew or should have known that Claimant required medical care and that a DPL should have been sent out or that they had an obligation to designate a medical provider willing to treat Claimant in the first instance. This did not occur until February 11, 2021, over eight months after Claimant became disabled during which time Claimant had continued care by his providers. As found, Claimant proved that it was more likely than not, by a preponderance of the evidence that the right of selection passed to Claimant.

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical care related to the injuries. As found, Respondents had notice of the accident on April 30, 2020 as established by the completed Division form, the Employer's First Report of Injury issued by Respondents. Also, the Town Administrator and Town Attorney had notice at least by May 26, 2020 when Claimant's wife contacted them to advise Claimant was he was at the hospital and would be undergoing brain surgery for the SDH. The Town Attorney actually mentioned to Claimant's wife that Claimant could file a workers' compensation claim to that effect. Further, Employer failed to designate any medical providers within a reasonable time as Claimant clearly required immediate medical care. Both Claimant and his wife credibly

testified that they had never received a designated provider list. This ALJ infers this to mean that they did not receive one until one was sent to Claimant's counsel on February 11, 2021. Lastly, the DPL that was in evidence failed to show that it was sent to Claimant within seven day following notice to Employer of the work injury or potential work injury either following the April 30, 2020 work related injury nor following the May 26, 2020 admission. Therefore, as found, Employer failed to refer Claimant to a provider in a verifiable manner in order for Claimant to choose a provider at the time he required medical care in by June 2020. The right to select a provider passed to Claimant and Claimant chose Franktown Family Medicine.

D. Change of Physician

A claimant can obtain a change of physician "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change of physician. *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider many factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ need not approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007). On the other hand, the ALJ is not precluded from considering the claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688-075 (December 18, 2008).

As found, Claimant failed to establish a basis for a change of physician. Franktown Family Medicine and PA Kremer were authorized treating providers when Claimant initially selected the providers and by choosing to continue to receive treatment through them. Now Claimant is requesting a change in medical provider but provided no persuasive testimony to support a change in provider nor provided an alternative medical provider. Claimant's request for a change of provider is denied.

E. Temporary Total Disability benefits

To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he

left work as a result of the disability, and the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. Sec. 8-42-105(3)(a)-(d), C.R.S.

Claimant alleges impaired earning capacity from May 26, 2020 through the present. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary disability benefits. Claimant credibly testified that he would be unable to drive to and from work or drive the equipment needed to perform his work. Further, PA Kremer and Dr. Kinder have both addressed that Claimant continues to be disable from work as he would not be capable of engaging in work activities. Dr. Kinder specifically stated that Claimant should be on long-term disability as he was not able to meet the demands of his job. Claimant was first disabled when he was admitted at Parker Adventist and was not able to return to work beginning May 27, 2020 to the present.

There is some mention in the medical records that Claimant volunteered to assist training the new head of public works for Employer and Claimant's wife also mentioned that Claimant attempted to return to work without success. Therefore, Respondents may take credit for any money paid by Employer to Claimant from May 27, 2020 to the present. Further, there is mention of short-term and long-term disability benefits. If Claimant received either type of benefit or Respondents paid for any portion of the disability benefits policies, they are entitled to an offset in the appropriate proportion.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work-related injury to his head on April 30, 2020 in the course and scope of his employment.

2. Respondents shall pay for all authorized, reasonably necessary, and related medical benefits including but not limited to treatment at Parker Adventist, Dr. Rauzzino, Front Range Spine and Neurosurgery, Franktown Family Medicine, Fyzical Therapy & Balance Centers, Centura Health Center for Therapy Parker Adventist, Neurology of the Rockies and Dr. Kinder as well as any other provider within the chain of referral to treat the SDH and seizure disorder, and in accordance with the Colorado Medical Fee Schedule.

3. Claimant has failed to show he is entitled to a change of physician.

4. The stipulation of the parties is approved and granted. Claimant's average weekly wage is $1014.40.

5. Respondents shall pay temporary total disability benefits beginning May 27, 2020 until terminated by law. Respondents are entitled to offset any benefits paid, in accordance with the law.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 5th day of April, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant has a permanent partial disability of the whole person for his left shoulder injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 57 years old at the time of the admitted work related injury of February 15, 2022. He worked as an 18 wheeler semi-truck trailer driver doing deliveries. He had been doing this type of job for approximately 16 years, but with this employer approximately 4 years. He denied any prior work injuries affecting the low back and left shoulder.

2. Claimant was seen by Anthony de Mooy, MS, BSN for an On-site First Aid Evaluation on February 15, 2022. Claimant reported that he felt pain and a pinch as a result of lifting a semi-trailer door that was sticking and hard to lift. Claimant complained of left shoulder pain and left lateral lower back pain in T-12 region. Upon exam, Mr. Mooy found pain, loss of range of motion, decreased both in the lumbar spine and the left shoulder. He recommended warm/cold packs, rest and elevation of the shoulder as well as over the counter ibuprofen.

3. On February 18, 2022 Mr. Mooy noted that Claimant was having difficulty taking off his sweatshirt and t-shirt, appearing to be unable to lift his left arm and splinting his left arm with his right hand. He observed that Claimant could not lift his left arm past 90 degrees. Mr. Mooy referred Claimant to Dr. Irish for further evaluation.

4. On the same day, February 18, 2022, Margaret Irish, DO of Injury Care Associates evaluated Claimant. Claimant reported to Dr. Irish that he felt a crack in his left shoulder when he opened the trailer door and another crack when he slid a dock plate across the floor. Claimant complained of a "pinch" feeling in his back and stated it was below the shoulder blade and into the low back. On exam, Dr. Irish noted that palpation throughout the neck and back and left shoulder/upper arm showed moderate muscle tightness in the lower left thoracic paraspinal muscles and mild tightness in the left lumbar paraspinal muscles. There was mild muscle tightness in the left upper trapezius area. Active range of motion of the left shoulder was to approximately 90 degrees abduction and forward flexion. There was a positive Neer's, Hawkins, drop arm, speeds and O'Brien's tests in the left shoulder. Dr. Irish diagnosed left shoulder rotator cuff tear and rupture, left shoulder pain, muscle and tendon strain of the muscle and tendon of back wall of thorax, and muscle, fascia and tendon strain of the lower back. Dr. Irish ordered a left shoulder MRI with arthrogram, and physical therapy. She recommended taking ibuprofen, light duty restrictions and follow up.

5. Thomas Robinson, P.T. evaluated Claimant on February 21, 2022 and Claimant was tender on palpation over the supraspinatus and infraspinatus muscles. On the pain diagram for that day, Claimant showed pain in the upper back in the trapezius areas as well as in the chest area but changed to only the trapezius, upper back area of the shoulder blade by February 23, 2022. Claimant was not working at that time. Claimant continued to have tenderness in the supraspinatus and infraspinatus muscles on multiple subsequent days as documented during treatment with Mr. Robinson.

6. By February 24, 2022 Claimant reported to Dr. Irish that the low back pain was almost completely gone, but continued to have pain of the left shoulder and left upper back/upper trapezius area. Claimant reported that physical therapy was helping, especially with range of motion and strength. On exam, Dr. Irish continued to find positive Neer's, Hawkins, drop arm, speeds and O'Brien's tests on the left. Dr. Irish noted that the objective findings were consistent with the work-related mechanism of injury. This ALJ noted that on the pain diagram for this visit, Claimant marked pain in his shoulder blade, trapezius muscle area down the scapula on the left side, proximal to the glenohumeral joint and affecting the infraspinatus, supraspinatus and subacromial muscle areas.

7. The March 1, 2022 MRI arthrogram of the left shoulder showed full-thickness tear through the anterior half of the supraspinatus tendon with medial tendon retraction estimated at 12 mm and resultant extravasation of contrast into the subacromial subdeltoid bursa, with an estimated 9mm tear and no significant muscle atrophy. Dr. Ross of Health Images read the films to show a high-grade partial-thickness tear of the subscapularis tendon with medial delamination of the posterior fibers approximately 17 mm. This resulted in medial subluxation and partial-thickness tearing of the proximal biceps tendon. There were also findings of severe osteoarthrosis of the acromioclavicular joint with minimal undersurface acromial spur formation and subchondral cystic changes along the lateral margin of the humeral head.

8. On March 2, 2022, Dr. Irish referred Claimant out for a surgical evaluation with Dr. Schnell.

9. On March 28, 2022 Claimant was evaluated by Sophie Schmitz, PA-C. Claimant reported slight improvement in the left shoulder pain but continued limited range of motion. Claimant reported he saw Dr. Schnell on March 23, 2022, discussed treatment options and findings of the MRI. Dr. Schnell recommended surgery and Claimant reported he would proceed with the recommend treatment. Ms. Schmitz proceeded to conduct the pre-op laboratory testing. On exam of the left upper extremity, Ms. Schmitz found tenderness to palpation diffusely along the posterior aspect of the left shoulder and upper trapezius region, limited range of motion of the left shoulder when compared to the right, abduction to roughly 60 degrees, limited strength against resistance of the left shoulder when compared to the right, positive Neer's, Hawkins, empty can, and teres minor/infraspinatus tests. Ms. Schmitz assessed Claimant with a QPOP test. Claimant reported, on the pain diagram, pain along the shoulder blade and trapezius as well as into the shoulder joint. On the “QuickDash” assessment, Claimant reported having moderate difficulty with social and family activities with the arm and shoulder, as well as moderate difficulty sleeping due to the pain. He also reported very limited ability to work other than daily living activities.

10. Claimant proceeded with surgical repair under Dr. Luke Schnell on April 7 2022 for a left shoulder arthroscopic supraspinatus, infraspinatus and subscapularis tendon repair, arthroscopic subacromial decompression, left shoulder open long head biceps tenodesis and extensive arthroscopic debridement.

11. On April 19, 2022 Ms. Schmitz noted that Claimant had pain of 6-8/10 located across the superior and posterior of the left shoulder. She noted tenderness along the same area, though Claimant continued to be in an immobilizer due to the surgery. Ms. Schmitz referred Claimant back to physical therapy for post op PT. The pain diagrams continued to show pain in the trapezius and scapula areas.

12. By May 5, 2022 Claimant continued to report pain in the upper back, shoulder blade area. This pattern on the pain diagrams continued throughout his treatment. Claimant reported he could not open jars, wash his back, use a knife, stated that his shoulder pain caused extreme difficulties with daily activities and socializing, and caused so much difficulty that he was having problems sleeping.

13. On May 23, 2022 Ms. Schmitz noted Claimant continued in an immobilizer arm sling, had tenderness to palpation diffusely along the posterior aspect of the left shoulder, limited range of motion of the left shoulder when compared to the right, flexion and abduction to roughly 80 degrees though she did not perform special tests of the shoulder due to Claimant being 7 weeks postop.

14. Claimant attended an appointment at Dr. Schnell's office, where PA Jane Gustafson saw Claimant on June 8, 2022 and took a history. After examination, Dr. Schell noted that there were no post-operative complications. Dr. Schnell recommended continued physical therapy, advancing to phase 2 arthroscopic rotator cuff repair protocols but below shoulder level with the left arm, discontinuing the sling and sleeping in a recliner, and reassessment in 6 weeks.

15. Claimant also followed up at Injury Care with Sophie Schmitz on June 15, 2022 and July 12, 2022. She advanced Claimant's PT regime pursuant to Dr. Schnell's instructions. This ALJ noted that on the pain diagram for this visit, Claimant marked pain in his shoulder blade, trapezius muscle area down the scapula on the left side, above the shoulder joint on the trunk and affecting the infraspinatus, supraspinatus and subacromial muscle areas. The QuickDash form noted Claimant continued to have severe difficulty sleeping due to the shoulder pain, which also interfered with opening jars, carrying bags, and engaging in activities of daily living.

16. By July 19, 2022 Dr. Schnell advanced Claimant to protocol phase 3 twice a week for six weeks, recommending no pushing, pulling, or lifting greater than 10 lbs. with the left arm until the follow up appointment.

17. Claimant followed up with PA Schmitz on August 8, 2022 who noted improvement of the left shoulder motion but still noted Claimant's slight difficulty with flexion, abduction and external rotation. Claimant still reported pain, at the time of exam, but only up to 3/10 at its worst. This ALJ noted the pain diagram for this visit, where Claimant marked pain in his shoulder blade, trapezius muscle area down the scapula on the left side.

18. Claimant's last appointment with Dr. Schell was August 26, 2022. He noted Claimant had good improvement following surgery at 4 ½ months post-operatively. He reported Claimant had returned to work, should continue with physical therapy and a home exercise program for another 3 months, as well as restrictions of pushing, pulling and lifting to 20 lbs. for another 2 weeks with the left arm, then progress to full duty, stating Claimant was at MMI and should return to consult as needed basis.

19. Dr. Richard Pompei evaluated Claimant for the first time on September 2, 2022. He noted Claimant continued to progress with treatment. Claimant was concerned with the 20 lbs. lifting restrictions because his employment required him to lift up to 90 lbs. from 6 inches to 60 inches. Dr. Pompei ordered two more weeks of physical therapy consistent with Dr. Schnell's recommendations. This ALJ noted that the pain diagram for this visit, Claimant marked pain in his shoulder blade, trapezius muscle area down the scapula on the left side, and affecting the infraspinatus, supraspinatus and subacromial muscle areas.

20. On September 16, 2022 Dr. Pompei contacted Employer to determine whether Claimant would be required to lift 90 lbs. from 6 inches to 60 and was advised this was not a requirement of the job. Claimant noted that he was approximately 90% better following the surgery and physical therapy. Dr. Pompei released Claimant to work full time on "a trial basis" and stated, if it went well, he would likely place Claimant at MMI and conduct an impairment rating due to the surgery. Claimant was advised he had a couple more sessions of physical therapy he could attend. This ALJ noted that the pain diagram Claimant had pain in his shoulder blade, trapezius muscle area down the scapula on the left side.

21. Claimant returned to physical therapy on September 21, 2022 with Robyn Ignatowski, P.T. Claimant reported he continued to see improvement with this left shoulder pain, rating it at worst 2/10 on a pain scale. Ms. Ignatowski reported Claimant had returned to work full duty with good tolerance. She documented that Claimant had progressed very well with post-op rehab to date, recommend he finish the next week's scheduled therapy visits and then be discharged. The pain diagram for this visit showed Claimant reporting pain in his shoulder blade, trapezius muscle area down the scapula on the left side.

22. On September 28, 2022 Claimant again was evaluated by Ms. Ignatowski. She documented that Claimant had continued improvement in his left shoulder and rated his pain 3/10 at its worst. She documented Claimant was complying with his independent home exercise program (IHEP) and was ready to continue independently. He demonstrate minor deficits in AROM at end ranges secondary to stiffness. Otherwise he has had excellent recovery, had demonstrated ability to lift 50 lbs. and push/pull 145 lbs. on the sled without provocation of his familiar pain. He met all established goals for therapy and was discharged. Claimant continued to note pain in his shoulder blade, trapezius muscle area down the scapula on the left side, proximal to the glenohumeral joint and affecting the infraspinatus, supraspinatus and subacromial muscle areas on the pain diagram.

23. Dr. Pompei released Claimant at MMI on September 30, 2022. Claimant reported that he was working full duty without issue, had been taking over-the-counter

medications for pain control on rare occasions, had no acute complaints and was ready for case closure. Claimant continued to note pain in his shoulder blade, trapezius muscle area down the scapula on the left side, proximal to the glenohumeral joint and affecting the infraspinatus, supraspinatus and subacromial muscle areas on the pain diagram.

24. On October 4, 2022 Dr. Pompei conducted the impairment evaluation. On that day Claimant reported to Dr. Pompei that he had been diligent with his home exercises, had been swimming, which helped, and he had returned to full duty at work. Dr. Pompei evaluated Claimant's residual impairment in accordance with the *AMA Guides to the Evaluation of Permanent Impairment,* Third Edition (*Revised*). He determined that Claimant had an 8% upper extremity impairment due to loss of range of motion of the upper extremity, which converted to a 5% whole person impairment.

25. Respondents filed a Final Admission of Liability on October 21, 2022 admitting to the 8% extremity impairment, as a scheduled impairment. The FAL noted that Claimant's average weekly wage was $2,499.42 qualifying him for the maximum temporary total disability rate of $1,158.92 based on his February 15, 2022 date of injury. Claimant was 58 years old at the time he was placed at MMI.

26. Claimant timely objected and filed an Application for Hearing on November 18, 2022 on the issue of conversion of the upper extremity impairment to a whole person impairment based on the situs of the functional impairment. Claimant specifically accepted the admission on maintenance medical benefits under *Grover*.

27. Dr. Richard J. Pompei testified by deposition dated March 9, 2023 as a Board Certified expert in occupational medicine and as a Level II accredited physician. He took over Claimant's care when he started at Injury Care Associates, becoming Claimant's authorized treating physician. He reviewed the medical records including history of a lifting mechanism of injury while performing his essential job functions injuring his left shoulder and left low back. Dr. Pompei noted that, after starting physical therapy, Claimant's low back pain resolved but he continued to have left shoulder pain. They obtained an MRI, which showed rotator cuff pathology and warranted a referral to a surgeon. He noted that Dr. Schnell performed a rotator cuff repair, specifically a left shoulder arthroscopic supraspinatus, infraspinatus and subscapularis tendon repair, subacromial decompression, left shoulder open long head biceps tenodesis and extensive debridement.

28. Dr. Pompei explained that after the surgery, Claimant had a normal course of physical therapy. He clarified that every patient is different but it was typical to run PT for approximately four to six weeks postoperatively. He noted that Claimant remained with some motion deficits once he placed Claimant at maximum medical improvement (MMI) on September 30, 2022. He performed an impairment rating examination, which showed Claimant had an 8% scheduled impairment, which converted to a 5% whole person impairment, without apportionment. He explained that each of the tendons and corresponding musculature had a role in the associated loss of function, including the supraspinatus and infraspinatus in abduction and flexion. Dr. Pompei highlighted that the muscles going from proximal to the shoulder joint (proximal and behind his shirt seam), beyond from the scapula to the subscapularis assisted in the rotation of the arm. Further, the infraspinatus and supraspinatus assisted in the raising of the arm and simply raising

of the left shoulder would involve the infraspinatus and supraspinatus as well as crossing the arm in front of the body. He noted that the infraspinatus, supraspinatus and arthroscopic subacromial decompression repairs were proximal to the glenohumeral joint.

29. Claimant had reported to his providers that he was having difficulty sleeping. Dr. Pompei testified that this is an associated symptom and common for patients with post-surgical symptoms, like Claimant, because it put pressure on the surgical site, impinging the joint and the structures of the rotator cuff muscles. Claimant was using a TENS[1] Unit with electrodes that were likely placed along the upper back of the shoulder blade. Claimant noted on September 16, 2022 that he was having severe difficulty with sleeping due to the left shoulder pain, which did not surprise Dr. Pompei. He agreed that the shoulder was the scaffold upon which the arm sits. Dr. Pompei noted that the surgical sites took place in the glenohumeral joint and superior or above to the glenohumeral joint. This ALJ infers this to mean proximal to the joint.

30. Claimant testified at hearing that he had returned to full duty work but that he avoided overhead work with the left arm. He stated that he continued to have tightness in the neck and shoulder, with pain and discomfort, despite having returned to full duty work. Claimant stated he continued to have pain and discomfort over the top of the left shoulder, along the trapezius, including tenderness in the area. He stated that he had never had problems with the left shoulder before this work related injury. While the surgery relieved a great majority of the symptoms, he continued with pain while using his left upper extremity. The pain was also along the shoulder blade and trapezius muscle. He had problems with lifting weight, lifting overhead, and anxiety, though less following surgery. He especially had problems when he slept.

31. Prior to this injury, Claimant was a stomach sleeper and he had to change his habits, but while sleeping he still may turn on to the left shoulder or onto his back and has a lighting pain sensation that will invariably wake him during the night. He testified he had problems using the left arm for many things, including driving. While the TENS Unit does help, he continued to have difficulties with moving the left shoulder, including to do exercises like pull ups. Before this accident, pull ups were a normal part of Claimant's exercise routine but Dr. Schnell advised him to not perform any repetitive overhead work with the left arm. He would place the electrodes for the TENS along the muscles on the upper back, shoulder blade and the biceps. Claimant avoids lift over his head any longer, but rather, if boxes fall off of pallets, he puts the boxes on a 10-wheeler cart so he does not have to place them back on top of the tall pallets. He had to change how he dresses and puts on a shirt and how he buttons up his shirt to avoid putting his arm straight out or overhead. Reaching out and away from his body hurts the left side of his neck.

32. Claimant has difficulty changing lanes when driving as he has difficulty looking over his left shoulder to make sure he is safe to change lanes. He has to turn his whole body in order to see properly. The pain has continued to affect him in the neck, the left shoulder, along the shoulder blade and scapular region, which is commonly called the shoulder blade.

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[1] Transcutaneous electrical nerve stimulation (TENS), which produces mild electrical current to treat ongoing pain.

33. Claimant reviewed the last pain diagrams he completed on September 6 and September 12, 2020 during his last physical therapy sessions and September 16, 2020 during his visit with Dr. Pompei. He noted that he continued to have pain up to a 3/10, depending on activity levels, and the pain was mainly located on the upper back along the shoulder blade and trapezius muscles up to the shoulder joint or glenohumeral joint. Claimant stated that he had to rely on his right upper extremity to compensate for the left shoulder injury and continued to have pain when lifting with both upper extremities. He also has had problems pushing and pulling pallets full of boxes, especially when the pallets were not properly wrapped and the boxes on the pallet shift or fall, and he has to move the heavy cases.

34. Ronald Swarsen, M.D. testified on behalf of Claimant as an expert in occupational medicine, family medicine and as a Level II accredited physician. While Dr. Swarsen did not examine Claimant, he testified regarding the structures and anatomy of the shoulder, upper extremity and arm articulation. He noted that the shoulder girdle was the scaffold upon which the arm sits and functions, specifically that the arm could not articulate without the muscles and ligaments proximal to the glenohumeral joint. Dr. Swarsen explained that Claimant had tears of the subscapularis, supraspinatus and infraspinatus muscles, which attached to the head of the humerus and were torn off. The surgery performed by Dr. Schnell included reattaching the torn ligaments. He noted that three of the four major muscles were repaired during the surgery.[2] Dr. Swarsen explained that the sack that the muscles glided upon is a cushion of fluid but because there was impingement, Dr. Schnell removed the cushion to enlarge the acromion space. Dr. Swarsen further explained the surgical procedure where the anchors were placed by drilling the bone and securing the torn tendons. There was also extensive debridement and noted that Dr. Schnell caused bleeding to occur as that was a method of irrigating the site of the surgery to promote healing.

35. Dr. Swarsen reviewed the medical records in this case and explained that three of the surgical procedures occurred proximal to the glenohumeral joint. The fourth procedure occurred partly within the joint and distal to the joint humeral head. He noted that the trapezius had three portions which start at the base of the neck on the side of the spine, traverses and attaches to the spine of the scapula and function to help stabilize the scapula and pull it upward. The mid-portion pulls the scapula into the middle of the body. Dr. Swarsen explained that Claimant continues to have an irritated trapezius and supraspinatus, which are proximal to the glenohumeral joint.

36. Dr. Swarsen reviewed Dr. Pompei's impairment rating report and agreed that Claimant has a whole person impairment rating because his continuing loss of function as well as his injury were all proximal to the glenohumeral joint, located in and around the shoulder blade and on the trunk of the body. Dr. Swarsen noted that the range of motion would not be possible without the structures of the shoulder blade and therefore all of the loss of ROM should be considered as a whole person. Dr. Swarsen explained that Claimant's symptoms involved the neck and trapezius muscles. He remarked that Claimant suffered recruitment of the muscles surrounding his left shoulder because of the pain from his work-related injury.

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[2] The fourth muscle that was not affected was the teres muscle.

37. Dr. Swarsen expounded that during the hearing Claimant would point to his neck and upper back to explain where he was continuing to have pain and discomfort, including the trapezius muscle, which was not uncommon for the kind of injury Claimant had. Claimant's loss of range of motion originated in the scapula with complex movements of the muscle tissue of the muscles attached to the trunk of the body in order to accomplish any movement of the upper extremity. In essence, the loss of function as demonstrated by Claimant continued to be in the trapezius muscle, causing the situs of functional impairment to be to the muscle tissue that is proximal to the shoulder joint.

38. As found, Claimant established that it is more probably true than not that his left upper extremity rating should be converted to a whole person impairment. As found, medical records reflect that throughout the course of Claimant's medical care, all treatment involved the shoulder and not the arm. As found, Claimant continues to experience issues with sleep and left shoulder pain that is located proximal to the glenohumeral joint and specifically over the trapezius area on the upper back. Claimant continues to modify how he performs his current job duties so that he protects his left shoulder and is overcompensating with his right upper extremity. He credibly testified that he has pain at the base of the trapezius into the scapula running along the top and at the front of his left shoulder. Claimant remarked that when he changes lanes in traffic, he needs to turn his whole body to see oncoming traffic as he has difficulty looking over his shoulder. He also now puts on shirts with his left arm first. Finally, Claimant noted that rolling onto his left shoulder interrupts his sleep.

39. Dr. Swarsen persuasively explained that Claimant suffered a functional impairment proximal to the glenohumeral joint, the scheduled rating issued by Dr. Pompei should be converted into a whole person impairment, and Claimant's symptoms involved the neck, trapezius, and rhomboid muscles, which are proximal to the glenohumeral joint. Dr. Swarsen credibly opined that most of the Claimant's surgical procedures on April 7, 2022 (three of the four procedures) occurred above the plane of the glenohumeral joint in the left shoulder. He persuasively explained that the Claimant suffered recruitment of muscles surrounding his left shoulder because of the pain from his work-related injury, and that it was common for injured workers undergoing surgery of the shoulder to suffer dysfunction and pain in the area of the trapezius muscles. He explained that the trapezius muscle is above both the glenohumeral joint and arm, on the trunk of the body. As found, Dr. Swarsen credibly and persuasively opined that the situs of Claimant's functional impairment was above the arm at the shoulder in the area of the trapezius and the Claimant's impairment should be converted to a whole person impairment.

40. Claimant's authorized treating provider's, Dr. Pompei's, credible testimony corroborated Dr. Swarsen's opinion that the majority of the surgeries occurred above the glenohumeral joint. Dr. Pompei also agreed that Claimant's left arm sustained no anatomical disruption to account for the loss of motion, but that Claimant's impairment was to the Claimant's whole person upper extremity, which was a 5 % whole person impairment in accordance with the *AMA Guides* due to diminished motion from the anatomical disruption of the tissues of the rotator cuff tendons and the attached muscles in the torso. As Dr. Swarsen remarked, Claimant suffered recruitment of the muscles surrounding his left shoulder because of the pain from his industrial injury. Dr. Swarsen also persuasively opined that it was common for injured workers undergoing surgery of

the shoulder to suffer dysfunction and pain in the area of the trapezius muscle. As found and concluded, based on the medical records, Claimant's credible testimony and the persuasive opinions of Dr. Swarsen and Dr. Pompei, Claimant suffered a functional impairment above the glenohumeral joint in his left shoulder as a result of his February 15, 2022 admitted work related injury. Accordingly, Claimant has established by a preponderance of the evidence that the 8% scheduled left upper extremity impairment rating issued by Dr. Pompei should be converted into a 5% whole person rating.

41. Testimony and evidence inconsistent with the above findings is either not relevant, credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay

witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Conversion of the impairment

If Claimant sustains an injury not found on the schedule of injuries, Sec. 8-42-107(1)(b), C.R.S. provides Claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes, the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

The "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. 4-240-315 (ICAO, June 11, 1998). If the claimant has a functional impairment to part(s) of his body other than the "arm," he has sustained a whole person impairment and must be compensated under Sec. 8-42-107(8), C.R.S. Whether a claimant has suffered the loss of an arm at the shoulder under Sec. 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under Sec. 8-42-107(8)(c), C.R.S. is determined on a case-by-case basis. *See Delaney v. ICAO*, 30 P.3d 691 (Colo. App. 2000).

Under this test, an ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment'" and constitute a functional impairment for purposes of assigning a whole person impairment rating. *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002). Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled

or whole person impairment. *See, e.g., Martinez v. Albertson's LLC, supra.* ("The [claimant's] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint"). The mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021). However, pain affecting the trapezius, difficulty sleeping on the injured side or limitations on overhead reaching can constitute functional impairment beyond the arm at the shoulder and be appropriate for conversion to a whole person impairment. *Martinez v. Albertson's LLC*, *supra; Brown v. City of Aurora*, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004).

As found, Claimant met his burden of proof and established by a preponderance of the evidence he was entitled to permanent partial disability benefits based upon a whole person medical impairment rating. The medical evidence in the form of treatment records provided objective evidence that anatomical structures beyond the shoulder joint were involved. Dr. Schnell performed surgery on structures that were proximal to the glenohumeral joint and arm. Dr. Pompei's and Dr. Swarsen's opinions also supported this conclusion. In addition, Dr. Swarsen's expert testimony was persuasive on this subject, as well, that the surgery took place in anatomical areas of the body that were proximal to the shoulder joint. Dr. Swarsen was also persuasive that the majority of Claimant's impediments arise from Claimant's dysfunction caused by pain in the trapezius, and supraspinatus areas, which activate when using the upper extremity.[3] Multiple providers, including ATPs and therapists noted that Claimant had pain and tenderness in the trapezius and the pain diagrams consistently showed pain along the trapezius.

More importantly, Claimant credibly described pain and associated functional limitation in areas proximal to his arm such as the scapula and trapezius. This pain affected his ability to engage in various activities, including overhead reaching, looking over his shoulder while driving, protecting his left upper extremity while working, overcompensating with his right upper extremity, and interruption of his sleep due to pain in the left trapezius. Claimant's testimony regarding the injury to his left shoulder and its sequelae provided the factual support for this ALJ to find that Claimant has a functional impairment to parts of the body located on his truck/upper back along the trapezius muscle and support the determination that the situs of the functional impairment should entitle Claimant to a whole person rating. The ALJ also finds that Respondent presented no credible evidence to contravene the finding that structures beyond the shoulder joint were implicated. Based upon the totality of evidence presented at hearing, the ALJ determines, finds, and concludes Claimant showed he sustained a functional impairment that extends beyond the "arm at shoulder."

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[3] This ALJ declines to read the *AMA Guides* in the manner that Respondents propose (that the arm at the shoulder is equivalent to the upper extremity and therefore the structures of the shoulder girdle are part of the arm, not the trunk.) In fact, this ALJ reads the statutory provision of the "arm at the shoulder" to mean that the arm ends at the shoulder junction of the ball and socket or the glenohumeral joint.

Dr. Pompei provided an 8% scheduled rating, which converted to 5% whole person. Neither party requested a DIME, so Dr. Pompei's rating is binding under Sec. 8-42-107.2(b), C.R.S. Claimant is entitled to PPD benefits based on Dr. Pompei's 5% whole person rating. Claimant was 58 years old when he was placed at MMI on September 30, 2022. His TTD rate was $1.158.92. Therefore, 5% whole person provides PPD in the amount of $24,105.54.

ORDER

IT IS THEREFORE ORDERED:

1. Insurer shall pay Claimant PPD benefits based on Dr. Pompei's 5% whole person rating in the amount of $24,105.54.

2. Insurer may take credit for any PPD benefits previously paid to Claimant in connection with this claim.

3. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

4. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 6th day of April, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-147-151-004

PROCEDURAL HISTORY

On July 19, 2022 Respondent filed an Application for Hearing on issues which included overcoming the DIME physician's opinions by clear and convincing evidence, causation, failure to comply with modified job offer and unauthorized medical care, as well as offsets, overpayment and credits.

Claimant filed a Response to Application for Hearing on August 18, 2022 listing the issues of medical benefits that were authorized, reasonable and necessary, temporary total and temporary partial disability benefits, and defense of the DIME physician's opinion and defense to failure to comply with modified job offer.

The parties submitted the Stipulation of Facts on March 29, 2023. The Stipulation of Facts are accepted and approved. The Stipulation of Facts are the official transcript for the November 15, 2022 hearing.

ISSUES

I. Whether Respondent proved by clear and convincing evidence that the Division of Workers' Compensation Independent Medical Examination (DIME) physician, Dr. Ranee Shenoi, was incorrect in her findings of causation, maximum medical improvement (MMI), and permanent partial impairment.

II. What were Claimant's permanent partial impairments related to the work injury, if any.

III. Whether Claimant has shown by a preponderance of the evidence that she sustained a loss of wages from March 29, 2021 through MMI.

IV. Whether Respondent has shown by a preponderance of the evidence that Claimant was responsible for her wage loss and Respondent entitled to recoup an overpayment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Generally:

1. Claimant worked for Employer as a bus driver since approximately 2018. As part of her job, she conducted a pre-trip inspections of the bus. She had to open the hood of the bus, check oil and everything under the hood to make sure it was in working order. She had to do a break test, check windows and seats, check the First Aid kits, the tires, bolts, lights, dings or damage to the bus. The pre-trip inspection allotted time was

12 minutes but sometimes it took more time to complete it. Then she would be ready to proceed with her route. She would pick up elementary, middle school and high school children on her route. The preschoolers had paraprofessionals sometimes ride with them during the noon time. She never really had any problems with the kids, and she did not normally have do much lifting other than the heavy bus hood. The job required her to lift 50 lbs. minimum to qualify for the job. Claimant did not have any problems doing her day to day activities related to the job before her accident. She stated that she liked the summers off because it gave her time to recoup and recharge.

2. On a snowy day, on November 11, 2019, she slipped on ice when stepping up onto a curb. She had a bag in her left hand and a purse in her other hand. She slipped in a split with each leg going opposite ways. Another coworker went to grab her on her way down. She fell onto her big bag and her left leg, hitting the ground, but not all of her body fell to the ground. She did not specifically hit her head or her shoulder. One of her hands did hit the ground. She jarred her body but she did finish her bus route. She reported it to her supervisor and was seen by Dr. Matus on the date of her accident.

3. Claimant stated that she had no prior problems or injuries prior to the November 11, 2019 event. This ALJ does not find this particularly credible since Claimant injured her left lower extremity, specifically had a bone spur in her left heel in 2000, including a surgery to her left heel,[1] and had a neck whiplash injury in the 1980s, as documented in the medical records.

B. <u>Medical records</u>:

4. Claimant was evaluated by Dr. Brenden Matus at WorkWell on March 10, 2020.[2] Dr. Matus noted the patient was feeling a bit better. She had a flare with a particular stretch. Claimant had pain present in the mid-to-low back and left foot. Her pain rating was 7/10. She had "upper back neck tension and paresthesias in the right ulnar nerve distribution since her last massage." Dr. Matus stated he would monitor this problem. He further stated that if she continued to have left foot pain, he would order an MRI of the left foot and ankle as well as refer her to Dr. Myers.

5. On May 15, 2020 Claimant was evaluated by Dr. Bruce Cazden at WorkWell. He noted the mechanism of injury of November 11, 2019 when Claimant slipped on ice while stepping up on a curb with her left leg. She reported right mid to low back pain from slipping and left foot and ankle pain. He specifically noted that "[S]he has new symptoms of neck pain with numbness and tingling in both upper extremities. It does not appear that this is related to her work comp claim." He did not diagnose the neck condition as work related.

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[1] See Dr. McCranie's, Dr. Chan's and Dr. Shenoi's past medical history and surgery sections on Exhibit F, bate 031; Exh. M, bate 90, and Exh. N. bate 99.

[2] Records between November 11, 2019 and March 10, 2020, where not in evidence, only other providers' summaries of the visits, including physical therapy and massage therapy visits. This ALJ chose to rely on the descriptions from those records.

6. An MRI[3] of the cervical spine from July 14, 2020 showed degenerative disc and joint changes with mild dural sac indentation and multilevel bilateral foraminal narrowing.

7. Samuel Chan, M.D. evaluated Claimant on July 24, 2020. He took a history consistent with that described by Claimant and other providers. He specifically noted that claimant had landed on her left foot and continued to have problems with the left foot, low back, interscapular area and cervical spine. Claimant reported that her treatment plan was somewhat interrupted because of the COVID pandemic. He documented that Dr. Myers was treating her for the left foot pain and recommended she obtain HOKA shoes. He reviewed all of Dr. Matus' records. He reviewed both the x-rays of the foot and the MRI of the ankle and foot. They showed moderate anterior talofibular and mild deltoid ligament sprains as well as suspected hammertoe deformities but were otherwise normal. Dr. Chan documented that Dr. Matus continued to cite to Claimant's ongoing cervical spine complaints. On exam he noted that Claimant was tender to palpation of right greater and lesser occipital nerve insertion areas. There was also tenderness to palpation of right trapezius, levator scapulae, and splenius capitis muscles, with active trigger points noted. Tenderness to the bilateral AC joints but otherwise a normal cervical spine exam. He noted negative lumbar spine exam but tenderness to palpation of the calcaneus, sinus tarsi and downgoing toes bilaterally. He diagnosed bilateral occipital neuralgia, migraine syndrome and myalgia. He recommended trigger point injections for the occipital neuralgia, which he proceeded to perform.

8. The initial visit with Dr. Barry Ogin was on November 9, 2020 when Dr. Ogin took a fairly long history. Claimant was referred to Dr. Ogin by Dr. Matus with ongoing complaints of neck and cervicogenic headaches. He noted that Claimant had a comprehensive course of conservative care including physical therapy, massage therapy, dry needling and trigger point injections, and medications. Claimant reported that her low back pain only gave her occasional problems. He noted that Claimant's chief complaint was her neck, including aching and stiffness centrally but worse on the left hand than on the right side. She reported daily headaches and radiation into her shoulders and upper back centrally. Claimant had full shoulder range of motion without pain, scapular retraction and protraction was symmetric, she had full active range of motion of the cervical spine including with flexion, extension, right and left rotation, right and left lateral flexion. She was not reporting any numbness and tingling at that time. Dr. Ogin recommended medial branch block to the cervical spine given the MRI indications and, per the guidelines p. 28, physical examination findings consistent with facet origin pain, at least 3 months of pain, unresponsive to conservative care, including manual therapy, and has a positive psychosocial screen without aberrant concerns.

9. Dr. Ogin also documented that on December 10, 2020 she had a 100% relief following a cervical facet injection at the C2-5 bilateral MBB.

10. Dr. Ogin's report noted responses for December 18, 2020 that Claimant was three days post medial branch block (MMB) and her neck and headaches were feeling better with a good diagnostic response though the pain was gradually returning.

[3] Description taken from multiple medical records, including Dr. Ogin's March 11, 2021 report, as the original report was not in evidence.

She also complained of tingling and numbness down her left arm and into her left fourth and fifth fingers of the left hand.

11. On March 11, 2021 Dr. Ogin took a history that Claimant had increasing pain along her parascapular region, with severe pain in her right upper shoulder, down her medial arm to her hand, along the ulnar distribution. She also complained of pain in her sternum. She denied any new injuries other that the fact that she had returned to driving and had to hold out her arms to hold the steering wheel. His diagnosis and assessment was sprain of the ligaments of the cervical spine, including cervical facet joint syndrome, cervical pain, myalgia, cervical stenosis and cervical disc disorder with radiculopathy of mid-cervical region. He noted that the upper neck and headaches had responded to treatment but that, following performing an EMG which revealed a right C8-T1 radiculopathy. After a re-review of the MRI, the multi-level degenerative disc with spinal stenosis was more prevalent in the C5-C7. With that in mind, he recommended a C7-T1 epidural steroid injection.

12. On April 11, 2021, Dr. Paul Ogden responded to a request to approve a modified job offer, which included assembling and bagging hoagie sandwiches, assisting administrative personnel, and watching videos. Dr. Ogden added that "[B]ased on the restrictions of March 29, 2021 of avoiding reaching out or overhead" as well as allowing "position changes sit/stand/walk every 20-30 minutes" that Claimant was able to perform the tasks listed.

13. Respondent scheduled Claimant for an Independent Medical Evaluation (IME) with Dr. Kathy McCranie which took place on June 15, 2021. She took a history, which included the event of November 11, 2019 as well as an incident where she was cleaning out a closet and had an immediate onset of symptoms into her upper extremities and neck. She noted Claimant's recall of her medical treatment including that she did not have any benefit from the trigger point injections but had 100% immediate relief from the epidural steroid injections, though they lasted for a fairly short time before symptoms started to return. She also reviewed the medical records. Dr. McCranie opined that Claimant sustained both a lumbar strain and a strain of the foot and ankle, both of which resolved. She opined that Claimant's continuing complaints involving the cervical spine and the right greater than left upper extremity paresthesias, which were not documented until March 10, 2020, were not work related conditions. Lastly, Dr. McCranie opined that the right shoulder labral tear was not related to the November 11, 2019, injury, as an acute labral tear would cause immediate, severe pain in the shoulder and Claimant did not report shoulder pain for approximately seven months post-accident. Dr. McCranie further stated that, while the treatment for the cervical spine and shoulder were reasonably necessary, they were not causally related to the November 11, 2019 work injury.

14. Dr. McCranie stated as follows:

> [Claimant] has reached MMI for her work-related lumbar and left foot injury. She would have reached maximum medical improvement by July 6, 2020. At that time, her back symptoms had resolved and her left ankle symptoms were very minimal. Considering complete resolution of her lumbar symptomatology, normal examination of the lumbar spine, and full lumbar range of motion; there is no

> permanent impairment of the lumbar spine. Similarly in the left ankle, she has had complete resolution at this time of her left ankle pain with full range of motion. Therefore, there is no impairment of the left ankle.
>
> It is my impression that the cervical spine is not accident related, making an impairment rating non-applicable. If, however, this condition is deemed to be accident related for administrative purposes, an impairment rating was performed as it is my opinion that she is at MMI for the cervical spine regardless of causality. For degenerative changes in the cervical spine, she would receive a 6% impairment with a 4% impairment for range of motion as her sensory examination was normal. Motor examination revealed some weakness in the ulnar distribution, more likely related to findings of peripheral neuropathy. If the cervical spine is deemed to be accident related, impairment would be 10% whole person. As noted previously, it is my opinion, however, that this impairment is not accident related. Regarding the right shoulder, it is my opinion that this impairment is not accident related. She is currently involved in ongoing workup of the right shoulder and if this is deemed accident related, this is not yet at MMI. However, it is my opinion, this should be treated outside of the worker's compensation arena for the reasons outlined above.

15. On June 21, 2021 Dr. Matus issued a report which included a description of Claimant's treatment to date. He noted his diagnosis as a work related fall injury with a strain of the low back and other muscle spasms, and strain of the muscles and tendons of the ankle and foot and the objective findings of those injuries were consistent with the history and mechanism of injury.[4] His physical exam revealed full range of motion of the cervical spine though Claimant reported tenderness on palpation of the right paraspinous muscles and trapezius muscles on the right, but no midline cervical spine tenderness. Back pain was causing minimal to some difficulty in daily life and left ankle had very minimal pain. Dr. Matus provided restrictions of limited use of the right upper extremity, avoid repetitive reaching out or overhead; limited lift, push and pull of 5 pounds maximum, and should be allowed to change positions regularly between sit/stand/walk at least every 20-30 minutes; and referred her to Dr. Primack for a final evaluation and impairment rating.[5]

16. Claimant was placed at maximum medical improvement on July 9, 2021 by Dr. Matus without restrictions or impairment. Dr. Matus agreed with the IME examiner, Dr. McCranie that the cervical spine, headaches and shoulder conditions were not work related injuries and should be treated by Claimant's PCP, if Claimant continued to have ongoing complaints regarding those problems. He did not provide a diagnosis for the neck, nor did he show in his report that he performed an impairment rating for the related low back or left lower extremity. Yet he continued to document that back pain was causing minimal to some difficulty in daily life and left ankle had very minimal pain. Dr. Matus stated "[W]e have agreed to target Maximum medical improvement status, Injury related symptoms resolved, ongoing non related symptoms." As found, Dr. Matus placed

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[4] As found, the section in Dr. Matus' June 21, 2021 and July 9, 2021 reports under "Case Summary" (Exh. H, bates 054-055; Exh. I, bate 065-066) are summaries of other providers' diagnosis, opinions and recommendations for treatment and were not necessarily adopted by Dr. Matus.

[5] The evaluation with Dr. Primack did not take place, according to the medical records and the parties statements at hearing.

Claimant at MMI as of July 9, 2021 noting that only the low back and left lower extremity injuries were related to the November 11, 2019 work injury. As further found, he did not perform an impairment rating with regard to either condition but considered them resolved.

17. On July 22, 2021 Respondent filed a Final Admission of Liability. Claimant objected and requested a Division Independent Medical Evaluation (DIME).

18. Dr. Ranee Shenoi was selected as the DIME physician. She evaluated Claimant on October 12, 2021 and issued her report on October 21, 2022. She opined that Claimant reached MMI on July 9, 2021 and had a 7% whole person impairment related to the cervical spine, including 4% for specific disorder of the spine (Table 53 IIB), a 2% for loss of range of motion, and 1% for neurologic system (loss of strength). Dr. Shenoi stated that she was asked to evaluate the cervical, thoracic and lumbar spine as well as the left foot. She stated "[A]s the DIME Examiner, I will address MMI and impairment. I will not address causation."

19. Dr. Shenoi opined that Claimant had reached MMI on July 9, 2021. She stated that the DIME application did not request she address the bilateral shoulder problems and she believed that the thoracic spine issues were coming directly from the shoulder pathology. Based on the *AMA Guides* she opined that the left foot injury provided a 1.25% impairment of the lower extremity which converted to 0% whole person impairment of the foot based on the peroneal nerve injury for altered sensation.

20. Dr. Shenoi asked Claimant what complaints were related to the work injury and she related sleep problems, pain in her right shoulder, arm, elbow and hand, including burning in the right axillary line and that her hand would get cold. She reported multiple neck complaints, going across her shoulders, which radiated into her chest and sternum as well as the right upper extremity. She reported headaches that were only intermittent. She also reported low back and left foot pain as well as ringing in her ears. As found, Dr. Shenoi only provided an impairment rating for the neck and foot, without providing a causation analysis of the body parts for which she was providing an impairment ratings. Further, she did not rate the lumbar spine or go through the process to assess the lumbar spine range of motion.

21. Dr. McCranie issued a supplemental report on November 5, 2021. Dr. McCranie specifically commented regarding the DIME physician's report. She noted that Dr. Shenoi had specifically erred by failing to perform a causation analysis. She noted as follows:

> A causation analysis is necessary in order to determine if the body part to be rated is applicable for a work-related impairment rating. By stating that she made no causation analysis, Dr. Shenoi is indicating that she is not making an opinion as to whether the rating provided is applicable to the work injury. The rating itself was otherwise technically correct. However, without any causation analysis, there is no indication that the impairment rating is applicable to the work injury of November 11, 2019. According to Desk Aid 11 impairment rating tips number 7, division independent medical examiner may declare that a condition is not work related. This may occur despite the fact the payer has accepted a body part or a diagnosis as part of the claim. In [Claimant]'s case, treatment has occurred and MMI has

been declared by an authorized provider. Considering the late onset of [Claimant]'s cervical symptoms, and a new non-accident-related event that caused the onset of these symptoms in April of 2020, it was essential that Dr. Shenoi perform a causation analysis in order to opine as to the relatedness of the cervical impairment.

C. <u>Dr. McCranie's Deposition:</u>

22. Dr. McCranie testified by deposition on June 1, 2022 as a board certified physiatrist and pain medicine specialist, with a Level II accreditation. She noted that she continued to see both private patients, including at Concentra twice a week, and patients for medicolegal evaluations with approximately 30 years of experience. Dr. McCranie indicated she was familiar with the *AMA Guides to the Evaluation of Permanent Impairment,* Third Edition (*Revised*), WCRP and the Impairment Rating Tips of the Colorado Division of Workers Compensation.[6] She specifically noted that Rule 11-3(K) required that each DIME physician make "all relevant findings regarding MMI, permanent impairment, and apportionment of impairment, unless otherwise ordered by an ALJ." Dr. McCranie stated that a causation analysis was an integral part of conducting a determination of permanent impairment. She specified that physician were required to comply with the Rules, the Division materials and Level II accreditation coursework.

23. Dr. McCranie testified that following the review of the medical records and consideration of the history provided by Claimant, March 10, 2020 was the first medically documented problem, including some tension in her neck and some right upper extremity paresthesias. The first documented pain in her cervical spine/neck was on May 15, 2020. Dr. McCranie explained that in order to link a cervical injury to the original date of injury, there needed to be a temporal relationship between the onset of symptoms and the initial accident, which was not present in this case. What was significant here is that Claimant reported to Dr. McCranie that she was cleaning out her closet in April of 2020, and she was reaching, lifting and moving some hair products, towels and sheets from her closet, and had an acute onset of neck pain and right shoulder pain at the point that brought on a lot of these symptoms, which was a more probable cause of Claimant's neck and shoulder pain.

24. Dr. McCranie specifically noted that Dr. Shenoi was aware that the medical records indicated Claimant had not reported any problems until the March 10, 2020 date when she reported tension in her upper back and neck, that Dr. Shenoi was aware of the "closet" incident, but that Claimant had stated that she had felt a pop in physical therapy as an explanation of when she started to have problems in her neck and upper back. Dr. McCranie explained that it was incorrect to simply rely on a Claimant's claim that any particular injured body part was caused by the injury but it was up to the DIME physician to make and explain the causation analysis. As a DIME physician, it is up to that physician to determine the injuries or body parts that are causally related to the work injury in question and the DIME physician cannot rely on the items check off on the Application for

[6] Division's Desk Aid No. 11, Impairment Rating Tips, Division of Workers Compensation Rules of Procedure.

a DIME. Finally, Dr. McCranie opined that Dr. Shenoi committed a clear error in addressing MMI and impairment and declining to address causation of the particular body parts, which rendered her opinions on impairment clearly incorrect under the *AMA Guides*, Third Edition, and the Division training material. Dr. McCranie stated that based on the Division's Rules of Procedures specifically dealing with DIMEs and Level II accreditation, the Division's Impairment Ratings Tips, the training for recertification, the requirement that physicians utilize the methodology in the *AMA Guides*, Third Edition, it is absolutely incumbent on a DIME physician to do a causation analysis.[7] Dr. McCranie also suggested that Dr. Shenoi relied on the fact that the ATPs had provided treatment which was paid for by Respondents. This ALJ agrees with Dr. McCranie's inference that in relying on the fact that Respondent paid for the treatment for the cervical spine that it justifies addressing impairment to that body part as related to the November 11, 2019 work injury, which is clearly incorrect.

25. Dr. McCranie cited to the Impairment Rating Tips. The Section on DIME Panel Physician Notes, under Section 7, the tips emphasize as follows:

> Declaring Condition is Not Related to Injury: Division Independent Medical Examiners may declare a condition is not work-related. This may occur despite the fact a payer has accepted a body part or diagnosis as part of the claim, treatment has occurred, and MMI has been declared by the authorized provider. If this situation arises, an impairment rating must be provided in the report or as an addendum to the DIME report. This information will often be used by the parties for further negotiations and/or settlement of the claim. However, only the work-related impairment ratings are to be recorded on the DIME Examiner's Summary Sheet.

D. Dr. McCranie's Hearing Testimony:

26. Dr. McCranie's testimony at hearing was consistent with her testimony during the deposition and her reports. She opined that, considering the degenerative disc disease in the spine as verified by the MRI report of the cervical spine and the evidence of acute injury sometime in April or May 2020, when she reported excruciating pain, the incident of the closet was the more likely cause of the neck injury. Further, Dr. McCranie did explain, that sometimes, ATPs take time to make a final causation analysis, which Dr. Matus provided in his MMI report. She opined that the fact that Claimant was sent to multiple providers, including Drs. Chan, Ogin, and Castro, for the neck injuries, was not a *de facto* determination of causation.

27. Dr. McCranie opined that Dr. Shenoi's failure to specifically address causation in her DIME report was clearly incorrect. She explained that, based upon her understanding of the Division of Worker's Compensation Rating Tips, the *AMA Guides to the Evaluation of Permanent Impairment*, Third Ed. (*Revised*), and other medical publications that the failure to perform or provide a causation analysis to support her cervical impairment rating rendered her opinion on medical impairment clearly incorrect

[7] At hearing Dr. McCranie explained that the *AMA Guides to the Evaluation of Disease and Injury Causation* explains a somewhat different and more expansive methodology of causation determinations. However, This ALJ will only rely on the law and rules applicable in this matter.

because a DIME physician must do a causation analysis for every body part that is rated and that it is insufficient and contrary to the impairment rating tips simply because the claimant had received treatment for the body part to provide a rating. Dr. McCranie also explained that the causation analysis required both an explanation of the temporal relationship of when the symptoms manifested as well as an analysis of the mechanism of injury. Dr. McCranie opined that without this analysis regarding the initial causation, the entire rating process was defective.

E. <u>Risk Manager's Testimony:</u>

28. The Risk Manager for Employer (Redacted, hereinafter JO) testified at hearing in this matter. She stated that she handled the workers' compensation claims until the excess policy carrier was activated by large expenses. As the Risk Manager she managed, monitored, reviewed, and made decisions with regard to workers' compensation claims and liability. She was generally involved from day one of a claim. She was the one that issued the First Reports of Injury (FROI) and made sure she was getting the M-164 forms to determine a worker's work status. She commented that she stayed involved in a case until the end of the claim.

29. The Risk Manager explained that Employer saw claims from the perspective of getting workers back to work, so they may authorize medical care that may not necessarily be related to the particular work accident. Employer would frequently request that providers conduct diagnostic testing early on in the case instead of delaying the process, in the hope that conservative care would work and the worker would get back to work sooner.

30. JO[Redacted] was involved in the case, however, a younger adjuster through the third party administrator, who may not have felt confident enough to question the ATP's causation analysis, was handling the day to day issues. JO[Redacted] testified she might have handled this case differently but she had a wealth of approximately 30 years' experience. It was clear that the adjuster continued to authorize care despite a lack of a good causation analysis, until she, as the Employer's Risk Manager, requested the IME with Dr. McCranie.

31. The Risk Manager was very familiar with the modified job offers made to Claimant and was involved in the process. The February 9, 2021 offer was for Claimant to perform some office work and watch safety videos (approximately 50 of them) in order to keep Claimant busy and engaged in work activities. Dr. Matus authorized this modified job offer on the same day and Employer sent the offer of modified work for Claimant to start on February 15, 2021. On March 28, 2021 Claimant advised her supervisor that she had completed the safety videos so modified duty was terminated.

32. Based on the FAL of July 22, 2021, Claimant was originally paid regular salary through December 12, 2019 (pursuant to Sec. 8-42-124, C.R.S.) at which time the Third Party Administrator paid TTD benefits beginning December 13, 2019 through January 27, 2021. Then Claimant was paid temporary partial disability (TPD) on January

28 for one day and TTD resumed as of February 1, 2021 through February 15, 2021. As of February 18, 2021[8] Claimant was paid TPD until March 28, 2021.

33. Then JO[Redacted] worked with Nutrition Services because they were frequently understaffed. At that time they were making sandwiches for the lunch truck that was provided to the children and community. They were to have Claimant sitting at a conference room table, where other workers would bring the ingredients and Claimant could make the sandwiches.

34. JO[Redacted] stated that Claimant never went back and that Dr. Matus had said that the job was within her restrictions. The Risk Manager stated that Claimant was not placed back on temporary total disability because Claimant was the one to violate the April 9, 2021 Rule 6 offer of modified employment and that the job was still available. Then school ended on May 27, 2021, and because the bus drivers were paid on a twelve month cycle despite summer time off, they restarted to pay regular wages, despite Claimant not working.

35. JO[Redacted] stated that while the pay check periods showed payment at the end of the month, the period of payment was not correct because Employer's pay period was really from the middle of the month through the middle of the following month. This ALJ infers from this testimony that, for example, the March 31, 2021 pay check actually paid from February 15 through March 14, 2021. This was confirmed by Claimant.

36. JO[Redacted] was on vacation through April 26, 2021 and prepared a letter to Dr. Matus, which was sent on May 13, 2021 with a job description of assembling and bagging hoagie sandwiches. On May 14, 2021 Dr. Matus answered stating that the prior restrictions provided by Dr. Ogden were still applicable, as long as the job did not require any work lifting greater than 10 lbs. and that Claimant be able to keep her arm close to her side. As found, this is a new restriction as of May 14, 2021.

37. Respondent argued that Employer should be entitled to a reimbursement for overpayment to Employer of the 24 hours paid to Claimant at the rate of $20.75 per hour for a total of $498.00, if Claimant was entitled to temporary disability benefits. JO[Redacted] stated that this was for the period of April 27, 2021 through April 30, 2021 paid by Employer.

38. JO[Redacted] testified that Claimant returned to work at full wages as of March 29, 2021 and temporary partial disability benefits stopped per the Final Admission of Liability (FAL) dated July 22, 2021.

39. The statement of earnings showed that in March[9] 2021 Claimant was paid $2,033.49,[10] in April 2021 she was paid $1,523.67, in May she was not paid any wages, in June she was paid $814.44 and in July she was paid $814.44 as well.

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[8] There was no explanation as to why Claimant was not paid for February 16 and 17, 2021, but it does show on the time log that she worked 6 hours a day for both days and it is to be assumed that those hours were paid by Employer.

[9] Pay periods were calculated on a monthly bases from the first to the last day of any given month and paid generally on the last day of the month.

[10] This ALJ was unable to reach the same calculation by Employer, at least with the March 31, 2021 Employee Statement of Earnings. Claimant's rate of pay was $20.75. The accrual wages showed 108

40. The hours worked print out showed Claimant working from March 29, 2021 through April 9 2021. This is consistent with what the Risk Manager testified, with the exception that it did not seem that Claimant worked her full hours all days following March 29, 2021. In fact, there were some periods that were listed as "Leave Without Pay."

F. Other Evidence:

41. On May 21, 2021 Claimant secured the signature of the supervisor approving the note stating that Claimant had showed up for work on April 26, 2021 but spoke with both the Nutrition Services Manager (supervisor) and her assistant (JC), that she was unable to make the sandwiches because of the repetitive nature of the job. The supervisor confirmed that she took down Claimant's phone number and advised Claimant to go home. The Manager further confirmed that she would call Claimant "when she found out what they should do." Claimant's testimony in this matter is found credible and supported by the supervisor's signature on the note.

42. The note further stated that Claimant worked on April 22, 2021[11] and could punch the clock at Nutrition Services but the "Oracle" system would not take her badge number. The time clock report at Exhibit Q, bate 134 seems to indicate that Claimant did, in fact, work on April 22 as it reports "5 Trans_Bus Cleaning" and provides a rate of pay. It is also clear from this print out that Claimant's work was not logged into this system after April 22, 2021. However, Claimant reported working May 24, 25, and 27, 2021 and on June 1, 2021 she received instructions from the Risk Manager to enter May 28, 2021 as work injury leave.[12] Therefore the hourly payroll print out is clearly erroneous. Also, no payroll was paid in May and the June payroll earnings statement does not include any hours worked.[13]

43. A second note dated May 24, 2021 stated that on April 23, 2021 Claimant showed up for her work shift but was in pain, feeling she needed to see her doctor, so she would not be working. The front desk receptionist agreed and noted that she would let "them" know.

44. The third note dated May 27, 2021 stated Claimant worked hours for May 24, 25, and 27, 2021. It noted Claimant was working without breaks, took May 26, 2021 off as a personal day, and on May 28, 2021, pursuant to the Assistant, JC, that she should not go into work. Claimant stated this document was signed by another supervisor (JCS-D). These dates and times were also sent to the Risk Manager, who confirmed that May 28, 2021 should be entered as work injury leave.[14]

G. Claimant's Testimony:

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hours were paid at $1,960.88. However, 108 hours multiplied by $20.75 equals $2,241.00 not $1,960.88. Even if we deduct the leave without pay of 11.50 hours from the 108 hours, that would total 96.5 hours times $20.75 for $2,002.37. There may be something this ALJ is not aware of and certainly was not clarified during JO[Redacted] testimony or Claimant's testimony.

[11] The note showed the year 2020 but given the time line of work and when work was offered, this ALJ infers that the correct year was 2021.

[12] Exh. 8.

[13] Exh. P, bates 111-112.

[14] Exh. 8.

45. Claimant testified that she continued to suffer from the effects of the injury at the time of the hearing. She stated that the treatment she received, including physical therapy, massage therapy, and the different injections helped her, but when she returned to her job of injury, she continued to have the symptoms. She also stated that treatment was delayed during some period because of the COVID pandemic and most of 2020 she was off work. Treatment was also delayed because she was struck with pneumonia and was out for multiple weeks without the ability to attend any medical appointments.

46. Claimant stated that she was initially seen at the original WorkWell for her physical therapy but because of how busy they were, she changed over to get PT at the Parker WorkWell. Claimant testified that they treated her neck symptoms in PT from the beginning as well.

47. Claimant testified that she reported the neck complaints from the beginning of her injury to her providers. As found, this was not documented in the medical records provided as evidence in the matter, though there was a dearth of records from the time period of November 11, 2019 through March 9, 2020.

48. Claimant stated that when she returned to work on January 28, 2021, she spoke with the coordinator about having problems driving the bus. She was taken back off work and WC started paying her again. Eventually she receiving the modified duty offer.

49. The offer went to Claimant on April 9, 2021 to start as of April 15, 2021. Claimant testified she started with Nutrition Services on April 22, 2021. Claimant reported that she had concerns that the work was outside her restrictions and was too repetitive. On the following day, April 23, 2021 Claimant showed up to work but left work that day to go to the doctor. On April 26, 2021 she advised her supervisor that the work was violating her restrictions. Nutrition Services did not know what to do so they sent her home. As found, Claimant is credible in this matter.

50. When she went to Nutrition Services she would have to reach for the items she needed, which was causing increased symptoms and problems for her. At one point she was delegated to just opening bags, and she had to open over two thousand baggies in one day and was in so much pain, she could not tolerate that work. She testified that she called the Risk Manager and she called Dr. Ogden without response. Claimant was frustrated by the fact that she could not clock in and out of Nutrition Services because officially, she was not one of their employees. Claimant testified that she went to WorkWell and was seen Dr. Ogden's PA on April 23, 2021.

51. She testified that she went to work on April 26, 2021. This was confirmed by signature of the supervisor. She reported that the work was outside of her restrictions. She stated that she never told the Manager or the supervisor that she could not do any of the work, only that she could not do the baggies all day, opening them. Nutrition Services did not know what to do with her. She was willing to do something other than opening the hoagies bags. Dr. Matus never took her off work completely but provided restrictions.

52. Claimant was then sent home by the Nutrition Services supervisor and was told by the supervisor that she would call Claimant when she knew something. Claimant

testified that she never received any calls after April 26, 2021 from Nutrition Services, HR or from the Risk Manager. She stated that it really was not her choice to leave. She had, at one point been making cookies from boxes of frozen ones and put them on trays to bake them, something she could do. It was really not her choice to leave but the work of opening baggies repetitively, was too much.

53. She stated that she prepared, typed and took the note dated May 21, 2023 to the Nutrition Services Manager and had her sign it to confirm the statements. Claimant did confirm she did not work in either June or July, as school was out. She did work at the end of May, 2021, after which she was again sent home. Claimant stated that she had worked some days in April and in May, 2021 but did not recall which ones exactly, other than the ones mentioned on the notes that the supervisors signed.

H. <u>Ultimate Findings:</u>

54. As found, Respondents have shown by clear and convincing evidence that Dr. Shenoi was incorrect in her final assessment of Claimant's impairment for the cervical spine being caused to the work accident. Dr. Shenoi failed to accomplish one of the integral requirement of a DIME physician in that she declined to make causation assessments in this matter. While she issued an impairment rating for the cervical spine and the left lower extremity, this does not equate to a determination of causation. A determination of causation cannot be declined or evaded. It is a requirement established by the Act, case law, the AMA Guides, the WCRP, the Level II accreditation materials as well as the Division's Impairment Rating Tips.

55. As found, the lumbar spine and left lower extremities are causally related to the November 11, 2019 work related injury.

56. As found, Claimant reached MMI with regard to the work related medical conditions on July 9, 2021, as opined by both the ATP, Dr. Matus, and Dr. Shenoi.

57. As found, the cervical spine injury was not causally related to the November 11, 2019 work injury and, despite Dr. McCranie's and Dr. Shenoi's rating of the cervical spine, no benefits are indicated in this matter.

58. However, also as found, all providers who address the condition of the left lower extremity indicated that the left lower extremity injury was causally related. This is persuasive. The ATP provided no rating nor did he take any range of motion measurements as required by the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. McCranie, while she mentions that Claimant had full range of motion testing, she did not provide a worksheets upon which to rely, nor did she address the Claimant's loss of sensation. Therefore, as found, Dr. Shenoi's lower extremity impairment is found to be persuasive in this matter. Claimant is entitled to a 1.25% impairment of the lower extremity related to the peroneal nerve loss of sensation.[15]

59. As found, Claimant was under restrictions from March 29, 2021 through July 8, 2021, after which she was placed at MMI by the ATP. Claimant has shown she was

[15] As this is an ankle and foot injury, the scheduled impairment is appropriate.

entitled to temporary disability benefits from March 29, 2021 through April 9, 2021 and April 22, 2021through July 8, 2021.

60. As found, Respondents failed to show Claimant was responsible for her wage loss. Dr. Ogden's restrictions were "avoiding reaching out or overhead" as well as allowing "position changes sit/stand/walk every 20-30 minutes." Dr. Matus agreed with these restrictions and added that as long as the job did not require any work lifting greater than 10 lbs. and that Claimant should keep her arm close to her side. Dr. Matus again confirmed these restrictions on June 21, 2021 stating Claimant should "Limit use right upper extremity, avoid repetitive reaching out or overhead. Limit lift, push and pull 5 pounds max. Must be able to change positions regularly between sit/stand/walk, recommend at least every 20-30 minutes."

61. As specifically found, Claimant never received a call between April 26, 2021 through the time she returned to work in May, 2021 due to poor communication between the assigned Manager of Nutrition Services and the Risk Manager or HR. Claimant was found to be credible in this matter. As found she was provided instructions to go home and await a phone call. The Manager of Nutrition Services specifically took down Claimant's phone number down and it was reasonable to assume, if Employer wanted Claimant to return to work that the Manager of Nutrition Services or another of Employer's delegated individual would call Claimant or communicate with her in some manner. This was confirmed in the note signed by the Manager on May 21, 2021. Even the note of May 27, 2021, when Claimant was working, showed that Claimant was not provided the required breaks pursuant to Dr. Ogden's and Dr. Matus' recommendations.

62. As, found, Claimant is entitled to temporary disability from March 29, 2021 through April 14, 2021, when Claimant should have started work pursuant to the modified job offer dated April 9, 2021. This ALJ infers that Claimant did not stop working as of March 28, 2021 but April 9, 2021, as shown by the wage records, when she was working irregular hours. Claimant showed up for work on April 22, 2021 instead of April 15, 2021. Claimant is not entitled to indemnity benefits from April 15, 2021 through April 21, 2021.

63. As found, Claimant is entitled to temporary disability benefits from April 22, 2021 through July 8, 2021, after which Claimant was placed at MMI without restrictions. Claimant credibly testified that she believed the work was not within her restrictions as she was working without breaks and in a repetitive manner. On April 26, 2021 her supervisor at Nutrition Services sent Claimant home, advising Claimant that the supervisor of Nutrition Services would call her when she found out what to do. At no time was any credible evidence provided that Nutrition Services called Claimant back to report to work. Claimant returned to work on May 24, 2021, and worked the 24th, 25th and 27th, the last day the school was open. Claimant was instructed that she should not go into work on May 28, 2021 by the Nutrition Services assistant supervisor (JC). This was confirmed by another supervisor (JCS-D). He also confirmed that Claimant had no breaks, despite the restrictions imposed by Dr. Ogden for breaks every 20-30 minutes.

64. As further found, the wage records are insufficient to determine what periods were paid by employer as the wage records and time record are not clear, nor do they show which days and hours were paid by Employer. Therefore, the parties need to

exchange this information and agree on the TTD and TPD to be paid or provide it to this ALJ for further determination of the exact amounts to be paid by Respondent, if anything.

65. Testimony and evidence inconsistent with the above findings are either not credible, significantly relevant and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming the DIME Physician's determination of MMI and Impairment

Respondent argues that the DIME physician, Dr. Shenoi, was incorrect in multiple manners with regard to Claimant's MMI status and work related impairment ratings. The party challenging a DIME physician's opinions must prove that the DIME physician's determinations were incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003); *In re Claim of Lopez*, 102721 COWC, 5-118-981 (Colorado Workers' Compensation Decisions, 2021). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the determination is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. See *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 2002). Consequently, when a party challenges the DIME physician's opinion, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning her opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's opinion is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to reach a particular determine is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008); *In re Claim of Pulliam*, 071221 COWC, 5-078-454-001 (Colorado Workers' Compensation Decisions, 2021). Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME

physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

The Act requires a DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* A determination of MMI requires the DIME physician to asses, as a matter of diagnosis, whether various components of the claimant's medical condition are casually related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*. Lastly, where an ALJ finds a claimant's description of her present symptoms credible, this is sufficient to overcome the DIME physician's opinion. *In re Claim of Conger*, 100521 COWC, 4-981-806-001 (Colorado Workers' Compensation Decisions, 2021).

It is clear from the evidence that Dr. Shenoi's true opinion is that, as a DIME physician, she need not address the issue of causality with regard to the different components of Claimant complaints of work related injuries. This is inconsistent with the law as established by the Act, the *AMA Guides*, the WCRP, the Division's teachings under Level II accreditation and the Impairment rating tips. Dr. McCranie is persuasive in this matter that the issue of causality is an integral part of the DIME process as well as the medical process of any physician in the workers' compensation system. She persuasively testified that a failure of a DIME physician to conduct a causation analysis before assigning an impairment rating violates the *AMA Guides* as to causation, multiple DOL rules of procedure as well as recognized standards among level II physicians for performing impairment ratings.

Dr. McCranie's opinion that Dr. Shenoi's impairment rating is "clearly incorrect" is unrebutted in the medical records or in the hearing testimony. Unlike other situations wherein a Court has to interpret multiple or even conflicting opinions from a DIME; in this case there are no such conflicting opinions with regard to causation. In fact, there are no opinions from Dr. Shenoi on causation because she failed to provide one and specifically stated she declined to do so.

Claimant argues that since Dr. Shenoi provided a diagnosis for the neck, that it is to be assumed that it was related to the November 11, 2019 incident. However, Dr. Shenoi also lists upper extremity paresthesias as well as shoulder pain and did not perform an impairment evaluation on those body parts or explain sufficiently why she did not provide ratings for the shoulder injuries. Claimant also argued that it can be assume that Dr. Shenoi adopted a causation analysis because she was aware from the medical records that Claimant had received extensive authorized medical treatment for her cervical spine under this workers compensation claim. However, as testified to by Dr. McCranie, and as set out the Division's Impairment Rating Tips, Division has made it clear to Level II physicians and DIME physicians that simply because a specific condition is identified on a DIME application and/or simply because medical treatment has been voluntarily provided for a specific body part, causation is not to be assumed.

Here, as found, Dr. Shenoi made the assumption that, since treatment was authorized for the cervical spine, that Respondent was liable and therefore rated the cervical spine. As found, Dr. Shenoi was in error. This is further supported by the fact that she discussed Claimant's shoulder issues. She stated that, since the shoulder was not checked off on the Application for a DIME, that she need not address it. This is another assumption that is incorrect. A DIME physician has an obligation to consider all body parts and make causation determinations with regard to those body parts, whether they are or not related to the injury in question, and only then can a DIME physician make determinations whether Claimant has reached MMI for those related conditions and/or if the related conditions justify an impairment rating. Dr. McCranie's testimony in this regard is credible and persuasive. Respondents have shown by clear and convincing evidence that Dr. Shenoi was clearly incorrect and have overcome the DIME physician's opinions by clear and convincing evidence.

C. Maximum Medical Improvement

Where a party has carried the initial burden of overcoming the DIME physician's opinion by clear and convincing evidence, the ALJ's determination of the correct MMI determination or rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence." *Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When the ALJ determines that the DIME has been overcome, the ALJ may independently determine the correct rating or date of MMI. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004). An ALJ may thus determine whether a claimant has reached MMI and assign an impairment rating as a question of fact. *Destination Maternity and Liberty Mutual Insurance Company v. Burren*, 19SC298 (Colo. May 18,

2020); *see Niedzielski v. Target Corporation*, WC 5-036-773-001 (ICAO, Mar. 9, 2020) (when an ALJ determines that a DIME opinion has been overcome, the issue of the claimant's correct impairment rating becomes a question of fact and the ALJ may calculate the impairment based upon a preponderance of the evidence).

In this matter, Claimant's ATP, Dr. Matus, determined that Claimant was at MMI as of July 9, 2021. Claimant continued to have treatment, including therapy for the work related condition until that time. While Dr. McCranie identified an earlier date, based on her review of the medical records, this is only considered speculation as Dr. McCranie did not evaluate Claimant at that point in time. Once Dr. McCranie did evaluate Claimant and the report was provided to the ATP, the ATP had the option to make a determination of when Claimant reached MMI, and he did so by stating Claimant had reached MMI with regard to her lumbar spine and lower extremity injury on July 9, 2021. This opinion is more credible and persuasive than Dr. McCranie's speculative choice. Claimant has proven that she reached MMI as of July 9, 2021.

D. Permanent Impairment Ratings

Here, the parties must show by a preponderance of the evidence what the proper determination of impairment with regard to the work related conditions should be. But before this can be address, it is essential to have a determination of which injuries are causally related to the November 11, 2019 accident.

In this matter, it is found that the cervical spine is not a work related injury caused by the November 11, 2019 work related event. The medical records in evidence, supported the opinion of Dr. Cazden and Dr. McCranie, that Claimant did not have the cervical spine and shoulder complaints until sometime in March or April 2020, well over four months from the date of injury. While Claimant did state that the "closet" incident was not the cause of the neck and shoulder conditions, this was not persuasive. Dr. McCranie persuasively testified that it was more likely that the closet incident was the cause of those conditions and that, in order to link a cervical injury to the original date of injury, there needed to be a temporal relationship between the onset of symptoms and the initial accident, which was not present in this case. This is also true of the Claimant's continuing bilateral upper extremity symptoms. Dr. McCranie credibly opined that Claimant's continuing complaints involving the cervical spine and the right greater than left upper extremity paresthesias, which were not documented until March 10, 2020, were not work related conditions.

Lastly, Dr. McCranie credibly opined that the right shoulder labral tear was not related to the November 11, 2019, injury, as an acute labral tear would cause immediate, severe pain in the shoulder and Claimant did not report shoulder pain for approximately seven months post-accident. Dr. McCranie credibly explained that what was significant here is that Claimant reported to Dr. McCranie (and to Dr. Shenoi) that she was cleaning out her closet in April of 2020, and she was reaching, lifting and moving some hair products, towels and sheets from her closet, and had an acute onset of neck pain and right shoulder pain at that point that brought on a lot of these symptoms, which was a more probable cause of Claimant's neck and shoulder pain. Respondents have shown that it was more likely than not that the cervical spine condition and the bilateral shoulder conditions are not related to the November 11, 2019 work related accident.

It is further found that Claimant has shown that the lumbar spine and the left lower extremity conditions are related to the claim by a preponderance of the evidence. This determination is supported by the medical records of Claimant's initial treatment records that are available. None of the rating physicians have provided a lumbar spine rating in this matter. Therefore, Claimant's lumbar spine rating is 0%.

Claimant has shown that the lower extremity condition continues to have an impairment cause by loss of sensation due to damage to the peroneal nerve. Dr. Shenoi persuasively rated Claimant's lower extremity impairment at 1.25% of the lower extremity in accordance with the *AMA Guides* to the Evaluation of Permanent Impairment, Third Edition (*Revised*). This was not addressed at all by Dr. McCranie. Therefore, Dr. Shenoi's determination of permanent impairment of the lower extremity cause by the damage to the peroneal nerve is more persuasive than any contrary determination. Claimant has shown by a preponderance of the evidence that it was more likely than not she has a 1.25% lower extremity impairment rating.

E. Temporary Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. Sec. 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant was under restrictions from March 29, 2021 through July 8, 2021, after which she was placed at MMI by the ATP. Here, Claimant was paid TTD through March 28, 2021. Claimant credibly testified that, when she completed watching the videos, she advised her supervisor that she had completed her assigned tasks. No further offers of employment were made by Employer between March 29, 2021 until April 9, 2021. As found, Claimant was not responsible for her wage loss. Claimant continued

to be under restrictions due to the work related injury at this time. As found, Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits between March 29, 2021 through April 14, 2021.[16]

On April 9, 2021 Employer sent Claimant an offer of modified duty to begin April 15, 2021. This job offer was approved on April 11, 2021 by one of Claimant's ATPs, Dr. Paul Ogden. The job was to report to Nutrition Services by April 15, 2021. Claimant failed to report until April 22, 2021. Therefore, as found, Claimant was not entitled to temporary disability benefits from April 15, 2021 through April 21, 2021.

Claimant started work on April 22, 2021. On April 23, 2021 Claimant reported to work but was in significant pain due to the repetitive nature of the tasks assigned and went to her provider. On April 26, 2021 Claimant advised her supervisor that the work was violating her restrictions due to the repetitive nature of the job. Nutrition Services did not know what to do so they sent her home. As found, Claimant was credible in this matter and, as found, she was not responsible for her wage loss. While Employer consulted with Claimant's treating provider, Dr. Matus on May 13, 2021 to determine if Claimant's job with Nutrition Services complied with Claimant's restrictions. He stated that "presuming she can keep her arm close to her side this should not preclude assembling sandwiches and placing them in bags." However, Nutrition Services nor the HR manager communicated that new restriction to Claimant nor that they would accept Claimant back to work under those terms. Claimant was credible in this regard. As found, Claimant was no responsible for her wage loss and Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits from April 26, 2021 through May 23, 2021 and May 28, 2021 through July 8, 2021.[17]

The exact amount of temporary disability benefits is not determined at this time as the wage records, Employer payments as well as the third party administrator's payments are incomplete. Neither can it be determined whether the temporary benefits are temporary total or temporary partial that are due and owing. Respondents shall provide Claimant an accounting of the wages paid to Claimant and the exact dates paid. Should the parties be unable to calculate the amount, the parties may provide the information within 10 days of this order and this ALJ may issue a Supplemental Order.

ORDER

IT IS THEREFORE ORDERED:

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[16] The wage records at Respondent's Exhibit Q are specifically found not to be accurate or credible, because we know that Claimant worked on May 24, 25 and 27 and these records fail to show the hours worked. This was confirmed by a supervisor at Exhibit 7 bate 45, and Exhibit 8 email from the Risk Manager.

[17] Employer argued that Employer's payment of $498.00 for wages paid from April 27, 2021 through April 30, 2021 should be credited or offset from any benefits paid. However, this is beyond this ALJ's purview and jurisdiction to address. Only benefits under the Act may be determined in this venue.

1. The Stipulation of Facts signed by the parties on March 29, 2023 are approved. The Stipulation of Facts is the official transcript of the November 15, 2022 hearing.

2. Respondent overcame Dr. Ranee Shenoi's DIME opinion by clear and convincing evidence.

3. Claimant was at MMI as of July 9, 2021.

4. Respondents shall pay permanent partial disability of 1.25% extremity impairment in accordance with Dr. Shenoi's impairment of the lower extremity for the peroneal nerve injury.

5. Respondents shall pay temporary disability benefits from March 29, 2021 through July 8, 2021.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 6th day of April, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-218-738-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable left knee injury in the course and scope of his employment on August 10, 2022.

IF THE CLAIM WAS DETERMINED TO BE A COMPENSABLE INJURY, THEN:

II. Whether Claimant proved by a preponderance of the evidence that the left total knee replacement recommended by authorized treating provider ("ATP") Lucas G. Schnell, D.O. is reasonable, necessary, and related to the August 10, 2022 work injury.

III. Whether Claimant established by a preponderance of the evidence an average weekly wage ("AWW") of $1,808.24 a week, based upon his 52 weeks of earnings prior to his date of injury, which wage comports to a temporary total disability ("TTD") rate of $1,205.49.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on December 2, 2022 on the issues of compensability, medical benefits that are reasonable, necessary and related to the injury, causation of the injury, average weekly wage, and entitlement to TTD benefits. At hearing, Claimant withdrew the issue of TTD benefits.

On December 30, 2022, Respondent filed a Response to Claimant's December 2, 2022 Application for Hearing citing issues of relatedness, pre-existing condition, reasonable and necessary medical benefits, and average weekly wage.

Claimant testified on his own behalf in this matter.

At the commencement of the hearing, Claimant offered to stipulate that Claimant's average weekly wage ("AWW") was $1,808.24, based upon 52 weeks of earnings prior to his date of injury. Respondent conceded that Claimant's average weekly wage was $1,808.24 in Employer's position statement. The stipulation of the parties is approved and incorporated in this order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was a 55-year-old corrections security officer who has worked for Employer for 25 years. On August 10, 2022, Claimant was serving the position of a night

shift supervisor at one of Employer's youth services center. The center is for "at risk" youths and he and a staff of 10 performed nightly rounds and responded to any situations that arose, which included handling physical management and would respond to medical situations.

2. Claimant had a prior history of left knee injuries. On April 20, 2007[1], Dr. Mark Failinger examined Claimant and noted a tear of the cartilage or meniscus of the knee, negative Lachman's, some joint line pain and minimal effusion with good motion. He noted that the cortisone injection had "helped tremendously" and he was very happy with the results. Dr. Failinger noted that "[U]nfortunately he knows he has significant arthritis and unfortunately there is not "any cure" for that, but we are trying to manage to progress him, doing as many things as possible without making his symptoms worse." At that time, Dr. Failinger recommended conservative care but not an unloader brace.

3. On August 10, 2022, prior to Claimant's work related aggravation, he attended an appointment with his primary care provider at Kaiser, Tracy Frombach, D.O. for issues regarding his left knee. At that evaluation, it was Dr. Frombach's assessment that Claimant had "osteoarthritis of the left knee … left knee instability," and Dr. Frombach stated:

> We did discuss operative and non operative (sic.) options of knee arthritis. The patient does not want to consider knee replacement surgery at this time he wants to consider repeat steroid injection to see how well this does
> Unloader brace was also offered to the patient due to his instability. He wants to avoid bracing at this [2]

4. On exam, Dr. Frombach noted some left knee tenderness palpation over the lateral joint line but not the medial joint line, range of motion from 0° to approximately 130 without any pain, varus stress with LCL[3] mild laxity, valgus negative, and a negative McMurray. Dr. Frombach ordered x-rays, which showed no acute osseous abnormality but the prior left ACL repair changes were seen with severe lateral compartment osteoarthritis and a moderate suprapatellar joint effusion and noted prepatellar soft tissue swelling. Dr. Frombach performed a steroid injection and ordered physical therapy.

5. Following the visit with Dr. Frombach, Claimant reported to work for the evening shift of August 10, 2022. Claimant was involved in physical management training with other employees and was injured during one of the training exercises. He was involved with inserting himself between two other employees to show a technique when avoiding stepping on them, he twisted his left knee and it immediately gave out, causing swelling and severe pain.

6. Claimant testified that while his knee was somewhat sore while going up steps before, now it dislocates going up and down steps and he has to use a knee brace every day. Further his pain is only tolerable with medications. This has also caused

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[1] The April 20, 2007 visit with Dr. Failinger was for a date of injury of September 21, 2003.

[2] There are two versions of this note. The first stated "patient does want want (sic.) to consider knee replacement" and the other stated "patient does not want to consider knee replacement." This ALJ made the logical determination and inference that the provider realized the grammatical error and corrected his record.

[3] LCL is assumed to be lateral collateral ligament.

further mental health issues and is currently taking medication for that as well due to the pain and adjustment disorder.

7. On August 12, 2022, Claimant presented at the Employer's designated medical provider "Injury Care Associates of Thornton" where he was evaluated by James Fox, M.D., an authorized treating physician (ATP) who took a Report of Injury as setting forth:

> Patient is employed as a corrections officer and was injured on 8/10/22 during a training exercise inadvertently stepped in between 2 participants and twisted his left knee. Of note, pt has a history of ACL reconstruction in 1989. He denies any significant knee problems in the past 20 years but states that he had arthroscopic evaluation of his knee twice in the "2000s". Patient is still having quite a bit of pain in his knee which is increased with weightbearing, twisting and pivoting.

8. It was ATP Fox's opinion at that first visit that Claimant's injury was "consistent with history and/or work-related mechanism of injury," and he did not assign any restrictions. Dr. Fox ordered an MRI of the left knee and requested Claimant follow up after the diagnostic evaluation.

9. Claimant credibly testified that he requested no restrictions following his August 10, 2022 medical appointment because his Employer would accommodate any temporary limitations Claimant had due to his workplace injury. Claimant stated he was able to do most of his activities, with the exception of the training and responding to emergencies as he could not handle the stairs.

10. The MRI performed on August 15, 2022 at Health Images Diamond Hill and read by Steven Ross, M.D. showed a previous ACL reconstruction with evidence of re-tear of the intra-articular portion of the graft, previous partial meniscectomy and/or complex tears of both the medial and lateral menisci, moderate to severe tricompartment osteoarthrosis and chondromalacia, postsurgical changes of the patellar tendon, and knee joint effusion.

11. Also on August 15, 2022 Employer completed an Employer's First Report of Injury (FROI) noting that on August 10, 2022 Claimant sustained an injury to his left knee during PSI training close to midnight. His left knee swelled up throughout the shift and caused stiffness and was reported to his supervisor later in the shift the following morning.

12. On August 18, 2022, Claimant again reported to Injury Care Associates of Thornton, where ATP Fox was replaced by ATP Richard J. Pompei, D.O. It was Dr. Pompei's assessment at the second visit that:

> 54-year-old male with history of left ACL reconstruction with acute on chronic left knee pain occurring after a work-related incident. Discussed MRI results with the patient today. Results listed below. Suspect these are chronic and degenerative in nature. However plan to refer to orthopedic surgery for further MRI review and further causation analysis.
> * * *
> **Causality Statement WORK RELATED**: Based on the clinical exam findings and information provided to me by the patient, the incident is likely related to

> the occupational events, if the history provided to me is accurate. This incident is likely work-related.

13. Claimant filled out a pain diagram at the August 18, 2022 visit indicating that the pain in his left knee was an 8 out of 10 and that he was "most of the time" concerned that his "knee might suddenly give way or let [him] down." He also reported that most nights he had difficulty with his knee.

14. On August 24, 2022, Claimant presented at the offices of Front Range Orthopedics & Spine where he was evaluated by referral from ATP Fox by Lucas Schnell, D.O. who made an assessment in current plan as follows:

> This is a 54-year-old male who sustained an acute injury to his left knee at work on 8/10/2022. He works as a corrections officer and was doing skills exercise when he got his left foot caught and had a pivoting injury. He has had sharp pain globally in the knee ever since.
>
> * * *
>
> I discussed with the patient that unfortunately he had a pre-existing condition of a complete ACL rupture as well as arthritis. With multidirectional meniscus tears I feel that there is some chronicity to these tears as well. I cannot delineate whether there was exacerbation or progression of tears with his work-related injury however. It is reasonable to correlate an exacerbation of his pre-existing conditions with the work injury that he describes. At this time I do not think he would be a good candidate for an additional arthroscopic procedure due to his history and the amount of arthrosis of his knee.

15. On September 2, 2022 Claimant returned to ATP Pompei, who noted the following:

> Patient states he saw Dr. Schnell on 8/24/2020 [sic 8/24/2022] where he received a corticosteroid injection in his left knee. . . . He notes they were considering possibly doing a knee arthroscopy, and the subject of knee replacement was brought up, ... He states he is having trouble with stairs, getting up from a seated position.

16. At the September 2, 2022 medical appointment with ATP Pompei, Claimant was still concerned that his knee might suddenly give way, and the pain diagram documented that he was having "trouble with stairs, getting up from a seated position, popping and dislocating." He was managing his pain with Mobic with some benefit and requested pain medication refills. On exam, Dr. Pompei noted joint effusion, difficulty with range of motion in terms of flexion and extension of his knee, as well as tenderness to palpation along the medial and lateral joint lines. He had a positive McMurray's, an equivocal Lachman's, varus and valgus stress testing with significant crepitation of the knee, a positive patellar grind and an antalgic gait.

17. Claimant reported working full duty. He complained of moderate to severe pain. He had difficulties with his activities of daily living, including bathing, getting into a vehicle, doing household chores, problems standing or getting up because of his knee. He noted he would have extreme difficulty getting up if he were to kneel down. He was limping most of the time, having the knee give way all of the time, and trouble sleeping because of the knee.

18. Claimant was seen by Dr. Schnell on September 30, 2022 who noted that the steroid injection only provided two days of relief. He was still attending physical therapy and had both pain and apprehension of his left knee. Claimant reported that his knee was actually subluxing when he pivoted, squatted, twisted or rolled over in bed. Dr. Schnell noted that Claimant had:

> …failed conservative management. He has a pre-existing condition of arthritis and likely a chronic ACL rupture. I cannot delineate the acuity of his meniscus tears. He is not a candidate for arthroscopic intervention due to severe arthrosis. A knee replacement would address all of the issues in his knee at this point. He is (sic.) likely exacerbated pre-existing condition and potentially made the problem worse with his work-related injury regarding his meniscus tears. We reviewed the recovery time and expectations with a knee replacement. He would like to proceed with this.

19. On September 30, 2022, Claimant followed up with ATP Pompei, who noted that:

> Patient rates his pain is 7 out of 10 today. He states he has seen Dr. Schnell on 9/21/2022 and 9/30/2022 … He notes Dr. Schnell is recommending total knee arthroplasty of his left knee because at this point the patient is increasingly functionally limited with pain and apprehension with subluxation of his knee.

Dr. Pompei assessed that Claimant had a sprain of unspecified site of the left knee and noted:

> Also I agree that he has exacerbated his pre-existing condition and made the problem worse at his work-related injury given the fact that his pain has significantly increased along with now subluxation of his knee following his work-related injury without much improvement in physical therapy. I agree that the next definitive step is left total knee arthroplasty with Dr. Schnell (sic.) patient is to follow-up with our clinic letting us know the date of surgery so we can appropriately adjust his M1 64 (sic.) and follow-ups accordingly.

Claimant reported similar symptoms on the Oxford Knee Assessment, including difficulties with giveaway of the left knee most of the time. Dr. Pompei recommended Claimant ice the knee as needed and follow up with Dr. Schnell for the surgery.

20. On October 3, 2022, ATP Schnell put in a "Surgery Authorization Request" for Claimant to undergo a "left total knee arthroplasty" (TKA).

21. On October 13, 2022, Respondent timely denied ATP Schnell's request for surgery, indicating "compensability had not been established."

22. When Claimant's surgery was denied he obtained his records from Kaiser and noted that the report issued by Tracy Frombach, D.O. on August 10, 2022 prior to his injury that evening was in error. Claimant testified he reached out to Kaiser, who issued a corrected medical record for the August 10, 2022 visit which set forth that Claimant did **"**not want to consider knee replacement surgery" at that time but wished to consider repeat steroid injection to see how well he did.

23. On October 14, 2022, Claimant returned to ATP Pompei, who noted:

> Patient's pain is an 8 out of 10 today. He continues with sensations of instability, popping, clicking, locking. … He continues with physical therapy at Injury Care Associates. He notes that he received a call from his insurance company and stating that the surgery was denied, however he is going to get records from his previous work-related surgery from Concentra to be reviewed.

Dr. Pompei agreed with Dr. Schnell that Claimant was not a candidate for an arthroscopic intervention due to the severe arthrosis. He further emphasized as follows:

> Also agree that he exacerbated his pre-existing condition and made the problem worse at his work-related injury given the fact that his pain has significantly increased along with now subluxation of his knee following his work-related injury without much improvement in physical therapy. I agree that the next definitive step is left total knee arthroplasty with Dr. Schnell.

24. Claimant's pain diagrams following his injury consistently indicated that he was concerned most of the time or all of the time that his knee might give out.

25. On October 21, 2022 Respondent filed a Notice of Contest stating that it was for further investigation of prior medical records.

26. Claimant credibly testified that prior to his injury he did not have clicking, popping, or locking in his knee. Claimant testified that he had some instability, but that his knee was not dislocating as it was following his injury, nor was he having any significant pain prior to the injury. Following his August 10, 2022 accident the pain was constant, and he was having problems negotiating the stairs or even getting out of a seated position, especially when he would twist and pivot.

27. On November 1, 2022, Claimant presented again to ATP Pompei who noted that Claimant's pain continued to be a 7 out of 10, he felt unsafe at work at this point as he could not mitigate any circumstances that would need de-escalation with the knee the way it was. He continues to have knee stability issues and felt there was a safety issue as he could not intervene in any situations that might need de-escalating without significant risks of harm to himself. Dr. Pompei continued to state that Claimant had an exacerbation of his pre-existing condition and the August 10, 2022 accident made the problems worse.

28. On November 29, 2022, Claimant presented to ATP Pompei, who provided Claimant with a "hinged knee brace to aid instability while he is at work in case he has to restrain someone." On exam, Dr. Pompei noted that claimant had progressed from having a small effusion up to a moderate effusion, a positive Lachman, positive AP drawer, valgus and varus stress with significant crepitation on exam, positive pivot shift, positive for subluxation, positive McMurray's and difficulty squatting due to sensation of instability. At that visit it was ATP Pompei's opinion that Claimant needed to have his knee aspirated due to increased effusion. His Oxford Knee Assessment and pain diagram remained consistent with prior reports.

29. All of Claimant's pain diagrams since his date of injury reflected that Claimant's pain complaints were in the range of 7 to 8 out of 10.

30. Claimant credibly testified that his pain levels in his knees have remained at an increased level since the date of injury and not returned to baseline.

31. On January 10, 2023, Claimant continued his treatment with ATP Pompei, who noted that Claimant's reported pain complaint continued to be about 7 out of 10**.** Claimant was getting good effect with his visits with Dr. Reilly and he felt the Prozac was helping. Claimant reported that his knee had been "dislocating more often" despite being in physical therapy and trying to strengthen the muscles around his knee is much as possible. On exam, Dr. Pompei found only minimal effusion but Claimant continued with a positive Lachman, positive AP drawer, positive valgus and varus stress with significant crepitus on examination, positive pivot shift, positive subluxation, which was more prolonged than previous, positive McMurray's and difficulty with squatting due to sensation of instability.

32. Claimant testified at the time of his injury he was not receiving mental healthcare, but as a result of the anxiety and problems sleeping from his knee pain, he was referred by ATP Pompei to Kevin Reilly, PSY, and had been prescribed Prozac, which was helping Claimant with his mental health condition related to his workplace injury.

33. Claimant underwent an independent medical evaluation with Dr. Failinger on January 13, 2023. Dr. Failinger took a history that Claimant was doing relatively well prior to the August 10, 2022 incident when he was participating in a Physical Management Training session. He stated he was performing a V-Man maneuver, and he was getting down to place his knees between another coworker's leg to perform the maneuver, but his left shoe got caught on the pants leg of the person he was working with. He believed he was falling as he was trying to step between the other coworker's legs. In an attempt to not step on her, he stepped "over her," and his weight shifted to his left knee. He noticed sharp pain in the left knee. He stated the knee hurt right away, and he had increasing pain in his knee. He reported the incident to his supervisor.

34. Claimant provided Dr. Failinger with a history of prior injuries to his left knee while in high school, for which he underwent surgery, while in the military, for which he also underwent surgery, for a work-related injury to the left knee, which required two surgeries before he was placed at maximum medical improvement with a 20% lower extremity impairment rating. Claimant told Dr. Failinger that his knee was never great after the 2003 work related injury and that after injections and other surgeries, he was told he would likely develop degenerative joint disease. Claimant reported that prior to the injury on August 10, 2022, he would have flare-ups that would settle down after occasional cortisone injections. Claimant reported to Dr. Failinger that he had popping and noises by the knee, and had difficulty going up stairs now. He stated that the knee dislocated now, which was not something that happened to him before the incident of August 10, 2022.

35. Dr. Failinger diagnosed Claimant with a left knee sprain. Dr. Failinger opined that Claimant had a flare-up of his pre-existing arthritis on August 10, 2022, not a new injury. Dr. Failinger explained that it was not medically probable that Claimant sustained any significant appreciable acceleration or permanent aggravation of his pre-existing medial and lateral meniscus tears, both of which appeared to have undergone prior surgeries and both of which had significant degeneration prior to August 10, 2022. Dr. Failinger went on to explain that of greatest importance is the MRI scan which noted severe osteoarthritis that was tricompartmental. Dr. Failinger opined that the MRI findings

were pre-existing and not due to or accelerated by anything that occurred on August 10, 2022. However, Dr. Failinger admitted that "[N]o imaging is provided" for his review, so he did not review the actual imaging, just the report.

36. Claimant's primary complaint to Dr. Failinger was about instability and the frequent dislocation of their knee. Dr. Failinger opined that the instability could not have been worsened by the mechanism of injury described by Claimant. Dr. Failinger explained that once the anterior cruciate ligament was gone, and Claimant's had been for many months to years prior to August 10, 2022, one cannot make the instability worse unless other ligaments were torn and Claimant did not sustain any ligamentous injury on August 10, 2022.

37. Mark Failinger, M.D., opined that the surgery recommended by Dr. Schnell was necessary, but that it was not causally related to the work injury, giving the opinion that:

> It appears, with high medical probability, that his next step in treatment to avoid his instability and his pain would be to undergo a total knee replacement, as an arthroscopy and ACL reconstruction would only make him worse, as Dr. Schnell appropriately counseled the patient. However, the need for a total knee replacement would not be reasonably performed to treat any pathology created in the work incident of 08-10-2022. Rather, a knee replacement is necessary to treat pathology and symptoms due to the pre-existing arthritis.

38. On January 24, 2023, Claimant returned to ATP Pompei, who noted Claimant had had his independent medical exam performed and was awaiting the results. He stated his hearing was scheduled for March, he had been working full duty and continued to utilize his hinged knee brace for stability. On exam, Dr. Pompei again found Claimant was wearing the hinged brace, which he removed for the exam, and noted continued positive pivot shift and positive Lachman's. He found that the knee did sublux again on exam and noted a slight antalgic gait.

39. On February 7, 2023, Claimant returned to ATP Pompei, who noted Claimant had the **"**sensation of increasing instability and more frequent subluxations." Claimant had been diligent with physical therapy and home exercises and had been wearing the brace full-time as opposed to just wearing it at work and that he continued on modified duty.

40. Claimant stated that he had never used a brace until ATP Pompei prescribed the knee brace, and Claimant agreed to use it because his knee condition was substantially and permanently aggravated by the injury on August 10, 2022. Claimant focused on the clicking, popping, and locking that was not present prior to his injury of August 10, 2022, and the fact that no doctor prior to Dr. Schnell had requested a knee replacement.

41. Claimant stated that the problems with the clicking, popping and subluxations or dislocations had not happened prior to the incident on August 10, 2022. He also explained that he now had difficulty going down the stairs, which he did not have prior to the work injury. Going up and down the stairs was an important part of his job in order to respond to emergencies that happened at the youth center. While he stated that the pain is somewhat controlled with medications, it has not returned to baseline since

the work incident, neither has the anxiety and mental health issues. He continues to take medications for both. Prior to this, he did not have any restrictions and was able to perform the full duties of his job. Further, prior to the work injury he was able to work out and keep fit. He has not been able to reengage in the same kind of physical fitness program as prior to his injury.

42. Claimant stated that the findings of his ATPs, specifically Dr. Pompei's opinion on at least two occasions, that "he exacerbated his pre-existing condition and made the problems worse at work" support his claim that the injury which occurred on August 10, 2022 was a substantial and permanent aggravation.

43. As found, Claimant is found to be credible and his testimony reliable.

44. As found, Dr. Failinger's opinions have been considered, to the extent they focus on pathology, not symptoms, and the request for surgery is based upon Claimant's current symptoms, which include dislocating or subluxation of the left knee, popping and clicking, all of which were not present prior to the August 10, 2022 work injury.

45. As found, Dr. Pompei's and Dr. Schnell's opinions are more credible and persuasive than the contrary opinion of Dr. Failinger. As found, Claimant's testimony is in direct contradiction to Dr. Failinger's findings in that the pain diagrams reflect higher pain than prior to injury, reflect the knee giving out, which it was not doing prior to August 10, 2022, including the clicking, locking and popping.

46. As found, Dr. Failinger's opinion that Claimant "sustained a knee strain at most," is not found as credible as the opinion of Dr. Pompei, Claimant's ATP, who found Claimant had sustained an aggravation of the preexisting underlying degenerative condition, and by inference Dr. Schnell, who has put in an authorization request for the left total knee arthroplasty.

47. As found, Claimant continues to work for Employer who has modified his position so that he is not placed in a position that will further injure the left knee.

48. As found, the parties' stipulation of AWW of $1,808.24 is approved and incorporated into this order.

49. Testimony and evidence inconsistent with the above findings is found to not be relevant, not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*,

33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

A pre-existing condition does not preclude a claim for compensation and an injury is compensable if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc.*, W.C. No. 4-989-682-01 (August 17, 2016). Compensable medical treatment includes evaluations or diagnostic evaluations.

Causation may be established entirely through circumstantial evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Medical evidence is neither required nor determinative of causation. A claimant's testimony, if credited, may alone constitute substantial evidence to support the ALJ's determination concerning the cause of the claimant's condition. *See Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that his employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); see also *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) (lay testimony sufficient to establish disability).

As found, Claimant has shown by a preponderance of the evidence that it is more likely than not that he suffered an injury arising out of and in the course of employment while demonstrating a training movement at work and stepped over a coworker, trying to

avoid stepping on her, and he injured his left knee, including causing severe pain and knee dislocation. As found, Claimant's accident directly and proximately caused the injury to his left knee which included substantial and findings of the permanent aggravation of his preexisting condition, the ongoing knee dislocations or subluxation as opined by Dr. Pompei, all conditions for which benefits are sought. Dr. Pompei's and Dr. Schnell's opinions are persuasive and support the claim that it is more likely than not that Claimant had an aggravation of the underlying degenerative condition.

As found, on August 10, 2022 Dr. Frombach noted some left knee tenderness to palpation over the lateral joint line but not the medial joint line, range of motion from 0° to approximately 130 without any pain, varus stress with LCL[4] mild laxity, valgus negative, and a negative McMurray. Dr. Frombach performed a steroid injection as part of Claimant's maintenance program prior to the injury. However, as further found, following the incident and accident of August 10, 2022, Dr. Pompei noted on September 2, 2022 that Claimant had joint effusion, difficulty with range of motion in terms of flexion and extension of his knee, as well as tenderness to palpation along the medial and lateral joint lines. He found that Claimant had a positive McMurray's, an equivocal Lachman's, varus and valgus stress testing with significant crepitation of the knee, a positive patellar grind and an antalgic gait. As found, Dr. Pompei credibly and persuasively documented Claimant's increase in physical findings and Claimant credibly and persuasively testified to this increasing symptom of pain, instability, clicking and popping of his left knee, were triggered by the August 10, 2022 accident and consequently triggered the Claimant's need for medical treatment. As found, Claimant's need for treatment and disability (as Claimant has had to modify his job duties) were the proximate result of the August 10, 2022 work related injury and not just the natural consequence of the pre-existing condition. As concluded, had the injury not occurred Claimant would have likely continued to require injections when he had flare-ups and but for the accident of August 10, 2022, Claimant may have continue to maintain his symptoms under control without requiring further care. As further concluded, but for the accident of August 10, 2022 Claimant would not have required the treatment currently being recommended. As found and concluded, Claimant has shown by a preponderance of the evidence that that it is more likely than not that he suffered a compensable permanent aggravation of his preexisting condition when he was involved in the training exercise while in the course and scope of his employment on August 10, 2022 which caused a need for medical care and disability.

C. Reasonably necessary and related medical benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial*

[4] LCL is assumed to be lateral collateral ligament.

Claim Apps. Office, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Respondents argued that all the way back in 2007 Dr. Failinger advised Claimant that he would eventually need the left knee replacement, and that despite the accident of August 10, 2022, as supported by Dr. Failinger opinion, that the time was now, not because of any aggravation but because it was inevitable due to the arthritic and degenerative process cause by the prior injuries. This ALJ disagrees. An arthritic knee alone does not cause the need for the left knee replacement. The exponential increase in symptoms is what caused the need for the surgery. And this is well supported by Claimant's testimony that while he had some pain and discomfort prior to the August 10, 2022 accident, those symptoms were controlled by exercise, maintaining himself in shape, the occasional steroid injections that really helped his symptom control and some medications. As found, following the work injury of August 10, 2022 the symptoms were not just occasional pain and discomfort, they were the frequent subluxation of the knee, the clicking and popping of the knee, the swelling of the knee, the positive findings on exam as established by Dr. Pompei and noted above. All these new symptoms and serious instability are the cause for the need for the total knee arthroplasty (TKA) recommended by Dr. Schnell. All of these new symptoms were proximally cause and aggravation of the underlying preexisting condition, which are found to be caused by the compensable work related injury of August 10, 2022. Even Dr. Failinger stated that the TKA was reasonably necessary at this point in time. As found, Claimant has shown by a preponderance of the evidence that it was more likely than not that the TKA is reasonably needed and related to the August 10, 2022 work related injury.

D. Average Weekly wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid &*

Waldron v. Vigil, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

Here, the parties agreed that Claimant's average weekly wage was appropriately $1,808.24 and the stipulation of the parties was approved in this order.

ORDER

IT IS THEREFORE ORDERED:

1. The Claimant proved by a preponderance of the evidence that he suffered an aggravation of his underlying degenerative condition of his left knee on August 10, 2022 within the course and scope of his employment.

2. Respondents shall pay for reasonably necessary and related medical care cause by the August 10, 2022 aggravation, including the total knee arthroplasty recommended by Dr. Schnell.

3. The stipulation of the parties is approved and ordered. Claimant's average weekly wage is $1,808.24 and the temporary total disability rate is $1,205.49.

4. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 10th day of April, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the closed claim of March 11, 2019 should be reopened due to a worsening of condition.

II. If the claim is reopened, then whether Claimant has proven by a preponderance of the evidence he is entitled to further medical care to cure and relieve him of the effects of the admitted work injury, including surgery recommended by the authorized treating physician (ATP), John D. Papilion, M.D.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was a right handed, 82 years old at the time of the hearing in this matter. Claimant originally injured his right shoulder on March 11, 2019 while working for Employer as a shuttle driver. This was an admitted claim.

2. Claimant would pick up customers and their luggage at Employer's place of business and drop them off at the airport and vice versa. He would pick up customer's luggage and place the luggage on the rack, which had three levels. He would also assist customers with their luggage and place the luggage in customers' car trunks. Claimant worked for Employer for nine years without problems before his March 11, 2019 work injury.

3. On June 20, 2019 Claimant was initially evaluated by Dr. John Papilion with regard to his March 11, 2019 work injury. Dr. Papilion took a history that Claimant was carrying out his duties as a shuttle driver and was swinging a heavy 20 to 25-pound bag up overhead, felt a pop in his right shoulder and had immediate pain and drop arm. Since then, he had significant difficulty with raising his right arm, lifting away from his body and overhead. He had a history of rotator cuff repair in 1987. On exam he noted a markedly positive drop arm test with weakness in the supraspinatus and infraspinatus, a positive lag test, positive belly press test and positive impingement sign. Following review of the diagnostic testing, he assessed Claimant had a massive acute on chronic rotator cuff tear of the right shoulder and medial dislocation of the biceps tendon. He noted that the rotator cuff was irreparable and recommended proceeding with a total reverse shoulder arthroplasty.

4. Claimant last worked for Employer of injury in January 2020. Claimant testified he was laid off and did not seek further employment until two years later.

5. The surgery did not take place until February 5, 2020 and it is not clear from the evidence what was the cause of the significant delay. Dr. Papilion proceeded with the reverse total right shoulder arthroplasty, which included a Tornier size 29 mm glenoid

plate with a 39 mm glenosphere, a size 8 press-fit Aequalis Flex stem with a high-offset reverse tray and a +6 mm polyethylene humeral cup. Dr. Papilion also performed an in-situ biceps tenodesis.

6. By March 19, 2020, Dr. Papilion noted that Claimant was doing exceedingly well with minimal to no complaints of pain. He was very pleased with Claimant's progress. By April 30, 2020 Dr. Papilion continued to be effusive over Claimant's progress, recommended work hardening and released Claimant to work as a commercial driver with lifting limited to 10 lbs. away from the body or overhead.

7. On August 5, 2020 Dr. John Sacha performed an impairment rating noting that Claimant merited only an impairment for loss of range of motion of the right shoulder of 9% upper extremity impairment, which converted to a 5% whole person impairment. He recommended that Claimant be placed at maximum medical improvement (MMI), with light duty as recommended by Dr. Papilion and be allowed maintenance medical care.

8. Claimant saw Dr. Papilion on February 11, 2021 for a routine follow-up. Overall, he was doing very well. He had a functional capacity evaluation 6 months previously and fell into the medium work category. He had not yet returned to work as he had not been called back by Employer. His biggest complaint was weakness in external rotation. He was having little to no complaints of pain and good strength in the deltoid with a negative drop-arm test. Dr. Papilion stated that Claimant was doing well overall and placed him at MMI at that time with permanent restrictions of 40 lbs. lifting and push/pull up to 100 lbs. He recommended maintenance visits.

9. Claimant was placed at MMI on February 18, 2021 by Dr. Amanda Cava of Concentra with the same restrictions imposed by Dr. Papilion, with the exception that she added no overhead reaching. Claimant felt good at the time. While he was able to use his right arm, he could not do so fully. He stated he did not have the same strength, range of motion and felt weaker than prior to his work injury.

10. Claimant recalled he had a functional capacity evaluation performed. His permanent restrictions were lifting 40 lbs., no overhead lifting and pushing/pulling up to 100 lbs. Claimant credibly stated that he never violated those restrictions.

11. Respondents filed a Final Admission of Liability on April 19, 2021 and the claim was closed, except that medical benefits remained open for maintenance care.

12. On February 10, 2022 Claimant returned to Dr. Papilion for a follow-up maintenance visit, two years post reverse shoulder arthropathy for his massive irreparable rotator cuff arthropathy. On exam, Dr. Papilion noted that Claimant's wound was well healed, he could actively flex and abduct to about 120 degrees, with external rotation of 60, internal rotation of 60, good strength and manual testing in the deltoid with a negative drop-arm test. Dr. Papillion documented finding some calcification in the lateral deltoid adjacent to the acromion. At the time Dr. Papilion stated that Claimant remained at MMI. He had not regained any motion and had some limited function. He had few complaints of pain. He stated that he did review Dr. Sasha's impairment rating and it was apparent that Dr. Sasha did not take into consideration additional impairment for Claimant's total shoulder arthroplasty. Under the Table 19, he should have been awarded

an additional 30% impairment of the upper extremity which should have been combined to his loss of motion.

13. Claimant stated he returned to consult with Dr. John Papilion in February 2022 for a routine visit only, at which time he was doing fine. He stated he had no pain in the right shoulder, despite the limited strength and range of motion. He stated that his shoulder was functioning well enough for what he would do on a daily basis.

14. Claimant returned to work for another employer as an auto parts delivery driver (hub driver) in February 2022 to work part time, starting with two days a week. He was working one and one half days a week after August 2022. He serviced two stores, one in Sterling and the other in Fort Morgan. He would regularly do two round trips per day. He would push a cart, loaded with parts, from the dock to his van and load the parts, which were generally small, like windshield wipers, spark plugs, short exhaust pipes, fuel pumps, nuts and bolts. During his tenure with this employer he had only taken large engine blocks only twice. These were loaded onto the van for him with a forklift and taken off with a forklift. He did not touch them. In fact, Claimant credibly testified that he did not touch anything that was heavy or exceeding his restrictions. Claimant continued to work for this subsequent employer part time.

15. The first week of August, he was at his part time job. He went to get his cart that had been loaded with items for delivery. He started pushing it out to his van. He stated that the cart was no more than 20 lbs. and the items on it weighed no more than 10 to 15 lbs. total. The cart had a handle which he used to push the cart. When the cart went over the sill of the doorway, the cart was jarred, jogging the packages and one of the packages started to fall off to the right of the cart no more than two feet away from Claimant. The package was approximately two inches by eight inches and approximately twelve inches long, and was approximately on the cart at shoulder height on top of other packages. Claimant went to reached out, but as he was extending his right hand, he felt a sliding sensation in his right shoulder, like it was going to dislocate, so he stopped the movement immediately. He never made contact with the box that fell to the ground. Claimant had never felt that sensation before. He continued with his duties and felt fine for the remainder of the day. By this time Claimant had been working for this employer for approximately six months without problems.

16. A couple of weeks after the first incident, he was again at work, and after he had loaded his van, he went to close the sliding door of the van, when again, felt the sliding sensation, as if his shoulder was going to dislocate. He pulled back, tightened his shoulder and the joint seemed to slide back into place. Claimant was outside of the van on the passenger side, when he attempted to slide the door closed with his right upper extremity. He had not more problems with finishing his work but he was careful with his right arm.

17. Approximately one week later, the third incident happened the last Saturday in August[1], when he was lying on his couch. He went to cross his arms and his arm slipped off his chest and fell to the floor. He experienced an extremely painful sensation where his shoulder popped out. Claimant looked down and noticed that his shoulder had

[1] This ALJ infers that this was on August 27, 2022.

just popped out, and there was a big bulge. He fought the pain to get his shoulder to go back into place by pulling back with the muscles of his shoulder until it popped back into place. Claimant determined he should schedule an appointment with Dr. Papillion. He was able to secure an appointment for September 15, 2022.

18. Approximately the following Monday, which would have been September 12, 2022, when he was working, Claimant was turning the wheel of his van to make a right-hand turn and as he turned the wheel, his shoulder went out again. It was very painful and was very difficult to push and pull his shoulder joint (ball) back into the socket. This subluxation was the most painful of the incidents.

19. Claimant stated that he did not file a claim against the current employer because the incidents above were just normal everyday movements and not injuries in and of themselves. He felt that there was something wrong with the shoulder replacement and that was part of his March 11, 2019 claim. He explained that because the arm socket just fell away from the ball when he made certain movements he felt that there was something wrong with the shoulder replacement. Claimant has changed the way he uses his right arm after the fourth episode and now he uses his left arm when he must reach for anything.

20. On September 15, 2022 Claimant was evaluated by Dr. Papilion. Claimant reported that he was trying to catch a small box and reached forward and felt as though his shoulder came out of place. He was able to self-reduce.[2] This occurred about 6 weeks prior to his follow up with Dr. Papilion. He had a total of 4 similar episodes. These were quite painful for him. There was little activity, just reaching forward. He had to compress the shoulder and was able to reduce it and then symptoms resolved. On exam, Dr. Papilion noted some muscular atrophy and deformity about the shoulder as expected. He could flex and abduct to about 150 degrees, external rotate of 80, internal rotate of 70. There was good strength to manual testing of the deltoid and negative drop-arm test. He did have a positive apprehension test and Dr. Papilion was able to manually sublux the right shoulder anteriorly. Dr. Papilion recommended proceeding with a revision arthroplasty with poly[3] exchange but did not believe there was need to change any of the other components. He provided Claimant with work restriction of 5-pound lift and no overhead lifting. Dr. Papilion sent the request for authorization of the revision surgery on September 29, 2022 to Respondents.

21. On November 8, 2022 Dr. Papilion stated that it remained his opinion that the additional revision surgery was related to the original March 11, 2019 work related injury and not to any minor incidents where Claimant was simply reaching forward.

22. Respondents had Claimant evaluated by Dr. William Ciccone for an independent medical examination on December 21, 2022. Dr. Ciccone took a history as follows:

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[2] Both Dr. Papilion and Dr. Ciccone noted that the use of the words “self-reduced” was a medical term that means to put the socket of the humerus bone up onto the metal ball, and was a term likely interpreted and used by the physician, not claimant.

[3] This ALJ infers that poly is the polyethylene humeral cup, which was part of the prosthesis of the shoulder replacement.

> In September 2022 he was loading a van and as a box fell off of a cart. He reached out quickly to grab the box and felt a shift in his shoulder. There was no pop, or clunk and had very minimal pain at the time. Approximately one week later, this occurred again when he was reaching back for the van door and felt it slip.
>
> A more recent event was while lying down his arm fell off the couch into extension and had a significant dislocation and clunked when putting it back into joint. Overall, this has happened four times. Since that time, he has been restricting use of the arm, restricting any abduction or external rotation due to feelings of instability. He started at Concentra and eventually saw orthopedics again to discuss possible surgery to stabilize the shoulder. He reapplied to have his case reopened.

23. Dr. Ciccone performed a record review going back to 2014 summarizing only key complaints. Multiple records were incorrect. For example, he stated that Dr. Papilion documented an episode in March 2022. In fact, Dr. Papilion stated that the reaching for the box incident was only six weeks prior to his evaluation on September 15, 2022.

24. Dr. Ciccone opined that revision shoulder surgery was needed to stabilize Claimant's shoulder replacement. He disagreed that the March 11, 2019 work injury should be reopened because he felt that the incident of reaching for a falling box at work was the cause of the current instability and that Claimant needed to open another workers' compensation claim with the current employer as the surgery was reasonably necessary and related to the new incident at work.

25. At the time of the hearing Claimant stated that he avoided using his right arm because when he tried, if felt like it would slip out. Claimant would like to proceed with the surgery proposed by Dr. Papilion because he has no confidence in being able to use the right arm without it subluxing or dislocating, which is generally very painful.

26. Dr. William Ciccone testified by deposition on March 22, 2023 as an expert orthopedic surgeon and noted that he was Level II accredited. He had conducted an independent medical evaluation on December 21, 2022. He reviewed the medical records, examined Claimant, and provided his opinion. Dr. Ciccone noted that the incidents at work and the incident at home where Claimant reported subluxation of his shoulder, are all consistent and could explain the subsequent positive apprehension tests. He further stated as follows:

> A … His instability events began specifically after the event at work for [current employer] in September of 2022. And after that, it became much more persistent and restrictive.
>
> So from a causal analysis, you would relate the second injury to the instability, not the first injury.
>
> Q And the second injury being --
>
> A The one at [current employer].
>
> Q Okay. And then the third incident with the van, was that a subsequent injury event as well?
>
> A Yeah, I think these are all subsequent events with shoulder instability. Once that creates itself, you have multiple subluxation events. It can happen from any type

of activity. It may not -- it could be individual injuries but it's because of the initial event.

27. Dr. Ciccone explained that the initial inciting event is the one where Claimant reached out to catch the box while at work. Dr. Ciccone opined that the objective medical evidence did not support that Claimant's shoulder condition worsened as a natural progression of the original 2019 work related injury. He went on to state that three things could cause instability. The first being wearing out the plastic, an infection or having a subsequent injury. Dr. Ciccone opined that it was too early to have wear and concluded that the instability was caused by a subsequent event. However, when questioned, it is clear that Dr. Ciccone did not fully enquire about how the incidents happened. He was unaware that Claimant had not fully extended his arm or that he did not catch the falling box. He confirmed a quoted statement from his report that Claimant had reached back for the van door and felt the shoulder joint slip. But Claimant did not "reach back" for the van door. When asked about how painful the third subluxation was, he stated "I don't have it there. I - I - I don't - I don't think he mentioned whether it was painful or not. At least I don't have it in my note."

28. Dr. Ciccone opined that the revision arthroplasty was reasonably needed to repair the instability of Claimant's shoulder. He further stated that he believe the activity of reaching out probably loosened some scar tissue and some other constraints that can happen from surgery that now makes the shoulder unstable. Lastly, he stated that "My *assumption is that he had an event when he caught a box* and he dislocated his shoulder. That is the primary event" (*emphasis added*). When asked whether there was evidence that the replacement failed, Dr. Ciccone stated "So I would say that instability is a failed replacement."

29. John D. Papilion, M.D. testified at hearing and was accepted as an expert in medicine generally and as an orthopedic surgeon specializing in shoulder surgeries as well as a Level II accredited physician accredited by the Division of Workers' Compensation. Dr. Papilion explained reverse arthroplasty surgery of the shoulder as a shoulder replacement where the ball and socket are reversed, which caused the deltoid muscle to be the major muscle to articulate the arm, substituting for the rotator cuff, when it was so damaged that it could not be repaired. So the metal ball was fixed to the socket and the plastic cup was fixed to the upper end of the humerus. Dr. Papilion explained that like most patients, Claimant was able to get improved motion, strength and function following the surgery but never back to normal, and was unable to return to his regular job with Employer lifting heavy bags.

30. Dr. Papilion confirmed that he had seen Claimant in February 2022 for a routine maintenance visit only, which had been set up when Claimant was placed at MMI. Dr. Papilion noted that on exam at the September 15, 2022 visit, Claimant provided the history of what was happening with his shoulder. Dr. Papilion noted atrophy and wasting of the musculature surrounding the shoulder, which was expected since the rotator cuff tendons and muscles were no longer attached to the bone and there was nothing stimulating them to keep them toned or functioning. It also showed a different appearance because the socket was where the ball was and vice versa. He credibly testified that the atrophy was expected because "everybody that has a reverse shoulder replacement has

atrophy around the – the musculature in the shoulder girdle…" Dr. Papilion explained a reverse total shoulder arthroplasty as follows:

> This is a salvage procedure that we do in patients that have massive irreparable rotator cuff tears, rotator cuffs that we cannot repair. So this procedure is basically a shoulder replacement. It's an open surgery where we dislocate the shoulder, take the ball off, and replace the ball and socket with metal and plastic. And we reverse those, meaning that we put a ball where the socket was and a stem down the inside of the bone that has a socket attached inside the humerus that has a plastic socket. And it's a bit technical, but it basically changes the biomechanics of the shoulder and it pushes – it pushes the center of rotation that way and that way, and it puts the deltoid muscle under tension, and that's what the patient uses to raise their arm up.

31. Dr. Papilion noted that patients do not get back full motion or strength with the procedure. Following taking a history and examining Claimant, Dr. Papilion opined that Claimant's claim needed to be reopened for purposes of proceeding with a revision arthroplasty surgery.

32. Dr. Papilion opined that Claimant did not have an injury that aggravated his shoulder condition, only that it was a progressive condition, expected with total reverse arthroplasty patients. Claimant only had incidents caused by the natural progression of the expected consequence following a total reverse shoulder arthroplasty. Dr. Papillion opined that simply reaching for the box did not damage the components he wants to replace or that Claimant did not tear anything in his shoulder at that time. Dr. Papilion stated:

> my feeling that either - either his capsule had stretched out or he tore - tore his subscapularis, which is one of the restraining muscles that were reattached, but it wasn't -- it wasn't an injury that caused his shoulder to -- to dislocate.
>
> …
>
> I don't think that with the history that he was giving to me that he had an injury. He had an incident where the shoulder just happened to come out of place just merely reaching forward, which I don't think was a traumatic episode, and I don't think it was enough to tear anything.
>
> So my - that's - that's the big reason why I think this is related to his reverse shoulder arthroplasty. Sometimes we just get unstable. Sometimes the capsule can stretch out or the muscles are not strong enough. That would give this shoulder its stability, is the muscle that -- the deltoid muscle pulling on the humerus bone into that -- into that ball, and if you don't have that muscle tone, then the shoulder can become unstable.

18. Dr. Papilion further stated that he did not think that simply reaching out did any damage to the components that he replaced. He opined that the capsule had just stretched out, which gave him the initial subluxation, which in turn put tension on the capsule and that with each subluxations there was more laxity. He stated that:

> I just think that his shoulder is unstable, and when I examined him, I could sublux it. I could push it out of place.

> So the typical treatment for that is to - unfortunately, you have to go back in and open the shoulder up, and you pop out the little plastic cup that we put on the humerus bone, and it comes in all different thicknesses, and I would..
>
> Would involve opening up the shoulder, taking that little plastic liner out and putting a thicker one in that's either 3 or 6 millimeters thicker, and then I also would probably - his cuff that he has now is not terribly constrained, and I would put another constrained cup that has deeper - a deeper dish in it to - to restore that stability to the shoulder.
>
> And I -- and every shoulder dislocation I've seen after a reverse replacement, that subscapularis tendon is - the one in the front of the shoulder is usually torn off when the shoulder dislocates.
>
> So we would either try to reattach that or if not, then just - just deal with it. But those are the actions that I would do to restore the stability intraoperatively.

33. As found, Claimant was credible in his testimony. Claimant clearly explained that he was not doing anything out of the ordinary or outside his restrictions either at work or at home when his shoulder slipped out of place. The movements were not quick, fast and were ordinary activities he performed every day. Claimant credibly explained that he believed that something went wrong with his shoulder replacement when it slipped out and that he had done nothing that would be the responsibility of his current employer. He expressed his belief that it was all part of the original claim and injury of March 11, 2019.

34. As found, Dr. Papilion's explanation of the progression of the cup or capsule stretching out and the muscles not being strong enough to keep the cup on the metal ball was credible and persuasive. He further credibly explained that stretched cup and the lack of muscle tone of the shoulder joint caused it to become unstable and caused the subluxations or dislocations.

35. As found, it is more probable than not that the condition of the artificial joint was no longer stable and supported by the atrophying muscles and caused the subluxations and instability. As found, Claimant's condition has changed significantly because the instability of the joint changed how Claimant carries out activities of daily living and work, where he has to continuously protect the right upper extremity from movement.

36. Dr. Papilion's opinions are more persuasive that Dr. Ciccone's opinions. Especially since Dr. Ciccone failed to get a complete history and correct mechanism of actions that Claimant described above. Dr. Ciccone noted that Claimant had made a "quick" motion to catch the box that was falling. When, in fact, Claimant was merely beginning to reach out when he felt his shoulder slip and stopped the motion immediately. He did not reach out to catch the falling box. In fact, the box fell to the ground. Dr. Ciccone noted that Claimant was "reaching back for the van door and felt it slip," when, in fact, Claimant was outside of the van on the passenger side, sliding the door closed. He made mistakes such as not noting the time line, first stating these incidents occurred in March and then in September. As found, Dr. Ciccone did not have all the correct facts to make a credible causation analysis.

37. Furthermore, Dr. Ciccone noted that one of the possibilities was that the instrumentation of the joint replacement had failed or stretched. He recognized that movement could probably loosen some scar tissue and some other constraints that can happen from surgery that could make the shoulder unstable.

38. Claimant has proven by a preponderance by a preponderance of the evidence that he has had a change in condition that is proximally related to the original surgery and joint replacement due to the March 11, 2019 work related injury. Claimant has proven that it is more likely than not that the instability of his shoulder and need for further surgical repair is sufficient to establish the need to reopen the March 11, 2019 claim. As found, Claimant's credible testimony regarding the "incidents" cited above were merely functions of inconsequential movements that did not amount to injuries or aggravations or intervening events, movements well within his restrictions and activities he performed daily without consequence.

39. As found, Both Dr. Papilion and Dr. Ciccone did agree that the revision surgery was reasonably necessary. Dr. Papilion was more credible than the contrary opinions of Dr. Ciccone with regard to the proposed surgical revision of the total reverse shoulder arthroplasty being related to conditions proximately caused by the original work injury.

40. As also found, Claimant's March 11, 2019 industrial injury left Claimant's body in a weakened condition that played a causative role in producing additional disability or the need for additional medical treatment. As a result, Claimant's disability and need for medical treatment represent compensable consequences of the industrial injury. As a result, the ALJ finds and concludes that Claimant has establish by a preponderance of the evidence that his condition proximately caused by the March 11, 2019, industrial accident has worsened since being placed at MMI and that his claim should be reopened.

41. Thus, the ALJ further finds and concludes that Claimant has established by a preponderance of the evidence that the need for medical treatment is causally related to his March 11, 2019, work injury. Claimant has proven by a preponderance of the evidence that the revision surgery is reasonably necessary and related to the March 11, 2019 work injury.

42. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Petition to Reopen for Further Medical Benefits

The issue of medical benefits is integrally intertwined with the issue of the petition to reopen the claim. A Claimant cannot reopen a claim without claimant a specific benefits

such as temporary disability or medical benefits that are reasonably needed and related to the claim in question. Therefore, both issues will be addressed at the same time.

Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. When a claim is closed, the claimant is precluded from receiving further benefits unless there is an order reopening the claim on the grounds of error, mistake or change of condition. *See Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), (a claim may be reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Indus. Claim Appeals Off.*, 833 P.2d 780 (Colo. App. 1991).

Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988). There is no basis to reopen a claim if the reopening does not lead to the award of additional benefits. *Richards v. ICAO*, *supra.*

In seeking to reopen a claim, Claimant shoulders the burden of proving his condition changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005); *Cordova v. Industrial Claim Appeals Office, supra*; *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986); *El Paso County Department of Social Services v. Donn*, 865 P.2d 887, (Colo. App. 1983); *Barker v. Poudre School Dist.,* W.C. No. 4-750-735 (ICAO, Mar. 7, 2012). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

Respondents are liable to provide medical treatment that is reasonably necessary to cure or relieve the employee from the effects of the injury or prevent further deterioration of the claimant's condition. Sec. 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995). However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The mere occurrence of a compensable injury does not require an ALJ to find that the need for subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those, which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); Sec. 8-41-301(1)(c), C.R.S. (2022).

A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off., supra*; *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002); *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). A change in condition pertains to changes that occur after a claim is closed (after a Claimant was determined

to be at maximum medical improvement). *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006); *El Paso County Department of Social Services v. Donn*, *supra*. The pertinent and necessary inquiry in this case is whether Claimant has suffered any deterioration in his work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office, supra*.

The question of whether Claimant has proven a change in condition of the original compensable injury or a change in physical or mental condition which can be causally connected to the original compensable injury is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, *supra*; *City of Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997); Faulkner v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1,* 924 P.2d 1177 (Colo.App.1996). See *Berg v. Ind. Claim Appeals Off. of Colorado*, *supra*. The ALJ is vested with authority to address whether a claimant met their burden of proof under a preponderance of the evidence standard. See *Renz. V. Larimer County Sch. Dst. Poudre R-1, supra*. Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball, supra*; *Jarosinski v. Industrial Claim Appeals Office, supra*; *City of Durango v. Dunagan*, *supra*. However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). If a new intervening cause results in the need for care then reopening is improper. See *Owens v. ICAO*, *supra*. "If the worsening is the result of an intervening cause, including an intervening industrial injury, the worsened condition is not a compensable consequence of the original industrial injury, but a new injury." *Edwards v. Wal-Mart Stores, Inc.*, W.C. No. 4-478-405 (ICAO, December 13, 2002). The question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

An ALJ must determine, based on the totality of the circumstances if the causal link is present. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). In this case, both surgeons, Dr. Papilion and Dr. Ciccone, have agreed that the revision of the reverse total shoulder surgery is reasonable and necessary and this ALJ agrees. The only issue is whether the worsening of Claimant's condition was related to the March 11, 2019 work injury.

As found, this ALJ credits the opinions of Dr. Papilion, the original surgeon that performed the total reverse right shoulder arthroscopy, to reach the conclusion that Claimant's need for revision surgery was, more likely than not, probably caused by the

natural stretching or deterioration of the plastic cup portion of the prosthesis which was implanted as a consequence of the March 11, 2019 work related injury. Dr. Papilion's opinions are more credible and persuasive that the contrary opinions of Dr. Ciccone, who based his causation analysis on faulty assumptions.

Moreover, this ALJ is not even remotely persuaded that the described "incidents" while Claimant was carrying out employment related duties aggravated, accelerated or combined with this pre-existing condition to give rise to an intervening event. These incidents were, in fact, non-events, as Claimant was simply moving his body in a manner that was natural and not outside his restrictions. Claimant's disability and need for treatment, rather, were caused by the instability of the shoulder replacement and the atrophied muscles caused by the original shoulder replacement. In February 2022, before Claimant began his current position, Dr. Papilion documented finding some calcification in the lateral deltoid adjacent to the acromion. As found, this likely started the deteriorating process.

As Dr. Papilion noted in his September 15, 2022 report, Claimant provided the history of what was happening with his shoulder. Dr. Papilion noted atrophy and wasting of the musculature surrounding the shoulder, which was expected since the rotator cuff tendons and muscles were no longer attached to the bone and there was nothing stimulating them to keep them toned or functioning. The atrophy of the muscles combined with either the calcification or loosening scar tissue is what caused the instability as the muscle were having a difficult time holding the stretched out polyethylene humeral cup onto the metal ball implanted during the reverse arthroplasty. Dr. Papilion persuasively and convincingly opined that an incident where the shoulder just happened to come out of place just merely reaching forward, was not a traumatic episode, and was not enough to tear anything. The persuasive evidence presented supports a conclusion that Claimant's need for treatment, including surgery is more probable than not related to the natural deterioration of the prosthesis and scar tissue that simply released causing the subluxations or dislocations, which in turn caused the instability of the right shoulder. From the totality of the evidence, Claimant's need for the surgery was proximately caused by the progression of atrophy of Claimant's muscles caused by the joint replacement. Further, the joint replacement was proximately caused by the March 11, 2019 work injury. Therefore, the need for the revision surgery flows naturally and proximately from the March 11, 2019 work injury.

Based upon the totality of the evidence presented, Respondent are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. (2022); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents are liable for the revision surgery proposed by Dr. Papilion as well as any medical care or rehabilitation associated with that surgery.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has shown by a preponderance of the evidence that he had a worsening of condition to justify a reopening of the March 11, 2019 claim.

2. Respondents shall pay for the revision surgery under Dr. Papilion and for any associated medical care related that surgery.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 28th day of April, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he her average weekly wage ("AWW") should be increased above what was admitted to in the general admission of liability ("GAL")?

- Whether Claimant is entitled to additional temporary disability benefits, including temporary partial disability benefits, based on the increased **AWW?**

- The parties stipulated prior to the hearing that if Claimant was to be found to have earned less than her AWW for any given period of time in which she was on restrictions after her injury, Claimant's loss of earning was attributable to the effects of the work injury.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on September 6, 2021 while working for Employer. Claimant testified she went to pick up a bag of dog food that weighed forty-seven (47) pounds and injured her lower back. Claimant had begun working for Employer on June 2021. Claimant testified she was initially earning $12.75 per hour. Claimant testified at hearing that prior to her work injury she had received a raise to $14 per hour. Claimant testified she worked overtime prior to her date of injury.

2. Claimant testified she received two raises after her injury, one to earning over $15 per hour, and a second raise that increased her hourly rate to over $16 per hour. According to the wage records entered into evidence, Claimant received a raise from $12.75 per hour to $14 per hour on August 8, 2020. According to the wage records entered into evidence, Claimant received a raise from $14 per hour to $15.81 per hour on or about February 20, 2022. According to the wage records, Claimant received a second raise up to $16.48 per hour on or about May 1, 2022.

3. In addition to Claimant's job with Employer, Claimant had another job with working information technology ("IT") for a law firm owned by her family. Claimant testified she began working for her family's law firm while she was teenager. Claimant testified she earns $500 twice per month plus bonuses.

4. Claimant testified she stopped working for Employer on May 28, 2022. Claimant testified that after her injury she was not able to maintain a full time schedule. Claimant testified she was not paid temporary disability benefits from her Employer.

5. Claimant testified she has not missed time from work with her concurrent Employer working IT since her injury.

6. Respondents filed a general admission of liability ("GAL") admitting for an AWW of $453.46. The GAL admitted for TTD benefits beginning May 28, 2022 at a TTD rate of $302.31. According to the GAL, the AWW was calculated based on Claimant's earnings from June 14, 2021 through September 4, 2021.

7. Claimant argues at hearing that the ALJ should consider post injury raises in calculating Claimant's AWW. The ALJ is not persuaded. The ALJ notes that while Claimant received post-injury raises, those raises were provided to Claimant over five months after the injury. Under these circumstances, the ALJ does not believe that using Claimant's post-injury earnings is the appropriate method for calculating Claimant's AWW.

8. Respondents argue that it is improper to use Claimant's earnings from her concurrent employment with the law firm due to the fact that Claimant has not missed time from her concurrent employment. Respondents argue that this may become relevant to readdress if Claimant is provided a permanent impairment rating in the future, but should not be included in the AWW calculation at the present time.

9. The ALJ is not persuaded. Claimant should not have to seek a new hearing in the future to increase her AWW once she is provided a permanent impairment rating. Claimant's AWW is to be calculated based on her earnings at the time of her injury, which includes her concurrent employment. There is no requirement that Claimant miss time from her concurrent employment or receive a permanent impairment rating to have her earnings from her concurrent be included in calculating her AWW.

10. While Claimant's temporary disability benefits will not include her concurrent employment, it does not negate the fact that Claimant's AWW is intended to include earnings from any concurrent employment Claimant had at the time of the injury.

11. According to the wage records, Claimant worked 29.22 hours her first week of employment (June 14 through June 19, 2021), but worked 42.58 hours the next week. The ALJ notes that there were only two weeks prior to Claimant's injury in which she worked less than $30 hours for employer, the first week of employment and the week of August 1, 2021 through August 7, 2021 when Claimant took leave without pay. The ALJ has determined that these two weeks should not be included in calculating Claimant's AWW as she was voluntarily off of work for a period of time during one week and the first week of Claimant's employment may not have included all days within the pay period. In the remaining ten (10) weeks of employment, Claimant averaged 34.583 hours of work per week, not including overtime. Claimant also worked 2.58 hours of overtime that was paid at a rate of time and a half during the week of June 20 through June 26, 2021.

12. Based on Claimant earning $14 per hour at the time of the injury, the ALJ determines Claimant's AWW should be based off of her hourly rate at the time of the injury. The ALJ further notes that Claimant received two $75 vaccination stipends

during her employment with Employer prior to her injury. The ALJ finds that the vaccination stipends should likewise be used in calculating Claimant's AWW.

13. Using Claimant's hourly rate of $14 per hour and considering Claimant's average hours per week, plus the 2.58 hours of overtime, the ALJ determines Claimant's AWW from her work with Employer to be $504.58 (345.83 hours worked x $14 = $4,841.62 + $54.18 (2.48 x $14 x 1.5) = $4,895.80 + $150.00 ($75 x 2 vaccination stipends)= $5,045.80 divided by 10 weeks= $504.58).

14. Claimant's AWW should also include her earnings from her concurrent employment, even Claimant did not miss time from work with her concurrent employment. Claimant testified that she was paid $1000 per month ($500 twice per month) for her concurrent employment. This equates to an increase in the AWW of $230.77 ($12,000 divided by 52= $230.77).

15. Therefore Claimant's AWW for this injury is determined to be $735.85.

16. Claimant's temporary partial disability ("TPD") benefits for the period of September 7, 2021 through May 27, 2021 are based only off of Claimant's AWW related to her employment with Employer as Claimant was not losing wages from her concurrent employment. For purposes of TPD benefits, Respondents shall pay Claimant TPD benefits for each week she did not earn $504.58 for the period of September 7, 2021 through May 27, 2022 pursuant to W.C.R.P. 5-6(E).

17. For purposes of temporary partial disability ("TPD") benefits after May 28, 2022, Respondents shall pay Claimant TPD benefits at a TPD rate of $338.39 ($504.58 x 2/3 = $338.39) based on Claimant's earnings of $504.58 with Employer beginning May 28, 2022 and continuing until terminated by law or statute.

18. The ALJ notes that the GAL admitted for TTD benefits effective May 28, 2022, however these would technically be TPD benefits as Claimant continued to maintain her concurrent employment without any wage loss.

CONCLUSIONS OF LAW

1. The purpose of the 'Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995).

5. As found, claimant's AWW for her September 6, 2021 injury is properly calculated at $735.85.

6. Based on the stipulation of the parties, Respondents are liable for TPD benefits for each week Claimant was not earning her AWW as calculated by her earnings with Employer to be $504.58 while employed with Employer up through May 27, 2022 after which time, Claimant is entitled to TPD benefits at a rate of $338.39.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant weekly TPD benefits based on Claimant's earnings of $504.58 for the period of September 7, 2021 through May 27, 2022.

2. Respondents shall pay Claimant TPD benefits at a rate of $338.39 for the period of May 28, 2022 until terminated by law of statute.

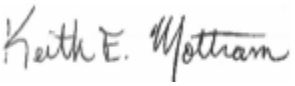
3. Claimant's AWW for her September 6, 2021 injury is $735.85.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. In **addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: April 27, 2023



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-124-689-006

ISSUES

- Did Respondent prove Claimant received an overpayment of $2,563.19?
- If the ALJ finds Claimant received an overpayment, the amount or rate of repayment.

FINDINGS OF FACT

1. Claimant works for employer as a Correctional Officer.

2. Claimant suffered an admitted injury to her left side, including her left knee and left breast when she fell at work during drill instruction exercises. The date of injury was October 8, 2010.

3. Following a Division Sponsored IME with Dr. Larson, the Claimant was placed at MMI. However, the Claimant successfully challenged that determination at hearing and the MMI determination was set aside by Order of ALJ Lamphere, dated February 2, 2021.

4. The Claimant underwent further treatment after that Order and again was placed at MMI on November 12, 2021.

5. Respondent filed a Final Admission (FAL)) on December 8, 2021. (Respondent's Exhibit B). In that Final Admission, the Respondent asserted an overpayment of $2,563.19. Claimant objected to the FAL and requested a hearing. Claimant's Application for Hearing dated January 4, 2022 did not endorse overpayment. Although not an exhibit, Respondent states in its proposed order that it filed a Response to the Application for hearing listing the overpayment asserted under the FAL. No hearing was held on this Application for Hearing.

6. Respondent filed an application for hearing dated December 21, 2022 alleging overpayment. (Claimant Exhibit 4). Claimant filed a Response to the Application dated December 28, 2022. (Claimant Exhibit 5).

7. [Redacted, hereinafter SW] is a claim adjuster at [Redacted, hereinafter CV]. She testified that CV[Redacted] is the Employer's third-party administrator. She handled the Claimant's workers' compensation claim at CV[Redacted] and oversaw the indemnity payments to the Claimant. She was familiar with the payment logs in Exhibit E of Respondent's Exhibits. The logs included payments that were made by CV[Redacted], as well as payments made by the prior third-party administrator. She was familiar with the payments made after MMI. She testified that the overpayment was due to temporary disability benefits paid after MMI. The indemnity payment log submitted into evidence shows two TTD checks issued on November 18, 2021 and November 25, 2021, each in

the amount of $1,329.06. The first check includes the day before MMI. After subtracting that day of TTD, the overpayment for TTD paid after MMI is the amount claimed by Respondent.

8. Respondent's Exhibit D shows wage records from checks issued beginning on February 28, 2022 through January 31, 2023. These records establish a pay raise that occurred in January 2022, associated with a promotion. They also establish various incentive pay and a bonus paid at various times in 2022.

9. Claimant testified that she exhausted her paid time off, sick pay, comp time and vacation time for time she spent away from work for medical treatment and was never reimbursed for those hours. However, Claimant did not provide any credible specific evidence concerning these hours and the ALJ is left to speculate as to the specifics of these allegations and whether this information would have any effect on the specific overpayment asserted in this hearing. In any event the issue of unpaid temporary disability benefits was not endorsed as an issue for hearing in Claimant's Response to Application for Hearing and is not an issue before the ALJ in this hearing. The only issue listed by Claimant in her Response was "Overpayment". (Claimant's Exhibit 5). As such, the ALJ cannot consider any alleged unpaid temporary disability benefits as a reduction to the overpayment asserted.

10. With respect to funds available to satisfy the overpayment, Claimant was asked questions concerning accounts shared between Claimant and her Spouse. Claimant maintains a separate banking account for her income, separate and apart from her husbands' banking account. Respondent provided no evidence that Claimant's husband's income is relevant to the repayment issue.

CONCLUSIONS OF LAW

A. Respondent's Assertion that Claimant is bound by the existence and amount of Overpayment

Respondent asserts that because Claimant did not endorse any challenge to the overpayment in her January 4, 2022 Application for hearing that she is bound by the existence and amount of overpayment as set forth in the FAL. This argument is without merit. Respondent provides no legal authority for this argument. The issue of overpayment continues to be the burden of proof of the Respondent to be established at a hearing. The notation regarding "overpayment" in the FAL simply provides notice to the claimant that an overpayment is asserted. See, *Peoples v. Industrial Claim Appeals Office*, 457 P.3d 143 (Colo. App. 2019). The notice of overpayment does not relieve the Respondent establishing the amount of overpayment at an evidentiary hearing.

B. Overpayment

Section 8-40-201(15.5) defines an overpayment as:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results

> in duplicate benefits because of offsets that reduce disability or death benefits payable . . . . For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits . . . .[1]

The statute creates three categories of overpayments. The first category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid. . ." Only the first category of overpayment is involved in this case.

Respondent has the burden to prove Claimant received an overpayment. *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

The Claimant was paid TTD after the date of MMI of November 12, 2022 and that constitutes an overpayment which the Respondent is entitled to recover.

C. Repayment

C.R.S. §8-43-207(1)(q) provides that an ALJ is empowered to order a repayment of overpayment in connection with a hearing. After consideration of the evidence, including the receipt of a raise in pay, a bonus and incentive pay, the ALJ concludes that a reasonable amount for repayment of the overpayment is $200 per month until the overpayment is repaid.

[1] This statute was amended in HB 21-1207, effective on January 1, 2022. The Industrial Claims Appeals office recently decided that the definition of overpayment does not apply to injuries that occurred prior to this effective date. *Barnes v. City and County of Denver*, WC 5-063-493. (ICAO March 27, 2023).

ORDER

It is therefore ordered that:

1. Respondent's claim for an overpayment of $2,563.19 is granted.

2. Claimant shall repay Respondent the TTD overpayment of $2,563.19 at the rate of $200 per month until the overpayment is repaid.

3. Any issue not addressed herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 13, 2023

Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-153-633-004

ISSUES

- Did Claimant prove that Claimant is subject to a penalty pursuant to C.R.S. §8-43-304 for violation of the Order of Judge Lamphere dated April 13, 2022.

- Claimant's request for attorney fees for Respondent's alleged pursuit of an unripe issue.

PROCEDURAL HISTORY

A hearing was previously held in this claim on March 10, 2022 before ALJ Lamphere in which the parties stipulated Claimant was overpaid benefits in the amount of $4,458.99. In his April 13, 2022 order, ALJ Lamphere ordered Claimant to repay the overpayment in monthly payments of $300 starting the first of the month after the order became final. (Respondent's Exhibit A). Claimant timely appealed ALJ Lamphere's order to the Industrial Claim Appeals Office ("ICAO'). The ICAO decision issued on August 15, 2022 affirmed ALJ Lamphere's order. (Respondent's Exhibit B). Claimant did not appeal the ICAO decision, thus, ALJ Lamphere's order became final 22 days after the ICAO decision, or on September 6, 2022.

Claimant subsequently filed another Application for Hearing in this claim with issues of reopening and medical benefits. The Claimant did not identify Judge Lamphere's order for repayment as an issue on this Application for hearing. This case was consolidated with the claim for compensability in W.C. 5-202-731.The hearing on that Application was held before ALJ Perales on September 29, 2022. ALJ Perales' order denying and dismissing Claimant's petition to reopen was issued on November 18, 2022. That order also denied and dismissed the claim for compensability in WC 5-202.731. That Order was affirmed by the Industrial Claim Appeals Office on April 4, 2023. Claimant is currently appealing that order to the Colorado Court of Appeals.

STIPULATED FACTS

The parties have stipulated that Claimant has not made any payments in any amount towards the $4,458.99 overpayment.[1]

FINDINGS OF FACT

1. Claimant worked for Employer as a correctional officer. Claimant sustained an admitted injury on October 23, 2020 to his right shoulder. The claim was previously closed by Final Admission. (Respondent's Exhibit A, p.3).

2. Claimant applied for a hearing to reopen this claim and the reopening was denied by order of Judge Lamphere dated April 13, 2022. That order also ordered repayment of the stipulated overpayment of $4,458.99 at the rate of $300 per month payable at the first of the month. That Order became final on September 6, 2022 when all appeals were exhausted.

3. Claimant also filed another application for hearing on this claim on the issues of petition to reopen and medical benefits. The hearing was consolidated with W.C. 5-202-731 on the primary issue of compensability. The hearing on that application was held before ALJ Perales on September 29, 2022. ALJ Perales denied and dismissed the Claimant's petition to reopen and claimed medical benefits in an order issued on November 18, 2022. The order also denied compensability in the consolidated case. As noted in footnote 1, Claimant has stated that he has filed an appeal of this order to the Colorado Court of Appeals and the Order is not final.

4. Claimant testified that the last day he worked was April 7, 2022 when he was restricted from work when he claims to have sustained a new injury to his right arm.[2]

5. Claimant testified that he is has been receiving disability benefits from [Redacted, hereinafter UM] since the Lamphere Order was issued. On December 24, 2022, Claimant received $15,107.14 in disability benefits from UM[Redacted] followed by $9,377.85 on January 25, 2023. (Respondent's Exhibit E, pp. 34 – 35). Additionally, Claimant testified that he continues to receive monthly long-term benefit checks from UM[Redacted] in the amount of $3,124.95). Claimant receives no other income.

CONCLUSIONS OF LAW

A. Stay of Proceedings

[1] Claimant provided this stipulation during the telephone testimony of [Redacted, hereinafter TC] and TC's[Redacted] testimony is therefore not included in the Findings of Fact since it was unnecessary to the disposition of the matter.

[2] This claimed injury is the subject matter of WC 5-202-731 where compensability was denied as part of the order issued by Judge Perales on November 18, 2022.

Claimant argues that the issue of penalties should be stayed pending a final order of Judge Perales' Order dated November 18, 2022. Claimant's argument ignores the fundamental fact that the Order of Judge Lamphere is the Order that imposes the obligation to repay the overpayment of $4,458.99 at the rate of $300 is a final order and is not subject to any further appeal. Moreover, the amount of the overpayment was stipulated by the parties and that is not subject to dispute. The current order on appeal by Judge Perales does not affect the Claimant's obligations owed on the Lamphere order to repay the overpayment, irrespective of the outcome to the Perales order on appeal. Claimant argues that if the Perales order is reversed or set-aside then potentially no overpayment would exist. This argument ignores the current legal obligation to repay the overpayment as ordered under a final order. It also relies on speculation as to what may happen in future court proceedings that may or may not eliminate the overpayment. Such speculation does not provide a basis for a stay of this proceeding. As such, the request for stay of this hearing on penalties, for violation of the Lamphere order is denied. Claimant has provided no legal authority in support of his request for stay and the Judge in this case is unable to find any legal authority that applies to this specific situation in an administrative proceeding that would require that a stay of this proceeding be imposed.

B. Ripeness and Attorney Fees

Claimant contends that the penalty claim, which is the subject matter of this hearing, is not ripe for consideration because of an ongoing appeal of a prior order in this claim. C.R.S. §8-43-211(3) provides that an attorney who requests a hearing or files a notice to set a hearing on an issue not ripe for adjudication may be assessed reasonable attorney fees for the expenses of the opposite party. An issue is ripe when it is real, immediate and fit for adjudication. *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App 2006). The term "fit for adjudication" refers to a disputed issue for which there is no legal impediment to immediate adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which never occur. Olivas-Soto v. ICAO, supra. (Citations omitted). *See also McMeekin v. Memorial Gardens*, W.C. 4-384-910 (ICAO 9/30/2014). There is nothing speculative or contingent with respect to the determination of penalties for violation of Judge Lamphere's order. The Order contains a stipulation of the amount of overpayment. It contains the rate of repayment and it is final. The status of the appeal of a subsequent order of Judge Perales on the issues of reopening of this claim and compensability of a consolidated claim does not affect whether there has been a violation of the order issued by Judge Lamphere. As such, the issue of penalties is ripe.[3]

C. Penalty

Section 8-43-304(1) provides that an employee who "fails, neglects, or refuses to obey any lawful order made by the director or panel. . . shall be punished by a fine of not more than one thousand dollars per day for each such offense. . ." Further, C.R.S. §8-43-

[3] Even if that were not the case, attorneys fees and costs may not be awarded absent a request by the requesting party to have the unripe issue stricken by a prehearing administrative law judge. C.R.S. §8-43-211(3). Claimant did not present evidence of compliance with this statutory requirement.

305 provides that 'Every day during which any . . employee . . . fails to comply with any lawful order of an administrative law judge . . . shall constitute a separate and distinct violation thereof."

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. First, the ALJ must determine whether the employee violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

There is no question that the Claimant in this case violated the final order of Judge Lamphere ordering repayment of the overpayment. The order is very clear that the overpayment amount was stipulated to by the parties and the rate of repayment was not appealed or otherwise disputed. Claimant also stipulated in this hearing that he has made no payments pursuant to Judge Lamphere's Order. Further, Claimant did not make any argument that the order was not final. As to reasonableness, the argument provided by Claimant is that this proceeding should be stayed pending appeal of a subsequent order that denied reopening of this case based on worsening of condition. In his position statement, the Claimant argues that he is unable to pay and the money since he has been on short term and long-term disability and that money is not considered income. However, Claimant provided no testimony of his inability to pay the overpayment at hearing. I am therefore left with argument without persuasive supporting testimony or other evidence on Claimant's alleged inability to repay the overpayment. The only testimony Claimant provided as to this allegation was his inclusion of testimony that the disability payments received from UM[Redacted] were used to pay his bills from the previous months. No further testimony or evidence was offered as to why he could not repay the overpayment based on his financial circumstances. I conclude that based on the preponderance of the evidence that the violation of Judge Lamphere's order based on this argument is not objectively reasonable. Claimant has been in violation of the April of the final order of Judge Lamphere for 187 days from October 1, 2022, the first full month following the date the Lamphere order became final, until the date of this hearing.

As to the amount of penalties, in order to assess an appropriate penalty, this ALJ is mindful of the analysis in Associated Business Products v. Industrial Claim Appeals Office, 126 P.3d 323 (Colo. App. 2005) which includes as factors the reprehensibility or culpability of the party, the relationship between the penalty and the harm to the victim caused by the other party's actions and the sanctions imposed in other cases for comparable misconduct. I conclude that based on the evidence, Claimant is culpable for payment of the undisputed overpayment and failed to provide any persuasive evidence as to why he failed to pay the required amounts. As to other comparable penalties, I have considered the facts and holding in the case of Lange v. Kern, W.C. 4-907-620-002 (ICAO January 18, 2019) that imposed penalties of $2 per day for failing repay an overpayment pursuant to an order. After consideration of that case as well as the facts in this case, and considering the amount of the overpayment in dispute as well as the Claimant's financial situation, based on the evidence presented at the hearing, the ALJ determines that the

appropriate penalty for violation of Judge Lamphere's order is $5 per day. The ALJ has considered the holding in Colorado Department of Labor v. Dami Hospitality, L.L.C. 442 P.3d 94 (Colo. 2019) regarding gross disproportionality. Based on the disability payments received from UM[Redacted], the amount of penalty imposed is not excessive and serves the purpose of compliance with a valid order without unduly burdening the Claimant's financial situation. Even though the harm to the Respondent in this case may be considered minimal, the Claimant's failure to comply with a lawful order is serious and must result in a meaningful consequence so that Claimant understands that he may not ignore a valid order.

ORDER

It is therefore ordered that:

1. Claimant's request for a stay of this proceeding to determine the issue of penalties is denied.

2. Respondent's request for imposition of penalties against the Claimant is granted. Claimant shall pay penalties of $935.00. The amount apportioned to Respondent shall be 25% of the penalty and the remaining 75% is apportioned to the Colorado uninsured employer fund as set forth in C.R.S. §8-43-304(1).

3. Claimant's request for attorney fees is denied and dismissed.

4. Any issue not resolved by this order is reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 27, 2023

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-208-340-002

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on March 12, 2022 he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment he has received for his right hip is reasonable and necessary medical treatment to cure and relieve the effects of the March 12, 2022 injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment he has received for his right knee is reasonable and necessary medical treatment to cure and relieve the effects of the March 12, 2022 injury.

4. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) and/or temporary partial disability (TPD) benefits.

5. If the claim is found compensable, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant shall be assessed a late reporting penalty pursuant to Section 8-43-102(1)(a), C.R.S.

FINDINGS OF FACT

1. The employer operates a construction equipment rental business. In addition to renting large construction equipment, the employer also rents, sells, and repairs small equipment such as lawn mowers and chainsaws. [Redacted, hereinafter JS] and his spouse, [Redacted, hereinafter MC], own and operate the business.
2. In November 2021, the claimant was hired to work for the employer as a driver and small engine mechanic. The claimant's driver job duties included pickup and delivery of rented equipment at customer locations.

3. On Saturday, March 12, 2022, the claimant was tasked with delivering a bobcat/skid steer with a snow bucket attachment from the employer's location in Glenwood Springs, Colorado to a customer in Snowmass, Colorado. The claimant was accompanied by another employee, the owners' 16 year old son, WS[1]. The piece of equipment was delivered to the requested location in Snowmass without incident. The

[1] The ALJ identifies WS by initials only because WS was a minor on March 12, 2022, and remained a

minor on the date of the hearing.

claimant and WS were then tasked with picking up the equipment later the same day. When the claimant and WS arrived at the designated pick up time, they learned that the equipment was essentially buried in snow. The claimant and WS assisted the customer with shoveling snow to remove the equipment.

4. JS[Redacted] was aware of all of the above details related to the equipment delivery and pick up.

5. The claimant provided detailed testimony regarding the loading of the March 12, 2022 equipment upon pick up. The claimant testified that as he began to drive the bobcat onto the trailer, the trailer became unhitched from the ball of the trailer hitch. The claimant further testified that this resulted in the trailer going up into the air creating a space between the trailer and the truck. The claimant testified that WS ran in between the raised trailer and the truck. The claimant testified that he was concerned that if he continued forward with the bobcat onto the trailer, or reversed off of the trailer, this would cause the trailer to crash toward the ground, injuring WS. The claimant testified that he opted to leap from the bobcat to tell WS why it was unsafe to stand in that location. The claimant further testified that while in the act of jumping up and out of the bobcat, his right foot became caught in the "foot pocket". The claimant testified that he immediately felt pain in his right hip.

6. JS[Redacted] was not informed of these details described in paragraph 5 above regarding the Snowmass equipment on March 12, 2022.

7. Subsequently, the trailer was secured and the bobcat loaded. The claimant and WS traveled back to Glenwood Springs from Snowmass. The claimant drove on the return trip.

8. The claimant testified that while driving back to Glenwood Springs, he began to experience pain in his right knee. The claimant believes that while exiting the bobcat he may have struck his knee on the snow bucket.

9. Thereafter, the claimant returned the bobcat to the employer's location and then drove WS to his home. The claimant did not communicate with JS[Redacted] or MC[Redacted] upon arrival at their home.

10. The following day, Sunday, March 13, 2022, the claimant was not scheduled to work. The claimant testified that on that date he had pain in his right hip with pain and swelling in his right knee.

11. The claimant reported to work as scheduled on Monday, March 14, 2022. Upon his arrival the claimant and JS[Redacted] interacted. The claimant reported that the delivery and pick up in Snowmass went well. The claimant did not provide any information regarding the unhitched trailer and related incident. JS[Redacted] did notice that the claimant appeared "stiff' in his movements and he inquired about it. The claimant responded that he tweaked his knee in the snow. The claimant did not indicate that the "tweak" occurred as a work related incident. The claimant did not make any

statements regarding his right hip. JS[Redacted] asked if the claimant needed to see a doctor for his knee and the claimant declined.

12. MC[Redacted] testified via deposition. MC[Redacted] provided testimony regarding the employer's process for handling employee injuries. MC[Redacted] testified that if an employee is injured that they would be expected to report that injury to either JS[Redacted] or MC[Redacted]. Once that reporting occurred steps would be taken to obtain medical treatment and file a claim. that it is the employer's

13. The claimant did not provide the employer with a verbal or written statement regarding the unhitched trailer and "near miss" incident involving WS. The only information relayed to the employer was that he tweaked his knee in the snow.

14. MC[Redacted] first became aware of the claimant's right knee issues on April 29, 2022. MC[Redacted] testified regarding a conversation she had with the claimant on that date regarding JS[Redacted] own medical treatment. During that conversation, the claimant stated that he receives medical treatment at Steadman clinic. The claimant also stated to MC[Redacted] that he might have to seek treatment for his right knee because he had slipped on the snow in March. The claimant did not indicate to MC[Redacted] that his slip on ice occurred at work. The claimant did not indicate that he wanted to pursue a workers' compensation claim during the April 29, 2022 conversation.

15. On May 23, 2022, the claimant was seen by his primary care physician (PCP) Dr. Kelli Konst-Skwiot with Grand River Clinic Rifle. The purpose of that appointment was a normally scheduled follow-up regarding the claimant's pain medications. The claimant has taken pain medications for many years to treat chronic lumbar back pain. The claimant began seeing Dr. Konst-Skwiot on January 14, 2020.

16. Dr. Konst-Skwiot's January 4, 2020 medical record refers to the claimant's use of Vicodin for approximately 10 years. The claimant reported to Dr. Konst-Skwiot that he had used Vicodin since undergoing surgery and injections years prior. Medical records entered into evidence demonstrate that the claimant had extensive low back treatment with Steadman Clinic beginning in 2013. Since beginning treatment with Dr. Konst-Skwiot in 2020, the claimant has regularly occurring follow-up appointments to discuss his pain medications.

17. The claimant testified that on March 12, 2022 he was using Vicodin, as was his practice. The claimant also testified that as of the day of hearing he continues to use Vicodin on a daily basis.

18. While at such a follow-up appointment with Dr. Konst-Skwiot on May 23, 2022, the claimant described any incident that occurred in March involving his right knee. Dr. Konst-Skwiot noted "He states he was getting out of bobcat and there are pockets for his feet. His leg got caught in bucket and it was really sore[.] It happened in [M]arch and it is still painful[.] He said it happened at work. He has not yet started a

case through his job." At the May 23, 2022 appointment with Dr. Konst-Skwiot, the claimant did not report injuring any other body part.

19. During the May 23, 2022 appointment, Dr. Konst-Skwiot provided the claimant with forms for pursuing a workers' compensation claim. The claimant understood that he was to provide these documents to the employer.

20. On May 23, 2022, the claimant presented MC[Redacted] with the paperwork provided to him by Dr. Konst-Skwiot. At that time, the claimant informed MC[Redacted] that he wished to pursue a workers' compensation claim related to his right knee and an incident that occurred on March 12, 2022. MC[Redacted] testified that she did not immediately initiate a claim because she understood that any injury was to be reported within four days.

21. After communications with the insurer, on June 13, 2022, MC[Redacted] prepared a First Report on Injury or Illness regarding a March 12, 2022 incident. The body part identified in that report is the claimant's right knee. The report also states that the claimant "tweaked knee on snow" while "loading a machine on trailer". MC[Redacted] testified that the information provided in that First Report was directly from the claimant. The claimant did not provide any additional information regarding the mechanism of his injury to MC[Redacted]. The claimant did not report injury to any other body.

22. On that same date, MC[Redacted] provided the claimant with a list of designated medical providers. The claimant selected Glenwood Medical Associates (GMA).

23. The claimant was seen at GMA on June 15, 2022 by Dr. Emily Zerba. At that time, the claimant reported right hip pain, right knee pain, and left foot pain. With regard to the March 12, 2022 mechanism of injury Dr. Zerba recorded:

> He was loading jumped out of skid-[steer] to help a co[-]worker and when he landed his right foot was at an angle (no pain in the knee) but then started to have right hip pain. The right hip pain started when he tried to pull his leg out. Pain on the anterior portion of the hip. . . Later that day he started to have right knee pain on the inside (medial aspect).

24. In the June 15, 2022 medical record, Dr. Zerba ordered magnetic resonance imaging (MRI) of the claimant's right hip and right knee. The purpose of the MRIs was to ascertain if the claimant had suffered a labral tear in his right hip and/or a meniscus tear in his right knee. The claimant denied prior right hip and right knee injuries. Dr. Zerba opined that the claimant's right hip and right knee condition were work related. She assessed work conditions that included a 15 pound lifting restriction, and no crawling, kneeling, squatting, or climbing.

25. On June 15, 2022, the claimant provided MC[Redacted] with the work restrictions assigned by Dr. Zerba. Due to the claimant's work restrictions the employer was unable to provide the claimant with continuing work. June 17, 2022 was the claimant's last day working for the employer.

26. JS[Redacted] testified that between March 12, 2022 and June 15, 2022, the claimant continued to perform all of his normal jobs duties without issue. The claimant did not communicate to JS[Redacted] that he could not perform his job duties because of an injury.

27. MC[Redacted] also testified that the claimant continued to work "full pace" until he was seen by Dr. Zerba on June 15, 2022.

28. On June 23, 2022, the claimant underwent MRIs of both his right hip and right knee. Dr. Elizabeth Kulwiec authored reports for both of the June 23, 2022 MRIs.

29. With regard to the right hip MRI, Dr. Kulwiec noted, *inter alia,* that cam-type morphology of the right hip with extensive degenerative changes and tears of the anterosuperior and posterosuperior labrum; mild osteoarthritis of the hip with grade 3 chondromalacia of the superior joint; a small joint effusion; mild bilateral greater trochanteric bursitis; and lumbar degenerative disc disease.

30. For the claimant's right knee, Dr. Kulwiec noted that, *inter alia,* a tear of the body and posterior horn of the medial meniscus; quadriceps enthesopathy; grade 2 chondromalacia of the patella and medial femoral condyle; strain or tendinosis of the semimembranosus tendon; a small joint effusion; and mildly thickened medial patellar plica.

31. On July 2, 2022, the respondents filed a Notice of Contest regarding the March 12, 2022 incident. The document indicates the respondents contested the claimant's claim pending a doctor's report.

32. On July 13, 2022, the claimant returned to Dr. Zerba to discuss the MRI results. Dr. Zerba noted that the right knee MRI showed a posterior horn meniscus tear and the right hip MRI showed a cam deformity with an anterior posterior labral tear. Dr. Zerba referred the claimant for an orthopedic consultation and increased the claimant's lifting restriction to 30 pounds.

33. On July 19, 2022, physician advisor Dr. Albert Hattem issued a report in which he opined that the claimant did not suffer an injury on March 12, 2022. In support of this opinion, Dr. Hattem noted that the claimant did not seek treatment related to the March 12, 2022 event until he was seen by Dr. Zerba on June 15, 2022. Dr. Hattem also noted that if the claimant had experienced a significant injury to his right hip and/or right knee "one would have expected him to seek treatment for these injuries at that time or within weeks of the injury, not more than three months later." Finally, Dr. Hattem opined

that a medial meniscus tear and a labral tear are both "likely age-related degenerative findings and not due to an acute injury."

34. On August 17, 2022, the claimant returned to Dr. Zerba and reported that his claim was denied and he had not seen an orthopedic specialist.

35. At the request of the respondents, on October 25, 2022, the claimant attended an independent medical examination (IME) with Dr. Robert Messenbaugh. In connection with the IME, Dr. Messenbaugh reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. At the IME, the claimant described a mechanism of injury virtually identical to the one he described in his testimony regarding the bobcat and WS. The claimant denied prior treatment and injuries to his right hip and right knee. The claimant disclosed to Dr. Messenbaugh that he has consistently taken Vicodin since undergoing a lumbar spine fusion. On examination, Dr. Messenbaugh noted a "slight catch" within the right hip. On examination of the claimant's right knee, Dr. Messenbauth noted full extension and full flexion of his right knee.

36. During his review of the claimant's medical records, Dr. Messenbaugh noted that on August 2, 2017, the claimant underwent a right hip MRI. In his IME report, Dr. Messenbaugh noted that the 2017 MRI shows severe and advanced pathology involving his right hip with labral tearing and degeneration, chondral damage, and evidence of impingement.

37. The August 2, 2017 MRI report was admitted into evidence at hearing. That report was issued by Dr. Charles Ho. In this report, Dr. Ho found, *inter alia,* a partial detachment of the articular margin of anterior to lateral labrum, with severe central labral degeneration and swelling hypertrophy; chondral degeneration thinning grade 2 to 3 along the peripheral anterior lateral aspect of the acetabulum; mild greater trochanteric bursitis, scarring, and edema.

38. In the October 25, 2022 IME report, Dr. Messenbaugh opined that the claimant did not suffer injuries to his right knee or his right hip on March 12, 2022. Dr. Messenbaugh noted that it was improbable that the right meniscus tear was caused by the events of March 12, 2022. Dr. Messenbaugh explained that a contusion to the knee would not result in a meniscus tear. With regard to the claimant's right hip, Dr. Messenbaugh noted that the pathology in the claimant's right hip was present "well before" March 12, 2022.

39. After reviewing additional medical records, on December 6, 2022, Dr. Messenbaugh issued an addendum to his IME report. In that addendum, Dr. Messenbaugh noted his review of records from Steadman clinic from February 18, 2011 through November 16, 2017. Dr. Messenenbaun noted that on August 2, 2017, Dr. Thos Evans performed a right hip intraarticular steroid injection. In that same August 2, 2017 medical record Dr. Evans noted that if the injection did not provide the claimant with relief, a referral to Dr. Philippon for right hip arthroscopy would be appropriate. In the IME addendum, Dr. Messenbaugh opined that the claimant had "quite severe and

symptomatic right hip pathology years prior to any event on March 12, 2022." Dr. Messenbaugh noted that his opinions expressed in his October 25, 2022 IME report were unchanged. Dr. Messenbaugh's testimony was consistent with his written reports.

40. At the request of the claimant, Dr. Kulwiec compared the 2017 and 2022 right hip MRIs. On February 16, 2023, Dr. Kulwiec issued an addendum to her June 23, 2022 report. In that addendum, Dr. Kulwiec noted that this comparison showed that the mild asphericity of the femoral head was unchanged; that abnormal signal and blunting of the glenoid labrum was similar on both exams; a small joint effusion was unchanged; and the signal in the quadratus femoris muscle remained normal.

41. The ALJ finds the claimant's testimony about the event involving the trailer coming unhitched and his dramatic exit from the bobcat to be neither credible nor persuasive. At no time did the claimant report the emergent nature of this incident to the employer. The ALJ finds that the claimant simply stated that he tweaked his knee on the snow.

42. The ALJ credits the testimony of JS[Redacted] and MC[Redacted] regarding the sequence of events in this case. The ALJ credits the medical records, particularly the comparisons of the two hip MRIs that demonstrate no change to the claimant's right hip. In addition, the ALJ credits the opinions of Drs. Hattem and Messenbaugh over the contrary opinions of Dr. Zerba. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that on March 12, 2022 he suffered an injury arising out of and in the course and scope of his employment with the employer. The ALJ further finds that the claimant has failed to demonstrate that it is more likely than not that the events of March 12, 2022 aggravated or accelerated any preexisting condition in his right hip and/or right knee to necessitate medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ's factual findings concern only evidence that is dispositive of the issues involved.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see* a/so *Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on March 12, 2022, he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the events of March 12, 2022, accelerated or aggravated any preexisting condition to necessitate medical treatment. As found, the medical records, the testimony of [Redacted JS] and MC[Redacted], and the opinions of Drs. Hattem and Messenbaugh are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim related to a March 12, 2022 date of injury is denied and dismissed. All remaining endorsed issues are denied and dismissed as moot.

Dated April 10, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8--43-301(2), C.R.$. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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In **addition, It Is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-188-968-002

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the cervical disk arthroplasty at the C5-C6 level, as recommended by Dr. Alex Sielatycki, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 21, 2021 work injury.

FINDINGS OF FACT

1. The claimant works for the employer as a welder/mechanic. On May 21, 2021, the claimant suffered a work injury when he stood up and stuck his head on scaffolding. The claimant testified that initially he felt a "crunching sound" in his neck and felt dazed. Over the next several days the claimant experienced increasing pain in his neck. In addition, the claimant had radiating pain into his right shoulder and right arm.

2. On May 24, 2021, the claimant was seen by Dr. Matthew Grzegozewski regarding the May 21, 2021 injury. At that time, x-rays showed no evidence of fracture or subluxation. Dr. Grzegozewski diagnosed a cervical strain and administered a trigger point injection.

3. On May 24, 2021, Dr. Grzegozewski ordered work restrictions of no lifting, pushing, or pulling over 20 pounds. Over time the claimant's symptoms improved and his work restrictions were gradually increased to 40, 50, 60 pounds lifting and push/pull up to 100 pounds.

4. On July 12, 2021, the claimant underwent magnetic resonance imaging (MRI) of the cervical spine. The MRI was deemed to be a "negative study". The radiologist noted normal alignment and marrow signal, well-maintained disc height, and no bulge or herniation.

5. In the weeks and months following the injury the claimant underwent conservative care that included physical therapy, occupational therapy, massage therapy, chiropractic care, and pain medications. The claimant testified that these various treatment modalities provided temporary relief of his symptoms. No treatment has provided long term relief.

6. As part of this conservative medical treatment, the claimant underwent osteopathic manipulative therapy (OMT). On November 17, 2021, the claimant was seen by Dr. Aaron Stewart. At that time, the claimant reported right sided neck pain down into the upper thoracic area. Dr. Stewart administered OMT and recorded that the claimant tolerated the procedure well.

7. On November 19, 2021, the claimant communicated with [Redacted, hereinafter KF], Nurse Case Manager. In that discussion, the claimant reported to KF[Redacted] that he did experience some symptom relief from the recent OMT session. The claimant specifically reported that the burning radiating pain was better after OMT.

8. The claimant testified that in the days after the November 17, 2021 OMT treatment he started to experience left sided symptoms. The claimant described this as a deep sensation on the left side of his neck. The claimant further testified that he had not previously experienced left sided symptoms.

9. On Sunday, November 21, 2021, the claimant experienced an extreme flare up of symptoms while hanging a door at home. At the time of this incident, the claimant's work restrictions included lifting up to 60 pounds, and push/pull up to 100 pounds. The claimant testified that he was attempting to adjust a bifold door when he felt a pop in his neck followed by excruciating pain in his neck. In addition, the claimant experienced numbness down his left arm, followed by a burning sensation from his left shoulder into his left wrist. The claimant's pain was so severe that he was transported to Memorial Regional Emergency Services.

10. On November 21 2021, the claimant was seen at Memorial Regional Emergency Services by Dr. Tinh Huyn. Dr. Huyn recorded that the claimant was experiencing "sudden worsening neck pain while working on a cabinet with arms over head prior to arrival." The claimant reported to Dr. Huyn that he had pain radiating down his left arm. The claimant also described the May 21, 2021 work incident to emergency department staff. The claimant was given Gabapentin and placed in a soft neck collar, which provided some relief of his symptoms. Dr. Huyn reviewed the June 24, 2021 MRI and determined that the claimant did not need further imaging.

11. On November 22, 2021, the claimant spoke with KF[Redacted] and stated that "he is slightly better than last night. The OMT seemed to help last week, but the pain has now gone to his left side which is new. Yesterday was the worst pain he has had. He had a pop last night and he had numbness to his left arm and fingers. His arm was weak for a while."

12. On November 22, 2021, the claimant returned to Dr. Stewart. The medical record of that date states that the claimant's "pain had improved following an OMT treatment last week." The claimant also described the November 21, 2021 incident at home and treatment in the emergency department. The claimant testified that Dr. Stewart did not administer OMT on November 22, 2021, because of the claimant's report of the November 21, 2021 incident and onset of symptoms. Dr. Stewart ordered a cervical spine MRI.

13. The claimant testified that the new left sided symptoms lasted a few days. Then one night while wearing the neck brace provided by the emergency department, he felt a pop in his neck, and his symptoms returned to the right side. It is the claimant's belief that the left sided symptoms were caused by the November 17, 2021 OMT.

14. On November 24, 2021, the claimant underwent a repeat MRI of the cervical spine. That MRI showed a congenitally small canal at the C3 to CG levels and a disc bulge at the C5-C6 level.

15. On December 1, 2021, the respondent filed a General Admission of Liability regarding the claimant's May 21, 2021 work injury.

16. Following the November 24, 2021 MRI, the claimant was referred for a surgical consultation. On December 20, 2021, the claimant was seen by Dr. Michael Rauzzino. Dr. Rauzzino documented that the claimant was experiencing neck pain, bilateral shoulder pain, and right arm weakness. Dr. Rauzzino noted that an initial MRI showed degenerative findings. Dr. Rauzzino noted that the claimant had "an abrupt episode of worsening of symptoms when he felt a pop on the left side of his neck when his symptoms switched from the right side to the left." Dr. Rauzzino noted that a repeat MRI showed findings similar to the prior MRI, with a small concentric disc bulge at the C5-C6 level. Dr. Rauzzino opined that this disc bulge was not the cause of the claimant's pain symptoms. Dr. Rauzzino recommended continuing physical therapy and consideration of injections.

17. Thereafter, the claimant consulted with Dr. Eric Harris. The claimant was first seen by Dr. Harris on January 11, 2022. In the medical record of that date, Dr. Harris noted the claimant's May 2021 incident at work. Dr. Harris recorded that the claimant had "several repeat aggravations of his symptoms, one in early November of last year that caused him to have some symptoms on the left. He then went for an MRI, which was reportedly negative. He then started having symptoms on the right, which is where he is hurting now." Dr. Harris noted that the claimant had "an unusual constellation of symptoms that have been kind of moving around". Dr. Harris recommended continuing physical therapy, use of a Medrol Dosepak, and referred the claimant to Dr. Trevin Thurman for injections.

18. On January 20, 2022, the claimant was seen by Dr. Thurman. At that time, the claimant reported an onset of symptoms in May, with a worsenting in November. The claimant also reported pain radiating down his right arm and into his hand. Dr. Thurman reviewed the claimant's cervical spine MRI and diagnosed a right C6 radiculopathy and C5-C6 disc herniation Dr. Thurman recommended a right C6-C7 interlaminar epidural steroid injection (ESI). The claimant underwent the recommended ESI on February 4, 2022. In a report dated March 16, 2022, Dr. Thurman noted that the February injection did not provide the claimant with relief. Dr. Thurman recommended the claimant undergo a transforaminal epidural steroid injection (TFESI).

19. On March 17, 2022, Dr. Long Vu administered right C4-C5 and C5-C6 TFESIs.

20. On April 5, 2022, the claimant was seen by Dr. Scott Primack. In the medical record of that date, the claimant reported that the March 17, 2022 TFESIs provided him with pain relief for 16 days. Dr. Primack recommended that the claimant undergo facet joint injections at the C4-C5 and C5-C6 levels.

21. On May 4, 2022, Dr. Thurman administered bilateral C4-C5 and C5-C6 intraarticular facet joint injections. On May 23, 2023, the claimant returned to Dr. Thurman and reported he had 80 percent relief of his neck pain symptoms, but no improvement of the radiating right arm pain. The claimant also reported that he had started to experience left sided neck pain that radiated into his left arm. At that time, Dr. Thurman referred the claimant back to Dr. Harris.

22. On May 24, 2022, the claimant was seen by Dr. Harris and reported radiating pain into both arms. At that time, Dr. Harris recommended a repeat MRI of the claimant's cervical spine.

23. On June 22, 2022, the MRI showed a disc bulge at the C5-C6 level that was asymmetric to the right with annular tear demonstrates mild to moderate spinal canal narrowing and contacts the ventral right cord and mild left neural foraminal narrowing secondary to uncovertebral disease.

24. On June 23, 2023, Dr. Thurman performed electromyography (EMG) testing. In his EMG report, Dr. Thurman noted mild to moderate bilateral subacute C6 cervical radiculopathy; and mild to moderate left and mild right median neuropathy (consistent with carpal tunnel syndrome).

25. On June 24, 2022, the claimant returned to Dr. Harris. At that time, Dr. Harris noted the EMG findings and recommended that the claimant undergo surgical intervention. Specifically, Dr. Harris recommended either a C5-C6 cervical disc arthroplasty or, in the alternative, a C5-C6 anterior cervical discectomy and fusion (ACDF).

26. On August 3, 2022, the claimant returned to Dr. Rauzzino. At that time, Dr. Rauzzino agreed that surgery was warranted. However, he opined that an ACDF at the C5-C6 level would better address the claimant's symptoms. Dr. Rauzzino noted that the claimant had more than a year of symptoms without significant relief from conservative treatment. Dr. Rauzzino also identified an abnormal MRI**,** and EMG results that suggested C6 nerve root irritation. Dr. Rauzzino further opined that the claimant's need for the surgery was ..occupationally related."

27. On August 19, 2022, the claimant attended an independent medical examination (IME) with Dr. B. Andrew Castro. In connection with the IME, Dr. Castro obtained a history from the claimant, performed a physical examination, and reviewed the claimant's medical records. In his August 21, 2022 IME report, Dr. Castro opined that surgery is not indicated to treat the claimant's symptoms. In support of this opinion, Dr. Castro noted that the claimant is neurologically intact with mild findings on MRI. Dr. Castro also noted that the claimant does not have clear symptoms of cervical

radiculopathy. Dr. Castro noted that the claimant's symptoms are "somewhat vague". It is also Dr. Castro's opinion that the onset of new symptoms in November 2021 is unrelated to the claimant's May 21, 2021 work injury. Dr. Castro recommended that the claimant undergo a functional capacity evaluation.

28. The IME recording and related transcript were entered into evidence. During the IME, the claimant told Dr. Castro that a few days after a "DO worked on [the claimant]" in November, he began to have left sided symptoms. The claimant then described the November 21, 2021 incident at home.

29. On October 24, 2022, the claimant was seen by surgeon Dr. Alex Sielatycki for "a third opinion". Dr. Sielatycki diagnosed a disc herniation at the C5-C6 level, which was causing radiculopathy. Dr. Sielatycki recommended the claimant undergo a cervical disc arthroplasty, rather than a fusion. As to the issue of causation, Dr. Sielatycki opined:

> it is highly likely that the injury in question did cause these symptoms and the disk herniation. The MRI has the appearance of a more acute soft disk herniation. The patient denies any significant previous cervical spine pain. The onset of symptoms correlates with the injury as described. I therefore do believe that the injury in May of 2021 is causally related to his disk herniation in the neck and is related to the need for ongoing treatment.

30. Dr. Castro's testimony by deposition was consistent with this written report. Dr. Castro reiterated his opinion that the recommended surgery is not indicated to treat the claimant's condition. Dr. Castro also testified that he does not see a causal connection between the claimant's May 2021 work injury and the fusion surgery recommended by Dr. Harris. Dr. Castro testified that the claimant's symptoms are "all over the place" as far as moving between right sided and left sided. He also noted that even the claimant's neck symptoms are intermittent. Dr. Castro also reiterated that the MRI findings are mild and noted that the claimant is neurologically intact on examination.

31. The claimant testified that his current symptoms include a burning sensation into his right and left shoulders, with pain that begins on the right side of his neck and radiates down into his right shoulder blade. He also experiences pain in his right forearm. The claimant further testified that since November 21, 2021 he has not returned to work for the employer. In addition, he is no longer able to engage in other activities such as hunting and fishing.

32. The ALJ does not find the claimant's testimony regarding the onset of his new left sided symptoms to be credible or persuasive. The ALJ finds that the claimant began to experience those new left sided symptoms only after he attempted to hang a closet door at his home on November 21, 2022. The ALJ is not persuaded that the OMT administered by Dr. Stewart led to the onset of those symptoms. The ALJ credits the medical records and the opinions of Dr. Castro over the contrary opinions of Drs. Harris,

Rauzzino, and Sielatycki. Although Drs. Harris, Rauzzino, and Sielatycki each make some reference to an increase of the claimant's symptoms in November 2021, the ALJ is not persuaded that they were made aware of the incident at the claimant's home on November 21, 2021. The ALJ finds that only Dr. Rauzzino had a clear understanding of the claimant's full medical history, including details surrounding the November 21, 2021 incident. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the recommended cervical spine surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 21, 2021 work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

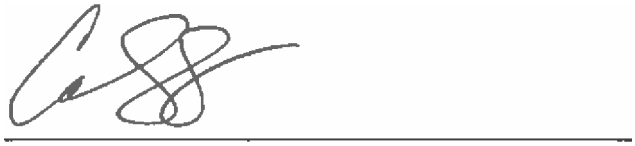
4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate that the cervical disk arthroplasty at the C5-C6 level, as recommended by Dr. Alex Sielatycki, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 21, 2021 work injury. As found, the medical records and the opinions of Dr. Castro are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a cervical spine surgery, as recommended by Dr. Alex Sielatycki, is denied and dismissed.

Dated April 20, 2023.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 5. 6th Street, Suite 414
Grand Junction, Colorado 81501

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-197-156-002

PROCEDURAL MATTERS

1. On November 30, 2022, the respondents filed an Application for Hearing (AFH) endorsing the issue of withdrawing the March 4, 2022 General Admission of Liability (GAL) on the basis of improvidence.

2. The claimant is self-represented in this matter.

3. The respondents mailed a copy of the AFH to the claimant at the address of [Redacted, hereinafter HA]. This is the address that the DOWC has on file for the claimant. The DOWC has no email listed for the claimant.

4. On December 14, 2022, the respondents filed a hearing confirmation with the Office of Administrative Courts (OAC) for a hearing on March 16, 2023 at 1:00 p.m. The hearing confirmation was emailed to the claimant at two email addresses: [Redacted, hereinafter ESS] and [Redacted, hereinafter JG]

5. However, in the certificate of mailing on the hearing confirmation, the claimant's email address was identified as ESS[Redacted] This email contains a typographical error in the spelling of the claimant's first name ([Redacted, hereinafter JEY] vs. [Redacted, hereinafter JFY]).

6. On December 19, 2022, the OAC issued a hearing notice for the March 16, 2023 hearing. The email used for the claimant was the one containing the typographical error [Redacted, hereinafter OY]).

7. On March 9, 2023, the OAC sent a Google Meet invitation to the parties to attend the March 16, 2023 hearing via that platform. The email used for the claimant for that invitation was his correct email address of JEY[Redacted].

8. On March 16, 2023, the respondents appeared ready to proceed to hearing. The claimant failed to appear and did not contact the court indicating that he would be late or otherwise request to be excused from the hearing.

9. At the March 16, 2023 hearing, the ALJ considered Rule 23 OACRP which applies to a non-appearing party. The ALJ determined that although the hearing confirmation was sent to the email address containing a typographical error, the hearing confirmation and the Google Meet invitation were both emailed to the correct email address. Therefore, the ALJ determined that the claimant was provided some notice of the March 16, 2023 hearing.

10. The ALJ entered the respondents' exhibits into evidence and heard the respondents' legal position regarding the request to withdraw the GAL.

11. Given the unusual circumstances surrounding the notifications provided to the claimant of the hearing, the ALJ elected to issue an Order to Show Cause related to the claimant's failure to appear.

12. Therefore, on March 20, 2023, the ALJ issued an Order to Show Cause that held issuance of Findings of Fact, Conclusions of Law, and Order (FFCLO) pending the claimant providing good cause, in writing, for his failure to appear at the March 16, 2023 hearing. The claimant was given until April 20, 2023 to provide such information to the ALJ.

13. That show cause order also stated that if no good cause was shown, the ALJ would close the evidence in this matter and issue FFCLO pursuant to Section 8-43-215 C.R.S.

14. No written statement was received from the claimant regarding his failure to appear on March 16, 2023. Therefore, the ALJ now issues FFCLO on the endorsed issue.

ISSUES

Whether the respondents have demonstrated, by a preponderance of the evidence, that the March 4, 2022 GAL should be withdrawn as improvident, and a new GAL filed for medical benefits only.

FINDINGS OF FACT

1. On January 25, 2022, the claimant suffered a work related injury to his low back.

2. Following the injury, the claimant sought treatment in the emergency department (ER) at Fort Defiance Indian Hospital on January 25, 2022. At that time, the claimant was seen by Karissa Nemeti, RN and Matthew Plumb, PA-C. The medical record of that date indicates that the claimant was injured while climbing down a ladder and twisted.

3. PA Plumb assessed a muscle strain and took the claimant off of work for five days.

4. On February 8, 2022, the claimant returned to the ED and was seen by Kendra Wilson, FNP. At the claimant's request, Nurse Wilson determined that the claimant could return to work without restrictions.

5. On March 4, 2022, the insurer filed a General Admission of Liability reflecting payments for temporary total disability (TTD) benefits for the period of January 29, 2022 through February 7, 2022.

6. The respondents' now request to withdraw the March 4, 2022 GAL, as the dates of TTD are based upon work restrictions assigned by a physician's assistant (PA) and lifted by a nurse practitioner (FNP).

7. If the request is granted, and the GAL withdrawn, the respondents intend to file a new GAL reflecting admission for medical benefits only.

8. Absent any persuasive evidence to the contrary, the ALJ finds that the respondents request to withdraw the March 4, 2022 GAL is appropriate. The ALJ finds that the respondents have demonstrated that it is more likely than not that the March 4, 2022 GAL was filed improvidently.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.$. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. Section 8-43-201(1), C.R.S.; see also *Salisbury v. Prowers County School District,* W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District,* W.C. No.

4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to Section 8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital,* W.C. No. 4-754-838-01 (ICAO, Oct. 1, 2013).

5. As found, the respondents have demonstrated, by a preponderance of the evidence, that the March 4, 2022 GAL should be withdrawn as improvident, and a new GAL filed for medical benefits only.

ORDER

It is therefore ordered:

1. The General Admission of Liability (GAL) filed on March 4, 2022 is hereby withdrawn.

2. Within ten (10) days of this order, the respondents shall file a General Admission of Liability admitting for medical benefits only.

3. All matters not determined here are reserved for future determination.

Dated April 21, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.$. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-141-216-004

ISSUES

- Did Claimant prove a bilateral SI joint fusion surgery performed by Dr. Christian Balcescu on November 3, 2022 was reasonably needed and causally related to her admitted work injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a Produce Supervisor. Her regular duties included stocking fruits and vegetables. The job was physically demanding and required her to frequently lift and carry up to 50 pounds.

2. Claimant suffered admitted injuries to her low back and left shoulder[1] on June 12, 2020 while breaking down pallets of lettuce. She lowered a heavy box of produce from her head to her left shoulder and felt a painful "pop" in her low back and severe pain radiating down her legs.

3. Claimant's claim has been complicated by a lengthy pre-injury history of low back problems, beginning with a lumbar fusion in 1994. She recovered well from the fusion, but the record reflects several subsequent episodes of low back symptoms, typically as a result of triggering incidents. The most recent episodes before the work accident were in 2015 and 2016.

4. Claimant was evaluated by PA-C Scott Morey on January 13, 2015 for low back pain. She had fallen in late 2014, and her back and right leg had been bothering her since that time. She described numbness in the right buttock, anterior lateral thigh, and anterior shin on the right, occasionally down to the foot. Examination showed significant tenderness over the right-side paraspinals and the right SI joint. The left SI joint was nontender, as were the bilateral sciatic notches. Sensation was decreased in the right leg but normal in the left. Mr. Morey reviewed a recent MRI which he described as "rather benign" with no stenosis, disc desiccation, or herniations. Mr. Morey assessed "low back pain associated with her fall." He thought the right leg numbness could be from "a contused nerve." He ordered an EMG but did not anticipate Claimant would need surgery. The record contains no subsequent records from Mr. Morey.

5. Claimant started PT on March 4, 2016 for "LBP and neck pain which began about a year ago when she fell on ice but became worse on 2/8/16." Claimant testified

[1] Claimant's left shoulder injury was the subject of a prior hearing before ALJ Lamphere on June 29, 2021. Judge Lamphere ordered Respondents to cover a left shoulder surgery recommended by Dr. James Duffey. The shoulder surgery was eventually performed on December 9, 2021. The left shoulder is not involved in the present litigation, and will only be noted in passing for historical purposes or if otherwise necessary to understand Claimant's medical status as relates to her lumbar spine and/or SI joint conditions.

her back and neck had flared from moving to Colorado in a U-Haul vehicle. She told the therapist her legs occasionally gave out. She was using a TENS unit but taking no pain medication. The therapist instructed Claimant to perform aquatic exercises pending an MRI and orthopedic evaluation.

6. A lumbar MRI was performed on March 8, 2016. It showed post-surgical changes at L4-S1, and mild multi-level DDD and facet arthropathy.

7. Claimant saw PA-C Phillip Falender on March 9, 2016. Her primary complaints appeared related to her neck and associated upper extremity symptoms, but she also reported pain in her low back, right buttock, and right leg. Mr. Falender indicated she had "very mild stenosis" in her lumbar spine per the MRI. He ordered PT and referred Claimant to Dr. Mark Meyer to consider injections.

8. Claimant was evaluated by Dr. Julia Brinley on April 26, 2016 for severe neck and low back symptoms. She described shooting pain down her legs into her feet. Dr. Brinley noted there was nothing on the recent MRI to explain her symptoms. Physical examination showed multiple bilateral tender points on the arms, legs, and back. Dr. Brinley opined, "given her multiple tender points and imaging that is unrevealing of cause she could potentially have fibromyalgia." Dr. Brinley ordered electrodiagnostic testing.

9. Dr. Gregory Ales performed a lower extremity EMG on June 6, 2016. The results were normal except for reduced amplitude of the right peroneal motor nerve. Dr. Ales suspected the finding was related to prior nerve root compression, although it could possibly reflect an L5 radiculopathy. There was no evidence of compressive neuropathy, or acute or chronic radiculopathy in any other nerves or muscles studied.

10. Claimant had a lumbar injection in June 2016 that helped her leg symptoms.

11. On June 27, 2016, Dr. Brinley opined Claimant "has a component of fibromyalgia in addition to her long-standing arthritis."

12. The final pre-injury record regarding Claimant's low back is dated November 16, 2016 from Dr. Brinley. The lower extremity numbness had improved and she was only having "mild" leg pain. Dr. Brinley recommended continued weight loss and PT.

13. Before the work injury, Claimant participated in numerous activities without difficulty, including horseback riding, four-wheeling, camping, hiking, skiing, shoveling snow, dancing, and walking her dog. Additionally, she performed her physically demanding job with no limitations or restrictions. Claimant's testimony is supported by the lack of treatment records from November 2016 until the work accident in June 2020.

14. After the June 12, 2020 industrial accident, Employer referred Claimant to UCHealth for authorized treatment. She saw PA-C Jayme Eatough at the initial appointment. Claimant reported severe pain in her back, hips, legs, and left shoulder. Ms. Eatough commented the physical examination was "hard today due to pain." She was "very tender" to palpation over the thoracic and lumbar spines, and the paraspinal muscles on both sides. Her gait was stiff and slow and it was painful to move and change

positions. Straight leg raise testing was negative. Lumbar x-rays showed moderate disc space narrowing from L3-S1, but no fracture or other obvious bony abnormality. Thoracic x-rays showed diffuse degenerative changes. Claimant was given a nonspecific diagnosis of "back pain." Ms. Eatough prescribed muscle relaxers and took Claimant off work.

15. Claimant saw Dr. Emily Burns on June 17, 2020. She reported ongoing mid- and low back pain, radiating pain in both legs, and numbness in the right thigh, down to the foot. Physical examination showed significant diffuse tenderness to palpation along the lumbar spine the bilateral paraspinal muscles. Dr. Burns noted "not much" SI joint or sciatic notch tenderness to palpation.[2] Sensation was decreased to light touch in both feet, the lateral lower legs, and right anterior thigh. Her gait was "very antalgic." Dr. Burns ordered "stat" thoracic and lumbar MRIs to rule out cauda equina syndrome or an acute thoracic fracture. Claimant's medications were refilled and she was continued off work.

16. The MRIs were completed later that evening. The thoracic MRI showed a left-sided disc protrusion at T9-10 with potential compression of the left T10 nerve root, but no other significant abnormality. The lumbar MRI showed a posterior disc protrusion and mild facet arthropathy at L2-3, and a pre-existing fusion from L3-S1, with no residual or recurrent stenosis.[3]

17. Claimant returned to Dr. Burns on June 19, 2020. She continued to report low back pain and right thigh numbness. Physical examination showed diffuse tenderness throughout the lumbar spine and tenderness over the right SI joint. Dr. Burns reviewed the MRI reports and noted the left T10 nerve root impingement could be related to her thoracic symptoms, although it did not exactly correspond to her symptoms, which were worse on the right. Dr. Burns saw nothing acute or emergent on the lumbar MRI to account for Claimant's low back and leg symptoms. She recommended conservative treatment and referred Claimant to Dr. Brian Polvi, a chiropractor. Claimant was released to resume "very limited duty," with minimal lifting and frequent postural changes.

18. Claimant had her initial evaluation with Dr. Polvi on June 30, 2020. She reported ongoing severe pain in her back, buttocks, and legs, including periodic "lightning bolts down both legs." Claimant was in moderate to severe distress because of pain with difficulty ambulating and changing positions. Dr. Polvi documented a very thorough physical examination of Claimant's thoracic and lumbar areas. Dr. Polvi noted muscle spasm and trigger points on palpation throughout the bilateral paralumbar and gluteal musculature, with associated moderate to severe local pain. He also found moderate to severe local pain over the bilateral SI joint sulci. Kemp's maneuver produced increased diffuse thoracic, lumbar, SI joint, and gluteal region symptomatology. Hibb's maneuver was remarkable for moderate to severe piriformis muscle spasm bilaterally with increased lower extremity referred symptomatology. Yeoman's maneuver produced increased bilateral SI joint pain. Dr. Polvi administered treatment to the lumbar, sacral, and gluteal regions, and bilateral piriformis musculature. He advised Claimant he may perform

[2] The ALJ interprets this as reflecting some SI joint pain, but significantly less than the low back pain.

[3] Claimant had a prior low back injury that resulted in an L5-S1 lumbar fusion, with subsequent extension of the fusion to L3, and subsequent removal of the fusion hardware.

manipulative procedures to the bilateral SI joints at future visits depending on her tolerance.

19. Claimant completed 12 sessions with Dr. Polvi over approximately 8 weeks. Dr. Polvi consistently documented complaints of pain in the low back, buttocks, sacrum, and pelvis. He also repeatedly observed tenderness and muscle spasm in the low back and pelvic areas. He directed manual therapies, exercises, and dry needling to the low back, buttocks, pelvis, hips, and piriformis muscles.

20. Dr. Burns' records document improvement with chiropractic treatment in July and August 2020. In contrast to her earlier records and Dr. Polvi's records, Dr. Burns noted "no SI joint or sciatic notch tenderness to palpation" on several occasions.

21. On August 18, 2020, Claimant told PA-C Peter Carroll in Dr. Burns' office she had improved "a lot" with Dr. Polvi's treatment. She had lifted 50 pounds without difficulty or pain during a recent therapy session, and wanted to go back to work. She was released with medium level work with no lifting over 50 pounds.

22. Claimant followed up with Dr. Burns on August 24 and said she was doing "very well with almost no low back pain." She also denied leg symptoms. Employer had "not accepted" the previous restrictions, so Dr. Burns released Claimant to full duty.

23. On September 16, 2020, Dr. Burns noted Claimant was "doing OK" but having some low back pain at work with reaching down or turning to the side. She asked about spinal injections to help improve her function. Dr. Burns referred Claimant to Dr. Kenneth Finn, a physiatrist.

24. Claimant saw Dr. Finn on October 8, 2020. She described low back pain radiating to the hip, buttock, and right leg, with numbness and tingling in what sounded to Dr. Finn like an L3 distribution. Examination of the low back showed muscle spasm and tenderness. Dr. Finn appreciated no SI join tenderness. Lower extremity sensation was decreased in an L3 distribution. Dr. Finn recommended an intralaminar ESI at L2-3.

25. The ESI was performed on November 3, 2020.

26. Claimant followed up with Dr. Finn on November 17, 2020. The ESI had significantly decreased her pain for three days and then abruptly returned, which Dr. Finn considered a positive diagnostic response. Dr. Finn noted she was still having predominantly L3 and some L2 symptoms and recommended a transforaminal ESI "for a more targeted approach."

27. On December 9, 2020, Dr. Burns documented Claimant was doing worse and "in a lot of pain, especially her right leg." She appeared "very uncomfortable . . . Even with just sitting on the table." Dr. Burns thought Claimant's symptoms sounded consistent with L4-5 compression or irritation, although the MRI had not showed an issue at that level. She referred Claimant back to Dr. Polvi for additional chiropractic treatment.

28. The transforaminal ESI was performed on December 16, 2020. Claimant's pain initially flared for few days, then improved slightly for a few days, and then "came back really strong." At a follow-up appointment with Dr. Finn on January 5, 2021, Claimant still had intense, burning pain in her thighs and numbness into her feet. Her pain was worsening, and she was interested in "a more aggressive next step." Dr. Finn opined additional injections were not warranted because they did not provide appreciable therapeutic benefit, and referred Claimant to Dr. Hammers for a neurosurgical evaluation.

29. Claimant saw Dr. Burns on January 6 and reported burning pain in both thighs wrapping around into her groin area and radiating down the right leg to the foot. Dr. Burns opined, "it is very clear we need to put her back on some restrictions which she has been hesitant to in the past but agrees to today."

30. Respondents denied the referral to Dr. Hammers and set up an IME with Dr. Wallace Larson.

31. Claimant saw Dr. Larson on February 21, 2021. She described ongoing and worsening back pain, and pain and numbness in her legs and feet. On examination, Claimant was tender to palpation throughout her thoracic and lumbar spine areas, buttock, hips, and sacrum. Dr. Larson saw no objective evidence of any acute pathology on the imaging studies and dismissed Claimant's physical exam findings as "nonphysiologic." He opined there was no indication for shoulder or spinal surgery. Dr. Larson opined Claimant had returned to her "baseline" and required no further treatment related to the June 2020 work injury.

32. Dr. Burns reviewed Dr. Larson's IME report on March 16, 2021. She disagreed that Claimant's then-current condition was consistent with her pre-injury "baseline." Dr. Burns noted Claimant had recovered well from her 1994 lumbar surgery and was having no significant back or leg symptoms or limitations immediately before the June 2020 work accident. Dr. Burns reiterated her agreement with Dr. Finn's referral for a surgical evaluation. She also ordered a lower extremity EMG.

33. Dr. Finn performed electrodiagnostic testing on April 13, 2021. There was evidence of a chronic L5 radicular process but nothing acute.

34. On June 29, 2021, Claimant attended a hearing before Administrative Law Judge Lamphere regarding the surgical evaluation with Dr. Hammers and a left shoulder surgery recommended by Dr. Duffey.

35. On August 10, 2021, Dr. Burns discussed with Claimant the possibility that the prolonged delay in completing the neurosurgery evaluation could have a long-term negative effect on her condition. Claimant asked if she could move forward in the meantime under her health insurance, but Dr. Burns did not know if that was an option for a work-related condition during an active claim. She advised Claimant to discuss the issue with her attorney.

36. On September 22, 2021, Judge Lamphere ordered Respondents to cover the shoulder surgery, and the lumbar surgical evaluation with Dr. Hammers.

37. An updated lumbar MRI was performed on August 11, 2021. It was unchanged compared to the June 17, 2020 MRI.

38. Dr. Hammers evaluated Claimant on October 25, 2021. He saw no neurological compression or other surgical lesion on the MRIs to account for Claimant's symptoms or examination findings. Therefore, Dr. Hammers did not recommend surgery.

39. On November 9, 2021, Dr. Burns referred Claimant back to Dr. Finn to consider SI joint injections.

40. Dr. Finn reevaluated Claimant on November 29, 2021. The physical examination showed midline and paravertebral tenderness of the lumbar spine, bilateral SI joint tenderness, and a positive Patrick's maneuver. Dr. Finn diagnosed sacroiliitis and recommended bilateral SI joint injections.

41. The SI injections were performed on December 29, 2021.

42. Claimant moved to Sheridan, Wyoming approximately 10 days after the SI joint injections. Her care was transferred to Sheridan Orthopedic Associates.

43. Claimant was evaluated by Dr. Cristian Balcescu, a spine surgeon at Sheridan Orthopedic Associates, on March 8, 2022. Claimant was "currently still quite painful," and described low back pain with radiation down the buttocks and hips into both legs and feet. Confusingly, the physical examination documented in Dr. Balcescu's report was entirely normal. Dr. Balcescu provided a preliminary "working diagnosis" of lumbar radiculopathy, but wanted to obtain Claimant's records before making his final diagnosis or treatment recommendations.

44. Dr. Balcescu reevaluated Claimant on March 25, 2022. He had reviewed voluminous records in the interim and was better prepared to understand the details of Claimant's situation. Dr. Balcescu agreed with Dr. Hammers that spinal surgery was not indicated based on the imaging studies. However, he noted Claimant has received some benefit from the bilateral SI joint injections in December 2021. Claimant said her pain increased shortly after the injections but she started getting relief approximately 3 days later. Dr. Balcescu would not consider that timeline to be a positive diagnostic response. But when pressed for specifics, Claimant could not categorically state she had no temporary relief immediately after the injection for the duration of the anesthetic. Given Claimant's uncertainty about the post-injection response, and the arguably therapeutic benefit she received after several days, Dr. Balcescu recommended repeating the injections.

45. Repeat bilateral SI joint injections were performed on April 11, 2022 by Dr. Shaun Gonda. The injections were performed under CT guidance to ensure proper placement.

46. Claimant returned to Dr. Balcescu on May 17, 2022. She described a positive diagnostic response to the injections, with an immediate reduction of her pain from 8-9/10 to 0/10. Approximately 4 hours later (when the anesthetic wore off), her pain

returned to 6/10. Dr. Balcescu performed a physical exam and found significant clinical signs of SI joint dysfunction, including bilateral tenderness to palpation over the sacral sulcus, positive thigh thrust test, positive FABER (*i.e*., Patrick's test), and positive Gaenslen's maneuver. Dr. Balcescu diagnosed bilateral SI joint arthropathy based on her reported symptoms, exam findings, and positive diagnostic response to the SI joint injections. Given her failure to respond to conservative measures, Dr. Balcescu recommended bilateral SI join fusions. Claimant wanted to pursue surgery but was unsure whether Respondents would cover it.

47. Respondents denied the surgical preauthorization request pending and IME with Dr. Anant Kumar.

48. Claimant saw Dr. Kumar on July 19, 2022. Examination of Claimant's low back showed tenderness to palpation and reduced range of motion. He also noted several positive Waddell signs. In contrast to Dr. Finn and Dr. Balcescu, Dr. Kumar stated all SI joint tests were negative on his exam. Dr. Kumar also noted Claimant had no immediate pain relief from the SI joint injections performed by Dr. Finn in December 2021, which "obviously proves the SI joint is not a pain generator." Dr. Kumar opined there were no clinical, radiological, or objective indications for an SI joint fusion.

49. Claimant followed up with Dr. Balcescu on October 5, 2022. SI joint testing was again positive bilaterally. Dr. Balcescu reiterated his recommendation for bilateral SI joint fusions. Claimant wanted to proceed with surgery despite the denial of preauthorization because she was debilitated by ongoing severe symptoms.

50. Dr. Balcescu performed a bilateral SI joint fusion on November 3, 2022.

51. Claimant had a post-op appointment with Dr. Balcescu's PA-C on November 23, 2022. Claimant reported she was "doing very well" since the surgery. Her pain level had dropped to 1-2/10 and she was taking no pain medication, not even Tylenol. She was no longer having the "zingers" down her legs, and had only occasionally a "little bit" of residual numbness in two toes on the right foot.

52. At hearing, Claimant testified the surgery was tremendously helpful and, "I'm back to living again." Consistent with the post-op report, she testified her lower extremity numbness has improved and she no longer has "lightning bolts" going down her legs. Her pain levels decreased to 2-3/10 and she had stopped taking pain medication. Claimant is very satisfied with the surgery and would do it again "in a heartbeat."

53. Dr. Balcescu testified he initially provided a provisional diagnosis of lumbar radiculopathy because Claimant's pain appeared to be in an L5 distribution. The symptoms she described can also be consistent with SI joint dysfunction, but the more common source would be the lumbar spine. He had the opportunity to review her medical records before he next saw Claimant on March 25, 2022, and the information in her records pointed away from the lumbar spine as the source of her problems. The imaging studies showed the previous fusion had healed well, and there was no significant stenosis or nerve compression. The most "striking" thing Dr. Balcescu noticed in the prior records

was that Claimant's best therapeutic response occurred after she received bilateral SI joint injections in December 2021. She then had a strongly positive diagnostic response to the repeat injection, coupled with clinical examination findings confirming the diagnosis of bilateral SI joint dysfunction. Dr. Balcescu opined the SI joint problems and the resulting surgery are causally related to the June 2020 work accident. He saw nothing in the medical records to contradict Claimant's report that she was doing well with no significant symptoms of functional limitation immediately before the work accident.

54. Dr. Kumar testified any pathology related to Claimant's SI joints is unrelated to the June 2020 work accident. He pointed out the first diagnosis of SI joint dysfunction was provided by Dr. Finn in November 2021, 18 months after the work accident, and opined it is improbable that an injury to Claimant's SI joints would have gone undiagnosed by multiple providers for so long. He did not mention the multiple positive SI joint exam findings documented at Dr. Polvi's June 30, 2020 evaluation. Dr. Kumar questioned the validity of Dr. Balcescu's exam findings and testified that his own exam at the IME showed no evidence of SI joint pathology. He opined it is not medically probable Claimant's complaints of low back pain, hip pain, and bilateral leg pain and numbness were caused by an injury to the SI joints. Instead, Dr. Kumar opined Claimant's reported symptoms are "nonphysiological," and therefore unlikely to respond to any treatment, including surgery. Dr. Kumar disputed Claimant's report of significant improvement after the SI joint surgery, opining such a "miraculous" recovery "doesn't make any sense."

55. Dr. Balcescu's opinions and conclusions are credible and more persuasive than the contrary opinions offered by Dr. Kumar and Dr. Larson.

56. Claimant's testimony is credible and persuasive regarding her preinjury functional abilities and her response to the November 3, 2022 SI joint fusion surgery.

57. Claimant proved the bilateral SI joint fusion surgery performed by Dr. Balcescu on November 3, 2022 was reasonably needed and causally related to the admitted June 12, 2020 work injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved the bilateral SI joint fusion surgery performed by Dr. Balcescu on November 3, 2022 was reasonably needed and causally related to the admitted June 12, 2020 work injury. Dr. Balcescu credibly explained that his diagnosis of bilateral SI joint arthropathy is consistent with Claimant's reported symptoms and supported by objective evidence including exam findings and Claimant's response to SI joint injections. To be sure, it is unusual that no one specifically diagnosed SI joint dysfunction until November 2021. But clinical signs implicating the SI joints as a pain generator have been present since the beginning. Dr. Burns noted SI joint tenderness within a week after the accident. And Dr. Polvi's detailed examination on June 30, 2020 provides persuasive evidence of SI joint involvement. Given the close connection between the SI joints and the spine, the considerable overlap between symptoms referable to these body parts, and Claimant's prior lumbar fusion, it is perhaps understandable that the SI joints were initially given short shrift. As Dr. Balcescu explained, the lumbar spine was the more likely source of Claimant's symptoms, so it made sense to focus there first. The ALJ also notes it took 10 months to complete the neurosurgical evaluation with Dr. Hammers, but once Dr. Hammers ruled out a surgical issue in the lumbar spine, Dr. Burns quickly referred Claimant to Dr. Finn for possible SI joint injections. Eventually, with a fresh perspective and the benefit of a longitudinal picture of Claimant's treatment, Dr. Balcescu uncovered the true source of Claimant's ongoing symptoms. And his insights were ultimately validated by the immediate and substantial benefit Claimant received from the SI joint surgery.

Claimant had episodes in 2015 and 2016 with low back and right leg symptoms similar to those documented after the 2020 work accident. But the prior episodes were relatively transient and did not require long-term treatment. Claimant received good relief from an injection in June 2016, and there is no persuasive evidence she sought specific treatment for low back or radicular symptoms between November 2016 and the June 12, 2020 work accident. More important, Claimant performed a physically demanding job during that time with no restriction or limitations related to low back or leg symptoms. The persuasive evidence shows the June 12, 2020 accident either caused new SI joint pathology, aggravated an underlying, pre-existing SI joint condition, or some combination thereof. The net result was a substantial change in Claimant's pre-injury status that is directly traceable to the work accident. The preponderance of persuasive evidence establishes that the June 12, 2020 accident was the proximate cause of Claimant's SI joint dysfunction and need for treatment, including surgery. The good surgical outcome confirms the surgery was reasonably needed.

ORDER

It is therefore ordered that:

1. Insurer shall cover the bilateral SI joint fusion surgery performed by Dr. Cristian Balcescu on November 3, 2022.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 4, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-146-499-002

ISSUES

- Did Respondents prove all issues in this claim were closed by a Final Admission of Liability (FAL) filed on August 9, 2022?
- Did Claimant prove one or more issues in his claim should be reopened based on a change of condition?
- If the claim is reopened, did Claimant prove additional medical treatment is reasonably needed and causally related to his admitted injury?
- Did Claimant prove entitlement temporary disability benefits before December 25, 2021 greater than the benefits admitted in the August 9, 2022 FAL?
- Did Claimant prove entitlement to reinstatement of TTD on or after December 25, 2021?
- Did Respondents prove additional TTD is barred because Claimant was responsible for termination of employment?
- Average weekly wage.
- PPD.
- Disfigurement.

FINDINGS OF FACT

1. Claimant suffered an admitted injury on August 12, 2020 while working as a mover. Claimant was moving heavy boxes when he felt a pulling and tearing sensation in his right groin area. Approximately one week later, he coughed and felt a sharp pain in the right groin and noticed a bulge. The bulge became progressively larger and more painful, so Employer referred Claimant to Concentra. He was diagnosed with a right inguinal hernia and referred to Dr. McCann, a surgeon.

2. Dr. McCann performed a right inguinal hernia repair with mesh on September 2, 2020.

3. Claimant was put at MMI on October 5, 2020 by Dr. Daniel Peterson at Concentra. Claimant was still having pain in the right groin, but felt ready to return to work.

4. Shortly after being placed at MMI, Claimant noticed a painful bulge in his left groin. An ultrasound confirmed a left inguinal hernia. Claimant also reported ongoing pain in the right inguinal area radiating down his right thigh, and pain in the right testicle.

5. The claim was reopened, and Claimant underwent a left inguinal hernial repair by Dr. McCann on December 16, 2020.

6. The left hernia repair was successful, but Claimant continued to complain of pain in the right groin and right testicle. A repeat ultrasound of the scrotum and right inguinal area on January 29, 2021 showed no abnormalities to explain the ongoing symptoms.

7. Claimant saw Dr. Peterson on February 24, 2021 and reported no improvement in the right groin and testicular pain. Dr. Peterson thought the symptoms might be related to ilioinguinal neuropathy and recommended Claimant follow up with Dr. McCann.

8. Claimant returned to Dr. Peterson on March 24, 2021. He had seen Dr. McCann, who did not think Claimant had any inguinal nerve issues. Dr. McCann saw no surgical issue and recommended pain management.

9. Claimant saw Dr. Mark Meyer on May 13, 2021, who recommended an ilioinguinal nerve block.

10. On June 16, 2021, Claimant told Dr. Peterson he was very frustrated by his ongoing severe symptoms. He was receiving Oxycodone from the VA for an unrelated back condition, but the medication was not helping his groin symptoms. Claimant was not working and said he had "too much pride for light duty." Claimant wanted to proceed with the injection recommended by Dr. Meyer.

11. Claimant returned to Dr. Peterson on July 26, 2021. He had undergone the nerve block, which only provided relief for approximately two days.

12. Claimant had two additional nerve blocks, without benefit. Based on Claimant's lack of response to injections, Dr. Meyer opined he was not a candidate for radiofrequency neurotomy.

13. Claimant's last appointment with Dr. Peterson was October 13, 2021. Claimant's pain was unchanged since the prior visit. Dr. Peterson found no evidence of recurrent inguinal hernias. Claimant missed a follow up appointment on November 12, 2021, and was later discharged from Dr. Peterson's care.

14. Dr. Lawrence Lesnak began treating Claimant as the new ATP on January 10, 2022. Claimant had no relief from the injections and said Dr. Meyer advised he was not a candidate for a radiofrequency ablation procedure. Dr. Lesnak agreed that an ablation was not indicated given Claimant's lack of response to the injections. On examination, Dr. Lesnak found no clinical evidence of recurrent hernia or any other objective findings to explain Claimant's symptoms. Nevertheless, Dr. Lesnak ordered an ultrasound of the right groin to look for a possible occult recurrent right inguinal hernia. Dr. Lesnak offered Claimant a tramadol prescription for his pain. However, Claimant stated, "I've tried tramadol in the past, and if this is all you're gonna give me, I don't want anything at all." Therefore, Dr. Lesnak wrote no prescriptions.

15. Claimant had the right groin ultrasound on January 27, 2022. It showed no evidence of a recurrent right inguinal hernia.

16. Claimant followed up with Dr. Lesnak on February 7, 2022. He continued to complain of constant moderate-to-severe right testicular pain, as well as right-sided low back, buttock, and medial thigh pain. His testicular pain was severely aggravated with walking, squatting, or lifting. Any direct pressure on his right testicle or scrotum significantly increased his pain. Claimant gave Dr. Lesnak a 2-½ page handwritten narrative describing his constant pain and associated functional limitations. Physical examination showed no evidence of any inguinal abnormalities. Testicular examination produced pain, but no appreciable abnormality. Dr. Lesnak told Claimant he could not identify any specific pain generator based on examination, post-surgical diagnostic imaging, or the diagnostic nerve injections. Dr. Lesnak recommended no additional testing or specific treatment and put Claimant at MMI. Dr. Lesnak opined Claimant did not quality for a rating because he had no palpable hernia-related defects and no clinical evidence to support a diagnosis of right ilioinguinal neuritis. He released Claimant from care.

17. Dr. Martin Kalevik performed a Division IME on June 28, 2022. Claimant described ongoing severe right groin and testicular pain, as he had previously reported to Dr. Lesnak. Claimant said the pain prevented him from lifting any appreciable weight and limited his ability to sit for prolonged periods. Claimant was using a cane because the groin pain made it difficult to walk. Dr. Kalevik observed a slight alteration of gait, favoring the right leg. Claimant was upset about the continued right groin and testicular pain, and felt the doctors had "brushed him off" without providing adequate treatment. Dr. Kalevik's examination showed no evidence of a recurrent hernia. He agreed with Dr. Meyer and Dr. Lesnak that additional nerve blocks were not warranted because of Claimant's previous lack of response. He also agreed Claimant was at MMI as of February 7, 2022. Dr. Kalevik assigned a zero percent rating because there was no palpable hernia defect on the right or left side, and "pain in and of itself is not ratable." He concluded the source of Claimant's pain is "unclear" and no specific pathology had been identified by multiple examinations or diagnostic testing. However, Dr. Kalevik thought it was reasonable to obtain an MRI of the right groin or pelvis within the next 90 days to look for a recurrent hernia, "meshoma," or malfunctioning of the mesh. If the MRI showed an abnormality associated with the injury and hernia repair, re-evaluation by a surgeon would be warranted. Otherwise, Claimant would remain at MMI.

18. Respondents filed a Final Admission of Liability (FAL) on August 9, 2022 based on Dr. Kalevik's DIME report. The FAL admitted for various periods of temporary disability benefits, statutory interest, an overpayment, and $20,561.97 in medical benefits. The FAL specifically denied medical benefits after MMI, and denied that Claimant suffered any permanent impairment. The section addressing disfigurement was left unchecked, and the accompanying space to state the amount of any disfigurement benefit was left blank. The FAL contains no language to the effect that all benefits not specifically admitted are denied.

19. Claimant filed an Objection to Final Admission of Liability on August 24, 2022. He then filed a Notice and Proposal and Application for a Division IME form on August 29, 2022.

20. Claimant exchanged emails with Respondents' counsel on September 13, 2022 and was advised that the claim was closed because he had not requested a hearing within 30 days of the FAL. Claimant contacted the Division and was told by an unidentified person that his claim was not closed. The Division representative mailed Claimant a blank Application for Hearing form.

21. Claimant completed the Application for Hearing and mailed it on September 22, 2022, which was 44 days after the FAL.

22. All issues endorsed on Claimant's Application for Hearing (except for reopening), were ripe for adjudication when the FAL was filed.

23. Respondents proved the claim is closed as to all issues specifically admitted or denied in the August 9, 2022 FAL. Claimant conceded he received the FAL, and there is no persuasive evidence it was technically defective in any way. Although Claimant timely filed the Objection to Final Admission of Liability form, he did not file an Application for Hearing within 30 days of the FAL. Claimant had already undergone a DIME and was not entitled to a second DIME. As a result, the August 29, 2022 Notice and Proposal was insufficient to perfect an objection to the FAL.

24. Respondents failed to prove the FAL closed the issue of disfigurement. The FAL neither admitted nor denied disfigurement benefits.

25. Claimant has surgical scarring in his groin area because of the work injury. At hearing, the ALJ advised Claimant of the so-called "bathing suit rule" for determining if a disfigurement is "normally exposed to public view." Claimant agreed the scarring is not visible when wearing a bathing suit. However, Claimant demonstrated a slight alteration of gait favoring his right side. Claimant also routinely uses a cane to assist with ambulation when he is out of the house in public. Claimant credibly testified the alteration of his gait and need for a cane are related to his ongoing right groin and testicular pain since the work injury. Claimant has sustained serious permanent disfigurement to areas of the body normally exposed to public view. The ALJ finds that Claimant shall be awarded $1,800 for disfigurement.

26. Claimant failed to prove a change of condition to justify reopening any portion of his claim. He has complained of right groin and testicle pain and associated functional limitations to multiple providers, since before he was put at MMI. At hearing, Claimant admitted his current condition is the same as when he was put at MMI in 2022. There is no objective evidence of worsening, nor any other persuasive basis to conclude that Claimant's condition is appreciably different than it was when he was put at MMI.

CONCLUSIONS OF LAW

A. Issue closure

Respondents argue that Claimant's claim was closed by the August 9, 2022 FAL, and the ALJ has no jurisdiction to award any additional benefits unless the claim is reopened. Closure of issues by an FAL is an affirmative defense that the respondents must prove by a preponderance of the evidence. *Yim v. Avalanche Industries*, W.C. Nos. 4-506-753; 4-059-342 (December 5, 2005).

An FAL provides the primary mechanism for the respondents to initiate administrative closure of a claim. Once an FAL is filed, the claimant must take certain actions within thirty days or "the case will be automatically closed as to issues admitted in the final admission." Section 8-43-203(2)(b)(II)(A). Objecting to an FAL is a multi-part process. Here, Claimant completed the first step in the process by filing the Objection to Final Admission of Liability form on August 24. However, simply filing the Objection form is not enough. A claimant must also request a DIME pursuant to § 8-42-107.2 or request a hearing on ripe and disputed issues. *Id*.

The available options (either requesting a DIME or requesting a hearing) may be limited depending on what has previously transpired in the claim. Section 8-43-203(2)(b)(II)(A) provides that a claimant may only request a DIME "if [a DIME] has not already been conducted." In this case, Claimant had already undergone a DIME with Dr. Kalevik, so his only option was to request a hearing on ripe and disputed issues, within 30 days of the FAL. *Caylor v. State of Colorado*, W.C. No. 4-880-213-03 (May 13, 2015).

An issue is "ripe" if it is "real, immediate, and fit for adjudication." *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). An issue is "fit for adjudication" if there is no legal impediment to its immediate adjudication. *E.g., McMeekin v. Memorial Gardens*, W.C. No. 4-387-910 (September 30, 2014).

Claimant's September 22, 2022 Application for Hearing was untimely because it was mailed more than 30 days after the FAL. [1] The FAL explicitly addressed medical benefits, AWW, temporary disability, permanent impairment, and medical benefits after MMI. Those issues were "ripe for adjudication" when the FAL was filed and were closed by the failure to timely request a hearing. No further temporary disability, PPD, or medical benefits can be awarded absent a reopening. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005).

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[1] Claimant's Application for Hearing was not actually received by the OAC until October 13, 2022, because it was inadvertently mailed to the OAC's prior address at 1259 Lake Plaza Drive based on outdated information provided to Claimant by the Division. But even if we accept September 22, 2022 as the date of filing under the doctrines of "unique circumstances" or "substantial compliance," the Application was still 14 days late. *E.g., Converse v. Zinke*, 635 P.2d 882 (Colo. 1981); *Kratzer v. Iliff Care Center*, W.C. No. 4-280-513 (August 22, 2001).

B. Disfigurement

Although Respondents proved that most of the issues endorsed on Claimant's Application are closed, they failed to prove the issue of disfigurement is closed.

As an initial matter, it is important to bear in mind that FALs do not necessarily close a "claim." Rather, an FAL closes "issues" in a claim. *See* § 8-43-203(b)(II)(A) ("the case will be automatically closed *as to the issues admitted* in the final admission") (emphasis added). While the net effect may be to close the entire claim depending on the specific issues addressed in the FAL, such an outcome is not invariably the case.

Because the legal effect of an FAL is directed to "issues" and not "claims," an uncontested FAL may result in some issues being closed while others remain open. For instance, in *Dalco Industries v. Garcia*, 867 P.2d 156 (Colo. App. 1993) the respondents filed a FAL that addressed temporary and permanent partial disability benefits but did not address penalties. The court held that "§ 8-43-203(2) provides for continuing jurisdiction over *any issue not specially addressed* in a non-contested final admission of liability. The [ ] final admission of liability was limited to an admission for temporary and permanent partial disability benefits. Therefore, the issue of penalties was not 'automatically closed' and the ALJ retained jurisdiction to decide this issue." *Id.* at 158 (emphasis added).

The Court of Appeals refined this rule in *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001). In *Dyrkopp*, the FAL had admitted for various benefits, including PPD. The FAL also contained a statement that "All benefits or penalties not admitted below are hereby specifically denied." The court held,

> [T]he language "as to the issues admitted" in § 8-43-203(2)(b)(II) does not mean only those "issues" on which an employer agrees to pay benefits. Rather, . . . the phrase must be interpreted as referring to issues on which the employer *affirmatively takes a position*, either by agreeing to pay benefits or by denying liability to pay benefits. *Id*. at 822. (Emphasis added).

Even though the FAL in *Dyrkopp* contained no checkmark or other notation in the section related to PTD benefits, the court pointed to the explicit denial of "all benefits not admitted" as encompassing the issue of PTD. Therefore, the court held the issue of PTD was closed.

The ICAO has repeatedly relied on statements in FALs to the effect that "benefits not specifically admitted are denied" as sufficient to close issues that were not otherwise explicitly addressed on the FAL. *E.g., Campello v. Progressive Insurance Company*, W.C. No 4-205-461 (January 27, 2003); *Tygrett v. Denver Water*, W.C. No. 4-979-139-002 (March 15, 2021); *Villegas v. Denver Water*, W.C. No. 4-889-298-002 (February 5, 2021).

In Claimant's case, the section of the August 9, 2022 FAL relating to disfigurement was left blank, and the FAL contained no categorical denial of all benefits not specifically admitted. Because the FAL failed to "affirmatively" take a position with respect to disfigurement, the issue is not closed.

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." Disfigurement compensation is appropriate "if the scars would be apparent in swimming attire." *Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986). When made aware of the applicable legal standard, Claimant agreed the scarring in his groin area is not visible to the public and therefore ineligible for a disfigurement award.

A claimant's use of a cane or other assistive device can be a disfigurement if causally related to a work injury. *E.g., Felix v. The Griffith Center, Inc*., W.C. No. 3-972-633 (January 12, 1998); *Irvin v. Medical Center of Aurora*, W.C. No. 4-320-720 (January 6, 2006). As found, Claimant proved his altered gait and regular use of a cane are causally related to the work accident. The ALJ concludes Claimant should be awarded $1,800 for disfigurement.

C. Reopening

Section 8-43-303 authorizes an ALJ to reopen any award based on a change in condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition has changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from a separate cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. When a claimant seeks reopening based on a change of condition after MMI, a prior DIME determination is entitled to no special weight. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The claimant must prove a basis to reopen by a preponderance of the evidence. Section 8-43-304(4). A claimant is not required to present expert medical testimony or opinions to establish a change of condition, but can rely on any form of competent and persuasive evidence, including lay testimony. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

As found, Claimant failed to prove a change of condition to justify reopening any portion of his clam. The ALJ does not doubt that Claimant continues to suffer severe groin and testicular pain, and he is understandably searching for a solution to those issues. But the symptoms and associated functional limitations have been present since before Claimant was put at MMI. Claimant conceded his current condition is the same as when he was put at MMI in 2022. There is no objective evidence of any worsening, nor any other persuasive basis to conclude that Claimant's condition is appreciably different than it was when he was put at MMI.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant $1,800 for disfigurement.

2. Claimant's claims for additional temporary disability benefits, additional medical benefits, PPD benefits, and medical benefits after MMI are denied and dismissed.

3. Claimant's request to reopen closed issues in his claim is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 7, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-116-023-001

ISSUES

- Did Claimant prove he is entitled to PPD benefits based on a 10% whole person impairment?

FINDINGS OF FACT

1. Claimant suffered an admitted work-related injury on April 4, 2019 when a heavy security door slammed shut on his right elbow.

2. Claimant was initially seen at Concentra on April 4, 2019. X-rays showed no fracture, and he was diagnosed with a right elbow contusion. He participated in therapy for several months, without substantial benefit. He continued to report elbow pain with pain, numbness, and tingling into his right hand.

3. Claimant testified he started having neck pain approximately two months after the accident. He likened the pain to a "kink" in the neck with sharp pain when moving his head too quickly. Claimant testified he received incidental treatment to the neck during therapy for the right elbow. However, the therapy records from June and July 2019 primarily focus on the right arm, with no persuasive indication of any significant neck or right shoulder issues.

4. Dr. John Sacha performed electrodiagnostic testing in September 2019 that showed right ulnar neuropathy and carpal tunnel syndrome.

5. Claimant was referred to Dr. Craig Davis, a surgeon. Initially Dr. Davis recommended conservative care. However, because of Claimant's persistent symptoms, Dr. Davis eventually recommended surgery.

6. Dr. Davis performed a right elbow ulnar nerve decompression, right carpal tunnel release, and right olecranon bursectomy on December 11, 2019.

7. Claimant resumed therapy after surgery. Therapy records through July 8, 2020 contain no persuasive evidence of any neck or shoulder symptoms.

8. At a July 9, 2020 PT session, Claimant complained of severe left shoulder pain from sleeping on the shoulder. There was no mention of any right shoulder symptoms. On August 18, 2020, the therapist also documented "pt reports neck pain on contralateral side of injury," *i.e.*, the left side of the neck. There were no examination findings or other persuasive clinical evidence of any associated functional impairment related to the neck or shoulder. The reference to contralateral neck pain was repeated in the PT records for approximately three weeks. On September 9, 2020, the therapist documented "pt reports he no longer has neck pain on contralateral side." This comment was repeated in subsequent PT records through October 13, 2020.

9. Claimant completed multiple pain diagrams during his treatment at Concentra. At least four pain diagrams are in the record, none of which indicate any complaints beyond the right arm.

10. Claimant saw multiple treating providers during his course of treatment without reported shoulder or neck symptoms. There are no documented complaints beyond the right elbow during visits with Dr. Sacha in 2019. Dr. Davis documented no complaints beyond the right elbow during multiple appointments from May 14, 2019 through August 5, 2020. There were no complaints beyond the right elbow during at least 13 Concentra appointments from January 2020 through January 2021.

11. Claimant completed a Functional Capacity Evaluation (FCE) on January 20, 2021, which showed he could work at the medium physical demand level. Claimant reported right elbow and arm pain that limited heavy lifting and gripping. He described popping and shooting pain in the right elbow, forearm, and wrist. He also reported numbness and tingling in the right forearm and hand. There was no mention of significant right shoulder or neck symptoms.

12. Claimant was put at MMI by Dr. Thomas Corson at Concentra on January 25, 2021. Dr. Corson documented continued right elbow problems, but nothing related to the shoulder or neck.

13. Dr. Sander Orent performed a DIME on July 16, 2021. Claimant reported "ongoing and persistent pain in the elbow with locking and tingling in the fingers." Dr. Orent determined Claimant was not at MMI. He recommended an MRI, repeat electrodiagnostic testing, and a consultation with Dr. Davis "to see what can be done about the locking elbow and the persistent neuropathic symptoms in the hand." Dr. Orent's documented significant exam findings were confined to the right elbow and arm. However, in the section of the report addressing a provisional rating, Dr. Orent stated, "there are symptoms here that include discomfort around the shoulder blade and neck, especially when he wakes up from sleep. I do not think these areas are rated but they do suggest the possibility of whole person conversion." Dr. Orent described no functional impairment associated with the neck and shoulder blade symptoms.

14. Respondent accepted the DIME and authorized additional evaluations and treatment.

15. Claimant followed up with Dr. Davis on December 7, 2021. He reported "clicking and popping [in the elbow] and has low-grade pain, but he is doing all of his normal activities." Dr. Davis noted the popping and clicking seemed to be coming from inside the joint, and hypothesized Claimant may have synovitis or a small loose body. Dr. Davis ordered an MRI of the right elbow. He offered Claimant an injection, but Claimant declined because a previous injection had not helped. There is no mention of any shoulder or neck issues.

16. Claimant returned to Dr. Davis on March 9, 2022 to review the MRI. Dr. Davis commented that the MRI was "basically normal." Dr. Davis saw no surgical lesion and opined Claimant was at MMI.

17. Dr. Kawasaki performed electrodiagnostic testing on May 12, 2022. It showed residual sensory and motor nerve slowing across the elbow, but no slowing at the wrist. Claimant told Dr. Kawaski "he would like to have his case closed as he does not wish to pursue the cleanup surgery with no guarantees." Dr. Kawasaki put Claimant at MMI with a 13% right upper extremity rating for range of motion deficits and residual neurological impairment. Dr. Kawasaki's report contains no reference to shoulder or neck issues.

18. Claimant underwent a follow-up DIME with Dr. John Hughes on August 30, 2022. Dr. Hughes noted that Claimant's pain diagram showed right elbow and ulnar forearm symptoms as well as symptoms in the right wrist and hand. Examination of Claimant's neck showed full range of motion, except lateral flexion was reduced to approximately 30 degrees, with positive right-side facet loading. Dr. Hughes agreed Claimant was at maximum medical improvement as of May 19, 2022. He assigned a 5% upper extremity rating for right wrist range of motion, an 8% upper extremity rating for loss of range of motion in the right elbow, and a 3% upper extremity impairment rating for injury to the right ulnar nerve. Dr. Hughes' final combined rating was 16% upper extremity, which converts to 10% whole person. He gave no indication the incidental cervical spine findings were related to the work injury or warranted conversion to whole person.

19. In his deposition, Dr. Orent confirmed he had not seen or evaluated Claimant since July 2021, and had reviewed no additional records after the original DIME. Dr. Orent explained ulnar nerve injuries typically cause numbness and pain radiating distally from the elbow toward the ends of the hands, and weakness. Dr. Orent did not know what was causing the discomfort around Claimant's shoulder blade and neck noted in the DIME report, but thought it was probably referred pain from the elbow. He described no functional impairment associated with the neck and shoulder symptoms. Dr. Orent agreed with the rating methodology used by Dr. Hughes.

20. At hearing, Claimant described ongoing popping in his elbow that shoots pain down into his hand, fingers, and wrist, and up to his shoulder and neck. Claimant described "stiffness" in his neck and shoulder but testified "it doesn't hamper my range of motion." Claimant described no significant functional impairment associated with the episodes of shoulder and neck pain.

21. Claimant failed to prove his injury caused functional impairment beyond the right arm.

CONCLUSIONS OF LAW

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the

industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. E*.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). However, the mere presence of pain in a part of the body not listed on the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant failed to prove his injury caused functional impairment beyond the right arm. While Claimant may experience transient neck and right shoulder pain, those symptoms do not give rise to any functional impairment affecting parts of his body not listed on the schedule. Consequently, there is no basis to "convert" the admitted right 16% upper extremity scheduled rating to a whole person rating for purposes of calculating the PPD award.

ORDER

It is therefore ordered that:

1. Claimant's request for additional PPD benefits based on a whole person rating is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 13, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-987-001

ISSUES

- Did Claimant prove a left total knee arthroplasty (TKA) recommended by Dr. Robert Fitzgibbons is reasonably needed and proximately caused by his January 6, 2022 admitted work injury?

FINDINGS OF FACT

1. Claimant has worked for Employer as a security guard since 2004. In January 2022, he was stationed at the [Redacted, hereinafter FX] Mead freight facility. He typically patrolled the lot and parking areas three times during an 8-hour shift, which required walking up to 1.5 miles per patrol.

2. Claimant suffered admitted injuries on January 6, 2022 when he slipped on ice and fell. He twisted his left knee and fell on his left side. Claimant felt immediate severe pain in his left knee.

3. Employer referred Claimant to Concentra for authorized treatment. He saw Dr. Lori Long-Miller at the initial appointment on January 10, 2022. Claimant explained he slipped on ice, twisted his left knee, and fell on his left side. His knee felt unstable, and he was having difficulty ambulating. On inspection, Dr. Long-Miller observed swelling but no ecchymosis or effusion. The knee was tender to palpation over the MCL and the medial tibial plateau. Dr. Long-Miller noted crepitus and limited range of motion. Claimant was diagnosed with a knee "strain" and a suspected MCL injury.[1]

4. A left knee MRI was completed on January 11, 2022. It showed tearing and degeneration of the medial meniscus, "bone on bone cartilage loss" in the medial compartment, mild cartilage loss in the patellofemoral and lateral compartments, and partial tearing and degeneration of a prior ACL graft.

5. Claimant had two prior surgeries on his left knee that set the stage for his current situation. He had a left knee meniscal repair in 1997, and an ACL reconstruction in 2008. Claimant credibly testified he recovered well after the surgeries and returned to normal activities. Claimant's testimony is corroborated by the lack of medical records documenting any evaluations or treatment of the left knee until at least 2020.

6. Claimant injured his neck and back in a motor vehicle accident (MVA) in February 2020. Contemporaneous medical records make no mention of any injury to the left knee. Claimant participated in PT for several months after the accident. On April 13, 2020, the therapist noted Claimant was having some left knee pain with walking and

[1] Claimant also injured his left shoulder and back in the accident. Those conditions are not involved in the present litigation and will only be referenced if necessary to understand Claimant's status as relates to his left knee injury.

squatting during PT. On April 17, 2020, the therapist stated she discontinued squatting activities during therapy because they were causing knee pain. On August 17, 2020, Claimant reported his left knee was bothering him and he was using a knee brace "at times doing work at home due to feeling like his knee 'shifts.'"

7. Claimant discussed the left knee symptoms with his PCP, Aaron Schumacher, NP, on August 19, 2020. Claimant stated his knee pain had gotten worse since April 2020, and requested a referral to PT. Provocative knee tests were negative, except a positive posterior drawer sign. Mr. Schumacher diagnosed "probable arthritis" and recommended Claimant take ibuprofen, use a compression sleeve with activity, and ice his knee after "vigorous exercise."

8. Claimant discontinued PT on August 24, 2020, and there are no additional records specifically referencing left knee symptoms until after the January 6, 2022 work accident.

9. Claimant followed up with Dr. Long-Miller on January 13, 2022 to review the MRI. Dr. Long Miller noted "lots of degenerative changes, partial tear ACL graft and medial meniscus and bone on bone medial knee." She referred Claimant to PT and recommended an orthopedic evaluation.

10. Claimant saw Dr. Robert Fitzgibbons, an orthopedic surgeon, on January 17, 2022. Claimant described persistent pain since the work accident. He told Dr. Fitzgibbons about the 2008 ACL reconstruction and stated "his left knee was doing fairly well" before the January 6 accident. Considering the MRI findings, Dr. Fitzgibbons did not think an arthroscopy would be helpful. He recommended PT and possible injections if Claimant's symptoms did not improve.

11. On February 24, 2022, Dr. Long-Miller documented that Claimant's knee was "improved but not resolved." The examination showed continued tenderness to palpation, crepitus, and limited range of motion. Dr. Long-Miller advised Claimant a knee replacement "will not be done by work comp."

12. Claimant followed up with Dr. Fitzgibbons on March 8, 2022, primarily in relation to his left shoulder. Claimant stated his knee was "doing well," but also reported ongoing knee pain and instability, aggravated by prolonged standing and walking. Dr. Fitzgibbons recommended surgery for the shoulder.

13. On March 14, 2022, Dr. Long-Miller documented there was "no change" in Claimant's left knee since the previous visit.

14. Claimant started seeing Keith Meier, NP, at Concentra on April 5, 2022. Examination of the left knee showed tenderness over the medial joint line and limited flexion with pain. Meniscal tests were positive. Mr. Meier advised that Dr. Fitzgibbons would decide whether a knee replacement was warranted and would need to submit the request for authorization. Regarding causation, Mr. Meier opined, "Patient has work[ed] his current job for 19 years without issue. Current work injury exacerbated the left knee issue and should be considered work related."

15. On April 25, 2022, Dr. Fitzgibbons noted, "[Claimant's] left knee is still symptomatic and bothersome. Physical therapy helped initially but now he is left with pain and instability of his left knee. The patient is adamant that his left knee was doing well until [h]is work related injury." Dr. Fitzgibbons stated, "will get Workmen's Comp. approval for a left total knee arthroplasty and removal of hardware."

16. Dr. William Ciccone performed a records review for Respondents on June 14, 2022. He opined Claimant suffered a minor sprain/strain at work on January 6, 2022. He noted Claimant was predisposed to develop arthritis in the knee because of the previous ACL reconstruction. Dr. Ciccone opined all pathology shown on the January 11, 2022 MRI was pre-existing and unrelated to the work accident. He said degenerative meniscal tears are common in knees with advanced arthritis, and unrelated to trauma. Given the significant pre-existing degenerative changes, Dr. Ciccone would expect Claimant's symptoms to wax and wane for no specific reason. He concluded the minor sprain/strain did not cause, aggravate, or accelerate the advanced degenerative changes in Claimant's knee.

17. Respondents formally denied the TKA based on Dr. Ciccone's report.

18. Mr. Meier addressed the denial in his June 22, 2022 report. Mr. Meier opined, "I do not agree that the left knee injury is not work related. The patient has worked for this company for 19 years without issue. He has a documented work-related injury . . . Under Colorado guidelines an exacerbation of a preexisting condition is work related."

19. On July 20, 2022, Claimant told Mr. Meier, "I was squatting 175 pounds before this injury. Now I can't do any squatting. I want to get back to where I was."

20. Claimant started seeing Dr. Eric Vanzura at Concentra on August 19, 2022. Dr. Vanzura "entirely" disagreed with Dr. Ciccone's causation opinions, because Claimant was "fully functional" before the work accident despite the preexisting degenerative changes.

21. Dr. Vanzura reiterated his support for the TKA on August 19, 2022. He noted, "prior to the injury [Claimant] was walking and functioning normally despite degenerative changes [and] prior repair of ACL . . . which worked great. Was fully functional with squats and throwing hay bales prior to work related injury. MRI shows degenerative changes in addition to new injuries from work slip/fall." Dr. Vanzura added, "I insist that this patient's new knee instability is due to his slip and fall onto left leg with twisting knee injury. He does have pre-existing degenerative changes but was fully functioning and has entirely new problems after his work-related injury. WC definitely should cover at least the majority of cost for a total knee replacement." Dr. Vanzura referred Claimant to Dr. Lucas Schnell, a knee specialist, for a second opinion.

22. Dr. Schnell evaluated Claimant on September 12, 2022. Dr. Schnell agreed a TKA was appropriate. Regarding causation, Dr. Schnell opined Claimant's pre-existing arthritis "was exacerbated by his fall at work."

23. Dr. Ciccone performed an in-person IME on December 21, 2022. Claimant told Dr. Ciccone he had recovered from the ACL reconstruction with no significant ongoing issues. Claimant had completed a six-mile hike just a few weeks before the work accident. He also lifted weights at least twice per week and performed "full exercises with no pain." Since the accident, Claimant had given up numerous activities, such as weightlifting, running, hunting, landscaping, and home repairs. He was having difficulty with routine household activities such as mowing the lawn, taking out the garbage, vacuuming, and washing dishes. Dr. Ciccone saw no reason to change the opinions expressed in his previous report. He reiterated that the "minor" knee strain at work did not cause, aggravate, or accelerate the pathology seen on the MRI. Dr. Ciccone noted 2020 records showing intermittent knee pain, which he believed was consistent with the expected course of progressive osteoarthritis. He also pointed to post-injury records showing fluctuating pain levels. Dr. Ciccone concluded that the proposed TKA is related to the natural progression of Claimant's underlying, pre-existing condition, not the work injury.

24. Dr. Ciccone testified in deposition consistent with his report. Dr. Ciccone testified the improvement in the Claimant's knee pain in the weeks after the accident was consistent with a resolving left knee strain. He would expect a traumatic aggravation of pre-existing arthritis to produce persistent pain in the knee. Once the pain starts resolving, or goes back to intermittent, he considers the pre-existing condition to be at baseline. Dr. Ciccone downplayed the substantial change in Claimant's functional abilities before and after the work accident. Dr. Ciccone conceded a physical examination in August 2020 showed no evidence of a symptomatic meniscus tear or compromised ACL. He also agreed no pre-injury medical records documented sufficient clinical findings to suggest Claimant was a candidate for a TKA.

25. Dr. Sharma performed an IME for Claimant on January 17, 2023. Dr. Sharma opined Claimant suffered an "exacerbation, aggravation, acceleration and actually a worsening of his underlying arthritis as a result of this work injury."

26. In addition to his pre-injury work activities, Claimant regularly engaged in strenuous exercise, including heavy squats, leg extensions, rowing, and running. He also did "a lot" of work around his home, including heavy landscaping. Claimant's testimony regarding his pre-injury condition and activities is credible and persuasive.

27. The causation opinions of Dr. Vanzura, Dr. Schell, Mr. Meier, Dr. Fitzgibbons, and Dr. Sharma are credible and more persuasive than the contrary opinions offered by Dr. Ciccone and Dr. Long-Miller.

28. Claimant proved the January 6, 2022 work accident aggravated, accelerated, or combined with his pre-existing condition and proximately caused the need for a left TKA.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved the January 6, 2022 work accident aggravated, accelerated, or combined with his pre-existing condition and proximately caused the need for a left TKA. The causation opinions of Dr. Vanzura, Dr. Schell, Mr. Meier, Dr. Fitzgibbons, and Dr. Sharma are credible and more persuasive than contrary opinions in the record. Even though Claimant's left knee was severely arthritic and "bone on bone" the day before the work accident, he was able to work and engage in a wide range of avocational activities such as weightlifting, hiking, running, and landscaping, without limitation or difficulty. Dr. Ciccone's opinion that Claimant returned to "baseline" shortly after the accident is not persuasive. Claimant's preinjury baseline was a minimally symptomatic knee that caused no significant limitations on his ability to work or participate in a variety of physically demanding activities including weightlifting and hiking. Although the documented severity of Claimant's symptoms has fluctuated since the accident, he has continued to experience knee pain, and more importantly, substantially reduced function. The preponderance of persuasive evidence shows the work accident aggravated and accelerated the need for a TKA.

ORDER

It is therefore ordered that:

1. Insurer shall cover the left total knee arthroplasty recommended by Dr. Robert Fitzgibbons.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition

to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 21, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-221-765-001

ISSUES

- Did Claimant prove he suffered a compensable injury to his left shoulder on September 15, 2022 "arising out of" his employment?

- If the claim is compensable, the parties stipulated to an average weekly wage (AWW) of $1,273.15. The parties also stipulated that Respondent shall cover an evaluation with Dr. David Weinstein.

STIPULATED FACTS

1. Claimant injured his left arm on September 15, 2022 swatting at a fly that had been bothering him for a while. Claimant swatted at the fly as hard as he could with his left arm, causing immediate pain.

2. Claimant had no prior left shoulder problems.

FINDINGS OF FACT

1. Claimant works for Employer as a Correctional Officer. He injured his left shoulder on September 15, 2022 when he swatted forcefully at a fly while working at a desk. Claimant felt a painful, tearing sensation in the lateral left shoulder and numbness down his left arm into the left ring and middle fingers.

2. Claimant selected Concentra from Employer's list of designated providers. At the initial appointment, Claimant was diagnosed with a left shoulder strain and referred for an MRI and PT.

3. A left shoulder MRI was completed on October 28, 2022. It showed a joint effusion, mild arthritis, supraspinatus tendinitis, and mild AC joint impingement. No rotator cuff or labral tears were identified.

4. A steroid injection on November 3, 2022 provided some relief. Because of persist symptoms, Claimant was referred to Dr. David Weinstein for an orthopedic evaluation.

5. Claimant proved the left shoulder injury arose out of and occurred within the course of his employment.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The

"course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). There is no presumption that an injury occurring at work during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

Respondent does not dispute the "course of employment" element, and this case turns on whether Claimant's injury "arose out of" his employment.

As found, Claimant proved his injury arose out of his employment. Several interrelated concepts support this conclusion. First, a claimant need not actually be performing work duties at the time of the injury, nor must the injurious activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). "Many job functions involve discretionary or optional activities on the part of the employee, devoid of any duty component and unrelated to any specific benefit to the employer, but nonetheless are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). In this case, the fly had been "bothering" Claimant for "a while," and the ALJ infers it was interfering with his ability to focus on work tasks. As a result, swatting at the fly was intended to remove a distraction and facilitate accurate and timely completion of his work.

Second, Claimant's citation to the "personal comfort" doctrine is persuasive. Under the personal comfort doctrine, a wide variety of activities have all been held to be incidental to employment, such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water, and keeping warm. *E.g., In re Question Submitted by United Stated Court of Appeals for Tenth Circuit*, 759 P.2d 17 (Colo. 1988); *Eslinger v. Kit Carson County Memorial Hospital*, W.C. No. 4-638-306 (January 10, 2006) (warming up car and brushing off snow in parking lot at end of shift); *Geist v. Liberty Mutual Group*, W.C. No. 4-839-225 (October 11, 2011) (employee pushed back in chair to stand and go to the restroom); *Lehr v. Town of Wiggins*, W.C. No. 4-488-778 (February 14, 2002) (employee tried to throw an empty soda bottle into the trash but missed, bent over to pick up the bottle and injured his low back). The rule is based on the premise that actions taken to satisfy the employee's personal comfort are indirectly conducive to the employer's business. *Ocean Accident & Guarantee Corp. v. Pallero*, 180 P. 95 (Colo. 1919). Although personal comfort cases most commonly involve basic bodily functions (*i.e.*, eating, drinking, and toileting), the doctrine has been extended to activities which are not biological necessities, like smoking cigarettes. *E.g., Even v. The Mining Exchange*, W.C. No. 4-892-465 (April 29, 2013) (employee slipped on stairs while returning from a smoke break). Logically, the doctrine should also extend to an attempt

to remove disruptive stimuli, such as closing an office door to mitigate noise or, as here, swatting at a bothersome insect.

Third, the act of swatting at the fly was insufficiently "substantial" to constitute a personal deviation from Claimant's work. An employee who is otherwise engaged in work activity can momentarily step outside the scope of employment by engaging in a purely personal deviation. In such cases, the question is "whether the claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). The deviation must be "substantial" to remove the claimant from the course and scope of employment. *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009). Here, Claimant was performing work activity immediate before swatting the fly, and presumably intended to return to working immediately afterward. Although the duration of a putative personal deviation is not dispositive, it is a legitimate factor to consider when evaluating whether the deviation was substantial. More importantly, even though Claimant undoubtedly hoped to obtain a personal benefit of removing an annoyance, he was also attempting to facilitate his ability to concentrate on work tasks. This combination of personal and work-related motivations is inconsistent with a finding of a "purely personal" deviation.

Finally, a finding of compensability is consistent with the "but for" test for injuries arising from "neutral risks" set forth in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). *City of Brighton* recognized three categories of employment risks causing injury to employees: (1) employment risks; (2) personal risks; and (3) neutral risks, which are neither employment related nor personal. An irritating insect is not an inherently employment-related risk, like a gas explosion or malfunctioning piece of machinery. Nor is it an entirely personal risk, such as an epileptic seizure or an assault in retaliation for an adulterous affair. It is more akin to neutral risks such as stray bullets, car thieves, and lightning strikes. Under *City of Brighton,* an injury caused by a neutral risk arises out of employment "if it would not have occurred but for the fact that the conditions and obligations of the employment placed [the] claimant in the position where he or she was injured." *Id*. at 504-05. In this case, Claimant's injury would not have occurred "but for" the fact that his employment placed him in the position to be bothered by the fly.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury to his left arm and shoulder on September 15, 2022 is compensable.

2. Claimant's average weekly wage is $1,273.15.

3. Respondent shall cover an evaluation with Dr. David Weinstein.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 25, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-210-496-002

ISSUES

- Did Claimant prove he suffered a compensable injury to his right shoulder on March 10, 2022 arising out of and in the course of his employment?

- Did Claimant prove Respondent is liable for an evaluation by Dr. Timothy Sandell on December 1, 2022?

- Did Respondent prove Claimant's indemnity benefits should be reduced 50% for willful violation of a safety rule?[1]

FINDINGS OF FACT

1. Claimant works for Employer as a Head Clerk. In March 2022, his regular shift was from 2:30 PM to 11:00 PM.

2. Claimant injured his right shoulder at work on March 10, 2022. He was at the registers and observed two youths he believed were shoplifting beer. Claimant left his position near the registers and walked "at a quick pace" toward the front door, with the intent to "engage" the youths before they exited the store. Upon reaching the door, Claimant's hamstring "blew," and he fell on his outstretched right arm. He suffered a severe rotator cuff tear.

3. Shoplifting is a significant problem at many of Employer's stores, including the store where Claimant worked. Employer has promulgated written rules entitled "STORE PERSONNEL SHOPLIFTING DETERRENCE POLICY." The document states, "Improperly handling a suspected shoplifting situation puts the safety of Associates, Customers and the suspected shoplifter at risk. . . . Customer Service / Customer Delight is the best method to deter shoplifting, and it is the only deterrence method you may use." (Emphasis in original). The Policy explicitly instructs employees "Do not pursue, follow, or chase a shoplifter inside the store or outside the store exit."

4. Despite these admonitions, Employer does not expect its employees to remain entirely passive in the face of shoplifting. Under the section captioned "WHAT YOU SHOULD ALWAYS DO," the Policy states, "Engaging with a suspected shoplifter while they are in the store may prevent the theft. In most cases, excellent Customer Service / Customer Delight at the door can deter a push-out or walk-out. Always engage with Customer Service / Customer Delight first."

[1] No indemnity benefits were requested at the March 7, 2023 hearing because Claimant withdrew the endorsed issues of TTD and TPD. Nevertheless, the parties agreed Respondent's safety rule defense was ripe for determination and elected to try the issue.

5. Claimant interpreted Employer's policy of "engagement" to mean he should "try to talk to" or "have a conversation with" suspected shoplifters to deter theft. There is no persuasive evidence Claimant received training or instruction about "engagement" that differs from his understanding.

6. Claimant's medical records contain notations that he was "running after" and "chasing" the youths when the injury occurred. Claimant credibly disputed the characterization that he was chasing or running after the youths; he was walking toward the door at "a quick pace" because he "was trying to get to the door before they did." The medical providers probably incorrectly paraphrased Claimant's statements.

7. Claimant did not immediately ask Employer to provide medical treatment because, "I didn't think it was going to be a serious thing." He went to his PCP and was sent to physical therapy. Claimant participated in PT for eight weeks, without significant improvement.

8. An MRI of the right shoulder was done on May 17, 2022. It showed supraspinatus, infraspinatus, and subscapularis tendon tears, a torn biceps tendon, and a greater tuberosity osteochondral injury related to the acute rotator cuff tears.

9. After learning the extent of his injury, Claimant initiated a workers' compensation claim with Employer. [Redacted, hereinafter JM], the District Asset Protection Manager, interviewed Claimant about the incident in May 2022. During the interview, Claimant initially stated that he was "hurrying after" the shoplifters, but on further questioning, he clarified he was "not chasing" them.

10. Employer's Shoplifting Deterrence Policy states that "associates who violate this policy will be subject to disciplinary action up to and including termination." Employer has previously disciplined other employees for violating the policy.

11. Claimant was not disciplined for the March 10, 2022 incident. When asked at hearing whether JM[Redacted] believed Claimant's description of the incident constituted a violation of Employer's policy, she replied, "possibly."

12. Employer referred Claimant to Concentra. He was diagnosed a rotator cuff tear and referred to Dr. Michael Simpson for a surgical evaluation.

13. Dr. Simpson evaluated Claimant on July 19, 2022, and opined Claimant "undoubtedly" required surgery. Dr. Simpson submitted a preauthorization request for an arthroscopic subacromial decompression, rotator cuff repair, biceps tenodesis, and possible in-space balloon acromioplasty if the supraspinatus turns out to be "non-reconstructable."

14. Respondent filed a Notice of Contest on July 19, 2022 denying the claim as "not work-related." Respondent also denied the surgery preauthorization request.

15. Dr. Allison Fall performed an IME for Respondent on November 10, 2022. Dr. Fall agreed the surgery requested by Dr. Simpson is reasonably necessary and causally related to March 10, 2022 work accident.

16. Claimant saw Dr. Timothy Sandell, a physiatrist, on December 1, 2022. Dr. Sandell reviewed Dr. Simpson's report and agreed Claimant remained a surgical candidate. However, he referred Claimant to a different surgeon, Dr. Ross Schumer.

17. Dr. Sandell stated Claimant was "referred to my office to assume care moving forward," but his records do not identify the referral source.

18. No medical record or other document in evidence shows a referral to Dr. Sandell by any authorized provider. No testimony was presented on this issue, and the parties did not stipulate that Dr. Sandell is authorized.

19. Claimant's testimony regarding the accident, his understanding of Employer's shoplifting policies, and the motivation for his actions is credible.

20. Claimant proved his injury arose out of his employment and he remained within the sphere of employment when the injury occurred.

21. Respondent failed to prove Claimant willfully violated a safety rule.

22. Claimant failed to prove Dr. Sandell is an authorized provider.

CONCLUSIONS OF LAW

A. Compensability

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). There is no presumption that an injury occurring at work during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

Ordinarily, it would seem rather obvious that injuries suffered by a grocery store manager while attempting to speak with a shoplifter arose out of and occurred within the course of the employment. But Respondent argues Claimant violated specific directives relating to shoplifters and was therefore acting outside the "sphere of his employment" when the injury occurred.

If an employer issues a directive that limits the "sphere" of a claimant's employment, any injury sustained while violating such directive is not compensable. *E.g., Bill Lawley Ford v. Miller,* 672 P.2d 1031 (Colo. App. 1983). To remove conduct from the sphere of employment, the directive must be clear, specific, and evidence an intent to cause a cessation of employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). Relevant factors in the analysis include the employer's reason for imposing the directive, the circumstances under which it was given, when it was given, what the employer intended to prohibit, and how the claimant interpreted the order. *Nielsen v. PXC Denver, LLC*, W.C. No. 4-241-772 (March 5, 1996).

As found, Claimant proved he remained within the "sphere of his employment" at the time of his injury. Employer's Policy regarding shoplifters does not evidence a clear intent to cause a cessation of employment. The directives are intended to regulate Claimant's conduct while performing his job instead of limiting the scope of his employment. Contrary to the situation in *Bill Lawley Ford, supra,* Employer's Policy does not instruct employees to do nothing in response to shoplifting. Rather, Employer requires employees to take some action and attempts to limit "how" they do it. In other words, the Policy "regulate[s] the employee's conduct while he is engaged in such employment," as opposed to defining the sphere of the employment itself. *Ramsdell v. Horn, supra*, at 152. Claimant was attempting in good faith to comply with the instruction to "engage" the shoplifters before they left the store. Therefore, the injury arose out of and occurred within the course of his employment.

B. Safety rule penalty

Section 8-42-112(1)(b) provides that indemnity benefits shall be reduced 50% where the injury results from the claimant's "willful" failure to obey any reasonable rule adopted by the employer for the safety of the employee. The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondents to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *see also Sayers v. American Janitorial Service, Inc*., 162 Colo. 292, 425 P.2d 693 (Colo. 1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to the employer). Willfulness may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp*., 246 P.2d 902 (Colo. 1952). Violation of a safety rule is not willful if the employee had a "plausible purpose to explain his violation of a rule." *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1995). Generally, violating a rule to facilitate accomplishment of a job-related task is not willful. However, violation of a rule simply to make the job easier or quicker is not considered a "plausible purpose." *Grose v. Riviera Electric*, W.C. No. 40418-465 (August 25, 2000). A safety rule penalty is an affirmative defense, and it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

As found, Respondent failed to prove Claimant willfully violated a safety rule. Claimant performed no action prohibited by the Shoplifting Deterrence Policy. He was not pursuing or chasing the shoplifters but rather was attempting to engage with them at the front door. Claimant's testimony regarding his understanding of the Policy and his motivation for moving quickly to meet the shoplifters at the door is credible.

Employer's Policy requires relatively nuanced distinctions if an employee suspects or knows a customer is stealing merchandise. On the one hand, the employee must not "pursue, follow, or chase a suspected shoplifter." But they are encouraged—and arguably required—to "engage" with shoplifters "while they are in the store" or "at the door," which is precisely what Claimant believed he was doing when the injury occurred. Claimant understood "engagement" to mean conversing with the shoplifter or asking if they required assistance. There is no persuasive evidence Claimant was trained in methods of engagement that differ from his understanding. The absence of any detailed description of the ways to "engage" shoplifters creates a zone of discretion for the employee to decide how best to handle any given situation. The lack of clarity is confirmed by JM's[Redacted] admission that the circumstances described at hearing were only a "possible" violation of Employer's rules. And the fact that Claimant was not disciplined in connection with the incident suggests even Employer was not convinced Claimant violated a rule.

Even if Claimant were deemed to have violated a safety rule based on his position relative to the shoplifters, the violation was not "willful." Instead, Claimant had a "plausible purpose" to engage the shoplifters before they left the store.

C. Dr. Sandell's December 1, 2022 bill

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). The respondents are only liable for treatment rendered by authorized treating providers. Absent an emergency, the ALJ cannot award medical treatment recommended or provided by unauthorized providers, even if the treatment was otherwise reasonably needed or causally related. *E.g., Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (May 15, 2018); *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995).

Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

As found, Claimant failed to prove Dr. Sandell is an authorized provider. There is no persuasive evidence that Concentra or Dr. Simpson referred Claimant to Dr. Sandell. Dr. Sandell stated Claimant was "referred to my office to assume care," but did not identify the referral source. There is no medical record or other document in evidence reflecting a referral to Dr. Sandell by an authorized provider. No testimony was presented on this issue, and the parties did not stipulate that Dr. Sandell is authorized.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right shoulder injury is compensable.

2. Respondent shall cover medical treatment from authorized providers reasonably needed to cure and relive the effects of Claimant's compensable injury.

3. Claimant's request for payment of Dr. Sandell's December 1, 2022 bill is denied and dismissed.

4. Respondent's request for a 50% reduction of indemnity benefits for a safety rule violation is denied and dismissed.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 28, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-215-456-001

STIPULATIONS

The parties agreed to the following:

1. Claimant's designated Authorized Treating Physician (ATP) is Nicholas K. Olsen, D.O.;

2. Claimant's Average Weekly Wage (AWW) is $883.87;

3. Claimant received wages between September 2, 2022 and October 5, 2022 at the rate of $800.00 per week or $113.97 per day;

4. Claimant is owed Temporary Partial Disability (TPD) benefits between September 2, 2022 and October 5, 2022 at the rate of $55.91 per week, or $7.99 per day. The amount is based upon the difference between the admitted AWW of $883.87 and the paid weekly wage of $800.00 x 2/3;

5. Claimant is owed Temporary Total Disability (TTD) benefits from October 6, 2022 through November 30, 2022, and then beginning again on December 8, 2022 and continuing until terminated by statute.

ISSUE

Whether Claimant is entitled to receive TTD or TPD benefits, and if so at what rate, for the week of December 1, 2022 through December 7, 2022. Respondents assert that the $500 bonus Claimant received on December 1, 2022 should be considered in the calculation of TPD. In contrast, Claimant contends that the $500 bonus does not constitute "wages" and thus should not be considered in the calculation of PPD. Instead, he should receive TTD benefits for the December 1-7, 2022 pay period.

FINDINGS OF FACT

1. Claimant is a 74-year-old male who has been working for Employer since 1974. On September 2, 2022, while working as a Field Supervisor, Claimant sustained injuries to his right leg, bilateral elbows and left arm. Claimant specifically tripped on a lead wire in Employer's steel factory and fell.

2. Claimant has not returned to work for Employer since his industrial injuries. He remains significantly disabled and ambulates with the use of a wheelchair. Claimant's treating providers have continually assigned work restrictions since the date of his injuries.

3. Employer's wage records at Respondents' Exhibit G-83 reflect that during the period December 1-7, 2022 Claimant received a Bonus-O in the amount of $500.00. Wage records do not reveal why this bonus was paid. There was also no evidence presented at the hearing regarding the origin of the bonus. Claimant did not receive any other wages or temporary disability benefits from Employer for the period December 1, 2022 through December 7, 2022.

4. Employer's wage records at Respondents' Exhibit G-83 also show that Claimant received a series of other bonuses in the total amount of $1813 as reflected in the following:

- Bonus-O - $900
- Bonus-S - $493
- Birthday Bonus - $100
- COVID Bonus - $160
- COVID Bonus - $160

The wage records show that the preceding bonuses were paid at various times throughout the year 2022.

5. Claimant's December 1-7 bonus does not constitute "wages." Initially, there was no evidence presented with regard to the basis for Bonus-O in the amount of $500.00. Notably, because Claimant had not been working for three months at the time the bonus was received, it is unlikely that it was given for work performed or because Claimant had satisfied some condition of employment. The record is unclear regarding the basis for the bonus, and it may have been purely gratuitous in nature. Because it has already been determined and paid, Claimant has no further access to the bonus and no expectation of earning any additional bonuses. Accordingly, Claimant had no "reasonable access on a day-to-day basis, actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." The December 1-7, 2022 Bonus-O in the amount of $500.00 is thus a fringe benefit not enumerated in §8-40-201(19) and thus does not constitute "wages."

6. The parties have stipulated to Claimant's AWW in the amount of $883.87. The parties presumably considered the total income Claimant received from Employer. In addition to wages, Claimant received Bonus-O during the week of December 1-7, 2022 as well as $1813 in additional bonuses during the year 2022. Therefore, Claimant's AWW is not at issue. Instead, after determining that the December 1-7, 2022 bonus in the amount of $500 does not constitute "wages," the central inquiry is whether Claimant is entitled to receive TPD or TTD benefits for the period.

7. Although Respondents seek to reduce Claimant's stipulated AWW with his December 1-7, 2022 Bonus-O in the amount of $500, Claimant's bonus constituted a fringe benefit and not wages. Specifically, Respondents' stipulated AWW of $883.87- Bonus-O of $500 = $383.87. Multiplying $383.87 x 2/3 = $255.91**.** Respondents contend that $255.91 is Claimant's TPD benefit for the week of December 1-7, 2022. However,

because Claimant's December 1-7, 2022 bonus does not constitute "wages" he did not suffer a partial wage loss during the period. Instead, because Claimant earned no wages or suffered a complete wage loss during the period, he is entitled to receive TTD benefits for the period December 1-7, 2022.

8. Claimant has demonstrated that it is more probably true than not that he is entitled to receive TTD benefits for the period December 1-7, 2022. Initially, the parties agreed that Claimant is owed TTD benefits from October 6, 2022 through November 30, 2022, and then beginning again on December 8, 2022 and continuing until terminated by statute. The record reveals that Claimant's industrial injuries during the period December 1-7, 2022 caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Notably, during the December 1-7, 2022 period, Claimant did not work for Employer or earn any other wages. Moreover, TTD benefits may only be terminated pursuant to one of the specific instances enumerated in §8-42-105(3), C.R.S. None of the instances have occurred in the present case. Claimant has not reached MMI or returned to regular employment. Furthermore, he has not received a written release to return to regular employment or received a written offer to return to work in a modified capacity but declined. Instead, Claimant remains completely off work and has not been receiving wages since Employer terminated wage continuation on October 6, 2022. Respondents thus owe Claimant TTD benefits for the period December 1-7, 2022.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Whether the December 1-7, 2022 Bonus Constituted Wages

4. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. Indus. Claim Appeals Off.,* 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Id*.

5. Under §8-40-201(19)(a), C.R.S., the term "wage" is defined as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury…" When the Workers' Compensation Act was enacted in 1919, "wages" included "the reasonable value of board, rent, housing, lodging or any other similar advantage received from the employer." Colo. Sess. Laws 1919, ch. 210, 47 at 716; *see Ganser v. Mountain Energy, Inc.* WC 5-128-084-002 (ICAO, June 4, 2021). In 1989 the General Assembly narrowed the definition of "wages." It still included board, rent, housing and lodging, specifically added gratuities and certain costs of continuing or converting health insurance, but for the first time excluded "any similar advantage or fringe benefit not specifically enumerated." Colo. Sess. Laws 1989, ch. 67, 8-47-101(2) at 411; *Ganser v. Mountain Energy, Inc.* WC 5-128-084-002 (ICAO, June 4, 2021). The preceding provision remains essentially unchanged. *See* §8-40-201(19)(b), C.R.S.

6. In *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996), the court of appeals reviewed the addition to the AWW of the claimant's accrual of paid time off. Specifically, the employer credited the claimant with 9.5 hours of paid leave for each pay period. The court of appeals applied the terms of §8-40-201(19)(a) and (b). Section 8-40-201(19)(a) defined 'wages' "to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Subparagraph (b), however, limited the definition to exclude "any similar advantage or fringe benefit not specifically enumerated in this subsection (19)." To determine if the claimant's accrued time off constituted an included "wage" or an excluded "fringe benefit," the decision applied criteria inquiring "whether a reasonable, present-day, cash equivalent value can be placed upon it and whether the employee has reasonable access on a day-to-day basis, either actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." *Meeker,* 929 P.2d at 28.

7. The *Meeker* court determined the claimant's accrued time off qualified as "wages" to be included in the AWW. The hours credited to the claimant had an easily discernable, immediate cash value derived by multiplying each hour accrued by the claimant's hourly rate of pay. Moreover, once earned, the time off was never forfeited and the claimant had reasonable access to the benefit. Notably, the claimant's weekly wage rate was increased by the hourly value of the number of time-off hours earned each week. *See Burd v. Builder Services Group, Inc.*, WC 5-058-572-001 (ICAO, July 9, 2019). Conversely, in *City of Lamar v. Koehn*, 968 P.2d 164 (Colo. App. 1998), the court of appeals affirmed the application of the *Meeker* test and concluded that vacation and sick leave earned by the claimant did not constitute "cash equivalents" for purposes of §8-40-201(19)(a) because the benefits were subject to forfeiture if the claimant accrued a specified maximum number of leave days.

8. In *Orrell v. Coors Porcelain*, WC 4-251-934 (ICAO, May 22, 1997) and *Yex v. ABC Supply Co*., WC 4-910-373-01 (ICAO, May 16, 2014), the Panel considered the addition of bonuses paid from employers' profit sharing plans to a wage calculation. In both cases the prior receipt of the bonuses was excluded as fringe benefits rather than included as wages. Applying the *Meeker* test, the bonus was deemed contingent and without a present day cash equivalent value. Importantly, the size of the bonus could only be established at the conclusion of the year or quarter. The claimant also had no access to the bonus on a day-to-day basis and had no immediate expectation of receiving the bonus.

9. As found, Claimant's December 1-7 bonus suffers from similar defects to the plans in *Orwell* and *Yex* and thus does not constitute "wages." Initially, there was no evidence presented with regard to the basis for Bonus-O in the amount of $500.00. Notably, because Claimant had not been working for three months at the time the bonus was received, it is unlikely that it was given for work performed or because Claimant had satisfied some condition of employment. The record is unclear regarding the basis for the bonus, and it may have been purely gratuitous in nature. Because it has already been determined and paid, Claimant has no further access to the bonus and no expectation of earning any additional bonuses. Accordingly, Claimant had no "reasonable access on a day-to-day basis, actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." The December 1-7, 2022 Bonus-O in the amount of $500.00 is thus a fringe benefit not enumerated in §8-40-201(19) and thus does not constitute "wages."

10. As found, the parties have stipulated to Claimant's AWW in the amount of $883.87. The parties presumably considered the total income Claimant received from Employer. In addition to wages, Claimant received Bonus-O during the week of December 1-7, 2022 as well as $1813 in additional bonuses during the year 2022. Therefore, Claimant's AWW is not at issue. Instead, after determining that the December 1-7, 2022 bonus in the amount of $500 does not constitute "wages," the central inquiry is whether Claimant is entitled to receive TPD or TTD benefits for the period.

TPD or TTD Benefits

11. Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between a claimant's AWW at the time of injury and earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

12. To prove entitlement to TTD benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

13. As found, although Respondents seek to reduce Claimant's stipulated AWW with his December 1-7, 2022 Bonus-O in the amount of $500, Claimant's bonus constituted a fringe benefit and not wages. Specifically, Respondents' stipulated AWW of

$883.87- Bonus-O of $500 = $383.87. Multiplying $383.87 x 2/3 = $255.91**.** Respondents contend that $255.91 is Claimant's TPD benefit for the week of December 1-7, 2022. However, because Claimant's December 1-7, 2022 bonus does not constitute "wages" he did not suffer a partial wage loss during the period. Instead, because Claimant earned no wages or suffered a complete wagste loss during the period, he is entitled to receive TTD benefits for the period December 1-7, 2022.

14. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive TTD benefits for the period December 1-7, 2022. Initially, the parties agreed that Claimant is owed TTD benefits from October 6, 2022 through November 30, 2022, and then beginning again on December 8, 2022 and continuing until terminated by statute. The record reveals that Claimant's industrial injuries during the period December 1-7, 2022 caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Notably, during the December 1-7, 2022 period, Claimant did not work for Employer or earn any other wages. Moreover, TTD benefits may only be terminated pursuant to one of the specific instances enumerated in §8-42-105(3), C.R.S. None of the instances have occurred in the present case. Claimant has not reached MMI or returned to regular employment. Furthermore, he has not received a written release to return to regular employment or received a written offer to return to work in a modified capacity but declined. Instead, Claimant remains completely off work and has not been receiving wages since Employer terminated wage continuation on October 6, 2022. Respondents thus owe Claimant TTD benefits for the period December 1-7, 2022.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's designated ATP is Dr. Olsen.

2. Claimant's AWW is $883.87.

3. Claimant received wages between September 2, 2022 and October 5, 2022 at the rate of $800.00 per week or $113.97 per day.

4. Claimant is owed TPD benefits between September 2, 2022 and October 5, 2022 at the rate of $55.91 per week or $7.99 per day. The amount is based upon the difference between the admitted AWW of $883.87, and the paid weekly wage of $800.00 x 2/3.

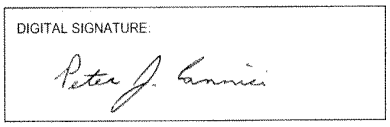
5. Claimant is owed TTD benefits from October 6, 2022 through November 30, 2022, and then beginning again on December 8, 2022 and continuing until terminated by statute.

6. Because Claimant's December 1-7, 2022 $500 bonus did not constitute "wages," he shall receive TTD benefits for the pay period December 1-7, 2022.

7. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: March 3, 2023.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-394-002

ISSUE

Whether Claimant has proven by a preponderance of the evidence that his 9% scheduled right upper extremity impairment rating should be converted to a 5% whole person rating.

FINDINGS OF FACT

1. Claimant was born on December 24, 1974 and has worked as a firefighter for Employer since September 27, 2010. During a team building exercise on June 6, 2021, Claimant was injured when he felt a pop in his right shoulder and numbness that traveled down his right arm to his hand. He selected Annu Ramaswamy, M.D. as his Authorized Treating Physician (ATP).

2. Dr. Ramaswamy began treating Claimant on June 6, 2021. He subsequently referred Claimant to In Sok Yi, M.D. for possible right elbow surgery and Thomas John Noonan, M.D. for consideration of right shoulder surgery.

3. On August 26, 2021 Claimant underwent right elbow surgery with Dr. Yi. On November 8, 2021 Claimant underwent right shoulder surgery with Dr. Noonan. The surgery included the following: (1) a right shoulder arthroscopy; (2) arthroscopic rotator cuff repair; (3) arthroscopic subacromial decompression; (4) arthroscopic distal clavicle resection; (5) arthroscopic bicep release; (6) arthroscopic debridement/tear; (7) arthroscopic debridement anterior labral tear and; (8) arthroscopic debridement partial tearing subscapularis.

4. On June 16, 2022 Dr. Ramaswamy determined that Claimant had reached Maximum Medical Improvement (MMI). On examination of the right shoulder, Dr. Ramaswamy found mild tenderness in the biceps tendon region anteriorly, no crepitus in the joint, minimal trigger point activity in the posterior shoulder girdle and negative impingement with provocative maneuvers. He determined that Claimant could continue full duty work and thus did not impose any work restrictions. Dr. Ramaswamy assigned a 7% upper extremity impairment for right elbow range of motion loss, a 3% upper extremity impairment based on sensory ulnar neuropathy, and a 3% upper extremity rating for the right shoulder. Combining the ratings yields a 13% right upper extremity impairment. On July 8, 2022 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Ramaswamy's MMI and impairment determinations.

5. Claimant challenged the impairment rating and requested a Division Independent Medical Examination (DIME). On September 26, 2022 Claimant underwent a DIME with Paul Ogden, M.D. Dr. Ogden agreed that Claimant had reached MMI on June 16, 2021. On examination, Dr. Ogden found no tenderness of the trapezius, scapular, and periscapular areas, no tenderness over the supraspinatus muscle, and no

tenderness over the acromioclavicular joint. There were also no findings of glenohumeral instability. Regarding Claimant's clinical diagnosis, Dr. Ogden determined Claimant had suffered a right rotator cuff labral injury to his right shoulder, arthritis of his right acromial clavicular joint, bicep tendonitis, impingement of the right shoulder and right ulnar nerve entrapment.

6. Dr. Ogden documented that Claimant experiences sharp pains in his right trapezius area that respond to stretching and physical therapy. There is also a binding sensation in the right shoulder area with shoulder abduction in rotation. Claimant further has difficulties washing his back because of limited range of motion in his right shoulder and elbow. Dr. Ogden assigned a total 17% right upper extremity impairment rating for Claimant's June 6, 2021 industrial injuries. Specifically, for the right shoulder area Dr. Ogden assigned a 7% right upper extremity rating due to range of motion loss and an additional 2% upper extremity impairment for Claimant's distal clavicle excision. The ratings for the right shoulder area combined to yield a 9% upper extremity impairment.

7. Claimant testified at the hearing in this matter. He remarked that he returned to full duty work for Employer on June 7, 2022. Claimant explained that he experiences right shoulder weakness that limits his ability to use his right arm. Specifically, the impairment of Claimant's right shoulder inhibits his ability to perform various functions of his job. He notably suffers functional limitations that require use of his left or non-dominant extremity to throw ladders and open doors. Claimant also wears a hose pack containing 100 feet of fire hose over his left shoulder because of diminished strength in his right shoulder area. Claimant commented that he continues to experience referred pain and limitations at the primary situs of his initial right shoulder injury.

8. Ronald Swarsen, M.D. testified at the hearing in this matter. He maintained that, because Claimant suffered an injury to his right shoulder and not arm, his impairment requires conversion to a whole person rating. Dr. Swarsen stated that the shoulder is not a part of the arm, but rather the scaffolding on which the arm is attached. He remarked that the shoulder has its own range of motion separate from the arm itself.

9. Dr. Swarsen marked Claimant's Demonstrative Exhibits 6-7 to identify the areas of right shoulder anatomy that were surgically addressed by Dr. Noonan. He relied on Exhibits 6 through 10 for his opinion and noted that they were from the first volume of the *Netters* compendium. Dr. Swarsen used the color orange to reflect where the arthroscopic rotator cuff debridement and the arthroscopic labral debridement occurred. He relied on Exhibit 8 to show the arthroscopic subacromial decompression at the glenohumeral joint to identify the open subpectoral long head biceps tenodesis and delineate the plane of the glenohumeral joint. He used Exhibit 6 to show the distal clavicle excision.

10. Dr. Swarsen commented that all of the preceding procedures, with the exception of the subpectoral long head biceps tenodesis, occurred above the plane of the glenohumeral joint. He testified that the scheduled impairment rating issued by Dr. Ogden should be converted into a whole person impairment. Dr. Swarsen detailed that Claimant suffered a functional impairment above the glenohumeral joint in his right shoulder. He

determined it was reasonable to convert the scheduled shoulder rating to a whole person impairment because Claimant's right upper extremity deficiency was due to weakness of the shoulder girdle musculature. The weakness flowed from the shoulder into the arm. Dr. Swarsen thus summarized that the 9% upper extremity impairment rating for Claimant's right shoulder should be converted to a 5% whole person rating.

11. Dr. Ramaswamy also testified at the hearing in this matter. He was Claimant's primary ATP from June 7, 2021 through June 16, 2022 and saw Claimant approximately 12-15 times. Dr. Ramaswamy placed Claimant at MMI and assigned a 3% upper extremity impairment for Claimant's right shoulder. After hearing all of the areas described by Claimant regarding functional limitations, Dr. Ramaswamy remarked that they all were limited to the right arm. Consequently, Dr. Ramaswamy determined the situs of functional impairment did not extend beyond the arm and, therefore, the best measurement of Claimant's permanent partial disability was on the schedule. Accordingly, conversion of Claimant's right upper extremity rating was not warranted.

12. Claimant has proven that it is more probably true than not that his right upper extremity rating should be converted to a whole person impairment. Initially, on June 6, 2021 Claimant suffered admitted industrial injuries to his right upper extremity during the course and scope of his employment with Employer. Claimant subsequently underwent right shoulder surgery including the following: (1) a right shoulder arthroscopy; (2) arthroscopic rotator cuff repair; (3) arthroscopic subacromial decompression; (4) arthroscopic distal clavicle resection; (5) arthroscopic bicep release; (6) arthroscopic debridement/tear; (7) arthroscopic debridement anterior labral tear; and, (8) arthroscopic debridement partial tearing subscapularis. On June 16, 2022 Claimant reached MMI. Subsequently, DIME Dr. Ogden assigned a 7% right upper extremity rating due to range of motion loss and a 2% upper extremity impairment for Claimant's distal clavicle excision for the right shoulder area. The ratings combined to yield a 9% upper extremity impairment.

13. Medical records reflect that Claimant's course of medical treatment, aside from his elbow, has involved his right shoulder area and not his arm. Claimant credibly explained that he experiences right shoulder weakness that limits his ability to use his right arm. He testified that, although he was released to full duty employment, his right shoulder limitations inhibit his ability to perform various functions of his job. Claimant notably suffers functional limitations that require use of his left or non-dominant extremity to throw ladders and open doors. He also wears a hose pack containing 100 feet of fire hose over his left shoulder because of diminished strength in his right shoulder area. Furthermore, during his DIME Dr. Ogden documented that Claimant experiences sharp pains in his right trapezius area that respond to stretching and physical therapy. There is also a binding sensation in the right shoulder area with shoulder abduction in rotation. Finally, Claimant has difficulties washing his back because of limited range of motion in his right shoulder and elbow.

14. Dr. Swarsen persuasively explained that Claimant suffered a functional impairment above the glenohumeral joint. The scheduled rating issued by Dr. Ogden should thus be converted into a whole person impairment. Dr. Swarsen emphasized that

the shoulder is not a part of the arm, but rather the scaffolding on which the arm is attached. He commented that all of Claimant's surgical procedures on November 8, 2021 with Dr. Noonan, with the exception of the subpectoral long head biceps tenodesis, occurred above the plane of the glenohumeral joint. He detailed that Claimant suffered a functional impairment above the glenohumeral joint in his right shoulder. Dr. Swarsen determined it was reasonable to convert the scheduled shoulder rating to a whole person impairment because Claimant's right upper extremity deficiency was due to weakness of the shoulder girdle musculature. The weakness flowed from the shoulder into the arm.

15. In contrast, Claimant's ATP Dr. Ramaswamy maintained that Claimant warranted a scheduled right upper extremity impairment for his June 6, 2021 industrial injuries. After hearing all of the areas described by Claimant regarding functional limitations, Dr. Ramaswamy remarked that they only involved the right arm. Consequently, Dr. Ramaswamy determined the situs of functional impairment did not extend beyond the arm. The best measurement of Claimant's permanent partial disability was thus on the schedule. However, Dr. Ramaswamy failed to address Dr. Swarsen's comments that Claimant's right shoulder surgery primarily occurred above the plane of the glenohumeral joint. Claimant's range of motion loss is thus attributable to physiological structures beyond the arm at the shoulder. Specifically, it is necessary that muscles, tendons, and ligaments in the shoulder and torso activate in order to move the arm. Accordingly, based on the medical records, Claimant's credible testimony and the persuasive opinion of Dr. Swarsen, Claimant suffered functional impairment proximal to the glenohumeral joint in his right shoulder as a result of his June 8, 2021 admitted industrial injuries. Therefore, the 9% scheduled right upper extremity impairment rating issued by Dr. Ogden should be converted into a 5% whole person rating.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998). When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

5. Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S. is determined on a case-by-case basis. *See DeLaney v. Indus. Claim Appeals Off.*, 30 P.3d 691, 693 (Colo. App. 2000).

6. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO, Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson–Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

7. Under the functional impairment test, neither the situs of the injury nor the anatomical distinctions found in the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (*AMA Guides*) controls the issue. *Garcia v. Terumbo BCT*, W.C. No. 5-094-514 (ICAO, July 30, 2021). Rather, the ALJ must consider all relevant evidence and determine the parts of the body that have been functionally impaired. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996). Even if the claimant proves tissue damage and pain in structures beyond the schedule, the ALJ may still find a scheduled injury. *Strauch,* 917 P.2d at 367-68. Depending on the particular facts of a claim, damage to the structures of the "shoulders" may or may not reflect a "functional impairment" that is enumerated on the

schedule of disabilities. *Walker v. Jim Fouco Motor Co.,* 942 P. 2d 1390 (Colo. App. 1997)*; see Henke v. United Airlines,* W.C. Nos. 4-456-163, 4-490-897 (ICAO, Sept. 10, 2003). In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (ICAO, July 8, 2021).

8. The portion of the *AMA Guides* pertaining to the upper extremities is not a model of clarity. *Id.* The *AMA Guides* do not rate impairments of the shoulder but only of the upper extremity. However, the applicable statutory schedule of impairments reads, *"*loss of an arm at the shoulder.*"* §8-42-107(2), C.R.S. The arm, without other bodily tissue, is unable to move. Thus, without other bodily tissue, the arm lacks range of motion and has no functional ability. For range of motion to exist in the arm, it is necessary that muscles, tendons, and ligaments in the shoulder and torso activate. *Id.*

9. When a claimant seeks to challenge a scheduled impairment rating, the claimant must show by a preponderance of the evidence that the scheduled rating is incorrect. *See* W.C.R.P. 5-5(E)(1)(c)(i); *see also Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998) (DIME procedures of §8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments); *Gebregeorgis v. ISS Facility Services*, WC 5-135-393-003 (ICAO, Feb. 27, 2023).

10. As found, Claimant has proven by a preponderance of the evidence that his right upper extremity rating should be converted to a whole person impairment. Initially, on June 6, 2021 Claimant suffered admitted industrial injuries to his right upper extremity during the course and scope of his employment with Employer. Claimant subsequently underwent right shoulder surgery including the following: (1) a right shoulder arthroscopy; (2) arthroscopic rotator cuff repair; (3) arthroscopic subacromial decompression; (4) arthroscopic distal clavicle resection; (5) arthroscopic bicep release; (6) arthroscopic debridement/tear; (7) arthroscopic debridement anterior labral tear; and, (8) arthroscopic debridement partial tearing subscapularis. On June 16, 2022 Claimant reached MMI. Subsequently, DIME Dr. Ogden assigned a 7% right upper extremity rating due to range of motion loss and a 2% upper extremity impairment for Claimant's distal clavicle excision for the right shoulder area. The ratings combined to yield a 9% upper extremity impairment.

11. As found, medical records reflect that Claimant's course of medical treatment, aside from his elbow, has involved his right shoulder area and not his arm. Claimant credibly explained that he experiences right shoulder weakness that limits his ability to use his right arm. He testified that, although he was released to full duty employment, his right shoulder limitations inhibit his ability to perform various functions of his job. Claimant notably suffers functional limitations that require use of his left or non-dominant extremity to throw ladders and open doors. He also wears a hose pack containing 100 feet of fire hose over his left shoulder because of diminished strength in his right shoulder area. Furthermore, during his DIME Dr. Ogden documented that Claimant experiences sharp pains in his right trapezius area that respond to stretching and physical therapy. There is also a binding sensation in the right shoulder area with

shoulder abduction in rotation. Finally, Claimant has difficulties washing his back because of limited range of motion in his right shoulder and elbow.

12. As found, Dr. Swarsen persuasively explained that Claimant suffered a functional impairment above the glenohumeral joint. The scheduled rating issued by Dr. Ogden should thus be converted into a whole person impairment. Dr. Swarsen emphasized that the shoulder is not a part of the arm, but rather the scaffolding on which the arm is attached. He commented that all of Claimant's surgical procedures on November 8, 2021 with Dr. Noonan, with the exception of the subpectoral long head biceps tenodesis, occurred above the plane of the glenohumeral joint. He detailed that Claimant suffered a functional impairment above the glenohumeral joint in his right shoulder. Dr. Swarsen determined it was reasonable to convert the scheduled shoulder rating to a whole person impairment because Claimant's right upper extremity deficiency was due to weakness of the shoulder girdle musculature. The weakness flowed from the shoulder into the arm.

13. As found, in contrast, Claimant's ATP Dr. Ramaswamy maintained that Claimant warranted a scheduled right upper extremity impairment for his June 6, 2021 industrial injuries. After hearing all of the areas described by Claimant regarding functional limitations, Dr. Ramaswamy remarked that they only involved the right arm. Consequently, Dr. Ramaswamy determined the situs of functional impairment did not extend beyond the arm. The best measurement of Claimant's permanent partial disability was thus on the schedule. However, Dr. Ramaswamy failed to address Dr. Swarsen's comments that Claimant's right shoulder surgery primarily occurred above the plane of the glenohumeral joint. Claimant's range of motion loss is thus attributable to physiological structures beyond the arm at the shoulder. Specifically, it is necessary that muscles, tendons, and ligaments in the shoulder and torso activate in order to move the arm. Accordingly, based on the medical records, Claimant's credible testimony and the persuasive opinion of Dr. Swarsen, Claimant suffered functional impairment proximal to the glenohumeral joint in his right shoulder as a result of his June 8, 2021 admitted industrial injuries. Therefore, the 9% scheduled right upper extremity impairment rating issued by Dr. Ogden should be converted into a 5% whole person rating. *See Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (ICAO, July 8, 2021) (affirming ALJ's conversion of extremity rating to whole person impairment for shoulder injury because, based on range of motion loss, the anatomical disruption or functional impairment of the claimant's extremity not only involved the arm or glenohumeral joint, but also the shoulder complex proximal to the torso from the glenohumeral joint).

ORDER

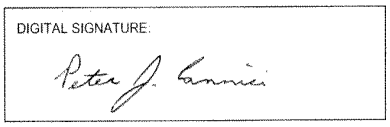
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's 9% right upper extremity rating shall be converted to a 5% whole person impairment. The payments to Claimant shall be calculated based on the formula in §8-42-107(8)(d), C.R.S.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 9, 2023.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-106-637-005

ISSUE

Whether Claimant has proven by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive Permanent Total Disability (PTD) benefits as a result of industrial injuries he sustained during the course and scope of his employment with Employer on December 26, 2018.

FINDINGS OF FACT

1. Claimant is a 39-year-old former diver/project manager for Employer. On December 26, 2018 Claimant was involved in a diving accident while at a depth of between 120 and 160 feet. Instead of being oxygenated with air, Claimant received 100% oxygen for approximately 15-20 minutes. He was rendered unconscious while underwater and suffered an oxygen toxicity condition.

2. Claimant was brought back to the surface and assessed on site, He was then evaluated at Parker Adventist Hospital. Kevin Merrell, M.D. noted Claimant exhibited minor tongue cuts from his seizure, slight memory loss and confusion, and petechiae. Dr. Merrell consulted with the medical director of the "DAN network who is a dive medicine specialist," The director of the DAN network determined that Claimant did not have the bends or a barotrauma. There were also no long-term symptoms from oxygen toxicity. Claimant declined Dr. Merrell's suggestion to remain hospitalized.

3. Claimant returned to work of the following day. However, he then took off for a week in early January, 2019 because of sinus difficulties.

4. Claimant was evaluated by Justin Moon, M.D. on January 16, 2019. He reported his memory, vertigo and headaches had improved since the incident. A brain MRI on January 25, 2019 showed an area of abnormality in the cerebellum. An EEG on February 15, 2019 revealed a possible seizure disorder. Dr. Moon recommended Claimant discontinue work as a diver due to his abnormal EEG.

5. On March 1, 2019 Claimant first visited Concentra Medical Centers for an evaluation. Claimant complained of daily headaches and a panic attack "which he had never had before," and "[h]e had no problems with panic attacks from his [military] service." Carrie J. Burns, M.D. assigned work restrictions of no diving, no ladders and no working in confined spaces.

6. On March 30, 2019 Claimant reported intensifying headaches after driving to Utah. On April 1, 2019 Dr. Burns noted Claimant relayed that, he was struggling with computer screens. She thus took him off work for one week and referred him to Kevin Reilly, M.D. for a neuropsychological evaluation.

7. Claimant returned to work for Employer in April, 2019. He traveled to Nevada to inspect the Hoover Dam for a prospective job. However, Claimant resigned in mid-April, 2019. He filed a Federal Maritime lawsuit in the US District Court for the State of Colorado on April 23, 2019.

8. Psychologist John Mark Disorbio, Ed. D. evaluated Claimant September 19, 2019. Dr. Disorbio did not document a history of prior mental health conditions. He assessed an adjustment disorder, anxiety disorder, a pain disorder with anxiety and depression, and PTSD.

9. On August 27, 2020 psychiatrist Gary Gutterman, M.D. evaluated Claimant. Claimant denied "psychiatric or psychological treatment prior to this injury." His recent and remote memory were intact with adequate attention/concentration, he was focused and organized with thoughts, and he displayed no cognitive, speech, or word finding problems. Dr. Gutterman assigned Claimant a 9% mental impairment on October 8, 2020.

10. John Aschberger, M.D. assigned Claimant a combined 28% impairment rating. The rating consisted of 15% for headaches, 10% for erectile dysfunction, and 5% for equilibrium. Ronald Wise, M.D. also assigned a 14% impairment for Claimant's vision.

11. On March 16, 2021 Dr. Burns placed claimant at Maximum Medical Improvement (MMI). She assigned permanent restrictions of no diving, no work in confined spaces, no ladders or working at heights, and no driving company vehicles.

12. Brian Mathwich, M.D. performed a Division Independent Medical Examination (DIME) of Claimant on January 25, 2022. He agreed that Claimant reached MMI on March 16, 2021. Dr. Mathwich assigned a combined 36% whole person physical and mental permanent impairment rating. He incorporated Dr. Wise's and Dr. Gutterman's impairments, and assigned a 19% nervous system rating inclusive of a 10% seizure rating and 10% rating for sexual function. Dr. Mathwich noted Claimant's abnormality on MRI was not work-related. He recommended restrictions of no diving, no work in confined spaces, no ladders or working at heights, and no driving company vehicles.

13. Respondents subsequently filed a Final Admission of Liability (FAL) acknowledging the 36% combined physical and mental impairment rating assigned by Dr. Mathwich. Claimant filed an application for hearing asserting that he was permanently and totally disabled.

14. On April 21, 2022 neurologist Eric Hammerberg, M.D. performed an independent medical examination of Claimant. Claimant reported his headaches were "becoming more frequent and more intense." Dr. Hammerberg determined Claimant's abnormality on brain MRI was not work-related. In a June 8, 2022 supplemental report, Dr. Hammerberg clarified there was no physiologic explanation for Claimant's worsening headaches, dizziness, and cognitive complaints over time. Symptoms and functional abilities should improve following a single toxic event. Claimant's impairment demonstrated on testing was indicative of significant dementia to an extent he would not

even be able to provide a verbal history or drive a vehicle. Dr. Hammerberg recommended a neuropsychological evaluation to measure validity and potential symptom magnification.

15. On May 10, 2022 Lynn Parry, M.D. performed an independent medical examination of Claimant. She determined Claimant certainly experienced a decompression syndrome and an oxygen toxicity event. Dr. Parry diagnosed vestibular and possible TMJ dysfunction. She also determined he required vocational counseling to return to employment.

16. On April 27 and May 19, 2022 Claimant underwent a Functional Capacity Examination (FCE). Because Claimant reported headaches, dizziness, and nausea symptoms during the evaluation, it occurred over two days. The stair climbing test, occasional crouching/squatting reach tests and kneeling to standing and back reach tests were declined altogether. Remaining tests were delayed or halted due to Claimant's subjective reports.

17. On May 18, 2022 Roger Ryan performed a vocational evaluation. Claimant reported daily headaches as well as migraines 2-3 times each week. Additional complaints included blurry vision while driving and using a laptop. Mr. Ryan determined Claimant is employable and identified twenty-two entry level jobs in the Denver, Colorado area based upon the work restrictions recommended by Dr. Burns, Dr. Mathwich, Dr. Hammerberg, Dr. D'Angelo and Dr. Parry. Mr. Ryan also performed labor market research for the following three positions: unarmed security guard; janitor; and night auditor. Claimant fit the employment profile for five of the security companies that had both full and part time work available. Claimant also met the profile for five janitorial companies. Notably, all but one of the companies had part-time work available in addition to full-time work. Finally, Claimant fit the profile for six night-auditing companies. All but one of the companies had part and full-time work available.

18. On July 20, 2022 Kathleen D'Angelo, M.D. authored an independent medical examination report. In response to a question inquiring about his primary difficulties, Claimant noted the following: headaches, memory loss, problems thinking, depression and stress. Dr. D'Angelo documented that Claimant had normal physical, mental, and neurological exams. He was articulate and thorough in his discussions, "which belies his complaints of cognitive compromise." Dr. D'Angelo did not believe Claimant's complaints had a clear etiology. She also noted Claimant's pre-existing panic attacks and PTSD were contrary to reports he had given to providers. Dr. D'Angelo determined that Claimant did not suffer decompression illness as a result of his December 26, 2018 diving accident. She agreed Claimant should undergo a neuropsychological evaluation.

19. On July 20, 2022 Kevin Reilly, M.D. performed a neuropsychological independent medical examination. Dr. Reilly remarked that Claimant had no deficits in recall and presented in a normal manner. However, his psychometric testing was indicative of a negative response bias and invalidity consistent with exaggerated symptom reporting. Therefore, the testing results could not be considered valid. Dr. Reilly stated

there was no objective data to support Claimant's reported symptoms, and his worsening was contradictory to the natural course for brain injuries. Dr. Reilly stated there was no valid or reliable data to support Claimant's claim of impairments. He thus diagnosed Claimant with Malingering.

20. On August 24, 2022, after reviewing Dr. Reilly's results, Dr. Hammerberg issued an addendum report. He explained that, based on Dr. Reilly's findings, Claimant's test results at his own independent medical examination were not valid. Claimant had no evidence of cognitive impairment and only his seizure disorder was related to his diving accident. Dr. Hammerberg recommended permanent restrictions of no climbing ladders, no working at heights, no diving and no driving company vehicles.

21. On August 26, 2022 Dr. D'Angelo issued an addendum report. She reasoned that, based upon the new psychometric testing data and her own evaluation of Claimant, Claimant's only work-related diagnosis was a seizure disorder. She explained that, based on Claimant's diagnosis of malingering, only diagnoses supported by objective findings, can be attributed to his December 26, 2018 diving accident. Dr. D'Angelo recommended permanent restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment.

22. Claimant testified at the hearing in this matter and through a rebuttal deposition. He explained that his normal job duties for Employer included managing employees, preparing project bids, working on contracts, handling client communication, and coordinating materials and vendors. Claimant explained that he would have continued working with Employer after his diving accident, but it became too hard for him to perform basic tasks. He told IS[Redacted] he was leaving Employer due to medical difficulties.

23. Claimant testified that he suffers daily headaches and experiences migraines 2-3 times per week. The migraines incapacitate him. Claimant remarked he also suffers blurry vision that can trigger headaches. Furthermore, Claimant noted daily dizziness and nausea, including almost daily vomiting. Claimant stated that he wants to work but the biggest issues are the unpredictable generalized headaches and migraines. Once he begins feeling a headache, he can barely function, has trouble putting words together, cannot focus and lies down. Claimant remarked that, when the migraines occur, he is "literally laid up for the day." He detailed that "[a]ll I can do is lay in the dark and try to ice my head and just pray that it will end. It's –it feels like my head is literally going to explode, and if I move, it hurts. Claimant feared being fired from a job due to missing too much work.

24. [Redacted, hereinafter JM] testified through a rebuttal evidentiary deposition in this matter on February 2, 2023. She remarked that in the two months she had been dating Claimant prior to the diving injury, he never complained of headaches. Claimant was also not limited in any way physically or emotionally in what he could do before the accident. JM[Redacted] described Claimant's worsening memory issues and forgetfulness since the diving accident. She commented that, when Claimant gets a headache or migraine, it is very obvious because his face turns red, he cannot focus, his

eyes become squinty, his mood changes and he becomes physically nauseous. JM[Redacted] remarked that Claimant suffers migraines five days per week and becomes incapacitated.

25. Neurologist Dr. Parry testified at the hearing in this matter. She maintained that Claimant sustained a brain injury from oxygen toxicity as a result of his December 26, 2018 diving accident. The oxygen toxicity was so severe that it resulted in a seizure disorder and decompression injury during his ascent. Based on the significance of the seizure disorder, Dr. Parry determined it was certainly reasonable and foreseeable that Claimant would experience an ongoing headache and migraine disorder.

26. Dr. Parry explained that Claimant has headaches and migraines related to his injury that most likely constitute vestibular migraines. She commented that Claimant's generalized and migraine headaches are unpredictable. Triggers are activities that cannot be suppressed such as visual scanning or tracking. Claimant's headaches, combined with vestibular components, interfere with concentration and result in significant disability issues. Claimant is unemployable because he cannot attend work on a regular and consistent basis. Finally, Dr. Parry remarked that the neuropsychological testing performed by Dr. Reilly four years after the diving accident would not be helpful because of interference from other factors such as pain, mood changes and depression. Furthermore, interpretation involves subjective assessment. Dr. Parry summarized that Claimant is currently unable to earn any wages in any capacity. However, he may be able to earn wages in the future with additional care and treatment.

27. Katie Montoya testified as an expert in vocational rehabilitation through an evidentiary deposition on October 27, 2022. She also authored a report on July 22, 2022 and an addendum report on September 3, 2022. Ms. Montoya maintained that Claimant is incapable of earning any wages in any capacity. Specifically, Claimant has been consistent regarding his limitations caused by headaches, migraines, balance and vision issues. Because of Claimant's unpredictability as to whether he can show up for full or part-time positions based on his physical limitations, he is currently incapable of earning any wages in any capacity.

28. On January 6, 2023 the parties conducted the deposition of Dr. D'Angelo. She maintained that Claimant's only condition caused by the December 26, 2018 diving accident was a seizure disorder from oxygen toxicity. After considering emails, text messages, and Claimant's testimony, she determined he was very functional for several months after his diving accident. Dr. D'Angelo noted Claimant's initial symptoms and functionality at work suggested he did not have an organic abnormality. She explained Claimant's complaints of headaches should not be credited, because they were inconsistent with his expected course of recovery, his invalid neuropsychological testing with Dr. Reilly and Claimant's lack of candor about his medical history. Dr. D'Angelo reasoned that Claimant did not have a work-related headache or migraine condition that prevented him from working.

29. Owner of Employer IS[Redacted] testified at the hearing in this matter that Claimant returned to full-time work after the diving accident. He commented that after the

accident he and Claimant were in the office 75% of the time. [Redacted, hereinafter IS] further testified Claimant did not miss work on a regular basis until a few weeks before his resignation. Claimant otherwise completed his job tasks without difficulty or delay, traveled to work sites in and out of state, worked on a computer for hours at a time, held conversations with clients, and displayed no memory or concentration issues. He remarked that Claimant never complained of concentration issues, dizziness, or vision problems. Claimant only mentioned a headache on one occasion after the diving accident.

30. Respondents' Exhibit G contains text messages between Claimant and IS[Redacted] discussing work and personal issues from the date of the diving accident on December 26, 2018 until Claimant's resignation in April, 2019. For example, January 23, 2019 texts discuss working on the [Redacted, hereinafter CG] tunnel job. IS[Redacted] explained CG[Redacted] was a job in California that they worked on together. IS[Redacted] also explained texts on February 11, 2019 pertaining to a 1 ½ mile long 5' x 8' tunnel he and Claimant inspected. On March 20, 2019 Claimant and IS[Redacted] texted regarding a job they had traveled to in Grand Junction, Colorado. IS[Redacted] testified Claimant resigned in mid-April, 2019 because he wanted to find a new career, was considering becoming a day trader, or perhaps go back to school. Claimant did not mention medical symptoms as a reason for quitting.

31. Dr. Reilly testified at the hearing in this matter as an expert in the fields of clinical and neuropsychology. He explained that neurocognitive symptoms are typically worst shortly after a brain injury. If symptoms increase six months or more after a brain injury without an intervening event, that is typically a strong indication for psychosocial factors influencing symptoms. Dr. Reilly commented that Claimant displayed no issues of fatigue or memory issues over the testing and interview process, and the test results were incongruent with Claimant's presentation. Claimant's testing identified over-reporting of symptoms/symptom magnification, and test data was not valid for interpretation.

32. Dr. Reilly explained that malingering is defined as the intentional production or exaggeration of symptoms for external incentives. He assigns the diagnosis in only 1-2% of patients. Dr. Reilly remarked that his diagnosis was based on all the testing batteries and influenced by Claimant's denial of pre-existing mental health conditions from military service.

33. Dr. Reilly testified that he had reviewed the testing that Dr. Andrews performed in April, 2019. He acknowledged the battery was quite extensive and did not reveal any evidence of malingering or negative response bias. Nevertheless, Dr. Reilly acknowledged that neuropsychological testing is largely based upon different interpretive approaches and Claimant scored much worse on his testing than Dr. Andrews because of the negative response bias. Claimant's performance was "much worse" at the more recent evaluation. Dr. Reilly also rejected Dr. Parry's opinion that neuropsychological testing would be of no value due to the presence of physical pain or a mood disorder. Instead, a neuropsychological assessment has increased efficacy in the presence of the preceding symptoms.

34. Mr. Ryan testified at the hearing as a vocational expert. He noted Claimant has a varied work history inclusive of supervisory experience, customer service, estimating, bidding, inspecting, and welding. The opinions of the physicians in the case were unanimous in recommending work restrictions. Mr. Ryan detailed his labor market contacts for the positions of unarmed security guard, janitor, and night auditor, included contacting numerous actual employers in the Denver metropolitan area. However, Claimant's employment opportunities are not limited to those employers who were contacted and additional opportunities with other employers for those types of jobs were available.

35. Mr. Ryan explained that work from home jobs, such as telemarketing and sales, are options for Claimant. He also remarked that Claimant could work temporary staffing day jobs on days he felt better. The positions included multiple entry level jobs within Claimant's work restrictions. Moreover, temporary day labor was an employment option even assuming Claimant's testimony he could not maintain regularly scheduled employment due to having migraines several times per week. Mr. Ryan testified there were no assigned working restrictions pertaining to Claimant's headaches, and Claimant had not tried returning to employment. He felt it was improper to inject limitations into his evaluation that are not based upon medical restrictions. Mr. Ryan thus concluded that Claimant is capable of earning wages in some capacity.

36. Claimant has failed to prove that it is more probably true than not that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of the industrial injuries he sustained during the course and scope of his employment with Employer on December 26, 2018. The record reveals that physicians have assigned Claimant permanent physical restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment. The restrictions permit him to function in the work environment and render him a suitable candidate for a number of employment opportunities.

37. Initially, Claimant was involved in a diving accident on December 26, 2018. He suffered an oxygen toxicity event resulting in a seizure disorder. The bulk of the evidence suggests there are no additional, expected long-term symptoms. Claimant was evaluated at Parker Adventist where, in conjunction with a dive medicine specialist, Dr. Merrell ruled out a decompression illness. None of the other physicians who have treated or evaluated Claimant, including Drs. Moon, Hammerberg, Burns, and Mathwich, have diagnosed a decompression illness.

38. The opinions of Drs. D'Angelo, Hammerberg, and Reilly reveal that Claimant's diving injury should have manifested as a typical brain injury and likely improved over time. Claimant's symptoms initially followed the expected course. Over the ensuing two months after the accident Claimant reported to Dr. Moon's office that his memory and dizziness were improving, and he had a complete resolution of headaches. After considering emails, text messages, and Claimant's testimony, Dr. D'Angelo specifically noted that Claimant was very functional for several months after his diving accident. She remarked that Claimant's initial symptoms and functionality at work suggested he did not have an organic abnormality. IS[Redacted] also credibly explained

that Claimant did not miss work on a regular basis until a few weeks before his resignation. Claimant otherwise completed his job tasks without difficulty or delay, traveled to work sites in and out of state, worked on a computer for hours at a time, held conversations with clients, and displayed no memory or concentration issues. He remarked that Claimant never complained of concentration issues, dizziness, or vision problems.

39. By March 16, 2021 DIME Dr. Mathwich determined that Claimant had reached MMI and assigned a combined 36% whole person physical and mental permanent impairment rating. Nevertheless, Claimant asserts that he has suffered worsening symptoms including daily headaches, incapacitating migraines, vision problems and mental health issues as a result of his diving accident. However, on July 20, 2022 Dr. Reilly conducted psychometric testing of Claimant that was indicative of a negative response bias and invalidity consistent with exaggerated symptom reporting. Dr. Reilly stated there was no objective data to support Claimant's reported symptoms, and his worsening was contradictory to the natural course for brain injuries. Dr. D'Angelo also explained that only diagnoses supported by objective findings can be attributed to Claimant's December 26, 2018 diving accident. She recommended permanent restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment. Similarly, Dr. Hammerberg determined Claimant had no evidence of cognitive impairment and only his seizure disorder was related to his diving accident. Dr. Hammerberg also recommended permanent restrictions of no climbing ladders, no working at heights, no diving and no driving company vehicles. Notably, Claimant has received permanent work restrictions that are virtually unanimous from both treating and evaluating physicians.

40. Mr. Ryan noted Claimant has a varied work history inclusive of supervisory experience, customer service, estimating, bidding, inspecting, and welding. He determined Claimant is employable and identified twenty-two entry level jobs in the Denver, Colorado area based upon the work restrictions recommended by Dr. Burns, Dr. Mathwich, Dr. Hammerberg, Dr. D'Angelo and Dr. Parry. Mr. Ryan detailed his labor market contacts for the positions of unarmed security guard, janitor, and night auditor, and included contacting numerous actual employers in the Denver area. He also explained that work from home jobs, such as telemarketing and sales, are options for Claimant. Mr. Ryan remarked that Claimant could work temporary staffing day jobs on days he felt better. The positions included multiple entry level jobs within Claimant's work restrictions. Moreover, temporary day labor was an employment option even assuming Claimant's testimony he could not maintain regularly scheduled employment due to having migraines several times per week. Mr. Ryan testified there were no assigned working restrictions pertaining to Claimant's headaches, and Claimant had not tried returning to employment. He thus concluded that Claimant is capable of earning wages in some capacity.

41. In contrast, Claimant testified that he suffers daily headaches and experiences migraines 2-3 times per week. The migraines incapacitate him. Claimant remarked he also suffers blurry vision that can trigger headaches. Furthermore, Claimant noted daily dizziness and nausea, including almost daily vomiting. Claimant stated that

he wants to work but the biggest issues are the unpredictable generalized headaches and migraines. JM[Redacted] remarked that in the two months she had been dating Claimant prior to the diving injury, he never complained of headaches. Claimant was also not limited in any way physically or emotionally in what he could do before the accident. JM[Redacted] corroborated that Claimant suffers frequent migraines and becomes incapacitated. Dr. Parry explained that Claimant's headaches and migraines are related to his injury and most likely constitute vestibular migraines. She commented that Claimant's generalized and migraine headaches are unpredictable. Triggers are activities that cannot be suppressed such as visual scanning or tracking. Claimant's headaches, combined with vestibular components, interfere with concentration and result in significant disability issues. Claimant is unemployable because he cannot attend work on a regular and consistent basis. Ms. Montoya also maintained that Claimant is incapable of earning any wages in any capacity. Specifically, Claimant has been consistent regarding his limitations caused by headaches, migraines, balance and vision issues. Because of Claimant's unpredictability as to whether he can show up for full or part-time positions based on his physical limitations, he is currently incapable of earning any wages in any capacity.

42. Despite Claimant's testimony, as well as the conclusions of Dr. Parry and Ms. Montoya, the record reveals that Claimant is capable of earning wages. Claimant has been assigned and/or recommended permanent work restrictions that are nearly unanimous across the treating and evaluating physicians. Dr. Burns and Dr. Mathwich, the two non-retained medical providers who recommended restrictions, were aware of Claimant's severe subjective complaints yet chose not to assign additional restrictions. Furthermore, the record reflects that Claimant's abilities render him a suitable candidate for a number of employment opportunities. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions, he is capable of earning wages in some capacity. Accordingly, the record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Claimant's request for PTD benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Permanent Total Disability (PTD) is defined as the inability to earn "any wages in the same or other employment." §8-40-201(16.5)(a), C.R.S.; *Christie v. Coors Transportation Co.,* 933 P.2d 1330, 1333 (Colo. 1997). A claimant is not permanently and totally disabled if he is able to earn some wages in modified, sedentary or part-time employment. *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). The claimant carries the burden of proof to establish that he is permanently and totally disabled by a preponderance of the evidence. The question of whether the claimant has proven PTD is a question of fact for resolution by the ALJ. *Id.*

5. A claimant must demonstrate that his industrial injuries constituted a "significant causative factor" in order to establish a claim for PTD. *In Re Olinger,* W.C. No. 4-002-881 (ICAO, Mar. 31, 2005). A "significant causative factor" requires a "direct causal relationship" between the industrial injuries and a PTD claim. *In Re Dickerson,* W.C. No. 4-323-980 (ICAO, July 24, 2006); *see Seifried v. Industrial Comm'n,* 736 P.2d 1262, 1263 (Colo. App. 1986). The preceding test requires the ALJ to ascertain the "residual impairment caused by the industrial injury" and whether the impairment was sufficient to result in PTD without regard to subsequent intervening events. *See Joslins Dry Goods Co. v. Indus. Claim Appeals Off.*, 21 P.3d 866 (Colo. App. 2001). Resolution of the causation issue is a factual determination for the ALJ. *In Re of Dickerson,* W.C. No. 4-323-980 (ICAO, July 24, 2006).

6. In ascertaining whether a claimant is able to earn any wages, the ALJ may consider various "human factors," including a claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998); *Holly Nursing v. Indus. Claim Appeals Off.,* 992 P.2d 701, 703 (Colo. App. 1999). The critical test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer*, 955 P.2d at 557. Ultimately, the determination of whether a Claimant suffers from a permanent and total disability is an issue of fact for resolution by the ALJ. *In Re Selvage,* W.C. No. 4-486-812 (ICAO, Oct. 9, 2007). The ability to earn wages inherently includes consideration of whether claimant is capable of getting hired and sustaining employment. *See Christie*, 933 P.2d at 1335; *Cotton v. Econ. Lub-N-tune*, W.C. No. 4-220-395 (ICAO, Jan. 16, 1997).

7. The test for determining "availability of work" is whether employment exists "that is reasonably available to claimant under his or her particular circumstances." *Christie*, 933 P.2d at 1335; *Bymer,* 955 P.2d at 554-55. Respondents are not required to prove the existence of a particular job that a specific employer has made available to the claimant. *Labiak v. Bader Burke & Co.,* W.C. No. 4-134-999 (ICAO, Oct. 14, 2009) *citing Beavers v. Indus. Claim Appeals Off.*, No. 96CA0275 (Colo. App., Sept. 5, 1996).

8. As found, Claimant has failed to prove by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of the industrial injuries he sustained during the course and scope of his employment with Employer on December 26, 2018. The record reveals that physicians have assigned Claimant permanent physical restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment. The restrictions permit him to function in the work environment and render him a suitable candidate for a number of employment opportunities.

9. As found, initially, Claimant was involved in a diving accident on December 26, 2018. He suffered an oxygen toxicity event resulting in a seizure disorder. The bulk of the evidence suggests there are no additional, expected long-term symptoms. Claimant was evaluated at Parker Adventist where, in conjunction with a dive medicine specialist, Dr. Merrell ruled out a decompression illness. None of the other physicians who have treated or evaluated Claimant, including Drs. Moon, Hammerberg, Burns, and Mathwich, have diagnosed a decompression illness.

10. As found, the opinions of Drs. D'Angelo, Hammerberg, and Reilly reveal that Claimant's diving injury should have manifested as a typical brain injury and likely improved over time. Claimant's symptoms initially followed the expected course. Over the ensuing two months after the accident Claimant reported to Dr. Moon's office that his memory and dizziness were improving, and he had a complete resolution of headaches. After considering emails, text messages, and Claimant's testimony, Dr. D'Angelo specifically noted that Claimant was very functional for several months after his diving accident. She remarked that Claimant's initial symptoms and functionality at work suggested he did not have an organic abnormality. IS[Redacted] also credibly explained that Claimant did not miss work on a regular basis until a few weeks before his resignation. Claimant otherwise completed his job tasks without difficulty or delay, traveled to work sites in and out of state, worked on a computer for hours at a time, held conversations with clients, and displayed no memory or concentration issues. He remarked that Claimant never complained of concentration issues, dizziness, or vision problems.

11. As found, by March 16, 2021 DIME Dr. Mathwich determined that Claimant had reached MMI and assigned a combined 36% whole person physical and mental permanent impairment rating. Nevertheless, Claimant asserts that he has suffered worsening symptoms including daily headaches, incapacitating migraines, vision problems and mental health issues as a result of his diving accident. However, on July 20, 2022 Dr. Reilly conducted psychometric testing of Claimant that was indicative of a negative response bias and invalidity consistent with exaggerated symptom reporting. Dr.

Reilly stated there was no objective data to support Claimant's reported symptoms, and his worsening was contradictory to the natural course for brain injuries. Dr. D'Angelo also explained that only diagnoses supported by objective findings can be attributed to Claimant's December 26, 2018 diving accident. She recommended permanent restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment. Similarly, Dr. Hammerberg determined Claimant had no evidence of cognitive impairment and only his seizure disorder was related to his diving accident. Dr. Hammerberg also recommended permanent restrictions of no climbing ladders, no working at heights, no diving and no driving company vehicles. Notably, Claimant has received permanent work restrictions that are virtually unanimous from both treating and evaluating physicians.

12. As found, Mr. Ryan noted Claimant has a varied work history inclusive of supervisory experience, customer service, estimating, bidding, inspecting, and welding. He determined Claimant is employable and identified twenty-two entry level jobs in the Denver, Colorado area based upon the work restrictions recommended by Dr. Burns, Dr. Mathwich, Dr. Hammerberg, Dr. D'Angelo and Dr. Parry. Mr. Ryan detailed his labor market contacts for the positions of unarmed security guard, janitor, and night auditor, and included contacting numerous actual employers in the Denver area. He also explained that work from home jobs, such as telemarketing and sales, are options for Claimant. Mr. Ryan remarked that Claimant could work temporary staffing day jobs on days he felt better. The positions included multiple entry level jobs within Claimant's work restrictions. Moreover, temporary day labor was an employment option even assuming Claimant's testimony he could not maintain regularly scheduled employment due to having migraines several times per week. Mr. Ryan testified there were no assigned working restrictions pertaining to Claimant's headaches, and Claimant had not tried returning to employment. He thus concluded that Claimant is capable of earning wages in some capacity.

13. As found, in contrast, Claimant testified that he suffers daily headaches and experiences migraines 2-3 times per week. The migraines incapacitate him. Claimant remarked he also suffers blurry vision that can trigger headaches. Furthermore, Claimant noted daily dizziness and nausea, including almost daily vomiting. Claimant stated that he wants to work but the biggest issues are the unpredictable generalized headaches and migraines. JM[Redacted] remarked that in the two months she had been dating Claimant prior to the diving injury, he never complained of headaches. Claimant was also not limited in any way physically or emotionally in what he could do before the accident. JM[Redacted] corroborated that Claimant suffers frequent migraines and becomes incapacitated. Dr. Parry explained that Claimant's headaches and migraines are related to his injury and most likely constitute vestibular migraines. She commented that Claimant's generalized and migraine headaches are unpredictable. Triggers are activities that cannot be suppressed such as visual scanning or tracking. Claimant's headaches, combined with vestibular components, interfere with concentration and result in significant disability issues. Claimant is unemployable because he cannot attend work on a regular and consistent basis. Ms. Montoya also maintained that Claimant is incapable of earning any wages in any capacity. Specifically, Claimant has been consistent regarding his limitations caused by headaches, migraines, balance and vision issues. Because of

Claimant's unpredictability as to whether he can show up for full or part-time positions based on his physical limitations, he is currently incapable of earning any wages in any capacity.

14. As found, despite Claimant's testimony, as well as the conclusions of Dr. Parry and Ms. Montoya, the record reveals that Claimant is capable of earning wages. Claimant has been assigned and/or recommended permanent work restrictions that are nearly unanimous across the treating and evaluating physicians. Dr. Burns and Dr. Mathwich, the two non-retained medical providers who recommended restrictions, were aware of Claimant's severe subjective complaints yet chose not to assign additional restrictions. Furthermore, the record reflects that Claimant's abilities render him a suitable candidate for a number of employment opportunities. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions, he is capable of earning wages in some capacity. Accordingly, the record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Claimant's request for PTD benefits is thus denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for PTD benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: March 17, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-207-495-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on May 11, 2022.

2. Whether Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his May 11, 2022 industrial injuries.

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 11, 2022 until terminated by statute.

5. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits after May 10, 2022.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $2290.24.

2. Respondents are entitled to an offset for unemployment benefits under §8-42-103(f), C.R.S.

FINDINGS OF FACT

1. On November 16, 2021 Claimant began working for Employer as a Risk Manager. Claimant also received unemployment benefits during the period October 30, 2021 through December 14, 2021.

2. On February 28, 2022 Employer placed Claimant on a Performance Improvement Plan (PIP). Employer's Area Manager [Redacted, hereinafter KH], testified Claimant's performance was deficient in terms of productivity, efficiency, attendance,

teamwork, communication and quality of work. Despite signing the PIP, Claimant denied all of the performance deficiencies.

3. On April 7, 2022 Claimant underwent non-work related fusion surgery on his back with neurosurgeon Sean Markey, M.D. He then took paid time off and vacation leave for a few weeks to recover from his surgery. Claimant returned to work remotely and part-time in the last few days of April, 2022.

4. On May 10, 2022 Claimant attended a meeting with KH[Redacted] and Employer's Business Unit Manager [Redacted, hereinafter RN]. At the meeting he was terminated from employment. Claimant was terminated because he failed to improve his performance. There were also complaints from clients that Claimant was combative, argumentative, abrasive and he would not be on time or show up for meetings. Claimant received his final paycheck and was locked out of Employer's computer/IT system.

5. At the termination meeting, KH[Redacted] required Claimant to provide him with his key card and work tablet. However, Claimant did not have the items with him at the time because they were in his home office. Claimant told KH[Redacted] and RN[Redacted] that he would bring the tablet back to the office the following day. Claimant testified that he also told KH[Redacted] and RN[Redacted] that there was additional work he was going to do on behalf of the company to get his files and client lists transferred over to his co-worker and Risk Manager for Business Unit 1 [Redacted, hereinafter AK].

6. Despite being terminated, Claimant contends he continued to perform work after the meeting on May 10, 2022. Claimant remarked he received a phone call from client [Redacted, hereinafter LC] about an OSHA inspection. He commented that he then gathered information and files off his laptop and transferred them to a USB stick in order to pass them onto KH[Redacted].

7. KH[Redacted] testified that, after the termination meeting, he did not ask Claimant to meet with AK[Redacted] to transfer work. Claimant also did not have a meeting with RN[Redacted] to discuss OSHA concerns of client LC[Redacted]. KH[Redacted] explained that he only sought the return of the keycard and laptop from Claimant. He remarked that Claimant offered to bring the laptop back on the following day, and agreed that would be fine. KH[Redacted] did not invite Claimant back to the office on May 11, 2022 for any other purpose.

8. KH[Redacted] remarked that he did not plan any kind of an exit interview or expect any transfer of files. He noted that Claimant had stated after the termination meeting that he was willing to provide client information, but KH[Redacted] declined because Employer had Claimant's computer. He emphasized that AK[Redacted] was fully capable of assuming Claimant's job responsibilities without any input from Claimant. KH[Redacted] summarized that Claimant's "employment was terminated and that was it." Claimant was simply going to come into the office at 10:00 a.m. on May 11, 2022 to drop off the keycard and laptop.

9. On May 11, 2022 Claimant visited Employer's facility and met with KH[Redacted]. Claimant testified he was expecting to go over the work files he had passed on to AK[Redacted], the OSHA situation with LC[Redacted], and have his exit interview. After Claimant argued somewhat about his termination, he returned the keycard and laptop. Claimant requested to grab something from his office and KH[Redacted] acquiesced. KH[Redacted] did not ask Claimant to work because he had been terminated. He emphasized that, although Claimant wanted to provide information about the work he was doing, it was unnecessary because Claimant had been terminated. KH[Redacted] did not ask Claimant to perform any work on May 11, 2022 or recall providing him with a pen and notepad to write down information. Claimant then returned to KH's[Redacted] office after a couple of minutes and stated he had retrieved what he needed. KH[Redacted] walked Claimant out the front door of Employer's suite.

10. In contrast, Claimant testified that KH[Redacted] gave him a notepad and pen on May 11, 2022. He told Claimant to go to his cubicle to document everything he was passing onto AK[Redacted]. Claimant then went to his workstation to write notes for AK[Redacted] and prepare a USB drive containing his files. He remarked that, after he received a call from a client, he got up from his workstation to go to the photocopy machine. When he returned, he pulled his office chair to sit down, but it became caught on something. Claimant then tried to sit on the chair, fell and landed on the floor.

11. Employer's Payroll Manager [Redacted, hereinafter SJ] testified that while at work on May 11, 2022 he heard a bang, but did not think much of it. About thirty seconds later, Claimant called out to SJ[Redacted] for help. When SJ[Redacted] arrived at Claimant's cubicle, Claimant was either on his knees or on the floor. Because SJ's[Redacted] back had been toward Claimant in a different cubicle, he did not see Claimant fall. He asked Claimant if he could help him up because Claimant was on the floor unplugging "something." Claimant explained that he fell off his chair while getting an item from under his desk.

12. Claimant testified that KH[Redacted] then came out of his office and asked whether he was done with what he was doing. Claimant responded that he was just about done, and that he just hurt himself. KH[Redacted] responded, "[y]ou need to be a little more careful. I need you to wrap up what you are doing and get going."

13. KH[Redacted] explicitly denied that he had spoken to Claimant after the alleged fall on May 11, 2022. He explained that he did not realize Claimant had made an accusation of falling until a couple of days later. KH[Redacted] reiterated that walking Claimant out of the suite was the last time he has seen Claimant. He also recalled that on either May 10 or May 11, 2022 Human Resources Director [Redacted, hereinafter HG] called him and stated she had about a 45-minute conversation with Claimant. The conversation was somewhat of a tirade because Claimant had been terminated and felt wronged.

14. Business Development Manager [Redacted, hereinafter EQ] commented that on May 11, 2022 he arrived at work and saw Claimant in one of the breakout rooms

in the lobby of Employer's building. Claimant called his name and tried to get up. He told EQ[Redacted] he had a meeting with KH[Redacted] and that he "[f]ell and kind of jacked up his back." EQ[Redacted] helped Claimant stand, grabbed his backpack and walked Claimant to his car. He inquired whether Claimant wanted a ride home, but Claimant declined.

15. On May 16, 2022 Claimant underwent x-ray imaging of his lumbar spine at Porter Adventist Hospital. The visit was characterized as a postoperative follow-up. Providers compared the imaging to a lumbar spine MRI from April 10, 2022. The impression was "similar postoperative changes from instrumented posterior fusion without radiographic evidence of dynamic instability or acute hardware complication."

16. On May 24, 2022 Claimant had a telemedicine visit at Denver Health. He reported that he had fallen off his chair at work a couple of weeks earlier and hurt his back. Ali Zirzakzadeh, M.D. assessed Claimant with acute lower back pain.

17. On June 3, 2022 Claimant completed a Workers' Claim for Compensation. He described the accident as "I was in for a scheduled meeting, wrapping up my notes & laptop. I went to grab the chair to sit down. The back wheel of the chair got caught on the plastic carpet cover (in the damaged corner) the chair seat swiveled, my butt hit the seat" and I slid off and fell to the floor.

18. On July 7, 2022 Claimant's primary care doctor, Grace Ann Alfonsi, M.D., confirmed that he had been doing well following his initial surgery. However, he fell at work on May 13, 2022. Imaging subsequently revealed that Claimant had pulled out the L2 screw and suffered fractures of the pedicle.

19. On July 22, 2022 Claimant underwent a T10-L3 fusion, removal of hardware and bilateral steotomies. Dr. Markey documented that Claimant was on full restrictions for a spinal fracture from May 11, 2022 and continuing through 3-6 months following August 1, 2022.

20. Claimant has failed to demonstrate that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on May 11, 2022. Claimant's aggravation of his back condition did not arise out of his employment with Employer. The record reveals that on May 10, 2022 Claimant had been terminated. Claimant's purpose in visiting the office on May 11, 2022 was limited to simply returning his keycard and laptop. KH[Redacted] directed him not to carry out any further employment duties. Nevertheless, Claimant asserts that he was injured while performing work for Employer on May 11, 2022 when he fell off a chair in his cubicle. However, Claimant's argument fails and he did not suffer a compensable injury. Claimant had been terminated on the previous day, his activities on May 11, 2022 were not incidental to employment, and he was explicitly advised not to perform additional work that limited the sphere of the employment relationship.

21. Initially, Claimant worked for Employer as a Risk Manager. On April 7, 2022 he underwent non-work related fusion surgery on his back. He then took paid time off and vacation leave for a few weeks to recover from his surgery. Claimant returned to work remotely and part-time in the last few days of April, 2022. However, he was terminated on May 10, 2022 because he failed to improve his performance after receiving a PIP. Claimant's performance was deficient in terms of productivity, efficiency, attendance, teamwork, communication and quality of work. There were also complaints from clients that Claimant was combative, argumentative, abrasive and that he would not be on time or show up for meetings. Claimant received his final paycheck and was locked out of Employer's computer/IT system on May 10, 2022.

22. KH[Redacted] credibly testified that, after the termination meeting, he did not ask Claimant to meet with AK[Redacted] to transfer work. Claimant also did not have a meeting with RN[Redacted] to discuss OSHA concerns of client LC[Redacted]. KH[Redacted] remarked that he did not plan any kind of an exit interview or expect any transfer of files. He noted that Claimant had stated after the termination meeting that he was willing to provide client information, but KH[Redacted] declined because Employer had Claimant's computer. He emphasized that AK[Redacted] was fully capable of assuming Claimant's job responsibilities without any input from Claimant.

23. KH[Redacted] explained that he only sought the return of the keycard and laptop from Claimant. He remarked that Claimant offered to bring the laptop back on the following day, and he agreed the return of the laptop would be fine. Mr. KH[Redacted] did not invite Claimant back to the office on May 11, 2022 for any other purpose. He summarized that Claimant's "employment was terminated and that was it." Claimant was simply going to come into the office at 10:00 a.m. to drop off the keycard and laptop.

24. On May 11, 2022 Claimant visited Employer's office and met with KH[Redacted]. After Claimant argued somewhat about his termination, he returned the keycard and laptop. When Claimant requested to grab something from his office, KH[Redacted] acquiesced. He did not ask Claimant to work because he had been terminated. KH[Redacted] emphasized that, although Claimant wanted to provide information about the work he was doing, it was unnecessary because Claimant had been terminated.

25. In contrast, Claimant contends that on May 11, 2022 KH[Redacted] gave him a notepad and pen to take to his workstation to document everything he was passing onto AK[Redacted]. Claimant then went to his workstation to write notes for AK[Redacted] and prepare a USB drive containing his files. He remarked that, after he received a call from a client, he left his workstation to go to the photocopy machine. When he returned, he pulled his office chair to sit down, but it became caught on something. Claimant then tried to sit on the chair, but fell and landed on the floor suffering injuries.

26. Despite Claimant's account, his testimony lacks credibility. The record reflects that Claimant was irritated and dissatisfied after being terminated on May 10, 2022. On May 11, 2022 Claimant was expecting to go over the work files he had passed

on to AK[Redacted], the OSHA situation with LC[Redacted], and have his exit interview with KH[Redacted]. HG[Redacted] also had an approximately 45-minute conversation with Claimant that was somewhat of a tirade because he had been terminated and felt wronged. Claimant's actions subsequent to the termination demonstrate that he sought an exit interview and more information about the details of his termination. Claimant also repeatedly persisted in wanting to provide information and files to Employer. His account of returning to his office to do work after being terminated is simply not plausible. Claimant had already submitted his laptop and keycard, and been repeatedly told that no further information was necessary. Claimant's actions reflect a clear violation of KH's[Redacted] request to simply return the keycard and laptop. Finally, the actual occurrence of the accident was questionable because it was unwitnessed, Claimant called two co-employees over to him by name, and he merely recounted the alleged incident.

27. Claimant's actions in returning to his cubicle to perform work after retuning his laptop and keycard were also not incidental to employment. Claimant explained that he went to his cubicle to write notes for AK[Redacted] and prepare a USB stick containing his files. Claimant was not engaging in activities preparatory for employment or incidental to his job duties. Instead, he was performing work after termination in contravention of the clear instructions of KH[Redacted]. Claimant's injuries thus did not arise out of a risk that was reasonably incidental to the conditions and circumstances of his specific employment.

28. An employer's direction to an employee may potentially limit the sphere of the employment relationship. The direction must be specific and show a clear intent to limit the sphere of the employment relationship. Here, KH[Redacted] specifically directed Claimant to return to Employer's office on May 11, 2022 to simply return the keycard and laptop. Because Claimant had been terminated on May 10, 2022, Mr. KH's[Redacted] directive constituted an intent to limit Claimant's sphere of employment to simply return items and not engage in any work. Notably, KH's[Redacted] instructions were not an effort to control Claimant's method of completing his job duties. The directive negated the requisite causal relationship between Claimant's employment and resulting injury. Claimant's violation of Employer's instructions governing the sphere of employment thus severed the causal relationship between his employment and any injuries. Accordingly, Claimant did not suffer compensable injuries on May 11, 2022. His claim is therefore denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

5. As a general rule, the course of employment for employees having a fixed time and place of work encompasses a reasonable interval before and after official working hours during which the employee is engaged in preparatory or incidental acts. There is no requirement that the activity be a duty of employment if it is reasonably incidental to the employment. *Ventura v. Albertson's, Inc.,* 856 P.2d 35 (Colo. App. 1992). The employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In re Swanson,* WC 4-589-645 (ICAO, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In re Rodriguez,* WC 4-705-673 (ICAO, Apr. 30, 2008).

6. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d

999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).; *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

8. Generally, an employer has the right to issue directives concerning what an employee may do and when she may do it. *In re Eelorriaga*, WC 5-047-389-01 (ICAO, June 19, 2018). In some cases, the claimant's disobedience of the employer's instructions concerning what is to be done and when it is to be done negates the requisite causal relationship between the employment and the resulting injury. In such circumstances the employer's instructions are said to limit the "sphere" of the employment. *In re Eelorriaga*, WC 5-047-389-01 (ICAO, June 19, 2018). The employee's violation of the employer's instructions governing the "sphere" of employment severs the causal relationship between the employment and the injury, rendering the injury non-compensable. *Bill Lawley Ford v. Miller*, 672 P.2d 1031, 1032 (Colo. App. 1983); *see Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007). Conversely, violation of rules and directives relating only to the employee's conduct within the sphere of employment do not remove injuries from the realm of compensability. *Bill Lawley Ford* 672 P.2d at 1032.

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on May 11, 2022. Claimant's aggravation of his back condition did not arise out of his employment with Employer. The record reveals that on May 10, 2022 Claimant had been terminated. Claimant's purpose in visiting the office on May 11, 2022 was limited to simply returning his keycard and laptop. KH[Redacted] directed him not to carry out any further employment duties. Nevertheless, Claimant asserts that he was injured while performing work for Employer on May 11, 2022 when he fell off a chair in his cubicle. However, Claimant's argument fails and he did not suffer a compensable injury. Claimant had been terminated on the previous day, his activities on May 11, 2022 were not incidental to employment, and he was explicitly advised not to perform additional work that limited the sphere of the employment relationship.

10. As found, initially, Claimant worked for Employer as a Risk Manager. On April 7, 2022 he underwent non-work related fusion surgery on his back. He then took paid time off and vacation leave for a few weeks to recover from his surgery. Claimant returned to work remotely and part-time in the last few days of April, 2022. However, he was terminated on May 10, 2022 because he failed to improve his performance after receiving a PIP. Claimant's performance was deficient in terms of productivity, efficiency, attendance, teamwork, communication and quality of work. There were also complaints from clients that Claimant was combative, argumentative, abrasive and that he would not be on time or show up for meetings. Claimant received his final paycheck and was locked out of Employer's computer/IT system on May 10, 2022.

11. As found, KH[Redacted] credibly testified that, after the termination meeting, he did not ask Claimant to meet with AK[Redacted] to transfer work. Claimant also did not have a meeting with RN[Redacted] to discuss OSHA concerns of client LC[Redacted]. KH[Redacted] remarked that he did not plan any kind of an exit interview or expect any transfer of files. He noted that Claimant had stated after the termination meeting that he was willing to provide client information, but KH[Redacted] declined because Employer had Claimant's computer. He emphasized that AK[Redacted] was fully capable of assuming Claimant's job responsibilities without any input from Claimant.

12. As found, KH[Redacted] explained that he only sought the return of the keycard and laptop from Claimant. He remarked that Claimant offered to bring the laptop back on the following day, and he agreed the return of the laptop would be fine. KH[Redacted] did not invite Claimant back to the office on May 11, 2022 for any other purpose. He summarized that Claimant's "employment was terminated and that was it." Claimant was simply going to come into the office at 10:00 a.m. to drop off the keycard and laptop.

13. As found, on May 11, 2022 Claimant visited Employer's office and met with KH[Redacted]. After Claimant argued somewhat about his termination, he returned the keycard and laptop. When Claimant requested to grab something from his office, KH[Redacted] acquiesced. He did not ask Claimant to work because he had been terminated. KH[Redacted] emphasized that, although Claimant wanted to provide information about the work he was doing, it was unnecessary because Claimant had been terminated.

14. As found, in contrast, Claimant contends that on May 11, 2022 KH[Redacted] gave him a notepad and pen to take to his workstation to document everything he was passing onto AK[Redacted]. Claimant then went to his workstation to write notes for AK[Redacted] and prepare a USB drive containing his files. He remarked that, after he received a call from a client, he left his workstation to go to the photocopy machine. When he returned, he pulled his office chair to sit down, but it became caught on something. Claimant then tried to sit on the chair, but fell and landed on the floor suffering injuries.

15. As found, despite Claimant's account, his testimony lacks credibility. The record reflects that Claimant was irritated and dissatisfied after being terminated on May

10, 2022. On May 11, 2022 Claimant was expecting to go over the work files he had passed on to AK[Redacted], the OSHA situation with LC[Redacted], and have his exit interview with KH[Redacted]. HG[Redacted] also had an approximately 45-minute conversation with Claimant that was somewhat of a tirade because he had been terminated and felt wronged. Claimant's actions subsequent to the termination demonstrate that he sought an exit interview and more information about the details of his termination. Claimant also repeatedly persisted in wanting to provide information and files to Employer. His account of returning to his office to do work after being terminated is simply not plausible. Claimant had already submitted his laptop and keycard, and been repeatedly told that no further information was necessary. Claimant's actions reflect a clear violation of KH's[Redacted] request to simply return the keycard and laptop. Finally, the actual occurrence of the accident was questionable because it was unwitnessed, Claimant called two co-employees over to him by name, and he merely recounted the alleged incident.

16. As found, Claimant's actions in returning to his cubicle to perform work after retuning his laptop and keycard were also not incidental to employment. Claimant explained that he went to his cubicle to write notes for AK[Redacted] and prepare a USB stick containing his files. Claimant was not engaging in activities preparatory for employment or incidental to his job duties. Instead, he was performing work after termination in contravention of the clear instructions of KH[Redacted]. Claimant's injuries thus did not arise out of a risk that was reasonably incidental to the conditions and circumstances of his specific employment.

17. As found, an employer's direction to an employee may potentially limit the sphere of the employment relationship. The direction must be specific and show a clear intent to limit the sphere of the employment relationship. Here, KH[Redacted] specifically directed Claimant to return to Employer's office on May 11, 2022 to simply return the keycard and laptop. Because Claimant had been terminated on May 10, 2022, KH's[Redacted] directive constituted an intent to limit Claimant's sphere of employment to simply return items and not engage in any work. Notably, KH's[Redacted] instructions were not an effort to control Claimant's method of completing his job duties. The directive negated the requisite causal relationship between Claimant's employment and resulting injury. Claimant's violation of Employer's instructions governing the sphere of employment thus severed the causal relationship between his employment and any injuries. Accordingly, Claimant did not suffer compensable injuries on May 11, 2022. His claim is therefore denied and dismissed. *See Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007) (where ALJ determined that the sphere of employment was limited by the employer's direction to either go home or wait for scaffolding to be repaired and claimant was told not to perform his duties, the claimant's subsequent injuries were not compensable). *Compare In re Eelorriaga*, W.C. No. 5-047-389-001 (ICAO, June 19, 2018) (because the employer's attempt to regulate driving by prohibiting phone calls while driving constituted an effort to control the claimant's methods of carrying out her duties and not a regulation concerning the sphere of employment, her injuries were compensable).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for Workers' Compensation benefits is denied and dismissed.

2. Claimant earned an AWW of $2290.24.

3. Respondents are entitled to an offset for unemployment benefits under §8-42-103(f), C.R.S.

4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 23, 2023.

DIGITAL SIGNATURE.

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-196-616-001

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that Pre-Hearing Administrative Law Judge (PALJ) Susan D. Phillips was incorrect in determining in a March 24, 2022 Order that claim notes are part of the claim file and subject to initial disclosure under §8-43-203(4), C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of §8-43-203(4), C.R.S. by failing to timely disclose the claim file and claim notes.

3. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover penalties from Claimant for violating WCRP 9-1 by failing to timely produce requested discovery.

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to a general award of medical maintenance benefits pursuant to *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988).

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage of $559.85.

FINDINGS OF FACT

1. Claimant is a 31-year-old delivery driver for Employer. On December 23, 2021 he was involved in a motor vehicle accident (MVA) during the course and scope of his employment.

2. On December 24, 2019 Claimant was involved in a prior MVA. He suffered injuries to similar body parts as he claims in the current December 23, 2021 matter.

3. On January 19, 2022 counsel for Claimant sent a written request to Respondents for the claim file in the present matter pursuant to §8-43-203(4), C.R.S. Counsel precisely requested the following:

> Please send us a copy of all of your file materials, including the E-l, any admissions or denials of liability, any other employment records, wage records, and an indemnity log reflecting all payments made to our client to date. Please treat this as a specific request for the claims file under §8-43-203(4). This is a specific request for the entire claims file under the Act and includes a specific request for production of any and all claims' or adjusters'

notes and/or compliance with the privilege log requirements of the Act.
Please, of course, copy us on all of the medical records in your file as well.

4. On February 10, 2022 Claimant sent a follow-up letter to Insurer's adjuster stating that the claim file was late because it was due by February 3, 2022 under §8-43-203(4), C.R.S. and Respondents were now in a penalty situation.

5. Insurer's Claims adjuster [Redacted, hereinafter TM] testified that the claim was initially treated as medical benefits only. There was no information available to Insurer that Claimant had lost any time from work. The claim was thus assigned to adjuster [Redacted, hereinafter TW] to handle authorization of medical benefits only.

6. TM[Redacted]explained that, upon determination that the claim involved lost work time and Claimant had hired an attorney, the claim file was transferred to him. He became the adjuster for the claim on February 11, 2022. TM[Redacted] thus began collecting information from Employer in order to comply with the 20-day notice provision of §8-43-203(1), C.R.S.

7. The claim was reported to the Division of Workers' Compensation (DOWC) on February 11, 2022.

8. On February 15, 2022 TM[Redacted] filed a General Admission of Liability (GAL) for the December 23, 2021 claim. In the GAL TM[Redacted] calculated Claimant's Average Weekly Wage (AWW) at $559.85. TM[Redacted] explained that he used the most recent 12 weeks of wages prior to Claimant's December 23, 2021 MVA in his calculation. He further remarked that he used the gross wages as listed on the Claimant's payroll records. TM[Redacted] commented that he did not include amounts noted on payroll records as "Driver Maint Reimb – Payable" because the amount was not part of "gross wages."

9. On February 28, 2022 counsel for Claimant sent TM[Redacted] a letter again demanding the claim file and providing a different calculation of Claimant's AWW. He asked TM[Redacted] to file an amended GAL incorporating his AWW calculations. In reaching his AWW calculation, Claimant's counsel added to the gross wages the "Driver Maint Reimb – Payable" fee. As of February 28, 2022 TM[Redacted] was aware of a demand for the claim file on a "lost time" from work claim that would trigger the provisions of §8-43-203, C.R.S. TM[Redacted] remarked that he then proceeded to obtain legal counsel on the case to represent Respondents and respond to outstanding requests.

10. TM[Redacted] testified that he did not understand claim notes to be a part of the claim file. He commented that claim notes and any notes by adjusters or other insurance company personnel are not kept with the claim file. They are maintained in a separate program that is separately accessed. TM[Redacted] detailed that, when he sends the initial claim file to an attorney for Respondents in a Workers' Compensation claim, he does not include claim notes because they are not maintained as part of the

claim file. He only accesses the program where the claim notes are kept and prepares a log of the claim notes if specifically requested.

11. On March 8, 2022 legal counsel [Redacted, hereinafter BP] entered an appearance on behalf of Respondents.

12. On March 9, 2022 Respondents sent a copy of the claim file including all medical records, pleadings, correspondence, wage records and investigation in the file to Claimant's counsel. Counsel for Claimant acknowledged receipt of the claim file, but stated that it did not include any of the requested claim and adjuster notes. He also asserted that failure to produce the adjuster's notes as soon as possible would result in Respondents' claim of privilege being waived. On March 9, 2022 Claimant also requested a pre-hearing conference that was scheduled for March 24, 2022.

13. On March 11, 2022 Respondents submitted Interrogatories and Requests for Production to Claimant requesting information about prior MVAs, insurance benefits received, and information about prior injuries. Claimant never responded to the discovery requests. Respondents also never filed a motion to compel requesting Claimant to produce the information.

14. On March 21, 2022 Respondents submitted a written objection to Claimant's Motion for Respondents to produce adjuster notes. Respondents asserted that the claim notes are not enumerated within the disclosure provision of 8-43-203(4), C.R.S. and not a part of the claim file.

15. On March 24, 2022 Pre-Hearing Administrative Law Judge (PALJ) Susan D. Phillips entered an order granting Claimant's motion to compel production of the adjuster's claim notes and ordering Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the order. PALJ Phillips remarked that §8-42-203(4), C.R.S. does not specifically state the words "adjuster notes" in the text of the statute. However, in accordance with *Lyman v. Town of Bowmar*, 533 P.2d 1129 (Colo. 1975), the General Assembly intended the word "includes" in the statute to create an expansion of the types of items that an insurer is required to provide as part of the claim file. She therefore concluded that the adjuster's notes were part and parcel of the claim file and Respondents had ten days to provide them to Claimant subject to an accompanying privilege log.

16. On March 25, 2022 Respondents produced the adjuster's claim notes and redacted only the notes about reserves. They asserted the claim of privilege for the reserve notes.

17. Claimant received medical treatment from Authorized Treating Physician (ATP) Caroline Gellrick, M.D. for his December 23, 2021 injuries. She determined that Claimant reached Maximum Medical Improvement (MMI) on June 30, 2022. On July 13, 2022 Dr. Gellrick concluded that Claimant warranted a 5% whole person impairment rating as a result of his December 23, 2021 MVA. She advised Claimant that, in terms of

maintenance care, he could continue to use over-the-counter topical medication for his lumbar spine.

18. On July 26, 2022 Respondents filed a Final Admission of Liability (FAL) acknowledging that Claimant reached MMI on June 30, 2022 with a 5% whole person impairment rating. The FAL also reflected that Claimant earned an AWW of $559.85. The FAL acknowledged that Claimant was entitled to medical maintenance benefits, but specified that if no "pursuant to Dr. Caroline Gellrick 's medical report dated 07/13/2022." The FAL specifically provided:

"Admit to Maintenance Care after MMI? ☒ Yes ☐ No

If no, pursuant to Dr. Caroline Gellrick 's medical report dated 07/13/2022."

19. TM[Redacted] explained that he was the adjuster who filed the FAL. He testified that it was his understanding that he should attach the medical report of Dr. Gellrick to the FAL. TM[Redacted] specified that he attached Dr. Gellrick's report because he was relying on it for the admission of permanent partial disability and maintenance care after MMI. Under the "remarks and basis" for permanent disability award, the FAL simply noted that maintenance care was admitted without any improper limitation. TM[Redacted] testified that Insurer has not denied authorization of any of Claimant's medical treatment. He further commented that, as of the date of the hearing, there were no outstanding requests for medical treatment from Claimant.

20. On October 26, 2022 Claimant filed an Application for Hearing (AFH) endorsing, AWW, TTD, TPD, medical benefits, and asserting a penalty claim against Respondents for failure to provide "the complete claims file, including claims and/or adjuster's notes." Claimant further asserted that Respondents waived its claimed privilege by failing to provide a timely privilege log for adjuster's notes. Notably, as of the date of filing the AFH, Respondents had provided claim notes more than seven months earlier.

21. On October 26, 2022 Respondents submitted a second set of Interrogatories and Requests for Production to Claimant. They again sought information about prior MVAs, insurance benefits received by Claimant as a result of earlier MVAs, and any prior injuries.

22. On November 23, 2022 Respondents authored an email to Claimant stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel explained that he was missing one attorney for medical leave and one paralegal for a family emergency.

23. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Medical records related to the prior December 24, 2019 MVA were not provided at

that time. Respondents never filed a motion to compel discovery responses with respect to the October 26, 2022 Interrogatories and Requests for Production.

24. On December 8, 2022 Dr. Gellrick advised Claimant's counsel that her office was closing due to retirement. She noted that, if Claimant needed further maintenance treatment, he would need to visit another physician.

25. In January, 2023 Respondents received additional discovery from Claimant's counsel including medical records from Littleton Chiropractic. The documents revealed that Claimant had been involved in a prior MVA on December 24, 2019. He injured his thoracic and lumbar spine as well as his sacroiliac. The preceding areas involve the same body parts Claimant contends were injured in the December 23, 2021 MVA.

26. Upon learning of the prior MVA through Claimant's discovery responses, Respondents again sought discovery regarding the prior claim including a release for the insurance file from carrier USAA that paid damages. Rather than providing a release to Respondents for USAA, Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it.

27. On January 24, 2023 PALJ John H. Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." Claimant requested the file from USAA on February 14, 2023.

28. Respondents have failed to demonstrate it is more probably true than not that PALJ Phillips was incorrect in determining in a March 24, 2022 Order that claim notes are part of the claim file and subject to initial disclosure under §8-43-203(4), C.R.S. Initially, on January 24, 2023 PALJ Phillips granted Claimant's motion to compel production of the adjuster's claim notes and ordered Respondents to provide them to Claimant subject to an accompanying privilege log within 10 days of the order. PALJ Phillips remarked that §8-42-203(4), C.R.S. does not specifically state the words "adjuster notes" in the text of the statute. However, in accordance with *Lyman v. Town of Bowmar*, 533 P.2d 1129 (Colo. 1975), the General Assembly intended the word "includes" in the statute to create an expansion of the types of items that an insurer is required to provide as part of the claim file. She therefore concluded that the adjuster's notes were part and parcel of the claim file and Respondents had ten days to provide them to Claimant subject to an accompanying privilege log.

29. Notably, §8-42-203(4), C.R.S. provides in relevant part that the insurer shall provide to the claimant "a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of the injury and thereafter." The word "includes" reveals that what is to follow is only part of a greater

whole. Rather than creating an exhaustive list, the statute identifies the general class of "a complete copy of the claim file," and then specifics particular examples or subclasses.

30. The specifically delineated parts of a "complete copy of the claim file" in §8-42-203(4), C.R.S. include "correspondence," "investigation files" and "investigation reports." Although "claim notes" are not specifically enumerated in §8-42-203(4), C.R.S., they are in the same class of documents as the preceding examples. The enumeration of the types of materials that constitute a "complete copy of the claim file" is merely illustrative, not exclusive. The list of materials to be disclosed is thus only illustrative and partial. The use of the word "includes" enlarges, rather than limits what constitutes a "complete copy of the claim file." The inclusion of "claim notes" as items in the claim file is a reasonable construction of the plain language of §8-42-203(4), C.R.S. Had the General Assembly sought to limit materials to be disclosed to specifically enumerated items, it could have used the word "means" instead of the general or enlarging term "includes."

31. The preceding construction gives the words in the statute their plain and ordinary meanings. The adjuster's notes, although not specifically enumerated by the statute, are part and parcel of the general term "claim file" and therefore fall within the requirements of §8-43-203(4). Accordingly, claim notes are properly included as part of "a complete copy of the claim file" under §8-42-203(4), C.R.S. They are thus subject to the initial disclosure provisions pursuant to §8-43-203(4), C.R.S. PALJ Phillips therefore properly granted Claimant's motion to compel production of the adjuster's claim notes and ordered Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the March 24, 2022 Order.

32. Claimant has failed to establish it is more probably true than not that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of §8-43-203(4), C.R.S. in failing to timely disclose the claim file and claim notes. Initially, Claimant seeks penalties on two separate grounds. First, Claimant seeks penalties for Respondents failure to provide the claim file within 15 days of a request made on January 19, 2022. Claimant also seeks penalties for the time period after Respondents provided the claim file but not the claim notes. However, Claimant has failed to satisfy his burden of establishing that Insurer's actions were objectively unreasonable with respect to the two reasons for seeking penalties.

33. Claimant first seeks penalties for Respondents failure to provide the claim file within 15 days of January 19, 2022. This request was made less than one month after Claimant's injury on December 23, 2021. TM[Redacted] credibly testified that the claim was initially assigned to a medical-benefits-only adjuster because it was not clear that the case involved a lost time claim at that point. The First Report of Injury (FROI) was not filed until February 11, 2022. The claim was also not reassigned to TM[Redacted] until February 11, 2022 and his initial priority was to obtain information from Employer regarding the claim in order to file a GAL. He then filed the GAL on February 15, 2022. Claimant has not proven that TM[Redacted] was aware of the January 19, 2022 demand for the claim file and the demand letter was premature. Therefore, Claimant has not

established that there was knowledge of any violation of the statute for failing to provide the claim file within 15 days.

34. On February 28, 2022 counsel for Claimant sent a second demand for the claim file and provided incorrect AWW calculations. He asked TM[Redacted] to file an amended GAL using the incorrect calculations. Because TM[Redacted] was aware of a demand for the claim file, he engaged legal counsel within one week of receiving the letter. Respondents' counsel entered an appearance with the DOWC on March 8, 2022 and sent a copy of the claim file to Claimant's counsel on the next day March 9, 2022. The production of the claim file thus occurred within 15 days of Claimant's February 28, 2022 demand. There is a lack of reprehensibility with respect to Insurer's conduct. Further, Claimant has not demonstrated harm by not having the claim file at the early stage of the claim or less than two months after the Claimant's injury, where Respondents also quickly filed a GAL accepting liability for payment of medical benefits and temporary disability benefits. The record thus reflects that Respondents' have offered a reasonable factual and legal explanation for its actions. They were thus not objectively unreasonable.

35. Moreover, because the claim file was produced more than seven months before Claimant filed an AFH endorsing the penalty as an issue, the penalty had been cured pursuant to §8-43-304(4), C.R.S. Thus, the imposition of penalties in this case requires Claimant to prove by clear and convincing evidence that Insurer knew or reasonably should have known it was in violation. While Claimant sent a notice to TM[Redacted] on February 28, 2022 alleging that Insurer was in violation, the notice also contained improper calculations for AWW and demanded that TM[Redacted] amend his GAL with the incorrect AWW calculations. Counsel for Claimant was adverse to Insurer and TM[Redacted] had no obligation to rely on the legal advice provided by Claimant's counsel. At this point, TM[Redacted] acted swiftly to engage legal counsel for Respondents to resolve a legitimate legal dispute. By March 9, 2022 Insurer's counsel had provided the claim file to Claimant within 15 days of February 28, 2022. Accordingly, Claimant's request for penalties for Respondents' failure to timely produce the claim file under §8-43-203(4), C.R.S. is denied and dismissed.

36. On March 9, 2022 legal counsel for Insurer did not include claim notes with the claim file. Claimant also seeks penalties for the time period after Respondents provided the claim file but not the claim notes. Claimant again bears the burden of establishing that Insurer's actions were objectively unreasonable with respect to this basis for seeking a penalty. However, Claimant's argument fails because the record demonstrates that Respondents had a good faith basis in law or fact for failing to produce the claim notes.

37. The preceding section of this opinion details that claim notes are properly included as part of "a complete copy of the claim file" under §8-42-203(4), C.R.S. They are thus subject to the initial disclosure provisions pursuant to §8-43-203(4), C.R.S. Nevertheless, Respondents have made a good faith argument that claim notes are not, in fact, part of the "claim file" pursuant to §8-43-203(4), C.R.S. TM[Redacted] explained that he did not understand the adjuster's notes to be a part of the claim file because they

are not even maintained with the rest of the claim file. Respondents reasonably asserted that claim notes could not be reasonably construed to be part of a "claim file." Claims adjusters rarely provide such notes to their own counsel when transmitting the entire claim file for a litigation referral. Here, TM[Redacted] commented that this was his practice and adjuster's notes were not initially sent to counsel with the claim file.

38. On March 24, 2022 PALJ Phillips entered an order granting Claimant's motion to compel production of the adjuster's claim notes and ordering Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the order. On the following day March 25, 2022 Respondents produced the adjuster's claim notes and redacted only the notes about reserves. The actions of Insurer up to this point were not objectively unreasonable. Respondents' actions were based on a rational argument in law or fact. Importantly, "claim notes" are not specifically enumerated in §8-42-203(4), C.R.S. Claimant has thus not met his burden of establishing Insurer's actions were objectively unreasonable under the circumstances. Accordingly, Claimant's request for penalties based on Respondents failure to produce claim notes is denied and dismissed.

39. Respondents have failed to prove it is more probably true than not that they are entitled to recover penalties from Claimant for violation of WCRP 9-1 for failing to timely produce requested discovery. Specifically, the record reveals that Claimant's failure to timely respond to requested discovery did not constitute a willful violation justifying an award of penalties.

40. Initially, on March 11, 2022 Respondents submitted Interrogatories and Requests for Production to Claimant requesting information about prior MVAs, insurance benefits received, and prior injuries. Claimant did not respond to the discovery requests. Respondents also never filed a motion to compel requesting Claimant to produce the information. On October 26, 2022 Respondents submitted a second set of Interrogatories and Requests for Production to Claimant. They again sought information about prior MVAs, insurance benefits received by Claimant as a result of earlier MVAs, and any prior injuries. On November 23, 2022 Respondents authored an email to Claimant stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel explained that he was missing one attorney for medical leave and one paralegal for a family emergency. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Respondents never filed a motion to compel discovery responses with respect to the October 26, 2022 Interrogatories and Requests for Production.

41. In January, 2023 Respondents received additional late discovery from Claimant's counsel including medical records from Littleton Chiropractic. The documents revealed that Claimant had been involved in a prior MVA on December 24, 2019. Upon learning of the prior MVA, Respondents again sought discovery regarding the prior claim including a release for the insurance file from carrier USAA that paid damages. Rather

than providing a release to Respondents for USAA, Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it. On January 24, 2023 PALJ Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." On February 14, 2023 Claimant requested the file from USAA.

42. The record reveals that Claimant violated WRCP 9-1 on an ongoing basis by failing to provide disclosures and then discovery related to a prior MVA and the insurance claim file related to the prior MVA. Respondents repeatedly propounded discovery, but Claimant failed to respond. Although Claimant violated WCRP 9-1 by failing to respond, the record reflects that his conduct did not constitute a willful violation. There is no presumption of willfulness because Respondents never filed a motion to compel requesting Claimant to produce the information.

43. Claimant did not provide discovery responses to Respondents' initial the March 11, 2022 Interrogatories. However, Claimant did not file an AFH until October 26, 2022 and Respondents never filed a motion to compel requesting Claimant to produce the information. Instead, Respondents propounded discovery requests again on October 26, 2022 upon receipt of the AFH. Because Claimant did not respond to this discovery request, Respondents authored an email to Claimant on November 23, 2022 stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 and reasonably explained that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel detailed that he was missing one attorney for medical leave and one paralegal for a family emergency. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Respondents never filed a motion to compel the discovery responses.

44. Upon learning of Claimant's prior MVA, Respondents again sought discovery including a release for the insurance file from carrier USAA that paid damages. Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it. On January 24, 2023 PALJ Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." Respondents again did not seek a motion to compel and PALJ Sandberg granted Claimant's request to review the claim file from USAA for privilege prior to production. PALJ Sandberg's decision reflects that Claimant's request to review the information before disclosure was reasonable.

45. The record is devoid of any evidence showing that Respondents filed a motion to compel discovery responses from Claimant. Claimant's actions cannot therefore be presumed to be willful. Notably, Claimant's conduct was not deliberate and did not exhibit either a flagrant disregard of discovery obligations or constitutes a

substantial deviation from reasonable care in complying with discovery obligations. Accordingly, Respondents' request for penalties for Claimant's violation of WCRCP 9-1 is denied and dismissed.

46. On July 26, 2022 Respondents filed an FAL acknowledging that Claimant reached MMI on June 30, 2022 with a 5% whole person impairment rating. The FAL remarked that Claimant was entitled to medical maintenance benefits, but specified that if no "pursuant to Dr. Caroline Gellrick's medical report dated 07/13/2022." TM[Redacted] testified that it was his understanding that he should attach the medical report of Dr. Gellrick to the FAL. He credibly commented that he attached Dr. Gellrick's report because he was relying on it for the admission of permanent partial disability and maintenance care after MMI. Under the "remarks and basis" for permanent disability award, it is simply noted that maintenance care is admitted without any improper limitation of continuing care. TM[Redacted] also noted that Insurer did not deny authorization of any medical treatment for Claimant. He further commented that, as of the date of the hearing, there were no outstanding requests for medical treatment from Claimant. The record thus reveals that Respondents' July 26, 2022 FAL constitutes a general award of medical maintenance benefits. Accordingly, Claimant's request for amendment of the FAL is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Propriety of PALJ Phillips' March 24, 2022 Order

4. Section 8-43-207.5(2), C.R.S. grants a PALJ authority to issue "interlocutory orders." A PALJ may also order a party to participate in a prehearing conference and make evidentiary rulings. An order of a PALJ is "an order of the director and binding on the parties," and "such an order shall be interlocutory." §8-43-207.5(3); *see Kennedy v. Indus. Claim Appeals Off.*, 100 P.3d 949 (Colo. App. 2004); *Martinez v. Vertical Electric Inc.*, WC 5-049-469 (ICAO, Oct. 20, 2017) (orders relating to prehearing conferences are generally interlocutory because a prehearing conference is followed by a full hearing before the director or an ALJ). ALJ's have the authority to review the pre- hearing orders of PALJ's. *See Dee Enterprises v. Indus. Claim Appeals Off.*, 89 P.3d 430, 441 (Colo. App. 2003); *Villegas v. Denver Water*, WC 4-889-298-005 (ICAO Apr. 14, 2021).

5. Section 8-43-203(4), C.R.S. provides that,

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer, or if insured, the employer's insurance carrier or third-part administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of the injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

6. Under the general principles of statutory construction statutes must be construed to give effect to their legislative purpose. *Grogan v. Lutheran Medical Center, Inc.*, 950 P.2d 690 (Colo. App. 1997). If the statutory language is unambiguous, there is no need to resort to interpretative rules of statutory construction because it must be presumed the General Assembly meant what it clearly said. *Davison v. Indus. Claim Appeals Off.*, 72 P.3d 389 (Colo. App. 2003). To discern the legislative intent, we must first give the words in the statute their plain and ordinary meanings. A forced, subtle, or strained construction of the statute should be avoided if the language is simple and the meaning is clear. *Snyder Oil Co. v. Embree*, 862 P.2d 259 (Colo. 1993). Furthermore, where the statute is part of a comprehensive legislative scheme, it must be considered in relation to the other provisions to effect the legislative intent of both statutes. *Gonzales v. Advanced Components*, 949 P.2d 569 (Colo. 1997); *DeJiacomo v. Indus. Claim Appeals Off.*, 817 P.2d 552 (Colo. App. 1991).

7. When a statute uses a general word followed by the word "include" and then an enumerated list, the plain and ordinary meaning of "include" is used as "an extension or enlargement." *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (1975). To conclude otherwise "would transmogrify the word 'include' into the word 'mean.'..." *Id.*; *see People v. Patton*, 425 P.3d 1152, 1156 (Colo. App. 2016) (concluding that statute did not require

notice only in person or in writing, because the word "includes" is a word that is meant to extend rather than limit)*; Dillabaugh v. Ellerton*, 259 P.3d 550, 553 (Colo. App. 2011) (relying on *Lyman* for the proposition that “include” is ordinarily used as a word of extension or enlargement and warning against transmogrifying “include” into the word “mean”); *Arnold v. Colo. Dep't of Corr.*, 978 P.2d 149, 151 (Colo. App. 1999) ("the word ‘include’ is ordinarily used as a word of extension or enlargement and is not definitionally equivalent to the word ‘mean.’ ").

8. As found, Respondents have failed to demonstrate by a preponderance of the evidence that PALJ Phillips was incorrect in determining in a March 24, 2022 Order that claim notes are part of the claim file and subject to initial disclosure under §8-43-203(4), C.R.S. Initially, on January 24, 2023 PALJ Phillips granted Claimant’s motion to compel production of the adjuster’s claim notes and ordered Respondents to provide them to Claimant subject to an accompanying privilege log within 10 days of the order. PALJ Phillips remarked that §8-42-203(4), C.R.S. does not specifically state the words “adjuster notes” in the text of the statute. However, in accordance with *Lyman v. Town of Bowmar*, 533 P.2d 1129 (Colo. 1975), the General Assembly intended the word “includes” in the statute to create an expansion of the types of items that an insurer is required to provide as part of the claim file. She therefore concluded that the adjuster’s notes were part and parcel of the claim file and Respondents had ten days to provide them to Claimant subject to an accompanying privilege log.

9. As found, notably, §8-42-203(4), C.R.S. provides in relevant part that the insurer shall provide to the claimant “a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of the injury and thereafter.” The word ”includes” reveals that what is to followis only part of a greater whole. Rather than creating an exhaustive list, the statute identifies the general class of “a complete copy of the claim file,” and then specifics particular examples or subclasses.

10. As found, the specifically delineated parts of a “complete copy of the claim file” in §8-42-203(4), C.R.S. include “correspondence,” “investigation files” and “investigation reports.” Although “claim notes” are not specifically enumerated in §8-42-203(4), C.R.S., they are in the same class of documents as the preceding examples. The enumeration of the types of materials that constitute a “complete copy of the claim file” is merely illustrative, not exclusive. The list of materials to be disclosed is thus only illustrative and partial. The use of the word ”includes” enlarges, rather than limits what constitutes a “complete copy of the claim file.” The inclusion of “claim notes” as items in the claim file is a reasonable construction of the plain language of §8-42-203(4), C.R.S. Had the General Assembly sought to limit materials to be disclosed to specifically enumerated items, it could have used the word “means” instead of the general or enlarging term “includes.”

11. As found, the preceding construction gives the words in the statute their plain and ordinary meanings. The adjuster’s notes, although not specifically enumerated

by the statute, are part and parcel of the general term “claim file” and therefore fall within the requirements of §8-43-203(4). Accordingly, claim notes are properly included as part of “a complete copy of the claim file” under §8-42-203(4), C.R.S. They are thus subject to the initial disclosure provisions pursuant to §8-43-203(4), C.R.S. PALJ Phillips therefore properly granted Claimant’s motion to compel production of the adjuster’s claim notes and ordered Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the March 24, 2022 Order.

Penalties

12. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person “fails, neglects, or refuses to obey any lawful order made by the director or panel.” This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Off.,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

13. The cure provision of §8-43-304(4), C.R.S., provides that,

> After the date of mailing of [any application for hearing for any penalty pursuant to subsection (1)], an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking the penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed….

14. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.”) *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party’s conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

15. An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. no. 4-619-954 (ICAO. May 5, 2006). However, any penalty assessed should not be excessive or grossly disproportionate to the conduct in question. When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the other party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Indus. Claim Appeals Off.,* 126 P.3d 323 (Colo. App. 2005).

Penalties Related to Claimant's Request for Claim File under §8-43-203(4), C.R.S.

16. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of §8-43-203(4), C.R.S. in failing to timely disclose the claim file and claim notes. Initially, Claimant seeks penalties on two separate grounds. First, Claimant seeks penalties for Respondents failure to provide the claim file within 15 days of a request made on January 19, 2022. Claimant also seeks penalties for the time period after Respondents provided the claim file but not the claim notes. However, Claimant has failed to satisfy his burden of establishing that Insurer's actions were objectively unreasonable with respect to the two reasons for seeking penalties.

17. As found, Claimant first seeks penalties for Respondents failure to provide the claim file within 15 days of January 19, 2022. This request was made less than one month after Claimant's injury on December 23, 2021. TM[Redacted] credibly testified that the claim was initially assigned to a medical-benefits-only adjuster because it was not clear that the case involved a lost time claim at that point. The First Report of Injury (FROI) was not filed until February 11, 2022. The claim was also not reassigned to TM[Redacted] until February 11, 2022 and his initial priority was to obtain information from Employer regarding the claim in order to file a GAL. He then filed the GAL on February 15, 2022. Claimant has not proven that TM[Redacted] was aware of the January 19, 2022 demand for the claim file and the demand letter was premature. Therefore, Claimant has not established that there was knowledge of any violation of the statute for failing to provide the claim file within 15 days.

18. As found, on February 28, 2022 counsel for Claimant sent a second demand for the claim file and provided incorrect AWW calculations. He asked TM[Redacted] to file an amended GAL using the incorrect calculations. Because TM[Redacted] was aware of a demand for the claim file, he engaged legal counsel within one week of receiving the letter. Respondents' counsel entered an appearance with the DOWC on March 8, 2022 and sent a copy of the claim file to Claimant's counsel on the next day March 9, 2022. The production of the claim file thus occurred within 15 days of Claimant's February 28, 2022 demand. There is a lack of reprehensibility with respect to Insurer's conduct. Further, Claimant has not demonstrated harm by not having the claim file at the early stage of the claim or less than two months after the Claimant's injury, where Respondents also quickly filed a GAL accepting liability for payment of medical benefits and temporary disability benefits. The record thus reflects that Respondents'

have offered a reasonable factual and legal explanation for its actions. They were thus not objectively unreasonable.

19. As found, moreover, because the claim file was produced more than seven months before Claimant filed an AFH endorsing the penalty as an issue, the penalty had been cured pursuant to §8-43-304(4), C.R.S. Thus, the imposition of penalties in this case requires Claimant to prove by clear and convincing evidence that Insurer knew or reasonably should have known it was in violation. While Claimant sent a notice to TM[Redacted] on February 28, 2022 alleging that Insurer was in violation, the notice also contained improper calculations for AWW and demanded that TM[Redacted] amend his GAL with the incorrect AWW calculations. Counsel for Claimant was adverse to Insurer and TM[Redacted] had no obligation to rely on the legal advice provided by Claimant's counsel. At this point, TM[Redacted] acted swiftly to engage legal counsel for Respondents to resolve a legitimate legal dispute. By March 9, 2022 Insurer's counsel had provided the claim file to Claimant within 15 days of February 28, 2022. Accordingly, Claimant's request for penalties for Respondents' failure to timely produce the claim file under §8-43-203(4), C.R.S. is denied and dismissed.

20. As found, on March 9, 2022 legal counsel for Insurer did not include claim notes with the claim file. Claimant also seeks penalties for the time period after Respondents provided the claim file but not the claim notes. Claimant again bears the burden of establishing that Insurer's actions were objectively unreasonable with respect to this basis for seeking a penalty. However, Claimant's argument fails because the record demonstrates that Respondents had a good faith basis in law or fact for failing to produce the claim notes.

21. As found, the preceding section of this opinion details that claim notes are properly included as part of "a complete copy of the claim file" under §8-42-203(4), C.R.S. They are thus subject to the initial disclosure provisions pursuant to §8-43-203(4), C.R.S. Nevertheless, Respondents have made a good faith argument that claim notes are not, in fact, part of the "claim file" pursuant to §8-43-203(4), C.R.S. TM[Redacted] explained that he did not understand the adjuster's notes to be a part of the claim file because they are not even maintained with the rest of the claim file. Respondents reasonably asserted that claim notes could not be reasonably construed to be part of a "claim file." Claims adjusters rarely provide such notes to their own counsel when transmitting the entire claim file for a litigation referral. Here, TM[Redacted] commented that this was his practice and adjuster's notes were not initially sent to counsel with the claim file.

22. As found, on March 24, 2022 PALJ Phillips entered an order granting Claimant's motion to compel production of the adjuster's claim notes and ordering Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the order. On the following day March 25, 2022 Respondents produced the adjuster's claim notes and redacted only the notes about reserves. The actions of Insurer up to this point were not objectively unreasonable. Respondents' actions were based on a rational argument in law or fact. Importantly, "claim notes" are not specifically enumerated in §8-42-203(4), C.R.S. Claimant has thus not met his burden of establishing

Insurer's actions were objectively unreasonable under the circumstances. Accordingly, Claimant's request for penalties based on Respondents failure to produce claim notes is denied and dismissed.

Penalty Related to Claimant's Violation of WCRP 9-1 for Failure to Timely Provide Discovery Responses

23. Workers' Compensation Rules of Procedure WCRP 9-1(B) permits discovery in the form of written interrogatories. Under WCRP 9-1(D), the parties have a "continuing duty to timely supplement or amend responses to discovery up to the date of the hearing." Rule 9-1(F) provides that "[i]f any party fails to comply with the provisions of this rule and any action governed by, an administrative law judge may impose sanctions upon such party pursuant to statute and rule." Rule 9-1(G) specifies that once an order to compel has been issued, failure to comply with the order to compel shall be presumed willful.

24. The purposes of discovery and pretrial procedural rules include the production of relevant evidence, the simplification of issues, the elimination of surprise and the encouragement of fair and just settlements. *Shafer Com. Seating, Inc. v. Indus. Claim Appeals Off.*, 85 P.3d 619, 621 (Colo. App. 2003). To uphold these purposes in Workers' Compensation matters, §8-43-207(1)(e), C.R.S. provides that ALJs "may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery." In order for a discovery violation to be considered "willful," the ALJ must determine that the conduct was deliberate or exhibited "either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations." *Reed v. Indus. Claim Appeals Off.*, 13 P.3d 810, 813 (Colo. App. 2000); *see Henrichs v. Department of Human Services*, WC 5-030-150-010 (ICAO, Feb. 8, 2022); *In re Claim of Zvolanek*, WC 4-859-506-02 (ICAO, July 13, 2016).

25. Whether to impose sanctions and the nature of the sanctions to be imposed are matters within the fact finder's discretion. *Shafer Com. Seating, Inc. v. Indus. Claim Appeals Off.*, 85 P.3d 619 (Colo. App. 2003). The fact finder is given flexibility in choosing the appropriate sanction and should exercise informed discretion in imposing a sanction that is commensurate with the seriousness of the disobedient party's conduct. *Id*. The Colorado Supreme Court has determined that, although the rule provides little guidance in the selection of a sanction, it should be applied "in a manner that effectuates proportionality between the sanction imposed and the culpability of the disobedient party." *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672 (Colo. 1987); *see Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 702 (Colo. 2009) ("When discovery abuses are alleged, courts should carefully examine whether there is any basis for the allegation and, if sanctions are warranted, impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party."). The sanction should therefore be commensurate with the seriousness of the sanctioned conduct. *See In re Claim of Nozik*, W.C. No. 4-874-669 (ICAO, Mar. 13, 2013). An ALJ's exercise of discretion in determining an appropriate discovery sanction is broad and binding in the absence of a clear abuse of discretion.

Pizza Hut v. Indus. Claim Appeals Off., 18 P.3d 867 (Colo. App. 2001); *Hall v. Home Furniture Co*., 724 P.2d 94 (Colo. App. 1986) (ALJ's authority to impose a sanction is discretionary and may not be disturbed in "absence of clear abuse of discretion").

26. As found, Respondents have failed to prove by a preponderance of the evidence that they are entitled to recover penalties from Claimant for violation of WCRP 9-1 for failing to timely produce requested discovery. Specifically, the record reveals that Claimant's failure to timely respond to requested discovery did not constitute a willful violation justifying an award of penalties.

27. As found, initially, on March 11, 2022 Respondents submitted Interrogatories and Requests for Production to Claimant requesting information about prior MVAs, insurance benefits received, and prior injuries. Claimant did not respond to the discovery requests. Respondents also never filed a motion to compel requesting Claimant to produce the information. On October 26, 2022 Respondents submitted a second set of Interrogatories and Requests for Production to Claimant. They again sought information about prior MVAs, insurance benefits received by Claimant as a result of earlier MVAs, and any prior injuries. On November 23, 2022 Respondents authored an email to Claimant stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel explained that he was missing one attorney for medical leave and one paralegal for a family emergency. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Respondents never filed a motion to compel discovery responses with respect to the October 26, 2022 Interrogatories and Requests for Production.

28. As found, in January, 2023 Respondents received additional late discovery from Claimant's counsel including medical records from Littleton Chiropractic. The documents revealed that Claimant had been involved in a prior MVA on December 24, 2019. Upon learning of the prior MVA, Respondents again sought discovery regarding the prior claim including a release for the insurance file from carrier USAA that paid damages. Rather than providing a release to Respondents for USAA, Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it. On January 24, 2023 PALJ Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." On February 14, 2023 Claimant requested the file from USAA.

29. As found, the record reveals that Claimant violated WRCP 9-1 on an ongoing basis by failing to provide disclosures and then discovery related to a prior MVA and the insurance claim file related to the prior MVA. Respondents repeatedly propounded discovery, but Claimant failed to respond. Although Claimant violated WCRP 9-1 by failing to respond, the record reflects that his conduct did not constitute a willful violation. There is no presumption of willfulness because Respondents never filed a motion to compel requesting Claimant to produce the information.

30. As found, Claimant did not provide discovery responses to Respondents' initial the March 11, 2022 Interrogatories. However, Claimant did not file an AFH until October 26, 2022 and Respondents never filed a motion to compel requesting Claimant to produce the information. Instead, Respondents propounded discovery requests again on October 26, 2022 upon receipt of the AFH. Because Claimant did not respond to this discovery request, Respondents authored an email to Claimant on November 23, 2022 stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 and reasonably explained that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel detailed that he was missing one attorney for medical leave and one paralegal for a family emergency. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Respondents never filed a motion to compel the discovery responses.

31. As found, upon learning of Claimant's prior MVA, Respondents again sought discovery including a release for the insurance file from carrier USAA that paid damages. Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it. On January 24, 2023 PALJ Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." Respondents again did not seek a motion to compel and PALJ Sandberg granted Claimant's request to review the claim file from USAA for privilege prior to production. PALJ Sandberg's decision reflects that Claimant's request to review the information before disclosure was reasonable.

32. As found, the record is devoid of any evidence showing that Respondents filed a motion to compel discovery responses from Claimant. Claimant's actions cannot therefore be presumed to be willful. Notably, Claimant's conduct was not deliberate and did not exhibit either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations. Accordingly, Respondents' request for penalties for Claimant's violation of WCRCP 9-1 is denied and dismissed. *See O'Reilly v. Physicians Mutual Insurance Co.*, 992 P.2d 644 (Colo. App. 1999) (absence of a prior order compelling discovery precluded C.R.C.P. 37(b) sanctions for any alleged violation); *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (March 25, 2013) (ALJ erred in drawing adverse inference as a discovery sanction when no order compelling discovery previously had been entered).

Medical Maintenance Benefits

33. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). An award for *Grover*-type medical benefits is neither contingent

upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Off.,* 992 P.2d 701,704 (Colo. App. 1999); *Stollmeyer v. Indus. Claim Appeals Off.,* 916 P.2d 609 (Colo. App. 1995). Nonetheless, the claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Cob. App. 1992). The care becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate so that he or she will suffer a greater disability. *Id.;* see *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna,* 77 P.3d at 866. Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center,* 992 P.2d at 704.

34. As found, on July 26, 2022 Respondents filed an FAL acknowledging that Claimant reached MMI on June 30, 2022 with a 5% whole person impairment rating. The FAL remarked that Claimant was entitled to medical maintenance benefits, but specified that if no “pursuant to Dr. Caroline Gellrick's medical report dated 07/13/2022.” TM[Redacted] testified that it was his understanding that he should attach the medical report of Dr. Gellrick to the FAL. He credibly commented that he attached Dr. Gellrick’s report because he was relying on it for the admission of permanent partial disability and maintenance care after MMI. Under the “remarks and basis” for permanent disability award, it is simply noted that maintenance care is admitted without any improper limitation of continuing care. TM[Redacted] also noted that Insurer did not deny authorization of any medical treatment for Claimant. He further commented that, as of the date of the hearing, there were no outstanding requests for medical treatment from Claimant. The record thus reveals that Respondents’ July 26, 2022 FAL constitutes a general award of medical maintenance benefits. Accordingly, Claimant’s request for amendment of the FAL is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claim notes are properly included as part of “a complete copy of the claim file.” They are thus subject to the initial disclosure provisions under §8-43-203(4), C.R.S. PALJ Phillips therefore properly granted Claimant’s motion to compel production of the adjuster’s claim notes.

2. Claimant’s request for penalties for Respondents’ failure to timely produce the claim file and claim notes under §8-43-203(4), C.R.S. is denied and dismissed.

3. Respondents’ request for penalties for Claimant’s violation of WCRCP 9-1 is denied and dismissed.

4. Claimant's request for the amendment of the July 26, 2022 FAL regarding medical maintenance benefits is denied and dismissed.

5. Claimant earned an AWW of $559.85.

. 6. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: March 29, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is entitled to maintenance treatment in the form of cognitive behavioral therapy ("CBT").

FINDINGS OF FACT

1. Claimant is a 42-year old woman who works for Employer as a warehouse associate.

2. Claimant sustained an admitted industrial injury on June 20, 2014. Claimant underwent arthroscopies of her left and right hips on January 11, 2016 and August 1, 2016, respectively.

3. Claimant was placed at maximum medical improvement ("MMI") in October 2017. Respondents admitted for maintenance medical care.

4. On June 29, 2022, Claimant's authorized treating physician ("ATP") Robert Moghim, M.D. noted complaints of axial back pain with extension into the left hip. Claimant reported her condition had worsened. He documented, "She has issues with anxiety and 'getting out of the house.' She her (*sic*) anxiety is due to pain. She may benefit for (*sic*) CBT but this has been denied by WC." (Cl. Ex. J).

5. On July 20, 2022, Dr. Moghim noted, "My recommendation is pelvic floor PT, GTB injections w/ steroids, CBT and follow up PT for core muscle stabilization. Multimodal pain management has been shown to be the most effective in managing complex chronic pain symptoms. In the past, she has had excellent results when these modalities were deployed." (*Id*.)

6. On October 4, 2022, Amanda Osborne, DPT, authored a letter recommending that Claimant undergo CBT therapy. She noted that scientific literature has demonstrated the efficacy of interventions such as CBT in reducing pain, and opined Claimant should receive skilled mental health intervention like CBT to facilitate her pain management and to increase her participation in recreation and community engagement.

7. At the request of Respondents, Kathleen D'Angelo, M.D. performed Independent Medical Examinations ("IMEs") of Claimant on June 22, 2020, May 3, 2021 and October 31, 2022. Dr. D'Angelo has interviewed Claimant on multiple occasions, performed physical examinations, and did a comprehensive review of Claimant's medical records dating back to 2013. Dr. D'Angelo opined that Claimant 's need for CBT is not work-related. Dr. D'Angelo noted that in her evaluations of Claimant, Claimant admitted that she is able to leave her home for work and for doctor appointments without difficulty,

anxiety or psychic trauma. Dr. D'Angelo further noted Claimant can enjoy herself upon meeting friends, and that she has no concerns once she leaves her home. Dr. D'Angelo opined that providing CBT for a condition that is truly not present is not medically indicated.

8. Claimant testified at hearing to her belief that Dr. D'Angelo is biased. She referenced multiple parts of Dr. D'Angelo's prior IME reports and testimony from prior depositions, noting perceived inaccuracies or areas of disagreement with Dr. D'Angelo. Claimant testified that she did not request CBT until a couple years after her surgeries when she realized her issue with getting out of the house. She further testified to her belief that she needs CBT therapy to help get out of the house. Claimant testified that her issue with getting out of the house is a learned experience after undergoing her surgeries, noting that for two years she only left her house to go to doctors' appointments and that she does not have a strong support system. Claimant testified that she drives herself to medical appointments and goes to work and to the grocery store when out for work. She stated that she does not participate in other activities outside of her home. Claimant testified that she seldomly goes out of her home for an activity other than work or appointments. She acknowledged that she has a problem leaving the house, but once she leaves the house she is fine. Claimant testified that, prior to the work injury, she was active and did not experience similar issues.

9. On January 27, 2023 Dr. D'Angelo testified by post-hearing deposition as a Level II accredited expert in internal medicine. Dr. D'Angelo testified that Dr. Carbaugh's psychometric testing demonstrated depression at the time and that his February 24, 2016 report diagnosed Claimant with somatic symptom disorder, probable persistent depressive disorder, and avoidant personality traits with a rule out for avoidant personality disorder. She testified that Dr. Carbaugh recommended 8 sessions of CBT for Claimant. Claimant underwent multiple session of CBT with Dr. Carbaugh. Per her review of the medical records, Claimant reported to Drs. Walker and Fillmore that the CBT with Dr. Carbaugh was not helpful. Dr. D'Angelo opined that CBT therapy would not be helpful to Claimant at this time if it was not helpful in the past. Dr. D'Angelo testified that Claimant does not have symptoms of agoraphobia because she can get out of the house, go to work, go to doctor's appointments and, once she is out with friends, she is okay. She further testified that Claimant has no difficulties interacting with others, is able to go to work routinely and has no phobia of driving. Dr. D'Angelo testified that such presentation is inconsistent and not medically probable. Dr. D'Angelo concluded that CBT not reasonably necessary and causally related treatment for Claimant's June 20, 2014 work injury, stating, "You cannot treat something that doesn't have a diagnosis." Dr. D'Angelo explained that she could not relate Claimant's purported anxiety issues to a work injury sustained 8 years prior, and surgeries that occurred 6 years prior.

10. On cross examination, Dr. D'Angelo confirmed that she is not a psychologist and is not "certified" in CBT. She testified that Claimant's situation of attending nothing but therapy and doctors' appointments for two years between 2016 and 2018 is not learned behavior, explaining that Claimant's selective issue with going out for social interaction

but then being fine during such interaction is not consistent with any specific pattern. She opined it is not medically probable Claimant's issue is casually related to her work injury or surgeries. She further stated that there is no evidence Dr. Moghim reviewed Dr. Carbaugh's or Dr. Johnsrud's notes regarding prior CBT therapy.

11. In response to Dr. D'Angelo's January 27, 2023 deposition testimony, Claimant offered additional testimony by post-hearing deposition on February 6, 2023. She testified that has not had a life since 2016, reiterating her belief that her anxiety regarding going out socially is learned behavior resulting from not going out socially due to her pain, and limitations in walking and driving for almost a year after her surgeries. Claimant testified that she did not request CBT until two years after her surgeries when she realized that her issue with not getting out of the house was psychological. She further testified that she has told Dr. D'Angelo more than once that she has anxiety.

12. The ALJ finds the testimony of Dr. D'Angelo, as supported by the medical records, more credible and persuasive than the opinions of Drs. Moghim and Osborne.

13. Claimant failed to prove it is more probably true than not CBT is reasonably necessary and causally related maintenance medical treatment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that medical maintenance treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012).

Claimant argues she experiences anxiety in going out of the house for anything other than work or appointments, and that such condition is a learned psychological state resulting from her work injury and subsequent surgeries. Dr. D'Angelo credibly and persuasively opined that any need for CBT therapy is not reasonably necessary or causally related to Claimant's June 2014 work injury and 2016 surgeries. Dr. D'Angelo has performed multiple IMEs of Claimant and comprehensively reviewed Claimant's medical records. Dr. D'Angelo credibly and persuasively opined that it is not medically probable Claimant's need for CBT therapy is related to the work injury, particularly considering the dichotomy between Claimant being able to go out to work and for appointments versus going out for other social issues and being fine once out. As noted by Dr. D'Angelo, there is no indication Drs. Moghim reviewed Claimant's medical records regarding prior CBT treatment. While Claimant is credible in her reports regarding her perceived condition, the preponderant evidence does not demonstrate that any need for CBT therapy is causally related to her 2014 work injury and resultant surgeries.

ORDER

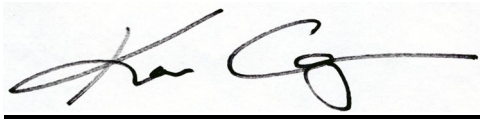
1. Claimant failed to prove by a preponderance of the evidence the CBT is reasonably necessary maintenance treatment causally related to her work injury.

2. Claimant's request for CBT is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 15, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-192-744-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is entitled to temporary total disability ("TTD") benefits from December 31, 2021, ongoing.

II. Whether Respondents proved by a preponderance of the evidence Claimant was responsible for her termination from employment and thus not entitled to TTD.

STIPULATION

The parties stipulated at hearing to an average weekly wage ("AWW") of $500.00.

FINDINGS OF FACT

1. Claimant is a 53-year-old woman who was employed by Employer as a deli clerk from approximately October 2021 to January 2022.

2. A written job description for Claimant's position indicates the position required, *inter alia*, the ability to lift/carry up to 70 lbs. and the ability to stand up to 4 hours continuously for a total of 8 hours per shift.

3. Claimant sustained an admitted industrial injury on Friday, December 31, 2021 when she slipped and fell at work. Claimant immediately reported the injury to the manager on duty. Employer then provided Claimant a list of four designated providers, including Lutheran Medical Center, Peak to Peak Family Practice Inc., CareNow Urgent Care, and Family Physicians.

4. Claimant sought treatment at the emergency department of Lutheran Medical Center later that same day. Claimant presented with complaints of pain in her coccyx, left ribs, abdomen, head and neck after slipping and falling at work. Claimant underwent a CT scan of the lumbar spine. The provider's final impression was coccyx pain, lumbar herniated disc, fall from standing, and left-sided rib pain. The provider placed Claimant on 48-hour restrictions of lifting no more than 10 lbs. and discharged Claimant with instructions to follow up with a primary care provider. Claimant did not provide any work restrictions to Employer.

5. Claimant Exhibit 15 contains a call log of calls to between Claimant and the main telephone number of Employer's store. Claimant testified that the call log reflects all the calls she made to Employer's store around that time period. She testified she did not know if Employer called from any other numbers other than the main store number and that, if Employer did she would not have recognized the numbers.

6. Employee work schedules are posted electronically on an online portal for employees, as well as in the employee breakroom. Work schedules are posted two weeks in advance. The schedule for the week of January 2, 2022 was published on December 24, 2022. The schedule for the week of January 9, 2022 was published on December 31, 2022.

7. Claimant was next scheduled to work on 4:30 p.m. on Saturday, January 1, 2022. Claimant called Employer at 9:00 a.m. on January 1, 2022 and informed Employer that she was unable to appear for her scheduled shift to the work injury. Employer considered the January 1, 2022 an excused absence.

8. Claimant was next scheduled to work on January 4, 2022 at 6:30 p.m. Claimant called Employer at 6:51 a.m. on January 4, 2022 and notified Employer she was again unable to appear for her scheduled shift due to the work injury. Employer considered the January 4, 2022 an excused absence.

9. Claimant's next scheduled shift was on January 6, 2022 at 4:30 p.m. Claimant did not appear for her scheduled shift due to the work injury. She did not notify Employer of her absence prior to the start of her scheduled shift. Claimant's call log indicates Claimant received a missed call from Employer at 1:45 p.m. on January 6, 2022. Claimant testified she did not recall receiving any voicemail from Employer. Claimant returned Employer's call at 5:33 p.m. that day, one hour after her scheduled shift began. Employer considered this a no-call, no-show.

10. Claimant was next scheduled to work on January 8, 2022 at 4:30 p.m. Claimant did not appear for her scheduled shift due to the work injury, nor did she contact Employer at any time to notify Employer of her absence.

11. Claimant testified she does not recall anything about January 8, 2022.

12. Claimant testified that, a few days after the date of injury, she attempted to log into the online portal to access her employee discounts and she was unable to log into the system. Claimant testified she called [Redacted, hereinafter MP], who was not in, and then called the corporate office, who sent her another PIN number that did not work.

13. Claimant testified on direct examination:

> Q: So, at that point, how would you - - if it is possible, how would you know about your shift?
>
> A: I didn't.

(Hrg. Tr. 42:8-10).

14. Claimant further testified on direct examination:

> Q: All right. And so it looked like you disagreed with [[Redacted, hereinafter MH]] about calling in?
>
> A: Yes.
>
> Q: Well, which shift - - just sitting here, which shift did you not call in on?
>
> A: I don't recall because I wasn't able to see the portal. I mean, I was calling in just to let them know what was going on and trying to update them.

(Hrg. Tr. 49:6-13).

15. On cross examination, when asked if her work schedule for the week of January 1, 2022, including January 4, January 6 and January 8, was posted in the online portal prior to December 31, 2022, she testified, "I guess. I assume. I don't know." (Hrg Tr. 64:22). Claimant testified she could have called the store or a co-worker to inquire about her schedule.

16. MH[Redacted] testified Claimant would not have been locked out of the online portal until a separation was final. He testified that Claimant never informed him she had an issue accessing the online portal.

17. Employer policy provides that employees may be terminated for two consecutive no-call, no-shows. Employees are required to notify Employer of an absence at least two hours prior to their scheduled start time. Per the policy, failure to notify Employer of an absence more than two hours in advance of a shift will be considered a no-call, no-show.

18. At hearing, when asked if she knew how many no-call/no-shows Employer permitted before termination, she testified, "I believe it is two or three." (Hrg. Tr. 53:24).

19. MH[Redacted] testified at hearing on behalf of Respondents. MH[Redacted] was the Store Manager of Claimant's store at the time of Claimant's work injury. MH[Redacted] testified that, after January 4, 2022, he did not speak to Claimant again until January 11 2022, despite Employer placing multiple telephone calls to Claimant in that time period to no avail. MH[Redacted] explained that the store has four telephone lines and that the calls placed to Claimant could have come from the store's main telephone number, or the other lines. He testified it is common practice to not use the main line as it is often busy. MH[Redacted] testified he tried to contact Claimant at least once for every shift for which she was scheduled to work and missed between January 5, 2022 and January 10, 2022.

20. On January 10, 2022, Claimant sought treatment at CareNow Urgent Care Center. Claimant testified she sought treatment at the urgent care center because she had a migraine and did not have any other doctor to go to. Claimant testified she had contacted another provider on Employer's designated provider list and understood that the provider was not accepting new clients at that time. She had scheduled an

appointment with another designated provider, Dr. Yamamoto, who was unable to see Claimant until February 3 2022. Claimant testified she planned to get a document from the urgent care center to provide to Employer regarding any work restrictions. While Claimant was completing documentation at the urgent care center, the urgent care center contacted Claimant's store, who informed the urgent care center that treatment was denied. Accordingly, Claimant was not evaluated at the urgent care center.

21. On January 10, 2022 at 8:24 a.m., MP[Redacted], Administrative Coordinator, emailed [Redacted, hereinafter AO], Human Resource Business Officer. She stated,

> We have a [team member] who has NCNS'd her past two shifts, the last time the Core talked to her was Tuesday when she called in for that shift, she had a shift on Thursday and Saturday and Core was not able to reach her. [Claimant] had hurt herself the week before here at the store and has a workman's comp claim open. Is there anything that needs to happen before submitting an ER ticket?

(R. Ex. C, p. 014).

22. MH[Redacted] testified that an ER ticket is a recommendation for termination, which is submitted to corporate, who makes the ultimate determination if the employee will be terminated.

23. AO[Redacted] replied to MP[Redacted] at 8:55 a.m. instructing AO[Redacted] to proceed with submitting a ticket.

24. At 11:10 a.m. on January 10 2022, MP[Redacted] emailed AO[Redacted]and ME[Redacted], Employer's Workers' Compensation Supervisor. She wrote,

> [Claimant] fell in the deli a couple of weeks ago. Since then she has called in for a couple of shifts but most recently she has NCNS'd her last two consecutive of shifts. Today, an urgent care center called for authorizations for a workman's comp. visit for [Claimant]. The center wasn't one of the ones that was listed and we denied the authorization. I had already opened an ER for job abandonment before the center called and just wanted to make sure that we were proceeding correctly.

(Id. at 015).

25. [Redacted, hereinafter ME] replied to MP[Redacted] on at 11:14 a.m. on January 10, 2022 notifying her that no one at the store was authorized to deny treatment and that authorizations for medical treatment needed to be reviewed by the claims department.

26. Employer's Timesheet Exceptions Report (R. Ex. D) is an internal document of Employer used by management that reflects employee attendance. The document reflects that MP[Redacted] marked Claimant's absences on January 1 and January 4, 2022 as excused, and her absence on January 6, 2022 as an unexcused no-call/no-

show. The document reflects that Claimant's January 8, 2022 absence was marked as excused and approved by MH[Redacted] at 6:33 a.m. on January 10, 2022.

27. MH[Redacted] addressed the discrepancy in his testimony. He testified that, early on Monday mornings, he quickly clears all exceptions for all employees to make sure each employee's time can be submitted to payroll. He does not investigate each entry. He testified he marked the exceptions report as excused at 6:33 a.m. on Monday January 10, 2022 before he had talked to his management team about Claimant's failure to call off for her shift.

28. Employer terminated Claimant due to no-call/no-shows for her scheduled shifts on January 6 and January 8, 2022. MP[Redacted] completed a Team Member Separation Form dated January 11, 2022 citing the reason for termination as no-call/no-shows on January 6 and January 8, 2022. She noted that attempts to contact Claimant were made by MH[Redacted] and MP[Redacted] on January 6, and January 8, 2022. MH[Redacted] signed the document on January 11, 2022.

29. Claimant, unaware of her termination, called MH[Redacted] on January 11, 2022. Claimant testified she called MH[Redacted] to obtain her correct claim number, as she had previously been provided an incorrect claim number. Claimant initially testified that she spoke to MH[Redacted] in two telephone calls on January 11, 2022. She later testified that it was one call.

30. Claimant's daughter recorded portions of Claimant's telephone conversation with MH[Redacted] on January 11, 2022. Three subparts of the telephone call were admitted into evidence as Claimant's Exhibit 16 and Respondents' Exhibits S-U. Claimant testified she recorded the call because she felt MH[Redacted] was speaking to her inappropriately and unprofessionally in what she described as a rude and sarcastic tone.

31. Claimant's call log reflects a call to MH[Redacted] at the store at 3:49 p.m. on January 11, 2022 for a duration of five minutes and nine seconds. The three recordings of the audio call submitted as exhibits total approximately two minutes and 25 seconds in duration.

32. The ALJ listened to each audio clip in its entirety. The clips start and stop suddenly throughout a larger conversation. During one audio clip (Cl. Ex. 16, video 3 and R. Ex. S), Claimant and MH[Redacted] state, in relevant part:

> MH[Redacted]: I've been straight up with you about everything.
>
> Claimant: Okay.
>
> MH[Redacted]: You're the one giving me the runaround by not calling us for your scheduled shift to keep us in the loop and see what's going on.
>
> Claimant: I called you Tuesday and told you I still wasn't feeling well, and I had Wednesday off.

MH[Redacted]: And then what about the rest of the week?

Claimant: I'm still down.

MH[Redacted]: Yeah, but you could've called me - -

Claimant: I mean - -

MH[Redacted]: and let me know. And then you go to an urgent care?

Claimant: Yeah, it's one of the four places listed on this print out.

MH[Redacted]: Right, but you gotta - - you need to call me to say 'Hey, I'm gonna go to the store - - I'm gonna go get this looked at - - and can you give me the information. You just take it on your own accord to go? You don't think the store should know that? I mean, you work in the medical field, you should know right? If that's the proper procedure.

33. In a second audio clip (Cl. Ex. 16, video 2, R. Ex. T), MH[Redacted] and Claimant state:

MH[Redacted]: - - inform the store?

Claimant: Inform the store of what? Me going into be seen?

MH[Redacted]: Yeah. And you're not showing up for your shift, right?

Claimant: Well I'm not going to be able to show up until I get a release.

MH[Redacted]: Right. But you still gotta let us know. You'll scheduled for a shift, right?

Claimant: So, am I gonna a get a claim, or?

MH[Redacted]: Yeah I'm looking. I'm pulling it up.

34. In the third audio clip (Cl 1, Resp. 3), MH[Redacted] provides Claimant a claim number. MH[Redacted] and Claimant then state:

MH[Redacted]: Keep us in the loop - - it is not fair for us at the store for you to not communicate with us. Alright?

Claimant: Okay.

MH[Redacted]: Let's all be adults about this and have those great conversations. (*Inaudible*) Not be afraid not return calls and do other things on the backend without informing your employer of these things. Alright?

CL: Okay.

(Telephone hangs up).

35. MH[Redacted] testified that he was unaware the telephone call between himself and Claimant on January 11, 2022 was being recorded. He testified he did not say anything to Claimant during the call about being terminated as they had just submitted the paperwork to corporate and a decision was still pending at the time. He testified that, during his conversation with Claimant, he was emphasizing to Claimant the necessity of communicating with the store about what was going on and about her condition if she could not come in for scheduled shifts.

36. Claimant testified that during their January 11, 2022 telephone MH[Redacted] did not make any mention of her being terminated. She testified that, when MH[Redacted] made multiple references to her failing to communicate with the store, she did not disagree with him because he was "screaming" at her on the call and she did not know what to say.

37. MH[Redacted]was not screaming at Claimant on the audio clips of the telephone call.

38. Claimant testified she did not become aware of her termination until receiving a COBRA letter at some unspecified time. The letter is dated January 10, 2022. She further testified she did not otherwise receive any written or verbal notification from Employer of her termination, nor did she speak to Employer after January 11, 2022.

39. Claimant's call log confirms Claimant placed a 2:29 long call to the main telephone number of Employer's store at 1:51 p.m. on January 15, 2022.

40. Respondents filed a General Admission of Liability on January 20, 2022 admitting for medical benefits only.

41. On January 13, 2022, Claimant sought treatment with a non-designated provider, Matthew Gray, M.D., at Mountain View Pain Specialists. She reported slipping and falling at work and experiencing severe headaches, worsening memory, cervical axial pain radiating into the left shoulder and left fingers, thoracic left-sided pain, and lumbar axial pain radiating into her left leg and foot. She further reported that ability to work and perform household activities were significantly affected by her symptoms. Dr. Gray referred Claimant for chiropractic treatment and physical therapy and ordered MRIs of the spine. He recommended that Claimant avoid lifting greater than 10 lbs. and that she take frequent breaks throughout the day.

42. On February 3, 2022 Claimant presented to designated provider David W. Yamamoto, M.D. at Peak to Peak Family Medicine, P.C. He assessed Claimant with cervical and lumbar strains, left leg pain and numbness, left arm pain and numbness, and a closed head injury with concussion. He restricted Claimant from all work.

43. Dr. Yamamoto continued Claimant's no-work restrictions through June 23, 2022.

44. Upon the referral of Dr. Yamamoto, Claimant saw Roberta Anderson-Oeser, M.D. at Premier Spine & Pain Institute, who referred Claimant for physical therapy, chiropractic care, neuromuscular massage and a neuropsychological consultation with William Boyd, Ph.D.

45. On June 24, 2022, Dr. Yamamoto released Claimant to work with restrictions of lifting, carrying, pushing, pulling no more than 5 lbs., walking no more than 1-2 hours per day, and changing positions every 15 minutes as needed.

46. On August 26, 2022 Dr. Yamamoto released Claimant to work up to four hours per day with restrictions of lifting, carrying, pushing, pulling no more than 8 lbs., walking and standing no more than 1 hour per day, and sitting 3-4 hours per day.

47. Dr. Anderson-Oeser drafted an undated letter responding to several questions from Respondents' counsel regarding Claimant's condition and status. She noted that prior medical records reflected that Claimant had a prior history of several conditions, including headaches, dizziness, neck pain, low back pain, stiffness in joints, tingling in feet, memory problems, and depressed mood, with prior diagnoses of and treatment for osteoarthritis of the knees, degenerative disc disease, fibromyalgia, migraine and depression. She noted prior records referenced Claimant informing her physicians of applying for disability. Dr. Anderson-Oeser opined that Claimant suffered a cervical strain, lumbar strain and left leg pain and muscle spasms as a result of the work injury. She opined that Claimant was not at MMI for her work-related injuries. She concluded that Claimant's any head injury was not work-related. She opined that Claimant needed 8 additional sessions of physical therapy, chiropractic treatment and neuromuscular massage treatments to reach MMI. Dr. Oeser opined that Claimant could perform seated work.

48. On October 13, 2022 Dr. Yamamoto restricted Claimant to working a maximum of 5 hours per day, 30 hours per week, with restrictions of lifting, pushing and pulling no more than 10 lbs., no more than 8 lbs. of repetitive lifting and carrying, no more than 1-2 walking hours of walking per day, standing sitting of 3-4 hours per day.

49. On November 3, 2022 Dr. Yamamoto noted that Clamant had sustained a non-work-related right fibular fracture when a box fell onto her leg in a private storage unit. Dr. Yamamoto continued Claimant's work restrictions.

50. On December 1, 2022, Allison M. Fall, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Fall's assessment was: status post fall leading to left hip and upper thigh contusion, right forearm contusion and adjustment disorder with increased anxiety. Dr. Fall opined that Claimant's symptoms were out of proportion to the mechanism of injury and that Claimant's subjective complaints were without correlating objective findings. She opined that Claimant reached MMI as of May 9, 2022 without the need for permanent impairment or further treatment for the work injury.

51. Claimant testified she has been unable to work since December 31, 2021 because of her injuries, symptoms and appointments. She testified that she has been under work restrictions since seeing Dr. Yamamoto. Claimant testified to numbness in her left side, pain, and an inability to stand for more than 3 hours in an 8-hour shift. Claimant testified she is unsure if she is capable of working 25-30 hour weeks. She confirmed she was not been offered work by Employer.

52. MH[Redacted] testified that, had Claimant showed up at any of her scheduled shifts following her injury date, he would not have had or allowed her to work as she did not have a work release, which she would be required to produce. He further testified that Employer did not offer Claimant because Employer had not received documentation stating Claimant's restrictions. He explained that, even if Claimant did not have a document allowing her to return back to work, she remained responsible for her contacting Employer regarding her scheduled shifts.

53. The ALJ finds MH's[Redacted] testimony, as supported by the employment records, more credible and persuasive than Claimant's testimony.

54. Claimant proved it is more probably true than not the December 31, 2021 work injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss.

55. Respondents proved it is more probably true than not Claimant is responsible for termination of her employment and thus Claimant is not entitled to TTD as of January 11, 2022.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the

witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

TTD

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a

recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As found, Claimant proved she is entitled to TTD benefits from December 31, 2021 through January 10, 2022. Claimant suffered an admitted work injury on December 31, 2021 which rendered her unable to resume her work as a deli clerk. Claimant's position required lifting and carrying up to 70 lbs. and continuously standing for up to 4 hours in an 8-hour shift. The provider at Lutheran Medical Center placed Claimant on 48-hour restrictions of lifting no more than 10 lbs. Claimant credibly testified she was unable to perform her job duties at such time due to the symptoms from the work injury. Claimant missed more than three work shifts as a result of the work injury. Accordingly, to the extent Claimant sustained wage loss from December 31, 2021 through January 10, 2022, she is entitled to TTD.

Responsibility for Termination

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the

termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, Claimant is not entitled to TTD as of January 11, 2022 as the preponderant evidence demonstrates Claimant was responsible for termination from her regular employment. Claimant's testimony and actions establish awareness and understanding of Employer's policy requiring employees to call Employer within two hours of a scheduled shift to notify Employer of an absence. On both January 1 and January 4, 2022, Claimant followed Employer's policy by calling out more than two hours in advance of her scheduled shifts. Claimant was aware that no-call/no-shows could lead to termination. She further specifically acknowledged a general understanding of the need to communicate her status with Employer when she testified that she was calling in to let Employer know what was going on and to update Employer.

Claimant's contention that she did not properly call out on January 6 and January 8, 2022 because she did not have access to the online portal and was unaware of her scheduled shifts is incredible and unpersuasive. Claimant had access to her work schedule for the week of January 2, 2022 on December 24, 2022 and for the week of January 9, 2022 on December 31, 2022, prior to her alleged inability to access the online portal. Claimant was aware of, and properly called off for, scheduled shifts just two and four days prior to her scheduled shifts later that week on January 6 and January 8, 2022. Furthermore, Claimant acknowledged that she could have contacted the store or a co-worker to inquire about her schedule if she was having an issue accessing her schedule.

The audio recordings of the January 11, 2022 telephone call between Claimant and MH[Redacted] further support the finding Claimant was aware she missed scheduled shifts and failed to properly notify employer of her absences. MH[Redacted] repeatedly references Claimant's failure to call out for scheduled shifts. At one point, Claimant responds that she did call off on Tuesday, January 4, 2022. When MH[Redacted] specifically asks her about the rest of the week, Claimant merely replies "I'm still down." Claimant did not ask what MH[Redacted] was referring to, nor in any way indicate she was unaware she was scheduled for other shifts and failed to call out for them as required. A reasonable person who was actually unaware of the scheduled shifts and need to call out would make some indication to her supervisor of that at the time. Claimant's stated reason for failing to address this in the recorded telephone call - that she did not know what to say because MH[Redacted] was screaming at her - is unpersuasive, as the ALJ listened to the audio in its entirety, and it did not evidence MH[Redacted] yelling at Claimant.

Based on Claimant's responses to MH[Redacted] during the January 11, 2022 telephone conversation, Claimant, of her own volition, chose not to contact Employer regarding absences for scheduled shifts on January 6 and January 8, 2022 because she because she felt she could not work and had not received documentation releasing her to work. Claimant's presumption that she did not need to contact Employer per Employer policy was unreasonable. Claimant does not argue, nor was any evidence

offered to demonstrate, that she reasonably relieved on some information or indication from Employer that, due to her circumstances, she was not required to follow policy regarding absences for scheduled shifts. Even if Employer would not have allowed Claimant to work a previously scheduled shift prior to providing a release, Claimant remained required to notify Employer of her absences under these circumstances, particularly when Employer had not received any documentation of a release or restrictions at that time.

To the extent Employer's Timesheet Exception Report indicates MH[Redacted] initially marked Claimant's January 8, 2022 absence as excused, MH[Redacted] provided a credible explanation, and other records support the timeline and reason for termination proffered by Respondents and found by the ALJ. Based on the totality of the credible and persuasive evidence, it is more probably true than not Claimant was at fault for her separation from employment and thus not entitled to TTD benefits as of January 11, 2022.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $500.00.

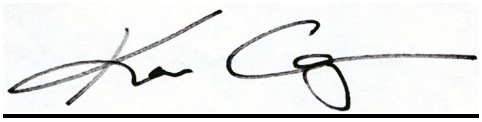
2. Respondents shall pay Claimant TTD from December 31, 2021 through January 10, 2022.

3. Claimant was responsible for her termination from employment, and thus not entitled to TTD benefits as of January 11, 2022.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 20, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-180-032-001

ISSUES

I. Whether Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable industrial injury, entitling Respondent to withdraw its admissions of liability.

II. In the alternative, whether Claimant proved by a preponderance of the evidence the lumbar surgery recommended by Robert Blatt, M.D. is reasonable, necessary and related.

FINDINGS OF FACT

1. Claimant is a 59-year-old who has been employed with Employer for approximately six years.

2. Claimant has a prior history of left hip pain noted in personal medical records dated December 2016 and January 2017, as well as low back pain radiating into his left lower extremity in January 2021.

3. Claimant alleges he sustained a compensable work injury on August 4, 2021 that was exacerbated while at work on August 10, 2021.

4. Claimant testified at hearing that in the days leading up to his work injury he had been working with the hand asphalt patching crew, which included removing old asphalt, pushing the road base, raking, pushing and shoveling. Claimant testified that his symptoms began on August 4, 2021 when he felt a pinch in his back and pain in his groin area while raking. He testified he went to work on August 10, 2021 feeling completely normal. Claimant participated in stretching exercises with his crew as part of their normal occupational activity to prepare for the day. Claimant testified that, while engaged in a hip flexor stretch, he felt a sharp stinging and burning pain in his lower back. Claimant stated he stopped the stretch and attempted to walk around to relieve his symptoms. He testified that his symptoms worsened and he began experiencing numbness and radiating pain down his left leg. Claimant found himself unable to climb stairs to use the restroom, and ultimately fell when stepping off of a sidewalk due to the lack of feeling in his left leg.

5. [Redacted, hereinafter TJ] testified at hearing on behalf of Respondent. TJ[Redacted] works for Employer as the road and bridge director. TJ[Redacted] testified that, per Employer records documenting the day, location and type of work performed by each worker, on Claimant was performing mowing on August 4, 2021 and asphalt patching on August 5, 2021. As it was typical for employees in the summer to not work weekends, Claimant did not work August 6-8, 2021. Claimant performed mowing duties

on August 9, 2021. TJ[Redacted] explained that raking asphalt involves pushing and the asphalt, which he estimated weighs around 150 pounds per cubic foot.

6. Claimant presented to the emergency department at UC Health on Tuesday, August 10, 2021 with complaints of low back pain. Regarding the onset of symptoms, the provider noted Claimant "developed back pain last Thursday. He believes this began while at work. He does manual labor. Starting Sunday noted worsening back pain and then yesterday numbness to left extremity. Either last night or today started noting weakness." (R. Ex. F, p. 31). Claimant reported he fell earlier in the day due to weakness. A lumbar spine MRI of revealed degenerative changes of the lower lumbar spine, greatest at L4-5, with mild spinal canal and mild/moderate bilateral foraminal narrowing. There was no effacement of the nerve. The provider's clinical impression was acute left-sided low back pain with left-sided sciatica and numbness and tingling of the left leg. Claimant was provided a walker and prescribed prednisone, hydrocodone, and flexeril. The provider referred Claimant for physical therapy and instructed him to follow-up with a worker's compensation physician.

7. On August 11, 2021 Claimant saw Amber R. Payne, PA-C at authorized provider Workwell Occupational Medicine ("Workwell"). Regarding the mechanism of injury, PA-C Payne noted,

> [Claimant was] Doing hot asphalt patching shoveling and raking on 8/4/21 and was really sore for a couple days. He was doing his preventative stretching at work yesterday and he was getting more and more sore and all of the sudden lost feeling in the left leg. He almost fell when he tried to get up on a prota (*sic*) potty trailor (*sic*). He reports that when he went to step down out of the office his leg went out and he went right down on his buttocks.

(R. Ex. G, p. 37).

8. Claimant reported to PA Payne that most of his pain was in his groin. He denied experiencing prior problems of the same type. On physical examination, PA Payne noted Claimant was unable to lift his left leg in the flexed position, absent sensory at the anterior thigh, and unable to extend knee actively with full passive extension. She diagnosed Claimant with an injury of the left femoral nerve at the hip and thigh level and referred him for an EMG and physiatry consultation with Dr. van den Hoven. PA Payne removed Claimant from all work and referred Claimant for a pelvic MRI. Regarding her review of the 8/10/2021 lumbar spine MRI, PA Payne remarked that the MRI results did not correlate with findings of the left lower leg, but that Claimant's numbness and loss of strength did correlate with the femoral nerve innervation.

9. Claimant returned to Workwell on August 12, 2021 and saw his primary authorized treating provider ("ATP") Robert Dupper, M.D. Regarding the mechanism of injury Dr. Dupper noted,

> On 8/4/2021 [Claimant] states he was working on an asphalt crew. Part of his job was to rake the asphalt. When he pushes the rake, he is pushing from 50 - 100 lbs. of asphalt. To get enough force to push it he places the end of the rake handle against the left groin area, and pushes with his groin/hip. He did this intermittently throughout the day on 8/4/2021. The next few days he was quite sore in the groin/hip area, but was able to continue working.
>
> Two days ago immediately after doing the morning stretching exercises he had an increase of pain in the left groin. He then noticed at the front of the left thigh fairly suddenly became numb. He could feel the numbness start from the groin and extend down the front of the thigh, knee, and proximal lower leg. He states there is also numbness in the 4th and 5th toes of the left foot.

(R. Ex. H, p. 43).

10. On examination, Dr. Dupper noted tenderness in the left groin, decreased sensation over the left anterior thigh extending distally to the proximal third of the anterior lower leg, decreased sensation to light touch and pinprick, and significant weakness in the quadriceps. Dr. Dupper continued the diagnosis of a femoral nerve injury and continued Claimant's work restrictions.

11. Claimant underwent pelvic MRIs on August 12, 2021 which revealed no acute abnormalities. The radiologist specifically noted that the left femoral nerve appeared normal.

12. On August 17, 2021 Dr. Dupper responded to a letter from Insurer requesting his opinion on the work relatedness of Claimant's condition. Dr. Dupper reiterated his understanding of the mechanism of injury as documented in his August 12, 2021 medical report. He noted Claimant had an onset of pain on 8/4/2021 while raking asphalt and then, on 8/11/2021 while at work stretching, the left groin pain increased significantly. Dr. Dupper opined the events surrounding Claimant's onset of left thigh numbness and weakness were all associated with his work activities and thus causally related to his work.

13. Respondent subsequently filed General Admissions of Liability ("GALs").

14. Dr. Dupper reexamined Claimant on August 19, 2021, noting Claimant now had a little more movement of his left leg. Claimant was using a cane. Claimant reported that his left leg continued to give out, causing him to fall on several occasions. Claimant further reported that he was now experiencing severe pain in the left gluteal area radiating to his left knee when laying down. Dr. Dupper noted, "[Claimant] states it feels like sciatica, which he has had in the past, but it hurts when his leg is extended, not when he is sitting." (R. Ex. L, p. 59). Claimant complained of mild pain in the lower back. Dr. Dupper noted Claimant's MRI did not demonstrate significant nerve impingement in

the lumbar spine and it did not appear Claimant's gluteal pain is radicular. Dr. Dupper continued Claimant's physical therapy and restrictions.

15. Upon referral from Dr. Dupper, Claimant presented to Raymond P. van den Hoven, M.D. for EMG testing on August 24, 2021. Regarding the mechanism of injury, Dr. van den Hoven noted,

> Apparently, he was involved in raking asphalt on 08/04/2021. This involved pushing a fairly wide rake and pushing fairly heavy asphalt. He has done this for a number of years, but that evening is when he noticed pain in his left groin pain (*sic*). The pain was aggravated the next day on the 5th and than (*sic*) on the 10th became significantly to the point that he went to the emergency room.

(R. Ex. M, p. 65).

16. On examination, Dr. van den Hoven noted obvious weakness in Claimant's left lower extremity, moderate tenderness in the lower thoracic spine, and reproducible discomfort in the left groin region with palpation and percussion. Dr. van den Hoven further noted Claimant had left lower extremity numbness, burning discomfort, and fairly global weakness with sensory changes all the way up to approximately T9 or T10 dermatomes. He opined Claimant likely had a disc injury in the lower thoracic spine around T9-10, just above where the MRI had visualized. Dr. van den Hoven recommended Claimant undergo a thoracic MRI. He suggested Claimant wait to undergo the recommended EMG, noting it takes 21-24 days for the optimal degree of findings to manifest after a nerve root injury.

17. Claimant underwent a thoracic spine MRI on August 27, 2021 which revealed some facet arthropathy in the mid to lower thoracic spine worst at T8-9, but no evidence of trauma or significant canal or foraminal narrowing at any level.

18. On September 8, 2021 Claimant returned to Dr. van den Hoven for an EMG. Dr. van den Hoven noted Claimant's thoracic MRI did not demonstrate any results that would affect Claimant's thoracic cord and produce his left leg symptoms. Dr. van den Hoven opined the results of the EMG were consistent with left L4 radiculopathy, moderate to severe, with abnormalities in the lumbar paraspinals, without clear evidence for L5 or S1 root findings. He stated, "With lumbar paraspinal abnormalities, this is not likely due to lumbar plexus injury. There is a possibility of acute idiopathic lumbar radiculoplexus neuropathy, but disease course is not consistent with such." (R. Ex. O, p. 74). Dr. van den Hoven recommended Claimant undergo a left L4 nerve block for diagnostic and therapeutic purposes, as well as a repeat lumbar MRI.

19. Claimant underwent a second lumbar MRI on September 20, 2021 that was compared to the August 10, 2021 lumbar MRI. The radiologist noted a broad based disc bulge at L4-5 and a superimposed central disc protrusion measuring 5 mm in AP diameter, partially effacing the ventral thecal sac, moderate degenerative facet

arthropathy and a small right facet joint effusion. There was overall a relatively similar mild stenosis of the bilateral neural foramen, right greater than left, and mild spinal canal stenosis. The radiologist's impression was: "Slight increase in size of a central disc protrusion at L4-5 and development of mild spinal canal stenosis at this level. Otherwise relatively similar appearance of the mild to moderate severity multilevel degenerative disease in the remainder of the lumbar spine, otherwise as detailed in the above report." (R. Ex. Q, p. 82).

20. Claimant returned to Dr. Dupper on October 13, 2021 with complaints of increased pain in his left buttocks radiating to the left distal anterior thigh and to the medial aspect of the knee and calf. Dr. Dupper noted profound weakness in the left knee extensors of the thigh and the hip flexors. He noted Claimant's EMG showed L4 radiculopathy but that the lumbar MRI did not indicate L4 impingement. He referred Claimant for a neurosurgical evaluation.

21. On October 20, 2021 Claimant underwent a left L4 selective nerve root block with Timo Quickert, M.D.

22. Claimant testified that he only experienced a few minutes of relief from the injection before his symptoms returned.

23. Dr. Quickert's office conducted a follow-up telephone call with Claimant on October 27, 2021, at which time Claimant reported that he experienced 60% relief for three hours immediately following the injection, but no relief thereafter.

24. At a follow-up examination with Dr. Dupper on October 27, 2021, Dr. Dupper noted that the injection did not seem to have changed anything very much. Claimant continued to report pain in the low back and left leg weakness.

25. On November 5, 2021 Claimant presented to neurosurgeon David Robert Blatt, M.D. at UC Health Brain and Spine Clinic. On examination, Dr. Blatt noted atrophy of the left thigh and leg, decreased sensation, back pain with hip manipulation and tenderness of the left lateral hip and across the lumbosacral region. He reviewed Claimant's 8/10/2021 lumbar MRI and remarked, "To level degenerative changes not unusual for age. Muscle atrophy. Normal conus. Diffuse disc protrusion at L4-L5. There is mild foraminal narrowing. I do not appreciate any neural impingement. No significant canal narrowing." (R. Ex. T, p. 97). He noted that 9/20/2021 lumbar MRI showed similar findings. He wrote, "In reviewing the 2 lumbar MRIs cannot rule out the possibility of L4 nerve compression within the foramen." (Id.) Dr. Blatt also reviewed the 8/27/2021 thoracic MRI, 8/12/2021 pelvic MRI, and EMG results. Dr. Blatt opined,

> Symptoms and clinical findings are most consistent with a lumbar plexopathy. Multiple nerve distributions are involved. EMG was performed 9/4 which was less than 1 month after weakness developed. That study was most consistent with L4 root involvement of plexopathy could not be ruled out. EMG changes can take 6 weeks or more to develop. At this time I recommend repeat electrodiagnostic studies of the left lower extremity. If

> plexopathy is not demonstrated then he would need MRI of the brain and cervical spine. Lumbar MRI findings do not explain his clinical presentation.

(Id. at p. 94).

26. Dr. van den Hoven performed a repeat EMG on December 7, 2021. He remarked,

> It should be noted that previous testing done in September did show moderate to severe left L4 lumbar radiculopathy. Unfortunately, the imaging is not conclusive for such.
>
> ELECTRODIAGNOSTIC TESTING: Today his EMG studies are essentially unchanged from before. There continue to be abnormalities in the paraspinal muscles as well as the muscles supposed by L4 nerve root in common. There is involvement of the femoral obturator and sciatic nerves (sciatic nerve component with L4). The iliopsoas is also involved. No clear evidence for L5 or S1 involvement.
>
> The only changes I see on today's study is that there is some increase in polyphasia in the L4 myotome, which would be consistent with early terminal sprouting and attempt to reinnervate denervated muscle fibers, which is anticipated at this stage.

(R. Ex. U, p. 99).

27. Dr. van den Hoven remarked,

> Lumbar paraspinals are clear (*sic*) abnormal, and findings are in multiple peripheral nerve territories (femoral, obturator, and sciatic (via superior gluteal nerve and fibular nerve)). Continues to demonstrate significant mechanical component of symptoms, with triggering of symptoms readily with palpation at L4-5 interspinous region, and positive femoral nerve stretch test. This suggests significant irritability of L4 root, and given degree of symptoms, involvement of the dorsal root ganglion is suggested. Typically, this type of presentation is most likely related to lumbar radiculopathy, though acute idiopathic radiculoplexus neuropathy could possibly present this way. However, since is (*sic*) now 4 months into clinical course, I have never seen an acute idiopathic radiculoplexus neuropathy show such continued mechanical irritability, and furthermore, onset presentation is much more consistent with an acute, rapid onset of symptoms, faster than typically observed with radiculopathy neuropathy (whereas lumbar radiculopathy due to root impingement from disk herniation or small hematoma could present this way). Given overall findings, left L4 root involvement at or just lateral to foramen appears to be

> implicated as the cause. Did have 2 hours of essentially complete pain relief after a left L4 nerve root block, also suggesting mechanical involvement of that root. This is clearly not an isolate femoral neuropathy given the findings in other peripheral nerve distributions. No clinical evidence to suggest shingles. This is clearly lower motor neuron injury, not due to CNS involvement.

(*Id*. at 101).

28. Claimant underwent an x-ray of the lumbar spine on December 20, 2021 which revealed mild degenerative disease throughout the lumbar spine and mild facet arthropathy at L3-4 through L5-S1.

29. On January 14, 2022 Dr. Blatt followed up with Claimant via telephone, noting extension x-rays did not show any instability. Dr. Blatt again reviewed Claimant's lumbar MRI. He noted the MRI results showed a disc protrusion at L4-5 with mild foraminal narrowing bilaterally but no clear neural impingement. Dr. Blatt opined, "The patient's symptoms and clinical findings are consistent with L4 involvement. The electrodiagnostic findings would be consistent with impingement of the L4 root in her far lateral and that is consistent with MRI showing some elevation superiorly of the L4 nerve root and foramen." (R. Ex. W, p. 105). He discussed the possibility of Claimant undergoing a left L4-5 far lateral extraforaminal microdiscectomy, noting that the procedure "in some ways be 'exploratory' as we do not see definitive nerve compression although his clinical and other diagnostic testing does lead to the site as being the source of his symptoms." (*Id*.)

30. At the request of Respondent, Carlos Cebrian, M.D. performed an Independent Medical Examination ("IME") on March 16, 2022. Dr. Cebrian issued an IME report dated April 4, 2022. Claimant reported he first developed symptoms on 8/4/2021 when he finished raking asphalt. He further reported his symptoms increased over the weekend and on 8/10/2021 he felt a pinch while stretching. Dr. Cebrian noted, at the time of his IME, clinical diagnosis was not clear. He concluded he could not state whether it was medically probable Claimant's complaints are causally related to his claim based on the available information. He remarked although there was evidence of L4 radiculopathy, there were not objective findings on the lumbar MRI correlating with that level, nor findings explaining the significant amount of atrophy and weakness, which developed quickly. Dr. Cebrian explained that, if there were a disc lesion, there would be more significant findings on the lumbar MRI. He noted that, if there is pathology in the lumbar plexus, it is not explained by any of the diagnostic testing. Dr. Cebrian remarked that Claimant's "clinical picture is confusing" and did not add up to a lumbar spine work-related injury with nerve root compression. He opined Claimant's presentation is more consistent with a systemic neuromuscular condition resulting in focal muscular atrophy. He explained that there are multiple different possible causes of such condition. Due to Claimant's age and profound and significant atrophy with minimal MRI findings, Dr. Cebrian recommended additional neurological work-up outside of the workers' compensation system. He ultimately opined Dr. Blatt's request

for left L4-5 far lateral extra foraminal microdiscectomy should be denied as not medically reasonable, necessary or related, noting there were no specific objective findings correlating with Claimant's pathology.

31. On April 14, 2022 Dr. Dupper documented,

> [Claimant] continues to have profound weakness of the left anterior thigh. He had an IME ordered by the insurer. The examiner concluded the condition is not work related, and the surgery recommended by Dr. Blatt is not medically necessary or indicated. He suggested there is a neuromuscular condition causing the weakness, but failed to give a differential diagnosis of what those conditions might be. It seems unlikely for a neuromuscular condition to affect the left suddenly and completely without any gradual onset. [Claimant's] condition does not have a clear and definite diagnosis. Because we are unable to say absolutely that the condition is or is not caused by his employment a neurology consult is indicated in my medical opinion to define what neuromuscular disease, if any, is affecting him.

(R. Ex. Y, pp. 130-131).

32. On May 5, 2022 Dr. Dupper noted Insurer denied continued workup of the etiology of Claimant's leg weakness and that, without further workup, the etiology of the weakness could not be determined. He remarked Claimant would be scheduled for an impairment rating as no further workup was being authorized by Insurer. Dr. Dupper opined that it was more than 50% probable that the weakness Claimant is experiencing is related to his work, noting that the providers had not been able to show this condition was due to any other specific condition.

33. On May 26, 2022 Dr. Dupper recommended Claimant undergo a repeat MRI and a neurologic evaluation to clearly determine causation. He reasoned,

> The cause of [Claimant's] condition has not been diagnosed. Temporally [Claimant's] symptoms correlated with his work. Additionally the symptoms came on suddenly, and were not a slow progressive onset. Usually a neuromuscular disease would progress slowly and symptoms would be gradually progressive. [Claimant's] symptoms were essentially the same at onset as they are now. The changes seen since onset are likely the result of his continued weakness, and loss of function and probably not a progressive underlying disease. Neither Dr. Blatt, or Dr. van den Hoven mentioned the probability of a neuromuscular disease. Both of them concluded that the symptoms were most consistent with an L4 radiculopathy. However, as I have stated we have not made a diagnosis that shows the condition is definitely not caused by his work, or that it definitely was caused by his work. In my opinion this should be defined clearly before concluding it is not a work related condition.

(R. Ex. Z, p. 136).

34. On June 7, 2022 neurologist Alexander H. Zimmer, M.D. performed an IME at the request of Respondent. Dr. Zimmer issued an IME report dated June 14, 2022. Dr. Zimmer noted that Claimant's physical examinations revealed a very diffuse sensory loss pattern, as well as motor symptoms that extended beyond the usual myotome of the L4 nerve root. Regarding the September 8, 2021 EMG, he remarked that, while denervation changes were noted predominantly in the left L4 muscles, they also were noted in muscles beyond the usual L4 distribution, with other areas showing reduced motor unit recruitment and discrete interference patterns consistent with neuropathic change in three non-L4 muscles.

35. Dr. Zimmer concluded Claimant's "clinical presentation of diffuse motor weakness and diffuse sensory abnormalities in the left lower extremity, associated with pain at the onset and subsequent muscle atrophy primarily of the thigh muscles followed by modest improvement in strength over several months", along with the results of the EMG studies and negative MRI findings, was most consistent with a diagnosis of lumbosacral radiculoplexus neuropathy. He explained,

> Lumbosacral radiculoplexus neuropathy is typically an idiopathic inflammatory condition which involves a combination of pathology of the lumbosacral plexus and lumbosacral nerve roots. A similar picture can be seen in patients with diabetes or with a variety of inflammatory diseases. In [Claimant's] case, there does not appear to be any clear incident at work that would be associated with the production of pathology involving the lumbosacral plexus. Therefore, it is my opinion to a medical probability that [Claimant's] condition is not work related but is most consistent with an idiopathic medical condition [lumbosacral radiculoplexus neuropathy] that developed in a subacute fashion while [Claimant] was participating in routine work activities and routine exercise activities, which do not correlate etiologically with a lumbosacral plexus injury.

(R. Ex. AA, p. 157).

Dr. Zimmer noted Claimant had shown some degree of recovery of motor function and some reduction in his original pain symptoms, which he explained was typical over time in patients with lumbosacral radiculoplexus neuropathy. He recommended Claimant follow up with a neurologist to review bloodwork that may be associated with various inflammatory mechanisms.

36. On August 16, 2022 orthopedic surgeon Michael Janssen, D.O. performed an IME at the request of Claimant. Claimant reported that on August 4, 2021 while raking asphalt he felt a pull towards the left side in his low back near his lumbosacral plexus and began experiencing some pain in his thigh, which progressed over the next number of days. He further reported that within a week he was doing some stretching at work

associated with numbness and tingling. Dr. Janssen reviewed several MRIs and EMGs, noting that the most recent lumbar MRI on September 21, 2021 showed a disc herniation centrally at L4-5, but was not lateralized per se, and revealed no other obvious compressive pathology. Dr. Janssen assessed Claimant with a work-related injury, and possible plexopathy and possible radiculopathy. He stated,

> In my professional opinion, after reviewing all of this information, the patient is not clinically improving. He correlates this to a clear-cut occupational condition. He does have substantial motor weakness in more than one dermatomal distribution that is not explained on the MRI…I recommend the following: A repeat MRI scan of the lumbar spine and possibly now an EMG to correlate with this because none of this actually makes sense from a musculoskeletal standpoint. He has clear-cut objective pathology. This does not appear to be a case where subjective symptoms outweigh clinical findings."

(R. Ex. BB, p. 163).

37. Dr. Dupper reexamined Claimant on August 18, 2022, noting some improvement. He referred Claimant for another lumbar MRI and EMG of the left lower extremity.

38. Claimant underwent a third lumbar MRI on August 26, 2022. The radiologist noted an ongoing disc protrusion at the L4-L5 level indenting the right thecal sac with associated diffuse disc bulging encroaching on both neural foramina and central canal and bilateral foraminal stenosis. The radiologist's impression was: "1. No significant change compared to the September 20, 2021 MRI. 2. L4-L5 central/right paracentral disc protrusion. 3. Milder spondylotic changes at other levels." (R. Ex. DD, p. 170).

39. On August 30, 2022 Claimant was evaluated outside of the workers' compensation system at Kaiser by Dr. David Weiner. Dr. Weiner diagnosed Claimant with lower back pain with radiculopathy and recommended a referral to neurology.

40. Upon referral by Dr. Dupper, Claimant presented to neurologist Kenneth Morris, M.D. at UC Health Neurology Clinic on September 6, 2022. Regarding the mechanism of injury, Claimant reported that he felt a pop in his back while getting ready for work then subsequently lost feeling in his left leg. Dr. Morris remarked,

> I agree there is good evidence for possible L4 nerve root involvement, but symptoms also seem to extend to other nerve roots, especially sensory symptoms. MRI of the lumbar spine does not show any clear area of L4 nerve impingement. Although he does not have a history of diabetes, I think monophasic inflammatory radiculoplexopathy is still a possibility.

(R. Ex. EE, p. 173).

Dr. Morris recommended an MRI of the left lumbosacral plexus for evaluation of any structural compression and another EMG.

41. On September 26, 2022 Anjmun Sharma, M.D. performed an IME at the request of Claimant. Claimant reported that on August 4, 2021 he felt symptoms when he finished raking asphalt and then felt a pinch on August 10, 2021 when stretching. Dr. Sharma opined Claimant was not at maximum medical improvement ("MMI"), noting Claimant had ongoing pathology in his lumbar spine or in his left plexus in lower extremity evidenced by significant atrophy and weakness in the left lower extremity. Dr. Sharma wrote,

> I am very surprised that this patient has gone on for well over one year nearly 14 months since the date of injury and he is still unable to get a simple procedure to alleviate the disc herniation on the nerve root. The patient clearly has an injury. This is supported by the MRI at L4-L5. This is also supported by the EMG findings which has been completed three times now. We are reconfirming the same diagnosis over and over. At this point in time, it is highly unlikely that a new diagnosis is going to be elicited While it is true that the patient may have an injury to the plexus, this will not necessarily be able to be addressed until the primary lesion is addressed which is the lumbar spine. The patient has a significant amount of atrophy in the left lower extremity. It takes quite a bit of time for such atrophy to occur but this atrophy has occurred because the patient's nerve is not firing properly and that is because it is compressed. The patient has a compressed disc, compressing on the left L4 nerve root This is resulting in the symptoms that are all consistent in the myotomal and dermatomal pattern on physical exam…The patient does not have knee pathology. He does not have a thoracic nor does he have a cervical pathology. The patient does not have a systemic, chronic immune or inflammatory problem. In these cases where there is a chronic systemic problem, this occurs in multiple body parts and is usually bilateral and symmetrical. To even raise this as a point of issue or to deny medical care because of alternative theories or alternative realities that do not exist is simply ignoring the evidence and the data that is already available in this claim.

(Cl. Ex. 6, pp. 91-92).

He recommended a repeat MRI of the lumbar spine, a repeat EMG of the left lower extremity, a surgical consultation with a neurosurgeon, physical therapy, and an MRI of the lower plexus to completely understand whether or not there is a lesion that is also in concomitant with the injury at L4 nerve root.

42. Dr. van den Hoven conducted a third EMG on September 28, 2022, noting results showed improvement in innervation. Dr. van den Hoven concluded,

> This overall pattern while not classic for it early on and certainly not suggested on his physical examination does now suggest that his initial insult to the nerve supply of the left lower extremity was due to acute idiopathic radiculoplexus neuropathy. There clearly were abnormalities in the lumbar paraspinal muscles early on on (*sic*) needle study. While plexus concern in the pelvis is a possibility, I doubt ongoing compression as he is improving clinically as well as electrodiagnostic testing evidence is showing improvement as well. Prior lumbar imaging does not suggest a significant L4 nerve root entrapment and given his improvement now it is more consistent with noncompressive neuropathy.

(R. Ex. FF, p. 178).

Dr. van den Hoven opined Claimant would show significant additional improvement over the next 6-12 months.

43. An October 19, 2022 MRI of the sacrum and lumbar sacral plexus revealed no abnormalities.

44. Dr. Zimmer issued an addendum IME report on October 28, 2022 after reviewing additional medical records. Dr. Zimmer continued to opine that his original assessment and diagnosis of lumbosacral radiculoplexus neuropathy remained, and was reinforced by additional clinical and EMG findings. He explained that evidence of reinnervation of Claimant's proximal left lower extremity muscles is consistent with recovery of some of the nerve fibers affected by the lumbosacral radiculoplexus neuropathy. Dr. Zimmer again noted that this type of plexopathy is typically idiopathic and inflammatory and is not related to trauma. Regarding Dr. Sharma's IME report, he explained that Dr. Sharma included an assessment of the lumbar MRI scans that was at odds with MRI scan interpretations by the radiologists, as well as by the surgeons who have examined Claimant. He remarked other providers all noted the absence of a compressive lesion on the MRI.

45. Dr. Dupper attended a SAMMS conference with counsel of both parties and issued a note on November 9, 2022 changing his opinion on the causality of Claimant's condition. Dr. Dupper opined Claimant has an idiopathic lumbosacral plexopathy and that he was unable to state with more than 51% certainty the actual cause of the condition.

46. Dr. Sharma testified on behalf of Claimant by pre-hearing deposition on December 7, 2022. Dr. Sharma was admitted as a Level II accredited expert in occupational medicine. Dr. Sharma testified the diagnoses of lumbar radiculopathy and lumbar plexopathy are interchangeable and that, whether Claimant has radiculopathy or plexopathy, it is work-related. He stated,

> …So an acute injury indicated that it was something that occurred as a result of a particular incident, a particular time or perhaps a series of

events that occurred in a short period of time. He was working. He was not having any pain. You know, for the record, he has had pain in his back before, but the pain resolved quickly without any need for intervention. The pathology that we see now on the imaging studies and the EMG supports the fact that this is a work-related condition. This did occur at work. This occurred at a specific time, a specific place, and specific activity, and all of these things have contributed to what is a workers compensation injury.

Q: Okay is the controversy over radiculopathy versus plexopathy tied to the multiple dermatomes that are involved in this?

A: Yes.

Q: So could you explain that to us?

A: Sure. So let's just talk, you know, let's use some definitive terms so, you know, everybody can understand what we are saying.

When we are talking about a radiculopathy we are talking about a nerve…if you are having pain in the nerve all the way down from the back or near the root where the issue is occurring, for example a herniation, that is going to present as a radicular pain all the way down into the leg or just a small portion of it, okay, depending upon how much of an impingement is occurring in the spine.

You know, when we are talking about a plexopathy, you know, we are talking about a network of nerves, not just one nerve, which is a radicular pain, but a network of nerves.

(Dr. Sharma Dep. Tr., p. 6:14-25, p. 7:1-25, p. 8:1-7).

47. Dr. Sharma clarified that either or both of the Claimant's occupational activities of stretching and/or the motions needed for asphalt repair could cause lumbar plexopathy. He testified his conclusion regarding Claimant's condition is supported by Claimant's subjective complaints and objective findings. Dr. Sharma testified that objective clinical findings include weakness, pain, burning, tingling and atrophy, and that objective findings on MRI were an extruded fragment at L4-5. Dr. Sharma acknowledged he did not personally review the MRI film, but believed this was referenced in Dr. Blatt's report. He testified that such reference in Dr. Blatt's report indicated to him that Dr. Blatt felt the nerve was being impinged by extruded fragments that you may not be able to see on the MRI. Dr. Sharma further testified the EMGs indicated a nerve root impingement starting from the lumbar spine at the L4-5 nerve root, and that the nerve block was diagnostic because of Claimant's good initial response. Dr. Sharma acknowledged that he had not reviewed any EMGs conducted after December 9, 2021.

48. Claimant testified at hearing that, prior to the work incident he had some minor hip and lumbar issues in the past, but that the symptoms from the August 10, 2021 work incident were completely different than anything that he had previously experienced. Claimant testified that in December 2016 he experienced some pain and swelling in his hip, whereas the August 10, 2021 incident caused numbness and a burning sensation, which he had never before experienced. Claimant further testified he also experienced atrophy and weakness as a result of the work injury, which he did not have previously. Claimant testified that he has experienced some slight improvement in his condition over time, but continues to experience significant weakness.

49. Dr. Dupper testified at hearing on behalf of Respondent. Dr. Dupper is an occupational medicine physician who has been practicing since 1985. Dr. Dupper testified he initially believed Claimant's condition was work-related, but that he now agrees with the conclusions of Drs. Zimmer and van den Hoven that Claimant's condition is idiopathic. Dr. Dupper testified he also discussed the matter with Dr. Morris. Dr. Dupper further testified he was unfamiliar with the condition of lumbar radiculoplexus neuropathy prior to treating Claimant. He stated that he has since conducted some reading on the condition, but not extensively. He acknowledged that he was not qualified to answer certain questions regarding the condition. Dr. Dupper stated he has not personally reviewed any research suggesting Claimant's condition could be caused by trauma; however, he testified that the condition can be caused if there is some sort of impact on the lumbosacral spine like a major injury such as pelvic fracture with displacement. He testified that it might be possible stretching/traction could traumatize the plexus and that it could be possible to have both radiculopathy and plexopathy concurrently. Dr. Dupper did not offer an opinion on whether the recommendation for a microdiscectomy is reasonable, necessary and related, noting he is not a surgeon.

50. Dr. Zimmer testified at hearing on behalf of Respondent as an expert in neurology. Dr. Zimmer testified consistent with his IME reports and continued to opine Claimant suffers from non-work-related idiopathic lumbar radiculoplexus neuropathy. He explained lumbosacral radiculoplexus neuropathy is a disease that can affect multiple areas, including the nerve root, the plexus, and the peripheral nerve, and that each case is a little different. He stated,

> …it can be quite confusing if you're the first person to see the patient because when it starts, it could start with just one nerve root area being involved, or one plexus area being involved, or one nerve area being involved. But, you know, typically, it's on the average what we would call subacute, meaning that it starts off sort of relatively suddenly, but it can evolve over a period of days or weeks, and then it stabilizes. And then eventually, it starts to improve. So that's the typical course.

(Hrg. Tr. p. 59:21-25, p. 60:1-4).

51. Dr. Zimmer explained that Claimant's course is consistent with lumbar radiculoplexus neuropathy. He testified that the condition can look like an L4 nerve root issue at the beginning in the subacute phase, as was the case in Claimant's situation. He explained that Claimant's providers initially assessed a femoral nerve injury, then L4 radiculopathy, but that Claimant's very diffuse sensory symptoms and weakness of muscles affected multiple nerve and root areas beyond L4, encompassing the whole nerve supply from L2 to S2. Dr. Zimmer reiterated that the lumbar MRIs did not show a disc compressing the L4 nerve root or any others. He noted MRI evidence of bilateral foraminal narrowing, which he explained is typically degenerative, and was equal on both sides for Claimant. Accordingly, he stated that there was no explanation based on the lumbar MRI findings of why Claimant's symptoms were on one side. Dr. Zimmer testified there would have to be obvious disc compression on MRI to cause the significant weakness Claimant is experiencing, not simply nerve root irritation. He further explained that the pelvic MRI did not evidence any issues with the plexus.

52. Regarding the EMGs, Dr. Zimmer testified that the EMGs predominantly pointed to issues in the L4 area, but also L5-S1 and well as L5 and L3 muscles. He explained Claimant's condition results in small vessel inflammation that causes diffuse patchy problems in the lumbar area, as well as in the plexus and nerves. Accordingly, there was some confusion in the beginning of Claimant's treatment because the EMG revealed some changes indicating damage to the paraspinal muscles, which would indicate some involvement of the nerve root. He opined the last EMG performed by Dr. van den Hoven was supportive of his initial impression in that the results showed a recovery pattern in the muscles, which is typically occurs when the nerves are starting to reinnervate and typical with radiculoplexopathy neuropathy. Dr. Zimmer explained that such recovery would not occur in the event Claimant had a compression lesion in the plexus.

53. Dr. Zimmer reviewed Dr. Sharma's deposition testimony and testified that Dr. Sharma's description seems to confuse radiculopathy and plexopathy, which are different. He explained that radiculoplexopathy means that both the nerve root and the plexus are involved in an inflammatory way.

54. Dr. Zimmer further explained that lumbosacral plexopathy/lumboplexus disease is different from lumbosacral plexopathy neuropathy. He testified that the physiology of lumbosacral plexopathy/lumboplexus disease is different, that it may have multiple causes, and does not necessarily have the patchy pattern involving multiple nerve roots. Dr. Zimmer testified that, with lumbosacral plexopathy/lumboplexus disease, if you have trauma to that area it will not start in one little area and then progress to a bigger area and then a third patchy area. He explained that Claimant's condition is a distinct entity that can be differentiated from lumbosacral pathology by its course.

55. Dr. Zimmer testified that Claimant's condition - lumbar radiculoplexus neuropathy – cannot be caused by trauma and is idiopathic. He testified that plexopathy – a different diagnosis- can result from major trauma such as a pelvic fracture or severe traction such as a hip dislocation, but not low-impact activities like pushing a rake in the

hip area or stretching. Dr. Zimmer stated that Claimant's description of placing a rake near the groin area would not be near the plexus, which is located on an individual's backside. He explained that the only thing the rake would have been close to per Claimant's description was the femoral nerve, which he does not think Claimant hit because it is deep in the groin and protected by the muscle.

56. Dr. Zimmer explained that Claimant's condition involves inflammation of small blood vessels, resulting in diffuse patchy problems. He stated that such patchy distribution can also be seen in diabetics. On cross-examination, when asked if diabetes is a potential contributing factor to developing Claimant's condition, Dr. Zimmer testified,

> A: No, no I'm just saying that in some people - - it's just statistically, it's like a risk factor, that if you're - - if you're diabetic, you're statistically at a higher risk of getting a vasculitis, or a small - - small blood vessel changes like this…So - - so that's because - - like I say, anatomically, it's the same structures.
>
> In other words, with diabetes, you get small blood essel disease, which can affect different areas. And with this entity, with this inflammation, it's also the same small blood vessels that are affected, so you can get the same damage to the plexus and - - so forth from small blood vessel changes. So I'm just saying that diabetes is a common cause of small blood vessel disease. And so that's why it's - - it can look the same." (Hr. Tr. p. 81: 1-7).

(Hrg. Tr. p. 80:20-25, p. 81:1-7).

57. Dr. Zimmer acknowledged that Claimant does not have diabetes nor any other underlying disease they know of causing Claimant's condition. He testified that, because there is no evidence of other involvement and Claimant's condition is improving, there is no need to test for systemic ongoing inflammation, as there would be with an individual with a more progressive disease. Dr. Zimmer testified that most of Claimant's recovery will occur with the natural reinnervation at a rate of one millimeter per day.

58. The ALJ finds the opinions of Drs. Zimmer, van den Hoven and Dupper, as supported by the medical records, more credible and persuasive than the opinions of Drs. Blatt, Janssen and Sharma and the testimony of Claimant.

59. The ALJ finds Respondent proved it is more probable than not Claimant's disability and need for treatment is not causally related to his employment. Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable work injury and Respondent is entitled permitted to withdraw its admissions of liability.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Withdrawal of Admission

Withdrawal of an admission is granted prospectively, except in limited situations where the claimant is shown to have fraudulently supplied materially false information upon which the insurer relied in filing the admission. *Rocky Mountain Cardiology v. Indus. Claim Appeals Office*, 94 P.3d 1182 (Colo. App. 2004); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Compare HLJ Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990), with *Vargo v. Colo. Indus. Comm'n*, 626 P.2d

1164 (Colo. App. 1981)(retroactive relief granted where claimant made fraudulent misstatements regarding specific injury for which benefits were claimed).

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-838-01 (ICAO, Oct. 1, 2013).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

As found, Respondent proved it is more probable than not Claimant's disability and need for treatment is not causally related to his employment and thus not a compensable work injury.

That Claimant experienced an onset of symptoms while performing his work duties is not dispositive of the fact his work activities caused Claimant's disability or need for treatment. The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). While Claimant initially testified he felt fine on the morning of August 10, 2021 prior to work, the records indicate Claimant reported experiencing worsening pain and numbness after August 4, 2021 and over the course of the next several days leading up to the morning of August 10, 2021. At Claimant's initial evaluations, he made no mention of feeling a pop or any other symptoms from stretching. Thus, Claimant's experience of symptoms while performing his work activities is one factor to consider among other evidence, particularly in light of Respondent's assertion of an idiopathic condition.

Throughout Claimant's course of treatment, multiple assessments have been provided including a femoral nerve injury, a lumbar plexus injury, lumbar radiculopathy, lumbar plexopathy, and lumbosacral radiculoplexus neuropathy. As elucidated in the medical records, Claimant presented with a confusing and challenging clinical picture - one in which he presented with significant objective findings on examination and on EMG, but no correlative findings on MRI. While Claimant's lumbar MRIs evidence a disc protrusion at L4-5 with mild foraminal narrowing bilaterally, each of the treating physicians - Drs. Dupper, van den Hoven, Blatt, and Morris - as well as the IME physicians retained by Respondent - Drs. Cebrian and Zimmer - and by Claimant, Dr. Janssen - all consistently opine the lumbar MRIs do not show effacement or clear neural impingement and do not correlate with Claimant's significant left lower extremity findings. Dr. Blatt noted he could not "rule out the possibility" of L4 nerve compression within the foramen and noted the MRI showed "some elevation superiorly of the L4 nerve root and foramen," but he again explicitly stated he did not see definitive nerve compression. Dr. Blatt's reference to the "possibility" of L4 nerve compression does not establish medical probability in light of the totality of the evidence in this case.

The only physician in this matter who opines there is significant nerve compression is Claimant's IME physician Dr. Sharma who, based on his interpretation of Dr. Blatt's reports, determined Claimant's condition results from a herniated disc with extruded fragments causing impingement. Such description and conclusion is not found in Dr. Blatt's reports, is not corroborated by any other medical records, and is at odds with the findings of multiple other physicians as discussed above. Moreover, as credibly testified to by Dr. Zimmer, if Claimant's condition was caused by compression or trauma, it would be seen on an MRI, particularly considering the significant weakness in Claimant's left lower extremity.

Claimant underwent extensive workup consisting of lumbar x-rays, three lumbar MRIs, a pelvic MRI, an MRI of the lumbar sacral plexus, a thoracic MRI, a left L4 selective nerve block, and three EMGs. It is undisputed the pelvic and lumbar sacral plexus MRIs revealed no abnormalities with the plexus or femoral nerve. Dr. Zimmer credibly, persuasively and thoroughly explained why it is medically probable Claimant suffers from idiopathic lumbar radiculoplexus neuropathy and not, the "possible" diagnosis (as identified by Drs. Blatt and Janssen) of lumbar radiculopathy and lumbar plexopathy. While Dr. Sharma testified that the terms lumbar radiculopathy and lumbar plexopathy are interchangeable, Dr. Zimmer credibly testified to the differences in those conditions, as well as their differences with respect to lumbar radiculoplexus neuropathy. Dr. Zimmer credibly explained that lumbar radiculoplexus neuropathy is a distinct entity that is differentiated from lumbosacral pathology by its course.

Dr. Zimmer provided a credible explanation for why Claimant's presentation and test results initially caused confusion for providers and why Claimant was initially assessed with a femoral nerve injury and L4 radiculopathy. He credibly testified that lumbar radiculoplexus neuropathy can initially appear as an issue with a specific nerve root or area, but subsequently affects multiple areas with a diffuse, patchy distribution of symptoms. As credibly explained by Dr. Zimmer, Claimant's presentation, EMG findings and negative MRI findings have been consistent with the course of lumbar

radiculoplexus neuropathy. Claimant's clinical improvement and evidence of improvement on EMGs further support the diagnosis of lumbar radiculoplexus neuropathy, as credibly opined by Drs. Zimmer and van den Hoven. Dr. Zimmer further credibly testified there is no evidence of further involvement as Claimant is clinically improving so there is no need to perform additional testing for systemic ongoing inflammation.

Dr. Zimmer's opinion is buttressed by the opinions of treating physicians and fellow neurologists Drs. van den Hoven and Morris. Dr. van den Hoven evaluated Claimant and performed each of Claimant's three EMGs and is familiar with the course of Claimant's presentation and condition. On September 8, 2021, prior to Dr. Zimmer performing any IME, Dr. van den Hoven specifically noted acute idiopathic lumbar radiculoplexus neuropathy as a possible cause of Claimant's symptoms based on his findings. Dr. van den Hoven ultimately opined Claimant's symptoms were the result of acute idiopathic radiculoplexus neuropathy based on Claimant's course. Dr. Morris also noted the possibility of an inflammatory condition as the cause of Claimant's symptoms when considering Claimant's presentation and testing. While Claimant's primary ATP Dr. Dupper initially attributed Claimant's low back and left lower extremity issues to a work-related femoral nerve injury, upon further testing, Dr. Dupper changed his opinion to conclude Claimant suffers from an idiopathic neuropathy condition, of which he was unfamiliar prior to dealing with Claimant's case.

In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of the Workers' Compensation Act and is thus compensable. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. *Id.* at 504-05.

Here, the preponderant evidence demonstrates Claimant's injury and condition is idiopathic and not compensable. Drs. Zimmer and van den Hoven credibly opined Claimant's condition is idiopathic and was not caused by Claimant's work activities. Although Claimant was in the scope of his employment and performing his normal work activities when he experienced an onset of symptoms, the totality of the circumstances do not establish a sufficient causal nexus between Claimant's employment and his injury/condition. Based on the totality of the evidence, Respondent proved it is more probable than not Claimant did not sustain a compensable work injury.

Respondent does not allege Claimant provided materially false information upon which Respondent relied in filing its admission(s). As Claimant did not suffer a compensable work injury, and Respondent does not allege fraud, Respondent shall be permitted to prospectively withdraw its admission(s) of liability.

ORDER

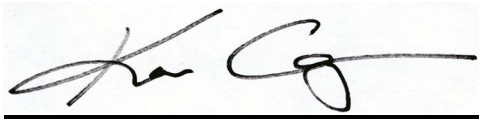
1. Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable injury.

2. Respondent's request to withdraw its admission(s) of liability is granted.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 29, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-899-087-007

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the L4-L5 foraminotomy requested by authorized treating provider ("ATP") Michael Rauzzino, M.D. is reasonable, necessary and related medical care.

II. If Claimant did not establish entitlement to the L4-L5 foraminotomy, whether the lidocaine patch requested by Dr. Rauzzino is reasonable, necessary and related maintenance medical care.

III. If Claimant did not establish entitlement to the L4-L5 foraminotomy, whether the methocarbamol requested by Dr. Sacha is reasonable, necessary and related maintenance medical care.

FINDINGS OF FACT

1. Claimant is a 60-year-old male who works for Employer as a package handler.

2. Claimant sustained an admitted industrial injury on September 12, 2012 when he picked up a box and felt a pop in his low back.

3. Claimant underwent medical treatment for the work injury with ATP John Sacha, M.D.

4. On December 17, 2012, Claimant underwent an EMG of the left lower extremity that was negative for left lower extremity radiculopathy.

5. Claimant was placed at maximum medical improvement ("MMI") on January 30, 2014.

6. Upon the referral of Dr. Sacha, Claimant presented to Andrew Castro, M.D. for a surgical evaluation on February 10, 2014. Claimant complained of low back pain as well as numbness and tingling in his left thigh. Dr. Castro opined surgical intervention would not benefit Claimant as Claimant's predominant complaint was low back pain with minimal involvement of nerve roots in the area. Dr. Castro recommended Claimant treat with non-operative conservative measures including physical therapy, anti-inflammatories, and other conservative modalities.

7. Respondent filed a Final Admission of Liability ("FAL") on July 17, 2014 admitting for reasonable and necessary related care from an authorized treating doctor.

8. Claimant continued to experience low back pain with radiating pain and numbness and tingling in his left leg.

9. Claimant continued to see Dr. Sacha as maintenance care, undergoing chiropractic treatment, acupuncture and taking medications. Claimant also underwent multiple left L5 and S1 lumbar transforaminal epidural steroid injections and trigger point injections performed by Dr. Sacha.

10. On December 30, 2014, Claimant presented to Dr. Sacha with increasing low back and left leg pain. Dr. Sacha recommended Claimant undergo a lumbar transforaminal epidural steroid injection.

11. On January 7, 2016, Dr. Sacha performed an L5 transforaminal epidural steroid injection/spinal nerve block as well as a left S1 transforaminal steroid injection for a diagnosis of lumbosacral radiculopathy. The injections provided Claimant relief.

12. On January 28, 2016, Claimant underwent a left greater trochanteric bursa corticosteroid injection with ultrasound guidance, which provided Claimant relief.

13. On September 15, 2016, Claimant underwent an L5 transforaminal steroid injection and left S1 transforaminal steroid injection with Dr. Sacha. Dr. Sacha noted Claimant had a diagnostic response to the injection, which provided Claimant some lasting relief.

14. Claimant returned to Dr. Sacha on December 1, 2016 reporting ongoing low back and left leg pain. Claimant reported that, if not for the chiropractic care and acupuncture, his symptoms would be intolerable.

15. On April 14, 2017, Dr. Sacha noted that since he last saw Claimant, Claimant had experienced a flare in severe pain in the low back with radiation to the left leg with increased numbness and tingling.

16. On April 26, 2017, Claimant returned to Dr. Sacha who performed an L5-S1 transforaminal epidural steroid injection/spinal block as part of his maintenance follow-up.

17. On May 3, 2018, Dr. Sacha noted that Claimant was returning under maintenance medical care for the “same distribution as his current pain” and performed an L5 transforaminal epidural steroid injection/nerve block as well as an S1 transforaminal epidural steroid injection/nerve block.

18. On October 4, 2018, Claimant returned to Dr. Sacha who indicated that Claimant had a diagnostic response at the L5 level, consistent with L5 radiculopathy, and placed a request for another repeat Left L5 transforaminal injection.

19. On February 7, 2019, Claimant underwent a left L5 transforaminal epidural steroid injection performed by Dr. Sacha which provided relief.

20. Claimant returned to Dr. Castro on May 24, 2019 for an evaluation of low back pain into the buttock and legs. Dr. Castro again remarked that Claimant’s back pain was his predominant complaint. He noted circumferential left lower extremity pain, but that

the low back pain was still greater than the leg pain. Dr. Castro further noted that a recent EMG revealed chronic S1-L5 radiculopathy. He reviewed x-rays and MRIs, noting that a disc bulge at L4-L5 could be extending into the foramen causing radiculopathy. Dr. Castro stated, "Certainly, there is not severe nerve encroachment at any of the levels. The foraminal stenosis seems to be more on the left side at L4-L5 than any other levels." (R. Ex. B., p. 34). He recommended that Claimant undergo a new lumbar MRI to better evaluate neural encroachment.

21. On August 28, 2019, Claimant again underwent a left L5 transforaminal epidural steroid injection/spinal block performed by Dr. Sacha which provided relief.

22. On July 16, 2020, Claimant returned to Dr. Sacha who noted that Claimant was there for maintenance care under a September 12, 2012 work-related injury. Dr. Sacha performed a trigger point injection.

23. Claimant returned to Dr. Sacha on August 6, 2020 for his repeat trigger point injection.

24. Dr. Sacha continued to recommend trigger point injections, which were denied by Respondent.

25. The parties went to hearing on January 7, 2021 after which the Court entered an Order on April 2, 2021 authorizing the trigger point injection recommended by Dr. Sacha. The findings of that Order (Cl. Ex. 7) are incorporated herein by reference.

26. On April 19, 2021, Claimant returned to Dr. Sacha who noted Claimant continued to experience ongoing low back pain, left buttock pain, and left posterior thigh pain. Dr. Sacha administered trigger point injections to Claimant on May 10, 2021.

27. On August 31, 2021, Dr. Sacha noted that although the injections were providing temporary relief, it may be time for Claimant to consider surgery, stating:

> I did do a maintenance followup visit today with [Claimant]. Since last being seen, he is still having ongoing low back and left leg pain. He is getting some relief either with the lumbar epidurals or the trigger point injections for about 2 weeks, then the pain returns. He is getting increased leg pain and cramping. At this point, this gentleman has been under maintenance care for a prolonged period, and I discussed with him that it might behoove him to start considering lumbar spine surgery, which we put off on this gentleman. He now does want to consider it. We will get a repeat MRI of the lumbar spine, compare to previous, and then assess to see whether this is reasonable.

(Cl. Ex. 8, p. 133).

28. On October 11, 2021, Claimant returned to Dr. Sacha who noted the following:

> [Claimant] did have a repeat MRI today that we did do as maintenance. It does show progression and worsening of his L4-5 spinal stenosis. It is not so much the canal that is narrow. The lateral recess on the left-greater-than-right side is worsening, and this is consistent with my findings on this gentleman's transforaminal injection of him having fairly severe foraminal stenosis of the left L5 spinal nerve. At this point, I recommend he get a surgical reevaluation with Dr. Castro. This is a gentleman who has been very good at maintaining his work status, working, and taking minimal medications. At this point, I do feel that surgical intervention is inevitable.

(Id. at p.135).

29. Dr. Castro reexamined Claimant on November 5, 2021. He reviewed Claimant's September 20, 2021 lumbar MRI report, noting a L4-5 left bulge with left foraminal annular tear results and mild to moderate left and mild right foraminal narrowing without spinal canal stenosis. He further noted the L5-S1 minimal disc bulge resulted in mild right neural foraminal narrowing. Dr. Castro recommended that he review the actual MRI images to make further evaluation and recommendations.

30. Claimant returned to Dr. Castro on December 6, 2021. Dr. Castro noted Claimant described ongoing back pain without radiating symptoms. He concluded surgical intervention was not necessary and referred Claimant back to Dr. Sacha to consider other physiatry interventions. He opined Claimant was at MMI from a spinal surgery standpoint.

31. On January 17, 2022, Claimant presented to ATP Michael Rauzzino, M.D. for a second opinion on whether he is a candidate for a microdiscectomy. Claimant reported continued severe pain in his back and radicular symptoms into his left lower extremity. Dr. Rauzzino noted,

> We reviewed his images at length. We used various models and diagrams in the clinic to discuss his pathology. [Claimant] has been dealing with his symptoms for several years. He has pain in his back radiating down his left leg. Most of his symptoms are in his left leg. His imaging studies show degenerative changes at L4-S1, particularly with left foraminal narrowing on the left at the L4-L5 level.
>
> We discussed various treatment options from doing nothing to more conservative modalities such as time, rest, medications, physical therapy, and additional injections. We discussed surgery as well. He is not interested in any injections or therapy. He is looking for a more definitive option including surgery

(Cl. Ex. 9, p. 158).

Dr. Rauzzino recommended proceeding with an EMG/NCS study and flexion/extension x-rays to better assess Claimant's pathology.

32. Dr. Sacha performed a repeat EMG/NCS on March 7, 2022. He remarked that the test results showed evidence of work-related chronic left L5 and S1 radiculopathy, as well as a sensory peripheral polyneuropathy that was not work-related.

33. On March 21, 2022, Claimant returned to Dr. Rauzzino with complaints of worsening back and left leg pain. Dr. Rauzzino noted that injections performed by Dr. Sacha at L4-5 provided diagnostic relief with subsequent return of symptoms. He further noted Dr. Castro preferred to manage Claimant non-operatively with injections, but Claimant preferred a more definitive fix. Dr. Rauzzino remarked that imaging obtained in September 2021 was of poor quality but suggested significant foraminal narrowing at L4-5 consistent with Claimant's symptomatology. He noted that an EMG performed by Dr. Castro on March 7, 2022 showed chronic left L5-S1 radiculopathy and chronic peripheral neuropathy consistent with Claimant's complaints of back and leg pain. Regarding treatment, Dr. Rauzzino noted,

> I told him I would not recommend a large surgery but instead a minimally invasive L4-L5 decompression in the hope of alleviating his leg symptoms. I explained that it would not take away all of his back pain but would help with the leg symptoms. I offered to have him return to Dr. Castro to perform the surgery as Dr. Castro knows him best; we would be happy to do the surgery if this was the patient's preference. We will arrange to get an MRI of better quality and he would need a note from his cardiologist to clear him for surgery.

(Id. at pp. 159-160).

34. Dr. Rauzzino submitted a request for authorization for an L4-L5 foraminotomy on March 21, 2022.

35. Respondent denied Dr. Rauzzino's surgery request and scheduled an independent medical examination ("IME") with Neil Brown, M.D.

36. Claimant returned to Dr. Sacha on March 29, 2022. Dr. Sacha agreed with Dr. Rauzzino's recommendation for surgery, stating that "probably [the surgery] should have been done some time ago for this patient with a fairly severe L5 radiculopathy, but because of multiple medical issues and the patient's own request to try and avoid it, we have not done that." (Cl. Ex. 8, p. 143). He noted Claimant was now healthy enough to undergo the surgery.

37. On May 2, 2022 Dr. Sacha noted Claimant was awaiting authorization for surgery. He again noted Claimant was now healthy enough for the surgery, and has ongoing objective findings of lumbar radiculopathy.

38. On May 5, 2022 N. Neil Brown, M.D. performed an Independent Medical Examination ("IME"). Dr. Brown noted Claimant initially had low back symptoms but developed left-sided radicular symptoms a few weeks later, which he stated was not unusual. He also noted Claimant's radicular symptoms have persisted through the most recent evaluation by Dr. Rauzzino on March 21, 2022.

39. Dr. Brown reviewed an October 31, 2012 lumbar MRI, noting a broad-based posterior disc bulge at L4-L5 with foraminal narrowing which could abut the L4 nerve root; however, he opined that the findings were incidental since there was no evidence of a L4 radiculopathy. There was also a minimal central disc bulge at L5-S1. Dr. Brown noted the December 17, 2012 EMG showed no evidence of any acute or chronic radiculopathy, but that an April 11, 2019 EMG confirmed chronic L5 and a possible S1 radiculopathy. Regarding the September 20, 2021 lumbar MRI, Dr. Brown noted findings indicating mild bulging to the left at L4-5 with a left foraminal annular tear and minimal disc bulging at L5-S1. He opined that the findings are non-operative, stating there is no documentation of objective findings which could account for the EMG findings on April 11, 2019. Dr. Brown further noted that Dr. Sacha opined there had been interval progression of spinal stenosis, which he stated is contrary to the radiological report.

40. Regarding the March 30, 2022 MRI Dr. Brown noted,

> There was moderate bilateral foraminal stenosis at L4-5 and moderate right-sided foraminal stenosis at L5-S1. Comment is made about disc material at L3-4 abutting the L4 nerves, at L4-5 abutting the L5 nerves bilaterally slight compression of the left L5 nerve…There is no evidence of significant central canal spinal stenosis reported.

(R. Ex. A, p. 22).

Dr. Brown again remarked that Claimant has no evidence of L4 radiculopathy and this was the first radiological documentation of a possible cause of the patient's L5 radiculopathy.

41. Dr. Brown opined that the surgery recommended by Dr. Rauzzino is reasonable and necessary, but not causally related to Claimant's work injury, stating,

> His clinical course since his remote occupational Injury on September 12, 2020 is manifested by pain behaviors which would signify an exaggerated psychological response to his physiological disorder. Surprisingly, no psychological counseling has been recommended. Lack of treatment of co-existing psychological disorder is associated with poor treatment outcomes so any surgical intervention should be deferred until his psychological condition had been adequately treated. Consequently, it is my opinion that his current subjective complaints are causally related to his occupational injury on September 12, 2012 but there is no objective evidence of any compromise of the L5 nerve roots until several years after his accident. The subjective symptoms may be psychological manifestations of his physiological injury. One does not operate on patients with subjective symptoms but no objective evidence of neural compression of the appropriate nerve roots. The findings on the March 30, 2022 MRI are simply age-related progression of lumbar degenerative disc disease. Consequently, any indication for surgery would not be related to

> his occupational injury but rather simply age related degenerative changes.

(Id. at p. 23).

42. Dr. Rauzzino subsequently submitted a request for authorization of lidocaine, which was denied by Respondent.

43. The parties subsequently attended a SAMMS Conference with Dr. Castro, who outlined his opinion in a letter dated September 22, 2022. Dr. Castro noted he had seen Claimant on several occasions and Claimant primarily complained of low back pain without lumbar radiculopathy. He noted the MRI findings of mild to moderate degenerative changes. He stated, "Specifically, I do not believe that a lumbar decompression is indicated in relation to his initial symptoms from an accident which occurred several years ago where he did not have radicular or claudicatory-type symptoms initially." (R. Ex. B, p. 26).

44. Dr. Castro reviewed the IME report of Dr. Brown, noting he agreed with the opinion of Dr. Brown but differed in that he did not believe surgery was indicated "irrespective of causality or degenerative changes." (Id.). Dr. Castro noted Claimant primarily has low back pain with mild findings without substantial neurological impingement. He further noted that he reviewed Dr. Rauzzino's March 21, 2022 medical note, and opined that his imaging did not support substantial neurological impingement. Dr. Castro reiterated his opinion that surgical intervention is not reasonable in this matter and is not related to Claimant's occupational injury of September 12, 2012.

45. Dr. Sacha reviewed the reports of Drs. Castro and Brown and issued a report dated October 4, 2022. Dr. Sacha continued to opine that Claimant is a surgical candidate for an L4-5 and possibly L5-S1 laminectomy and discectomy. He explained,

> In reviewing this patient's case, I do believe Dr. Castro is an excellent surgeon; however, he does not have all the information correct on this patient. Here's what we know based on the records. This patient (*sic*) MRI, which I am reviewing as we look at (*sic*), does have evidence of moderate foraminal narrowing at the L4-5 level. He also has mild-to-moderate foraminal narrowing in the L5-S1 level. This gentleman did not have a normal EMG, in fact, his EMG showed evidence of a chronic left L5 and S1 radiculopathy, and finally, I do not believe either Dr. Brown or Dr. Castro reviewed my procedure notes for the spinal nerve blocks for this gentleman. Every time this gentleman has had a transforaminal epidural injection/spinal nerve block, not only has he had a diagnostic response, but he has been noted during the procedure to have reproduction of symptoms when injected to the L5 neural foramen and moderate to severe compression of the L5 spinal nerve, especially on the left side. These are all very specific objective evidence of neural impingement. The notations by both Dr. Brown and Dr. Castro above are completely incorrect with respect to this, and the data is very specific and all of the diagnostic and

> therapeutic studies as outlined above. This gentleman meets all the medical treatment guidelines for lumbar spine surgery. He has all the objective findings on physical exam and although there are times when he has more back pain and leg pain, his pain has been consistent and the complaint is consistent dating all the way back to this gentleman's original date of injury of September 2012 and his practitioner has been the physician treating him over the entirety of this course and performing both his electrodiagnostic studies as well as transforaminal injections. This patient needs all the medical treatment guidelines appropriateness for the surgery.

(Cl. Ex 3, p. 34).

46. Dr. Brown reviewed Dr. Castro's September 22, 2022 letter and Dr. Sacha's October 4, 2022 report and issued an addendum to his IME report on November 21, 2022. Dr. Brown continued to opine surgical intervention is not indicated for Claimant.

47. Claimant returned to Dr. Sacha on November 29, 2022 who noted, "At this point, he does have L5 radiculopathy that is longstanding with foraminal compromise and does want to move forward with surgery. He has likely been a surgical candidate for a long period, but this patient was against any type of surgical intervention." (Cl. Ex. 8, p. 149).

48. Pending authorization for surgery, Dr. Sacha submitted a request for methocarbamol, which was denied by Respondent.

49. Claimant credibly testified at hearing. He testified the injections performed by Dr. Sacha have helped him be able to continue to perform his work duties, but that the relief from the injections is not sustained. Claimant testified he continues to experience symptoms of low back pain and radiating pain into his left leg and toes, and that the symptoms have worsened. Claimant has not sustained any new injuries to his low back. He stated he cannot perform more than two to three hours of work activities without pain. Claimant testified he understands the risks of the recommended surgery and wants to undergo the surgery to relieve his excruciating pain. Claimant stated that, if he is unable to undergo the recommended surgery, he wants the lidocaine and methocarbamol authorized to provide temporary pain relief.

50. The ALJ finds the opinions of Drs. Sacha and Rauzzino, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinions of Drs. Castro and Brown.

51. Claimant proved it is more probably true than not the L4-L5 foraminotomy requested by Dr. Rauzzino is reasonable, necessary and related medical care.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Respondents are liable for medical treatment that is reasonable and necessary relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S.; *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant proved it is more probable than not the surgery recommended by Dr. Rauzzino is reasonably necessary and causally related medical treatment. Respondents rely on the opinions of Dr. Castro and Respondent IME

physician Dr. Brown. While Dr. Brown concluded that the surgery is reasonable and necessary, he opined that objective findings of L5 radiculopathy were not evidenced until several years after Claimant's injury and are due to degenerative changes. Dr. Castro also believes Claimant's MRI findings are degenerative, but further found no objective evidence of substantial neurologic impingement. Dr. Castro opined that the surgery is not causally related or otherwise indicated, repeatedly stating Claimant's primary complaint is low back pain without lumbar radiculopathy and that he did not have radicular symptoms initially.

Both Dr. Rauzzino and Dr. Sacha address the purported lack of and delay in objective findings. Dr. Rauzzino credibly noted Claimant has been experiencing low back and left leg symptoms for several years. He reviewed the MRIs and EMGs and credibly and persuasively opined the imaging shows objective evidence of significant left foraminal narrowing at L4-5 and chronic L5-S1 radiculopathy consistent with Claimant's symptomatology. Dr. Rauzzino recommended surgery to help alleviate Claimant's left leg symptoms caused by the work injury.

Dr. Rauzzino's opinion is supported by Dr. Sacha, who has served as Claimant's primary ATP for over 10 years and is well-familiarized with Claimant's presentation and clinical course. Contrary to Dr. Castro's opinion that Claimant's primary concern is back pain, Dr. Sacha credibly explained that, while there are occasions Claimant has more back than leg pain, Claimant's back and leg pain have been consistent and dates back to his date of injury. Dr. Sacha's opinion is supported by Claimant's credible testimony regarding his symptoms as well as the medical records documenting complaints of, and treatment for, both back and leg pain over the course of several years. Dr. Sacha further credibly and persuasively opined that, in addition to the findings on MRI and EMG, Claimant's physical exam findings and his diagnostic responses to several injections are objective evidence of significant neural impingement warranting surgery. Dr. Sacha has reviewed the opinions of Drs. Brown and Castro and continues to opine that the recommended surgery is related to Claimant's work injury and reasonably necessary to relieve its effects. Based on the totality of the evidence, Claimant has met his burden to prove the L4-5 foraminotomy recommended by Dr. Rauzzino is reasonable, necessary and causally related medical treatment.

ORDER

It is therefore ordered that:

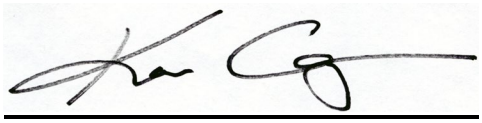
1. Respondents shall authorize and pay for the L4-L5 foraminotomy requested by Dr. Rauzzino.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-198-596-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that the following medical treatment is reasonably necessary to cure or relieve the effects of his work-related injury:

    a. Treatment at Centura/Lakewood Emergency and Urgent Care;

    b. Chiropractic care;

    c. Gabapentin;

    d. Lidoderm patches; and

    e. Left L4-5 and L5-S1 transforaminal epidural steroid injection.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant sustained an admitted injury to his lower back on January 3, 3022.

2. Claimant is the owner of Employer, and on the date of injury, contacted Insurer regarding his injury. Insurer instructed Claimant to seek medical treatment at Centura/Lakewood Emergency and Urgent Care center ("Centura").

3. On January 3, 2022, Claimant went to Centura and was examined by Case Kerr Newsom, D.O. Claimant reported pain in his low back with radiation down his left leg after lifting a heavy box at work that day. X-rays performed that day showed minimal degenerative changes and were negative for fractures. Claimant was diagnosed with a lumbar strain with possible radiculitis, and prescribed Lidoderm patches and naprosym. (Ex. 6).

4. On January 7, 2022, Claimant saw Gary Zuehlsdorff, D.O., at On the Mend Occupational medicine on January 7, 2022. Thereafter, Dr. Zuehlsdorff served as Claimant's authorized treating physician (ATP). Claimant reported low back pain and left leg symptoms. Dr. Zuehlsdorff diagnosed Claimant with a lumbar sprain/strain, back spasms, and left leg dysesthesias, ordered a lumbar MRI, and prescribed medications and physical therapy. (Ex. 3).

5. On January 11, 2022, Dr. Zuehlsdorff prescribed Claimant Lidoderm patches, and referred Claimant for chiropractic care. Claimant received six chiropractic visits, and reported to Dr. Zuehlsdorff he received relief from the chiropractic treatments. (Ex. 3).

6. On March 14, 2022, Dr. Zuehlsdorff referred Claimant for an evaluation with a physiatrist. Insurer denied authorization for the Lidoderm patches and the physiatry referral. (Ex. 3).

7. On April 19, 2022, Claimant underwent a lumbar MRI. On April 26, 2022, Claimant saw Dr. Zuehlsdorff, who interpreted the MRI as showing a disc extrusion at the left paracentral region at L4-5. Dr. Zuehlsdorff opined that the disc extrusion was indicative of an acute injury, not chronic and was consistent with Claimant's acute injury pattern. As of April 19, 2022, Insurer had not approved Claimant's prescription for Lidoderm patches. Claimant testified he obtained the patches using his health insurance, and the patches provided him with relief. Dr. Zuehlsdorff reiterated his request for a referral to physiatrist Dr. Trainor, and prescribed 30 Lidoderm patches. (Ex. 3).

8. On July 11, 2022, Claimant saw Dr. Trainor for evaluation. After examination, he diagnosed Claimant with lumbar spinal stenosis, and prescribed Gabapentin. Dr. Trainor also recommended an L4-5 L5-S1 transforaminal epidural steroid injection. Claimant initially chose to delay the procedure but ultimately decided to go forward with the injection. On August 3, 2022, Dr. Trainor requested authorization for left L4-5 and L5-S1 transforaminal epidural steroid injection (TESI) from Insurer. (Ex. 5). Insurer denied authorization for the procedure.

9. On November 1, 2022, Claimant saw Dr. Zuehlsdorff. Dr. Zuehlsdorff noted that Insurer continued to deny authorization of the TESI, and had denied further chiropractic care. Dr. Zuehlsdorff continued to prescribe gabapentin, and Lidoderm patches, but noted Claimant was obtaining Lidoderm through his primary care physician because of the denial. (Ex. 3)

10. As of November 30, 2022, Insurer had not authorized the requested TESI. Dr. Trainor's office indicated they would again submit the request for approval to Insurer. (Ex. 5).

11. On January 3, 2023, Claimant saw Dr. Zuehlsdorff again. He noted the TESI had not been approved, and Claimant was continuing to obtain Lidoderm patches through his primary care physician. Claimant reported receiving relief with the Lidoderm patches. (Ex. 3).

12. On January 23, 2023, Dr. Zuehlsdorff responded to a letter from Claimant's counsel regarding Claimant's need for treatment. In the letter, he indicated the TESI recommended by Dr. Trainor, and chiropractic treatment was reasonable and necessary to cure and relieve the effects of, and causally related to Claimant's work injury. He further indicated if the treatment failed, Claimant may need a surgical consult. (Ex. 3).

13. Dr. Zuehlsdorff testified at hearing and was admitted as an expert in occupational medicine. Dr. Zuehlsdorff testified the treatment Claimant received at Centura,

chiropractic care, Lidoderm patches, Gabapentin, and the TESI injection were reasonable and necessary to cure or relieve the effects of Claimant's work injury, and the treatment was causally related to Claimant's January 3, 2022 injury. Respondents submitted surveillance footage of Claimant driving a vehicle and photographs of Claimant using a hand-held leaf blower. (Ex. F & G). Dr. Zuehlsdorff credibly testified the surveillance videos did not demonstrate Claimant performing activities inconsistent with his presentation to Dr. Zuehlsdorff or any recommended work restrictions. Dr. Zuehlsdorff further testified Claimant's use of a leaf blower was not inconsistent with his injuries, presentation, or restrictions. Dr. Zuehlsdorff's testimony was unrebutted, credible, and persuasive.

14. Claimant testified at hearing that he had undergone one course of chiropractic treatment, which improved his function and gave him relief. He also indicated he received pain relief and increased function from use of Lidoderm patches, and he continued to use them, but obtained them through is private health insurance, because Insurer had not authorized them. Claimant also testified that Insurer had denied authorization for Gabapentin, and that it also provided relief. Claimant further testified he wished to undergo the TESI injection prescribed by Dr. Trainor. Claimant's testimony was unrebutted and credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Specific Medical Benefits At Issue

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Diagnostic testing which is reasonable and necessary for treatment of a work-related injury is compensable. *Beede v. Allen Mitchek Feed and Grain*, W.C. No. 4-317-785 (ICAO Apr. 20, 2000). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the medical treatment he received at Centura, the Lidoderm patches, Gabapentin and chiropractic care prescribed and recommended by Dr. Zuehlsdorff, and injections recommended by Dr. Trainor, are reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. The evidence establishes Claimant went to Centura on the date of his injury for evaluation and treatment directly related to is work injury. Claimant credibly testified he was instructed to go to Centura by Insurer. Dr. Zuehlsdorff' testified such treatment was reasonable, necessary, and causally related to Claimant's injury. With respect to Lidoderm, Gabapentin, and chiropractic care, Claimant's medical records demonstrate he contemporaneously reported relief with these treatments when he saw Dr. Zuehlsdorff. Dr. Zuehlsdorff testified these treatments were reasonable, necessary, and causally related to his work injury. Finally, Dr. Zuehlsdorff and Dr. Trainor have both recommended lumbar TESI injections. Dr. Zuehlsdorff testified this course of treatment is reasonable and necessary to cure or relieve the effects of Claimant's work injury. The ALJ finds Dr. Zuehlsdorff's unrebutted testimony credibly and persuasively establishes it is more likely than not that the treatment for which Claimant seeks authorization and

payment was reasonable and necessary to cure or relieve the effects of Claimant's January 3, 2022 back injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay the cost of Claimant's treatment at Centura/Lakewood Emergency and Urgent Care Center, according to the Worker's Compensation Medical Fee Schedule.

2. Claimant's request for authorization of the left L4-5 and L5-S1 transforaminal epidural steroid injections recommended by Dr. Trainor and Dr. Zuehlsdorff is granted.

3. Claimant's request for authorization of chiropractic treatment, Lidoderm patches, and Gabapentin is granted.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2023.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-148-539-004

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of employment with [Redacted, hereinafter TO] and/or [Redacted, hereinafter AA].

2. If Claimant established the existence of a compensable injury, whether Claimant is entitled to medical benefits.

3. If Claimant established the existence of a compensable injury, whether Claimant is entitled to temporary disability benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

Parties

1. Claimant is a 64-year-old man who contends he was employed by both TO[Redacted] and AA[Redacted]. Claimant contends he sustained an injury arising out of the course of employment with TO[Redacted] and AA[Redacted] on December 3, 2019.

2. AA[Redacted] is an adult day care facility located in Aurora, Colorado that provides services to older and disabled adults. These services include planned activities, meals, and transportation to various locations, such medical appointments, pharmacies, immigration offices, and others. As part of its services, AA[Redacted] transports clients to and from their homes to AA's[Redacted] facility. [Redacted, hereinafter AB] owns and operates AA[Redacted]. AB[Redacted] testified that all individuals who perform services for AA[Redacted] are independent contractors, consequently, AA[Redacted] does not maintain workers' compensation insurance.

3. TO[Redacted] is a home health care agency that provides in-home health care, personal care, and other services to its clients, including assistance with activities of daily living, such as laundry and trash removal. TO[Redacted] employs approximately 110 individuals. AB[Redacted] also owns TO[Redacted], and credibly testified that TO[Redacted] is a distinctly different business entity than AA[Redacted], and maintains a different tax ID, different payroll, and provides different services. TO[Redacted] maintains workers' compensation insurance through Insurer.

Background and Claimant's Relationship with Respondents

4. Beginning in 2013, Claimant was a client of Aurora Mental Health Center (AuMHC), receiving assistance dealing with issues that developed after Claimant served as an

interpreter for the United States Army in the Iraq war. Sometime in 2013, Claimant was working to obtain a certificate in family support through AuMHC, which required Claimant to perform volunteer work. Claimant began volunteering at AA[Redacted] in 2013 or 2014. (Ex. N). Claimant testified he provided transportation, served as a translator, helped serve meals, and provided other services, and that he dealt entirely with AB's[Redacted] husband, [Redacted, hereinafter SA], and had no communications with AB[Redacted].

5. Claimant testified that after completing his certificate in 2014, he worked for and was paid by AuMHC until 2019. He testified he worked for AuMHC on the weekends, and worked for AA[Redacted] during the week. Claimant testified he continued to provide the services to AA[Redacted] clients, such as translating, serving meals, and providing transportation from 2014 through 2019. Claimant was not paid for any of the services he alleges he provided during this time period. AB[Redacted] testified that Claimant was a volunteer at AA[Redacted], and occasionally came to AA[Redacted] to eat meals, but was not a staff member and was not employed by AA[Redacted]. No documentary evidence was presented establishing Claimant was employed by AA[Redacted] at any time from 2014 through summer 2019.

6. AB[Redacted] testified that Claimant never applied for a job and did not fill out an application for employment or to be an independent contractor. However, in the summer or fall of 2019, Claimant asked AA[Redacted] for a job. (Ex. N). AA[Redacted] agreed to train Claimant as a driver/client assistant for two months with pay. (Ex. N and R). Claimant began transporting AA[Redacted] clients from their homes to AA[Redacted], sometime in the summer or fall of 2019. Claimant testified he initially used his own vehicle, and later used a van owned by AA[Redacted] to transport clients.

7. Although AB[Redacted]testified Claimant was not paid for his services, AA[Redacted] did issue Claimant at least two checks in the amount of $1,500.00 from its payroll account on November 1, 2019 and December 2, 2019. (Ex. A). Claimant testified he was also paid $1,500 per month in September and October 2019, although no credible evidence of such payments was admitted.

8. Claimant testified that at various times, SA[Redacted] promised to pay Claimant, make Claimant a partner in the business, make him a manager, and buy him a home. No credible evidence of the alleged promises was presented at hearing.

<u>December 3, 2019 Incident</u>

9. In December 2019, AB[Redacted] and SA[Redacted] were out of the country, and their son, [Redacted, hereinafter NB], served in a supervisory role at AA[Redacted] during their absence. On December 3, 2019, an incident occurred between Claimant and NB[Redacted], during which Claimant asserts he sustained injuries to both knees. Claimant testified NB[Redacted] confronted him while Claimant was getting in one of AA's[Redacted] vans, pushed Claimant against the van, hit Claimant's legs with the van door two times, and hit claimant in the face. Claimant did not work again for

AA[Redacted] after December 3, 2019. For the reasons described below, Claimant's testimony regarding the incident with NB[Redacted] was not credible.

10. Claimant testified after the incident, he left the scene, went home, and slept, and that he went to a doctor a week later. No documentary evidence was presented admitted indicating Claimant sought medical care the week after December 3, 2019.

11. In January 2020, Claimant contacted AA[Redacted] and demanded $150,000 for back wages he asserted he was owed from 2014 to 2019. When AA[Redacted] refused to pay Claimant $150,000, Claimant began filing a series of claims against AA[Redacted]. Claimant testified he decided to file "everything" against AA[Redacted] as a way of obtaining the money he believed he was owed for alleged back wages.

12. On February 3, 2020, Claimant filed a Workers' Claim for Compensation against AA[Redacted] claiming to have suffered an injury to his large toe on December 12, 2017. (Ex. B).

13. Claimant filed a claim for unemployment benefits against AA[Redacted], which was denied on February 10, 2020. (Ex. CC).

14. On February 13, 2020, Claimant contacted the Aurora Police Department (APD) and reported that he had been assaulted by NB[Redacted]on December 3, 2019. The APD investigated and prepared a police report on February 13, 2020. (Ex. D). Claimant reported to APD that on December 3, 2019, as he "was getting out of the van, NB[Redacted] approached him from behind and shoved him up against the van a couple of times while yelling at him to turn over the van keys." Claimant also alleged he attempted to run into the building "but NB[Redacted] grabbed him by the back of his coat and yanked him back before he could reach the front door." Claimant reported he "decided to run off and left the premise." When questioned about injuries, Claimant "stated he had a few scratches on his legs from being shoved up against the van." Claimant indicated he had not photographed the injuries which had healed. The APD report indicates a witness – [Redacted, hereinafter MB] -- was interviewed and did not corroborate Claimant's report
that NB[Redacted] physically assaulted Claimant. (Ex. D).

15. Claimant later filed a complaint with the Colorado Civil Rights Division (CCRD) against AA[Redacted], alleging he was harassed and subject to unequal terms and conditions based on his national origin, disability, and/or retaliation for engaging in protected activity. (Ex. N). After investigation, the CCRD issued an order dismissing Claimant's complaint on January 13, 2021. (Ex. N).

16. Claimant also filed a claim against AA[Redacted] with the Equal Employment Opportunity Commission (EEOC). The EEOC adopted the CCRD's findings and issued a Dismissal and Notice of Rights on April 5, 2021. (Ex. P). AB[Redacted] testified that Claimant also filed complaints or grievances against AA[Redacted] with OSHA and the IRS.

17. On July 1, 2021, Claimant filed a civil lawsuit in which he asserted employment related claims against AA[Redacted], and SA[Redacted] and AB[Redacted] individually. Claimant did not assert he was employed by TO[Redacted] in the civil lawsuit. Ultimately, the parties reached a settlement and resolved the civil suit. (Ex. S, T, and BB).

18. No evidence was admitted indicating Claimant filed any claim or complaint against TO[Redacted], or that Claimant asserted he was employed by TO[Redacted] in any of the claims filed.

19. On September 24, 2020, Claimant filed a Workers' Claim for Compensation against AA[Redacted] related to the December 3, 2019 incident. Claimant asserted he sustained "fracture, strain" injuries to both knees on December 3, 2019. Claimant described the injury as occurring when "[NB[Redacted]] aggressively pushed the car door into my left knee, causing me to twist my right leg/knee." Claimant did not assert he was employed by TO[Redacted] in the September 24, 2020 Workers' Claim for Compensation. (Ex. H).

CLAIMANTS' MEDICAL TREATMENT

20. Claimant's first documented visit with any healthcare provider after the alleged December 3, 2019 work injury was a visit at AuMHC on February 5, 2020. Although the record references an altercation at work, it does not reference any physical injuries from the alleged altercation. (Ex. C).

21. Claimant's first documented medical evaluation for any physical injuries after December 3, 2019, was on June 3, 2020, when Claimant saw Khatera Jahan, FNP-C, at Colorado Alliance for Health Equity and Progress (CAHEP). At that visit, Claimant reported his knee pain began in December 2019 when someone opened a car door that hit his knee. Claimant reported his knee was initially painful with bruising and pain had continued to increase since. On examination, Claimant was noted to have inflammation present on the left lateral knee, tenderness with palpation, mild pain with flexion and extension and a negative McMurray's test. Claimant was referred for x-rays of the left knee. (Ex. E).

22. An x-ray of Claimant's left knee was performed on June 22, 2020, which was interpreted as showing normal soft tissues, narrowed joint spaces in 3 compartments, with prominent osteophytes and sclerosis. It was also noted that Claimant had a large loose osteochondral joint bodies in the suprapatellar bursa. (Ex. F).

23. On June 22, 2020, Claimant was evaluated at Colorado Joint Replacement by Todd Miner, M.D. Claimant reported that his left knee pain began on December 5, 2019 as the result of "another … employee purposefully hit him in the leg while opening the car door. The car door struck him on the outside of the knee." Claimant reported the pain and swelling initially improved but began to worsen more recently. (Ex. G). Dr. Miner noted Claimant had a remote history of ACL reconstruction on the left knee. Dr. Miner indicated "At this time I believe his symptoms are primarily related to the heterotopic ossification that is superior lateral of his kneecap as well as to the advanced osteoarthritis

of the left knee. … I feel both his arthritic condition and the fairly large loose osseous bodies in the suprapatellar region are likely aggravating his knee and contributing to his knee symptoms. He does have very severe tricompartmental arthritis of his left knee which is most likely attributing to the pain he is experiencing as well." Dr. Miner performed a left knee corticosteroid injection and recommended physical therapy. Although Dr. Miner
referenced a workers' compensation claim, he did not offer any credible opinion indicating Claimant's alleged work injury either caused or contributed to Claimant's need for treatment or his then-existing condition. (Ex. G).

24. On September 16, 2020, Claimant returned to Dr. Miner. Dr. Miner noted that Claimant's imaging studies demonstrated "severe varus osteoarthritis of both knees with bone-on-bone collapse of the medial compartments and advanced patellofemoral involvement." Due to his severe osteoarthritis, Dr. Miner felt that knee replacement was his best option to alleviate symptoms and restore mobility. He also indicated that bilateral knee replacement, as opposed to unilateral staged knee replacement was a reasonable treatment option. While Dr. Miner referenced Claimant's alleged workplace injury, he did not credibly opine that the need for bilateral knee replacement was causally related to Claimant's alleged work injury. (Ex. G).

25. On October 22, 2020, Claimant underwent a right total knee arthroplasty performed by Dr. Miner. (Ex. K). No credible evidence was admitted indicating Claimant's right total knee arthroplasty was causally related to Claimant's employment with AA[Redacted] or causally related to the December 3, 2019 incident involving NB[Redacted].

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the

witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641
(Colo. 1991). The Claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App.

1990); *Marjorie Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014).

Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a),
C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517- 537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Temporary Total Disability

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant's Claims Against TO[Redacted]

Claimant has failed to establish that he sustained a compensable injury arising out of the course of employment with TO[Redacted]. Specifically, Claimant has failed to establish he was an "employee" of TO[Redacted] on December 3, 2019, or any other time. As relevant to Claimant's alleged relationship with TO[Redacted], the Act defines employee as "any individual who performs services for pay for another …" § 8-43-202 (2)(a), C.R.S. No credible evidence was presented indicating Claimant was

performing any service for TO[Redacted] on December 3, 2019, or that he was employed by TO[Redacted] in any capacity. No credible evidence was presented in support of Claimant's contention that TO[Redacted]and AA[Redacted] were the same entity. Claimant's Workers' Claim for Compensation related to the December 3, 2019 incident did not identify TO[Redacted] as his employer. Moreover, in the multiple claims Claimant filed against AA[Redacted], he did not allege he was employed by TO[Redacted]. Because no credible evidence exists establishing any employment relationship between Claimant and TO[Redacted], Claimant has failed to establish that he sustained any injury arising out of the course of employment with TO[Redacted]. Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to medical or temporary disability benefits.

Claimant's Claims Against AA[Redacted]

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of the course of employment with AA[Redacted]. Unlike TO[Redacted], the evidence does establish it is more likely than not Claimant was providing services for AA[Redacted] on December 3, 2019 for pay.

AA[Redacted] offered Claimant two-months of paid training to determine whether Claimant could work as a driver for AA[Redacted]. AA[Redacted] paid Claimant $1,500 on November 1, 2019 and December 2, 2019. That Claimant did not formally apply for a position with AA[Redacted], and had not completed paperwork A AA[Redacted] deemed necessary does not lead to a different conclusion. The evidence was undisputed that Claimant was using or preparing to use one of AA's[Redacted] vans on December 3, 2019 when an incident with NB[Redacted]occurred. The ALJ makes no conclusions about the nature of Claimant's relationship except as relevant to the December 3, 2019 incident.

Claimant has failed to establish he sustained an injury arising out of his employment with AA[Redacted]. Claimant's testimony regarding the alleged incident with NB[Redacted]on December 3, 2019 was not credible, and no credible evidence was admitted establishing that Claimant sustained an injury on December 3, 2019. Claimant's first documented report of the alleged incident is the February 13, 2019 APD report, in which Claimant did not report being struck with a car door, or sustaining injuries to either knee. Instead, Claimant reported only scratches on his legs that had healed. Claimant's statements to APD that NB[Redacted]physically assaulted him were not corroborated by the other witness interviewed. Although the evidence establishes that Claimant and NB[Redacted] had an interaction on December 3, 2019, no credible evidence exists that NB[Redacted] assaulted Claimant, struck him in the knee with a van door, or otherwise injured Claimant.

Claimant's testimony that he chose to file numerous claims against AA[Redacted] in an attempt to obtain $150,000 also undermines Claimant's credibility. Although Claimant filed several different claims against AA[Redacted] in the months after December 2019, he did not file a workers' claim for compensation related to the

December 3, 2019 incident until September 2020, more than nine months after the alleged events. Claimant also did not seek medical treatment for his alleged knee injuries until June 3, 2020, six months after the alleged incident.

When Claimant did seek medical attention, his physician, Dr. Miner attributed Claimant's symptoms to ongoing severe arthritic conditions of the knee. Although Dr. Miner mentioned a workers' compensation claim, he offered no credible explanation as to how the alleged incident caused an injury to Claimant's knees, aggravated his pre existing condition, or caused the need for surgery. The ALJ finds, more likely than not that Claimant's knee condition and the need for surgery is the result of his preexisting knee condition, and is unrelated to any employment with AA[Redacted] or the December 3, 2019 incident involving NB[Redacted].

The ALJ finds Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of the course of employment with AA[Redacted]. Because Claimant has failed to establish a compensable injury, Claimant has failed to establish an entitlement to medical treatment or temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant's claims for workers' compensation benefits against TO[Redacted] and Insurer are denied and dismissed.

2. Claimant's claims for workers' compensation benefits against AA[Redacted] are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 14, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-204-404-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on April 1, 2022.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits.

3. Whether Claimant established by a preponderance of the evidence that left knee surgery recommended by Dr. Schnell is reasonable and necessary to cure or relieve the effects of a work-related injury.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 24-year-old man who worked for Employer as a concrete finisher.

2. On April 19, 2022, Claimant was working with a crew laying and finishing a raised concrete pad at the Larimer County Jail. Because the pad was inside a building, a concrete pumping truck was used to move concrete to the pad location through an 80-foot-long hose measuring 3.5 inches in diameter. (Ex. D). The project required placement of 18.5 cubic yards of concrete into an area approximately 25 to 30 feet in length and 15-20 feet in width. Due to the relatively small size of the project, the crew working on the pad was in close proximity to one another. (Ex. D). The concrete pumping truck arrived at the Larimer County Jail project at 5:30 a.m., on April 19, 2022 and remained on site until 9:45 a.m. (Ex. D).

3. Claimant testified his job assignment on April 19, 2022 was to place concrete into the pad form by holding the open end of the concrete hose. April 19, 2022 was the first time Claimant had performed this role. Claimant testified that sometime between 12:00 and 1:00 p.m., he was pulling the hose and had his left foot hooked beneath a piece of metal rebar or reinforcement mesh, when the pump "caught air"[1] and "blasted [him} in the opposite direction" (*i.e.*, backward). Claimant testified he fell to the ground after the hose "kicked," causing him to twist and injure his left knee. Claimant testified another worker helped him up. Claimant testified he verbally reported the incident to his foreman, [Redacted, hereinafter JH], and returned to work finishing concrete after the pour was completed.

[1] The phrase "catching air" refers to a situation where air interrupts the flow of concrete from the pump truck through the hose, causing the hose to expel air, rather than concrete.

4. [Redacted, hereinafter JS], one of Employer's foremen who was working at the project on April 19, 2022, testified at hearing. JS[Redacted] testified the crew working on the pad was close to each other at all times, and he did not recall Claimant's role in the work that day. JS[Redacted] testified when a concrete pump "catches air" it makes a loud, distinct noise that would have been audible to everyone present. When this occurs the pump operator will stop the pump to assess the problem. He did not recall the pump catching air on April 19, 2022, and did not recall Claimant being injured.

5. JH[Redacted] testified at hearing. JH[Redacted] was the foreman supervising Claimant on April 19, 2022, and was present while the concrete was being poured. JH[Redacted] testified when a concrete pump catches air it makes a distinct sound, and he did not recall the hose catching air or any other problems with the concrete pour on April 19, 2022. He testified it would be difficult for a person to hook a foot under the reinforcement mesh used on the pour because of the small distance between the mesh and the ground. JH[Redacted] did not see Claimant fall that day, but Claimant did report pain in his leg as the crew was finishing pouring concrete. He indicated Claimant wanted to keep working that day after reporting an injury.

6. Claimant first sought medical treatment for his left knee on April 21, 2022, when he saw Jeffrey Baker, M.D., at Concentra in Fort Collins, Colorado. Claimant reported to Dr. Baker that the injury occurred on April 19, 2022 at 11:00 a.m., while Claimant "was moving the concrete pump line laterally and he felt a 'pop' in his left knee." Dr. Baker characterized the incident as "the result of [a misstep] while carrying a cement hose." (Ex. 5). Dr. Baker's examination revealed no swelling of Claimant's knee. Claimant reported tenderness over the lateral and medial joint lines, and lateral collateral ligament, crepitus, and limited range of motion in all planes. Dr. Baker found positive Lachman's, laxity on varus stress, and lateral McMurray tests.[2] He diagnosed Claimant with a knee strain, and referred him for physical therapy. (Ex. 5). Claimant underwent six sessions of physical therapy at Concentra for his left knee. (Ex. 9).

7. On April 22, 2022, Employer prepared First Report of Injury or Illness (FROI), which described Claimant's injury occurring as he "was pulling a concrete hose and stepped backwards wrong and hurt his knee." (Ex. M).

8. On April 25, 2022, Claimant saw Linda Young, M.D., at Concentra. On examination, Dr. Young noted trace effusion and found tenderness over the lateral joint line and lateral collateral ligament, limited range of motion in all planes, and positive Lachman's and lateral McMurray tests. Dr. Young diagnosed claimant with internal derangement of the left knee, and ordered an MRI. (Ex. 6)

9. On May 3, 2022, Claimant underwent an MRI on his left knee. The MRI showed irregular tearing of the posterior horn of the lateral meniscus, and a complete or near complete tear of the anterior cruciate ligament (ACL) at the femoral attachment. The MRI

[2] Lachman's test is an anterior collateral ligament test. McMurray test is a meniscus test. (See WCRP Rule 17, Exhibit 6).

noted no effusion within the joint. The remainder of Claimant's knee ligaments and tendons were intact. (Ex. B).

10. Claimant returned to Dr. Baker on May 5, 2022. Dr. Baker indicated Claimant was returning for "left knee and lower back injuries as a result of a fall from the bottom step of his truck breaking."[3] He reviewed Claimant's MRI, diagnosed a left knee strain, ACL tear, and tear of the meniscus, and referred Claimant for an orthopedic consultation. Claimant saw Dr. Baker five additional times through August 22, 2022. At these visits, Dr. Baker's exam findings remained substantially unchanged. (Ex. 5).

11. On May 17, 2022, Respondents filed a Notice of Contest, indicating Claimant's claim was contested due to the need for further investigation. (Ex. L).

12. On May 23, 2022, Claimant saw Lucas Schnell, D.O., for an orthopedic consultation on referral from Dr. Baker. Dr. Schnell described Claimant's injury as occurring while "holding onto the concrete pump when it jerked violently. He had a pivot-shift type injury and felt an immediate pop in his knee. He notices swelling within an hour as well. " Dr. Schnell reviewed Claimant's May 3, 2022 MRI report and images and noted that Claimant had a lateral discoid meniscus with a posterior horn tear, and near-complete ACL rupture. On examination, Dr. Schnell found mild left knee effusion, a positive Lachman's test, positive anterior drawer test, and pain apprehension with lateral McMurray's testing. Based on his examination and the MRI film, Dr. Schnell diagnosed Claimant with a left ACL rupture, left posterior horn lateral meniscus tear, and left discoid meniscus. He recommended arthroscopic left knee ACL reconstruction surgery, lateral meniscus saucerization, and meniscectomy. Dr. Schnell opined that Claimant's described "twisting mechanism with his work Injury does correlate with an ACL rupture and lateral meniscal tear." (Ex. C). Dr. Schnell requested authorization of Claimant's surgery, which was denied by Insurer.

13. Dr. Baker and Dr. Schnell are authorized treating physicians.

14. On October 27, 2021, Mark Failinger, M.D., performed an independent medical examination (IME) of Claimant at Respondents' request. Dr. Failinger was admitted as an expert in orthopedic surgery and sports medicine and testified at hearing. Dr. Failinger documented Claimant's report of the mechanism of injury as: "[Claimant] was pulling the hose while pouring concrete, as he was pulling backwards, he states all the pressure was on his left knee when the pump 'caught air.' There was an air blast, and the hose kicked back. He states the hose pulled away from him, and it yanked him forward. He states he twisted and fell and felt a pop with some numbness to the left knee." (Ex. A). Dr. Failinger credibly testified that had Claimant sustained an acute ACL or meniscal tear on April 19, 2022, it would be unlikely Claimant could have returned to work that day, and that most patients would terminate weightbearing after such an injury.

15. Dr. Failinger reviewed Claimant's MRI films from May 3, 2022 and opined that there was "no medical possibility that the anterior ligament tear present on the MRI scan

[3] Dr. Baker continued to use this description of Claimant's mechanism of injury in each of his later records. No evidence was presented explaining the discrepancy in mechanism of injury in Dr. Baker's records.

occurred at the time of the alleged work incident of 04-19-2022." Dr. Failinger indicated the MRI did not show any acute changes to the Claimant's ACL, such as edema. He opined that an MRI of a recent ACL tear would tear would show significant edema (inflammation) within the ligament fibers and effusion in the joint even two and one-half weeks after the injury. He further opined Claimant's meniscus tears were also likely pre-existing and that a recent meniscal tear or worsening of a preexisting tear would also show significant joint effusion and more than minimal tibial bone bruising. Dr. Failinger opined that Claimant's ACL tear was preexisting, but placed Claimant at a greater risk of instability due the instability. Dr. Failinger opined that the need for ACL reconstruction and meniscal surgery was not due to any pathology caused by Claimant's April 19, 2022 work incident. Dr. Failinger agreed that ACL reconstruction may be reasonable and necessary, but does not believe the need for the surgery is work-related.

16. As of the date of hearing, Claimant had not undergone the surgery recommended by Dr. Schnell.

17. Claimant testified that he sustained a injury to his left knee in November 2021, while operating a motorized bicycle, that resulted in swelling and abrasions on his knee. Claimant testified he did not receive medical treatment for the injury, although he did limp, and his knee was bandaged. Claimant testified he had no prior injuries to his left knee. A photograph of Claimant's knee from November 8, 2021 was admitted into evidence as Exhibit D, and shows significant swelling and abrasions on Claimant's left knee. JH[Redacted] testified that Claimant was placed on light duty for approximately one month following the November 2021 knee injury. During that time, JH[Redacted] testified he observed Claimant limping, but he did not notice Claimant having difficulty with his assigned job tasks. Claimant was not on light duty from January 1, 1022 to April 18, 2022, and was able to work without limitations finishing concrete.

18. From December 26, 2021 through April 16, 2022, Claimant averaged 31.5 hours per week, including overtime. At the time of his injury, Claimant earned $24.00 per hour. The ALJ finds that Claimant's average weekly wage at the time of his injury was $756.00 per week.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dept. Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675 (*ICAO Sept. 1, 2006*).*

Claimant has failed established by a preponderance of the evidence that he sustained a compensable injury to his left knee arising out of the course of his employment with Employer on April 19, 2022. While Claimant did report knee pain to JH[Redacted] on April 19, 2022, the evidence does not credibly establish that Claimant incurred an injury to his left knee on April 19, 2022.

Claimant has offered inconsistent explanations of the mechanism of injury. Claimant testified he injured his knee while operating the concrete pump hose with his left foot placed beneath the rebar mesh when the hose "caught air" blasting him backward, causing him to fall. Claimant's testimony regarding the mechanism of injury was inconsistent with his initial report to Dr. Baker, the First Report of Injury, and includes elements not previously reported to his health care providers. For example, both Dr. Baker's initial report and the First Report of Injury indicate Claimant's injury occurred as the result of a misstep. Claimant did not report the concrete hose "catching air," being "blasted" back, twisting his knee, or falling, or positioning his foot beneath the rebar mesh until weeks or months later. Claimant did not report to either Dr. Schnell or Dr. Failinger that his foot was placed beneath the concrete rebar. Moreover, Claimant testimony that he was "blasted" in the opposite direction is inconsistent with his report to Dr. Failinger that he was pulled forward. Finally, neither JH[Redacted] nor JS[Redacted], who were present at the job site, recall the concrete hose "catching air," or recall Claimant falling. The inconsistencies in Claimant's descriptions of the mechanism of injury render Claimant's testimony unreliable and not credible. Dr. Schnell's opinion that Claimant's injury is causally related to his employment is not persuasive because it is based on the Claimant's unreliable description of the mechanism of injury.

While it is undisputed that Claimant has a ruptured ACL and meniscal pathology in his left knee, the ALJ finds persuasive Dr. Failinger's opinion that Claimant's left knee pathology was preexisting. Dr. Failinger credibly opined that an ACL tear or a meniscus tear sustained on April 19, 2022, would be accompanied by significant inflammation which would remain present for weeks after the injury. However, Claimant's April 21, 2022 examination by Dr. Baker's revealed "no swelling." Similarly, while Dr. Young and Dr. Schnell noted "trace" and "mild" effusion, neither noted significant swelling. Claimant's MRI also notes no joint effusion. The lack of significant swelling is inconsistent with an acute ACL or meniscal tear. Claimant's positive Lachman's and McMurray tests are

explained by his preexisting pathology, and are not necessarily indicative of an acute injury.

The ALJ finds credible Dr. Failinger's testimony that had Claimant sustained a torn ACL and/or meniscal tear on April 19, 2022, it is unlikely he would have been able to return to work that day. The ALJ concludes Claimant's ability to return to work the remainder of April 19, 2022, is inconsistent with an acute injury to the left knee.

Based on the totality of the evidence, Claimant has failed to establish it is more likely than not he sustained a compensable injury to his left knee arising out of the course of his employment with Employer on April 19, 2022.

Medical Benefits & Surgical Authorization

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant's has also failed to establish an entitlement to medical benefits, or authorization of the surgery recommended by Dr. Schnell.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Indus. v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

As found, Claimant's average weekly wage as of April 19, 2022 $756.00 per week. Neither of the AWW calculations proffered by the parties are supported by the evidence and do not accurately reflect Claimant's AWW.

ORDER

It is therefore ordered that:

1. Claimant's claim for worker's compensation benefits related to an alleged April 19, 2022 injury is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 23, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES PRESENTED

- Whether Claimant established, by a preponderance of the evidence, that [Redacted, hereinafter VG] suffered a compensable Coronavirus (Covid-19) infection arising out of his work duties for Employer on or about June 2, 2020.

- If Claimant established that VG[Redacted] suffered a compensable Covid-19 infection, whether she also established, by a preponderance of the evidence, that the care he received after his Covid-19 diagnosis was reasonable and necessary treatment to cure and relieve him of the effects of said infection.

- If Claimant established that VG[Redacted] suffered a compensable Covid-19 infection, whether she also established that his death was causally related to that infection.

- If Claimant established that VG[Redacted] suffered a compensable Covid-19 infection, whether she also demonstrated, by a preponderance of the evidence, that VG[Redacted] was temporarily totally disabled from June 2, 2020, until the date of his death on July 1, 2020.

- If Claimant established that VG[Redacted] suffered a compensable Covid-19 infection and that he succumbed to that infection, whether Claimant also demonstrated, by a preponderance of the evidence, that she and VG[Redacted] were in a common law marriage at the time of his passing.

- If Claimant established that she is the surviving spouse of VG[Redacted], whether she also demonstrated that she is entitled to wholly dependent death benefits pursuant to the provisions of C.R.S. § 8-41-501, § 8-42-114 and § 8-42-115 and if so, at what rate of compensation.

STIPULATION

Although Claimant indicates in her post-hearing position statement that the parties were unable to arrive at a stipulation concerning VG[Redacted] average weekly wage (AWW), Respondents, in their position statement, reference their willingness to stipulate that VG's[Redacted] AWW is $583.90. While no formal agreement appears to have been reached, since Respondents' AWW calculation is noted to be 10 cents more than what Claimant calculated for VG's[Redacted], the ALJ has reviewed Claimant's Exhibit 16 and ALJ agrees that, at the time of his death, VG's[Redacted] AWW is $583.80. This figure is based upon VG's[Redacted] gross wages for 2020 from a W2 form provided from Employer. Based upon the evidence presented, the ALJ is persuaded that this calculation represents the fairest approximation of VG's[Redacted] wage loss and diminished earning capacity based upon the 153 days of employment

from January 1, 2020 through June 1, 2020 after which VG[Redacted] was hospitalized and unable to work due to his alleged occupational disease. Accordingly, the ALJ finds VG's[Redacted] AWW to equal $583.80.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Generally

1. Employer in this action operates a long term/skilled nursing facility, i.e. a nursing home known as [Redacted, hereinafter UC]. VG[Redacted] was employed by the facility as a member of the housekeeping department, specifically in the capacity of a floor technician or "floor tech".

2. As a floor tech for the facility, VG's[Redacted] duties included cleaning/maintaining the main areas of the building, such as the dining room, the hallways, the common areas and the lobby. He would also collect and dispose of the building's trash. As is relevant to the issues presented, VG[Redacted] was continuously employed by facility from March 2020 through June 1, 2020.

3. VG[Redacted] became sick with Covid-19 on or about May 26, 2020. His health deteriorated rapidly and he was admitted to the hospital on June 2, 2020 with acute respiratory failure with hypoxia due to pneumonia. (Ex. 11, p. 57). The evidence presented supports a finding that Claimant was hospitalized in the ICU unit and unable to work in any capacity between June 2, 2020 and July 1, 2020. Accordingly, the ALJ finds that VG[Redacted] was temporarily and totally disabled from June 2, 2020, through July 1, 2020.

4. Despite advanced in-patient hospital care, VG's[Redacted] condition did not improve. He was subsequently intubated and ventilator dependent for a period of time while in the hospital's ICU. After developing multisystem organ failure, the difficult decision was made to withdraw further life support. (Ex. 11, p. 88). VG[Redacted] passed away on July 1, 2020.

The Testimony of [Redacted, hereinafter DM]

5. DM[Redacted] testified as Employer's current infection prevention (IP) nurse. She has worked for Employer for the past 9 years. DM[Redacted] testified that she took over the IP nursing position in October 2020. When she assumed the position, DM[Redacted] "inherited" a list of every person, both staff and resident that had tested positive or whom had developed symptoms consistent with Covid-19 prior to October 2020. (Hrg. Trans., p. 19, ll. 18-24). DM[Redacted] testified that the chart documenting when a resident or staff member developed Covid-19 was originally put together by the previous IP nurse, [Redacted, hereinafter LN]. *Id* at p. 19, ll. 2-8. According to DM[Redacted], she continued to document those residents and staff members who

developed Covid-19 after she took over as the IP nurse. *Id*. at. p. 19, ll. 9-14. The aforementioned chart is contained at Exhibit 18.

6. DM[Redacted] testified that as soon as a positive Covid-19 test result was received or as soon as a resident presented with symptoms consistent with a Covid-19 infection, they were placed in quarantine. (Hrg. Trans., p. 20, ll. 1-5). Staff members testing positive or exhibiting symptoms were "automatically placed out of work". *Id*. at p. 21, ll. 1-12.

7. DM[Redacted] testified that approximately 110 residents resided in Employer's facility between April 1 and June 30, 2020. Based upon the charting done during this period, DM[Redacted] testified that 20 residents tested positive for Covid-19 and 8 out of this 20 died from Covid-19 related disease. (Hrg. Trans., p. 21, ll. 16-25; pp. 22-23, ll. 1-8; Ex. 18). DM[Redacted] testified that during this same period, 20 staff members tested positive for and/or developed Covid-19 and one died, that being VG[Redacted]. *Id*. at p. 23, ll. 9-15. DM[Redacted] indicated that VG[Redacted] was the third staff member to come back with a positive Covid-19 test. *Id.* at p. 23, ll. 22-23.

8. According to DM[Redacted], the National Guard came to the facility on May 2, 2020, and tested both residents and staff members who consented to testing. (Hrg. Trans., p. 24, ll. 7-14). Claimant's Ex. 18 reflects that VG[Redacted] was tested on this date and that he had a negative test result. (Ex. 18, p. 137).

9. DM[Redacted] testified that the first positive test for Covid-19 in a resident was returned on May 24, 2020. (Hrg. Trans. p. 32, ll. 12-13). According to DM[Redacted], the facility declared a Covid-19 outbreak shortly thereafter on May 29, 2020. (Hrg. Trans. p. 25, ll. 12-17). As a result of the outbreak, DM[Redacted] testified that the staff stepped up their use of personal protective equipment (PPE)[1] and increased cleaning measures. The facility also set up an isolation unit for infected residents at the direction of the public health department. *Id*. at p. 26, ll. 2-3; p. 27, ll. 3-18. Despite these measures, the evidence supports a finding that residents and staff continued to contract Covid-19. *Id*. at p. 26, ll. 4-8.

10. DM[Redacted] described the isolation unit, also known as the "red unit", as a completely closed off section of the facility that housed known positive Covid-19 residents. (Hrg. Trans., p. 27, ll. 8-11). According to DM[Redacted], only "designated" staff members were allowed to work in the red unit and those persons used a completely separate entrance to the building and that unit so they did not walk through the main parts of the facility. *Id*. at p. 27, ll. 12-15. Per DM[Redacted], VG[Redacted] was not tasked with moving any residents to the isolation unit. (Hrg. Trans., p. 31, ll. 20-23).

11. DM[Redacted] stated that the two employees who tested positive before VG[Redacted] were restorative certified nursing assistants (CNAs) who worked "very

[1] Any contact with a resident exhibiting symptoms or any time testing was initiated would require the use of full PPE, including a gown, gloves, an N95 mask and a face shield. (Hrg. Trans., p. 28, ll. 4-11).

closely" with the residents during range of motion exercise sessions. (Hrg. Trans., p. 30, ll. 5-8). The ALJ infers from DM's[Redacted] testimony that these CNAs had direct hands on contact with the residents. These CNAs did not work directly with VG[Redacted]. *Id*. at p. 30, ll. 11-12.

The Testimony of [Redacted, hereinafter MN]

12. MN[Redacted] testified as the Director of Environmental Services for Employer. (Hrg. Trans., p. 87, ll. 23-25). She has worked for Employer for 27 years and for the past six years has managed the laundry, housekeeping and directed the floor techs at Employer's facility. *Id*. at p. 88, ll. 1-14. She was VG[Redacted] immediate supervisor. *Id*. at p. 99, ll. 6-7.

13. MN[Redacted] described VG's[Redacted] job duties as a floor tech to include vacuuming the common areas, throwing out the trash from dirty utility rooms, sweeping, stripping wax and doing room changes, although MN[Redacted] testified that she did the "majority" of the room changes. (Hrg. Trans., p. 92, ll. 12-25).

14. MN[Redacted] testified that none of her staff ever worked inside the red unit. (Hrg. Trans., p. 93, ll. 11-20). According to MN[Redacted], the laundry and trash from the red unit would be gathered by the unit's staff, placed in trash or "red bags" and set outside the door to the unit. *Id.* at p. 93, ll. 21-25, p. 94, line 1. Once outside the red unit door, the floor techs under MN's[Redacted] direction would proceed to the isolation unit to pick up the trash and transport it and any soiled linens, et cetera out of the back door and disposed of or taken to the buildings laundry. *Id*. at p. 94, ll. 2-7. Despite being bagged and outside of the red unit, MN[Redacted] testified the collection of materials, including the trash and dirty laundry from inside the red unit required the use of full PPE, including a gown, gloves, a face shield and a N95 mask. *Id*.

15. While MN[Redacted] testified that VG[Redacted] did not work with or have any direct contact with anyone who was known to have tested positive for Covid-19, she noted that the facility is very large and the staff is comprised of dietary workers, therapists, nurses, CNAs and admissions people and that there was quite a few people in the building on a daily basis. (Hrg. Trans., p. 15-20). She also testified that her housekeepers would go into resident rooms to clean and that the housekeepers and floor techs could interact with each other. *Id*. at p. 2-14.

16. Although she did not know who completed the First Report of Injury form or where that person got the information concerning VG's[Redacted] contraction of Covid-19, MN[Redacted] testified that the First Report was incorrect in as much as VG[Redacted] did not transfer sick residents to the red unit. (Hrg. Trans., p. 99, ll. 8-18). Rather, MN[Redacted] testified she personally transported sick residents to the red unit because she was a supervisor and had taken on additional "education" with what to do with infectious people. Id. at p. 93, ll. 5-10. Nonetheless, she acknowledged that after she transported a sick resident to the red unit she would return to her regular

duties which included having contact with her housekeepers and the floor techs, including VG[Redacted].

17. The ALJ has reviewed the employer's first report of injury that was filed with the Division of Workers' Compensation. The First Report states that VG[Redacted] "may have been exposed to Covid-19 while moving Covid-19 positive residents to isolation rooms". The First Report indicates that it was completed on June 24, 2020; however, it does not show who completed it nor is it signed. (Cl. Ex 13).

The Testimony of [Redacted, hereinafter SJ]

18. Claimant, SJ[Redacted], the personal representative of the Estate of VG[Redacted] and his alleged widow, testified that VG[Redacted] was her husband at the time of his death on July 1, 2020. (Hrg. Trans., p. 37, ll. 4-6).

19. Claimant testified that she and the decedent got married in a "very little, private ceremony in March of 2016" shortly after they started dating. (Hrg. Trans., p. 37, ll. 7-10). Claimant testified that she and VG[Redacted] lived together continuously between March 2016 and his death on July 1, 2020 and that during this time, they held themselves out as husband and wife. *Id.* at p. 37, ll. 11-17, p. 42, ll. 9-12.

20. Per Claimant's testimony, she and VG[Redacted] exchanged wedding rings, shared debts and obligations, purchased a home in joint tenancy and she was named as his surviving spouse on his life insurance policy. (Hrg. Trans., p. 37, ll. 18-25, p. 38, ll. 1-3, p. 42. ll. 6-24. Further, Claimant testified that when VG[Redacted] was taken to Penrose Hospital on June 2, 2020, she did not go with him and while he was "winded", he was alert and able to talk. (Hrg. Trans., p. 45, ll. 23-25). Consequently, the information that was given to the hospital staff upon his admission came directly from VG[Redacted] . *Id*. at p. 46, ll. 2-4. The Admission Facesheet from Penrose Hospital lists Claimant as VG[Redacted]' "Spouse" and emergency contact. (Ex. 11, p. 56). Moreover, the medical records from Penrose Hospital reference Claimant as VG's[Redacted] wife. (See generally, Ex. 11).

21. Claimant's Exhibit 15(a) verifies that there was a probate action wherein Claimant requested to be named as the decedent's personal representative and his common law wife. This action was initially contested by one of VG's[Redacted] daughters; however, this daughter stopped cooperating with her attorney who was subsequently permitted to withdraw from the case on December 1, 2021. (Ex. 15(a)). There was a hearing in the Pueblo County District Court on January 11, 2022, during which the Court found that Claimant and VG[Redacted] "agreed to enter into marriage on March 17, 2016 and a ceremony was held near Mt. Princeton". After this ceremony, Claimant and VG[Redacted] "exchanged rings symbolizing their marriage to each other". (Ex. 15(a) at ¶ 13). Moreover, the Court determined from the testimony of Claimant that she and VG[Redacted] "intended to be married and shared a relationship of mutual support and obligation" based upon the fact that they signed a lease and cohabitated together in an apartment until they purchased a residence in joint tenancy

in April 2020; the mortgage agreement obligating both to be financially responsible for the mortgage and the property. *Id*. at ¶¶ 14-15. In addition to the medical records being "replete" with references to Claimant as VG's[Redacted] spouse, the Court noted that VG[Redacted] designated Claimant as his beneficiary on a life insurance policy, "clearly" identifying her as his spouse. *Id*. at ¶¶ 16-17. Finally the Court noted that Claimant filed a joint tax return identifying VG[Redacted] as her spouse. Based upon Claimant's testimony and the records submitted, the Court determined that there was "clear and convincing" evidence that Claimant was VG's[Redacted]spouse at the time of his death. *Id*. at ¶ 19. In concluding that Claimant was VG's[Redacted] surviving spouse, the Court noted: "The determination of [Claimant] as a common law spouse was necessary to complete administration of the estate, but also to establish her entitlement to workers' compensation benefits that will not be paid into or become assets of the estate". *Id*. at ¶ 27.

22. The ALJ has reviewed the certified copy of the Order from the District Court dated February 2, 2022 at Exhibit 15(a) and finds the testimony of the Claimant in the present proceeding consistent with that found by the District Court Judge in the Order of Intestacy. Based on the totality of the evidence presented, the ALJ is convinced that Claimant is the surviving common-law spouse of VG[Redacted]. Indeed, Respondents confess that Claimant established that she is the surviving widow and statutory dependent of VG[Redacted]. (Resp. Position Statement, Finding of Fact, ¶ 13, p. 4).

23. Claimant testified that in the months before VG[Redacted] fell ill in the latter part of May of 2020, she worked as a care plan coordinator for [Redacted, hereinafter IE] which is a program for all-inclusive care for the elderly. Claimant testified that commencing March 18, 2020, and continuing until the decedent was taken to Penrose on June 2, 2020, she worked from home. (Hrg. Trans., p. 38, ll. 4-24).

24. Claimant testified that during the month preceding VG's[Redacted] hospitalization there were four people living in her and VG's[Redacted] house, to wit: herself, VG[Redacted], his half-brother, [Redacted, hereinafter RR], and her son, [Redacted, hereinafter CR]. She testified that in order to prevent/minimize the Covid-19 virus from entering that home, she used Instacart to order the household groceries for delivery to the home. (Hrg. Trans., p. 39, ll. 6). Once delivered, everyone would participate in wiping the food down. *Id*. at p. 39, ll.10-11. Claimant also testified that when CR[Redacted], RR[Redacted], and VG[Redacted] came home from work at UC[Redacted][2], she would have them strip off their clothes, leave their shoes at the door, have them put their clothes in the washing machine, wash their hands with sanitizer, and take a shower. Id. at p. 39, ll. 11-19. No guests or visitors were permitted in the house. *Id.*

[2] VG[Redacted], RR[Redacted] and CR[Redacted] all worked at Employer's facility. RR[Redacted] and CR[Redacted] worked in the kitchen as dietary aids and would try to secure the same schedule so they could all car pool to/from work. (Hrg. Trans., p. 40, ll. 2-19).

25. Claimant testified that VG[Redacted] would travel straight home from work and that none of the other residents of the house were ill nor had they tested positive for Covid-19 before VG[Redacted] exhibited fell ill. (Hrg. Trans., p. 42, l. 25, p. 43, ll. 1-17). Indeed, Claimant testified that while she had gastritis and gastrointestinal issues in the period between April 1 through June 1, 2020, no one in the house was sick before VG[Redacted] became ill toward the end of May 2020. *Id.* at p. 48, ll. 13-18. Regarding trips into the community as a potential source of VG's[Redacted] Covid-19 infection, Claimant testified that she was pretty strict and nagged VG[Redacted] about the "whole thing". *Id*. at p. 46, ll. 11-25. She added that as a nurse, she was concerned about the virus and therefore suggested that the only place that RR[Redacted], CR[Redacted], or VG[Redacted] were going during that period of time was to work and back home. *Id.*

26. Claimant also suggested that VG's[Redacted] duties were not limited to maintaining the floors and collecting the building's trash. Indeed, Claimant testified that VG[Redacted] was cross-trained to feed residents and that he would go into the dining room and help feed people. (Hrg. Trans., p. 43, ll. 20-24). Claimant described VG[Redacted] as a "jack-of-all trades" who would facilitate room changes, move furniture from room to room, and assist with maintenance from time to time. *Id*. at p. 44, ll. 1-6.

27. Claimant testified that VG[Redacted] expressed concerns about Covid-19 exposure at Employer's facility and mentioned that he had to move residents to the isolation unit a few times and that he didn't feel safe. (Hrg. Trans., p. 44, ll. 7-12). Claimant testified further that she was aware, from speaking with VG[Redacted], that the employer had made PPE available to the employees. Nonetheless, she did not know if he wore it correctly. Id. at p. 44, ll. 13-16.

The Testimony of Dr. Marcus Oginsky

28. Dr. Marcus Oginsky testified as a board certified expert in the fields of internal medicine and healthcare quality management, which is a field of medicine that pertains to the analysis of data that describes the quality standards of medicine. (Hrg. Trans., p. 60, ll. 8-19). The Board Certification in health care quality management entails having at least five years of previous experience in health care quality management, 24 hours of continuous classes and lecture materials and once passing a test every two years, an additional eight hours of continuous education in the field of health care quality management. *Id*. at p. 64, ll. 2-14.

29. Dr. Oginsky is the chief quality officer at Midtown Inpatient Medicine. His job is to analyze data that is generated in the course of the clinical practice and using that data to both describe the quality and efficiencies of the practice. Dr. Oginsky has direct training in the analysis of probability and statistics, has personally treated over a thousand hospitalized Covid-19 patients in all levels and spectrums of the disease process caused thereby and has developed Covid-19 protocols for his hospital quality program. He has done additional work developing Covid-19 protocols privately which

have been published by the Centers for Disease Control (CDC). (Hrg. Trans., pp. 62-63, ll. 1-11).

30. Dr. Oginsky was asked by Claimant to review VG's[Redacted] treatment history and available records and opine as to where he most likely contracted his Covid-19 infection that lead to his hospitalization. Dr. Oginsky authored a report dated October 6, 2022, in which he noted the following medical history and course of treatment:

> VG[Redacted] was a 67-year-old male with reported history of diabetes mellitus, hypertension, and obstructive sleep apnea. He first developed a fever of 100.7 on 5/26/20. He was afebrile when he presented to work at UC[Redacted] on 5/27 and 5/28 despite a reported fever at home. On 5/29 he called off sick as he felt too ill to work. On 6/2/20 he fell more significantly ill, and his wife recorded low oxygen saturations at home. She took him to the Parkview Hospital emergency room, and he was emergently transferred to Penrose Hospital in Colorado Springs. On arrival to the hospital, Covid-19 was confirmed by RT-PCR testing, and he reported to the admitting critical care physician that he had contact with Covid-19 sick patients. Of note, the admitting physicians reported about one month of antecedent fatigue symptoms. However, the onset of his fever and the timing of acute respiratory failure are consistent with acute Covid-19 beginning with the fever onset on 5/26/2020. This timing is consistent with standard public health definitions of case onset. On arrival he was requiring maximum flow oxygen at 15 liters. He was treated with Remdesivir, steroids, and convalescent plasma. He required heated high flow oxygen and non-invasive ventilator support with BIPAP until 6/23/2020 when he required intubation and mechanical ventilation for progressive respiratory failure. He failed to improve on the mechanical ventilator and passed away on 7/1/2020 with the cause of death listed as Covid-19 pneumonia.

(Ex. 12, p. 94).

31. VG's[Redacted] death certificate documents that he died of Acute Respiratory Failure/ARDS and Covid-19 Pneumonia. (Ex.14). The ALJ credits the content of the medical records and the death certificate to find that VG's[Redacted] death was, more probably than not, precipitated by a Covid-19 infection that progressed to pneumonia and sepsis leading to multisystem organ failure and ultimately respiratory failure.

32. In his October 6, 2022 report, Dr. Oginsky noted that the State and County public health authorities registered a Covid-19 outbreak for Employer's facility on May 29, 2020, with the first weekly report after the "outbreak" designation referencing 6

Covid-19 cases in residents and 2 cases in staff.[3] The numbers did not improve over time. Indeed, subsequent weekly reports documented 10 cases in residents and 6 cases in staff on June 10, 2020 and 34 cases in residents, 12 cases in staff with 9 additional "probable" cases in staff by June 24, 2020. (Ex. 12, p. 94). At the close of the outbreak[4] on July 29, 2020, a total of 35 cases, with 2 additional probable cases and 9 deaths had been reported in/for residents of Employer's facility. Staff cases included 13 known cases, 9 probable cases and 1 death, that being VG[Redacted]. Dr. Oginsky was careful to point out that the outbreak designation on May 29, 2020, did not imply that this was the "start of illness in that [facility]". Rather, May 29, 2020 reflected the date "when it was clear that the disease was present (in the facility) and the authorities were made aware of cases. *Id.* at p. 94. The ALJ infers from Dr. Oginsky's report that Covid-19 was probably circulating about Employer's facility before May 29, 2020. Indeed, per DM[Redacted] a positive test result was reported for a resident on May 24, 2020. Accordingly, the ALJ is convinced that infections among residents and staff were occurring before May 24, 2020.

33. Dr. Oginsky discussed the unique characteristics of the Covid-19 virus in his October 6, 2022 report, noting that the virus is spread by inhaling aerosolized virus particles that are "buoyant in the air and can travel in the air directly into a person's airways and lungs". (Ex. 12, p. 95). He noted further that the infectivity of a virus is based upon its "attack rate", which is defined as the "percentage of individuals who become infected after an exposure". According to Dr. Oginsky, the attack rates for the original circulating Alpha variant of Covid-19 at the time VG[Redacted] was infected was different for different environments. Indeed, in a home environment, where there is typically no mask use but prolonged close family contact, the attack rate ranges from 60-80%. (Ex. 12, p. 95). In congregate care environments, such as jails/prisons, reported attack rates can reach up to 72% and in work environments, where workers are not as closely confined, the attack rate can reach 20-30%. *Id.*

34. In determining the medical probability as to where VG's[Redacted] Covid-19 exposure/infection occurred, Dr. Oginsky testified that you do not apply a system of direct transmission to the analysis of how an individual was infected with Covid-19. Rather, Dr. Oginsky explained that in the case of respiratory illnesses, including Covid-19, the illness is often not traceable to a single event and it is indeed rare to be able to document a direct contact to contact exposure. Thus, Dr. Oginsky testified that to determine the source of likely transmission, he analyzed the three environments wherein VG[Redacted] spent his time, i.e. the community at large, his workplace and his home. Dr. Oginsky undertook an analysis of the probability of Covid-19 transmission in each environment, accounting for the attack rates and the contagious nature of the disease and then applied the probability that VG[Redacted] was exposed to and infected by the contagion in those environments. Dr. Oginsky testified that the

[3] Per Colorado Department of Public Health & Environment (CDPHE) reporting guidelines an "outbreak" was present, at the time, if two cases were present in the facility. (Ex. 12, p. 94).
[4] An outbreak is considered closed after the passage of 30 days from the last associated case in the facility. (Ex. 12, p. 94).

environment that yields the highest probability for transmission is deemed to be the most medically probable source of the exposure/infection.

35. Using publically available community databases, Dr. Oginsky noted that for the week of May 22, 2020, the daily case rate for Pueblo County was no greater than 4 cases per 100,000 people. (Hrg. Trans., p. 68, ll. 6-11). However, because Covid-19 is plus or minus prevalent and contagious for a seven-day time period, that averages to about 28 contagious persons at any simultaneous time period for that week. So there would be approximately 28 people per 100,000 who would be contagious with Covid-19 in Pueblo which represents a prevalence rate of .03%. *Id*. at p. 68, ll. 12-19. Nonetheless, Dr. Oginsky noted that during the time period of VG[Redacted] infection access limitations to testing probably lead to the number of infections being underestimated by 4-10 fold. Dr. Oginsky opined that accounting for a worst case scenario, i.e. a 10 fold error, there would be a bump in the chances of coming into contact contagious person in the community to around 0.3% (.03% × 10 = 0.3%). Simply put, Dr. Oginsky noted that "[i]f VG[Redacted] were . . . moving around in the community going to stores, grocery stores, and restaurants, the chances of an encounter with a contagious stranger was only 0.3%". Moreover, Dr. Oginsky noted that any such encounter would have to involve a long enough exposure to transmit the virus to VG[Redacted], which Dr. Oginsky concluded, mathematically speaking, was an "extremely low probability event". (Ex. 12, p. 96).

36. In contrast, Dr. Oginsky opined that the chances of VG[Redacted] being exposed/infected at home or in the workplace were substantially higher than in the community at large. Concerning the home environment, Dr. Oginsky testified that the attack rate, i.e. the infectivity percentage in the home environment is the highest it can be because there is often a "lower degree of air circulation" in the home than in other environments combined with a failure to employ environmental controls such as masking and social distancing. (Hrg. Trans., p. 71, ll. 11-25, p. 72, ll. 1-4). Thus, Dr. Oginsky testified that if Covid-19 is present in the home environment, it simply becomes the "highest probably site of contagion" transmission because of that attack rate. *Id.* at p. 72, ll. 5-8. Because there was no one in living in the home that had either tested positive for Covid-19 or shown symptoms of Covid-19 exposure prior to VG[Redacted] falling ill towards the end of May of 2020, Dr. Oginsky excluded the household as the site of VG's[Redacted] exposure/infection in this case. (Ex. 12, p. 96; Hrg. Trans., p. 72, ll. 13-19).

37. Concerning the likelihood that VG's[Redacted] contracted Covid-19 from his work environment, Dr. Oginsky testified that the public reporting databases, including the data reported by Colorado Department of Public Health and Environment (CDPHE), confirmed there was an outbreak at the employer's facility. (Hrg. Trans. p. 65, ll. 5-15). According to Dr. Oginsky, it was important to note that at the time the outbreak was declared, there were two Covid-19 cases that could be connected to the same physical location and that the timing of VG's[Redacted] acute illness, hospitalization and respiratory failure were consistent with an exposure around May 20, 2020 or after. (Hrg. Trans., p. 65, ll. 10-12; Ex. 12, p. 96). As noted by Dr. Oginsky, the outbreak

designation on May 29, 2020, does not imply that this was the start of infections/illness in Employer's facility, signifying instead that Covid-19 was present and circulating in the facility before the May 29, 2020 outbreak designation. Indeed, the evidence presented supports a finding that at least three residents and one staff member exhibited symptoms of Covid-19 prior to the outbreak designation prompting those residents to undergo PCR testing.[5] (Ex. 18, pp. 130-133). Every test for these three residents came back positive for the presence of Covid-19 and one resident was subsequently hospitalized and succumbed to his illness. *Id*. at p. 133.

38. Dr. Oginsky testified that the Covid-19 attack rate for VG[Redacted] work environment was approximately 30%, which was consistent with other healthcare environments as well as the "attack rate in a lot of common workplaces". (Hrg. Trans., pp. 68-69). Dr. Oginsky noted that while risk reduction strategies were implemented at the facility in an effort to limit the spread of the Covid virus, it would be false to "claim that [these] control measures [were] 100% effective". (Hrg. Trans., p. 66, ll. 2-21). Rather, Dr. Oginsky indicated that these risk reduction strategies may have been partially effective since such measures may have helped limit the spread of the disease to 35 cases in residents and 12 cases among staff members. Concerning the transmission of Covid-19 among staff members, including those adhering to safety protocols, wearing PPE and avoiding exposure to Covid-19 positive individuals, Dr. Oginsky testified that he was not really able to analyze whether these risk reductions strategies were effective. Id. at p. 67, ll. 4-14. Rather, all that could be discerned definitively was that there were "12 cases present in staff . . ., which was a much higher proportion that (sic) would have been present in the community at large". *Id*. Accordingly, Dr. Oginsky testified, "So regardless of [the] efficacy of controls and appropriateness of controls, there was spread of Covid-19 to staff members at [Employer's] facility". *Id*. at ll. 15-17. Indeed, Dr. Oginsky testified that the presence of Covid-19 in 30% of the residents and in 12-15 staff members supported a conclusion that there was "person-to-person" transmission within VG's[Redacted] workplace environment. *Id*. at p. 85, ll. 2-12.

39. Based upon his review of the available records/data, Dr. Oginsky concluded that VG's[Redacted] "acute (illness) presentation and time-course of his illness [was] consistent with an exposure window around the time that the outbreak was occurring at the facility. (Ex. 12, p. 97). Because the likelihood of coming in contact with a contagious person in the community was improbable at the time VG[Redacted] would have been exposed and because he had no household contacts who were ill with Covid-19 around the time he would have been exposed, Dr. Oginsky opined that the "highest probability environment for VG[Redacted] to acquire Covid-19 was the nursing facility where he worked". (Ex. 12, p. 97; Hrg. Trans. p. 72, ll. 13-25, p. 73, ll. 1-3). The testimony of Dr. Oginsky is unrebutted.

40. The ALJ credits the content of the medical records and the opinions of Dr. Oginsky, including his testimony that contagious individuals aren't recognized

[5] The evidence presented does not indicate whether the staff member exhibiting symptoms was tested for Covid-19.

immediately because symptoms may not manifest for up to 24 hours, to find that VG[Redacted] was probably exposed to and infected with Covid-19, either from a well appearing, but contagious resident or staff member in the workplace shortly before the outbreak designation at Employer's facility was announced. Moreover, the evidence presented persuades the ALJ that VG's[Redacted] subsequent illness and death was proximately caused by this workplace exposure and ensuing infection.

41. Based upon the evidence presented, the ALJ is convinced that the treatment VG[Redacted] received following his positive Covid-19 test result/diagnosis, including his in-patient hospital care, was causally related to his work-related Covid-19 infection. Moreover, the evidence presented persuades the ALJ that this care was reasonably necessary as an attempt to cure and relieve VG[Redacted] of the effects of this work-related occupational disease and otherwise preserve his life.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. C.R.S. § 8-43-201.

B. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo.App. 2002). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002).

C. The weight and credibility to be assigned expert testimony is also a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo.App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968). In this case, the undersigned ALJ concludes that the unrebutted expert medical opinions of Dr. Oginsky are supported by the medical record, the available medical literature and public databases. Dr. Oginsky has extensive prior experience treating Covid-19 patients, establishing Covid-19 safety protocols and had the opportunity to draw conclusions after reviewing the entire medical record and available databases concerning the facility involved in this case. Accordingly, the ALJ concludes that Dr. Oginsky's opinions are credible and more convincing than the suppositions raised by Respondents based upon the testimony of DM[Redacted] and MN[Redacted]. While the ALJ is convinced that the testimony of DM[Redacted] and MN[Redacted] is sincere, the medical evidence concerning the transmission of Covid-19 coupled with the remaining opinions of Dr. Oginsky persuades the ALJ that VG[Redacted] probably contracted Covid-19 while working in Employer's facility and that his need for treatment and ultimately his death were related to that exposure.

D. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Compensability

E. To sustain her burden of proof concerning the compensable nature of VG's[Redacted] death, Claimant must establish, by a preponderance of the evidence, all the elements necessary to find a work related injury compensable, specifically that the death arose out of and in the course of employment. See generally*, Matter of Death of McLaughlin,* 728 P.2d 337 (Colo.App. 1986); *Gates Rubber Co. v. Industrial Commission,* 705 P.2d 6 (Colo.App. 1986); see also*, Deane Buick Co. v. Kendall, 160 Colo. 265, 417 P.2d 11 (1966).*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for an injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions.

In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the evidenced presented persuades the ALJ that VG's[Redacted] alleged Covid-19 exposure and subsequent infection occurred within the Employer's facility during his working hours as he discharged his floor tech duties. Nonetheless, the question of whether VG's[Redacted] Covid-19 infection, subsequent illness and death arose out of his employment must be answered before his illness/death can be considered compensable.

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001); *Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the alleged injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996). As referenced above, proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo.App. 1997). Here, Claimant alleges that VG[Redacted] was exposed to and infected with the Covid-19 virus while discharging his duties as a floor-tech for Respondent-Employer. According to Claimant, this exposure lead to a positive Covid-19 test result, subsequent systemic illness, including the development of Covid-19 pneumonia, hospitalization to treat his resultant condition(s) and ultimately his untimely death.

H. Based upon the evidence presented, the ALJ concludes that Claimant's claims are rooted in the legal principals surrounding the manifestation of an occupational disease rather than an accidental injury. An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo.App. 1993). In contrast, an occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo.App. 1997). The criteria for proving an occupational disease is set forth in C.R.S. § 8-40-201(14). An occupational disease is defined as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause

and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

I. Thus, in practice an occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of that work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo.App. 1993). Evidence in a workers compensation claim regarding an occupational disease must establish a reasonable causal connection between the work and an occupational disease but need not establish it with "medical certainty." *Beaudoin Construction, Co. v. Industrial Commission*, 626 P.2d 711 (Colo. App. 1980). Expert opinion is neither necessary nor conclusive in proving causation of an occupational disease claim. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo.App. 1990); *In re the of Death of Talbert*, 694 P2d 864 (Colo.App. 1984); *Meza v. ICAO*, 2013 COA 71, 303 P.3d 158 (Colo.App. 2013). In this case, Respondents contend that because VG's[Redacted] job functions were janitorial in nature and did not require him to work directly with or transfer Covid positive residents to the isolation unit, Claimant failed to prove that his illness/death can be seen to have followed as a natural incident of his work. Simply put, because there were no documented incidents of exposure between VG[Redacted] and a Covid positive person at work, Respondents assert that Claimant failed to establish a causal connection between VG's[Redacted] employment and his Covid-19 infection. In order for VG's[Redacted] Covid-19 infection and subsequent death to be compensable, Respondents argue that Claimant "should have to establish that there was contact with the residents or know (sic) positive employees just before he tested positive . . ." (Resp. Position Statement, p. 10).

J. Concerning Respondents' contention that there must be direct contact with an infected person, Dr. Oginsky convincingly testified that because of its aerosolized nature, Covid-19 transmission spreads more effectively and efficiently than other viruses, including influenza and rhinovirus, which spread by infectious droplets. Because it is buoyant, Covid-19 contagion can travel via the air directly into a person's airways and lungs from a distance. Hence the Centers for Disease Control (CDC) established a six foot per fifteen minute exposure rule as their time line for when a person may receive a large enough amount of contagion to be infected with Covid-19. (Hrg. Trans., p. 70, ll. 8-13, p. 74, ll. 17-24). For this reason, Dr. Oginsky testified that it is usually 'fruitless" and inappropriate to apply a system of direct transmission to analyzing a case of Covid-19 infection, because the spread of respiratory illnesses, including Covid-19 is often not traceable to a single event. (Hrg. Trans., p. 66, ll. 2-13). Indeed, Dr. Oginsky testified that "[i]t is rare in the case of respiratory illnesses to ever document a direct contact to contact to contact exposure chain. *Id.* at p. 66, ll. 19-21. Accordingly, the ALJ is not convinced that there must be direct contact with an infected person for a sufficient dose of Covid-19 virus to be transmitted to another person.

K. Contrary to the assertions of Respondents' Counsel, the evidence in this case supports a conclusion that VG's[Redacted] Covid-19 infection, more probably than not, arose out of his work in Employer' facility. Indeed, the evidence presented

establishes that the chances of VG[Redacted] having a community encounter with a contagious stranger was only 0.3% as compared to the 30% attack rate for VG[Redacted]work environment. Moreover, Dr. Oginsky noted that any such community encounter would have to involve a long enough exposure to transmit the virus to VG[Redacted], which Dr. Oginsky concluded was an “extremely low probability event” in the community environment. In contrast, the statistical data regarding the number of residents and staff testing positive for or exhibiting symptoms of a Covid-19 infection supports a reasonable conclusion that VG[Redacted] was working in a facility besieged with a “person-to-person” spread of Covid-19. Indeed, the evidence presented persuades the ALJ that despite enhanced cleaning protocols, universal precautions, stringent use of PPE and a complete lock down of residents and limited contact between staff members, transmission of the virus within Employer’s facility continued. So much so, that an outbreak designation was imposed on the facility by the health department of May 29, 2020.

L. Based upon the airborne transmission vector and the statistical opinions expressed by Dr. Oginsky, the ALJ is convinced that VG’s[Redacted] Covid-19 infection is, more probably than not, directly related to his presence in Employer’s facility to discharge his work duties. In other words, the ALJ is persuaded that VG’s[Redacted] Covid infection followed as a natural incident of his work in Employers facility and as a result of the exposure occasioned by the nature of his employment, he fell ill and died. Thus, his employment exposure is the proximate cause his illness and death, whether or not he had close direct contact with infected residents or staff members. Indeed, close personal contact does not appear necessary for transmission of the virus given its aerosolized nature, which is why the CDC was prompted to recommend distancing rules. The testimony of MN[Redacted] that VG[Redacted] did not have any contact with known Covid-19 positive persons provides Respondents no safe harbor to escape liability given the fact that contagious persons may be asymptomatic for up to 24 hours before the onset of symptoms, which simply means that contagious individuals are often not recognized before they infect someone else. Based upon the totality of the evidence, including the opinions of Dr. Oginsky and the testimony of MN’s[Redacted] that the facility houses a large number of people on a daily basis, the ALJ is convinced that VG[Redacted], probably came into contact with a well appearing, but contagious person (resident or staff) in the building for a sufficiently long enough period to be infected with Covid-19. He subsequently fell ill and ultimately died as a consequence of this infection. Accordingly, the ALJ is convinced that Claimant has proven that there is a sufficient "nexus" or causal relationship between VG’s[Redacted] employment and the Covid-19 infection leading to his illness and death.

M. In concluding that Claimant has established that VG[Redacted] suffered a compensable occupational disease causally related to his work for employer, the ALJ rejects any suggestion that VG[Redacted] was equally exposed to a Covid-19 hazard outside of his employment and that he may have contracted Covid from Claimant or someone living in his household. While the evidence presented supports a finding that Claimant was sick with gastritis and gastrointestinal issues, there is no persuasive evidence to support a find/conclusion that any member of VG’s[Redacted] household

was sick with Covid before, during or after he became ill and tested positive for Covid-19. Indeed, the suggestion advanced by Respondents that VG's[Redacted] may have contracted Covid from Claimant comes from testimony of MN[Redacted]. However, MN[Redacted] testified that VG[Redacted] informed her that Claimant was sick approximately two weeks before VG[Redacted] developed symptoms. Moreover, VG[Redacted] informed MN[Redacted] he was not sure what was making Claimant sick. (Hrg. Trans., p. 94, ll. 12-25, p. 95, ll. 1). Based upon this evidence, the ALJ finds Respondents' suggestion/conclusion that Claimant was ill with Covid and did not want to get tested is speculative and unconvincing.

Medical Benefits

N. Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such medical benefits if the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

O. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). The question of whether the need for treatment is causally related to an industrial injury is also one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo.App. 1999). Here, the evidence presented persuades the ALJ that Claimant's hospitalization and subsequent intensive treatment was directly related to the ravages that his Covid-19 infection leveled on his body. Indeed, the evidence presented supports a finding that VG's[Redacted] Covid-19 infection caused him to develop pneumonia, hypoxia, sepsis and multiple organ failure. Moreover, the totality of the evidence presented establishes that Claimant's admission to the intensive care unit represented the last best resort to cure and relieve VG's[Redacted] of the ongoing effects of his infection. Consequently, the ALJ concludes VG's[Redacted] hospitalization and subsequent in-patient treatment was reasonable and necessary. Accordingly, Respondents shall, pursuant to C.R.S. § 8-42-101 (6)(a) and (b), reimburse such estate, widow, insurer or governmental program for the reasonable and necessary medical expenses incurred as a consequence of VG's[Redacted] hospitalization and in-patient Covid-19 treatment.

Claimant's Entitlement to Temporary Total Disability Benefits

P. Respondents concede that Temporary Total Disability (TTD) would be owed if Claimant established the compensable nature of VG's[Redacted] Covid infection, subsequent illness and death. In light of this concession and because the evidence presented otherwise supports a conclusion that VG[Redacted] suffered a compensable occupational disease leading to his hospitalization and inability to work between June 2, 2020 and his death on July 1, 2020, Claimant is entitled to TTD benefits for this time period.

Common Law Marriage

Q. As noted, Respondents confess that Claimant established that she is the surviving widow and statutory dependent of VG[Redacted]. (Resp. Position Statement, Finding of Fact, ¶ 13, p. 4). Even without such concession, the evidence presented supports a conclusion that Claimant and VG[Redacted] were common law married. Colorado has long recognized common law marriages. See *Taylor v. Taylor*, 50 P. 1049 (Colo.App. 1897). Since 1987, the pivotal case in Colorado outlining the requirements for establishing a common law marriage has been *People v. Lucero*, 747 P.2d 660 (Colo.1987). In *Lucero*, the Colorado Supreme Court stated that a common law marriage is established by mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. In doing so, it focused on cohabitation of the parties and their reputation in the community as the two primary factors to evaluate an intention to be married, although any evidence manifesting such an intention to establish a marriage could fulfill the burden of proof. *See Id.* at p. 665.

R. Recently the Colorado Supreme Court revisited the standard and refined the test to emphasize the parties' mutual agreement to enter into a marital relationship in the context of a trio of opinions issued on January 11, 2021. The primary case setting forth the Court's new standard was *Hogsett v. Neale*, 478 P.3d 713 (Colo. 2021). It elaborated on the new standard and need to review the totality of the circumstances in the case of *In re Estate of Yudkin*, 478 P.3d 732 (Colo. 2021).[6] In *Hogsett*, the Court modified the applicable test to acknowledge modern norms, which rendered the more traditional indicia of marriage no longer exclusive to marital relationships, i.e. those recognized by *Lucero* as typically indicative of a marital relationship because that indicia is often present in non-marital relationships currently. The new test established by *Hogsett*, while retaining elements from *Lucero*, is essentially that a common law marriage is "established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, manifested by conduct reflecting that agreement." *Hogsett*, 478 P.3d at 715. The *Hogsett* court elaborated that marriage represents "a deeply personal commitment to another human being . . . and the

[6] The third case, *In re Marriage of LaFleur and Pyfer*, 479 P.3d 869 (Colo. 2021), largely focused on the issue of whether same sex couples could prove the existence of a common law entered into prior to same sex marriages before Colorado legally recognized same sex marriages.

decision whether and whom to marry is among life's momentous acts of self-definition." *Id.* at p. 719, citing *Goodrige v. Dep't of Pub. Health*, 798 N.E.2d at 954-55 (2003). The core inquiry under this standard is whether the parties intended to enter into a truly marital relationship involving a committed, intimate relationship of mutual support and obligation. *Id.* at p. 715. The necessity to show an agreement to marry is absolute in this standard, although the Court retained the elements of *Lucero* that such an agreement could be inferred from the parties' conduct assessed within the context of the overall relationship. *Id.*

S. The *Hogsett* Court further elucidated factors which a Court should examine when necessary to infer an agreement to marry, including instances of shared financial responsibility such as leases, joint bills, filing joint tax returns, evidence of estate planning including wills, symbols of commitment (rings), the couples references to each other, and also the more traditional factors such as cohabitation, having children together, and use of surnames. *Id.* at pp. 722-725. However, it also noted the more important factors emphasized by *Lucero*, namely cohabitation, using each other's surnames, and having children together, were less decisive in modern times given the frequency with which those factors may be present in couples who both considered themselves married and not. *Id.* at pp. 722-723. The Supreme Court emphasized these points further in the *Yudkin* case, noting the purpose of a court's examination is to discover the intent of the parties to be married, not "test the couple's agreement to marry against an outdated marital ideal." *Yudkin*, 478 P.3d at 718.

T. In this case, the evidence establishes that Claimant and VG[Redacted] were in a long term personal relationship with a level of commitment mirrored the "momentous act of self-definition" the Colorado Supreme Court contemplated when deciding to refine the doctrine of common law marriage. The core query of *Hogsett* is to identify the existence of an intent to be married. Here, the evidence demonstrates that the relationship between Claimant and VG[Redacted] carried the attributes of a legally binding relationship. Indeed, they proceeded through a ceremony in the presence of their friends, wherein they expressed their desire to be considered husband and wife. They exchanged rings, purchased a home in joint tenancy and as the medical records demonstrate VG[Redacted] referred to Claimant as his spouse. Moreover, VG[Redacted] identified Claimant as the beneficiary on his life insurance policy, listing her as his wife. Finally, Claimant filed a joint tax return identifying VG[Redacted] as her husband following his death. From every aspect in which Claimant and VG[Redacted] had set up their lives, there were signs of an intent to enter into the legal institution of marriage. See *Sara Ortega v. Blue Star Holding Company*, W.C. No. 4-661-263-02 (ICAO, April 17, 2018). As noted in *Hogsett,* a common law marriage is "established by the *mutual* consent or *agreement* of the couple to enter the legal and social institution of marriage." Based upon the principles announced in *Hogsett* and *Yudkin*, the ALJ finds/concludes, as did the District Court Judge in the probate action, that there is sufficient evidence to prove the existence of a common law marriage in this case.

Death Benefits

U. The Workers' Compensation Act provides that spouses and the minor children (under the age of 18) of an injured worker who succumbs to his/her injuries are presumed to be wholly dependent and entitled to death benefits. C.R.S. § 8-41-501(1)(a) and (b). Section 8-41-503(1), C.R.S., provides: "Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions except as provided in section 8-41-501(1)(c). Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the director may designate."

V. Section 8-42-115(1)(b), C.R.S., states: "(1) In case death proximately results from the injury, the benefits shall be in the amount and to the persons following: . . . (b) If there are wholly dependent persons at the time of death, the payment shall be in accordance with the provisions of § 8-42-114." If there are both persons wholly dependent and partially dependent, only those wholly dependent shall be entitled to compensation. § 8-42-119, C.R.S. In this case, Respondents acknowledge that Claimant is a dependent. (Resp. Position Statement, FOF ¶ 13, p. 4). The evidence presented fails to establish that there are other wholly or partially dependent persons. Accordingly, death benefits payments shall be made to Claimant, as VG[Redacted] surviving widow, pursuant to C.R.S. § 8-42-114 in the amount of "sixty-six and two-thirds percent of the deceased employee's average weekly wage . . . per week. (See, C.R.S. §§ 8-41-501, 8-42-114).

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that VG[Redacted] contracted a compensable Covid-19 infection arising out of and in the course and scope of his employment with the employer on June 2, 2020.

2. Claimant has established, by a preponderance of the evidence, that VG's[Redacted] need for hospitalization, treatment and subsequent death were causally related to his compensable Covid-19 infection.

3. Claimant has established, by a preponderance of the evidence, that the care VG[Redacted] received after his Covid-19 diagnosis was reasonable and necessary to cure and relieve him of the effects of said infection and that his need for care was related to this infection. Accordingly, Respondents shall reimburse Claimant, individually as Personal Representative of VG's[Redacted] estate, and/or any insurance carrier or governmental program that has paid for the reasonably necessary and related medical care received by VG[Redacted] at Penrose Hospital between June 2, 2020, and his death on July 1, 2020.

4. Claimant has established, by a preponderance of the evidence, that VG[Redacted] was temporarily totally disabled from June 2, 2020, until the date of his death on July 1, 2020. Accordingly, Respondents shall pay TTD benefits in the amount

of sixty-six and two-thirds percent of VG[Redacted] average weekly wage of $583.80 commencing June 2, 2020 and running through June 30, 2020.

5. Claimant has established, by a preponderance of the evidence, that she is the surviving widow and a dependent of VG[Redacted]. Accordingly, Respondents shall pay death benefits to Claimant pursuant to the provisions of C.R.S. §§ 8-41-501, 8-42-114 and 8-42-115, commencing July 1, 2020, and continuing thereafter until terminated pursuant to the provisions of C.R.S. § 8-42-120.

6. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

DATED: March 1, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-160-157-001

STIPULATIONS

- Prior to hearing Respondents agreed that Claimant was entitled temporary total disability (TTD) benefits from the date of injury through his return to modified duty on January 29, 2021. Simply put, because the period of disability lasted longer than two weeks from the day Claimant left work as a consequence of the injury, Respondents conceded that Claimant was entitled to TTD pursuant C.R.S. § 8-42-103(1) (b) commencing December 25, 2020. According to Respondents' Counsel payment for the previously unpaid waiting period of time has been issued.

- The parties also stipulated and agreed that Claimant missed work on August 11, 2022 to attend the Division IME in Denver.

These stipulations were approved and accepted by the ALJ.

REMAINING ISSUES

I. Whether Claimant proved entitlement to temporary partial disability benefits the dates for which are outlined in Exhibit 12.

II. Whether Claimant proved that Respondents failed to timely pay medical benefits in violation of WCRP 16 and are liable for penalties pursuant to C.R.S. §§ 8-42-304(1) and 305 or under § 8-43-401(2)(a)

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a 48 year old (DOB: 10/10/74) trash truck driver for Employer. He injured his low back on or about December 24, 2020. Claimant's job duties require driving a commercial trash truck and collecting and loading trash, grass clippings and "anything sitting outside". (Hrg. Trans., p. 22, ll. 3-8). Claimant would occasionally lift 50 pounds or more. *Id*. at p. 22, ll. 9-12. Approximately 2-3 weeks prior to the date of injury, Claimant was assigned to a truck that required him to repetitively ascend and descend three steps on the left side of the truck to complete his route. Previously, Claimant had to negotiate one step to enter and exit the cab of his truck. Claimant developed left lower back pain while running his route on December 24, 2020. Nonetheless, he was able to complete his work shift.

2. Liability for Claimant's injury was admitted and he proceeded to treat conservatively. Claimant was initially treated at UC Health but eventually came under

the care of Dr. Castrejon who has overseen Claimant's care. Chiropractic treatment provided no lasting relief. Diagnostic testing revealed a left S1 radiculopathy prompting administration of an S1-2 transforaminal epidural steroid injection that provided next to no relief. After a surgical evaluation that concluded with a recommendation for continued non-operative management, Claimant was offered a facet injection, which he declined. Claimant was ultimately placed at maximum medical improvement (MMI) and discharged from care by Dr. Miguel Castrejon with an 11% whole person impairment rating.

3. Claimant was initially evaluated by Dr. Castrejon on May 10, 2021 during which Dr. Castrejon imposed physical restrictions to include, sedentary work, allowance to sit, stand and walk as tolerated, no commercial driving, no lifting and limited bending/stooping. (Ex. 3, bates 018; Ex. 2, bates 011). Claimant was seen by Dr. Castrejon approximately once per month for several months before being placed at MMI on January 6, 2022, with a permanent lifting restriction of 50 pounds. (Ex. 3, bates 018-019; Ex. 2, bates 012). At the request of respondents, Claimant underwent a Division IME (DIME) with Dr. Bryan Alvarez on August 11, 2022 who opined claimant was not at MMI. (Ex. 3, bates 014, 022).

4. Claimant was off of work immediately following the injury and returned to work on modified duty on January 29, 2021. A December 13, 2022 General Admission of Liability (GAL) reflecting that TTD was paid from December 30, 2021 (sic) through January 28, 2021 is contained at Exhibit 5, bates 029. As noted, Respondents stipulated that Claimant was due TTD beginning December 25, 2020 and running through December 29, 2020, and payment for this period has been issued.

5. Claimant continues to work for [Redacted, hereinafter GL]. He testified that since his return to work he has missed several shifts to either attend medical appointments or because he was in too much pain from the work injury to report to work. Claimant compiled a list of missed time from work he asserts is due to his admitted industrial injury. The list is contained at Exhibit 12, bates 067 and allegedly contains those days Claimant missed work due to a medical appointment or because he was physically unable to work secondary to pain caused by his low back injury.

6. As noted, Respondents have paid for all missed time prior to claimant's return to work on January 29, 2021. Thus, the question of whether Claimant is entitled to temporary disability benefits for the dates listed on Exhibit 12 commences with the entry for February 26, 2021 and ends on September 5, 2022, the last entry on Exhibit 12. Concerning the dates between February 26, 2021 and September 5, 2022, Respondents confess that Claimant had medical appointments on February 26, 2021, March 1, 2021, May 3, 2021, August 3, 2021, March 3, 2022, and August 11, 2022. These six dates are highlighted in yellow on Exhibit 12. The appointments from these dates are corroborated by other evidence, specifically the DIME report of Dr. Alvarez and the billing records presented by Respondents at Exhibits 6-11. Except on two occasions, Claimant testified that his supervisors did not require him to return to work following his medical appointments. (Hrg. Trans., p. 25, ll. 4-10). During cross-

examination, Claimant reiterated that he would miss a full day of work to attend his doctor's appointments and denied any suggestion that he was taking time off of work to care for his girlfriend. (Hrg. Trans., p. 32, ll. 9-25, p. 33, ll1-2).

7. In addition to the six dates referenced above, Exhibit 12 contains 30 other days between February 26, 2021 and September 5, 2022, which Claimant asserts he missed from work to attend other medical appointments or because he was in too much pain from his injury to report for his shift. Indeed, Claimant testified that there were days he "couldn't even get up" because of his pain and for this reason, he called off work. (Hrg. Trans., p. 26, ll. 16-21). In contrast to the verified six dates mentioned above, there is no persuasive corroborating evidence tending to establish that any of the additional 30 days Claimant missed from work between February 26, 2021 and September 5, 2021, were related to his attendance at a medical appointment to cure and relieve him from the effects of his admitted industrial injury.

8. Claimant testified that if he was going to miss time from work to attend a medical appointment he would contact his supervisor, [Redacted, hereinafter DE], by phone and alert him of the appointment or show him the appointment card from the doctor's office. (Hrg. Trans., p. 24, ll. 11-20). Concerning those days where Claimant was purportedly in too much pain to report to work, he testified that he would call off work for the day, on the day, by reporting to DE[Redacted] that he could not work. (Hrg. Trans., p. 29, ll. 7-13). For scheduled days off, Claimant testified that he would call into in work the day before he wanted to take off and ask for the day off. *Id*. at p. 29, ll. 11-16.

9. [Redacted, hereinafter DW] testified as Employer's operations manager. DW[Redacted] explained Employer's paid time off (PTO) policy. According to DW[Redacted] PTO referred to time off that had been previously scheduled and approved. (Hrg. Trans., p. 65, ll. 22-25, p. 66, l. 1). Typically, scheduled PTO is requested two weeks prior to the requested day off. *Id*. at p. 66, ll. 2-4. Time off described as "Unscheduled – PTO" referred to PTO that was not requested prior to the day but rather was a call-off the day of. *Id.* at p. 65, ll. 22-25, p. 66, l. 1. DW[Redacted] testified that Respondents' Exhibit C constituted a time chart for Claimant that contained a "print out of [Claimant's] days off", including both his PTO and unscheduled time off. (Hrg. Trans., p. 67, ll. 10-14). According to DW[Redacted], the time chart at Respondents' Exhibit C also documented several dates coded as "Holiday Ineligible – Unpaid". According to DW[Redacted], when seen on Exhibit C (Claimant's Exhibit 12), Holiday Ineligible "means the employee called off either the day before the holiday, the day after the holiday, the day of the holiday or the make-up day". *Id*. at p. 67, ll. 15-20. In order to be paid for a holiday, DW[Redacted] explained that employees must "work the day before the holiday, the day after the holiday, and either the holiday or the make-up day for the holiday". *Id*. at p. 68, ll. 2-4. Respondents Exhibit C/Exhibit 12 demonstrates that Claimant was ineligible for holiday pay on Labor Day (9/5/22), Christmas Eve (12/24/21), Thanksgiving (11/25/21), and Monday July 5, 2021 (Independence Day Observed). Based upon the testimony of DW[Redacted], the ALJ

finds that Claimant's "ineligibility" was probably due to Claimant's not working the day before, the day after, the day of or the make-up day for the aforementioned dates.

10. Respondents' Exhibit C confirms that Claimant did not work the day before, the day after, the day of or a make-up day for any of these documented holidays. Indeed, Exhibit C documents that Claimant made use of unscheduled PTO either before or after the observed holidays in question. (See Ex. C, bates 012-013). While Claimant's Exhibit 12 seeks compensation for each of the holidays, it does not consistently seek compensation for each of the days before the scheduled holiday. Specifically, Exhibit 12 does not include a request for temporary disability benefits for September 4, 2022 or November 24, 2021. The ALJ infers from Claimant's Exhibit 12 and his withdrawal of his request for benefits related to June 18, 2022 that any dates Claimant missed which are not contained on Exhibit 12 are days which Claimant probably missed work for personal reasons. Because Claimant missed both September 4, 2022 and November 24, 2021, then it is more probably true than not that Claimant was not paid for Labor Day (9/5/22) and Thanksgiving Day (11/25/21) because he was ineligible for holiday pay on those dates.

11. There is also a code designated "Unscheduled – unpaid SE" which DW[Redacted] testified meant that Claimant was out of PTO time, i.e. PTO allowance. (Hrg. Trans., p. 68, ll. 5-8). Crediting DW's[Redacted] testimony, the ALJ finds that Claimant was probably out of PTO on September 20, 2021, August 31, 2021 and April 6, 2021 as listed in Exhibit 12. Accordingly, his time off work for these dates was probably unpaid. (Ex. 12, bates 067).

12. Exhibit 12 and Exhibit C contain scheduled PTO dates for August 11, 2022, August 10, 2022, March 3, 2022, March 2, 2022 and September 14, 2021. The ALJ finds these dates noteworthy because, per the testimony of DW[Redacted] and Claimant himself, they reflect days that Claimant requested off prior to missing the day itself, possibly as much as two weeks prior to each date for which PTO was taken. However, outside of August 11, 2022, there is no corroborating evidence establishing that the remaining dates reflect days on which Claimant had scheduled medical appointments. The explanation Claimant offered for the missed time from work on these dates was that he was in too much pain to report to for his shift on these days. Thus, the court must infer that claimant requested these days prior to taking the days off because claimant believed he *would be* in too much pain to report to work on those days. It strains credulity to believe that Claimant could be so prophetic to predict, perhaps days in advance, when his pain would reach levels that would preclude him from reporting to work. Based on a totality of the evidence presented, the ALJ finds Claimant's testimony that he took PTO on the days listed in Exhibit 12 because his was in too much pain to work incredible and unpersuasive.

13. Claimant testified that the time of day of his medical appointments varied. Some appointments occurred in the morning while others occurred in the afternoon. When asked why he was not able to report to work before or after his appointments, Claimant simply suggested that he was not required to return to work after his

appointment. Similarly, Claimant offered no evidence or any explanation for why he did not miss time from work for any of the other numerous appointments he had between December 24, 2020 and the January 6, 2022 MMI appointment. Per the Division IME report, Claimant had at least 30 other scheduled medical appointments for which no accountable time appears on either Exhibit C or Exhibit 12. Accordingly, the ALJ finds that Claimant either did not miss time from work while attending these other medical appointments or was not held accountable for the time that was missed to attend these appointments. Based upon the evidence presented, the ALJ is convinced that Claimant was probably not held accountable for minimal lost time related to attending scheduled medical appointments on days that he reported to work either before or after his appointments. Indeed, the evidence presented supports a finding that Claimant was only held accountable for those days on which he did not report for work at all. Because the evidenced presented supports a finding that Claimant was probably not required to return to work after his medical appointments and the parties stipulated that Claimant attended medical appointments related to his industrial injury on 2/26/21, 3/1/21, 5/3/21, 8/3/21, 3/3/22, and 8/11/22, the ALJ is persuaded that the lost time on each of these dates is related to the work injury.

14. Concerning the remaining dates from Exhibit C/Exhibit 12 for which Claimant requests payment of temporary disability benefits, the evidence presented supports a finding that Claimant was not eligible for holiday pay on Labor Day (9/5/22), Christmas Eve (12/24/21), Thanksgiving (11/25/21), and Monday July 5, 2021 (Independence Day Observed) probably because he did not work the day before, the day after, the day of or the make-up day for the aforementioned dates. The ALJ is not convinced that Claimant missed the aforementioned dates of work because he needed to attend a medical appointment or was simply in too much pain from his industrial injury to work. Rather, the ALJ is convinced that Claimant probably missed time on these dates and for the remaining dates identified in Claimant's Exhibit 12 for reasons unrelated to his work injury which is strikingly consistent with his attendance and missed time from work pre-dating the work injury.[1] (See Exhibit C, bates 012-015). Accordingly, the ALJ finds that Claimant has failed to prove that he missed work on 9/5/22, 8/31/22, 8/10/22, 3/18/22, 3/2/22, 2/3/22, 1/12/22, 1/11/22, 1/10,22, 1/5/22, 1/4/22, 1/3/22, 12,24,21, 12/23/21, 11/27/21, 11/25/21, 11/1/21, 9/20/21, 9/14/21, 8/31/21, 8/30/21 8/16/21, 8/13/21, 8/12/21, 8/11/21, 7/5/21, 7/4/21, 6/24/21, 4/6/21, or 3/22/21 because

[1] The Employer's policy regarding absenteeism is that an employee would receive a verbal warning after three occurrences within six months; one occurrence is an absence and tardy is a half occurrence. (Hrg. Trans., p. 68, ll. 10-14). If the action occurs two more times, the employee receives a written warning. *Id.* at p. 68, ll. 16-17. This can then progress to a second written warning, a final written warning, and then separation from employment. *Id.* at p. 68, ll. 17-20. DW[Redacted] acknowledged that [Redacted, hereinafter MG] had received warnings prior to his work-related injury for his attendance. (Hrg. Trans., p. 74, ll. 13-75:16; Ex. D at bates 017-019). Since the date of his injury, December 24, 2020, however, he has only received one written warning for an absence (February 10, 2021). Hrg. Trans., p. 76, ll. 6-9; Ex. D at bates 020, 021 (duplicates)). MG[Redacted] was written up three times beginning in early 2018 and up to August of 2019. He had no write ups for the rest of 2019 or at all in 2020. He had one additional write up after the work injury. The first written warning was January 12, 2018 for not using proper call off procedures. (Ex. D at bates 017). The second write-up was February 4, 2019 and was incorrectly noted as a first written warning. *Id.* at 018. The final write up prior to the work injury was August 20, 2019 for failure to report to work.

of the work injury either to attend medical appointments or because of symptoms related to his admitted injury.

15. As noted above, Claimant attended a DIME with Dr. Bryan Alvarez on August 11, 2022. Dr. Alvarez determined that MG[Redacted] was not at MMI. (Ex. 3, bates 014).

16. Claimant then returned to the office of Dr. Castrejon to see what other treatment options were available to him. (Hrg. Trans., p. 27, ll. 7-12). However, Dr. Castrejon declined to see Claimant due to what he considered overdue medical bills totaling $773.41 related to five dates of service—May 20, 2021, July 22, 2021, September 16, 2021, March 3, 2022, and April 26, 2022. (Hrg. Trans., p. 27, ll. 3-20). Claimant has been unable to make an appointment with Dr. Castrejon since. *Id.* at p. 27, ll. 15-20. Respondents had issued payments for each of the bills and provided explanations of benefits (EOBs) for the denied portions of the bills. (Exhibits E through J). Dr. Castrejon resubmitted each bill for payment in full on multiple occasions and declined to let Claimant schedule a follow up appointment until each bill was paid in full. The only difference between the resubmitted bills and the original bills were handwritten notes on the Health Insurance Claim (HCFA) forms asking respondents to pay the balance.

17. [Redacted, hereinafter RA] testified as a claims supervisor employed by Gallagher Bassett Services, the third-party administrator adjusting the instant claim on behalf of GL[Redacted] and Ace American Insurance. RA[Redacted] testified regarding the bill paying process and the handling of the outstanding bills received from Dr. Castrejon. RA[Redacted] explained that the billing process involved the providers sending bills to a specific address and that the billing department handles bills for claims from all over the country. The bill is then sent to the handling adjuster who reviews it to ensure that the necessary medical records are attached and that the billing is related to the claim. The adjuster then chooses an internal pay code for processing the bill which is then sent back to the billing department for payment pursuant to the fee schedule. The billing department determines the fee scheduled amount and then sends out payment along with an explanation of benefits (EOB). If a provider believes the billing department has erred and would like reconsideration, then the provider is given specific instructions on the EOB to submit additional documentation and a letter outlining the basis for appeal/reconsideration. In this case, RA[Redacted] did not receive any documents from Dr. Castrejon's office that specifically complied with how it stated reconsideration requests should be documented, but it is clear that Dr. Castrejon's office did provide handwritten statements regarding missing payments on the HIPAA forms submitted. Hrg. Trans., p. 57, ll. 13-18; Ex. 6). RA[Redacted] admitted that although the handwritten notes did not look like what he would expect to see in a reconsideration request, he did not have any problem understanding that Dr. Castrejon's office was claiming that additional unpaid balances were due and owing from the bills his office resubmitted. (Hrg. Trans., p. 61, ll. 3-9).

18. RA[Redacted] testified that he had worked as the adjuster on the subject claim off and on prior to March of 2022 due to staffing issues with the company. He acknowledged that Gallagher Basset had received multiple billings from Dr. Castrejon's office. Indeed, RA[Redacted] acknowledged that Dr. Castrejon's office sent a billing for date of service of May 20, 2021 to Respondents on June 9, 2021, with subsequent submissions on October 22, 2021 and November 17, 2021. Tr. at 36:1-7; (Ex. 7 at bates 040-044). There continues to be an outstanding balance of $117.84 on that billing (Ex. 6 at bates 038). Respondents originally paid only $39.01 for that appointment. *Id*.; Hrg. Trans., p. 36, ll. 17-24). RA[Redacted] also acknowledged that Respondents received a bill from Dr. Castrejon's office for a date of service of July 22, 2021 on at least September 22, 2021 and again on October 25, 2021. Tr. at 37:1-14; (Cl's Ex. 8 at 46-49). There remains an unpaid balance concerning this invoice according to Dr. Castrejon's office. (Hrg. Trans., p. 37 ll. 5-24, 40, ll. 2-5; Ex. 6 at bates 037).

19. RA[Redacted] acknowledged that Dr. Castrejon's office sent a bill for a date of service of September 16, 2021, which was received by Respondents on October 11, 2021. Hrg. Trans., p. 40, ll. 6-11; Ex. 9 at bates 051). The payment for that same date of service was not made for tizanidine until June 10, 2022. (Ex. G at bates 085). The final payment for the tramadol prescription was not paid until December 9, 2022. (Hrg. Trans. p. 42, ll. 17-25, p. 43, ll. 1-2).

20. RA[Redacted] acknowledged that Respondents received a billing for a date of service of March 3, 2022. (Hrg. Trans., p. 43, ll. 17-19). Of the total bill of $278.97, Respondents paid $168.44 in April of 2022, but did not pay the subsequent payment of $110.53 until October 18, 2022. (Hrg. Trans., p. 43, ll. 17-25, p. 44, ll. 1-5; Ex. 6 at bates 035). Finally, RA[Redacted] acknowledged that Respondents paid Dr. Castrejon's bill for the office visit of April 26, 2022, but failed to pay for the meloxicam prescription until November 18, 2022. (Hrg. Trans., p. 45, ll. 5-15; Ex. 6 at bates 034).

21. RA[Redacted] admitted that each late payment that was issued used the same codes that Dr. Castrejon's office had listed on their bills. (Hrg. Trans. p. 46, ll. 18-25, p. 47, l. 1). Regardless, RA[Redacted] suggested that the bills submitted had only been partially paid due to the fee schedule and the CPT code the provider used. RA[Redacted] explained that he was not a billing expert and did not know the fee scheduled amounts or the correct CPT codes for billing services. Nonetheless, it was his understanding that Dr. Castrejon's office was asking to be paid for the full amount of charges billed regardless of the fee schedule. RA[Redacted] also explained that as a supervisor, he had the ability to escalate payment issues and waive deadlines and errors with the codes if after discussion with the provider, he was able to determine that a particular bill should be paid. He explained that no one from Dr. Castrejon's office ever called him or the other adjusters to discuss the issue but rather continued to resubmit the same previously denied bills without the additional documentation requested on the EOBs. Consequently, the billing department continued to deny the bills as duplicates. RA[Redacted] testified that he eventually escalated the resubmitted bills for payment in October and November of 2022. He explained that he typically escalates bills once someone reaches out to him directly.

22. Claimant has withdrawn his request for penalties based on the date of service May 20, 2021. The remaining dates of service, however, only involve two different service codes for office visits (99214) and for various medications (99070), including meloxicam, tizanidine, tramadol, and gabapentin. The amount billed changes depending on whether the DOS was in 2021 or 2022, but the codes remain the same. Respondents' denials and payments of the submitted invoices are inconsistent and random. For example, the office visit for April 26, 2022 was paid in full on June 3, 2022 ($203.42) (Ex. I at bates 109), but the office visit for March 3, 2022 is only partially paid at $168.44. (Ex. H at bates 093). The office visit for September 16, 2021 was paid in full on November 2, 2021, but the office visit for July 22, 2021 has still not been paid. (Ex. 6 at bates 037).

23. The July 22, 2021 date of service was submitted for payment on July 29, 2021. (Ex. 8 at bates 046). The September 16, 2021 date of service was submitted for payment on October 5, 2021. (Ex. 9 at bates 051). The March 3, 2022 date service was submitted on March 17, 2022. (Ex. 6 at bates 035). The April 26, 2022 data service was submitted on the same date service was rendered. *Id.* All of the dates of service have been submitted again on numerous occasions, including specifically on October 19, 2022. *Id.* at bates 033.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo.App. 2001).

B. It is the ALJ's sole prerogative to assess the credibility of witnesses and the probative value of the evidence to determine whether a party has met its burden of proof. In addition to determining the sufficiency of the evidence presented, the ALJ evaluates the credibility and probative value of conflicting evidence, including competing experts and inconsistencies in a particular witness' testimony. *Johnson v. ICAO*, 973 P.2d 624, 626 (Colo.App. 1997). When determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the

testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Claimant's Entitlement to Temporary Disability Benefits

D. To establish entitlement to temporary disability benefits, the claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *S*ee *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo.App. 2001). A "disability," occurs when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Baldwin Constr. Inc., V. Indus. Claim Appeals Office,* 937 P.2d 895, 897 (Colo.App. 1997). Claimant must prove both disability and wage loss or a loss in earning capacity to be entitled to temporary disability benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

E. Whether the claimant has proved a disability, including proof that the injury has impaired the ability to perform the pre-injury employment, is a factual question for the ALJ. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo.App. 1997). The ALJ has broad discretion in assessing the weight and sufficiency of the evidence to determine whether this burden has been satisfied. (*See Sena v. World of Sleep*, 173 Colo. 348, 478 P.2d 671 (1970); *Eisnach v. Industrial Commission*, 633 P.2d 502 (Colo.App. 1981).

F. As found here, Claimant's testimony regarding the reasons he lost time from work outside of those dates corroborated by the medical records is not credible. Indeed, Claimant's testimony was vague, non-specific, and in some cases contradicted by the documents. For example, Claimant testified that he had medical appointments on dates that were not corroborated by the medical records. In fact, Claimant testified that he requested time off on August 10, 2022 to attend a medical appointment with Dr. Castrejon despite indicating that he had not been able to return to Dr. Castrejon because of the claimed outstanding balances outlined above. Simply put, Claimant presented no persuasive evidence of a medical appointment on August 10, 2022 and the record submitted does not support the existence of such appointment. Similarly, Claimant initially testified that he missed work on June 18, 2022 due to his industrial injury. However, after evidence was presented establishing that he requested that day off for personal reasons, Claimant withdrew his request for temporary disability benefits for this date.

G. It is apparent from the evidence presented that outside those dates on which Claimant had a corroborated medical appointment, Claimant has no genuine recollection about why he missed any of the remaining specific dates listed on Exhibit 12. This is evidenced by foregoing as well as the fact that several holidays appear on this list. DW[Redacted] credibly testified that holiday pay was dependent on working the day before, the day of, the day after and a make-up day. Respondents' Exhibit C conclusively establishes that Claimant did not work the day before Labor Day in 2022 or the day before Thanksgiving in 2021. Claimant is not seeking benefits for the day before Labor Day or the day before Thanksgiving. Nevertheless, he contends that he did not work on Labor Day or Thanksgiving Day because of symptoms related to the work injury, when in fact he probably did not work those days because they were holidays.

H. Based upon the evidence presented, the ALJ agrees with Respondents that Claimant is simply asserting that any date for which he did not get paid after his work injury is related to the work injury unless there is proof to the contrary. This is not sufficient to prove his claim. Claimant has the burden of proving the lost time is related to the work injury. Respondents do not have the burden to prove the contrary. In this case, Respondents have presented evidence establishing that Claimant had a history of absenteeism prior to the work injury that closely resembles his absenteeism following the work injury. The evidence presented persuades the ALJ that outside of the six corroborated medical appointment dates listed on Exhibit 12, the remaining uncompensated lost time documented in Exhibit 12 probably represents time Claimant missed for personal reasons rather than time lost because of his work injury, which, as found above is consistent with extensive attendance issues that pre-date the work injury.

Claimant's Penalty Claim

I. The general penalty provision in § 8-43-304(1), C.R.S. sets forth four categories of conduct and authorizes the imposition of penalties when an employer or insurer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel. *See Holliday v. Bestop, Inc*., 23 P.3d 700 (Colo. 2001); *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo.App. 2001). The limiting phrase contained in § 8-43-304(1), C.R.S., "for which no penalty has been specifically provided" modifies the first three categories, but does not modify the fourth category, which is disobeying a lawful order. *Holliday v. Bestop, Inc., supra; Pena v. Industrial Claim Appeals Office,* 111 P.3d 84 (Colo.App. 2004).

J. The term "order" as used in § 8-43-304(1), C.R.S. includes a rule or regulation. (*See* § 8-40-201(15), C.R.S.; *Holliday v. Bestop, Inc., supra; Paint Connection Plus v. Industrial Claim Appeals Office,* 240 P.3d 429 (Colo.App.

2010)(failure to comply with a procedural rule is a failure to obey an "order" within the meaning of § 8-43-304(1), C.R.S); *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo.App. 2002); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo.App. 2005). Accordingly, the ALJ has authority to assess penalties under the general penalty provision contained at § 8-43-304(1), C.R.S. for a violation of WCRP 16-10 rather than the specific penalty enumerated at C.R.S. § 8-43-401(2)(a). (*Holliday v. Bestop, Inc*. *supra* at 706-707; *See also*, *Jill Goss v. The Kroger Company*, W.C. No. 4-855-895-02 (ICAO, January 14, 2013). Under Rule 16-10(A), "All bills submitted by a provider are due and payable in accordance with the Medical Fee Schedule within 30 days after receipt by the payer, unless the payer provides timely and proper reasons (for denial) as set forth by section 16-102 or 3". In this case, the question presented is not whether the ALJ has the authority to impose penalties for a violation of WCRP 16-10(A) under the general penalty statute at C.R.S. § 8-43-304(1) but whether the evidence presented supports that a violation occurred.

K. The imposition of penalties under § 8-43-304(1) requires a two-step analysis. First, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

L. The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *See Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). In this case, Claimant contends that Respondents unreasonably denied payment of portions of Dr. Castrejon's invoices within 30 days of submission. Hence, Claimant asserts that Respondents violated WCRP 16-10(A) and are subject to penalties for the following time periods and amounts:

1. Respondents claim to have received the billing for the July 22, 2021 date of service on September 22, 2021. Payment was due under the Rule by October 22, 2021. The late payments on that bill run from October 23, 2021 until the date of hearing. The balance had still not been paid in full as of the hearing date. That represents 445 days of late payment for a requested penalty of $4,450.

   Concerning this claim, the evidence submitted establishes that Dr. Castrejon's office submitted a billing invoice to Insurer for services rendered on July 22, 2021 in the amount of $442.33. (Ex. F, at bates 050). This bill was fee scheduled and a check was issued to Dr. Castrejon's office in his business name CPRMC (Colorado Pain and Rehabilitation

Medical Center), Inc. on October 29, 2021 for $270.42. *Id.* at bates 055-056. Although Respondents assert that the billing was received September 22, 2021, information attached to the check sent to Dr. Castrejon reflects that the billing date was September 15, 2021. (Ex. F at bates 055). Crediting Respondents indication that the billing date was September 15, 2021, the initial payment and EBO denying payment for $123.87 on October 29, 2021 was fifteen (15) days past the 30 days allowed for under WCRP 16-10(A). As noted, the initial fee scheduled payment did not include an additional $123.87 for 90 units of "supplies and materials" on the grounds that the billed service had "NO ALLOWANCE IN FEE SCHEDULER/URC" and because the "BILLED PROCEDURE CODE HAS AN RBRVS STATUS INDICATOR B IDENTIFYING A BUNDLED CODE. SEPARATE PAYMENT IS NOT ALLOWED. *Id*. at bates 056. Based upon the evidence presented, the ALJ finds that this $123.87 charge probably represented provision of medication prescribed by Dr. Castrejon. Although initially denied, the $123.87 charge was subsequently paid on August 11, 2022, 293 days after the initial denial and 30 day payment period under WCRP 16-10(A) expired. *Id*. at bates 057-058. Resubmission of the billing for consideration of additional charges from this date of service generated additional EOBs without further payment based upon an explanation for the continued denial of payment. *Id*. at bates 060-071; See also, Ex. 6 at bates 037.

2. Respondents claim to have received the billing for September 16, 2021 on October 11, 2021. For the late payment on the tizanidine prescription, the penalty runs from November 11, 2021 to June 10, 2022 (212 days) for a penalty of $2,120.The payment for the tramadol from this date of service was not made until December 9, 2022, so the penalty for that late payment runs from November 11, 2021 until that day (394 days) for a requested penalty of $3,940.

   Concerning these claims, the record evidence establishes that Dr. Castrejon submitted a total of $396.96 in charges for the September 16, 2021 date of service. (Ex. G at bates 073). With a billing date of October 5, 2021, Respondents fee scheduled the invoice and issued an EOB and a check to Dr. Castrejon for $171.36 on November 2, 2021. *Id*. at bates 073, 083-084. Accordingly, initial payment was made within the time period provided for by WCRP 16-10(A). While neither of the charges for Claimant's medications of $149.35 and $75.65 were included in payment to Dr. Castrejon for the same reasons as noted on the October 29, 2021 EOB, the November 2, 2021 EOB clearly denied payment for the additional charges and explained why those charges were denied. (See Ex. G at bates 84). Similar to the billing from July 22, 2021, the cost of one of Claimant's work-related medications from September 16, 2021 was eventually paid on June 10, 2022, 212 days after the initial denial and the 30 day payment period under WCRP 16-10(A) expired. (Ex. G at bates

085-086).[2] However, the $75.65 charge for Claimant's other medication was consistently denied in subsequent EOBs issued after resubmission of the billing. *Id.*; See also, Ex. 6, at bates 036. Following both the initial and subsequent denials, the $75.65 charge for this medication was ultimately processed and paid on December 9, 2022, 394 days after the 30 day payment period under WCRP 16-10(A) expired. (Hrg. Trans. p. 42, ll. 17-25). RA[Redacted] explained that the cost of this medication was only paid recently because the bill was either "sent back to Gallagher Bassett for review and reconsideration or [he] escalated [it] into [his] billing office". *Id.* at p. 43, ll. 3-8. Nonetheless, the evidence presented supports a finding that the initial billing for the $149.35 and $75.65 was initially denied by EOB on November 2, 20921 within the 30 day period allowed for by WCRP 16-10(A) given that the billing was received on October 5, 2021. (Ex. G at bates 083).

3. Claimant contends that the record supports that the March 3, 2022 date of service was received on March 17, 2022. Because payment for the $112.11 charges associated with this date of service were not paid until October 18, 2022, Claimant contends that penalties must be imposed from April 17, 2022 until October 18, 2022 (185 days) for a requested penalty of $1,850.

   Concerning this claim, the evidence presented establishes that Dr. Castrejon submitted two E-billing invoices for a March 3, 2022 date of service. (Ex. H at bates 088). The charges associated with this E-billing totaled $280.55 and $112.11 respectively. *Id*. The billing for $280.55 was received on March 17, 2022. (Ex. H at bates 093). This bill was fee scheduled and a check was issued to CPRMC, Inc. (Dr. Castrejon) in the fee scheduled amount of $168.44 on April 4, 2022. Thus, initial payment for this billing was made and an EOB issued within the window of time provided for under WCRP 16-10(A). Despite the indication that the charges for $112.11 were also received March 17, 2022, this billing was not paid and the initial EOB from April 4, 2022 makes no reference to a denial of the $112.11 charge. (Ex. H at bates 094). Dr. Castrejon's office requested additional payment indicating that the office did not have a "PPO with any insurance". (Ex. 6, at bates 035). Dr. Castrejon's resubmission of the $112.11 billing invoice generated multiple EOBs dated 8/26/2022, 10/7/2022, 11/1/2022 and 11/22/2022 indicating that a denial had already been recommended for the reasons outlined in the explanation codes included on the EBO. As noted, the initial EOB issued in connection with the March 3, 2022 date of service does not include a denial for the $112.11 charges. Despite the EOBs surrounding the March 3, 2022 charges for $112.11, RA[Redacted] testified that a fee scheduled payment in the amount of $110.53 was ultimately paid in connection with

[2] The total charge of $149.35 was reduced (fee scheduled) by $101.39 lowering the payment to Dr. Castrejon to $47.96. (Ex. G at bates 086).

this billing. (Hrg. Trans., p. 44, ll. 1-5). Payment was made on the October 18, 2022. *Id.* According to RA[Redacted], he did not know why the billing wasn't paid or if he was the one who escalated the billing to get it paid. *Id*. at p. 44, ll. 15-25. Nevertheless, this billing was fee scheduled and paid. Id. at p. 44, l. 25, p. 45, ll. 1-4. Payment of the fee scheduled $112.11 billing invoice occurred 185 days after the 30 day payment period under WCRP 16-10(A) expired.

4. Claimant contends that the record supports that the April 26, 2022 day of service was sent to Respondents on that same date. Because the charges for this date of service were not paid until October 8, 2022, Claimant asserts a penalty from May 27, 2022 until October 8, 2022 (166 days) for a penalty of $1,660.

Concerning this claim, the ALJ is persuaded that Dr. Castrejon submitted a billing invoice to Gallagher Bassett totaling $352.77, which billing included a charge of $149.35 for Meloxicam, one of Claimant's work-related medications. (Ex. I at bates 104, 110). This bill was received on May 16, 2022, and a check was issued to Dr. Castrejon in the fee scheduled amount of $203.42 on June 3, 2022. (Ex. I at bates 109). The EOB attached to Dr. Castrejon's June 3, 2022 check denied payment for the $149.35 for Claimant's Meloxicam. *Id*. at bates 110. Accordingly, the evidence presented supports a finding that the initial payment and the denial of the charges for the Meloxicam was timely based on the time period provided by WCRP 16-10(A). Following the initial billing, Dr. Castrejon's office resubmitted the billing with the indication that they had received payment for the office visit but not the Meloxicam. (Ex. 6 at bates 034). Subsequent EOBs issued 8/17/2022, 11/7/2022 and 11/25/2022 provided an explanation for the continued denial of payment. (Ex. I at bates 112-116, 118). Nonetheless, RA[Redacted] testified that the prescription for Meloxicam was paid on November 18, 2022. (Hrg. Trans., p. 45, ll. 5-15). RA[Redacted] testified that non-payment of the prescription was compounded by Dr. Castrejon's failure to write a reconsideration letter explaining why the billing for the Meloxicam should be paid. (Hrg. Trans., p. 45, ll. 16-26, p. 46, ll. 1-22).

M. Respondents contend that the facts presented do not support a violation of WCRP 16-10(A). With exception of the fifteen (15) day late payment of the July 22, 2021 billing invoice and the late payment of the $112.11 invoice from March 3, 2022, the ALJ agrees. WCRP 16-10-2 identifies grounds for denying medical bills for non-medical reasons including missing medical documentation and unrecognized or improper CPT codes. As noted above, with the exception of the July 22, 2021 and March 3, 2022 invoices, each of the bills at issue was timely processed and fee scheduled after receipt. Moreover, Respondents issued an EOB for each billing explaining the reductions in the bills based on fee scheduled limitations and problems

with the CPT codes. Each of the EOBs issued contained code 5721 as a basis and the following statement in all caps:

> TO AVOID DUPLICATE BILL DENIAL FOR ALL RECONSIDERATIONS/ADJUSTEMENTS/ADDITIONAL PAYMENT REQUESTS SUBMIT A COPY OF THIS EOR OR CLEAR NOTATION"

Each EOB also contained a State Specific EOB Message which read as follows:

> Do not resubmit bills for the same dates of services, as listed on this EOR, or they will be considered as duplicates. If any portion of this explanation/payment is being contested or corrected, pursuant to Rule 16(11)(D)(1), within 60 days the following items must be submitted for reconsideration; a copy of the original or corrected bill, a copy of this EOR, a letter that clearly identifies that this is a request for reconsideration with the specific item(s) being contested and with clear persuasive reasons for contesting each item, as well as any additional information as requested in this notice.

N. In this case, RA[Redacted] testified that Dr. Castrejon's office repeatedly submitted bills for the same dates of service without providing the additional information requested by the original EOBs or subsequent EOBs. As stated in each of the original EOBs, the subsequent billings were repeatedly denied as duplicates by the billing department. Per RA[Redacted], additional payments were not processed until he began communicating directly with the billing department advising that these resubmissions were in fact attempts to appeal the earlier denials. There is no allegation that Respondents did not timely deny each of the resubmitted bills. Rather, Claimant's allegation is that the billing department erred in its fee scheduled calculations to the fee schedule and should have paid the bills in full at the request of Dr. Castrejon. Claimant did not present any convincing evidence to support this allegation. In asserting that Respondents had not paid the bills in full pursuant to the fee schedule, Claimant relied entirely on the fact that Dr. Castrejon's office continued to resubmit the bills for payment. However, a review of the resubmitted bills from Dr. Castrejon's office does not prove that the billing department had indeed erred in their application of the fee schedule to Dr. Castrejon's bills. (See Ex. 6). None of the notes from Dr. Castrejon's office referred to the fee schedule or any of the CPT codes. Instead, Dr. Castrejon's office repeatedly asked for payment of the unpaid balance with no reference to or any discussion about the fee schedule or the explanation of benefits that had been provided.

O. The fact that Dr. Castrejon's office continued to resubmit the same bills asking for additional payment does not prove that the office was entitled to payment in full or to any additional payment pursuant to the fee schedule. It merely proves that Dr. Castrejon's office was asking for additional payment. It was Claimant's burden to prove that additional payment was in fact due pursuant to the fee schedule concerning the billing in question. Here, Claimant failed to carry that burden, with exception of the July 22, 2021 and March 3, 2022 late payments as noted above, by failing to present

persuasive evidence regarding the proper fee scheduled amounts for the services billed by Dr. Castrejon. In this case, RA[Redacted] testified that he was not a billing expert and did not know the fee scheduled amounts for the services billed by Dr. Castrejon. No one from Dr. Castrejon's office testified or offered any opinions regarding the proper fee scheduled amounts for the services billed. Claimant did not testify regarding the fee schedule nor did he present any billing experts, a representative of the Division of Workers Compensation, or any other testimony to prove that the third party (Gallagher Bassett) billing department had not properly applied the fee schedule to each of its denials. Because Respondents timely provided payment and EOBs outlining what was being paid and why concerning the invoices from September 16, 2021, March 3, 2022 (with exception of the $112.11 charges) and April 26, 2022, Claimant has failed to prove that Respondents violated WCRP 16-10(A) for the medical charges associated with these dates of service. The fact that additional bills were resubmitted does not negate the initial denial. The fact that RA[Redacted] escalated bills for payment at later dates does not change the analysis. Indeed, the ALJ agrees with Respondents that RA's[Redacted] decision to escalate the bills for additional payments in October and November of 2022 after the application for penalties was filed proves only that he was attempting to resolve the issue. Nonetheless, the ALJ finds that the totality of the evidence presented supports a conclusion that Respondents did not timely pay the billing invoice associated with the medical billing from July 22, 2021 nor did they timely deny or pay the billing associated with the $112.11 charge for Claimant's Meloxicam within the time prescribed by WCRP 16-10(A).

P. Based upon the evidence presented, the reasons RA[Redacted] cited for the failure to timely deny or pay the aforementioned bills fails to convince the ALJ that that failure was objectively reasonable. Indeed, RA[Redacted] simply testified he was not a billing expert, that he did not know the fee scheduled amount of the services billed and did not know why some of the bills were not paid. Any suggestion that RA's[Redacted] testimony supports a conclusion that failure to timely pay the above referenced medical bills was objectively reasonable is unpersuasive. To the contrary, the evidence presented persuades the ALJ that the failures to pay or denials are based on inconsistent and often contradictory reasons. Respondents contended at times that an amount requested was in excess of the fee schedule, but later turned around and paid that exact amount for that same bill or a later bill with the same code. As important here, the ALJ concludes that no reasonable insurer would ignore resubmitted bills, claiming that they were not submitted in the proper format. This is particularly true where, as here, the adjuster had no problem understanding what was still outstanding and unpaid from Dr. Castrejon's March 3, 2022 billing invoice. The fact that the unpaid medical bills have prevented the Claimant from seeing Dr. Castrejon for treatment following a DIME examination concluding that he was not at MMI persuades the ALJ that Claimant has suffered specific and serious harm from Respondents' actions and inactions. Accordingly, the ALJ concludes that Respondents violated WCRP 16-10(A) by failing to pay the July 22, 2021 billing timely and by failing to deny or pay the March 3, 2022 billing from Dr. Castrejon's office in the amount of $122.11. Because Respondents' actions in failing to pay or deny the billing invoices for July 22, 2021 and March 3, 2022 has, in part, resulted in Claimant's inability to secure additional timely

treatment from Dr. Castrejon, the ALJ is convinced that the effect of Respondents' conduct/violation amounts to a delay or denial of medical treatment for Claimant. Indeed, Claimant convincingly testified that he cannot access care based upon Respondents failure to timely pay Dr. Castrejon's bills. Accordingly, the ALJ is convinced that the imposition of penalties in this case is appropriate under the general penalty statute enumerated at C.R.S. § 8-43-304(1) rather than under C.R.S. § 8-43-401(2)(a). (*See*, *Jill Goss v. The Kroger Company*, W.C. No. 4-855-895-02 (ICAO, January 14, 2013; *Pamela Ringler v. King Soopers, Inc.,* W.C. No. 4-121-888-11 (ICAO, March 13, 2013)(Claimant's failure to seek penalties on any conduct outside of the penalty available under C.R.S. § 8-43-401(2)(a) limited the available penalty to eight percent of the withheld medical benefit).

Q. "The imposition of penalties under § 8-43-304(1) is mandatory if there has been a violation and the violation was not reasonable under an objective standard." *Castro v. FBG Service Corporation*, W.C No. 4-739-748(ICAO Dec. 31, 2008). *See also, Armbruster v. Rocky Mountain Cardiology,* W.C. No. 4-447-502 (ICAO Feb. 24 2003). *aff'd by Rocky Mountain Cardiology v. ICAO,* 94 P.3d 1182 (Colo. App. 2004). When, as here, the evidence supports a conclusion that Respondents knew the rule and did not present any convincing arguments that their actions did not violate the rule, the record compels the conclusion that Respondents knew or should have known that their failure to timely pay or deny the July 22, 2021 and March 3, 2022 billing violated the WCRP 16-10(A). As a result, the ALJ would err as a matter of law if he refused to impose a penalty. *Varga v. A1 Sewer Master Mountain Water,* W.C. No. 4-508-548 (ICAO July 1, 2004). "Negligence, as opposed to recklessness and other standards of conduct, connotes an objective standard measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *CCIA v. ICAO,* 907 P.2d 676, 678 (Colo. App. 1995). As noted, RA's[Redacted]justifications for the late payment are not objectively reasonable. An adjuster's "mistaken beliefs" and "poor handling procedures" are not predicated on a rational argument based on law or fact, and thus are not reasonable. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312, 1314 (Colo. App. 1997). As such, penalties must be assessed in this case.

R. The Colorado Supreme Court has adopted the "gross disproportionality" test for determining whether a regulatory fine violates the Excessive Fines Clause. *Colorado Dept. of Labor & Empl. v. Dami Hospitality, LLC*, *supra* (hereinafter *Dami Hospitality*). In Concluding that corporations were protected from the imposition of excessive fines pursuant to the Eighth Amendment, the Court provided:

> In sum, we hold that the Eighth Amendment does protect corporations from punitive fines that are excessive. The appropriate test to apply in assessing whether a regulatory fine violates the Excessive Fines Clause is the "gross disproportionality" test. In assessing proportionality, a court should consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the

> ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses.

Dami Hospitality, *Id.* at 103.

S. Concerning the penalties (fine) imposed in this case, the ALJ is mindful that C.R.S. § 8-43-304(4) provides that, "Any employer or insurer… [that] fails, neglects, or refuses to obey any lawful order (including a rule or regulation) made by the director or panel or any judgment or decree made by any court as provided by the articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each offense….". The statute specifically authorizes an ALJ to assess up to $1,000 per day in penalties against any party that fails to adhere to a regulation or rule of procedure. Asserting that Respondents established no legitimate justification for failing to timely pay Claimant's medical bills, which is precluding Claimant's ability to obtain medical treatment through Dr. Castrejon's office, Claimant contends that he has been forced to endure additional hardship as he needs further treatment to attain MMI. The ALJ is not convinced that Claimant's cited hardship arises to the level for imposition of the maximum penalty allowed for by statute. Indeed, the evidence presented persuades the ALJ that the limited violations in this case support the imposition of a $10.00/day penalty as suggested by Claimant.

T. The purpose of penalties is to address ongoing conduct. The ALJ finds and concludes that the delay in payment or denial of the medical billing involved in this case results from isolated, albeit unreasonable conduct, which billing was ultimately paid through the involvement of RA[Redacted]. Nonetheless, it is actionable to deter future like violations. In this case, a penalty of $10.00 per day is not grossly disproportionate to the harm or risk of harm caused by each day of Respondents failure to pay or deny the charges associated with Dr. Castrejon's July 22, 2021 and March 3, 2022, i.e. the $121.11 billing invoices. Simply put, the fine is proportional to the offending conduct and appropriate under the circumstances presented.

ORDER

It is therefore ordered that:

1. Claimant's request for payment of temporary disability benefits is GRANTED in part as follows:

a. Respondents shall pay temporary total disability (TTD) benefits from 12/25/20 through 12/29/20, pursuant to the stipulation of the parties;

b. Respondents shall pay temporary partial disability (TPD) benefits for Claimant's lost work time to attend medical appointments on 2/26/2021, March 1, 2021, May 3, 2021 August 3, 2021 March 3, 2022 and August 11, 2022;

c. Claimant's request for payment of temporary disability benefits associated with the remaining dates listed in Exhibit 12 is denied and dismissed.

2. Claimant established by a preponderance of the evidence that Respondents violated WCRP 16-10(A) by failing to timely pay Dr. Castrejon's July 22, 2021 billing invoice and by failing to deny or pay Dr. Castrejon's March 3, 2022 billing invoice in the amount of $112.11. Accordingly, Respondents shall pay penalties at a rate of $10.00 per day for these violations, pursuant to §§ 8-43-304(1) and 8-43-305, C.R.S. in the following amounts:

a. 7/22/2021: For the fifteen (15) days between October 15, 2021, when payment was due and October 29, 2021, when payment was made - $150.00 (15 days × $10.00/day = $150.00).

b. 3/3/2022: For the 185 days between April 17, 2022, when payment and or denial of the billing was due and October 18, 2022, when payment was made - $1,850.00 (185 days × $10.00/day = $1,850.00).

c. Claimant's remaining penalty claims are denied and dismissed.

3. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of benefits and compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

DATED: March 20, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-092-107-003

ISSUE

1. Whether Respondent established by a preponderance of the evidence that Claimant received an overpayment of permanent partial disability (PPD) benefits for which Respondent is entitled to repayment.

2. If Respondent is entitled to repayment, what are the terms of repayment?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant suffered a compensable injury on November 8, 2018.

2. Claimant reached maximum medical improvement (MMI) on September 28, 2020, and was given a 17% whole person impairment rating. Claimant's whole person impairment rating corresponds to an award of PPD benefits of $57,249.54. Due to the cap on indemnity benefits, Claimant is only entitled to $39,806.82 in PPD benefits. (Ex. A).

3. Following the date of injury, and until March 13, 2021, Respondent paid Claimant temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits totaling $64,141.88. (Ex. A and Ex. C).

4. On June 9, 2021, Respondent filed a Final Admission of Liability (FAL). The FAL states, "[t]here has been an overpayment in indemnity benefits in the amount of $12,821.86. Overpayment will be taken as a credit against any applicable future benefits." (Ex. A). Claimant filed an Application for Hearing on June 18, 2021, endorsing, among other things, the issue of "alleged overpayment," but the parties canceled the August 25, 2021 hearing.[1]

5. The ALJ finds that Respondent knew of the $12,821.86 overpayment of TTD benefits on June 9, 2021.

6. Two days later, on June 11, 2021, Respondent paid Claimant $20,315.48 in PPD benefits for the period of September 26, 2020 to June 14, 2021. (Ex. C). There is no

[1] Although not included in the evidentiary record submitted by the parties, the ALJ takes judicial notice of the Office of Administrative Courts' files related to this claim. *See Habteghrigis v. Denver Marriott Hotel*, W.C. No. 4-528-385 (ICAO March 31, 2006) ("A court can take judicial notice of its own records and files."). Respondent's contention that the Court may not take administrative notice of these facts is without merit.

evidence in the record that Respondent attempted to recover the known $12,821.86 TTD overpayment, by offsetting it against the PPD payment as provided in the June 9, 2021 FAL.

7. Between June 15, 2021 and July 26, 2021, Respondent paid Claimant an additional $13,183.98 in PPD benefits. Respondent paid Claimant $9,927.30 on June 25, 2021, $1,085.56 on June 25, 2021, $1,085.56 on July 9, 2021 and $1,085.56 on July 23, 2021. (Ex. C). There is no evidence in the record that Respondent attempted to recover the known $12,821.86 TTD overpayment, by offsetting it against any of these PPD payments as provided in the June 9, 2021 FAL. In total, Respondent paid Claimant $33,499.46 in PPD benefits between June 11, 2021 and July 26, 2021.

8. On August 3, 2021, Respondent filed an Amended FAL. The Amended FAL stated, "[t]here has been an overpayment in indemnity benefits in the amount of $12,821.86. Overpayment will be taken as a credit against any applicable future benefits."[2] (Ex. A).

9. Claimant did not object to the Amended FAL, nor did he file an Application for Hearing.

10. [Redacted, hereinafter LV] is a claims adjuster for [Redacted, hereinafter SC]. She credibly testified that the $12,821.86 overpayment noted in the FAL and Amended FAL reflected TTD payments made to Claimant after he returned to work.

11. After issuance of the Amended FAL, Respondent paid Claimant an additional $14,112.28 in PPD benefits. Respondent issued thirteen separate payments of $1,085.56 to Claimant between August 9, 2021 and January 6, 2022. There is no evidence in the record that Claimant ever attempted to recover the $12,821.86 TTD overpayment by offsetting it against any of these payments.

12. In total, Respondent paid Claimant $47,611.74 in PPD benefits between June 11, 2021 and January 26, 2022, when Claimant was only entitled to $39,806.82 in PPD benefits per the statutory cap.

13. The ALJ finds that Respondent overpaid Claimant $7,804.92 in PPD benefits.

14. Respondent filed an Application for Hearing on August 16, 2022, seeking "recovery of ***overpaid PPD benefits***." (emphasis added). In Claimant's Response to the Application for Hearing, Claimant asserted that the issues to be heard at hearing were "alleged overpayment by Respondents to Claimant of ***Permanent Partial Benefits***; effect of agreement of resolution." (emphasis added).

15. Claimant testified that he never had any conversations with LV[Redacted] or Respondent regarding any alleged overpayments. Claimant further testified that when

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[2] Respondent paid Claimant $64,141.88 in indemnity benefits, but Claimant was only supposed to be paid $51,320.02. This resulted in a $12,821.26 overpayment ($64,141.88 - $51,320.02).

he returned to work, he did not realize he was still being paid TTD benefits. The ALJ finds Claimant's testimony to be credible.

16. Claimant credibly testified that he currently works for Employer, and his average weekly wage is $1,000.00 per week. He testified that if required to make payments, he could afford payments of $100.00 to $200.00 per month at the most.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overpayment

Pursuant to § 8–43–303(1) C.R.S., upon a prima facie showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id*. Prior to January 1, 2022, the Act, defined "overpayment" as "money received by a claimant that

exceeds the amount that should have been paid, or which the claimant was not entitled to receive." § 8-40-201 (15.5), C.R.S. (2021). The General Assembly amended the statute (effective January 1, 2022) and removed this language. The statute now includes "money paid in error or inadvertently in excess of an admission or order that exists at the time that the benefits are paid to a claimant," as an overpayment. *Id.*

Respondent bears the burden of proving, by a preponderance of the evidence, that Claimant received an overpayment, and that Respondent is entitled to recovery of that overpayment. *Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002). As found, Respondent proved by a preponderance of the evidence that Claimant received an overpayment of $7,804.92 in PPD benefits. (Findings of Fact ¶ 13).

Respondent is seeking to recover a total overpayment of $20,626.78 (PPD benefits of $7,804.92 and TTD benefits of $12,821.86). Respondent's Application for Hearing, however, specifically states Respondent is seeking recovery of the overpayment of PPD benefits. Rule 12(A) of the OACRP states, "[i]ssues for hearing shall be listed in the Application for Hearing, the Response to the Application for Hearing, or may be added before the hearing date is confirmed by written notice to the OAC and the opposing party. After the hearing date is confirmed, issues may only be added by written agreement of the parties or order of a judge or designee clerk for good cause shown." Here, the Application for Hearing and the Response both note that the issue for hearing involved the alleged overpayment of PPD benefits. No other issues, particularly as related to TTD benefits, were added before the hearing.

Even if the overpayment of TTD benefits had been at issue, which it was not, Respondent would have been barred from seeking such recovery by the statute of limitations. Section 8-42-113.5(b.5)(I) of the Colorado Revised Statutes states "[a]fter the filing of a final admission of liability, except in cases of fraud, any attempt to recover an overpayment shall be asserted within one year after the time the requester knew of the existence of the overpayment." As the Court of Appeals held, "the term 'attempt' in section 8-42-113.5(1)(b.5)(I) cannot be a mere assertion of an overpayment; it must include some effort to regain the overpayment." *Peoples v. Indus. Claim Appeals Office*, 457 P.3d 143, 148 (Colo. App. 2019). An assertion in the FAL simply provides notice to the claimant of the overpayment. *Id.*

Here, Respondent filed an FAL on June 9, 2021, and provided notice to Claimant of the $12,821.86 overpayment of TTD benefits. As found, Respondent knew of the overpayment of TTD benefits on June 9, 2021. (Findings of Fact ¶ 5). Respondent filed an amended FAL on August 6, 2021, and again provided notice of the $12,821.86 overpayment of TTD benefits. Respondent acknowledged in the FAL and the Amended FAL that the overpayment of TTD benefits would be taken as a credit against any future benefits. Despite multiple opportunities, Respondent did not attempt to recover the overpayment. Respondent issued eighteen separate PPD payments between June 11, 2021 and January 26, 2022, but never offset the TTD overpayment that Respondent knew of on June 9, 2021. (Findings of Fact ¶¶ 6, 7, and 11). Thus, even if the recovery of the TTD overpayment had been endorsed in the August 16, 2022, Application for Hearing, the one-year statute of limitations to recover the overpayment would have run.

Claimant's contention that recovery of an overpayment is barred because the Amended FAL closed the issue of overpayment and Respondent did not file a petition to reopen, is without merit. As addressed in *Cooper v. Safeway, Inc*., W.C. 4-539-747 (ICAO Nov. 19, 2003), "[n]othing in § 8-43-303 mandates the filing of a formal petition to reopen in order to confer jurisdiction on an ALJ to determine whether there has been an overpayment. Rather, the filing of a petition to reopen is a procedural mechanism designed to facilitate the process of adjudicating requests to reopen. While courts have held the procedural rules governing the filing of petitions to reopen may be enforced, they have not held such rules erect jurisdictional barriers to adjudicating reopenings where the rules have not been complied with." (Citing *Lewis v. Scientific Supply Co.*, 897 P.2d 905 (Colo. App. 1995)). The failure to file a petition to reopen does not deprive the ALJ of jurisdiction to hear this matter.

Denver v. Indus. Claim Appeals Office 21CA0275 (Colo. App. 2021) does not require a different result. After an admission becomes final, a party may not seek increased or decreased benefits without reopening the proceedings. Respondent, however, is not seeking to either increase or decrease Claimant's benefits. Claimant's benefits, as admitted in the Amended FAL, remain unchanged. The evidence demonstrates Claimant, by no fault of his own, received money in excess of the benefits to which he is entitled. The excess payments are by definition, overpayments, and not "benefits." Thus, the alleged overpayment does not become "final."

As found, Respondent is entitled recover from Claimant the overpayment of PPD benefits in the amount of, $7,804.92.

Repayment

Under § 8-43-303(1), C.R.S., upon a finding of an overpayment, an order of repayment is mandatory. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." The Colorado Court of Appeals held the ALJ has discretion to fashion a remedy with regard to overpayments. *See Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994).

Claimant credibly testified at hearing that the most he can afford to pay toward an overpayment is $100.00 - $200.00 per month. The ALJ finds that requiring Claimant to make substantial payments would impose a financial hardship. The ALJ concludes Claimant is able to make payments of $100.00 per month without sustaining significant financial hardship.

ORDER

It is therefore ordered that:

1. Claimant received an overpayment of PPD benefits in the amount of, $7,804.92 and Respondent is entitled to repayment of that amount.

2. Claimant shall repay the overpayment at the rate of $100.00 per month, until satisfied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 2, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 3-707-077-003

ISSUES

1. Did Respondents prove by a preponderance of the evidence that they can terminate the general maintenance medical admission in the Final Admission of Liability (FAL)?

2. Is Claimant entitled to change her authorized treating physician (ATP) to Sander Orent, M.D.?

3. Did Claimant prove by a preponderance of the evidence that numerous, specific medical benefits are reasonable, necessary and related to her July 14, 1983 work injury as maintenance treatment? The specific benefits include:

   a. Pain management and treatment;
   b. Authorization for walk-in tub;
   c. Authorization for the following prescribed medications: folic acid, folate, D#-1000, Movantik, Cynaocobalamin injections, Alprazolam, Toradol, Magnesium oxide, Narcan, Lyriaca, Tizanidine, and Tolterodine;
   d. Authorization for membership at recreational center for water-based exercises;
   e. Evaluation and treatment at National Jewish Health for sleep apnea;
   f. Payment to Dr. Schaeffer for additional EMG testing;
   g. Ongoing botox injections;
   h. Physical therapy;
   i. Payment for treatment at Valley View Hospital October 2021, Sterling Regional Medical Center for December 2021, Pioneer Medical Center October 2021, and Banner Health May 2021; and
   j. Completion of proposed dental implant procedures.

4. Did Claimant prove by a preponderance of the evidence that Respondents have violated § 8-43-404(10)(b), C.R.S.? If so, what penalty, if any, should be ordered?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 71 year-old female who suffered an admitted injury on July 14, 1983. The admitted workers' compensation claim is currently on an FAL, dated February 6, 2018, admitting for permanent total disability and maintenance medical benefits. (Ex. OO).

2. Claimant's mechanism of injury, which occurred nearly 40 years ago, involved leaning over to pick up a bottle, and feeling a pain in her lower back when she stood up. Over the last 40 years, Claimant has received extensive medical care that has been approved by Insurer.

3. Claimant was placed at MMI on March 26, 1985, by James Reese, M.D. Dr. Reese diagnosed Claimant with chronic lumbar muscle strain. He provided a two percent partial disability for lumbar spine. (Ex. X).

4. On April 14, 1985, Claimant had a CT scan of her back that reflected a new, moderate, and central left-sided disc bulge at L5-S1. (Ex. X). The claim was reopened, and Claimant was later placed at MMI on September 10, 1991. After failure of vocational rehabilitation, Claimant asserted she was permanently and totally disabled, and this was admitted. (Ex. QQ).

5. Claimant has had numerous surgeries including a L4-5 decompression and fusion in 1988, and a L3-S1 fusion anteriorly and posteriorly in 1993 with a bone growth stimulator. She underwent physical therapy for years. Claimant subsequently began a course of pain management with providers at Denver Pain Management.

6. Claimant had an intrathecal morphine pump from 1994 to 2010. In addition to the intrathecal pump, Claimant received numerous injections, and was prescribed opiates. When the pump was removed, her providers prescribed her Fentanyl and Actiq.

7. In 2013, Shay Bess, M.D. performed a removal of Claimant's posterior segmentation of instrumentation, exploration of fusion mass with confirmed fusion L3-S1, T3 through the sacrum, pelvis posterior spinal fusion, T3-sacrum pelvis posterior segmental instrumentation, posterior pelvic fixation other than sacrum, transforaminal lumbar inner body fusion L2-3 and insertion of inner body implant L2-3. (Ex. A).

8. Kristin Mason, M.D. began treating Claimant on January 25, 2016 and served as her ATP. Dr. Mason specializes in physical medicine and rehabilitation. (Dep. Tr. 4:23-24). She conducted a new patient evaluation, and noted Claimant was initially injured on July 14, 1983, and developed low back pain and decreased capacity to lift. She further noted Claimant's complex medical history including a laminotomy in 1988, cervical and lumbar fusion in 1993, multiple pain pumps, and a long fusion from T3 to sacrum for scoliosis. Claimant's previous physician who managed her chronic pain, lost his medical license. Dr. Mason described Claimant as a "complex long term chronic pain patient." At the first appointment, Dr. Mason discussed her desire to reduce Claimant's medications, and stagger her benzodiazepines and pain medications. (Ex. M)

9. Dr. Mason completed a comprehensive record review on February 18, 2016. She concluded Claimant presented with an exceedingly complex situation with significant chronic multifactorial pain and an extensive procedural history. (Ex. M).

10. Dr. Mason evaluated Claimant on June 27, 2016. She noted Claimant's three falls within a week, and her general increased pain. Dr. Mason opined that Claimant's

"function is a problem but . . . she would not function at all if she did not have pain medications available to her." (Ex. M.).

11. Over the next several years, Dr. Mason regularly evaluated Claimant, and she gradually decreased Claimant's pain medications. Dr. Mason routinely checked the Prescription Drug Monitoring Program (PDMP) to ensure Claimant was not getting medications from other physicians, and Claimant complied with random urine drug screens.

12. In May 2017, Dr. Mason ordered a sleep study for Claimant, and formally referred her to neurosurgeon, Bernard Guiot, M.D., for an evaluation. (Ex. M). Dr. Guiot recommended C4-T4 fusion to treat junctional kyphosis at T4 and a pseudarthrosis at C5-6. Dr. Mason assessed Claimant as having psychologic and physical dependence to opiates for chronic pain, anxiety and sleep apnea. (Ex. M).

13. In November 2017, Claimant and Dr. Mason discussed whether Dr. Mason trusted Claimant. Dr. Mason explained that she did not trust anyone completely with respect to opiates. Dr. Mason told Claimant she did not feel Claimant was addicted, but definitely had ongoing psychologic and physical dependence on the opiates. (Ex. M.).

14. In April 2018, Dr. Mason and Claimant discussed Claimant's planned oral surgery, and subsequent pain management. They discussed the complexity of pain management post-op. (Ex. M). In the summer of 2018, Claimant received her lower implant, and a temporary upper denture. (Ex. M).

15. In February 2019, Claimant was hospitalized for a pulmonary embolus. Dr. Mason saw Claimant on March 25, 2019. She was concerned about the amount of opiates Claimant was taking, particularly given her pulmonary situation. Claimant and Dr. Mason discussed going through an inpatient detoxification program to get her off of her current medication and potentially on something like Suboxone. Claimant was open to the idea. (Ex. M).

16. Kathy McCranie, M.D., is a physician advisor for Insurer. She has worked in this position since 1996. (Vol. I Tr. 126:8-14). On March 26, 2019, Dr. McCranie conducted an Independent Medical Examination (IME) at the request of Insurer. Dr. McCranie is board certified in physical medicine and rehabilitation. (Vol. I. Tr. 40:14-16). Claimant provided Dr. McCranie a summary of her injury and treatment. Dr. McCranie conducted a physical examination of Claimant. She opined that Claimant's mechanism of injury did not cause her cervical issues, so any treatment for Claimant's cervical issues, was not work-related. Dr. McCranie recommended that Claimant transition from physical therapy to an independent exercise program, and continue tapering her opioid medications. (Ex. A).

17. Insurer asked Dr. Mason to review Dr. McCranie's IME. Dr. Mason reviewed the IME, and noted she had been weaning Claimant's medication. With respect to Claimant, Dr. Mason felt that with "a patient with this sort of chronicity, the best means to treat this level of psychologic dependence is likely a structured inpatient program. . . . [Claimant] is

frail enough physically that she would need to do tapering of opioid medications and more specifically the benzodiazepines in an inpatient setting." (Ex. M).

18. At Claimant's April 22, 2019 appointment with Dr. Mason, Claimant expressed her displeasure with the IME report. They discussed Dr. McCranie's recommendation of inpatient detoxification. Claimant was very resistant to this because she felt she had "too many painful procedures coming up to even think about lower amounts of medication." Dr. Mason continued to reduce Claimant's medications. She noted in Claimant's medical record, "I feel fairly strongly that it won't be possible to fully wean her off of the medication as an outpatient, and I have been encouraging a medical detox program for appropriate monitoring, given her medical frailty." (Ex. M)

19. Dr. Mason examined Claimant on May 20, 2019. She noted Claimant was quite angry still about Dr. McCranie's IME, and perseverated on the IME. Dr. Mason discussed inpatient detoxification and transitioning to Suboxone. She told Claimant that her pain levels hovered at 8 or 9 regardless of what medications they tried. Claimant agreed to try weaning down the Oxycodone. (Ex. M).

20. Over the next couple of months, Dr. Mason continued to wean Claimants' medications. Claimant continued to refuse to go to an inpatient detoxification facility. Dr. Mason routinely told Claimant that they could not continue having the same heated discussions regarding tapering her medications. (Ex. M).

21. At Claimant's February 11, 2020 appointment, Dr. Mason suggested Claimant consult with Dr. Gellrick because she may be able to do an outpatient Suboxone transition. Claimant had an appointment scheduled with Dr. Gellrick for some time in March. Claimant, however, ended up hospitalized with bacterial pneumonia, from March 15-19, 2020, so she had to cancel her appointment with Dr. Gellrick. Dr. Mason advised Claimant to reschedule the appointment. (Ex. M).

22. Dr. Mason began having telehealth visits with Claimant due to Covid. At her May 22, 2020 visit, Dr. Mason noted Claimant had not yet rescheduled her appointment with Dr. Gellrick. Claimant looked into inpatient treatment programs, but did not wish to go in that direction. (Ex. M).

23. Throughout 2020 and early 2021, Dr. Mason conducted telehealth visits with Claimant. After being fully vaccinated, Claimant saw Dr. Mason for an in-person appointment on May 3, 2021. Her subsequent appointments, however, were virtual visits.

24. In October 2021, Claimant and her husband went to Meeker, Colorado to go camping with family. Claimant testified they had been camping for a day when she began getting ill. Claimant thought she was developing a urinary tract infection. She was rushed to Pioneer Medical Center (Pioneer), and subsequently airlifted to Valley View Medical Center (Valley View). Claimant testified that she became quite ill, and had no memory for almost two weeks. (Vol. II Tr. 32:3-33:2).

25. Dr. Fauchet contacted Dr. Mason on October 8, 2021, to alert her that Claimant had been airlifted to Valley View with pulmonary emboli, confusion and hypoxemia. Dr.

Fauchet was concerned about the opioids Claimant was taking, so he transitioned her to Suboxone. He gave Claimant a 28-day prescription of Suboxone.

26. Claimant credibly testified she tried to fill the prescription for Suboxone, but Insurer did not authorize the prescription, and she could not afford it. (*Id.* at 33:4-7). She returned to her relatives' house in Meeker. Claimant testified she became sick and went into withdrawals. (*Id*. at 33:4-17). She was transported by ambulance back to Pioneer, and while there, Claimant was given opioids.

27. After Claimant was discharged from Pioneer, she filled prescriptions for Oxycontin and Oxymorphone that Dr. Mason had written previously. (Vol. II Tr. 33:21-34:1).

28. Claimant had a telehealth visit with Dr. Mason on November 1, 2021. Prior to the appointment, Dr. Mason reviewed the PDMP and saw that Claimant filled her previously written prescriptions for Oxymorphone and Oxycontin on October 13, 2021 and October 14, 2021, respectfully. There was no record of Claimant filling her Suboxone prescription, and Claimant never contacted Dr. Mason or Insurer to alert them to the fact she could not fill her Suboxone prescription. Claimant told Dr. Mason that when she was re-hospitalized at Pioneer, they put her back on her usual pain medications. Claimant also told Dr. Mason she did not remember much from either of the hospital stays. Dr. Mason told Claimant she needed to review the medical records from Valley View and Pioneer, but she was seriously considering discharging her as a patient for her failure to communicate. Dr. Mason was unwilling to write any other prescriptions for pain medications until she was able to review the medical records. Dr. Mason offered to facilitate an immediate admission to a medical detoxification facility, but Claimant was not interested. (Ex. M).

29. After reviewing the medical records from Valley View and Pioneer, and after speaking with Claimant, Dr. Mason decided to discharge Claimant from her care. Dr. Mason did not feel Claimant had been honest with her regarding the events in October. Dr. Mason noted Claimant "has been a difficult patient to manage under previous circumstances and I feel at this point that it is dangerous for her to continue on her medications, which is what she would like to do, and I no longer feel comfortable being her treating physician. I did go ahead and write a referral to inpatient detox which is the only care I am willing to offer her further for her safety." This record was copied to Claimant's counsel. (Ex. M).

30. On November 4, 2021, Dr. Mason wrote the following to Claimant: "it is clear that they transitioned you to Suboxone and that is what you were supposed to be on. You instead chose to resume taking your medications and fill[ed] the previously written prescription from me against medical advice. I am therefore formally discharging you from my practice effective November 8, 2021. My only recommendation for you at this point is that you be admitted to an inpatient detoxification facility. Your cardiopulmonary and renal issues may get unsafe for you to continue on opiate pain medication. I have written that referral and we will send it to Pinnacol for authorization." (Ex. M). Dr. Mason did not recommend a specific detoxification facility.

31. The ALJ finds Dr. Mason discharged Claimant from her practice for nonmedical reasons effective November 8, 2021. The ALJ further finds Dr. Mason began recommending an inpatient detoxification program for Claimant as far back as March 2019.

32. [Redacted, hereinafter LJ] is a complex claims representative for Insurer. LJ[Redacted] took over Claimant's claim in February 2019. (Dep. Tr. 4:5-8). LJ[Redacted] received Dr. Mason's November 4, 2021 medical record discharging Claimant as a patient, the letter Dr. Mason sent to Claimant, and the prescription for inpatient detoxification, on November 8, 2021, via fax. None of these documents were sent via certified mail. (Vol. I 190:2-192:9).

33. The ALJ finds Insurer had notice, on November 8, 2021, that Dr. Mason discharged Claimant as a patient.

34. LJ[Redacted] credibly testified that when she received the materials from Dr. Mason, she spoke with the medical case manager assigned to the claim, [Redacted, hereinafter HW]. LJ[Redacted] and HW[Redacted] agreed that inpatient detoxification treatment should be authorized. According to the claim notes, the "clock [was] ticking" before Claimant ran out of her medications. LJ[Redacted] noted it was "going to be VERY VERY difficult" to find a new ATP for Claimant. (Ex. RR).

35. LJ[Redacted] called Claimant's counsel on November 8, 2021, and left a message confirming Insurer would authorize inpatient detoxification, but if Claimant refused to go, they could discuss possibly settling the claim. (Vol. I Tr. 192:5-193:8).

36. The ALJ finds that Insurer notified Claimant, through her counsel, on November 8, 2021, that inpatient detoxification was authorized.

37. Claimant's counsel and LJ[Redacted] exchanged voicemail messages on December 1 and 2, 2021. They finally spoke on December 16, 2021. Claimant's counsel asked if Insurer had found Claimant a new ATP and LJ[Redacted] answered that she had not even tried. When LJ[Redacted] asked whether Claimant was going to inpatient detoxification, Claimant's counsel said she did not want to go. LJ[Redacted] asked Claimant's counsel about Dr. Gellrick, who Dr. Mason noted might be an option to take over Claimant's care. Claimant's counsel told LJ[Redacted] that Dr. Gellrick was likely not an option because she was too far away. (Vol. I Tr. 200:2-23 and Ex. RR).

38. Claimant had previously agreed to see Dr. Gellrick. As found, she had an appointment with Dr. Gellrick in March 2019, but had to cancel because she was hospitalized. Claimant never rescheduled the appointment with Dr. Gellrick. There is no objective evidence in the record that Dr. Gellrick was too far away to serve as Claimant's ATP.

39. On December 28, 2021, Respondents' counsel wrote to Claimant's counsel confirming that Dr. Mason's referral for inpatient medication detoxification was pre-approved, and she provided the contact information for three facilities: Centennial Peaks

Hospital, Detox Center of Colorado, and Rocky Mountain Detox. The direction was to "contact one of the facilities and arrange for [Claimant's] admission." (Ex. 9).

40. LJ[Redacted] testified that she did not contact any of the three facilities listed in the December 28, 2021 letter until January 28, 2022, a month later. LJ[Redacted] testified that she tried contacting the facilities at this time because Claimant was unable to get into any of the facilities listed in the December 28, 2021 letter. (Vol. I Tr. 207:13-25).

41. According to Insurer's records, Rocky Mountain Detox was the only facility, as of December 27, 2021 that had a bed available and would be able to admit Claimant. (Dep. Tr. 18:23-21:5 and 30:3-31:6). LJ[Redacted] credibly testified that the referral to a detoxification facility was an urgent need. (*Id.* at 23:3-7)

42. The ALJ finds that Insurer did not contact any of the detoxification facilities until December 27, 2021, nearly two months ***after*** Dr. Mason discharged Claimant and referred her to inpatient detoxification, which was an urgent need. The ALJ finds that as of December 28, 2021, only one of the facilities listed in the December 28, 2021 letter had been contacted and had a bed for Claimant.

43. On January 6, 2022, Respondents filed a Petition to Terminate Claimant's medical benefits because Claimant refused to submit to inpatient detoxification treatment. (Ex. LL). LJ[Redacted] credibly testified that the intent of filing the Petition was "to get [Claimant] to complete the recommendations that Dr. Mason had – had given her." (Vol. I Tr. 209:1-5).

44. On February 2, 2022, LJ[Redacted] wrote to Claimant re: "**URGENT – Admission scheduled for February 4, 2022."** The letter explained that Insurer had coordinated Claimant's admission to Rocky Mountain Detox, an inpatient detoxification facility. (Ex. RR). LJ[Redacted] testified that Insurer considers Rocky Mountain Detox to be Claimant's ATP. (Dep. Tr. 33:2-6). LJ[Redacted] further testified that she has never spoken with a doctor at Rocky Mountain Detox. (Vol. I Tr. 209:22-25).

45. The ALJ finds that Rocky Mountain Detox is not an appropriate ATP, and Insurer has not provided Claimant with a new ATP since November 8, 2021, when Dr. Mason discharged Claimant from her practice for nonmedical reasons.

46. Claimant never went to Rocky Mountain Detox despite the referral from Dr. Mason and Insurer's authorization. Instead, Claimant eventually ran out of her medications.

47. Claimant testified the last time she had any pain medications was in November 2021. She further testified that her functioning level has decreased since that time, and she goes from her bed to couch and back. She testified she cannot sit for long periods of time because of the pain, and she can no longer cook or clean. (Vol. II. Tr. 30:8-17).

48. Claimant testified that in October 2021, when she was on pain medications, she was not functioning as well as when she had been on higher doses. Claimant testified she lost quite a bit of function when she was taken off of physical therapy, and when her

medication doses were decreased. Claimant could, however, do some cooking and cleaning in October 2021. (Vol. II Tr. 29:13-21).

49. On March 9, 2022, Sander Orent, M.D., virtually evaluated Claimant for purposes of a new patient consultation. Dr. Orent is an expert in occupational and environmental medicine and internal medicine. He testified that Claimant's attorney requested he become Claimant's ATP and take over her care. The virtual evaluation entailed Dr. Orent taking a detailed history from Claimant. He did not review the thousands of pages of medical records nor did he examine Claimant prior to issuing an opinion. (Vol. II, Tr. 55:25-56:18).

50. In rendering his opinion, Dr. Orent relied primarily on the history Claimant provided to him, regardless of its veracity. For example, in his report, Dr. Orent described Claimant's 1988 surgery as a "sham fusion where she was never actually fused. . . . it was discovered that even though [the surgeon] took a piece of her hip bone from her hip, he never actually fused her spine. Apparently, there were incisions made both anterior and posteriorly, but the fusion had never happened." (Ex. 15). There is no evidence in the record Claimant had a "sham fusion" in 1988.

51. Based on his interview of Claimant, Dr. Orent recommended referring her to Dr. Wakeshima, a pain management specialist, to consider the resumption of pain medications. He opined Claimant needed a repeat EMG nerve conduction study and imaging of her T3 area. Dr. Orent also concluded Claimant needed to see an orthopedist and a neurologist. (Ex. 15).

52. On March 30, 2022, Dr. McCranie received additional medical records, and Dr. Orent's report. Insurer asked her to address multiple issues, including, but not limited to, Dr. Orent's recommendations. (Vol. I Tr.126:8-14). Dr. McCranie opined that there was no need for a change in ATP. She reasoned that Dr. Mason recommended inpatient detoxification, but Claimant refused the treatment. Dr. McCranie said "[o]piod management was the only treatment that had been reasonably related to the work injury, however, opioid use is no longer indicated for [Redacted, hereinafter KL]. While an inpatient detoxification program would be work-related, if KL[Readacted] refuses this treatment, she does not require other ongoing work-related treatment." (Ex. A).

53. Dr. McCranie testified that none of the medical care and treatment Claimant received from 1986 to present is related to the admitted injury in 1983. (Vol. I. Tr. 182:14-19). Further, she testified that there is no causal connection between Claimant's use of opiates and her 1983 injury. (*Id.* at 101:8-17).

54. While Dr. McCranie has completed a comprehensive review of Claimant's voluminous medical records, she has only examined Claimant on one occasion, four years ago. The ALJ finds Dr. McCranie's opinion to be credible, but not persuasive.

55. Dr. Orent recommended several referrals and courses of treatment for Claimant. (Ex. 15). Dr. Orent, however, has never physically examined Claimant, and he has only

reviewed limited medical records. (Vol. II Tr. 80:11-13). Based on these facts, the ALJ does not find Dr. Orent's opinion persuasive.

56. The only physician who has extensive personal experience with Claimant is Dr. Mason. She was deposed, and credibly testified Claimant needs ongoing medical care for her July 14, 1983 injury. Dr. Mason further testified she discharged Claimant as a patient because she no longer felt comfortable prescribing medications to her, but felt after Claimant detoxed off of the opiates, she would need some form of medication management. (Dep. Tr. 9:20-10:12). The ALJ finds Dr. Mason's testimony to be credible and persuasive as she is the only physician who actively treated Claimant for a significant amount of time.

57. The ALJ finds that Rocky Mountain Detox is not an appropriate ATP, and Insurer never designated a physician to serve as Claimant's ATP following Dr. Mason's decision to discharge Claimant for nonmedical reasons, effective November 8, 2021.

58. Claimant has not had an ATP since November 8, 2021. The ALJ finds that Claimant needs maintenance medical care. The ALJ further finds that Claimant needs an ATP to examine her and determine what maintenance medical care is needed.

59. The ALJ does not find Dr. Orent's recommendations for Claimant's maintenance medical care to be persuasive as he has not physically examined Claimant, nor has he reviewed her extensive medical records. His opinion is primarily based upon what Claimant reported to him.

60. There is no objective evidence in the record that Claimant sent written notice to Respondents, via certified mail, pursuant to § 8-43-404(10)(b), C.R.S., notifying Respondents that Claimant needed a new ATP. Accordingly, the ALJ finds that Respondents did not violate § 8-43-404(10)(b).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v.*

Indus. Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Petition to Terminate Benefits

Respondents seek to withdraw their admission for maintenance medical benefits. Section 8-43-201(1) of the Colorado Revised Statutes states: "the claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence;…and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Thus, Respondents must prove by a preponderance of evidence that maintenance medical benefits are not reasonable, necessary, or related to the original work injury in 1983.

As found, Dr. Mason treated Claimant, and served as her ATP from January 25, 2016 until November 8, 2021. When Dr. Mason discharged Claimant as a patient for nonmedical reasons, she recommended medical detoxification treatment, and Insurer authorized the treatment. Dr. Mason had been recommending detoxification treatment since March 2019. Dr. Mason credibly testified she discharged Claimant as a patient because she was not comfortable continuing to prescribe Claimant medications, particularly in light of Claimant's cardiopulmonary and renal issues. Dr. Mason also credibly testified that Claimant would need some form of medication management after she detoxed off of the opiates. As found, Claimant has not had any opiates since November 2021.

Dr. McCranie testified that no maintenance medical care is reasonable, necessary or related to Claimant's injury in 1983. As found, Dr. McCranie evaluated Claimant on one occasion, four years ago, and she completed an extensive record review. While Dr.

McCranie is credible, she does not have the personal experience of treating Claimant that Dr. Mason has. As found, Dr. McCranie's opinion is not persuasive.

The ALJ credits Dr. Mason's opinion and finds that even though Claimant has not had any opioid medications since November 2021, she still needs some form of medication management, and ongoing maintenance medical care. Based on the totality of the evidence, Respondents have not met their burden of proof to support the termination of benefits.

Designation of New ATP and Penalties

As found, Dr. Mason discharged Claimant as a patient, for nonmedical reasons effective November 8, 2021, and referred Claimant to inpatient detoxification treatment. As found, Claimant had notice on November 8, 2021 that Dr. Mason discharged her as a patient, and Insurer authorized inpatient detoxification treatment. LJ[Redacted] credibly testified that inpatient detoxification treatment was ***urgent***. Despite the urgent need for care, none of the parties acted urgently.

LJ[Redacted] credibly testified that as of December 16, 2021, she had not even tried to find a new ATP for Claimant. Insurer was aware that Claimant was going to run out of her medication, and LJ[Redacted] noted it would be difficult to find another ATP to treat Claimant. Dr. Mason suggested that Claimant treat with Dr. Gellrick. There is no evidence in the record, however, that Insurer ever attempted to contact Dr. Gellrick. Insurer takes the position that Rocky Mountain Detox is Claimant's ATP. Insurer had not spoken with a physician at Rocky Mountain Detox, they simply confirmed that a bed was available for Claimant, nearly two months after Dr. Mason discharged Claimant for nonmedical reasons. As found, Respondents did not designate a new ATP for Claimant despite her urgent need for care.

LJ[Redacted] credibly testified she left a voicemail message for Claimant's counsel on November 8, 2021. Claimant's counsel and LJ[Redacted] exchanged voicemail messages on December 1 and 2, 2021, but did not speak until December 16, 2021. There is no objective evidence in the record as to why Claimant's counsel and LJ[Redacted] did not speak until December 16, 2021 – over a month from the date Dr. Mason discharged Claimant from her practice.

As found, Insurer did not have a location, with an available bed, until December 27, 2021. Insurer, however, did not make arrangements for admission to Rocky Mountain Detox until February 4, 2022, nearly four months after Dr. Mason discharged Claimant as a patient. As found, Rocky Mountain Detox is not an appropriate ATP. The ALJ finds that Respondents did not designate a new ATP for Claimant after Dr. Mason discharged her as a patient, even though they knew that Claimant was in urgent need of medical care, and would run out of the medications she had been on for 30 years.

Claimant, however, exacerbated the situation by refusing to go to inpatient detoxification. Claimant knew Dr. Mason had been recommending inpatient detoxification

for years. She also had notice by November 8, 2021, that this treatment was authorized by Insurer.

It is undisputed that Dr. Mason notified Insurer on November 8, 2021, via facsimile, that she was discharging Claimant as a patient. Section 8-43-404(10)(a) of the Colorado Revised Statutes provides that when an ATP "discharges an injured employee from medical care for nonmedical reasons when the injured employee requires medical treatment to cure or relive the effects of the work injury, then the physician shall, within three business days from the refusal or discharge, provide written notice of the refusal or discharge by certified mail, return receipt requested, to the injured employee and the insurer or self-insured employer. The notice must explain the reason for the refusal or discharge and must offer to transfer the injured employee's medical records to any new authorized physician upon receipt of a signed authorization to do so from the injured employee." As found, Dr. Mason discharged Claimant for nonmedical reasons. Claimant provided notice of the discharge to Insurer via facsimile, not certified mail.

Respondents argue that § 8-43-404(10)(a), C.R.S., does not apply because Claimant has no more need for medical treatment that is reasonable, necessary, or related to the admitted work injury. Respondents assert that Claimant failed to follow the one recommendation made by Dr. Mason, her ATP, to go to inpatient detoxification. Respondents rely on the opinion of Dr. McCranie that none of Claimant's medical treatment since 1986 is related to Claimant's work injury. Dr. Mason testified, however, that Claimant would need medical management following the inpatient detoxification. As found, Dr. Mason's opinion with respect to Claimant's need for ongoing medical maintenance is credible and persuasive. Dr. Mason treated Claimant for nearly six years and has the most familiarity with her. The ALJ finds that Claimant continues to require medical maintenance.

It is undisputed that Dr. Mason sent her notice of discharge via facsimile, and not via certified mail. As found, Insurer had notice on November 8, 2021 that Dr. Mason discharged Claimant as a patient and recommended inpatient detoxification treatment. But Claimant's arguments about the application of § 8-43-404(10)(b), C.R.S., and designating Dr. Orent as Claimant's ATP are misplaced. The statute requires that before Claimant can select a new ATP, ***Claimant***, must first notify Respondents of the need for a new physician through written notice sent via certified mail. *See Greenberg v. Mtn. Capital Partners*, W.C. No. 5-095-740-009 (ICAO Sept. 8, 2021). The notice, ***from Claimant***, must include language that the ATP discharged claimant for nonmedical reasons when the claimant requires medical treatment, and that there is no other authorized physician willing to provide medical care. § 8-43-404(10)(b), C.R.S. Insurer, upon receiving such notice, has 15 days to designate a new ATP. If Insurer fails to do this, then the injured employee can select an ATP. Here, there is no objective evidence in the record that Claimant provided such a notice to Insurer to trigger this statute. Claimant has failed to prove by a preponderance of the evidence that Respondents violated § 8-43-404(10)(b), C.R.S. Claimant is not entitled to penalties.

To the extent Claimant wants to designate Dr. Orent as her ATP pursuant to § 8-43-404(5)(a)(VI)(A), C.R.S., there is no evidence in the record that Claimant ever

completed “a form prescribed by the Director” seeking such relief. While Dr. Orent’s March 9, 2022 report was forwarded to Respondents, this is not sufficient to comply with the requirements of § 8-43-404(5)(a)(VI)(A), C.R.S.

As found, Claimant requires maintenance medical treatment. Currently, Claimant does not have an ATP. As found, Dr. Orent’s recommendations regarding medical maintenance are not persuasive because Dr. Orent did not physically examine Claimant, nor did he comprehensively review her medical records. Claimant failed to prove by a preponderance of the evidence that Dr. Orent’s recommended medical treatment is reasonable, necessary and related to Claimant’s admitted work injury.

The Parties are to confer and decide upon a new ATP for Claimant. The designated ATP will personally examine Claimant and make recommendations regarding maintenance medical care.

ORDER

It is therefore ordered that:

1. Respondents are not allowed to withdraw the general admission for maintenance medical care under this claim.

2. Claimant’s request for a change of ATP to Dr. Orent is denied.

3. Claimant’s request for treatment, as set forth in Dr. Orent’s March 9, 2022 report, is denied,

4. The parties are to confer, and within 21 days, designate an ATP to treat Claimant.

5. Claimant’s new ATP will personally examine Claimant and make recommendations regarding medical maintenance treatment.

6. Claimant’s claim for penalties is denied and dismissed.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 22, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she was injured in the course and scope of her employment with Employer on April 20, 2022.

II. If the claim is found compensable, whether Claimant proved by a preponderance of the evidence she is entitled to medical benefits that are reasonably necessary and related to the injury for Concentra and their referral providers.

STIPULATIONS

The parties stipulated to holding the issues of average weekly wage and temporary disability benefits in abeyance.

The parties further stipulated that Claimant was not requesting payment for unauthorized medical care at Mountain View Pain Specialists.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was employed by Employer as a full time Child Welfare Social Worker and was 41 years old at the time of the hearing. Claimant's job required her to perform personal visits in the community to make assessments for child abuse and neglect. She had been working for Employer since April 2014. She also worked the "after hours" hotline, where a Social Worker would have to respond to emergencies. Her last day working for Employer was July 8, 2022, as she had put in her notice on June 20, 2022 due to the way she had been treated by Employer following the accident. She would generally spend three days a week in the field conducting visits in family homes, in schools or in the community, and two days in the office finalizing her findings in her reports.

2. Claimant had no prior history of neck, mid-back or low back conditions and had no medical treatment. She had not missed worked for any medical conditions prior to the work accident. Neither was she under any restrictions, was not taking any medications and had no problems performing the job duties assigned by Employer.

3. On April 20, 2022 Claimant was within the course and scope of her employment, driving from a home visit, responding to an emergency, when she was stopped at a stop light with her foot on the break, in the southbound lane on Broadway at the Evans intersection. Another motor vehicle rear-ended her vehicle at approximately

11:35 a.m. Claimant did not see the other vehicle before the accident happened. Claimant stated that she had been wearing her seatbelt at the time of the accident. She was also looking towards the right, outside her right drivers' window when the accident occurred. There was some damage to her rear bumper caused by the accident and had to have the damage repaired. Her air bag did not deploy at the time of the accident.

4. Claimant immediately reported her accident on the "ouch line" and requested medical attention as she felt immediate tension and pain following the accident. She injured her neck, mid-back and low back in the accident. She stated she felt immediate tightness in the middle of her neck and pain that started in her mid-back and into her low back. She was referred to Concentra Medical Center for medical care related to the incident. She did not continue onto her next client appointment and did not finish out her work day on the day of her accident. She stated she was seen the same day at Concentra, they provided Tylenol and a muscle relaxer that helped with the back pain. They also prescribed physical therapy, which worsened her condition, and they placed her on restrictions of four hours, desk duty only. She was not able to perform her regular job because that required her to be out in the community making visits.

5. Claimant was forced to use her personal time off because workers' compensation was not paying for the part time work lost wages. Further, after several weeks of treatment with the Concentra providers, she had to resort to seeing medical providers at Mountain View Pain Specialists for chiropractic treatment, dry needling and physical therapy. She also developed hip pain radiating from the low back, post concussive symptoms, memory loss, headaches and brain fog following the accident of April 20, 2022.

6. Claimant contacted Denver Health initially and a triage report was issued on April 20, 2022 at 12:30 p.m. Claimant reported she was sitting at a stop light when a car hit her from behind. She reported middle to lower back pain and neck pain when turning from side to side. She further reported mid-back pain into the bilateral hips and mid back pain with movement. Claimant was instructed to immediately be seen due to back and neck pain after motor vehicle accident (MVA). The report noted that Claimant chose to be seen at Concentra South.

7. Claimant was seen at Concentra by Stephen Danahey, M.D., on April 20, 2022. He documented Claimant's history of sitting at a red light and that the car behind her rear-ended her car with onset of middle to lower back pain with moderate neck pain when she would turn her head from side to side. He documented physical examination findings of muscular tenderness and did not note any cervical or lumbar radicular signs or symptoms. He noted tenderness present in the cervical spine at the right trapezius muscle and left trapezius muscles, tenderness in the level T1-T12 of the thoracic spine and at the L1-L5 levels of the lumbar spine. Dr. Danahey concluded that Claimant had sustained a bilateral trapezius muscular strain as well as a strain of the thoracic spine and lumbar spine regions. He recommended medication including acetaminophen and cyclobenzaprine. He also recommended initiation of physical therapy. Dr. Danahey noted that objective findings were consistent with the work related mechanism of injury.

8. Claimant started with physical therapy immediately at Concentra with Bethany Lubacz on April 20, 2022, including cold packs to the cervical spine and

therapeutic exercises. She recommended claimant be seen three times a week for two weeks.

9. Claimant returned to Dr. Danahey on April 25, 2022 who noted a similar focal exam as previously and assessed both cervical and lumbar strains, providing Claimant with limitations of sedentary work of no more than 4 hours a day. He noted that X-rays of the cervical spine were normal.

10. On May 2, 2022 Respondent file a Notice of Contest.

11. Claimant then transferred to physical therapy with Ron Reznichky. On May 4, 2022 Mr. Reznichky documented that Claimant stated she went to her private PCP to get help. She was instructed to continue physical therapy and was educated on expectations following a whiplash injury. Claimant reported she was becoming impatient with how long it was taking for her cervical pain to resolve. She also was experiencing increased frequency of headaches. He noted she was progressing slower than expected, though was demonstrating significantly improved ROM of cervical spine, with continued to complains of left sided pain. He noted she was educated on prognosis of whiplash injury following MVA and how it different recovery was from person to person. She was reassured that she was healing and heading in the right direction.

12. On May 12, 2022 Mr. Reznichky noted that Claimant was progressing slower than expected and was questioning the plan of care (POC) involving progressive loading of core musculature and progressing in functional activities. Mr. Reznichky noted that she was frustrated with delayed healing. He documented that most pain was with end range of motion and that Claimant had a hyper-lordotic posture with pain across the lumbosacral junction. He recommended Claimant continue with the therapy treatment plan.

13. Claimant was evaluated by Physician Assistant Felicia Turner on May 13, 2022. Ms. Turner documented Claimant's report of moderate discomfort to her neck, thoracic back and lower back. On examination of the cervical spine, there were findings of tenderness in the C7 region as well as in the right-sided trapezius and left-sided trapezius musculature of the cervical spine. In the lumbar spine, there were findings of tenderness in the L4 through S1 region with mild motion limitations in all planes of motion. Ms. Turner recommended further diagnostic evaluation to include MRI scans of Claimant's cervical and lumbar spine regions. She noted that objective findings were consistent with her work related mechanism of injury.

14. Claimant was seen at Stanley Lake Massage Therapy on May 19, 2022 with a history consistent with her testimony. She presented with moderate tenderness of the lumbar spine with moderate palpation, tender in the iliocostal muscles of the right greater than the left, tenderness in the bilateral piriformis and quadratus femoris.

15. A lumbar spine MRI was done on May 20, 2022, and was interpreted by Eduardo Seda, M.D. Dr. Seda described mild bilateral degenerative joint changes at the L5-S1 level. In particular, Dr. Seda noted that at L5-S1, there were mild bilateral findings of joint hypertrophy with small joint effusions.

16. Records from Mountain View Pain Center included records from Jonathan Edelman, FNP-C starting on May 17, 2022. Claimant reported a MVA on April 20, 2022,

and subsequently developed onset post-concussive symptoms of brain-fog and memory loss, headaches, cervical pain radiating into her left shoulder, thoracic pain, and lumbar pain radiating to her hips. Claimant reported her headaches occurred from prolonged sitting, and that her head felt heavy on her shoulders which triggered the headaches she was having up to 5 times a week. Her cervical pain extended down into her left shoulder, her thoracic pain was diffuse and sore, and her lumbar pain was her most bothersome complaint, a sharp pain that was felt with prolonged sitting and standing, and was disturbing her sleep. Nurse Edelman noted tenderness on palpation of the cervical spine, cervical paraspinals on the left and right, thoracic spine and lumbar spine. He also found on testing that Claimant had bilateral positive straight leg tests, and facet loading tests but negative FABERs on the left and positive on the right. He recommended a multi-modal treatment approach of chiropractic care, physical therapy and massage therapy.

17. Chiropractic records authored by Kimberlea Stonewerth, D.C. of Mountain View Pain Center showed treatment was initiated on May 20, 2022 and physical therapy was initiated as well and continued with Nicole Uncapher. When Claimant initiated this treatment, her pain levels in her spine was in the range of 8-9/10 as documented by Dr. Stonewerth.

18. PA Turner noted on June 2, 2022 that Claimant continued to have neck and back pain. She stated that Claimant had not had her cervical MRI due to anxiety so she prescribed a tablet of lorazepam to take when she went in for the MRI. On exam, she documented a normal exam except for tenderness in the C7 cervical spine level, and right trapezius muscle and left trapezius muscle, with mild limitation of motion to the right and left. She noted tenderness present at the L4-S1 of the lumbar spine with mild limitations of motion in all planes. She recommended restrictions of no driving, working only 4 hours per day and to change positions often. She referred Claimant for a physiatry evaluation.

19. The MRI of the cervical spine was completed on June 4, 2022 and read by Michael Kershen, M.D. He noted findings of mild multilevel degenerative changes with associated mild to moderate spinal stenosis and no more than mild neural foraminal stenosis.

20. On June 15, 2022 John Aschberger, M.D., a physical medicine and rehabilitation specialist (physiatrist) evaluated Claimant pursuant to Ms. Turner’s referral. He documented the history of the MVA, Claimant's course of care and persistence of both cervical and lumbar spine symptoms. On examination, he found Claimant's cervical spine was tight with right lateral flexion pulling at the left trapezius and that Spurling's maneuver was negative for any radiated symptoms. Dr. Aschberger documented muscular tightness involving the left trapezius musculature with a trigger point at the infraspinatus without radiation. He noted no tenderness in the midline thoracic spine. In the lumbar spine, Dr. Aschberger documented physical examination findings of mild increases in irritation at the right low back with facet loading but negative on the left side. Dr. Aschberger documented that there were no radicular signs or symptoms and he concluded that elements of the lumbar spine examination suggested potential irritation at the right sacral sulcus and involving the facet joints. Dr. Aschberger endorsed a continuing course of chiropractic care along with a core stability program. He noted that anti-inflammatory medications would be reasonable though would have to be monitored

due to her hypertension. He recommended that Claimant continue in this course of care and that if she did not make gains, "she is a candidate to consider corticosteroid injection at the lower lumbar facet and sacroiliac area."

21. On June 17, 2022 Claimant was evaluated by PA Turner of Concentra who continued to document that Claimant reported back and neck pain, though improving neck pain. Ms. Turner noted that massage therapy was helping and that the treatment of chiropractic care and physical therapy she had obtained on her own were helping. She noted that Dr. Aschberger had agreed chiropractic care and occupational therapy would be beneficial. PA Turner noted she would place the referrals that day.[1]

22. Under the review of systems, PA Turner listed Claimant's continuing joint pain, back pain, neck pain, joint swelling, joint stiffness and night pain. On exam she noted tenderness in the C7 level of the cervical spine, right and left trapezius muscles, and slow lateral rotation. Ms. Turner noted tenderness present in the lumbar spine but palpation was normal with mild limitations for ROM but otherwise an unremarkable exam. She continued to assess cervical strain, lumbar strain, thoracic spine strain, and bilateral trapezius strain.

23. PA Turner made a referral for chiropractic care and another for physical therapy, recommending the providers at Mountain View Pain. Lastly, she referred Claimant for further massage therapy and noted that objective findings were consistent with history and/or work-related mechanism of injury. She emphasized that Claimant was working modified duty but that she would advance from 4 hours to 8 hours a day but no work related driving and to change positions often, noting Claimant was not at maximum medical improvement (MMI).

24. Claimant was evaluated by Taylor Robertson, PA-C at Mountain View Pain Specialists on June 20, 2022. PA Robertson noted Claimant's cervical pain was primarily axial in nature and extended into the left and right shoulder, described as a dull intermittent ache. Claimant's thoracic pain was also axial in nature and intermittent. Claimant's lumbar pain was a constant dull ache, axial in nature and extended into her hips bilaterally. He diagnosed cervicalgia, lumbar degenerative disc disease, other low back pain, muscle spasms of neck, and thoracic back pain and muscle spasm. PA Robertson noted that Claimant had multilevel disc bulges in the cervical spine. PA Robertson recommended a trial of cervical trigger point injections (TPIs) and if she did not respond to continued conservative therapies would recommend reconsideration for cervical epidural steroid injections (ESI). She also recommended TPIs of the lumbar paraspinals and glutes.

25. Claimant was reassessed at Concentra by Nancy Strain, D.O. on July 8, 2022 through a telemedicine visit. Dr. Strain documented Claimant's report that she had improvement in neck and back pain in the course of her care at Mountain View Pain and that massage therapy was also helping. She provided updated work restrictions of up to an 8 hour day but still no work related driving and should change positions often. She recommended a continuing course of care and noted that she would make the appropriate referrals. She noted that diagnosis continued to be cervical, thoracic and lumbar strains

[1] The specific referrals were not in evidence.

as well as bilateral trapezius strains. She noted that objective findings were consistent with the history and work related mechanism of injury.

26. Dr. Danahey, Dr. Aschberger and Dr. Strain as well as PA Turner all concluded that Claimant's objective findings were consistent with her work related mechanism of injury of April 20, 2022.

27. At some point in time, an Accident Information form was completed with the Colorado Department of Revenue, Division of Motor Vehicles.

28. Multiple photos of Claimant's vehicle were taken at some point in time as well, showing slight damage to the rear bumper, which was repaired for $2,772.54.

29. Allison Fall, M.D. conducted an Independent Medical Examination (IME) of Claimant on September 8, 2022. Dr. Fall obtained a history of the mechanism of the accident consistent with Claimant's testimony and a history of the medical treatment, including that she was initially seen a Concentra and prescribed physical therapy, which she believed was worsening her symptoms, which was later stopped and changed to a medical massage treatment. Claimant later found another pain management practice were she was prescribed chiropractic care and dry needling, which helped improve her symptoms. Claimant listed low back, neck, left shoulder and mid back pain symptoms and denied that she had any prior conditions.

30. Dr. Fall described Claimant as a well-developed, well-nourished, obese female that was short in her answers and had a somewhat defensive manner and flat affect. Her examination of Claimant was within normal limits with diffuse tenderness along the entire spine from cervical to lumbar midline spine and a pulling sensation of the cervical spine with flexion. Dr. Fall opined that Claimant did not sustain an injury on April 20, 2022. She stated that if Claimant "did sustain an injury which at most would have been a mild muscular strain which would resolve without treatment with the passage of time, then she would be at maximum medical improvement with zero impairment."

31. On October 11, 2022 Appaji Panchangam, Ph.D. prepared a 58 page Vehicle Accident Reconstruction and Biomechanical Analysis at Respondent's request regarding the April 20, 2022 MVA. He noted that **"**Rimkus was retained to reconstruct the accident to determine the dynamics of the Lincoln and to evaluate the motions, forces, and mechanisms sustained by the driver of the Lincoln in relation to the injuries claimed by" Claimant. After analyzing all the data provided, including the photographs, the vehicle history, the CDR[2] report, the forces and speed of the impact as well the impact on the body, Dr. Panchangam concluded that Claimant's vehicle sustained a forward-directed speed change (delta-V) of less than 5 miles per hour (mph) due to the rear end impact, that transient cervical muscle strains, although unlikely, could not be ruled out but that lumbar muscle strains was unlikely from the mechanics of the accident. He noted that Claimant's bodily movements would have been well within physiological limits. Therefore, intervertebral disc herniations, spinal sprains, and upper-extremity sprains were not consistent with resulting dynamics of the accident. He opined that the loads that the cervical spinal tissues of the driver would have undergone would be within levels that

[2] CDR stands for Crash Data Retrieval and includes a program to retrieve the electronic crash information or non-impact information from a vehicle. It is a program provided by [Redacted, hereinafter BL].

these tissues would undergo during routine activities of daily living in which tissue damage was reasonably not expected. He noted that the mechanism for acute intervertebral disc herniations, in the absence of bony fractures or ligament tears, is combined hyperflexion and compression and that there were no mechanisms from accident that could account for structural injuries to Claimant's cervical spine or lumbar spine or to result in degenerative changes to those anatomic regions. He further concluded that Claimant's head accelerations in the subject accident were far below the accelerations associated with mild traumatic brain injury (mTBI) or concussion and the accident did not present a mechanism for asymmetric loading or meaningful internal motion that could cause a hip strain. He highlighted a study of multiple test subjects that were advised they had been in a MVA but were only subjected to a simulation with negligible force and reported subsequent symptoms, without a trigger, concluding that it was possible that Claimant fell within this category.

32. John Hughes, M.D. conducted an IME at Claimant's request on November 23, 2022. Dr. Hughes took a history and reviewed the medical records available. He noted that Claimant related she continued to be symptomatic. Her pain diagram outlined dorsal spinal pain across the back of her cervical spine and lumbar spine. She reported neck pain was "aching… it comes and goes" and had a magnitude of severity of 1/10. She noted that she was given a water pillow prescription by her clinicians that had been quite helpful for her neck pain. With respect to low back pain, Claimant noted she had an aching quality and made it difficult to get back into a normal routine as she sustained "setbacks." She noted a magnitude of pain of 4/10 for the lumbar spine.

33. On exam Dr. Hughes found hypertonicity in the bilateral posterior trapezius, a slight difference in lateral cervical spine range of motion. He noted bilateral erector spinae hypertonicity in the lumbar spine that releases well with walking in place and a negative straight leg test. Dr. Hughes assessed cervical spine sprain/strain, ("nearly resolved over a course of physical and chiropractic treatment"), with some residual left-sided posterior trapezius hypertonicity that measurably decreases right lateral flexion of the cervical spine, and lumbar spine sprain/strain with residual right-sided lumbar facet joint arthropathy, meriting additional treatment as recommended by Dr. Aschberger in his report of June 15, 2022. Following review of Dr. Panchangam's report, he noted from Claimant's physical examination that she had findings consistent with those noted by Dr. Aschberger on June 15, 2022. He concluded that when he performed his examination, he had not yet reviewed Dr. Aschberger's report, and it appeared they had concordant clinical findings supporting consistency of Claimant's injuries, which meant that these findings are more likely than not stemming from objective pathologies; and in his opinion that they stemmed from the motor vehicle collision of April 20, 2022.

34. Dr. Hughes went to on to state as follows:

> In the cervical spine, consistency is noted in reduced right lateral flexion of the cervical spine consistent with that noted by Dr. Aschberger on June 15, 2022 in conjunction with left-sided trapezius hypertonicity. Consistency is also noted in the lumbar spine with reduced right lateral flexion noted today at 14 degrees with positive right-sided facet loading findings also noted by Dr. Aschberger on June 15, 2022.

> [Claimant] underwent lumbar spine MRI scan evaluation on May 20, 2022. This was done one month after the motor vehicle collision. As noted by Dr. Seda; "at L5-S1, there were mild bilateral findings of joint hypertrophy with small joint effusions." These joint effusions are probably traumatic in etiology and consistent with [Claimant]'s current clinical findings of facet joint arthritis.
>
> It is my opinion that [Claimant] is not yet at maximum medical improvement (MMI). She should continue in treatment essentially as recommended by Dr. Aschberger in his report of June 15, 2022. [Claimant] may be a candidate for interventional spine care directed to her right-sided lumbar spine facet joint pathology. This treatment was also suggested by Dr. Aschberger in his report of June 15, 2022. Given the information currently available to me, it appears probable that [Claimant] will completely resolve her cervical spine injuries. She really has minimal objective pathology in the cervical spine and subjectively, she notes pain that "comes and goes" and has a magnitude today of 1/10.
>
> In contrast, [Claimant]'s lumbar spine has been more problematic. She notes decreases in pain levels from 8-9/10 down to 4/10; however, findings noted by Dr. Aschberger on June 15, 2022 have persisted. I believe her lumbar spine will require additional prescriptive medical care in accordance with the Colorado Division of Worker's Compensation Lumbar Spine Medical Treatment Guidelines.
>
> I do agree with Dr. Panchangam that [Claimant] was involved in a low energy motor vehicle collision. I disagree with him that [Claimant] could not have sustained injuries as a result of this collision. It seems clear to me and all of [Claimant]'s attending medical providers that she has sustained injuries meriting medical treatment. It is also clear that [Claimant] is responding positively to medical treatment rendered to date.

Ultimately, Dr. Hughes opined that Claimant sustained cervical and lumbar spine injuries on April 20, 2022, that the medical evaluations and treatment to date all appeared to be reasonable, necessary and related to this particular work-related motor vehicle collision, that she was not at MMI and should continue in treatment as had been recommended by Dr. Aschberger on June 15, 2022.

35. Dr. Panchangam testified at hearing as an expert in biomechanical and biomedical engineering and vehicle accident reconstruction. He reviewed information provided including the inspection of the vehicle and analyzed the information to extrapolate and determine the severity of the accident as it related to the parameters of the vehicle, how the conditions would have affected a typical driver in the Lincoln that Claimant was driving, and, finally, assessing whether the Claimant's diagnosed injuries were consistent with what would be expected with the typical driver in that particular setting.

36. Dr. Panchangam obtained information for similar accidents and damage to comparable vehicles from the National Highway Traffic Safety Administration and obtained the information from the Claimant's damaged vehicle control module or EDR[3], which recorded no events as it did not meet the threshold requirements of 5 miles per

[3] EDR stands for "event data recorder" and is also known as an ACM (Association for Computing Machinery), which measures the severity of a crash and determines whether or not to deploy airbags or safety devices or seat belt pretensioners.

hour. He concluded that Claimant's vehicle was not going faster than 5 miles per hour following the impact from being stationary. Dr. Panchangam also analyzed the structure of the bumper and the force that was absorbed by the bumper structures to calculate the Delta V, the velocity, to increase the accuracy of the final conclusion. He had little information regarding the damage to the vehicle that hit the Lincoln other than it was drivable following the accident.

37. Once Dr. Panchangam analyzed the severity of the accident, he turned to the bio-mechanics to deduce how the body of the driver in the Lincoln would move upon impact. He explained that upon impact the body, including the torso and the neck, would compress into the seat back and head rest for about 150 milliseconds, then rebound forward proportionally to the force impacting the vehicle. He stated that the force backwards and the subsequent force forward is minimized by activation of the neck muscles, which could cause whiplash and stretch the muscle tissue. In his opinion, this did not occur to Claimant. He further stated that the sheering force of the impact to the spine was not significant enough to cause the Claimant's cervical spine injuries. He further opined, based on the analysis of the data, that there would be a very remote possibility of a concussion or mild traumatic brain injury caused by the MVA. Lastly, he stated that the compression forces to the back is minimal both in backward motion into the contoured seat and forward at the speed the vehicle was moving upon impact.

38. Dr. Panchangam deferred to Claimant's providers with regard to the diagnosis of lumbar and cervical strains caused by the MVA. He stated that patients know when they have pain and know when to seek treatment and care. He also stated that he would defer to a physician to diagnose what the patient was suffering from, what the cause of the particular injury that was causing the symptoms as well as what treatment needed to be provided.

39. Allison Fall, M.D. testified on behalf of Respondent as an expert Level II accredited physician and expert in physical medicine and rehabilitation. She reviewed the available medical records, took a history from Claimant and from the intake Claimant completed. Claimant reported the accident consistent with her hearing testimony and the medical records from her initial visit at Concentra. She conducted a physical examination of the cervical spine and lumbar spine, including palpating the muscles, looking at range of motion, and asking about her symptoms. Claimant complained of pain along the midline of the cervical spine and pain right in the center of her low back. The side to side bending showed some restrictions but did not increase Claimant's symptoms. In general, Dr. Fall stated that all provocative maneuvers were negative and her neurological examination of the arms and legs were normal.

40. Dr. Fall stated that she looked at the facts when making her causation analysis, including mechanism of the injury, whether it was biologically plausible that the mechanism of injury led to the documented diagnosis, looking at the records, seeing what the other providers had found on their examinations, what the imaging had shown, how Claimant responded to treatments, looking at psycho-social factors that may be playing a role and then, history taking and examination in reaching her conclusion

41. Further, Dr. Fall stated that she reached the same conclusions as Dr. Panchangam without having the benefit of the calculation of forces or the lack of a

recorded event on the vehicle control module, that it was unlikely that there were any musculoskeletal injuries sustained as a result of the MVA but even if there had been, they would have been mild muscular strains. Dr. Fall stated that neck strains and trapezius strains were consistent with rear-end MVAs though lumbar spine strains were not typical. She noted that she was familiar with Dr. Danahey as she had previously practiced with him. She noted that Dr. Danahey had diagnosed multiple strains including the thoracic and lumbar spine strain, prescribed medications and physical therapy, which were reasonable treatments considering Claimant's reported symptoms and believed Dr. Danahey treated Claimant appropriately on April 20, 2022, following the MVA. She had also practiced with Dr. Aschberger for over 20 years in the same specialty. While she believed that the treatment provided and offered by Dr. Aschberger was controversial, it was appropriate given Claimant's ongoing complaints. Dr. Fall conceded that there were no facts or medical records indicating that Claimant had any preexisting conditions related to her neck and back.

42. As found, Claimant was within the course and scope of her employment when she was involved in a low impact motor vehicle accident on April 20, 2022 while returning from a home visit. As found, Claimant credibly testified that she was injured as a consequence of the accident, injuring her neck, bilateral trapezius areas and low back as a consequence of the work related accident. This is supported by the medical records of the authorized treating providers from Concentra, including Dr. Aschberger, Dr. Danahey, Dr. Stain, PA Ron Reznichky and PA Turner. It is further supported by the records of providers at Mountain View Pain Specialists. These listed providers were more credible and persuasive than the contrary opinion of Dr. Fall.

43. While Dr. Panchangam clearly explained his theory regarding the probability of injury during this type of MVA, it is also clear that Claimant was the exception to his scenario as she injured both her cervical spine and lumbar spine, despite the failure of the control module or EDR to record the accident. While this ALJ agrees that the accident was not a significantly violent accident, it was sufficient to injure Claimant, who was asymptomatic prior to the MVA and injury.

44. As found, Claimant reported the injuries to Employer immediately and was seen immediately at Concentra after she contacted Employer's "Ouch" line and was directed to Concentra. Dr. Hughes was also persuasive in his opinion that Claimant sustained cervical and lumbar spine injuries on April 20, 2022, that the medical evaluations and treatment to date were reasonable, necessary and related to this particular work-related motor vehicle collision, that Claimant was not at MMI and should continue in treatment essentially as had been recommended by Dr. Aschberger on June 15, 2022

45. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The claimant must also prove by a preponderance of the evidence that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." § 8-41-301, C.R.S.

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent

need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Claimant was within course of her employment as she was engaged in performing her duties as a Child Welfare Worker for Employer, returning from an assignment visiting a family on April 20, 2022 when the motor vehicle accident occurred. This job required Claimant to drive from location to location visiting family and community members regarding the families she was investigating. While in the course of performing those duties, Claimant was rear-ended by another vehicle. While the motor vehicle accident was not specifically violent, as found, it was sufficient to cause injuries to Claimant's cervical spine and low back as described by her treating providers at Concentra as well as Dr. Hughes. Claimant credibly testified that prior to the April 20, 2022 work related accident, she had no medical problems involving her cervical and lumbar spine. She reported her injuries immediately to her Employer, she was sent to Concentra and attended by Concentra, who diagnosed cervical, thoracic and lumbar spine injuries. Dr. Hughes was more credible than Dr. Fall. Dr. Hughes reviewed Dr. Fall and Dr. Panchangam reports and opined that the MVA of April 20, 2022 was the cause of Claimant's cervical and lumbar spine injuries. Claimant credibly testified that she had not preexisting symptoms prior to the April 20, 2022 work-related accident, despite the MRIs showing degenerative changes. As found, those asymptomatic degenerative changes were aggravated by the MVA of April 20, 2022. Claimant proved that she was within the course and scope of her employment with Employer on April 20, 2022 when she incurred injuries which were proximately caused by the MVA and for which she required medical attention, including treatment, specifically causing disability as Claimant was limited in her employment immediately following the work-related injuries. From the totality of the evidence, Claimant has shown by a preponderance of the evidence that the injuries to her lumbar spine, cervical spine and thoracic spine were more likely than not caused by her work related accident of April 20, 2022.

C. Medical benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101,

C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that she is entitled to all reasonable and necessary medical treatment related to the motor vehicle accident of April 20, 2022. This is supported by the Concentra records and Dr. Hughes' opinion that it was more likely than not that the treatment provided as well as the treatment recommended by Dr. Aschberger were reasonably necessary and related to the work related injury and accident of April 20, 2022.

It is clear that the Concentra providers and their referrals are authorized medical providers. The records in evidence are also clear that Claimant chose to go on her on to Mountain View Pain Center. It was not until June 17, 2022 that PA Turner made the first referral to Mountain View Pain Center for chiropractic care. It is presumed that Ms. Turner made an independent medical determination that the treatment she was referring Claimant to was appropriate under the circumstance. Therefore, any care at Mountain View Pain Center before June 17, 2022 was not authorized care and Respondents are not liable for that care.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained compensable work related injuries on April 20, 2022.

2. Respondents shall pay for reasonably necessary and related medical care as recommended by her Concentra providers as well as their referrals for physical therapy, chiropractic, medications and diagnostic testing, including Dr. Aschberger.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 13th day of March, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 5, 2022 to the present and continuing until terminated by law.

II. Whether Respondents have shown by a preponderance of the evidence that Claimant is responsible for his termination from employment with the Employer of injury and his subsequent employer.

STIPULATIONS OF THE PARTIES

The parties stipulated that Claimant's average weekly wage was $1080.00 which is based on 40 hours per week and $27.00 per hour.

The parties further stipulated that, if Claimant is entitled to temporary disability benefits, those benefits would start form March 5, 2022 through the present and continuing until terminated by law.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant worked as an iron worker and welder, including bent plate and installing all the detail work, for Employer beginning in May 2021. The bent plate and angles could weight up to 120 lbs. and Claimant would have to move them and put them in place. He was also installing stair rails that would weight approximately 30 to 40 lbs.

2. On October 11, 2021, while lifting one of the bent plate to put it on his shoulder, Claimant felt a pop in his low back and a felt a strain in his groin area and into his stomach. He thought it might be a hernia, and did not give the pop in his low back any thought. The following day, his back was in pain. He continued working despite the throbbing, needling pain in his low back, though he did have his coworkers help with putting the bent plate in place due to his back pain.

3. Claimant stated that he had seen Dr. Corson, who provided work restrictions of 15 lbs. maximum lifting. He stated that he provided his Employer the paperwork from his medical providers with the 15 lbs. restriction. Specifically he provided the paperwork to his supervisor and his foreman. Despite the restrictions, he testified continued to work, lifting the welder, which weighed approximately 100 lbs. and the bent plate or angles which were also heavy. He spoke to his employer about a modified duty job, but since the work needed to get done, he continued working his normal job though had some help.

4. The first time Claimant was placed on restrictions was on October 20, 2021 by Dr. Corson, approximately 9 days following his work injury, and included the 15 lbs. restriction. His restrictions continued through December 7, 2021 when Dr. Zimmerman evaluated Claimant.

5. Claimant testified that he left his employment with Employer because his back hurt and they kept having him do work outside of his restrictions. He let his foreman, [Redacted, hereinafter MM] know he was leaving as of December 22, 2021 in the afternoon. He testified that he left Employer both because of his back injury and because he was unable to receive his cortisone injection as recommended by Dr. Zimmerman. He stopped seeing the workers' compensation providers in December 2021 because he was under the impression that his workers' compensation benefits terminated when he left his position.

6. Claimant stated that he went to work for another company, [Redacted, hereinafter TI], performing work welding. Initially he was not doing any work lifting heavy things because they had carts that would hold the materials and the job was within his work restrictions. He testified that he left the job at TI[Redacted] because of back pain. When Claimant called in to work and told TI[Redacted] about his back, he stated his employer did not like the fact that he had back problems. He left this job on or about March 4, 2022.

7. Between December 2021 and October 2022, Claimant did not attend any medical appointments. He returned to see Dr. Rubio on October 17, 2022.

8. Claimant answered interrogatories on September 22, 2022 and represented that he answered them to the best of his ability. However, one of the questions asked was whether he had secured any employment since leaving Employer and Claimant answered that he had not, which was clearly incorrect since he was immediately employed by TI[Redacted] as a welder on December 23, 2021.

9. Claimant conceded that [Redacted, hereinafter LU] sent him for a pre-employment physical on December 22, 2021 at 8:21 a.m. to Concentra South, and that the same day in the afternoon he gave notice to Employer that he would not be returning to work for Employer.

10. Claimant was initially seen at Concentra by Ron Rasis, PA, on October 11, 2021 complaining of abdominal pain, groin pain and testicular pain. He documented that Claimant was lifting a 280 lb. piece of metal, straddling the metal, bent over to lift and as he was lifting he felt acute pain, pulling and tearing sensation into his right testicle and right lower abdomen. PA Rasis examined Claimant and failed to palpate any herniations, but noted that Claimant had abdominal tenderness in the suprapubic area and in the right lower quadrant. Mr. Rasis ordered an ultrasound and requested Claimant return following the evaluation. He diagnosed strain of the groin and persistent pain in the testicle. Claimant was returned to regular work.

11. On October 13, 2021 PA Rasis ordered an MRI of the lumbar spine and the pelvis. He diagnosed groin strain and lumbar strain.

12. Respondent Employer filed a First Report of Injury on October 13, 2021 noting that Claimant was lifting a metal plate and felt a shooting pain from his groin and down his leg.

13. PA Rasis reevaluated Claimant on October 20, 2021 for ongoing lower back aching pain, stiffness and radiation of pain down his right leg to his 3rd toe, burning pain in the right inguinal region into his right testicle. PA Rasis documented Claimant stated that he was being asked to lift heavy objects at work which were beyond his ability due to his back pain. He diagnosed lumbar strain and right groin strain. He discussed the new restrictions of 15 lbs., a trial of Lidoderm for his back pain, treatment for ROM, modalities, and myofascial release.

14. On November 8, 2021 PA Rasis documented that Claimant was working modified duty. However, he also stated that Claimant was not working due to fear of re-injury.[1] On exam he found an abnormal lordosis of the spine and tenderness of the lumbar spine. He continued the restrictions.

15. Claimant was again attended by PA Rasis on November 15, 2021, reporting ongoing midline lower back pain, soreness, limited tolerance to trunk flexion and intermittent groin pain. He was still awaiting an MRI. He had tenderness in the lumbar spine, bilateral paraspinals and had right sided muscle spasm. He continued with the restriction of 15 lbs. lifting. He returned to PA Rasis on November 29, 2021 with similar complaints, though continued with the tenderness of the lumbar spine, but no muscle spasms were detected. Restrictions remained the same.

16. Claimant was provided a Designated Provider List on November 16, 2021, which was signed by Claimant on November 17, 2021, marking Concentra Medical Centers. On the same day Claimant signed the acceptance of modified employment.

17. The MRI report was issued by Clinton Anderson, M.D. on November 18, 2021. He noted that Claimant has a transitional lumbar anatomy at L5, disc desiccation and mild disc space narrowing between L1-L5 and degenerative changes. There was a moderate disc bulge at L4-L5 with a small superimposed central disc protrusion, moderate right sided neuroforaminal narrowing without compression and mild left sided neural foraminal narrowing without compression.

18. Fredric Zimmerman, D.O. evaluated Claimant on December 7, 2021. He took a history consistent with Claimant's testimony. Claimant continued to complain of constant low back pain. Dr. Zimmerman noted that the abdominal and groin pain were slowly improving. The lumbar spine pain only had moderate improvement with treatment of physical therapy, though Claimant reported that the dry needling alleviated temporarily the muscle spasms. He reviewed the medical records, including the MRI. Dr. Zimmerman diagnosed lumbar displaced disk with evidence of annular tear/disc bulge on MRI and a combination of flexion and extension based back pain. He provided a Medrol Dosepak to treat the inflammation around the annulus, cyclobenzaprine and recommended scheduling an L5 transforaminal epidural steroid injection for both diagnostic and therapeutic purposes.

19. Physical therapy continued at Concentra through December 21, 2021. Scott Rendell, P.T. noted Claimant continued with symptoms, was awaiting authorization for injections, and was provided dry needling, exercises and manual therapy.

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[1] However, PA Rasis also noted that Claimant was not working due to fear of re-injury within the same report.

20. On December 22, 2021 a Craft Termination PAN was completed for [Redacted, hereinafter LR]. It noted Claimant Voluntarily Quit but the reason was for "Job Abandonment."

21. John Raschbacher, M.D. performed an independent medical examination (IME) of Claimant on September 20, 2022 at Respondents' request. Dr. Raschbacher took a history of the injury, his symptoms, medical treatment, and reviewed the medical records through December 7, 2021. On examination he found a normal deep tendon reflexes at the ankles and knees, a one inch and one quarter calf circumference difference with the left side atrophied compared to the right, no lumbar tenderness, normal lordosis, negative pseudorotation, slight positive Patrick's test right greater than left, negative straight leg test, and normal vascular, sensory and motor sensation of the lower extremities. He had a significant loss of range of motion but no inguinal findings.

22. Dr. Raschbacher noted Claimant reported stable symptoms and persistent discomfort at the low back. His MRI findings were fairly modest, with some changes at L4-5, but only a small disc protrusion. At that time, he may have had some neuroforaminal encroachment on the right, but there was no nerve root compression. He opined that the MRI did not explain, medically, the persistence of symptomatology he was reporting. He suggested potentially a repeat MRI to see if he had any new or different anatomy at the lumbar spine. He opined Claimant did not have any findings that clearly explained the persistence of his symptomatology or his reported inability to work. He stated that Claimant was not an appropriate candidate for injection or for surgery unless new evidence was found. He further stated that additional application of medical resources is unlikely to cause subjective resolution of his reported symptomatology. Dr. Raschbacher's final medical opinion was that Claimant was at MMI as of the date of the IME and did not have a clear ratable impairment or clear basis for restricting physical activity.

23. On October 17, 2022 Dr. Cynthia Rubio evaluated Claimant for low back pain, who was reporting both numbness and tingling at times. Claimant reported mid-lumbar pain everyday - 24/7, had a hard time sleeping, pain when walking, sitting, laying down, and driving. She noted that Claimant saw Dr. Zimmerman who suggested ESI, were apparently not approved by insurance and had no medical intervention/treatment since December 2021. Claimant reported that testicular pain was less frequent although he still noted intermittent throbbing pain. Discussed and reviewed MRI with degenerative changes although there was L4-5 disc pathology which may have been contributing to Claimant's right testicular pain. Dr. Rubio discussed treatment options including doing nothing, prescribing medications, physical therapy, chiropractic or acupuncture treatment and finally potential interventional pain procedures. On exam, Dr. Rubio noted that Claimant had loss of range of motion and tenderness to palpation in the paralumbar areas bilaterally. Otherwise, the exam was negative including Waddell signs. Dr. Rubio made referrals to physical therapy, Dr. Zimmerman and provided temporary restrictions of 20 lbs. lifting and up to 40 lbs. pushing and pulling.

24. TI's[Redacted] employment file for Claimant contained an Employee Status Sheet for Claimant showing that he had been hired as a journeyman welder on December 23, 2021 at the rate of pay of $33.00 per hour, which was $6.00 more per hour than he was earning with Employer. The referral from LU[Redacted] was issued on December

22, 2021, and certified that Claimant had taken a core class of fall protection pursuant to OSHA regulations. He completed paperwork for TI[Redacted] on December 23, 2021, including an Employer Status Sheet, Federal I-9 form, Designated Provider List, Safety Training Acknowledgement form, a Harness, Beamer[2] and Twin Retractable Issue and Use Agreement forms, and an Emergency Contact Form.

25. On February 21, 2022 Claimant received a second warning from TI[Redacted] due to attendance issues. On February 22, 2022 TI[Redacted] issued an Employee Warning Notice stating that Claimant was leaving early almost every day and not showing up at least once a week.[3] The TI[Redacted] Employee Terminated form shows Claimant was formally terminated from his employment on February 23, 2022 for attendance issues as "Employee leaves early almost every day he is here," noting that the final incident that cause the discharge being that he "left early again on 2/22/22."

26. Payroll records from TI[Redacted] show one payment of $83.50 for the week ending December 30, 2021. This ALJ infers that these initial wages were for the Safety Training which took place on December 23, 2021. Thereafter, from pay period January 7, 2022 through March 4, 2022, claimant continued to earn regular wages in a total amount of $10,466.50. Claimant testified that when he answered the interrogatories he completely forgot about the TI[Redacted] work he had done. This is not credible.

27. Once Claimant had hired an attorney, in approximately July 2022, he then found out that his workers' compensation benefits were not terminated but that he could return to see his authorized providers.

28. The LR[Redacted] Human Resources (HR) Director testified on behalf of Respondents. She worked for Employer for 30 years. She handled everything that fell under the HR wheelhouse, including compliance, benefits, and employee relations. She noted that Claimant was hired by Employer on May 17, 2021 as an ironworker apprentice.[4] The HR Director also stated that she dealt with a lot of work related injuries for Employer. She stated that the company offers modified duty to employees who were injured and that Claimant was notified that Employer would accommodate any and all work restrictions. In fact, Employer provided a formal offer for modified of employment to Claimant, which he accepted on November 17, 2021 and Claimant was supposed to be working that modified duty while he was under restrictions. The offer specifically noted that he was offered regular duty work with no lifting over 15 lbs. The HR Director stated that at no time did Claimant report to the HR Director work restrictions were not being followed by his supervisor. While Claimant testified that he did report the violation to the HR Director, he could not provide a date or time period in which the call or calls took place. As found the HR Director is more credible than Claimant in this matter.

29. Claimant testified that he spoke with his supervisor and was insulted in response. He stated that Employer did nothing to accommodate his restrictions.

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[2] An anchor for attachment to construction I-beams that then is attach to the twin retractable lead to a harness to prevent falls.

[3] This is not clear that this is the correct date since Claimant worked for TI[Redacted] from December 23, 2021 through March 4, 2022.

[4] Someone learning to be a journeyman ironworker.

30. Dr. Raschbacher testified by deposition on October 7, 2022 at Respondents' request as a Level II accredited occupational medicine expert. Claimant reported low back pain that was throbbing sometimes spreading to the right or the left side of the spine and sometimes would go into the buttocks. He noted that Claimant would take an ibuprofen every other day and that if he stood or sat for greater than 15 minutes, his pain would increase.

31. Dr. Raschbacher stated that Claimant underwent medical care which included physical therapy, dry needling and medications. Dr. Raschbacher noted that Claimant was placed on work restrictions of 15 lbs. lifting and to his knowledge Claimant was never taken off of those restrictions. He reviewed Claimant's medical records which included the MRI performed on November 18, 2021, which he did not consider had significant findings other than the unusual bony formation of the sacrum as a big shield-type of bone and some minimal other findings of disk bulging, disk protrusion and stenosis without impingement.

32. On exam, Dr. Raschbacher found no tenderness in the lumbar spine, though a slightly positive Patrick's test and limited range of motion, a negative straight leg test. He concluded that there really was not a good objective or physiological basis for Claimant's ongoing complaints of low back pain. He believed Claimant had reached MMI as of the time of his examination on September 20, 2022 without any impairment because, based on his opinion, Claimant had no objective findings that correlated to his subjective complaints of pain.

33. Upon cross examination, Dr. Raschbacher noted that lifting type injuries like Claimant were a common mechanism of injury for the low back injuries, including sometimes causing some pain into the inguinal area. He agreed that Claimant's MRI showed a moderate disk bulge, but denied that this was a significant finding.

34. As found, Claimant was under work restrictions placed on him by his authorized treating physicians as of October 20, 2021. His restrictions continued at least through December 7, 2021 and there are not records that contradict this. In fact, when Claimant returned to his ATPs in October 2022, his restrictions were continued

35. However, as found, Claimant's separation from employment with Employer on December 22, 2021 was due to finding a job which paid $6.00 more per hour, not because of his back complaints. As found, Claimant did not report to the HR Director for Employer that Employer was not complying with his work restrictions as the HR Director was more credible than Claimant in this matter. Claimant made a volitional decision in leaving Employer's employment. Further, as found, Claimant was responsible for his termination at TI[Redacted] for failure to comply with company attendance policies and not due to his low back injury. As Claimant committed volitional acts in leaving both his employment with Employer and with TI[Redacted] Claimant's right to temporary disability benefits is severed.

36. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Temporary Total Disability Benefits and Termination for Cause

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." However, even if a claimant is terminated for cause, post-separation TTD benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo. App. 2001); see also *Gilmore v. ICAO*, 187 P.3d 1129 (Colo. App. 2008).

The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant was still under restrictions of 15 lbs. lifting throughout December 2021 and he continued to have a 20 lbs. lifting restriction on October 20, 2022. Claimant alleged his supervisor or Employer were requiring him to work beyond his work

restrictions. However, the HR Director for Employer credibly testified that she was not advised that Claimant's restrictions were not being observed on the job. Employer provided a modified job offer on November 16, 2021, which Claimant signed the following day. Claimant had been working under the same restrictions since October 20, 2021, almost a month before he signed the form sent to him by the HR Director with the offer of modified employment. While Claimant testified that he had communicated the violation of his restriction to the HR Director, Claimant's testimony in this regard is not credible. Bolstering this are the facts that 1) Claimant failed to disclose in his discovery responses that he had subsequent employment, 2) he underwent a drug screening at 8:21 a.m. on December 22, 2021, before he tendered his resignation, 3) he was undergoing a safety class with his subsequent employer, TI[Redacted], the following day, on December 23, 2023, 4) TI[Redacted] was offering Claimant a significantly higher wage. All of these facts shed light onto Claimant's true purpose in leaving Employer, which was more likely than not due to his own convenience or benefit and not due to any violation of his restrictions. Respondents have shown, by a preponderance of the evidence that it was more likely than not Claimant was responsible for his termination and subsequent wage loss as his resignation was volitional.

Claimant argues that he was not responsible for his termination of employment on March 4, 2022[5] from TI[Redacted]. However, the facts are tenuous at best. Claimant was not credible with regard to his termination of employment with Employer and offered little evidence other than his own testimony that he left when he could not perform his job due to back pain. The TI[Redacted] termination documents, however, speak for themselves. Claimant was terminated due to multiple instances of leaving the work site early without permission. This is also a volitional act by Claimant. There was no documentation or credible evidence tendered showing that he notified the TI[Redacted] HR office of his ongoing medical problems, or requested accommodations, or other indication that there was some communication with his supervisor showing he was having difficulty performing his job at TI[Redacted]. Respondents have shown, by a preponderance of the evidence that it was more likely than not Claimant was responsible for his termination from TI[Redacted] and subsequent wage loss as his termination was caused by his own volitional acts of leaving his work early without permission.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for temporary disability benefits from March 4, 2022 is denied and dismissed.

2. All matters not determined here are reserved for future determination.

[5] The termination may have been February 22, 2022 based on the TI[Redacted] termination document but Claimant testified he worked at TI[Redacted] until March 4, 2022 and was seeking temporary disability benefits beginning March 5, 2022.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 15th day of March, 2023.

By: _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-121-045-003

ISSUES

The hearing in this matter was set on the issues of overcoming the Division IME, conversion of the shoulder impairment, medical benefits after MMI (Maximum Medical Improvement), overpayment and recovery of overpayment. Respondent conceded the issue of medical benefits after MMI, clarifying the position taken on the Final Admission of Liability dated August 16, 2022. It was previously unclear as to whether the Final Admission admitted for medical benefits after MMI. Counsel for Respondent indicated that Respondent did admit for those benefits.

The issues remaining for determination are:

- Did Claimant overcome the DIME's determination of MMI by clear and convincing evidence?
- Did Claimant prove by a preponderance of the evidence the 10% right shoulder extremity rating should be "converted" to the 6% whole person equivalent?
- Did Respondent prove an overpayment of $5,349.00 and that Claimant is liable for repayment of the overpayment?
- Disfigurement.

FINDINGS OF FACT

1. Claimant was employed by Respondent on October 12, 2019 as a correctional officer/supervisor in food service and supervised inmate cooks at the correctional facility in Cañon City, Colorado. On that date, at approximately 6:00 a.m. she went to the freezer to get vegetables with two inmates. There was ice on the floor that she noticed as she entered the freezer. She stepped over the ice. As she was leaving the freezer, she was stepping over the ice and started to fall when her shoe caught the edge of the ice. She tried to catch herself, but fell on her right side. The claim was admitted.

2. Claimant sought treatment immediately at CCOM/Emergicare in Cañon City. She testified that they took an X-ray and the Nurse Practitioner put her knee in a brace and her arm in a brace. She continued to wear the right arm brace until the end of November. According to the initial report from Centura Orthopedics, she was diagnosed with right shoulder strain and contusion of the right knee.

3. Following the initial visit, Claimant had physical therapy for her leg but not for her shoulder. She did not receive physical therapy for her shoulder until later.

4. Claimant did have MRI's in February of 2020 for her shoulder and hip. The shoulder MRI on February 13, 2020 showed mild degenerative changes in the right AC

joint. The shoulder was otherwise negative. The MRI report of the hip showed inflammation of the adductor magnus at the ischial attachment; possible partial-thickness tearing of the semitendinousus and long head of the biceps femoris on the ischial tuberosity; mild geater trochanteric bursitis and anterior superior labral tear with CAM type femoroacetabular impingement. After the MRI's were performed Claimant was referred out for physical therapy for the hip only. After conservative treatment was unsuccessful, she underwent surgery for the hip in June 2020. Following surgery, Claimant resumed physical therapy for the hip.

5. A second incident occurred when Claimant returned to work following the surgery. She attempted to lift a 20 pound box and when she turned while holding it, her hip "popped". After additional imaging, the Claimant underwent a second hip surgery in March, 2021. Following this second surgery, she underwent months of physical therapy for the right hip and leg.

6. Following the shoulder MRI, Claimant did not receive treatment for her shoulder complaints until October, 2021 when she complained of pain in her shoulder. Prior to that, all treatment was focused on the right hip and leg. Following her complaints about her shoulder pain, she was referred for twelve sessions of massage therapy. Eventually, she also received three to four visits of physical therapy for her shoulder.

7. Claimant's authorized treating physician, Mr. Quackenbush, P.A. eventually referred her to Dr. Reiter for an impairment rating. Claimant was unaware of the purpose of the visit to Dr. Reiter. Dr. Reiter saw Claimant on March 11, 2022 and determined that Claimant was at MMI with a 16% of the right lower extremity rating for the hip. He stated that the whole person impairment rating, if converted was 6% whole person, as applicable. He concluded that the Claimant was at MMI as of the date of the visit, March 11, 2022. Dr. Reiter did not provide a rating for her shoulder. At the time of the rating, the Claimant continued to have pain in her shoulder.

8. At the time of MMI and continuing, the Claimant cannot perform activities that she previously did, including playing the fiddle, taking wet laundry out of the washing machine, sweeping, mopping or vacuuming. She can no longer work on cars, she has trouble picking up anything and she has lost a lot of strength in her right shoulder. Claimant's inability to perform these activities is due to pain and loss of strength in her right shoulder. Claimant testified that her shoulder pain is in her shoulder including the collarbone area, down into her armpit area as well as the rear aspect of the right shoulder area. Claimant testified at hearing that she feels a knot in the muscles of her upper back. At the hearing, Claimant's counsel described where the Claimant was pointing to on her body as she testified, which corresponded to her testimony.

9. Following the MMI determination and impairment rating, Claimant underwent a Division Sponsored IME (DIME) with Dr. Polanco. At the time of the evaluation, she did tell Dr. Polanco about her ongoing shoulder symptoms.

10. Dr. Polanco determined that the Claimant reached MMI on March 11, 2022. He determined that the Claimant had a 10% impairment rating to her right upper extremity,

which converted to 6% whole person and a 21% impairment rating to her right lower extremity which converted to 8% whole person.[1] Dr. Polanco did take a history from the Claimant that she experienced pain in her right shoulder and a tingling sensation on the back of her arm, 7 to 8 out of 10 on the pain scale, but did not provide any indication that she was not at MMI for all conditions.

11. Dr. Rook performed an IME on September 20, 2022. He took a history from the Claimant that included the details of her injury and her subsequent treatment. He did document her treatment to her right hip including the two surgeries. With respect to treatment to the Claimant's shoulder, he did take a history of the massage therapy that was provided. He also documented that after the MRI of the shoulder did not show surgical pathology, the Claimant's orthopedist at the time, Dr. Minihane had no further treatment recommendations.

12. With respect to treatment for Claimant's shoulder, there is a discrepancy between Dr. Rook's statement that "she has not had any physical therapy for her right shoulder since the on-the-job injury" and the testimony the Claimant gave at the hearing. She testified that she received three to four sessions of physical therapy after the massage therapy. Dr. Rook opined that the Claimant was not at MMI for the shoulder since she had not been provided the treatment as outlined in the Shoulder Medical Treatment Guidelines. However, he does not opine that Dr. Polanco's determination that Claimant is at MMI is clearly in error. His opinion that "Dr. Polanco erroneously stated that this patient had reached maximum medical improvement when in fact she has not received any treatment for her right shoulder dating back to her occupational injury" is not based on information that is entirely accurate. He does acknowledge in his narrative that she received massage therapy. That constitutes treatment despite his conclusory statement to the contrary. He is also mistaken about the Claimant's lack of physical therapy sessions based on Claimant's testimony. He incorrectly assumes that Claimant had no physical therapy for his shoulder. Whether that treatment would have changed his opinion is unknown. In any event, I view Dr. Rook's statement as to Claimant not being at MMI to be a mere difference of opinion with that of Dr. Polanco's determination of MMI.

13. Claimant also underwent an IME with Dr. Bernton on January 12, 2023 at the request of Respondents. With respect to Claimant's right shoulder, he notes that the MRI of the shoulder did not demonstrate the presence of structural injury to the shoulder. He also states that the degenerative changes in the AC joint were not caused by the occupational injury. Finally, he stated that the record does not reflect treatable work-related conditions are present in the right shoulder requiring further workup and evaluation. However, he did provide a range of motion impairment rating for the right shoulder of 13%.

14. Claimant testified that she told Dr. Bernton of her shoulder symptoms during his IME and also told Dr. Rook of her shoulder symptoms at the time of his IME.

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[1] Although the DIME examiner's summary sheet refers to impairment of the left lower extremity, it is clear from the narrative that the impairment rating given was to the right lower extremity.

15. Following the DIME report of Dr. Polanco, a Final Admission of Liability (FAL) dated August 16, 2022 was filed. With respect to the overpayment asserted, the notations attached to the FAL (Respondent's Exhibit E, p. 41) indicate that the total indemnity paid was $99,422.41 and the indemnity cap was $94,330.19, resulting in an overpayment of $4,376.60. There was no attachment to the FAL which substantiated the payments listed in the FAL, supporting the payment total asserted in that pleading. The Respondent did provide a detailed payment history for indemnity at the time of hearing which showed a different payment amount of $100,706.01. (Respondent's Exhibit F).

CONCLUSIONS OF LAW

A. Claimant did not overcome the determination of MMI by clear and convincing evidence

A DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing standard also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME's whole person rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc.*, W.C. No. 4-842-550-01 (March 18, 2016).

Claimant's argument that she is not at MMI is based on the assertion that she had little evaluation and treatment for her shoulder condition over the course of her claim. Counsel for Claimant noted in his argument at hearing that Claimant treatment prior to MMI was primarily for her symptomatic hip injury. By the time she was approaching MMI, she did start receiving therapy for her shoulder. However, she still had pain in her shoulder in the range of 4 to 7 out of ten. Despite the ongoing pain, she was placed at MMI and did not even receive a rating for her shoulder injury from the rating physician, Dr. Reiter. Claimant further argues that Dr. Polanco erred by determining that she was at MMI despite the fact that she had a recognized shoulder injury, warranting a rating but he gave no consideration of ongoing treatment to improve her condition. However, it appears from Dr. Polanco's Division IME report that he considered the treatment for the shoulder, as documented, to be appropriate and that Claimant was at MMI for that condition. Dr. Polanco's determination of MMI is supported by the medical record and is credible. Dr. Rook's opinion to the contrary is a mere difference of opinion that does not rise to the level of proof that Dr. Polanco's opinion on MMI is clearly erroneous.

B. Claimant proved whole person impairment to her right shoulder.

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered functional impairment not listed on the schedule. Claimant credibly described pain and associated functional limitation in areas proximal to her arm. Claimant testified as to her functional limitations with her shoulder. She struggles with activities of daily living due to her shoulder, including, but not limited to, mopping, turning a wrench, and vacuuming. Claimant testified feeling she currently felt a knot in the musculature of her upper back. She also indicated visually that the knot was slightly proximal to the shoulder. The preponderance of persuasive evidence shows Claimant's functional impairment extends beyond her "arm at the shoulder."

Claimant proved she suffered whole person impairment to her right shoulder. Claimant's testimony as to her limitations in functioning and anatomic pain adequately demonstrates that her impairment extends beyond the extremity.

C. Impairment

Claimant has argued in her proposed order that the most reliable ratings in the record are those of Dr. Rook. Dr. Rook assigned 18% for the right upper extremity, 19% for the right knee and 27% for the hip. The Claimant further argues that the DIME doctor erred in his failure to include the knee in his impairment ratings. The ALJ specifically rejects Claimant's implicit argument that Dr. Polanco clearly erred in the amount of his impairment rating or his decision not to include the knee in the impairment rating, notwithstanding Dr. Rook's opinions to the contrary. Claimant has failed to sustain her burden of proof that Dr. Polanco clearly erred with respect to the amount of impairment or the decision not to include the knee in the ratings.

D. Disfigurement

Claimant has a visible disfigurement to the body consisting of a limp due to her hip surgeries. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108(1). I determine that she is entitled to $1,500 based on her disfigurement.

E. Overpayment and repayment of overpayment.

Section 8-40-201(15.5) defines an overpayment as:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable . . . . For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits . . . .

Respondent has the burden to prove Claimant received an overpayment. *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

Respondent has proven an overpayment of $5,349. The Final admission shows a total amount owed of $95,357.01. The third-party administrator's records show that the amount paid totals $101,706.01. The difference between the two results in an overpayment of $5,349.00. Although the overpayment on the Final Admission is less than asserted at hearing, the records submitted into evidence do support the revised overpayment amount and are credible, despite the discrepancy with the amount asserted in the Final admission of Liability. [2]

[2] Respondent has asserted an overpayment based on the difference between the indemnity due of $95,045.81 (Respondent Exhibit E, p. 41) and the indemnity paid of $100,706.01 (Respondent Exhibit F, p.43) for a total overpayment of $5,349.00. The Respondent is not asserting an overpayment based on the difference between the cap of $94,330.19 and the amount paid, as asserted in Exhibit F, and the ALJ does not consider that with respect to the overpayment issue before the Court.

Claimant has presented no credible evidence to the contrary. Based on the documentary evidence provided by the Respondent, the Respondent has proven by a preponderance of the evidence the amount of overpayment. Neither party provided any evidence regarding the rate of the repayment, which could include immediate repayment of the entire overpayment. In its position statement, Respondent argues that "Claimant has the ability to repay Respondent its overpayment in the amount of $5,349.00"[3] However, the argument does not rely upon any specific evidence presented at hearing. As such, the ALJ is without evidence to make that determination. If the parties are unable to agree as to the rate of repayment, they may set the matter for hearing on that issue.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME's determination that the Claimant is at maximum medical improvement is denied and dismissed.

2. Respondent shall pay Claimant PPD benefits based on a 6% whole person rating for Claimant's shoulder.

3. Respondent may take credit for any indemnity benefits previously paid to Claimant in connection with this claim up to the applicable combined indemnity cap for the date of injury.

4. Insurer shall pay Claimant $1,500 for disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

5. Claimant shall repay the overpayment of $5,349.00 at an amount to be agreed upon by the parties. If the parties are unable to agree as to the rate of repayment, they may set the matter for hearing on that issue.

6. Respondent shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

7. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or

[3] However, Respondent also asserts in the conclusion of its position statement that "It is fair and reasonable for Claimant to repay the overpayment to Respondent in set monthly installments until the overpayment of $5,349.00 is paid in full beginning the date after the Order so ordering becomes final." Based on this, Respondent does not dismiss that the repayment may be made in installments.

service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: March 20, 2023

Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that in November 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the treatment he received at Glenwood Medical Associates was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

FINDINGS OF FACT

1. The employer operates a [Redacted, hereinafter GC]. The claimant worked for the employer as a part-time cashier.

2. The claimant testified regarding an incident that occurred in early November 2021.[1] The claimant described an incident in which he was removing a five gallon container of liquid fertilizer from a shelf. The claimant testified that he could not reach the handle of the container while sliding it off the shelf. The container slipped to the left and the claimant reached with his right hand to hold the container against the shelving. As a result, the claimant asked his coworker, [Redacted, hereinafter MG], to assist him with the container. The claimant further testified that he immediately felt pain in his right upper back. The claimant ultimately completed his shift that day and was then scheduled to be off for the next two days. The claimant testified that during those two days off, his upper back continued to be sore.

3. The claimant's coworker, MG[Redacted] testified at the hearing. MG[Redacted] testified that he did not assist the claimant with the container. It is MG's[Redacted] recollection that he observed the claimant move a container of liquid fertilizer by the handle and placed it on the ground. MG[Redacted] further testified that he did not observe the claimant engaging in any pain behaviors after that incident.

4. Sometime in November 2021, the claimant made the employer owner, [Redacted, hereinafter PK], aware that he was experiencing back pain. The claimant asked PK[Redacted] to allow him to avoid heavy lifting while at work. PK[Redacted] allowed this behavioral

[1] All materials filed with the Colorado Division of Workers' Compensation (DOWC) identify the date of injury as November 6, 2021. However, at hearing, it would appear that the incident occurred on November 3, 2021. For the sake of consistency the ALJ will identify the incident as occurrin in early November 2021.

accommodation. No formal report was made of the November 2021 incident. The claimant was not referred to any medical provider by PK[Redacted].

5. The claimant first attempted to seek medical treatment related to the early November 2021 incident on December 20, 2021. On that date, the claimant sought treatment at Glenwood Medical Associates (GMA). However, the claimant was running a fever at that time and was not seen. It was on December 30, 2021 that the claimant was seen by Dr. Coya Lindberg at GMA. On that date, the claimant described a mechanism of injury that mirrored his hearing testimony. The claimant also reported continuing pain in his right thoracic area. Dr. Lindberg diagnosed a muscular strain and ordered x-rays. In addition, Dr. Lindberg referred the claimant to physical therapy.

6. Thoracic spine x-rays were taken on December 30, 2021. The x-rays showed normal alignment, mild degenerative disc disease, with no acute findings.

7. On January 10, 2022, the claimant returned to Dr. Lindberg. In the medical record of that date, Dr. Lindberg identified the claimant's diagnosis as a right thoracic strain. Dr. Lindberg continued to recommend physical therapy. The claimant was to return in three weeks for follow-up. However, the claimant has not returned to Dr. Lindberg.

8. On February 4, 2022, the claimant filed a Worker's Claim for Compensation regarding the early November 2021 incident.

9. On February 10, 2023, a First Report of Injury or Illness was completed regarding the early November 2021 incident. The preparer of that document is identified as "IW & DOWC". The ALJ finds that these acronyms are for the "injured worker" and the "Division of Workers' Compensation".

10. The claimant underwent physical therapy with Keith Mccarroll with Peak Performance. The physical therapy records indicate that the claimant was seen between the dates of February 21, 2021 and April 11, 2022. The claimant testified that physical therapy assisted with his back symptoms.

11. On January 11, 2023, the claimant attended an independent medical examination (IME) with Dr. F. Mark Paz. In connection with the IME, Dr. Paz reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. On January 19, 2023, Dr. Paz issued an IME report and opined that Dr. Lindberg's diagnosis of thoracic strain was related to the early November 2021 incident and that strain had resolved by the date of the IME. Dr. Paz's testimony was consistent with his IME report. However, after hearing the testimony of the employer witnesses, Dr. Paz had concerns regarding whether the early November 2021 incident occurred. As a result, Dr. Paz intimated that perhaps the claimant had not in fact suffered a thoracic strain at work.

12. The ALJ credits the claimant's testimony and finds that he did feel some manner of pain in his right upper back while at work in early November 2021. However, the ALJ also finds that the onset of that pain does not rise to the level of an injury. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury causing disability and/or necessitating medical treatment. In reaching this factual conclusion, the ALJ notes that the claimant did not seek medical treatment until December 20, 2021, more than six weeks after the incident. The ALJ finds that although an incident occurred, it did not rise to the level of being an injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1}, C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability} of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); see a/so *Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that in early November 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the early November 2021 incident did not rise to the level of an injury resulting in disability and/or necessitating medical treatment. Therefore, the ALJ concludes that the claimant did not suffer a compensable injury.

ORDER

It is therefore ordered that the claimant's claim related to an early November 2021 alleged injury, is denied and dismissed.

Dated March 16, 2023.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-189-008-003

ISSUES

- Did Claimant prove he suffered an injury while performing services for pay for Respondent?
- Did Respondent prove Claimant was an independent contractor?
- What is Claimant's average weekly wage ("AWW")?
- Did Claimant prove entitlement to TTD benefits from September 23, 2021 through March 23, 2022?
- The parties stipulated Dr. Mark Porter is the primary ATP if the claim is compensable. The parties further stipulated the treatment Claimant received for his injury was reasonably needed.
- Did Claimant prove Respondent should be penalized for failure to carry workers' compensation insurance?
- Did Respondent prove Claimant willfully violated a safety rule?
- Did Respondent prove Claimant was responsible for termination of employment?

FINDINGS OF FACT

1. Respondent is a marijuana farm, owned and operated by [Redacted, hereinafter PM].

2. Claimant worked for Respondent as a general laborer since the summer of 2018. He performed general landscape duties such as pulling weeds, digging holes, maintaining fences, basic greenhouse repairs and maintenance, and occasionally unloading deliveries.

3. In addition to his general labor duties, Claimant sporadically operated a de-stemming machine called a "bucker." Marijuana plants are fed into the bucker, which uses rollers or wheels to pull the plant through the machine and separate buds from stems.

4. On September 20, 2021, Claimant was operating the bucker when the machine became jammed. Claimant flipped the power switch and went around to the rear of the machine to dislodge the jam. When he loosened the clog, the machine began operating in reverse. It grabbed his glove and pulled his hand into the rollers. Claimant's wife also works for Employer and was standing a few feet away when Claimant's hand was pulled into the machine. She quickly switched off the machine and Claimant pulled

his hand out. Claimant suffered severe lacerations to his right hand and a dislocated right index finger.

5. Witnesses at hearing expressed confusion about how the machine resumed operating because Claimant believed he turned it off. The bucker's power switch is a three-position rocker or toggle switch, which operates in a FORWARD ➔ OFF ➔ REVERSE pattern. When the machine jammed, Claimant probably inadvertently switched it past the OFF position to the REVERSE position. Once the jam was loosened, the bucker suddenly started operating in reverse. Because Claimant was on the back side of the machine, the reverse motion pulled his hand into the rollers and caused the injury.

6. Claimant's hand was bleeding and obviously injured. PM[Redacted] helped Claimant wrap his hand and then drove him to the nearby volunteer fire department, where he hoped to find emergency medical personnel. No EMTs were available, so [Redacted, hereinafter MP] drove Claimant to the Parkview Medical Center emergency department.

7. MP[Redacted] exchanged text messages with PM[Redacted] when she and Claimant arrived at Parkview. PM[Redacted] stated, "Him saying he got hurt on the job is going to fuck me." MP[Redacted] replied, "He's not filling out the paperwork for it so you should be good." PM[Redacted] responded, "I appreciate that I really do." When asked at hearing about his texts, PM[Redacted] testified, "I figured I was going to have to pay for medical and stuff like that. . . . I just thought, he got hurt on the job, I'd probably have to."

8. The ER intake documentation identifies Claimant's "Employer" as "[Redacted, hereinafter DF]," and Claimant's occupation as "labor." Claimant reported "he was using a weed bucker that got jammed with debris. He attempted to clear the debris with his right hand." The ER physician observed large lacerations to the right index and middle fingers. The index finger PIP joint was dislocated, with associated disruption of the collateral ligament. The ER physician consulted the on-call hand surgeon, who recommended thorough irrigation, wound closure, and an external splint. The ER physician sutured the wounds, placed Claimant's fingers in a splint and wrapped the hand and wrist in a bandage. Claimant was discharged and advised to follow up with a hand surgeon. He was not given any specific work restrictions.

9. Claimant saw Dr. Mark Porter, a hand surgeon, on September 28, 2021. He described "mild" aching pain in the injured fingers, made worse by movement and lifting. His pain that date was 0/10. Examination showed lacerations to the right index and middle fingers, and some laxity of the radial collateral ligament of the index finger. Dr. Porter diagnosed complex lacerations and a sprain of the radial collateral ligament. He "buddy taped" Claimant's injured fingers and recommended continued icing and splinting until a follow up appointment in one week. Dr. Porter did not discuss no work restrictions.

10. Claimant returned to Dr. Porter on October 5, 2021. He reported 0/10 pain and was using no pain medication other than NSAIDs. Physical examination was unremarkable. Dr. Porter removed Claimant's sutures and recommended he continue with NSAIDs and buddy taping for one more month. No work restrictions were assigned.

11. Claimant pursued no additional treatment for seven months. On May 2, 2022, Dr. Porter referred him to occupational therapy and imposed work restrictions of no lifting over 35 pounds and no fine manipulation or keyboarding with the right hand. The basis for these restrictions is unclear, as no corresponding report of an office visit or telehealth appointment was offered into evidence.

12. Claimant had an initial OT evaluation on June 13, 2022. His condition appeared to have deteriorated since his last documented appointment with Dr. Porter. Claimant stated his fingers were very painful and he could not grip or catch objects. He also described "shooting" right wrist pain and limited range of motion. The therapist thought Claimant would benefit from OT.

13. There is no question Claimant was injured while performing tasks integral to Employer's business. PM[Redacted] conceded Claimant was paid for his time. Accordingly, Claimant proved the factual predicates for a determination that he was an "employee."

14. Employer is defending the claim on the theory that Claimant was an "independent contractor." Employer failed to prove Claimant was an independent contractor. There is no persuasive evidence Claimant was customarily engaged in an independent trade or business related to landscaping, maintenance, or marijuana farming. He performed those tasks exclusively for Employer. Claimant was paid personally in cash, and not in the name of any business. Claimant was paid on an hourly basis rather than a fixed or contract rate. Employer provided all tools and other equipment Claimant needed to perform his work, including gloves, shovels, wheelbarrows, post-hole diggers, a concrete mixer, and the bucking machine that caused the injury. Employer presented no 1099s, independent contractor agreements, or other corroborating documentation at hearing, despite alleging that "all" workers at the farm are independent contractors. PM[Redacted] alleged Claimant "was getting W-9s," but testified, "I don't have a copy with me." PM's[Redacted] testimony on this point not credible. Given the importance of any such evidence to its defense, the ALJ would expect such supportive documentation would have been offered into evidence if it existed. The ALJ also notes that IRS Form W-9 is the Request for Taxpayer Identification Number and Certification form,[1] and not used to report any payments to vendors. The Form 1099 is used to report payments to non-employees for services rendered.[2] PM's[Redacted] apparent lack of familiarity with standard IRS forms used for independent contractors belies the assertion that Employer operates its business solely using independent contractors. Finally, PM's[Redacted] text exchange with MP[Redacted] after the accident indicates his awareness that Claimant was an employee and not an independent contractor.

15. Employer paid Claimant exclusively in cash, at the end of each day. As a result, there are no paystubs, cancelled checks or direct deposit advices to establish Claimant's AWW.

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[1] 26 CFR § 31.3406(h)-3.
[2] 26 CFR § 1.6041-1(2).

16. Claimant and MP[Redacted] testified Claimant was paid $20 per hour for general "labor," and $17 per hour while running the bucking machine. PM[Redacted] testified he paid Claimant $17 per hour for all work and could not recall ever paying $20 per hour.

17. Claimant is alleging an AWW of $1,560, which equates to 78 hours per week at $20 per hour. Claimant presented no bank statements or other documentation of income. Claimant filed no income tax returns and there is no persuasive evidence he paid any income taxes. Claimant testified his earnings were always below the income threshold at which a tax return is required. This is inconsistent with his alleged AWW equating to more than $6,240 per month. Claimant also worked "under the table" for other employers and filed no tax returns for those wages either.

18. Claimant's only evidence regarding his alleged AWW consists of his and MP's[Redacted] testimony. Claimant offered conflicting testimony regarding his typical work schedule. He first testified he averaged 12 hours of work each week. He then testified he worked approximately 50-60 hours per week. Finally, he testified he worked 12 hours per day 5-6 days per week, which would be 60-72 hours each week. MP[Redacted] compounded the inconsistency by testifying they each worked 12 hours per day, 6-7 days per week (72-84 hours). Both Claimant and MP[Redacted] testified that neither of them "ever" earned less than $1,000 per week ($2,000 total). Neither Claimant nor MP's[Redacted] testimony regarding their alleged earnings is credible. Claimant failed to prove his AWW is $1,560. Claimant failed to prove any specific AWW by a preponderance of the evidence.

19. Employer maintained a rudimentary "record" of Claimant's wages, consisting of a handwritten list of hours Claimant worked each day. Employer had no time clock and relied on Claimant to track the number of hours he worked. At the end of each shift, PM[Redacted] wrote down the hours Claimant said he worked, and paid him accordingly. The handwritten list shows a total of 261.5 hours over the 262-day period from January 1, 2021 through September 19, 2021 (the day before the accident).[3] Assuming an hourly rate of $17 as testified by PM[Redacted], this equates to an AWW of $118.77 (261.5 x $17 = $4,445.50 ÷ 262 = $16.97 x 7 = $118.77).

20. Claimant and MP[Redacted] testified Claimant tried to work two days after the accident but could not continue because of his injury. PM[Redacted] testified Claimant was off work for approximately one week and returned to work on September 29, 2021, using primarily his left hand. PM's[Redacted] testimony is consistent with the handwritten record of hours, which shows Claimant worked three hours on September 29. This return-to-work date is plausible because it coincides with Claimant's initial appointment with Dr. Porter on September 28. Employer's wage record shows Claimant subsequently worked on October 1, 2, 5, 9, 11, 14, 16, 18, and 19, 2021.

[3] Claimant had only worked a few minutes before the accident on September 20, 2021 and was not paid for any time that day.

21. Claimant texted PM[Redacted]October 21, 2021 that he had an appointment at the DMV. PM[Redacted] asked Claimant "are you coming in after?" and Claimant replied, "Yeah, if you need us to." But he did not report to work that day. On October 22, Claimant texted he was unavailable because his father was having surgery. On October 25, Claimant texted he was having car trouble. And on October 30, 2021, Claimant texted his vehicle was still inoperable and "we are going to fix it when our checks come in . . . from the state [in] 7-14 days." The ALJ infers the text messages were intended to advise Employer why Claimant would not be coming to work those days.

22. At hearing, Claimant and MP[Redacted] denied having a DMV appointment in October 2021. However, PM[Redacted] retrieved Claimant's text message from his phone during his testimony. Claimant also denied that his father had a medical appointment or that he was waiting on a benefit check to repair his vehicle. Again, PM[Redacted] retrieved the text messages from his phone during the hearing to refute Claimant's testimony.

23. Claimant never returned to work for Employer after October 19, 2021.

24. The preponderance of persuasive evidence shows Claimant missed work as a direct and proximate result of the work accident from September 20 through September 28, 2021. Claimant is entitled to TTD from September 23 through September 28, 2021, accounting for the statutory three-day "waiting period."

25. Claimant's eligibility for TTD terminated on September 29, 2021 because he returned to work.

26. Claimant failed to prove he left work on or after October 19, 2021 because of the industrial injury. Claimant stopped reporting to work for personal reasons unrelated to the injury, including lack of transportation. Accordingly, Claimant failed to prove entitlement to TTD from September 29, 2021 through March 23, 2022.

27. Because Claimant failed to prove entitlement to TTD after September 28, 2021, Employer's defense that he was "responsible for termination" is moot.

28. PM[Redacted] testified Claimant was instructed not to unclog the bucker if it became jammed. He testified Claimant was told to ask a supervisor, [Redacted, hereinafter DC], for help. If DC[Redacted] was not available, Claimant could ask PM[Redacted] for help. Claimant denied every receiving such instructions. Employer produced no documentation, testimony of other witnesses (such as DC[Redacted]), or other persuasive evidence to corroborate the alleged "safety rule." Employer failed to prove Claimant willfully violated a safety rule.

CONCLUSIONS OF LAW

A. Claimant was an employee rather than an independent contractor.

Section 8-40-202(2)(a) provides that "any individual who performs services for pay for another shall be deemed to be an employee . . . unless such individual is free from

control and direction in the performance of the service . . . [and] is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." The claimant has the initial burden to prove they suffered an injury while performing services for another for pay. If the claimant carries that burden, the burden shifts to the employer to prove the claimant was an independent contractor. *Cordova v. Artistry Drywall*, W.C. No. 4-653-327 (April 10, 2006). The Act creates a balancing test to overcome the statutory presumption of employment and establish independence. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998). Section 8-40-202(2)(b)(II) sets forth several factors the General Assembly considers particularly "important" in distinguishing employees from independent contractors. *Industrial Claim Appeals Office v. Softrock Geological Services Inc*., 325 P.3d 560, 565 (Colo. 2014). No single factor is dispositive, and the determination must be based on the totality of evidence. *Id*.

After considering the totality of circumstances, including the factors enumerated in § 8-40-202(2)(b)(II), the ALJ concludes Claimant was an employee at the time of his accident. Some of the most significant factors are: (1) Claimant was not "customarily engaged in an independent trade or business." He had no business related to landscape maintenance or other farming activities, and never performed similar services for anyone else. (2) Employer paid Claimant an hourly rate rather than a fixed or contract rate. (3) Employer paid Claimant personally and not in the name of any business. (4) Employer never sent Claimant a 1099 or other appropriate tax documentation consistent with being an independent contractor. (5) Employer has no independent contractor agreements or similar documentation to corroborate the assertion that Claimant and "all" its employees are independent contractors. (6) Employer provided all tools Claimant needed to complete his work. (7) Claimant's tasks for each day were dictated by Employer and there is no persuasive evidence Claimant had any control over the work assignments. (8) There is no persuasive evidence of any limitation on Employer's ability to terminate Claimant's services at will. (9) PM[Redacted] admitted he was "fucked" if Claimant reported the injury as work-related.

Claimant was not "contracted" to perform any specific job or series of jobs but was hired on an open-ended basis to perform whatever tasks Employer had available on a given day. Claimant reported to work at Employer's farm with no prior negotiations about cost or the scope of work and was paid $17 per hour for the work he was assigned that day. This arrangement is far more akin to an employer-employee relationship than an independent contractor situation.

PM[Redacted] was clearly motivated to avoid the taxes, insurance cost, and other requirements associated with having employees. And no doubt Claimant was content to receive wages in cash with no withholding or reporting. But the parties' mutual willingness to avoid payroll taxes and other employment-related obligations it is not dispositive of whether Claimant was, in fact, an independent contractor. The preponderance of persuasive evidence shows Claimant was Employer's "employee."

B. Claimant's AWW is $118.77

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant failed to prove his AWW is $1,560. In fact, Claimant failed to prove any specific AWW by a preponderance of the evidence. Arguably, this would result in an AWW of zero. However, Employer confessed an AWW of $118.77, which is a reasonable interpretation of the handwritten wage record. Given the absence of any persuasive evidence to the contrary, the ALJ accepts Employer's proposed AWW of $118.77 as the most appropriate calculation under the circumstances.

C. Claimant is entitled to TTD benefits from September 23, 2021 through September 28, 2021

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). A claimant need not present formal restrictions from a physician to establish entitlement to TTD benefits but can rely on any competent evidence to establish disability and associated wage loss. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

No TTD benefits are payable for the first three days of an injury-related wage loss unless the total period of disability exceeds two weeks. Section 8-42-103(1)(a), (b).

As found, Claimant proved he is entitled to TTD benefits commencing September 23, 2021. He suffered a significant hand injury on September 20, 2021 that required him to leave work immediately and pursue emergent medical attention. Claimant was not paid for any work on September 20 because the injury happened shortly after he started his shift. After being discharged from the ER, Claimant reasonably required some brief period of convalescence while waiting for the orthopedic follow up. He returned to work on September 29, which is less than two weeks after the injury. Therefore, he is eligible for TTD from September 23, 2021 through September 28, 2021.

D. Claimant failed to prove entitlement to TTD after September 28, 2021

Once commenced, TTD benefits "shall continue" until the occurrence of an event enumerated in § 8-42-105(3)(a)-(d). One such terminating event is a return to "regular or modified employment," which in this case occurred on September 29, 2021.

Because his eligibility for TTD ceased when he returned to work, Claimant has the burden to reestablish entitlement to any subsequent period of TTD. Claimant's last day of work was October 19, 2021. As found, Claimant failed to prove he left work on or after October 19, 2021 because of the industrial injury. He stopped working for personal reasons unrelated to the injury, including lack of transportation. Accordingly, Claimant failed to prove entitlement to TTD from September 29, 2021 through March 23, 2022.

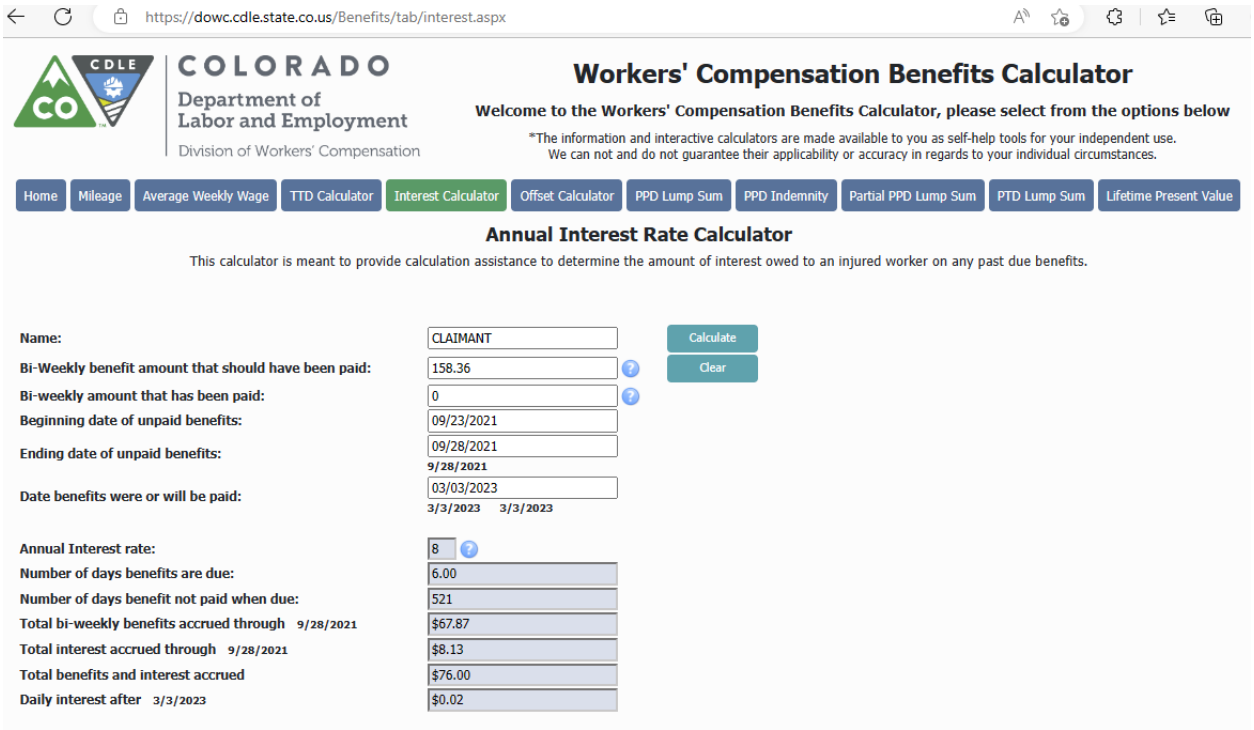
E. Respondent failed to prove Claimant willfully violated a safety rule

Section 8-42-112(1)(b) provides that an injured worker's indemnity benefits shall be reduced by 50% if the injury results from the willful failure to obey a reasonable safety rule adopted by the employer. The term "willful" means "with deliberate intent." *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968). A claimant's conduct is "willful" if they intentionally performed the forbidden act or recklessly disregarded the duty to the employer. *Sayers v. American Janitorial Service, Inc*. 425 P.2d 693 (Colo. 1967). A safety rule need not be formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Reduction of benefits under § 8-42-112(1)(b) is an affirmative defense that the respondents must prove by a preponderance of the evidence. *Id*.

Employer failed to prove Claimant willfully violated a safety rule. Although PM[Redacted] alleged a verbal rule against trying to clear a jam from the bucker, Claimant denied being told of any such rule. Employer produced no documentation, testimony of other witnesses (such as DC[Redacted]), or other persuasive evidence to substantiate the alleged safety rule. The only evidence on this point is PM's[Redacted] testimony. Given his obfuscations regarding Claimant's status as an employee, the ALJ is disinclined to credit PM's[Redacted] uncorroborated testimony to establish the existence of a safety rule.

F. Total TTD and statutory interest owed

Employers or insurers must pay statutory interest of 8% per annum on all benefits not paid when due. Section 8-43-410(2), C.R.S. Claimant's AWW of $118.77 corresponds to a TTD rate of $79.18 per week. Employer owes Claimant $67.87 for six days of TTD from September 23 through September 28, 2021 ($79.18 x 6/7 = $67.87). Employer also owes $8.13 in interest from September 23, 2021 through March 3, 2023. Interest will continue to accrue at the rate of $0.02 per day until the past-due TTD is paid. The accrued interest and ongoing daily interest were calculated using the Division of Workers' Compensation Benefits Calculator, which is available on the Division's website. https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx



G. Penalty for failure to insure

Section 8-43-408(5) provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc.*, W.C. No. 4-155-231 (February 13, 1998). Although the ALJ is not aware of a case directly on point, statutory interest is not properly considered "compensation or benefits" within the meaning of 8-43-408(5). Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

Employer has been ordered to pay Claimant $67.87 in TTD benefits. Twenty-five percent (25%) of the compensation awarded is $16.97.

H. Payment to Division trustee or a bond to secure payment of benefits

Employer was not insured for workers' compensation liability at the time of Claimant's injury. Under § 8-43-408(2), Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The total compensation, penalties, and interest Ordered herein is $92.97. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

It is therefore ordered that:

1. Claimant's injury on September 20, 2021 is compensable.

2. Dr. Mark Porter is Claimant's primary authorized treating physician.

3. Employer shall cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury, including Parkview Medical Center on September 20, 2021 and Dr. Mark Porter on and after September 29, 2021.

4. No medical bills were submitted at hearing, so no specific order for payment of medical expenses can be entered.

5. Claimant's average weekly wage is $118.77.

6. Employer shall pay Claimant $67.87 in TTD benefits from September 20, 2021 through September 28, 2021.

7. Employer shall pay Claimant $8.11 in statutory interest accrued through March 3, 2023 on past-due TTD. Interest will continue to accrue at the rate of $0.02 per day until the past-due TTD is paid in full.

8. Claimant's request for TTD benefits from September 29, 2021 through March 23, 2022 is denied and dismissed.

9. Employer's request for a 50% reduction in indemnity benefits for violation of a safety rule is denied and dismissed.

10. Employer shall pay $16.97 to the Colorado Uninsured Employer Fund. The check shall be payable to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, CO 80202, Attention Iliana Gallegos, Revenue Assessment Officer.

11. Employer shall notify the Division of Workers' Compensation and Claimant's attorney of payments made pursuant to this order.

12. In lieu of the direct payments set forth above, the Employer shall:

a. Deposit $92.97 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit; or

b. File a surety bond in the amount of $92.97 with the Division of Workers' Compensation within ten (10) days of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation, penalties and benefits awarded.

13. Filing any appeal, including a petition to review, shall not relieve Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the bond as required by paragraph 11(b) above. Section 8-43-408(2), C.R.S.

14. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

15. If Employer fails to pay the Claimant indemnity and/or medical benefits as ordered herein, Employer shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation, pursuant to § 8-43-408 (6), C.R.S.

16. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For

statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: March 3, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-201-483-002

ISSUES

- Did Claimant prove he contracted COVID-19 on or about January 12, 2022 because of work-related exposure?
- What is Claimant's average weekly wage (AWW)?
- Did Claimant prove entitlement to TTD on or after January 12, 2022?
- Did Respondents prove Claimant was responsible for termination of his employment?
- Did Claimant prove treatment by Dr. Carl Swendsen was authorized and reasonably needed to cure and relieve the effects of his compensable injury?
- Did Claimant prove the COVID-19 aggravated his pre-existing pancreatitis?

FINDINGS OF FACT

1. Claimant worked as the Activity Director at Employer's nursing home. His duties primarily involved designing and implementing activity programs for the residents. He also ran a vending "cart" and engaged in "one-to-ones" with residents, performing activities such as playing games, reading, or simply holding their hands. Claimant was initially hired in 2011. He left the company in approximately 2016 because of a family medical situation. He was rehired by Employer in 2019 and remained employed until his termination on February 4, 2022.

2. Claimant contracted COVID-19 in January 2022. The threshold question in this case is whether the COVID exposure probably occurred at work.

3. The nursing home was in "outbreak" status according the CDHPE from December 27, 2021 through March 31, 2022.

4. Employer had several COVID-19 safety protocols in effect in late 2021 and early 2022. Employees were tested for COVID-19 when they reported to work each day. Employees were required to wear masks in all common areas, and frequently wore goggles and face shields. Residents of the nursing home were "encouraged" but not required to wear masks. Some residents wore masks consistently, but many did not. The residents generally had serious end-stage health issues, including dementia, and many had difficulty wearing their masks properly even when they remembered to do so. And some residents simply refused to wear masks at all. No resident was ever forced to wear a mask because, as Claimant and [Redacted, hereinafter ML] noted, "this isn't a prison" and "they have rights."

5. Claimant had close personal interactions with numerous residents during a typical shift, which the ALJ infers were commonly within the 6-foot "social distancing" recommended by public health officials during the pandemic.

6. Claimant worked closely with his assistant, [Redacted, hereinafter TH], on a daily basis. They shared an office, which Claimant referred to as a "pod." Claimant and TH[Redacted] routinely removed their PPE in their pod, which was allowed under Employer's policies.

7. TH[Redacted] tested positive for COVID-19 on December 26, 2021. Claimant had last been in close contact with TH[Redacted] the day before (December 25). TH[Redacted] stayed home four days and returned to work on December 30, 2021.

8. Claimant worked double shifts while TH[Redacted] was out with COVID, and continued working extended shifts until his positive COVID test on January 12.

9. Claimant started feeling ill on January 11, 2022. He felt feverish when he awoke on January 12, but his home thermometer registered 99.9 degrees, which was apparently within Employer's acceptable range. However, his temperature registered 103 degrees when he got to work. A rapid test was positive for COVID and Claimant was sent home.

10. Two or three other individuals at Employer's facility contracted COVID-19 between December 26, 2021 and January 12, 2022.

11. Claimant maintained a restricted and isolated lifestyle in late 2021 and early 2022 to minimize his risk of contracting COVID-19. He primarily ordered groceries online for delivery, and his wife did the remainder of any shopping in brick-and-mortar stores. They disinfected groceries and other items before bringing them into the house. Claimant avoided crowded locations and situations. His public contact was even more limited after December 26, 2021 because of his busy work schedule.

12. There is no persuasive evidence that any other member of Claimant's household was exposed to or contracted COVID shortly before or after January 12. Nor is there persuasive evidence Claimant had contact with anyone outside of work known to have COVID. Claimant's adult son was ill with COVID on December 27, 2022. However, there is no persuasive evidence Claimant was physically in contact with his son around that time period.

13. Dr. Carlos Cebrian performed an IME for Respondents on November 10, 2022. Dr. Cebrian opined it is not medically probable Claimant contracted COVID from a work-related exposure. He noted Claimant was last exposed to TH[Redacted] on December 25, 2021 and did not develop symptoms of COVID until January 11. This 17-day period is outside the maximum incubation period of COVID-19. Dr. Cebrian emphasized that Claimant generally wore masks and eye protection at work. He stated there was no specific prolonged exposure to anyone diagnosed with COVID while Claimant was at work, within the COVID incubation period. He opined the most common

exposures to COVID-19 are from close household contact. Dr. Cebrian concluded Claimant's risk of exposure to COVID-19 was "equal in and out of the workplace."

14. Dr. Cebrian's opinion that Claimant was equally exposed to the risk of contracting COVID-19 outside of work is not persuasive.

15. Claimant proved he probably contracted COVID-19 from exposure at work.

16. Employer provided no list of designated providers despite knowledge Claimant had contracted COVID. Claimant's employment file contains a designated provider list from his original hire date in 2011. The document references only two providers, which does not comply with the current statutory requirement to provide a list of at least four providers. Moreover, there is no persuasive evidence that Claimant recalled the nearly 11-year-old document when he contracted COVID in January 2022.

17. After testing positive for COVID-19, Claimant spoke with his PCP, Dr. Yang, by telephone. Dr. Yang did not want Claimant to come in, because he had active COVID. No treatment was offered and no record of the telephone conversation was created. The ALJ finds this brief telephone contact insufficient to constitute Claimant's "selection" of a treating physician.

18. Claimant quarantined for five days after his positive COVID test. He then took preplanned annual leave for several days. There is no persuasive evidence Claimant traveled or participated in any "recreational" activities during his leave. Based on Claimant's credible description of the ongoing effects of COVID, the ALJ infers Claimant probably used his annual leave to rest and convalesce.

19. Claimant proved he left work because of his injury on January 12, 2022 and suffered an injury-related wage loss.

20. Claimant returned to work on January 26, 2022. By that date, his symptoms had improved and he was no longer considered infectious per CDC guidelines. However, Claimant credibly testified he still felt "ill" despite the relative improvement. He could not move around as well as before and received help from coworkers completing tasks. Claimant's testimony in this regard is corroborated Dr. Swendsen's February 3, 2022 medical report stating he was "feeling very weak, having a hard time doing his job." Also on February 3, Claimant texted TH[Redacted] that his medical situation was "pretty rough" and that he had discussed a medical leave with his doctor. Additionally, at the time of his termination, Claimant was given the option of taking FMLA leave, which implies Employer knew he was continuing to have medical issues affecting his ability to work.

21. Claimant proved the injury caused reduced efficiency and impaired his ability to perform his regular work after he returned to work on January 26, 2022.

22. Claimant was suspended without pay[1] on January 29, and terminated on February 2, 2022. The termination arose out of a conflict between Claimant and a co-worker, [Redacted, hereinafter TP], on January 29. When Claimant arrived at work that morning, he noticed flyers had been posted in common areas regarding a planned event. Claimant was concerned about allowing outsiders into the facility because of COVID, and upset that the activity had been set up without his knowledge or input. Claimant took down the flyers. Later that afternoon, Claimant questioned TP[Redacted] about the flyers. TP[Redacted] had apparently posted the flyers at the behest of Claimant's supervisor, [Redacted, hereinafter LJ].

23. TP[Redacted] later complained to LJ[Redacted] that she felt intimidated and harassed during the conversation with Claimant. LJ[Redacted] obtained statements from two other employees, neither of whom testified at hearing. LJ[Redacted] also texted and spoke to Claimant, who stated he had asked TP[Redacted] about the flyers, and she told him to discuss it with LJ[Redacted]. Claimant said he ended the interaction because TP[Redacted] was "very defensive."

24. LJ[Redacted] suspended Claimant the evening of January 29, and terminated him on February 2, 2022. The facility's acting HR Director, [Redacted, hereinafter KL], testified Claimant was terminated for violation of Employer's policy against "discrimination, harassment, and retaliation." The sole basis for the termination was the incident with TP[Redacted]; any previous performance issues had "nothing to do with" Claimant's firing.

25. Claimant and TP[Redacted] have substantially different perceptions of their encounter on January 29. TP[Redacted] did not testify at hearing but her written statement was admitted without objection. TP[Redacted] stated Claimant approached her and "pressed the issue." TP[Redacted] "felt he was coming off aggressive, demanding answers from me." TP[Redacted] alleged "he was close to me and made me feel surrounded and extremely uncomfortable." She claimed she tried to end the conversation but he continued to pursue her about it. TP[Redacted] felt embarrassed by the incident.

26. For his part, Claimant denied that he was aggressive or demanding. Claimant testified he simply asked TP[Redacted] about the flyers, and she became "aggravated" and "defensive." Claimant denied raising his voice, using foul language, or crowding TP[Redacted]. Claimant testified he was confused and surprised by TP's[Redacted] reaction and did not understand why she had gotten so upset.

27. Claimant presented the testimony of [Redacted, hereinafter MO], a former resident of the facility, to corroborate his version of the events. MO[Redacted] witnessed the interaction between Claimant and TP[Redacted]. MO[Redacted] testified TP's[Redacted] written description of the incident was "not at all" consistent with her

[1] The parties did not submit wage records showing the exact date Claimant was last paid. However, Claimant's February 2, 2022 text message to "[Redacted, hereinafter md]" states he was told he would not be paid during the suspension if he was "found guilty." Because Claimant was ultimately terminated for the same incident that triggered the suspension, the ALJ infers his pay was stopped effective January 30, 2022.

recollection. She testified Claimant spoke to TP[Redacted] "in a normal tone of voice, not threatening, or aggressive or anything like that." MO[Redacted] disagreed that Claimant "followed" TP[Redacted] to her desk, "because she didn't go anywhere. She was at her desk already."

28. MO's[Redacted] testimony is credible.

29. Respondents failed to prove Claimant was responsible for termination of his employment.

30. Claimant has a longstanding history of pancreatitis. The medical records document treatment for pancreatitis dating to 2012. The initial records show pancreatitis attacks approximately yearly. They were managed primarily by pain medication. In 2016, Claimant's pancreatitis attacks became more frequent.

31. Claimant started treatment with Dr. Carl Swendsen, a gastroenterologist, in September 2018. At the time, Dr. Swendsen discussed a Whipple procedure, but Claimant did not believe his condition was bad enough to warrant such a drastic option.

32. Claimant was hospitalized overnight on August 31, 2020 for acute pancreatitis. Claimant was offered a celiac plexus block, but he declined. He had another attack in February 2021, and this time he agreed to a celiac block. The block was helpful and relieved the pancreatitis for approximately 6 months. Claimant had another pancreatitis attack in August 2021, which resolved within a week.

33. Claimant has been seeing a pain management nurse, Brent Persons, since February 2021 for pain related to pancreatitis and shoulder issues. Mr. Persons uses an unfortunate template for his electronic medical records which includes numerous repetitive "cloned" entries. The format of Mr. Persons' records severely limits their usefulness in tracking the ebb and flow of Claimant's symptoms over time. For instance, Mr. Persons' January 7, 2022 report stated Claimant was "in acute pancreatitis last visit" which had subsequently improved in the interim. But the corresponding note from the prior appointment (December 10, 2021) simply said Claimant's "medications are working and he would like to keep it the same," with no mention of any pancreatitis flare. Mr. Persons' records are given little weight.

34. Claimant saw Dr. Swendsen on February 3, 2022. Dr. Swendsen noted Claimant's recent case of COVID-19 was "much worse in regards to symptoms" than a previous bout in November 2020. Claimant felt he was "losing weight, feeling very weak, having a hard time doing his job." Dr. Swendsen recommended a repeat celiac plexus block, and hoped recurrent blocks every 6 months would keep the symptoms under control. He also recommended an upper endoscopy and magnetic resonance cholangiopancreatography (MRCP). This appointment with Dr. Swendsen represents the exercise of Claimant's right to select his treating physician.

35. The celiac block was performed on March 9, 2022.

36. Claimant saw Dr. Swendsen's PA-C, Courtney Frerichs, on April 21, 2022. Claimant reported an increase in his average pain level and no benefit from the celiac block. Claimant stated his overall symptoms had increased since the recent COVID and wondered if COVID had caused him to become more "sensitive."

37. The most recent treatment record in evidence is a June 14, 2022 appointment with Dr. Swendsen. Claimant felt a lot of his ongoing issues were related to COVID. He reported fatigue, headaches, "feeling foggy," and periodic "mini attacks" of pancreas pain. He was also having diarrhea, gas, cramping, and distention after eating. Dr. Swendsen thought Claimant's symptoms "sounded more like IBS-D than I've heard from him in the past." Dr. Swendsen recommended medications and indicated he would consider another celiac block if Claimant were not improved by the next visit.

38. Dr. Miguel Castrejon performed an IME for Claimant on November 7, 2022. Claimant reported needing additional pain medication since contracting COVID in January 2022. He described daily fatigue that limited his activities. He was having difficulty walking ¼ mile because of the fatigue. He also reported frequent headaches, decreased concentration, and frequent gastrointestinal distress. Dr. Castrejon reviewed Claimant's medical records in detail, including records of his pre- and post-COVID pancreatitis treatment. Dr. Castrejon also performed a medical literature search regarding any association between pancreatitis and COVID, as well as the effect of COVID on pre-existing pancreatitis. He found literature supporting an association between acute pancreatitis and COVID-19. Dr. Castrejon concluded, "it is my professional opinion that a relationship exists between the exposure to COVID and the 'new' development not only of gastrointestinal but also physical symptoms which have become quite debilitating and fairly unresponsive to treatment. The literature surrounding the relationship of COVID to the development of acute, and chronic, pancreatitis, as well as the aggravating effects upon pre-existing chronic pancreatitis cannot be ignored."

39. Respondents' IME, Dr. Cebrian, disagreed that COVID had any effect on Claimant's pre-existing pancreatitis. Dr. Cebrian opined Claimant's abdominal symptoms after his diagnosis of COVID-19 were very similar to the complaints and need for treatment he had for several years. Dr. Cebrian also disagreed that medical literature supported a causal connection between COVID and worsening pancreatitis. Although he did not think the COVID was work-related, even if it were, Claimant was at MMI with no impairment, no restrictions, and no need for treatment as of January 18, 2022.

40. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Cebrian.

41. Claimant proved the evaluations and treatment provided by and through Dr. Swendsen from February 3, 2022 through June 14, 2022 were reasonably needed to cure and relieve the effects of his compensable injury.

42. Claimant proved the work-related COVID-19 caused at least a temporary exacerbation of his pre-existing pancreatitis.

43. Claimant proved his injury contributed at least in part to his wage loss commencing January 30, 2022.

44. Claimant was a salaried employee, earning $45,000 per year on the date of injury. Claimant's AWW is $865.39, calculated by dividing his annual salary by 52 weeks ($45,000 ÷ 52 = $865.39).

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Claimant proved he probably contracted COVID-19 from exposure at work. Dr. Cebrian's opinion that Claimant was at least equally exposed to the risk of contracting COVID outside of work is not persuasive. Claimant spent the vast majority of his waking hours at work between December 26, 2021 and January 11, 2022. His work required frequent close contact with numerous individuals, many of whom were not wearing masks or taking other precautions. There were at least three individuals at Claimant's workplace who had COVID-19 in the 17 days before he became sick. Thereafter, the nursing home remained in outbreak status until March 31, 2022, which indicates COVID continued to spread through the facility for weeks after Claimant became infected. By contrast, Claimant had no known contact with anyone infected with COVID outside of work in the two weeks before he became ill. No one in Claimant's household contracted COVID around that time. Claimant maintained a restricted and isolated lifestyle in December 2021 and January 2022 which minimized his exposure to members of the public outside of work. Although Claimant's adult son had COVID on December 27, there is no persuasive evidence Claimant was in contact with his son. In fact, the ALJ infers Claimant would have avoided his son while he had COVID, given Claimant's anxiety over contracting COVID himself and passing it to the nursing home residents. In any event, any contact with his son before December 27 would have been outside the incubation period, according to Dr. Cebrian.

B. Average weekly wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

Claimant advocates dividing his annual salary by 52 weeks to determine his AWW. Claimant's proposed methodology is reasonable, and Respondents offered no competing calculation or argument regarding AWW. Claimant's AWW is $865.39, with a corresponding TTD rate of $576.93 ($45,000 ÷ 52 = $865.39 x 2/3 = $576.93)

C. TTD benefits from January 12 through January 25, 2022

Claimant was disabled and suffered an injury-related wage loss from January 12, 2022 through January 25, 2022. Employer sent Claimant home based on his positive COVID test, so there is no reasonable dispute that Claimant left work on January 12 because of the injury. Thereafter, he was required to stay home for at least five days, which exceeds the minimum requirement of three shifts.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). In this case, Claimant's eligibility for TTD ended when he returned to work on January 26, 2022. Section 8-42-105(3)(b).

D. TTD benefits commencing January 30, 2022

Claimant seeks resumption of TTD benefits after his suspension. Respondents dispute Claimant's entitlement to TTD on two grounds. First, Respondents deny that Claimant was "disabled" after he returned to work on January 26. Second, Respondents argue TTD is barred because Claimant was responsible for termination of his employment.

A claimant is entitled to TTD benefits "in case of temporary total disability lasting more than three working days' duration." Section 8-42-105(1). Proof of "disability" is a threshold requirement for an award of TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The concept of disability incorporates "medical incapacity" and "loss of wage earnings" proximately caused by the injury. *Montoya v. Industrial Claim Appeals Office*, 488 P.2d 314 (Colo. App. 2018). "Medical incapacity" does not necessarily mean complete inability to work, but can also be shown by reduced efficiency in the performance of regular job duties. *E.g., Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991). A work injury need not be the sole cause of a wage loss; a disabled claimant is entitled to TTD benefits if the injury contributed "to some degree" to their wage loss. *PDM Molding, Inc. v. Stanberg, supra*. A claim for TTD benefits does not require formal work restrictions or expert opinions, but can be supported by any form of competent and persuasive evidence, including the claimant's testimony. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

As found, Claimant proved the injury caused reduced efficiency and impaired his ability to perform his regular work on and after January 26, 2022. Claimant credibly testified he still felt "ill" when he went back to work despite the relative improvement from the initial onset of COVID. He could not move around as well as before and received help from coworkers. Claimant's testimony in this regard is corroborated by Dr. Swendsen's February 3, 2022 medical report stating he was "feeling very weak, having a hard time doing his job." Also on February 3, Claimant texted TH[Redacted] that his medical situation was "pretty rough" and that he had discussed a medical leave with his doctor. Additionally, at the time of his termination, Claimant was given the option of taking FMLA leave, which implies Employer knew he was continuing to have medical issues affecting his ability to work.

Claimant also proved the work injury contributed "to some degree" to his wage loss after his termination. The persuasive evidence shows Claimant continued to suffer symptoms and associated limitations that reasonably limited his ability to sustain work, including severe fatigue, weakness, headaches, "foggy" thinking, pancreatic pain, and chronic diarrhea. On June 14, 2022, Dr. Swendsen noted Claimant wanted to work but was "fully disabled." Similarly, Dr. Castrejon considered Claimant "temporarily totally disabled."

E. Claimant was not responsible for termination

Respondents argue they are not liable for TTD after Claimant stopped working on January 29, 2022 because Claimant was responsible for termination of his employment.

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The "termination statutes" are an affirmative defense to a claim for temporary disability benefits. The respondents must prove by a preponderance of the evidence the claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This requires proof that the claimant performed a "volitional act" or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for their termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Respondents failed to prove Claimant was responsible for termination of employment. The sole basis for Claimant's termination was the interaction between Claimant and TP[Redacted] on January 29, 2022. TP's[Redacted] written statement indicates she personally felt uncomfortable and embarrassed. But Claimant cannot be said to have acted "volitionally" if he had no reasonable basis to anticipate his co-worker's subjective reaction. Respondents presented insufficient persuasive evidence to prove that Claimant engaged in harassment, retaliation, discrimination, or any other behavior prohibited by Employer's policies. Respondents offered no sworn testimony of any witness with firsthand personal knowledge of the incident. By contrast, Claimant disputed TP's[Redacted] account at hearing, and his testimony was corroborated by MO[Redacted]. No reasonable employee would expect to be terminated for the interaction

described by Claimant and MO[Redacted]. Respondents failed to prove Claimant performed a volitional act he should reasonably have expected to lead to his termination.

F. Right of selection

Under § 8-43-404(5), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith," or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). To properly exercise its right of selection, the employer must give the claimant a list of at least four providers from which he can choose. Section 8-43-404(5)(a)(I)(A). The effectiveness of a pre-injury designation by the employer turns on whether it gave the claimant actual notice of the employer's designated providers "at the time of the injury." *Trujillo v. Oppenheimer Management Corp*., W.C. 4-143-750 (August 9, 1993). In resolving this question, the ALJ may consider factors such as the nature of the notice given by the employer, how recently the notice was provided, and the claimant's individual capacity to recall the notice. *Jones v. Weld County Government*, W.C. No. 4-176-234 (December 8, 1996).

Claimant proved he had the right to select his own treating physician. Employer provided Claimant no list of designated providers despite knowing he had contracted COVID. Claimant's employment file contains a designated provider list from his original hire date in 2011. The document references only two providers, and therefore does not comply with the current statutory requirement to provide a list of at least four providers. Moreover, there is no persuasive evidence that Claimant recalled the nearly 11-year-old document when he contracted COVID in January 2022.

G. Claimant selected Dr. Swendsen

A claimant "selects" a physician when he demonstrates by words or conduct that he has chosen a physician to treat the injury. *Squitieri v. Tayco Screen Printing*, W.C. No. 4-421-960 (September 18, 2000).

The persuasive evidence shows Claimant selected Dr. Swendsen as his ATP. Although Claimant initially contacted his PCP, Dr. Yang by telephone, he was not offered an appointment because of his active COVID. Dr. Yang offered no treatment and made no record of the telephone conversation. There is no persuasive evidence Claimant ever saw Dr. Yang for any issues related to the January 2022 COVID diagnosis. A claimant does not "fully exercise" the right of selection unless the chosen physician is willing to treat the industrial injury. *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). The brief telephone contact with Dr. Yang was insufficient to constitute Claimant's "selection" of a treating physician.

Dr. Swendsen was the first physician Claimant saw after contracting COVID, and he continued to follow up with Dr. Swendsen's office thereafter. These factors persuasively demonstrate that Claimant selected Dr. Swendsen as his ATP.

H. Medical treatment

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). However, the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent treatment was causally related to the injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which they are seeking benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Dr. Swendsen treated Claimant on and after February 3, 2022 for ongoing symptoms related at least in part to COVID-19. Claimant proved the evaluations and treatment provided by and through Dr. Swendsen from February 3, 2022 through June 14, 2022 were reasonably needed to cure and relieve the effects of his compensable injury.

Claimant proved he suffered at least a temporary aggravation of his pancreatis, which caused a need for treatment and contributed to his temporary disability. Claimant repeatedly described worsened symptoms to Dr. Swendsen starting with the February 3, 2022 appointment, which he attributed at least partially to COVID. Dr. Castrejon cited medical literature showing an association between COVID and pancreatitis. After reviewing Claimant's history in detail, Dr. Castrejon opined Claimant's increased symptoms were causally related to COVID-19. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Cebrian.

Claimant argues the COVID "permanently" aggravated his pancreatitis. But a determination of whether the aggravation is "permanent" is premature at this time. No ATP has opined that Claimant is at MMI, and the ALJ has no jurisdiction to determine permanency. Additionally, the only post-COVID pancreatitis treatment documented in the record consists primarily of evaluations, diagnostic testing, and conservative treatments. It is therefore unnecessary, and would be inappropriate, to make findings and conclusions regarding the full extent of any aggravation, or speculate about other treatment that might be recommended in the future.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is compensable.

2. Claimant's average weekly wage is $865.39, with a corresponding TTD rate of $576.93.

3. Insurer shall pay Claimant TTD benefits at the rate of $576.93 per week from January 12, 2022 through January 25, 2022, and from January 30, 2022 until terminated by law.

4. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

5. Respondents' defense that Claimant was responsible for termination of his employment is denied and dismissed.

6. Dr. Carl Swendsen is Claimant's ATP.

7. Insurer shall cover medical treatment reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to evaluations and treatment provided by and through Dr. Swendsen from February 3, 2022 through June 14, 2022.

8. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

March 24, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-193-443-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on January 3, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 4, 2022 until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits after February 22, 2022.

STIPULATIONS

The parties agreed to the following:

1. If Claimant suffered compensable injuries while working for Employer, Concentra Medical Centers is the designated provider.

2. Claimant earned an Average Weekly Wage (AWW) of $1,346.15.

3. Any entitlement to TTD benefits will be offset by Claimant's receipt of unemployment benefits.

FINDINGS OF FACT

1. Claimant is a 53-year-old male who began working for Employer as a Building Engineer on November 11, 2021. He was responsible for building operations including electrical, plumbing and HVAC services. Claimant's job duties required lifting up to 50 pounds, crawling, kneeling, squatting and climbing.

2. On January 3, 2022 Claimant was at work pushing a cart up a hill transporting a large HVAC box. He slipped on ice and fell in somewhat of a "superman" position. Claimant struck his left knee on the ground and twisted his left hip. Because the accident occurred later in the day, he reported the incident to Employer's Assistant Property Manager [Redacted, hereinafter HN].

3. HN[Redacted] testified that on January 3, 2022 Claimant stated he had injured his left knee while moving boxes. She noted that Claimant reported the incident to her because she was the only person in the office. HN[Redacted] asked Claimant whether he wanted to complete an incident report, but he declined. Claimant recounted that he had a "bad knee," which he had previously injured, and there was no need for an incident report. Claimant planned to drive home, apply an ice pack and place a brace on his left knee.

4. Claimant has not worked for Employer since January 3, 2022. Employer placed Claimant on medical leave after the injuries.

5. On January 4, 2022 Claimant visited the Littleton Adventist Emergency Department for treatment. Claimant reported left lower back and left leg pain after he slipped and fell at work on the previous day. Claimant explained that when he fell on ice his left knee flexed and he landed on his left hip. He remarked that he has subsequently experienced numbness in his entire left leg as well as his left gluteal area. Physical examination showed no swelling or deformity. Claimant also exhibited normal range of left knee motion. An x-ray of the left knee noted that there was no acute bony abnormality.

6. On February 10, 2022 Claimant visited Thomas J. Corson, D.O at Concentra Medical Centers for an evaluation. He reported that on December 25, 2021 he was pushing a large load of AC filters on a dolly at work and slipped on ice. The momentum of the cart forced him to twist and land on his knees. Claimant injured his left leg from ankle to thigh. His hip was also sore with numbing pain. Dr. Corson assessed Claimant with a left hip strain, left knee strain and radicular pain of the left lower extremity. He determined that Claimant's work-related diagnoses included the following: (1) left hip strain; (2) left knee strain; and (3) radicular pain of the left lower extremity. Dr. Corson assigned work restrictions of no lifting, carrying or pushing/pulling in excess of 15 pounds. He also directed Claimant to sit 50% of the time, not use ladders and limit his use of stairs.

7. Employer's Human Resource Specialist [Redacted, hereinafter KL] testified at the hearing in this matter. Her job duties involved general human resource needs including recruiting, Worker's Compensation, payroll and performance management. KL[Redacted] noted that Employer initiated Claimant's background check on October 29, 2021. She explained that because of the COVID pandemic there were delays in completing background checks. The partial background check was not finished until December 1, 2022.

8. KL[Redacted] explained that on December 8, 2020 she spoke to Claimant about offenses that had been revealed on his partial criminal background check. A December 8, 2020 e-mail documented the conversation. Notably, the results revealed guilty pleas to the felonies of first degree forgery and theft by taking, and a nolo contendere plea to the misdemeanor of theft/shoplifting. KL[Redacted] sought court documentation from Claimant regarding the felony convictions and instructed him about how to dispute the misdemeanor. In the December 8, 2020 discussion with Claimant, KL[Redacted] recorded that he attributed the felonies to his association with his girlfriend

and denied the misdemeanor. KL[Redacted] asked Claimant whether there were any other items that might appear on the finalized background check and he replied "no."

9. On January 10, 2022 KL[Redacted] received an e-mail from [Redacted, hereinafter KS] stating that Claimant's background check had been completed and some discrepancies had been identified. In addition to the offenses delineated in the initial background check, the completed document revealed a misdemeanor theft by taking conviction with a disposition date of March 26, 2014. There was also a felony cocaine possession conviction and the misdemeanor of possession and use of drug related objects with disposition dates of July 28, 2015. The finalized check further revealed a felony cocaine possession conviction and the misdemeanor of possession of drug related objects with dispositions dated September 19, 2016. Finally, the background check showed a felony probation violation with a disposition date of August 28, 2017.

10. KL[Redacted] received the completed background check on January 12, 2022. She testified that, although Claimant had denied additional criminal activities would be revealed on the completed background check, the document reflected cocaine convictions. In fact, the completed background check showed two felonies and misdemeanors related to possession of cocaine and drug related objects, along with an additional felony for a probation violation.

11. KL[Redacted] subsequently engaged in e-mail correspondence with KS[Redacted] and [Redacted, hereinafter AL]. Based on the discussions, KS[Redacted] sent Claimant an adverse action letter on February 10, 2022. On February 22, 2022 [Redacted hereinafter KM] sent an e-mail to Claimant terminating his employment with Employer. She remarked that the termination was based on the contents of the background check because it was "not clear by our standards." KL[Redacted] elaborated that Claimant's termination was predicated on the extent of the offenses in the background check and his failure to disclose the cocaine convictions when asked if the completed background check would reveal any other offenses.

12. Claimant testified that the February 22, 2022 e-mail did not contain any specific reason for his termination from employment. He explained that he discussed the circumstances surrounding his cocaine conviction in the meeting with KL[Redacted] on December 8, 2020. Claimant remarked that it was his understanding that his explanation about the cocaine conviction was acceptable to Employer. Notably, Claimant denied a history of any felonies besides those related to cocaine. However, despite Claimant's testimony, his criminal history reveals felony forgery, felony theft by taking, and a felony probation violation. Claimant explained that the felony forgery charge was a conviction that was not supposed to be on his record. Furthermore, Claimant justified failing to mention the forgery conviction by stating that he only informed Employer of the most current charge on his record.

13. Claimant subsequently continued to receive treatment through Concentra. On February 25, 2022 he reported worsening left knee symptoms. After conducting a physical examination, Dr. Corson noted that, because Claimant's problems had been continuing for two months, it was imperative to reach a diagnosis. He referred Claimant

for a left knee MRI to determine whether any surgical pathology was present and avoid any further delay in treatment. Dr. Corson maintained that Claimant's objective findings were consistent with a work-related mechanism of injury.

14. On March 11, 2022 Claimant underwent a left knee MRI at Invision Sally Jobe and returned to Concentra for an evaluation. He reported that his symptoms were unchanged. Claimant continued to suffer constant aching pain in the left lateral hip, left buttock and left thigh. The left knee MRI revealed "a small 5 mm nondisplaced bony fracture fragment with adjacent bone marrow edema and soft tissue edema." The radiologist commented the fracture was not visualized on the prior radiographs from January 4, 2022, but the finding was age indeterminate and could be acute or subacute. David W. Hnida, D.O. concluded that Claimant's objective findings were consistent with a work-related mechanism of injury.

15. On March 22, 2022 Claimant underwent an orthopedic evaluation with Cary Motz, M.D. at Concentra. Claimant reported that on January 3, 2022 he landed directly on his left knee at work. He immediately experienced left knee and hip pain. Dr. Motz remarked that the left knee MRI had revealed a nondisplaced distal pole patella fracture with no internal derangement. He commented that the fracture was the source of Claimant's discomfort with stairs and kneeling. Furthermore, Claimant's left hip had some trochanteric bursitis that was not surprising because of limping. Dr. Motz was optimistic that Claimant's symptoms would improve, but considered a possible steroid injection into the trochanteric bursa. He remarked that Claimant's objective findings were consistent with a work-related mechanism of injury.

16. On April 26, 2022 Claimant returned to Dr. Hnida at Concentra for an examination. He reported that his left knee symptoms were much worse and he was experiencing significant difficulties with stairs. Claimant commented that he was also starting to suffer right knee pain and instability to the point where he has fallen several times. After performing a physical examination, Dr. Hnida assessed Claimant with a left patella fracture, left hip strain and trochanteric bursitis of the left hip. He referred Claimant for physical therapy. Dr. Hnida reiterated that Claimant's objective findings were consistent with a work-related mechanism of injury.

17. On June 14, 2022 Claimant visited Dr. Motz at Concentra for an examination. Claimant reported significant improvement in his left knee pain after a steroid injection five weeks earlier. After conducting a physical examination, Dr. Motz diagnosed Claimant with the following: (1) left knee healed inferior pole patellar fracture; (2) patellofemoral pain; and (3) mild, persistent left trochanteric bursitis of the left hip. He recommended physical therapy but a date of Maximum Medical Improvement (MMI) was unknown. Dr. Motz maintained that Claimant's objective findings were consistent with a work-related mechanism of injury.

18. Claimant's work restrictions have remained in effect throughout the duration of his medical treatment with Concentra. His restrictions include no lifting, carrying or pushing/pulling in excess of 15 pounds. He was also directed to sit 50% of the time, not use ladders and limit his use of stairs. Claimant testified that he has been unable to

perform his job duties of heavy lifting, crawling, kneeling, squatting, and climbing beginning January 3, 2022 through the date of hearing in this matter.

19. On July 20, 2022 Claimant underwent an independent medical examination with Allison Fall, M.D. Claimant recounted that he was pushing a cart up a hill with a large HVAC box on top when he slipped on ice and fell in somewhat of a superman position. His left knee struck the ground and his left hip twisted. Dr. Fall reviewed Claimant's medical records and conducted a physical examination. She assessed Claimant with the following: (1) left knee pain with grade 4 degenerative changes at the lateral tibial plateau and nondisplaced distal patellar pole fracture; (2) left hip muscular pain; and (3) occasional low back pain. She noted that Claimant's subjective complaints outweighed objective findings. Dr. Fall explained that she was unable to determine whether Claimant's bony abnormality at the distal pole of the patella was caused by the January 3, 2022 work incident because it was not visualized on initial x-rays. She was unable to state within a reasonable degree of medical probability that any of Claimant's complaints were caused by his work activities on January 3, 2022.

20. On November 8, 2022 the parties conducted the pre-hearing evidentiary deposition of Dr. Fall. She testified that the x-ray of Claimant's left knee taken on January 4, 2022 did not identify any bony abnormalities or fractures at the distal pole of the patella. Dr. Fall further remarked that the x-ray was sensitive enough to pick up a fracture if it had been present on January 4, 2022.

21. Dr. Fall explained that Claimant's January 4, 2022 physical examination at Littleton Adventist Hospital showed no swelling. If Claimant had suffered a fracture on January 3, 2022, then swelling would have been present. Claimant's physical examination was also not consistent with an acute injury or a distal pole patella fracture. Dr. Fall commented that Claimant's objective findings simply did not support a work-related injury and he does not require any additional medical treatment. She summarized that, based on the absence of x-ray findings, lack of swelling or tenderness on physical examination, and Claimant's ability to extend his knee on January 4, 2022, his patellar fracture must have occurred after January 4, 2022.

22. Claimant has established it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on January 3, 2022. Initially, on January 3, 2022 Claimant was at work pushing a cart up a hill transporting a large HVAC box. He slipped on ice and fell in somewhat of a "superman" position. Claimant struck his left knee on the ground and twisted his left hip. On January 4, 2022 Claimant visited the Littleton Adventist Emergency Department for treatment. Although Claimant reported left lower back and left leg pain after he slipped and fell on ice at work on the previous day, a physical examination showed no swelling or deformity. Furthermore, an x-ray of the left knee noted there was no acute bony abnormality.

23. After Claimant received additional treatment through Concentra, on February 25, 2022 Dr. Corson ordered an MRI to determine whether any surgical pathology was present and avoid any further delay in treatment. The left knee MRI revealed "a small 5 mm nondisplaced bony fracture fragment with adjacent bone marrow

edema and soft tissue edema." The radiologist commented the fracture was not visualized on the prior radiographs from January 4, 2022, but the finding was age indeterminate and could be acute or subacute.

24. On July 20, 2022 Dr. Fall conducted an independent medical examination of Claimant and was unable to determine whether the bony abnormality at the distal pole of the patella was caused by the January 3, 2022 work incident. She reasoned that the bony abnormality was not visualized on initial x-rays. Dr. Fall concluded that she was unable to state within a reasonable degree of medical probability that any of Claimant's complaints were caused by his work activities on January 3, 2022. She subsequently testified that Claimant's January 4, 2022 physical examination was also inconsistent with an acute injury or a distal pole patella fracture. Dr. Fall thus summarized that, based on the absence of x-ray findings, lack of swelling or tenderness on physical examination, and Claimant's ability to extend his knee at the Littleton Adventist Emergency Department, his patellar fracture must have occurred after January 4, 2022.

25. Despite Dr. Fall's testimony, the record is replete with evidence that Claimant likely suffered compensable injuries during the course and scope of his employment with Employer on January 3, 2022. Initially, despite minor date discrepancies, the record reflects that Claimant has consistently maintained he sustained injuries to his left hip and knee as a result of a slip and fall on ice at work while he was using a dolly to push a large load of AC filters. Moreover, the Concentra medical records reveal that Claimant's treating physicians have attributed Claimant's injuries to his slip and fall. Specifically, Drs. Corson, Motz and Hnida all persuasively emphasized that Claimant's objective findings were consistent with a work-related mechanism of injury. Notably, the preceding physicians were aware of the absence of x-ray findings of a pole patellar fracture on January 4, 2022. However, because the subsequent MRI revealed a nondisplaced distal pole patella fracture, the Concentra physicians attributed the injury to Claimant's slip and fall at work. Based on Claimant's consistent account of his mechanism of injury, the MRI revealing a left knee nondisplaced distal pole patella fracture and the persuasive medical opinions of Drs. Corson, Motz and Hnida, Claimant likely suffered injuries at work on January 3, 2022. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

26. Claimant has demonstrated that it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries. His medical treatment at Littleton Adventist Emergency Department, Concentra and Invision Sally Jobe was designed to address the work injuries he sustained on January 3, 2022. Claimant specifically underwent examinations, physical therapy, injections and diagnostic testing to assess and treat the effects of his industrial injuries. All of Claimant's medical treatment was reasonable and necessary to cure or relieve the effects of his work injuries. Accordingly, Respondents are financially responsible for all of Claimant's reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries.

27. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 4, 2022 until

terminated by statute. The record reveals that Claimant's January 3, 2022 industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. The record reveals that Claimant suffered injuries as a result of his slip and fall at work that impaired his ability to effectively and properly perform his regular employment.

28. Claimant's work restrictions have remained in effect throughout the duration of his medical treatment with Concentra. His restrictions include no lifting, carrying or pushing/pulling in excess of 15 pounds. He was also directed to sit 50% of the time, not use ladders and limit his use of stairs. Claimant credibly testified that he has been unable to perform his job duties including heavy lifting, crawling, kneeling, squatting, and climbing beginning January 3, 2022 through date of hearing. He has not returned to work for Employer and has not earned income from any other source since the slip and fall. Accordingly, Claimant is entitled to receive TTD benefits for the period January 3, 2022 until terminated by statute.

29. Although Claimant has established that he is entitled to receive TTD benefits, Respondents have demonstrated that it is more probably true than not that he was responsible for his termination from employment under the termination statutes. Claimant is thus precluded from receiving TTD benefits after February 22, 2022. Initially, on December 8, 2021 KL[Redacted] spoke to Claimant about offenses that had been revealed on his partial criminal background check. Notably, the results reflected guilty pleas to the felonies of first degree forgery and theft by taking, and a nolo contendere plea to the misdemeanor of theft/shoplifting. KL[Redacted] sought court documentation from Claimant regarding the felony convictions and instructed him about how to dispute the misdemeanor. In the December 8, 2020 discussion with Claimant, KL[Redacted] recorded that he attributed the felonies to his association with his girlfriend and denied the misdemeanor. KL[Redacted] asked Claimant whether there were any other items that might appear on a completed background check and he replied "no."

30. KL[Redacted] received the completed background check on January 12, 2022. She testified that, although Claimant had denied that any additional criminal activities would be revealed on the completed background check, the document reflected cocaine convictions. In fact, the finalized background check showed two felonies and misdemeanors related to possession of cocaine and drug related objects, along with an additional felony for a probation violation. Claimant explained that he discussed the circumstances surrounding his cocaine conviction in the meeting with KL[Redacted] on December 8, 2020. He denied a history of any felonies besides those related to cocaine. Despite Claimant's testimony, his criminal history reveals felony forgery, felony theft by taking, and a felony probation violation.

31. On February 22, 2022 Claimant was terminated from employment with Employer. The termination was based on the contents of the background check because it was "not clear by our standards." KL[Redacted] credibly elaborated that Claimant's termination was predicated on the extent of the offenses in the background check and his failure to disclose the cocaine convictions when asked if the completed background check would reveal any other offenses. Although Claimant stated that he disclosed his cocaine

charges to Employer on December 8, 2021, the record reveals that Employer was unaware of the convictions until a later date. Specifically, KL[Redacted] credibly explained that she was unaware of the cocaine charges on December 8, 2021 and did not receive information about the offenses until January 12, 2022. The extent of Claimant's criminal history and failure to disclose that additional criminal activities would be revealed on the completed background check reflects that he precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Respondents has thus demonstrated that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period February 23, 2022 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844,

846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on January 3, 2022. Initially, on January 3, 2022 Claimant was at work pushing a cart up a hill transporting a large HVAC box. He slipped on ice and fell in somewhat of a "superman" position. Claimant struck his left knee on the ground and twisted his left hip. On January 4, 2022 Claimant visited the Littleton Adventist Emergency Department for treatment. Although Claimant reported left lower back and left leg pain after he slipped and fell on ice at work on the previous day, a physical examination showed no swelling or deformity. Furthermore, an x-ray of the left knee noted there was no acute bony abnormality.

8. As found, after Claimant received additional treatment through Concentra, on February 25, 2022 Dr. Corson ordered an MRI to determine whether any surgical pathology was present and avoid any further delay in treatment. The left knee MRI revealed "a small 5 mm nondisplaced bony fracture fragment with adjacent bone marrow edema and soft tissue edema." The radiologist commented the fracture was not visualized on the prior radiographs from January 4, 2022, but the finding was age indeterminate and could be acute or subacute.

9. As found, on July 20, 2022 Dr. Fall conducted an independent medical examination of Claimant and was unable to determine whether the bony abnormality at the distal pole of the patella was caused by the January 3, 2022 work incident. She reasoned that the bony abnormality was not visualized on initial x-rays. Dr. Fall concluded

that she was unable to state within a reasonable degree of medical probability that any of Claimant's complaints were caused by his work activities on January 3, 2022. She subsequently testified that Claimant's January 4, 2022 physical examination was also inconsistent with an acute injury or a distal pole patella fracture. Dr. Fall thus summarized that, based on the absence of x-ray findings, lack of swelling or tenderness on physical examination, and Claimant's ability to extend his knee at the Littleton Adventist Emergency Department, his patellar fracture must have occurred after January 4, 2022.

10. As found, despite Dr. Fall's testimony, the record is replete with evidence that Claimant likely suffered compensable injuries during the course and scope of his employment with Employer on January 3, 2022. Initially, despite minor date discrepancies, the record reflects that Claimant has consistently maintained he sustained injuries to his left hip and knee as a result of a slip and fall on ice at work while he was using a dolly to push a large load of AC filters. Moreover, the Concentra medical records reveal that Claimant's treating physicians have attributed Claimant's injuries to his slip and fall. Specifically, Drs. Corson, Motz and Hnida all persuasively emphasized that Claimant's objective findings were consistent with a work-related mechanism of injury. Notably, the preceding physicians were aware of the absence of x-ray findings of a pole patellar fracture on January 4, 2022. However, because the subsequent MRI revealed a nondisplaced distal pole patella fracture, the Concentra physicians attributed the injury to Claimant's slip and fall at work. Based on Claimant's consistent account of his mechanism of injury, the MRI revealing a left knee nondisplaced distal pole patella fracture and the persuasive medical opinions of Drs. Corson, Motz and Hnida, Claimant likely suffered injuries at work on January 3, 2022. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

Medical Benefits

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

12. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant,

direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries. His medical treatment at Littleton Adventist Emergency Department, Concentra and Invision Sally Jobe was designed to address the work injuries he sustained on January 3, 2022. Claimant specifically underwent examinations, physical therapy, injections and diagnostic testing to assess and treat the effects of his industrial injuries. All of Claimant's medical treatment was reasonable and necessary to cure or relieve the effects of his work injuries. Accordingly, Respondents are financially responsible for all of Claimant's reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries.

Temporary Total Disability Benefits

14. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

15. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period January 4, 2022 until terminated by statute. The record reveals that Claimant's January 3, 2022 industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. The record reveals that Claimant suffered

injuries as a result of his slip and fall at work that impaired his ability to effectively and properly perform his regular employment.

16. As found, Claimant's work restrictions have remained in effect throughout the duration of his medical treatment with Concentra. His restrictions include no lifting, carrying or pushing/pulling in excess of 15 pounds. He was also directed to sit 50% of the time, not use ladders and limit his use of stairs. Claimant credibly testified that he has been unable to perform his job duties including heavy lifting, crawling, kneeling, squatting, and climbing beginning January 3, 2022 through date of hearing. He has not returned to work for Employer and has not earned income from any other source since the slip and fall. Accordingly, Claimant is entitled to receive TTD benefits for the period January 3, 2022 until terminated by statute.

Responsible for Termination

17. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that the claimant was responsible for his termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

18. As found, although Claimant has established that he is entitled to receive TTD benefits, Respondents have demonstrated by a preponderance of the evidence that he was responsible for his termination from employment under the termination statutes. Claimant is thus precluded from receiving TTD benefits after February 22, 2022. Initially, on December 8, 2021 KL[Redacted] spoke to Claimant about offenses that had been revealed on his partial criminal background check. Notably, the results reflected guilty pleas to the felonies of first degree forgery and theft by taking, and a nolo contendere plea to the misdemeanor of theft/shoplifting. KL[Redacted] sought court documentation from Claimant regarding the felony convictions and instructed him about how to dispute the misdemeanor. In the December 8, 2020 discussion with Claimant, KL[Redacted] recorded that he attributed the felonies to his association with his girlfriend and denied the misdemeanor. KL[Redacted] asked Claimant whether there were any other items that might appear on a completed background check and he replied "no."

19. As found, KL[Redacted] received the completed background check on January 12, 2022. She testified that, although Claimant had denied that any additional criminal activities would be revealed on the completed background check, the document reflected cocaine convictions. In fact, the finalized background check showed two felonies and misdemeanors related to possession of cocaine and drug related objects, along with an additional felony for a probation violation. Claimant explained that he discussed the circumstances surrounding his cocaine conviction in the meeting with KL[Redacted] on December 8, 2020. He denied a history of any felonies besides those related to cocaine. Despite Claimant's testimony, his criminal history reveals felony forgery, felony theft by taking, and a felony probation violation.

20. As found, on February 22, 2022 Claimant was terminated from employment with Employer. The termination was based on the contents of the background check because it was "not clear by our standards." KL[Redacted] credibly elaborated that Claimant's termination was predicated on the extent of the offenses in the background check and his failure to disclose the cocaine convictions when asked if the completed background check would reveal any other offenses. Although Claimant stated that he disclosed his cocaine charges to Employer on December 8, 2021, the record reveals that Employer was unaware of the convictions until a later date. Specifically, KL[Redacted] credibly explained that she was unaware of the cocaine charges on December 8, 2021 and did not receive information about the offenses until January 12, 2022. The extent of Claimant's criminal history and failure to disclose that additional criminal activities would be revealed on the completed background check reflects that he precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Respondents has thus demonstrated that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period February 23, 2022 until terminated by statute.

ORDER

1. Claimant suffered compensable injuries on January 3, 2022 during the course and scope of his employment with Employer.

2. Respondents are financially responsible for payment of Claimant's reasonable and necessary medical expenses for the treatment of his industrial injuries.

3. Claimant shall receive TTD benefits for the period January 4, 2022 until February 22, 2022.

4. Claimant earned an AWW of $1,346.15.

5. Claimant's entitlement to TTD benefits shall be offset by his receipt of unemployment benefits.

6. Because Claimant was responsible for his termination from employment, he is precluded from receiving TTD benefits after February 22, 2022.

7. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: February 9, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-175-074-002

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he suffered an occupational disease in the form of Carpal Tunnel Syndrome (CTS) to his right wrist during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an acute injury to his right wrist on April 15, 2021 during the course and scope of his employment with Employer.

FINDINGS OF FACT

1. Claimant is a 61-year-old male who works for Employer as a Facility Maintenance Mechanic. His job duties primarily involve building maintenance and HVAC repairs.

2. Claimant explained that on April 15, 2021 he was helping to remove materials from the roof of Employer's facility in preparation for a roofing project. He was using a dolly to move metal frames from a higher to lower level of the roof. When he was pushing the dolly down a ramp, he developed pain and numbness in his right wrist.

3. On April 16, 2021 Claimant completed a Workers' Compensation Notice. He reported that on the previous day, he was removing debris from Employer's roof in order to prepare for a roofing project. While transporting heavy metal in a cart Claimant experienced sharp twinges of pain in his right hand.

4. On April 16, 2021 Claimant visited personal medical provider Michael Schmitz, M.D. at Kaiser Permanente for an evaluation. He reported right wrist pain. Claimant noted that "he has been having on/off symptoms for over a year, and states that in the last 2-3 months has gotten worse at night. Affects his 1st-3rd fingers. Has purchased braces and have been somewhat affective." After a physical examination, Dr. Schmitz assessed Claimant "with a 2 month history of worsening right wrist pain concerning for carpal tunnel syndrome." He remarked that Claimant exhibited obvious features of right Carpal Tunnel Syndrome (CTS), including positive Phalen and Tinel signs, as well as atrophy of the thenar muscle. Dr. Schmitz placed Claimant in a right wrist brace and referred him for an EMG. The report contains no mention of work activities, lifting heavy objects or sharp pain.

5. On April 19, 2021 Claimant visited Authorized Treating Physician (ATP) John Raschbacher, M.D. at Midtown Occupational Medicine for an evaluation. Claimant reported that he had been developing digital numbness in his right hand for the past week. He did not describe any traumatic incident, heavy lifting or sharp pain. Dr. Raschbacher noted that Claimant had no symptoms before the April 15, 2022 event. After reviewing

Claimant's work history and conducting a physical examination, Dr. Raschbacher determined that Claimant's work activities caused him to develop right CTS. He referred Claimant to hand surgeon Thomas Mordick, II, M.D. for an evaluation.

6. On April 29, 2021 Claimant visited Dr. Mordick for an evaluation. He reported that, while carrying heavy buckets of material for a roofing project on April 15, 2021, he developed pain and numbness in his right hand. After conducting a physical examination, Dr. Mordick assessed Claimant with right wrist CTS and recommended nerve conduction studies. Based on Claimant's typical job duties as an HVAC worker, Dr. Mordick determined that he "probably qualifies for work-related [CTS], although a Job Demands Analysis [JDA] would be needed to make a formal decision regarding that."

7. On May 25, 2021 Claimant underwent electrodiagnostic studies of his right upper extremity with Eric Hammerberg, M.D. The findings were compatible with a diagnosis of severe right CTS. There was no evidence of cervical radiculopathy.

8. On June 15, 2021 Carlton M. Clinkscales, M.D. performed a records review of Claimant's claim. After considering Claimant's history, Dr. Clinkscales responded to the specific interrogatory of whether lifting heavy items on April 15, 2021 would have caused Claimant to develop CTS. His answer was "[m]aybe." Dr. Clinkscales noted that CTS is generally an overuse problem, but it can be associated with an acute incident. He explained that "severe" CTS is usually "a condition of more longstanding duration," but could be related to Claimant's April 15, 2021 work incident. He sought additional records from Kaiser to determine whether Claimant had pre-existing symptoms, a prior EMG, or previous surgical recommendations. Dr. Clinkscales noted that Claimant "claims no prior treatment and no prior recommendations, but some effort for confirmation would certainly be appropriate." He also requested a JDA before making a causation determination.

9. Throughout the remainder of 2021 Claimant continued to receive treatment from Dr. Raschbacher. Dr. Raschbacher maintained that the nature of Claimant's work activities caused him to develop right CTS. He cautioned that the longer Claimant's nerve was compressed, the less likelihood of a complete recovery.

10. On July 7, 2021 Respondent filed a Notice of Contest. Respondents specifically sought further investigation regarding the compensability of Claimant's claim.

11. On November 9, 2021 [Redacted, hereinafter JA] completed a JDA for the position of Facilities Maintenance Mechanic at Employer's facility. JA[Redacted] noted that Claimant is primarily responsible for maintenance of a variety of equipment and uses a number of different tools. Claimant spent about 90%-95% of his workday performing preventative maintenance and repairs on various machines in Employer's facility. The JDA also specified that Claimant spent about 5%-10% of his workday performing computer work.

12. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), JA[Redacted] not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties. JA[Redacted] conducted

specific studies calculating the amount of time Claimant spent performing each of his job duties. In considering Primary Risk Factors involving Force and Repetition/Duration involving six hours of lifting 10 pounds three times or more per minute, JA[Redacted] calculated that Claimant spent 2:49:06 during an eight-hour work shift engaging in the activity. She also determined that Claimant spent 2:33:36 during an eight-hour workshift using hand tools weighing two pounds or more. Finally, JA[Redacted] concluded that Claimant spent only 1:33:48 using a mouse each day.

13. Relying on the Primary and Secondary Risk Factors delineated in the *Guidelines*, JA[Redacted] explained that Claimant did not satisfy the requisite force and repetition/duration requirements to demonstrate a cumulative trauma condition. Claimant also did not exhibit the requisite Awkward Posture & Repetition/Duration, engage in computer work or use hand held vibratory tools for the thresholds enumerated in the *Guidelines*. Claimant also did not work in a cold environment.

14. After reviewing the JDA Dr. Mordick authored a note on November 23, 2021. He agreed that Claimant did not meet any risk factors for the development of a cumulative trauma condition "let alone any specific to carpal tunnel syndrome." Dr. Mordick thus concluded that Claimant's CTS was not likely work-related and should be treated through private health insurance.

15. On December 5, 2022 Dr. Clinkscales authored a letter after reviewing additional medical records. He remarked that, in his June 15, 2021 records review, he agreed it was possible Claimant's right CTS was related to his work activities. Although Dr. Clinkscales initially agreed with Dr. Raschbacher's impression that Claimant's CTS might be work-related, he concluded that the JDA "does not support work-relatedness in this particular case." He specified that the JDA did not identify any risk factors to support a cumulative trauma disorder based on the *Guidelines*.

16. On December 6, 2021 Claimant returned to Dr. Raschbacher for an evaluation. Dr. Raschbacher authored an addendum note stating that a JDA had been performed. After remarking that he was familiar with JDA's, Dr. Raschbacher maintained that Claimant's work activities caused him to develop right CTS.

17. On February 4, 2022 Claimant underwent a right CTS release through his private insurance.

18. Claimant testified at the hearing in this matter. He remarked that he experienced numbness and tingling in his right wrist after the April 15, 2021 incident, but denied ever previously experiencing similar symptoms. However, on cross-examination, Respondent's counsel presented Claimant with the Kaiser record dated April 16, 2021. The Kaiser document reflects that Claimant reported a one-year history of right wrist symptoms, including the purchase of splints, and his condition had worsened over the prior two to three months. Claimant responded that he "forgot" he had visited Kaiser. Further, he explained that the symptoms prior to April 15, 2021 only occurred at night when his wrists roll inward.

19. Claimant has failed to prove it is more probably true than not that he suffered an occupational disease in the form of CTS to his right wrist during the course and scope of his employment with Employer. A review of his job duties, the medical records and the persuasive opinions of Drs. Mordick and Clinkscales reflect that Claimant's job duties lacked the requisite duration, force or repetition to cause a cumulative trauma condition.

20. In her JDA JA[Redacted] noted that Claimant is primarily responsible for maintaining a variety of equipment and uses a number of different tools in Employer's primary facility. JA[Redacted] conducted specific studies calculating the amount of time Claimant spent performing each of his job duties. Relying on the Primary and Secondary Risk Factors delineated in the *Guidelines*, JA[Redacted] explained that Claimant did not satisfy the requisite force and repetition/duration requirements to demonstrate a cumulative trauma condition. Claimant also did not exhibit the requisite Awkward Posture & Repetition/Duration, engage in computer work or use hand held vibratory tools for the thresholds enumerated in the *Guidelines*.

21. After reviewing the JDA Dr. Mordick explained that Claimant did not meet any risk factors for a cumulative trauma injury, "let alone any specific to carpal tunnel syndrome." Dr. Mordick thus concluded that Claimant's CTS was not likely work-related and should be treated through private health insurance. Similarly, Dr. Clinkscales concluded that the JDA "does not support work-relatedness in this particular case." He specified that the JDA did not identify any risk factors to support a cumulative trauma disorder based on the *Guidelines*.

22. In contrast, Dr. Raschbacher remarked that Claimant's work activities caused him to develop right CTS. However, Dr. Raschbacher's report does not reveal whether he considered the JDA or even requested to review the report. In contrast, the record reflects that Drs. Mordick and Clinkscales performed a proper causation analysis pursuant to the *Guidelines*. A review of Claimant's job duties, in conjunction with the persuasive opinions of Drs. Mordick and Clinkscales, demonstrates that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant thus likely did not develop right CTS while working for Employer. His employment activities did not cause, intensify, or to a reasonable degree, aggravate his condition.

23. Claimant has failed to demonstrate that it is more probably true than not that he suffered an acute injury to his right wrist on April 15, 2021 during the course and scope of his employment with Employer. Initially, Claimant asserts that on April 15, 2021 he developed pain and numbness in his right wrist while removing debris from the roof of Employer's facility. Claimant subsequently visited ATP Dr. Raschbacher and reported that he had been developing digital numbness at the right hand for the past week. He did not describe any traumatic incident, reference heavy lifting or mention sharp pain. Dr. Raschbacher diagnosed Claimant with work-related right CTS and referred him to Dr. Mordick for an evaluation.

24. Dr. Mordick initially determined that Claimant's severe, right CTS probably constituted a work-related condition but sought a JDA to make a final determination.

Similarly, Dr. Clinkscales initially reasoned that Claimant's heavy lifting on April 15, 2021 might have caused severe CTS. He noted that CTS is generally an overuse problem, but it can be associated with an acute incident. He also explained that "severe" CTS is usually "a condition of more longstanding duration." Dr. Clinkscales also sought a JDA to assess causation. The record thus reveals that Drs. Mordick and Clinkscales were aware of Claimant's potential injury while lifting heavy materials on April 15, 2021, but did not determine that he suffered an acute injury. Instead, both physicians requested a JDA to ascertain whether Claimant's work activities over time caused him to develop severe CTS.

25. After reviewing the JDA, Dr. Mordick concluded that Claimant's right wrist CTS was not caused by his work activities for Employer. Although Dr. Clinkscales initially agreed with Dr. Raschbacher that Claimant's CTS might be work-related, he also determined the JDA "does not support work-relatedness in this particular case." Drs. Mordick and Clinkscales thus exercised medical judgment to reject a causal connection between Claimant's work activities and his development of severe right CTS. Importantly, Claimant's CTS was not caused by either an acute event on April 15, 2021 or through repetitive work exposure.

26. Claimant denied any prior right wrist symptoms to Dr. Raschbacher. He also testified that he experienced numbness and tingling in his right wrist after the April 15, 2021 incident, but denied ever previously experiencing similar symptoms. However, on cross-examination, Respondent's counsel presented Claimant with a Kaiser record dated April 16, 2021. The Kaiser document reflects that Claimant reported a one-year history of right wrist symptoms that had worsened over the prior two to three months. Accordingly, based on the medical records, persuasive medical opinions of Drs. Mordick and Clinkscales, and inconsistent statements about the development of right wrist pain, Claimant has failed to demonstrate that he suffered an acute right wrist injury while working for Employer on April 15, 2021. Claimant's work activities on April 15, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. His claim for Workers' Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Occupational Disease

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Off.,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that "CTC's of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures." W.C.R.P. Rule

17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the *Guidelines* provide that "[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment." W.C.R.P. Rule 17, Exhibit 5, p. 21.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Finally, another Primary Risk Factor in the category of computer work involves mouse use in excess of four hours per day. Secondary Risk Factors require three hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related."
W.C.R.P. Rule 17, Exhibit 5, p. 24.

8. The *Guidelines* specify that "good" but not "strong" evidence that occupational risk factors cause CTS include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. There is also "good" evidence that the combination of two pounds of pinch or 10 pounds of hand force three times or more per minute for three hours causes CTS. "Some" evidence of occupational risk factors for the development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. Notably, there is good evidence that repetition alone for six hours or less is not related to the development of CTS. W.C.R.P. Rule 17, Exhibit 5, pp. 28-29.

9. As found, Claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease in the form of CTS to his right wrist during the course and scope of his employment with Employer. A review of his job duties, the medical records and the persuasive opinions of Drs. Mordick and Clinkscales reflect that Claimant's job duties lacked the requisite duration, force or repetition to cause a cumulative trauma condition.

10. As found, in her JDA JA[Redacted] noted that Claimant is primarily responsible for maintaining a variety of equipment and uses a number of different tools in Employer's primary facility. JA[Redacted] conducted specific studies calculating the amount of time Claimant spent performing each of his job duties. Relying on the Primary and Secondary Risk Factors delineated in the *Guidelines*, JA[Redacted] explained that Claimant did not satisfy the requisite force and repetition/duration requirements to demonstrate a cumulative trauma condition. Claimant also did not exhibit the requisite Awkward Posture & Repetition/Duration, engage in computer work or use hand held vibratory tools for the thresholds enumerated in the *Guidelines*.

11. As found, after reviewing the JDA Dr. Mordick explained that Claimant did not meet any risk factors for a cumulative trauma injury, "let alone any specific to carpal tunnel syndrome." Dr. Mordick thus concluded that Claimant's CTS was not likely work-related and should be treated through private health insurance. Similarly, Dr. Clinkscales concluded that the JDA "does not support work-relatedness in this particular case." He specified that the JDA did not identify any risk factors to support a cumulative trauma disorder based on the *Guidelines*.

12. As found, in contrast, Dr. Raschbacher remarked that Claimant's work activities caused him to develop right CTS. However, Dr. Raschbacher's report does not reveal whether he considered the JDA or even requested to review the report. In contrast, the record reflects that Drs. Mordick and Clinkscales performed a proper causation analysis pursuant to the *Guidelines*. A review of Claimant's job duties, in conjunction with the persuasive opinions of Drs. Mordick and Clinkscales, demonstrates that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant thus likely did not develop right CTS while working for Employer. His employment activities did not cause, intensify, or to a reasonable degree, aggravate his condition.

Acute Injury

13. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

14. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

Soto-Carrion v. C & T Plumbing, Inc., W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

15. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

16. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, it does not follow that the claimant suffered a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

17. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered an acute injury to his right wrist on April 15, 2021 during the course and scope of his employment with Employer. Initially, Claimant asserts that on April 15, 2021 he developed pain and numbness in his right wrist while removing debris from the roof of Employer's facility. Claimant subsequently visited ATP Dr. Raschbacher and reported that he had been developing digital numbness at the right hand for the past week. He did not describe any traumatic incident, reference heavy lifting or mention sharp pain. Dr. Raschbacher diagnosed Claimant with work-related right CTS and referred him to Dr. Mordick for an evaluation.

18. As found, Dr. Mordick initially determined that Claimant's severe, right CTS probably constituted a work-related condition but sought a JDA to make a final determination. Similarly, Dr. Clinkscales initially reasoned that Claimant's heavy lifting on

April 15, 2021 might have caused severe CTS. He noted that CTS is generally an overuse problem, but it can be associated with an acute incident. He also explained that "severe" CTS is usually "a condition of more longstanding duration." Dr. Clinkscales also sought a JDA to assess causation. The record thus reveals that Drs. Mordick and Clinkscales were aware of Claimant's potential injury while lifting heavy materials on April 15, 2021, but did not determine that he suffered an acute injury. Instead, both physicians requested a JDA to ascertain whether Claimant's work activities over time caused him to develop severe CTS.

19. As found, after reviewing the JDA, Dr. Mordick concluded that Claimant's right wrist CTS was not caused by his work activities for Employer. Although Dr. Clinkscales initially agreed with Dr. Raschbacher that Claimant's CTS might be work-related, he also determined the JDA "does not support work-relatedness in this particular case." Drs. Mordick and Clinkscales thus exercised medical judgment to reject a causal connection between Claimant's work activities and his development of severe right CTS. Importantly, Claimant's CTS was not caused by either an acute event on April 15, 2021 or through repetitive work exposure.

20. As found, Claimant denied any prior right wrist symptoms to Dr. Raschbacher. He also testified that he experienced numbness and tingling in his right wrist after the April 15, 2021 incident, but denied ever previously experiencing similar symptoms. However, on cross-examination, Respondent's counsel presented Claimant with a Kaiser record dated April 16, 2021. The Kaiser document reflects that Claimant reported a one-year history of right wrist symptoms that had worsened over the prior two to three months. Accordingly, based on the medical records, persuasive medical opinions of Drs. Mordick and Clinkscales, and inconsistent statements about the development of right wrist pain, Claimant has failed to demonstrate that he suffered an acute right wrist injury while working for Employer on April 15, 2021. Claimant's work activities on April 15, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. His claim for Workers' Compensation benefits is thus denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: February 14, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the doctrines of issue preclusion, claim preclusion and law of the case bar Claimant from litigating whether the Veteran's Affairs Medical Center is an authorized provider.

3. Whether Claimant has established by a preponderance of the evidence that the Veteran's Affairs Medical Center is an authorized provider.

FINDINGS OF FACT

1. Claimant is an 88-year-old male. On June 12, 2014 he suffered an admitted industrial injury while working for Employer. Specifically, while using wire cutters to cut electric wire, Claimant felt a pop in his right chest wall. While at home several weeks later, Claimant was walking downstairs, missed a step, and twisted his left knee.

2. Claimant received treatment at different medical facilities following his work injury. Some of Claimant's treatment was related to his industrial injury and some was not. He treated at the Veteran's Affairs Medical Center (VA) in October or November, 2014.

3. In April 2015 Claimant underwent a left knee total knee replacement (TKR). Following the TKR, Claimant fell and suffered ischemic strokes of the bilateral cerebellum. After a series of hospitalizations, Claimant ultimately had a wound in the left proximal lower leg near the medial tibia.

4. On July 30, 2019 Claimant was diagnosed with a MSSA infection and underwent an above-knee right leg amputation at Sky Ridge Medical Center. Claimant subsequently pursued medical care and treatment through the VA with regard to his prosthesis and prosthesis training prior to Respondent's admission of liability for the right leg amputation.

5. On March 2, 2020 Claimant underwent a follow-up Division Independent Medical Examination (DIME) with Kristin Mason, M.D. She determined that the amputation was related to Claimant's work-related TKR and he had not reached Maximum Medical Improvement (MMI).

6. On April 7, 2020 Respondent filed an Amended General Admission of Liability (GAL). The GAL acknowledged responsibility for medical benefits as well as Temporary Total Disability (TTD) benefits arising from the amputation.

7. On July 9, 2020 the parties proceeded to a hearing before Administrative Law Judge (ALJ) Timothy Nemechek at the Office of Administrative Courts. The issue at

the hearing involved whether Claimant had proven by the preponderance of the evidence that the treatment he received at the VA was authorized.

8. Subsequent to the hearing before ALJ Nemechek, Dr. Wakeshima made multiple referrals for Claimant to obtain prosthetic treatment through the VA. For example, on July 16, 2020 Claimant visited Dr. Wakeshima for a video evaluation. Dr. Wakeshima commented that Claimant was progressing with his prosthesis training through the VA. He explained that he had received a letter from Respondent's counsel dated March 25, 2020 requesting names of referrals in Workers' Compensation matters for physical therapy and prosthesis training. Dr. Wakeshima responded that, "if this is not being authorized to be performed to the [VA] (which is the preferred route) I would then recommend Hanger Orthodics and Prosthesis for prosthesis and Spaulding Rehabilitation or Swedish for prosthetic treating." He also noted that Claimant was attempting to have physical therapy for prosthesis training continued at the VA. Dr. Wakeshima believed treatment through the VA would be medically reasonable if it could be accomplished under Claimant's Workers' Compensation claim.

9. In his July 16, 2020 report Dr. Wakeshima detailed that Claimant has had excellent progress with prosthetic training through the physical therapy department at the VA. Dr. Wakeshima thus wrote Claimant a specific order for physical therapy through the VA. He also requested authorization for Claimant's prosthesis through the VA. Dr. Wakeshima detailed that Claimant had been working with the VA and was very comfortable continuing treatment. Moreover, he remarked that the VA has "significant experience with prosthetic limbs, including the elderly population and therefore should be able to set [Claimant] up with the lightest and most straightforward prosthesis for his above-knee amputation as recommended on Dr. Mason's DIME." Therefore, Dr. Wakeshima wrote Claimant "specific orders for physical therapy and prosthesis to be performed/made through the VA Medical Center. I have previously not written patient any orders for prosthetic training and prosthesis to Hanger orthotics or Spaulding rehab as this was a second choice and the primary and preferred choice is to have this accomplished through the VA Medical Center." Finally, on July 20, 2021 Dr. Wakeshima made a separate referral to the VA for an above knee amputation prosthesis "to be accomplished under his Workers' Compensation claim."

10. On August 28, 2020 ALJ Nemechek issued a Summary Order. He determined that Claimant failed to satisfy his burden of proof for payment of benefits to the VA. ALJ Nemechek specifically found in paragraph 20 of the Summary Order that there was no evidence that ATP Dr. Wakeshima referred Claimant to the VA. He also determined in paragraph 21 that there was insufficient evidence to conclude that Claimant's care at the VA was within the normal progression of medical treatment.

11. On December 9, 2021 Claimant returned to Dr. Wakeshima for an examination. Dr. Wakeshima noted that he had written a referral to the VA "to specifically address whether [Claimant] will need a new socket and document its cost as this replacement socket would be related to his work injury, and should be covered by Workers' Compensation." In a separate authorization request, Dr. Wakeshima reiterated that he referred Claimant to the VA to assess whether he required a new socket or

modifications to his prosthesis. He then asked the VA to document approximate costs and forward the request for authorization to Claimant's Workers' Compensation carrier.

12. On January 29, 2022 Dr. Wakeshima authored a note in response to a letter from Respondent's counsel. He remarked that he attended a SAMMS conference with the attorneys for both parties on January 1, 2022. Dr. Wakeshima noted that he submitted a referral directly to the VA prosthetic clinic on January 29, 2022. He specifically documented in the referral that the prosthesis might be covered under Workers' Compensation. Dr. Wakeshima also inquired in the referral whether Claimant required a new socket or further modifications to his prosthesis. He asked the VA to document estimated costs and forward the request for authorization to Claimant's Workers' Compensation carrier.

13. On February 10, 2022 Claimant again visited Dr. Wakeshima for a video appointment. Dr. Wakeshima further recounted the discussion at the SAMMS conference about authorized treatment through the VA. He explained that Claimant's attorney had informed him at the SAMMS conference that treatment at the VA would be authorized with a referral. However, Respondent's adjuster sent an e-mail to Dr. Wakeshima's office denying treatment through the VA. The adjuster specified that the VA does not work with Workers' Compensation carriers or follow Workers' Compensation statutes. She documented that Claimant should be referred for prosthesis care to a provider who accepts and treats patients under Workers' Compensation.

14. On March 10, 2022 Claimant again had a video appointment with Dr. Wakeshima. Dr. Wakeshima recounted that, although it had been difficult to acquire progress notes from the VA, Claimant's son was able to obtain them through the patient portal and could forward them. Notably, Dr. Wakeshima commented that there was now a formal request for prosthetic treatment through the VA. Nevertheless, he again remarked that the adjuster had previously stated Respondent would not work with the VA for Workers' Compensation claims.

15. On November 3, 2022 Claimant presented for a follow-up DIME with Dr. Mason. Dr. Mason determined that Claimant reached MMI on November 3, 2022 and assigned permanent impairment. Maintenance recommendations included prosthetic evaluation and adjustment. Dr. Mason remarked Claimant "is comfortable with VA Hospital. I would not necessarily change his treating providers at this point, but do agree that the comp carrier should be financially responsible for that treatment. I agree with Dr. Wakeshima continuing to follow him…"

16. The doctrines of issue preclusion, claim preclusion and law of the case do not bar Claimant from litigating whether the VA is an authorized provider. Initially, Claimant received treatment at different medical facilities following his work injury. Some of Claimant's care was related to his industrial injury and some was not. He began treating at the VA in October or November, 2014. On July 9, 2020 the parties proceeded to a hearing before ALJ Nemechek on whether Claimant had proven by the preponderance of the evidence that the treatment he received at the VA for his industrial injuries was authorized. On August 28, 2020 ALJ Nemechek issued a Summary Order. He specifically

found in paragraph 20 that there was no evidence that ATP Dr. Wakeshima referred Claimant to the VA. He also determined in paragraph 21 that there was insufficient evidence to conclude that Claimant's care at the VA was within the normal progression of medical treatment.

17. Subsequent to the hearing before ALJ Nemechek, Dr. Wakeshima made multiple referrals for Claimant to obtain prosthetic treatment through the VA. For example, on July 16, 2020 Dr. Wakeshima wrote Claimant "specific orders for physical therapy and prosthesis to be performed/made through the VA Medical Center. I have previously not written patient any orders for prosthetic training and prosthesis to Hanger orthotics or Spaulding rehab as this was a second choice and the primary and preferred choice is to have this accomplished through the VA Medical Center." Moreover, on December 9, 2021 Dr. Wakeshima noted that he had written a referral to the VA "to specifically address whether [Claimant] will need a new socket and document its cost as this replacement socket would be related to his work injury, and should be covered by Workers' Compensation." Moreover, on March 10, 2022 Dr. Wakeshima commented that there was now a formal request for prosthetic treatment through the VA. Dr. Wakeshima's preceding comments reflect that the record is replete with referrals to the VA for Claimant's prosthetic care subsequent to the hearing before ALJ Nemechek.

18. Relying on issue and claim preclusion as well as the law of the case doctrine, Respondent contends that ALJ Nemechek's determinations in his August 20, 2020 Summary Order preclude Claimant from asserting that he was referred to the VA for treatment. However, the issue sought to be precluded is not identical to an issue actually determined in the prior proceeding because Dr. Wakeshima's numerous referrals to the VA occurred after ALJ Nemechek's Summary Order. The legal and factual matters for determination of whether the VA was authorized changed when Dr. Wakeshima explicitly referred Claimant for prosthetic care at the VA. Respondent has thus failed to establish the first prong of issue preclusion. Moreover, claim preclusion does not apply because, based on Dr. Wakeshima's referrals, the claims for relief are not identical. Accordingly, Claimant is not barred from litigating the issue of whether he was referred to the VA for treatment.

19. Claimant has established it is more probably true than not that the VA is an authorized provider. In contrast, Respondent contends that Dr. Wakeshima did not exercise his independent medical judgment in making referrals to the VA but instead made the referrals because Claimant obtained treatment at the VA both before and after the Summary Order. However, the record contains ample evidence to support that Dr. Wakeshima used his independent medical judgment concerning the referrals to the VA. The record is replete with evidence that Dr. Wakeshima did not refer Claimant to the VA for nonmedical reasons. Because Claimant did not engage in manipulative behavior and Dr. Wakeshima exercised independent decision-making, the referrals occurred in the normal progression of authorized care.

20. In his July 16, 2020 report Dr. Wakeshima detailed that Claimant has had excellent progress with prosthetic training through the physical therapy department at the VA. Dr. Wakeshima thus wrote Claimant a specific order for physical therapy and

requested authorization for Claimant's prosthesis through the VA. He detailed that Claimant had been working with the VA and was very comfortable continuing treatment. Moreover, Dr. Wakeshima remarked that the VA has "significant experiences with prosthetic limbs, including the elderly population and therefore should be able to set [Claimant] up with the lightest and most straightforward prosthesis for his above-knee amputation as recommended on Dr. Mason's DIME." Furthermore, on January 29, 2022 Dr. Wakeshima noted that he submitted a referral directly to the VA prosthetic clinic. He specifically documented in the referral that the prosthesis might be covered under Workers' Compensation. Dr. Wakeshima also inquired in the referral whether Claimant required a new socket or further modifications to his prosthesis. He asked the VA to document estimated costs and forward the request for authorization to Claimant's Workers' Compensation carrier. On March 10, 2022 Dr. Wakeshima recounted that, although it had been difficult to acquire progress notes from the VA, Claimant's son was able to obtain them through the patient portal and could forward them. Notably, Dr. Wakeshima sought to review Claimant's progress notes to provide appropriate care and recommendations.

21. Simply because Claimant requested ATP Dr. Wakeshima for a referral because he was comfortable with care at the VA does not mean the referrals were outside the scope of the normal progression of treatment. Instead, the preceding chronology reflects that Dr. Wakeshima exercised his independent medical judgment in referring Claimant to the VA. Notably, there is substantial evidence in the record that Dr. Wakeshima accommodated Claimant's request for a referral to the VA based on his professional determination that further evaluation and treatment from the VA was appropriate. Dr. Wakeshima specified that the VA had significant experience with prosthetic limbs for the elderly population and could obtain the lightest and most straightforward prosthesis for Claimant. The VA thus became authorized as a result of ATP Dr. Wakeshima's referrals in the normal course of treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Claim Preclusion, Issue Preclusion and Law of the Case

4. Claim and issue preclusion are affirmative defenses that must be pled and proven by the party seeking to apply the doctrines. *Bristol Bay Prods., LLC v. Lampack*, 312 P.3d 1155, 1164 (Colo. 2013). Although issue preclusion was created as a judicial doctrine, it has been extended to administrative proceedings, where it "may bind parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001); see *Holnam v. Indus. Claim Appeals Off.,* 159 P.3d 795 (Colo. App. 2006*)*.

5. Issue preclusion is broader than claim preclusion in that it applies to a cause of action different from that involved in the original proceeding. However, issue preclusion is narrower than claim preclusion because it does not apply to matters that could have been litigated in the prior proceeding but were not. *Pomeroy v. Waitkus*, 183 Colo. 244, 517 P.2d 396 (1974). Issue preclusion bars re-litigation of an issue if:

> (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom [issue preclusion] is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Youngs v. Indus. Claim Appeals Off., 297 P.3d 964, 974 (Colo. App. 2012); *Feeley v. Indus. Claim Appeals Off.*, 195 P.3d 1154, 1156 (Colo. App. 2008). An issue can be identical for issue preclusion purposes if either the facts or the legal matter raised is the same. *Carpenter v. Young*, 773 P.2d 561, 565 n. 5 (Colo.1989).

6. A full and fair opportunity to litigate an issue requires not only the availability of procedures in the earlier proceeding commensurate with those in the subsequent proceeding, but also that the party against whom the doctrine is asserted has had the same incentive to vigorously defend itself in the previous action. *Sunny Acres Villa, Inc.*, 25 P.3d at 47. A party lacks the same incentive to defend where its exposure to liability is substantially less than at the prior proceeding. *Salida Sch. Dist. R-32-J v. Morrison,* 732 P.2d 1160, 1166-67 (Colo. 1987). In addition to the amount of potential money awards, significant variations in exposure may arise from differences in the finality or permanence of judgments. *Sunny Acres Villa, Inc.*, 25 P.3d at 47.

7. Claim preclusion bars re-litigation of previously decided matters and matters that could have been raised in a prior proceeding but were not. *Foster v. Plock,* 411 P.3d 1008, 1014 (Colo.App.2016). The elements of claim preclusion are: “(1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, (4) identity or privity of parties to the actions.” *Camus v. State Farm Insurance*, 151 P.3d 678, 680 (Colo. App. 2006). Claim preclusion blocks litigation of claims that were or might have been decided only if the claims are tied by the same injury. *Layton Construction Co. v. Shaw Contract Flooring Servs., Inc.*, 409 P.3d 602 (Colo. App. 2016).

8. The law of the case doctrine is a "discretionary rule of practice ... based primarily on considerations of judicial economy and finality." *Brodeur v. American Home Assurance Co.,* 169 P.3d 139, 149 (Colo. 2007). Under the doctrine, although a court is “not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed.” *In re Bass,* 142 P.3d 1259, 1263 (Colo.2006). Therefore, "[w]hen a court issues final rulings in a case, the 'law of the case' doctrine generally requires the court to follow its prior relevant rulings." *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230, 243 (Colo. 2003).

9. As found, the doctrines of issue preclusion, claim preclusion and law of the case do not bar Claimant from litigating whether the VA is an authorized provider. Initially, Claimant received treatment at different medical facilities following his work injury. Some of Claimant’s care was related to his industrial injury and some was not. He began treating at the VA in October or November, 2014. On July 9, 2020 the parties proceeded to a hearing before ALJ Nemechek on whether Claimant had proven by the preponderance of the evidence that the treatment he received at the VA for his industrial injuries was authorized. On August 28, 2020 ALJ Nemechek issued a Summary Order. He specifically found in paragraph 20 that there was no evidence that ATP Dr. Wakeshima referred Claimant to the VA. He also determined in paragraph 21 that there was insufficient evidence to conclude that Claimant’s care at the VA was within the normal progression of medical treatment.

10. As found, subsequent to the hearing before ALJ Nemechek, Dr. Wakeshima made multiple referrals for Claimant to obtain prosthetic treatment through the VA. For example, on July 16, 2020 Dr. Wakeshima wrote Claimant “specific orders for physical therapy and prosthesis to be performed/made through the VA Medical Center. I have previously not written patient any orders for prosthetic training and prosthesis to Hanger orthotics or Spaulding rehab as this was a second choice and the primary and preferred choice is to have this accomplished through the VA Medical Center.” Moreover, on December 9, 2021 Dr. Wakeshima noted that he had written a referral to the VA “to specifically address whether [Claimant] will need a new socket and document its cost as this replacement socket would be related to his work injury, and should be covered by Workers’ Compensation.” Moreover, on March 10, 2022 Dr. Wakeshima commented that there was now a formal request for prosthetic treatment through the VA. Dr. Wakeshima’s preceding comments reflect that the record is replete with referrals to the VA for Claimant’s prosthetic care subsequent to the hearing before ALJ Nemechek.

11. As found, relying on issue and claim preclusion as well as the law of the case doctrine, Respondent contends that ALJ Nemechek's determinations in his August 20, 2020 Summary Order preclude Claimant from asserting that he was referred to the VA for treatment. However, the issue sought to be precluded is not identical to an issue actually determined in the prior proceeding because Dr. Wakeshima's numerous referrals to the VA occurred after ALJ Nemechek's Summary Order. The legal and factual matters for determination of whether the VA was authorized changed when Dr. Wakeshima explicitly referred Claimant for prosthetic care at the VA. Respondent has thus failed to establish the first prong of issue preclusion. Moreover, claim preclusion does not apply because, based on Dr. Wakeshima's referrals, the claims for relief are not identical. Accordingly, Claimant is not barred from litigating the issue of whether he was referred to the VA for treatment.

Authorization

12. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

13. If an ATP refers a claimant to his personal physician based on the mistaken conclusion that a particular condition is not work related, the referral may be considered valid because the risk of mistake falls on the employer. *Cabela v. indus. Claim Appeals Off.,* 198 P.3d 1277 (Colo. App. 2008). However, an ATP may limit the scope of a referral to a specific type of treatment, and if the provider to whom the claimant was referred provides treatment beyond the scope of the referral, the care is not in the normal progression of authorized treatment. Whether a referral is limited or general in scope presents a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.*, 198 P.3d 1274 (Colo. App. 2008); *Garcia v. Safeway*, W.C. 4-533-704 (ICAO, Mar. 19, 2004).

14. A referral that is based upon the treating physician's independent medical judgment and not manipulative behavior by the claimant is a referral in the normal progression of authorized treatment. *In Re Jurgens v. Prowers Medical Center*, W.C. 4-

576-630 (ICAO, June 24, 2004). In *City of Durango v. Dunagan,* 939 P.2d 496, 500 (Colo. App. 1997), the court of appeals determined that "the mere fact that the claimant requested that the authorized treating physician make a referral does not mean that said referral is outside the scope of the normal progression of treatment." To the contrary, the legal test is whether the treating physician exercised independent medical judgment in making the referral. *See Id.*; *In Re Sackett v. City Market*, W.C. 4-944-222-001 (ICAO, Apr. 21, 2015) (concluding that, where referral was made for non-medical reasons physician did not exercise his independent medical judgment and referral was unauthorized). Resolution of whether a physician exercised his independent medical judgment in making a referral is a question of fact for determination by an ALJ. *Rosson v. Owens*, W.C. 4-292-534 (ICAO, May 10, 2001).

15. As found, Claimant has established by a preponderance of the evidence that the VA is an authorized provider. In contrast, Respondent contends that Dr. Wakeshima did not exercise his independent medical judgment in making referrals to the VA but instead made the referrals because Claimant obtained treatment at the VA both before and after the Summary Order. However, the record contains ample evidence to support that Dr. Wakeshima used his independent medical judgment concerning the referrals to the VA. The record is replete with evidence that Dr. Wakeshima did not refer Claimant to the VA for nonmedical reasons. Because Claimant did not engage in manipulative behavior and Dr. Wakeshima exercised independent decision-making, the referrals occurred in the normal progression of authorized care.

16. As found, in his July 16, 2020 report Dr. Wakeshima detailed that Claimant has had excellent progress with prosthetic training through the physical therapy department at the VA. Dr. Wakeshima thus wrote Claimant a specific order for physical therapy and requested authorization for Claimant's prosthesis through the VA. He detailed that Claimant had been working with the VA and was very comfortable continuing treatment. Moreover, Dr. Wakeshima remarked that the VA has "significant experiences with prosthetic limbs, including the elderly population and therefore should be able to set [Claimant] up with the lightest and most straightforward prosthesis for his above-knee amputation as recommended on Dr. Mason's DIME." Furthermore, on January 29, 2022 Dr. Wakeshima noted that he submitted a referral directly to the VA prosthetic clinic. He specifically documented in the referral that the prosthesis might be covered under Workers' Compensation. Dr. Wakeshima also inquired in the referral whether Claimant required a new socket or further modifications to his prosthesis. He asked the VA to document estimated costs and forward the request for authorization to Claimant's Workers' Compensation carrier. On March 10, 2022 Dr. Wakeshima recounted that, although it had been difficult to acquire progress notes from the VA, Claimant's son was able to obtain them through the patient portal and could forward them. Notably, Dr. Wakeshima sought to review Claimant's progress notes to provide appropriate care and recommendations.

17. As found, simply because Claimant requested ATP Dr. Wakeshima for a referral because he was comfortable with care at the VA does not mean the referrals were outside the scope of the normal progression of treatment. Instead, the preceding

chronology reflects that Dr. Wakeshima exercised his independent medical judgment in referring Claimant to the VA. Notably, there is substantial evidence in the record that Dr. Wakeshima accommodated Claimant's request for a referral to the VA based on his professional determination that further evaluation and treatment from the VA was appropriate. Dr. Wakeshima specified that the VA had significant experience with prosthetic limbs for the elderly population and could obtain the lightest and most straightforward prosthesis for Claimant. The VA thus became authorized as a result of ATP Dr. Wakeshima's referrals in the normal course of treatment. *See In Re Jurgens v. Prowers Medical Center*, W.C. 4-576-630 (ICAO, June 24, 2004) (concluding that, where the claimant called the ATP and requested a referral to another neurosurgeon based on the recommendation of her personal chiropractor, the referral was made in the normal course of treatment and thus authorized); *Rosson v. Owens*, W.C. 4-292-534 (ICAO, May 10, 2001) (determining that ATP exercised independent medical judgment where his referral to a neurologist was based on the claimant's familiarity with the neurologist and the claimant suggested the referral).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is not barred from litigating the issue of whether he was referred to the VA for treatment.

2. Based on ATP Dr. Wakeshima's referrals in the normal course of treatment, the VA is an authorized medical provider.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: February 22, 2023.

DIGITAL SIGNATURE.
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-664-891-001

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that continuing medical maintenance benefits in the form of opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries.

2. Whether Claimant has established by a preponderance of the evidence that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a hairstylist and manager. On August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. On February 10, 2010 ALJ Cannici issued an Order concluding that Claimant was permanently and totally disabled. Respondents began paying benefits pursuant to the Order and filed a Final Admission of Liability (FAL) on May 5. 2010. Claimant continued to receive maintenance care from her treating physicians. She had a Spinal Cord Stimulator (SCS) implant prior to reaching Maximum Medical Improvement (MMI).

2. On August 25, 2020 Respondents filed an application for hearing challenging the reasonableness and necessity of medical maintenance care. Respondents specifically disputed the reasonableness and necessity of opioid medications and Ketamine infusions that have been prescribed by Claimant's current Authorized Treating Physician (ATP) Paul S. Leo, M.D.

3. Respondents retained Nicholas K. Olsen as their medical expert in the present matter. On February 23, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. He explained that Claimant has been chronically using opioid medications since the date of her injury. In a report dated April 3, 2017 Dr. Olsen noted that Claimant had been on high doses of opioids for over eight years. He also commented that there was no evidence that her function had improved or the opioids had decreased her pain levels.

4. The medical records frequently reference MME levels. Dr. Olsen testified that MME stands for Morphine Milligram Equivalent. Each opioid has a conversion to MME. The MME thus serves as a standard to compare the strength of different opioids. Dr. Olsen remarked that it is generally accepted that the MME levels should be no higher than 60-90.

5. In 2017 Claimant received care from ATP Peter N. Reusswig, M.D. Claimant treated with Dr. Reusswig until he passed away. Claimant subsequently received treatment from Dr. Reusswig's partner ATP Amar Patel, M.D. beginning in 2018.

6. On July 11, 2018 Claimant visited Dr. Patel for an examination. Dr. Patel commented that Claimant had been on high dose opioid therapy for quite some time and was going to need to be weaned. The dose was simply too high. When Claimant returned to Dr. Patel on September 4, 2018 he again stated that Claimant's opioids were too high and it was necessary to start the weaning process.

7. On October 2, 2018 Claimant saw Physician's Assistant Joseph Shankland at Dr. Patel's office. PA-C Shankland reported that Claimant had a second SCS implant about three weeks before the appointment. Claimant had noticed about a 50% improvement in her pain. She was taking Hydromorphone 2 MG tablets and using five different fentanyl patches. PA-C Shankland remarked that: "Pt has already started a self taper at this time. Coming into today MME=190, after today it is MME=182. Will need to continue downward trend to get the pt below MME=120 or lower, overall goal is MME=90."

8. On December 4, 2018 Claimant returned to Dr. Patel for an evaluation. He explained that the second SCS device was helping with Claimant's back pain. In addressing weaning from opioids Dr. Patel remarked, "she has been on high dose opiates pending placement of this device (done by Dr. Beasley at BNA). Accordingly, we are going to continue weaning her. Today, Fentanyl TD reduced by 12 mcg. We will CONTINUE TO WEAN MONTHLY TO AN OME < 90. Continue Hydromorphone by mouth for now. Follow-up in 1 month. The patient appears to be using opiates appropriately, without evidence of misuse or diversion."

9. On February 5, 2019 Claimant saw Dr. Patel for an examination. Dr. Patel explained that he had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates. We will see if this can get approved w/her insurance carrier."

10. On May 21, 2019 Claimant returned to Dr. Patel's office and visited Nurse Practitioner Susan Miget for an examination. Claimant reported body pain and repeated that her SCSs were not helping with pain. She reported pain levels of 8 out of 10. Claimant commented that Suboxone was making her feel sick and drunk. NP-C Miget switched Claimant from Suboxone and started her on Nucynta.

11. Claimant again visited Dr. Patel on July 2, 2019 for an examination. Dr. Patel noted that he and Claimant discussed the goal of completely weaning her from opioids within the next three months. Moreover, he also had an extensive discussion with Claimant and her husband about the reasonable option of Ketamine infusions based on her positive response to Nucynta. Dr. Patel noted that they had tried many other medications, including Gabapentin, Lyrica and Cymbalta, that were all discontinued due

to side effects. He reduced Claimant's Nucynta from 100 mg to 50 mg per day and Oxycodone from four to three per day.

12. On July 16, 2019 Claimant visited NP-C Miget for an evaluation. Claimant reported that her pain levels were 8 out of 10. NP-C Miget recounted that Claimant's husband specified Claimant had suffered severe pain since Dr. Patel had reduced her opioid medications. NP-C Miget detailed that every attempt to even slightly decrease Claimant's opioids had resulted in an immediate clinic follow-up visit to adjust medications back to previous levels. She had repeatedly asked Claimant to give any changes a few weeks to determine their effects. At the end of the visit, NP-C Miget adjusted Claimant's long-acting Nucynta back to 100 mg.

13. Dr. Patel testified at the hearing that in 2018 he sought to decrease Claimant's daily opiate pain medications. He explained that he attempted to substitute opiate medications with non-opiate treatments including Gabapentin, Lyrica, Cymbalta and Suboxone. However, after each trial of the non-opiate medications, Claimant quickly reported that she was experiencing difficult side effects and requested restoration of her opiate prescriptions. Claimant also complained that her SCS was no longer effective in mitigating her pain. Dr. Patel recommended a six-week period of abstinence from opiates because Claimant's system had become desensitized to their effectiveness. He emphasized that the goal of opioid reduction is to reach the lowest possible dose that achieves pain relief and maintains function. Dr. Patel recommended a series of Ketamine infusions to aid in abstinence. However, because of Claimant's resistance to his recommendations, Dr. Patel concluded Claimant and her husband were attempting to dictate medical care. He thus resigned as her physician. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications.

14. On September 16, 2019 Claimant began treatment with ATP Dr. Leo. On January 13, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Leo. He noted that he sees Claimant at least monthly through Telehealth to monitor her opioid medications. Dr. Leo testified that Claimant suffers from Chronic Regional Pain Syndrome (CRPS). He recounted that Claimant was using Nucynta extended release 100 millligrams twice per day and five milligrams of Oxycodone up to four times each day for a total MME of 110. Claimant also takes a variety of non-opioid medications for her symptoms. He explained that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. Dr. Leo commented that Ketamine infusions would hopefully help relieve Claimant's pain and reduce her dependence on opioids.

15. In a clinical note from October 24, 2020 Dr. Leo stated it was "absurd" that Respondents were trying to have Claimant wean off her medications "which are within the guideline for morphine equivalent and dose, and clearly helpful to her." Similarly, in his pre-hearing deposition, Dr. Leo explained that Claimant's MME of 110 was within the guidelines of between 90-120 MME's daily. He further elaborated that, even if Claimant's level of 90 MME is a "little above" the guidelines, the amount is "easily justified" and he did not "see any reason to decrease [Claimant] at this point" because it would not benefit her. Dr. Leo also acknowledged that he had not made any attempts to wean Claimant off

her opiates during treatment. He summarized that Claimant's current medication regime was appropriate.

16. Claimant testified at the hearing in this matter. She remarked that she still suffers from pain as a result of her work injuries. Claimant explained she is no longer using Fentanyl patches and has reduced her opioid use. She emphasized that she has consistently followed the recommendations of her physicians in reducing her opioid medications. Claimant would like to proceed with Ketamine infusions because the treatment may reduce her medications and alleviate her pain.

17. On February 23, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. Based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications. He explained that, given Dr. Patel's experience with Claimant and her husband during Dr. Patel's attempt to wean her from opioids, the weaning process could not be performed on an outpatient basis. Instead, weaning had to be done at an in-patient detoxification center. Dr. Olsen reasoned that, if Claimant did not accept the offer to attend an in-patient detoxification program, it would be unreasonable to allow Claimant to continue taking opioids. He explained that Claimant's intolerance to all prescribed non-narcotic medications suggests that she seeks to remain on opioid medications.

18. Respondents do not seek to terminate all of Claimant's medical maintenance benefits, but only her opioid medications. Claimant thus has the burden to prove the challenged treatment is reasonable, necessary and related to the industrial injury. The record reflects that Claimant has proven that it is more probably true than not that continuing medical maintenance benefits in the form of opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries only for a six-month weaning period from the date of this order.

19. Initially, on August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. Dr. Olsen persuasively explained that Claimant has used opioids dating back to her industrial injury. In a report from April 3, 2017 Dr. Olsen specified that Claimant had been on high doses of opioids for over eight years. He remarked that it is generally accepted that MME levels should be no higher than 60-90. Dr. Olsen also commented that there is no evidence that her function has improved or her pain levels have decreased. By July 11, 2018 ATP Dr. Patel also remarked that Claimant had been on high dose opioid therapy for quite some time and needed to be weaned. The medical records reveal that he continued to discuss the opioid weaning process with Claimant and her husband. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications. Finally, based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications.

20. In contrast, ATP Dr. Leo testified that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. However, the medical records, in conjunction with the persuasive opinions of Drs. Patel and Olsen, reflect that Claimant necessitates weaning from opioids. Specifically, Claimant requires a reduction of opioids until her use of the medications ceases. Accordingly, Claimant has established that her use of opioids is only reasonable and necessary to treat her August 28, 2005 industrial injuries for a six-month weaning period. Claimant shall be weaned from opioids within six months from the date of this order. Respondents are thus only obligated to pay for opiate medications for the next six months while Claimant weans off her opiate medications. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for opioid medications under the present claim.

21. Claimant has established that it is more probably true than not that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries only for a six-month weaning period from the date of this order. The bulk of the evidence demonstrates that Ketamine infusions will reduce Claimant's reliance on opioids and thus aid in the reduction and cessation of opioid medications. Therefore, Respondents shall only be obligated to pay for Ketamine infusions for six months from the date of this order.

22. In a February 5, 2019 examination, Dr. Patel had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates." Dr. Patel explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful." Furthermore, Dr. Leo testified that Ketamine infusions would hopefully relieve Claimant's pain and reduce her dependence on opioids. Finally, Claimant noted she would like to proceed with Ketamine infusions with the hope that the treatment will reduce her medications and alleviate her pain.

23. In contrast, Dr. Olsen explained that there is a lack of evidence suggesting that Ketamine can do what the providers in the present matter suggest it can do. Despite Dr. Olsen's opinion, the medical records, in conjunction with the persuasive opinions of ATPs Drs. Patel and Leo, reveal that Ketamine treatment is a reasonable and necessary modality to reduce Claimant's reliance on opioids and facilitate the weaning process. However, the record reveals that Dr. Leo may not agree to reduce or wean Claimant from opioid medications. Notably, he did not "see any reason to decrease [Claimant] at this point" because it would not benefit her. Dr. Leo also acknowledged that he had not made any attempts to wean Claimant off her opiates during treatment. He summarized that Claimant's current medication regime was appropriate. Based on Dr. Leo's stated reluctance to wean Claimant from opioids, Respondents shall not be required to pay for Ketamine infusions for more than a period of six months. Accordingly, Claimant may only

receive Ketamine infusions for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for Ketamine treatment under the present claim.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Maintenance Benefits

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest the liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013). Specifically, respondents are not liable for future

maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

Opioid Medications

5. As found, Respondents do not seek to terminate all of Claimant's medical maintenance benefits, but only her opioid medications. Claimant thus has the burden to prove the challenged treatment is reasonable, necessary and related to the industrial injury. The record reflects that Claimant has proven by a preponderance of the evidence that continuing medical maintenance benefits in the form of opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries only for a six-month weaning period from the date of this order.

6. As found, initially, on August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. Dr. Olsen persuasively explained that Claimant has used opioids dating back to her industrial injury. In a report from April 3, 2017 Dr. Olsen specified that Claimant had been on high doses of opioids for over eight years. He remarked that it is generally accepted that MME levels should be no higher than 60-90. Dr. Olsen also commented that there is no evidence that her function has improved or her pain levels have decreased. By July 11, 2018 ATP Dr. Patel also remarked that Claimant had been on high dose opioid therapy for quite some time and needed to be weaned. The medical records reveal that he continued to discuss the opioid weaning process with Claimant and her husband. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications. Finally, based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications.

7. As found, in contrast, ATP Dr. Leo testified that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. However, the medical records, in conjunction with the persuasive opinions of Drs. Patel and Olsen, reflect that Claimant necessitates weaning from opioids. Specifically, Claimant requires a reduction of opioids until her use of the medications ceases. Accordingly, Claimant has established that her use of opioids is only reasonable and necessary to treat her August 28, 2005 industrial injuries for a six-month weaning period. Claimant shall be weaned from opioids within six months from the date of this order. Respondents are thus only obligated to pay for opiate medications for the next six months while Claimant weans off her opiate medications. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for opioid medications under the present claim.

Ketamine Infusions

8. As found, Claimant has established by a preponderance of the evidence that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries only for a six-

month weaning period from the date of this order. The bulk of the evidence demonstrates that Ketamine infusions will reduce Claimant's reliance on opioids and thus aid in the reduction and cessation of opioid medications. Therefore, Respondents shall only be obligated to pay for Ketamine infusions for six months from the date of this order.

9. As found, in a February 5, 2019 examination, Dr. Patel had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates." Dr. Patel explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful." Furthermore, Dr. Leo testified that Ketamine infusions would hopefully relieve Claimant's pain and reduce her dependence on opioids. Finally, Claimant noted she would like to proceed with Ketamine infusions with the hope that the treatment will reduce her medications and alleviate her pain.

10. As found, in contrast, Dr. Olsen explained that there is a lack of evidence suggesting that Ketamine can do what the providers in the present matter suggest it can do. Despite Dr. Olsen's opinion, the medical records, in conjunction with the persuasive opinions of ATPs Drs. Patel and Leo, reveal that Ketamine treatment is a reasonable and necessary modality to reduce Claimant's reliance on opioids and facilitate the weaning process. However, the record reveals that Dr. Leo may not agree to reduce or wean Claimant from opioid medications. Notably, he did not "see any reason to decrease [Claimant] at this point" because it would not benefit her. Dr. Leo also acknowledged that he had not made any attempts to wean Claimant off her opiates during treatment. He summarized that Claimant's current medication regime was appropriate. Based on Dr. Leo's stated reluctance to wean Claimant from opioids, Respondents shall not be required to pay for Ketamine infusions for more than a period of six months. Accordingly, Claimant may only receive Ketamine infusions for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for Ketamine treatment under the present claim.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant shall receive opioid medications for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for opioid medications under the present claim.

2. Claimant may receive Ketamine infusions for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six

months, then Respondents are no longer financially responsible for Ketamine treatment under the present claim.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: February 28, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-193-745-002

ISSUES

I. Whether Respondent established by a preponderance of the evidence Respondent is entitled to withdraw its Final Admission of Liability (FAL) as a result of fraud.

II. Whether Respondent established by a preponderance of the evidence Claimant received an overpayment of worker's compensation benefits due to fraud and thus Respondent is entitled to repayment.

FINDINGS OF FACT

1. Claimant is a treasury clerk for Employer. Claimant has worked for Employer for approximately 15 years.

2. Claimant alleges she sustained a work injury on Friday, January 7, 2022 when she slipped and fell on ice in Employer's parking lot and twisted her ankle.

3. Claimant's scheduled start time is 6:00 a.m. Claimant testified at hearing she was running late to work on the morning of January 7, 2022 due to car trouble. She testified that that her common law husband, [Redacted, hereinafter DR], drove her to work that morning in a borrowed car.

4. At hearing, Claimant was shown Respondent's Exhibit F, an aerial view of her work location. Claimant testified that she and DR[Redacted] arrived in Employer's parking lot at approximately 6:25 a.m., entering through the [Redacted, hereinafter RC] entrance and pulling into a parking spot to the right of a large tree in front of her work building shown on the map. Claimant testified that upon exiting the vehicle, she slipped on ice, causing her ankle to go under the vehicle and twist. Claimant testified she initially believed she had just twisted her ankle. She testified DR[Redacted] then reminded her that they needed to pay a bill so she got back into the car. Claimant testified her and DR[Redacted] then exited Employer's parking lot and drove to a 7-11 store approximately one and a half blocks away. She testified she retrieved money from an ATM at the 7-11 store, gave DR[Redacted] the money, and proceeded to walk back to her work location while DR[Redacted] drove away. Claimant testified she walked back to work down 31st Street, turning into the work location through the entrance on 31st street.

5. Claimant testified that she was attempting to see if her ankle was "okay" while walking. Claimant testified that she did not report her alleged work injury to Employer on the date of the alleged incident because she thought she was okay. She testified that, upon arriving home after completing her shift on January 7, 2022, she experienced

swelling and bruising. She further testified that over the weakened she treated her ankle with ice and heat.

6. Claimant notified her supervisor of the alleged injury on the morning of Monday, January 10, 2022 and was sent for medical treatment.

7. Claimant presented to authorized treating physician (ATP) David Hnida, D.O. at Concentra on January 10, 2022 with complaints of persistent pain with no numbness or tingling. Physical examination of Claimant's ankle revealed ecchymosis and swelling laterally, tenderness in the lateral malleolus, and limited range of motion. X-rays revealed an avulsion fracture lateral malleolus. Dr. Hnida assessed Claimant with a right ankle fracture. He noted that the objective findings were consistent with Claimant's history and/or work-related mechanism of injury/illness. Dr. Hnida referred Claimant to an orthopedic specialist and released her to modified duty working seated duty only.

8. On March 4, 2022 ATP David Orgel, M.D. placed Claimant at maximum medical improvement (MMI) with no permanent impairment, restrictions or need for follow-up.

9. Based on Claimant's report of the injury, Respondent filed a FAL on April 13, 2022. Respondent noted $3,743.09 in TTD benefits paid for January 10, 2022 through February 24, 2022, and medical benefits paid totaling $2,407.15. Respondent further noted that it reserved the right to take credit for a TTD overpayment of $244.11 ($3,987.20 - $244.11 = $3,743.09). The FAL reflects an average weekly wage (AWW) $854.40.

10. Claimant does not dispute that she received a total of $3,987.20 in TTD benefits and $2,407.15 in medical benefits in connection with the alleged January 7, 2022 work injury.

11. DR[Redacted] testified at hearing on behalf of Claimant. He testified that he dropped Claimant off at work on the morning of January 7, 2022 and saw her fall. He testified that he and Claimant then went to a 7-11 store to retrieve cash and Claimant subsequently walked back to work. DR[Redacted] did not recall what time the alleged incident occurred. He testified that over the weekend he observed Claimant's leg, which appeared bruised and swollen. DR[Redacted] acknowledged that he and Claimant shared expenses, which would include repayment of worker's compensation benefits.

12. [Redacted, hereinafter DY] testified at hearing on behalf of Respondent. DY[Redacted] is the senior manager of Employer's treasury department and works in the same building as Claimant. DY[Redacted] reviewed Respondent's Exhibit F and testified that the numbers on the map correspond with Employer's exterior security cameras. DY[Redacted] explained that the map does not identify camera 61, which is located in the upper right hand corner of the map and covers the parking lot towards RC[Redacted], including the side of the treasury building with the large tree referenced by Claimant in her testimony. DY[Redacted] testified that he reviewed Employer's security camera footage taken from 6:00 a.m. to 7:00 a.m. on the date of the alleged incident. He testified that the video footage did not show Claimant entering or exiting Employer's parking lot in a vehicle, nor did it show Claimant slipping and falling. He testified that Claimant first

appeared on the video footage while walking outside of her work location at approximately 6:51 a.m.

13. The ALJ reviewed security camera footage from the date and time of the alleged incident, admitted as Respondent's Exhibit E. The footage contains views from multiple cameras (cameras identified on Respondent's Exhibit F as 05, 00, 1, 55, 58, as well as the camera identified by DY[Redacted] as camera 61), showing multiple angles of Employer's parking lot, the surrounding streets, and entrance to the building in which Claimant works. The footage specifically shows the area of Employer's parking lot where Claimant alleges DR[Redacted] dropped her off and she slipped and fell. At no point is Claimant observed entering or exiting the parking lot in a vehicle, entering or exiting a vehicle while in the parking lot, or slipping and falling whatsoever. The footage shows Claimant walking on a road outside of Employer's premises, walking into Employer's parking lot and entering her work building at approximately 6:51 a.m.

14. The ALJ also reviewed video footage from Employer's interior security cameras, which showed multiple areas of the workplace on the day of the alleged injury. Claimant is not observed limping or exhibiting any pain behaviors.

15. Claimant viewed part of the video footage at hearing. Claimant did not dispute the contents of the footage and offered no explanation as to why the footage did not show the alleged incident.

16. Claimant testified that her household income includes her wages and DR[Redacted] disability pay of approximately $1,100 per month. She testified to the following monthly household expenses: rent $1,050.00, car payment $400.00, Xcel energy $150.00, car insurance $200.00, and food $300.00. Claimant testified she could not afford to pay back any money owed to Respondent at a rate of $500 or $400 per month. Claimant did not identify a repayment amount she feels is feasible.

17. The ALJ credits the testimony of DY[Redacted], as supported by the records, over the testimony of Claimant and DR[Redacted].

18. Respondent proved it is more probably true than not Claimant knowingly made a false representation of material fact to Respondent for the purpose of obtaining worker's compensation benefits. Respondent relied upon Claimant's material misrepresentation in filing its FAL and paying benefits, only becoming aware of the false representation when reviewing video footage disproving Claimant's reported series of events.

19. Respondent proved it is more probably true than not Claimant received a total of $6,394.35 in medical and indemnity benefits to which she was not entitled due to fraud.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and

medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Withdrawal of FAL

An ALJ may permit an insurer to withdraw an FAL and order repayment of benefits if the claimant fraudulently supplied false information upon which the insurer relied in filing the admission. §8-43-303 C.R.S.; *see also Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996); *In re Arczynski,* WC 4-156-147 (ICAO, Dec. 15, 2005). Because admissions of liability may not ordinarily be withdrawn retroactively, §8-43-201(1) C.R.S. provides that the party seeking reopening bears the burden of proof by a preponderance of the evidence to establish the existence of fraud. *See Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *In re Arczynski, supra*.

To prove fraud or material misrepresentation, the party must show: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski*, *supra*, citing *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ. *Arczynski, supra*; *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981).

As found, the preponderant evidence demonstrates Claimant knowingly provided false information to Respondent upon which Respondent relied in filing its admission of liability. Claimant reported to Employer that she slipped and fell in Employer's parking lot on January 7, 2022, injury her ankle. Claimant purports that the alleged incident occurred between 6:10 a.m. and 6:45 a.m. Video footage showing multiple areas of Employer's parking lot from 6:00 a.m. to 7:00 a.m. on January 7, 2022, including the specific area in which Claimant alleged the incident took place, establishes that no such incident occurred. The footage does not evidence anything similar to what Claimant purports took place, aside from her walking into Employer's parking lot from outside of Employer's premises. Claimant observed the footage at hearing, did not dispute the video footage, and provided no explanation for why the footage did not demonstrate the incident she reported.

In addition to the footage refuting Claimant's reports of the alleged incident, Claimant's testimony that she slipped and twisted her ankle in Employer's parking lot, left, and then elected to walk back to work on the ice and snow on a twisted ankle is incredible and unpersuasive. Moreover, Claimant is observed walking without any noticeable limp or pain behaviors on the video footage. Claimant's testimony is only corroborated by DR[Redacted], who has a shared financial interest with Claimant. That Claimant was ultimately diagnosed with a fracture is not dispositive of the fact that the fracture arose out of and occurred during the scope of Claimant's employment for Employer. The credible and persuasive evidence demonstrates that it is more probable than not the incident reported by Claimant did not occur and Claimant did not sustain a compensable work injury.

As found, Claimant knowingly made false representations to Employer indicating she sustained a work injury for the purpose of obtaining worker's compensation benefits. Respondent relied on Claimant's false representations in filing the FAL, pursuant to which Respondent paid Claimant's medical and indemnity benefits. Respondent was unaware of the falsity of Claimant's representations regarding the alleged incident until observing security footage. Based on the totality of the evidence, Respondent filed a FAL and Claimant received benefits to which she was not entitled based on Claimant's fraudulent misrepresentations. Accordingly, Respondent shall be permitted to withdraw its FAL.

Overpayment

Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." Recovery of overpayments of benefits resulting from retroactive withdraws of admissions of liability based on fraud has been permitted. *See Stroman v. Southway Services, Inc.*, W.C. No. 4-366-989 (ICAO August 31,1999); *Vargo, supra*.

When the parties are unable to agree upon a repayment schedule, the ALJ may conduct hearings to require repayment of overpayments and to fashion a remedy with regard to overpayment at his or her discretion, including terms of repayment and schedule for recoupment. *See* §8-43-207(q), C.R.S., *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

Claimant received $3,987.20 in TTD benefits and $2,407.15 in medical benefits to which she was not entitled due to her fraudulent misrepresentations. As such, Respondent is entitled to recover an overpayment of $6,394.35.

Respondent requests a repayment rate of $500.00 per month. Claimant testified that she would not be able to afford a repayment rate of $400.00 to $500.00 per month, but did not otherwise propose what she considers to be a feasible repayment rate. Based on Claimant's total monthly household income and expenses, the ALJ concludes that a repayment rate of $300.00 per month is a reasonable schedule for repayment, ensuring that Respondent recoups the overpayment in a period under 24 months, while avoiding potential undue financial hardship on Claimant.

ORDER

It is therefore ordered that:

1. Respondent's admission of liability is hereby withdrawn.

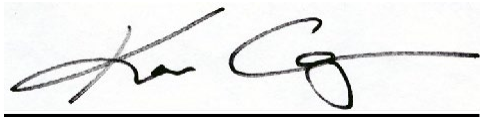
2. Claimant shall repay Respondent a total of $6,394.35 at a rate of $300.00/month until recovered in full.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 2, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-204-039-001

ISSUES

I. Whether the ALJ has jurisdiction to address whether Claimant's neck and shoulders are causally related to Claimant's admitted industrial injury of April 20, 2022.

II. Whether the ALJ has jurisdiction to address Claimant's entitlement to temporary total disability (TTD) benefits from August 23, 2022 through November 16, 2022.

FINDINGS OF FACT

1. Claimant sustained an admitted an industrial injury on April 20, 2022 when he fell from a step ladder onto his outstretched arms.

2. It is undisputed Pamela J. Rizza, M.D. at Workwell is Claimant's primary authorized treating physician (ATP) in this claim. Dr. Rizza determined that Claimant sustained work-related bilateral wrist fractures.

3. Dr. Rizza referred Claimant to ATP Lisa Nash, M.D., who performed surgical repair of Claimant's right wrist on May 3, 2022.

4. Dr. Rizza subsequently diagnosed Claimant with work-related left carpal tunnel syndrome.

5. Respondents filed a General Admission of Liability (GAL) on May 17, 2022 admitting for medical benefits and TTD benefits beginning April 21, 2022, ongoing. Respondents filed a second GAL on July 6, 2022 reflecting an increase in Claimant's average weekly wage (AWW).

6. On August 23, 2022, Dr. Rizza completed a Physician's Report of Worker's Compensation Injury releasing Claimant to regular duty effective August 23, 2022.

7. Respondents filed a GAL on August 31, 2022 terminating TTD as of August 23, 2022, based upon Dr. Rizza's release of Claimant to full duty work.

8. On September 1, 2022 Dr. Rizza noted Claimant reported dizziness and neck pain and wanted to discuss a neck MRI that was ordered through his primary care physician. She wrote,

> Discussed the MRI of the neck needs to be addressed by Dr. Mistry as he ordered the test and was referred by his PCP. Shows degenerative changes, no evidence of compression fracture or trauma related changes.

> Discussed if he feels he needs other restrictions, to follow up with PCP/Dr. Mistry which is outside of his WC claim. May work full duty until CT release.
>
> (R. Ex. A, p. 57).

Dr. Rizza continued Claimant on regular duty.

9. On September 28, 2022 Claimant filed an Application for Hearing (AFH) endorsing the following issues: Medical Benefits, Authorized Provider, Reasonably Necessary, Average Weekly Wage, Temporary Total Benefits from April, 20, 2022, ongoing and Temporary Partial Benefits from April 20, 2022[1], ongoing.

10. At a follow-up evaluation on September 29, 2022 Dr. Rizza noted Claimant continued to request that his self-referral to Dr. Mistry and subsequent referrals made by Dr. Mistry be included in his worker's compensation claim. Dr. Rizza noted she reviewed Claimant's medical record and concluded it was not 51% medically probable Claimant's reported concussion symptomatology is directly related to the occupational injury he sustained on April 20, 2022. She continued Claimant on regular duty.

11. The ALJ takes administrative notice of the Office of Administrative Courts file that a Notice of Hearing was sent to the parties on October 25, 2022, notifying the parties of a January 20, 2023 hearing set in this matter.

12. Claimant underwent a left carpal tunnel release on November 17, 2022 performed by Dr. Nash.

13. On December 1, 2022, Respondents filed a GAL admitting for medical benefits and TTD benefits from November 17, 2022, ongoing.

14. Dr. Rizza placed Claimant at maximum medical improvement (MMI) on January 4, 2023 without permanent impairment or restrictions. She listed the following diagnoses: unspecified fracture of the lower end of the right and left radius, adjustment disorder with mixed anxiety and depressed mood; and carpal tunnel syndrome of the left upper limb. Dr. Rizza released Claimant for full duty work. Regarding maintenance care, she recommended one year of follow up for concerns related to Claimant's right wrist hardware or left wrist carpal tunnel surgery.

15. Respondents filed a Final Admission of Liability (FAL) on January 12, 2023, noting TTD benefits from 4/21/22 thru 8/22/22 and 11/17/22 thru 1/3/23. Respondents did not admit for post-MMI medical treatment or any permanent impairment.

16. On January 19, 2023, Claimant filed an Objection to the FAL and a Notice and Proposal and Application for a Division Independent Medical Examination (DIME).

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[1] The Application for Hearing lists a date of "4-20-200." Based on the date of injury, April 20, 2022, the ALJ infers that the typographical error is meant to refer to the date of April 20, 2022.

17. At the commencement of the hearing on January 20, 2023, Claimant's counsel identified the following issues for hearing: (1) whether Claimant is entitled to temporary indemnity benefits from August 23, 2022 through November 16, 2022, and (2) whether Claimant's neck and shoulder conditions are causally related to the April 20, 2022 industrial injury. Claimant's counsel specified he was not pursuing the issue of AWW.

18. Claimant contends that, despite being released to full duty work by his ATP, he was unable to work from August 23, 2022 through November 16, 2022 due to dizziness and other issues.

19. Respondents' counsel argued that the ALJ does not have jurisdiction to address the issues identified by Claimant's counsel at hearing, as ATP placed Claimant at MMI and a DIME is pending. Claimant's counsel disagreed that the ALJ does not have jurisdiction to hear the stated issues.

20. At hearing Claimant stipulated that Dr. Rizza is Claimant's ATP, that she placed Claimant at MMI, and that Claimant Dr. Rizza released Claimant to full duty work during the time period for which Claimant is currently requesting TTD benefits.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals*

Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Jurisdiction

Respondents contend the ALJ does not have jurisdiction to address whether any neck and shoulder conditions are causally related to Claimant's April 20, 2022 industrial injury, as a DIME is pending. Respondents rely in part on *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006). In *McCormick*, the Panel vacated an ALJ's order that found Claimant, who had been placed at MMI by her ATP, sustained a temporary aggravation that had resolved and denied further curative medical treatment. The Panel held that the ALJ lacked jurisdiction to deny medical benefits after MMI in the absence of DIME, citing multiple other cases, including *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995); *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (Feb. 14, 2001) ("once an authorized treating physician places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits for the purposes of curing the industrial injury and assisting the claimant to reach MMI unless the claimant undergoes a DIME."); *Anderson-Capranelli v. Republic Industries, Inc.,* W.C. No. 4-416-649 (Nov. 25, 2002) (following MMI, "In the absence of a DIME the ALJ lacks jurisdiction to adjudicate a request for additional medical benefits to cure the effects of the injury."); *Cass v. Mesa County Valley School District*, W.C. No. 4-629-629 (Aug. 26, 2005) ("[I]f an ATP places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").

Claimant argues that *McCormick* is not applicable, as it was decided in 2006, prior to the adoption of SB 09-168, which amended section 8-43-203(2)(b)(II)(A), C.R.S. to include the following italicized language:

> An admission of liability for final payment of compensation must include a statement that ... the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. If an independent medical

> examination is requested pursuant to section 8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are ripe for hearing until the division's independent medical examination process is terminated for any reason. *Any issue for which a hearing or an application for a hearing is pending at the time that the final admission of liability is filed shall proceed to the hearing without the need for the applicant to refile an application for hearing on the issue*. (emphasis added)

Claimant did not cite to, nor is the ALJ aware of, any authority supporting Claimant's argument that the language of section 8-43-203(2)(b)(II)(A), C.R.S. confers jurisdiction to the ALJ to address the relatedness of other body parts in this instance. Claimant's interprets section 8-43-203(2)(b)(II)(A), C.R.S. to effectively require proceeding to hearing on any issue for which a hearing or application for hearing is pending at the time a FAL is filed is inconsistent with the statutory provisions of Section 8-42-107(8)(b), C.R.S. and well established case law. Pursuant to Section 8-42-107(8)(b)(I), C.R.S. an authorized treating physician shall make the initial determination concerning the date of MMI. If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached MMI, an independent medical examiner may be selected. §8-42-107(8)(b)(II), C.R.S. Section 8-42-107(8)(b)(III), C.R.S. specifically provides, "A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division."

The Colorado Supreme Court has noted that the DIME procedure is "the only way for an injured worker to challenge the treating physician's findings -- including MMI, the availability of post-MMI treatment, degree of nonscheduled impairments, and whether the impairment was caused by an on-the-job injury..." *McCormick*, *supra*, citing *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003). MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (Mar. 15, 2017).

Claimant's request that the ALJ address whether certain body parts and conditions are causally related to the industrial injury and thus require reasonable and necessary curative treatment is, effectively, a challenge to the ATP's finding of MMI. Absent a DIME, the ALJ does not have the authority to proceed to a hearing on those issues. *Slevin v. Larimer County*, W.C. No. 5-053-718-002 & 4-957-677 (Feb. 18, 2020) (noting that "the request by the parties to have the ALJ rule on the relatedness of the TKA surgery intended to cure and improve the claimant's medical condition is a challenge to the authorized treating doctor's finding of MMI" and concluding that the ALJ was without jurisdiction to address whether a July 2017 injury caused the need for surgery when the claimant had been placed at MMI by his ATP four months prior to the hearing before the ALJ.); *In re Claim of Dean*, W.C. No. 4-988-024-01 (INov. 7, 2016).

The ALJ also lacks jurisdiction at this time to rule on an award of TTD benefits August 23, 2022 through November 16, 2022. Claimant contends he was unable to work during this time period and sustained wage loss as a result of alleged injuries that the ATP did not deem causally related to the industrial injury. As discussed, a challenge to MMI and its inherent causal determinations are the province of a DIME in these circumstances. Additionally, Claimant's TTD was terminated on August 23, 2022 pursuant to the termination statute, section 8-42-105(3)(a)-(d), C.R.S. Claimant argues that section 8-42-105(3)(a)-(d), C.R.S. only applies to when benefits can be terminated without a hearing, and that Claimant is not precluded from demonstrating entitlement to an award of TTD from August 23, 2022 through November 16, 2022.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, W.C. No. 4-995-488 (Apr. 23, 2019).

There is a distinction between the factors considered in an award commencing TTD benefits versus termination of TTD benefits. Once it is established that a claimant's attending physician has released her to full duty, the attending physician's opinion is conclusive, "unless the record contains conflicting opinions from attending physicians

regarding a claimant's release to work. *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661, 662 (Colo. App. 1995); *Bestway Concrete v. Indus. Claim Appeals Off.,* 984 P.2d 680, 685 (Colo. App. 1999). In light of an attending physician's opinion releasing a claimant to full duty, any evidence concerning claimant self-evaluation of his ability to perform his job [is] irrelevant and should be disregarded by the ALJ. *Archuletta v. Indus. Claim Appeals Off.*, 381 P.3d 374, 377 (Colo. App. 2016).

Here, there is no dispute Claimant's ATP released Claimant to full duty on August 23, 2022. Accordingly, the ATP's opinion is conclusive, and the ALJ does not have jurisdiction at this juncture to award TTD benefits for August 23, 2022 through November 16, 2022.

ORDER

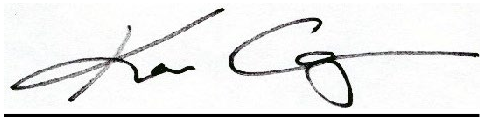
It is therefore ordered that:

1. The issues endorsed for hearing by Claimant are dismissed without prejudice for lack of jurisdiction.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 9, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-137-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable work injury arising out of and in the scope of her employment on August 6, 2022.

II. If compensable, whether Claimant proved by a preponderance of the evidence the treatment requested by authorized treating physician ("ATP") Hiep Lourdes Ritzer, M.D., including her referrals to Mile High Sports, Health Images, Orthopedic Centers of Colorado, and Eric K. Hammerberg, M.D., are all related to the August 6, 2022 industrial injury and necessary to cure and relieve the Claimant of the effects of her injury.

III. If compensable, whether Claimant proved by a preponderance of the evidence an entitlement to temporary partial disability ("TPD") benefits for the time period between August 17, 2022 through August 18, 2022.

IV. If compensable, whether Claimant proved by a preponderance of the evidence an entitlement to temporary total disability ("TTD") benefits from August 19, 2022, ongoing until terminated pursuant to statute.

V. If compensable, determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is a 50-year-old woman who works for Employer as a personal shopper/curb assistant. Claimant began working for Employer on May 8, 2022. Claimant's job duties included picking product for orders and delivering the orders curbside to customers.

2. Claimant worked Tuesday through Saturday, 4:00 a.m. to 12:30 p.m.

3. Claimant testified that an AWW of $803.38 most accurately reflects her weekly wages, based on gross earnings of $9,525.84 earned between May 8, 2022 and July 29, 2022, a period of 83 calendar days.

Prior History

4. Claimant has a history of seizure disorder and a congenital condition known as Chiari I malformation. Claimant treated with Eric K. Hammerberg, M.D. for the seizure disorder.

5. Claimant was involved in a motor vehicle accident ("MVA") in August 2018. On August 5, 2018 Claimant sought treatment at the emergency department of Denver Health after being involved in the MVA. Claimant complained of bilateral hip pain, as well abdominal pain, back pain and neck pain. There was no evidence of trauma to the head, cervical or thoracic spine, abdominal or extremities.

6. On September 5, 2018 Claimant reported to Dr. Hammerberg that after the MVA she experienced pain in her wrists, elbows, shoulders, neck, hips and feet. She complained of constant pain at the base of her neck into her bilateral shoulder blades, down into the left upper extremity and hand, also on the right side, as well as pain in the lower spine at the thoracolumbar junction and both hips. An EMG of upper extremities showed evidence of bilateral carpal tunnel syndrome.

7. On October 25, 2018 Claimant sought treatment at an emergency department for neck pain and nerve symptoms in her arms.

8. On November 29, 2018 Claimant reported increased neck pain after feeling a pop, as well as a "constellation of symptoms" which the provider noted Claimant believed was related to her Chiari I malformation. Claimant complained of blurry vision, numbness of the mouth and jaw, difficulty swallowing, clumsiness of hands, bilateral carpal tunnel syndrome, and tension headaches.

9. On December 19, 2018 Dr. Hammerberg noted Claimant's reports of pain in her posterior neck and over the left temporomandibular joint ("TMJ").

10. On April 30, 2019 Claimant presented to an emergency department at Lutheran Hospital with complaints of intermittent numbness and tingling to her bilateral upper extremities as well as headaches, shortness of breath and bilateral chest pain.

11. Claimant returned to the emergency department at Lutheran Hospital on May 1, 2019 for complaints of neck pain and headaches on her left side, with numbness, dizziness and tingling to the left side of her face as well as her left arm. A CT scan was negative for acute abnormalities.

August 6, 2022 Alleged Work Injury

12. Claimant alleges she sustained a compensable work injury while working for Employer at approximately 9:00 a.m. on Saturday, August 6, 2022. Claimant testified that she was putting a box containing three industrial-sized bottles of cleaning product into the bed of a pickup truck when the left handle of the box gave way. Claimant testified that the box containing the bottles jostled around, pushing her head back and jostling her body back and forth for a while until she was able to use her body to push the box against the truck and into the bed of the vehicle. Claimant estimates the box containing the bottles weighed approximately 30 pounds.

13. Claimant testified that after the incident she felt a lot of pressure in her back and right shoulder blade and "just did not feel right." She testified that she felt very off balance and did not have the energy she normally did.

14. Claimant did not report the incident to a supervisor that day and finished her work shift. Claimant testified she did not immediately report her injury because she did not know she was hurt at the time and because she was unaware of the process for reporting the injury. Claimant testified that the next morning she was in extreme pain in her shoulder blade and on her right side. Per her regular schedule, Claimant was off of work Sunday and Monday, August 7 and 8, 2022. Claimant called out of work on Tuesday, August 9, 2022 and went to her primary care physician at Carbon Health, who placed Claimant on work restrictions.

15. Claimant contacted [Redacted, hereinafter FM], [Redacted, hereinafter MH], on August 10, 2022 to report her injury and restrictions.

16. Claimant testified that she did not have any physical issues or limitations leading up to the incident on August 6, 2022.

17. The ALJ reviewed security footage from the date of the work incident, submitted by Respondents as Exhibits Kii, Kiii and Kiv. Video of the exterior of Employer's store and shows Claimant reaching for and unloading product from a grocery cart. The video angle does not capture the work incident. In-store security video of Employer's backroom shows Claimant coming into view at approximately 9:07 a.m., seven minutes after the alleged accident. Claimant is seen exhibiting a normal arm swing and gait. Thereafter Claimant is observed bending, lifting, pushing, twisting, walking, standing, and performing her job duties without any noticeable pain or discomfort.

18. On August 17, 2022 Claimant presented to Hiep Lelourdes Ritzer, M.D. at Employer's designated medical provider, SCL Health Medical Group. Claimant completed a pain diagram and visual analog scale on which she indicated she was experiencing right rib pain, right upper back pain, bilateral shoulder pain, bilateral chest pain, groin pain, left wrist pain, right wrist and hand pain, bilateral palm pain, jaw pain, bilateral ankle pain, and pain in all ten toes, at levels ranging from 6-10/10. Claimant reported to Dr. Ritzer that she was injured when lifting a box of bottles of Fabuloso into the back of a truck and the box slipped out of her left hand and jerked her around. She further reported experiencing an ache in her right shoulder blade and fatigue, with back stiffness that evening. Claimant complained of pain in her right scapular area, and right lateral chest wall, right elbow and lower neck. She reported that her left shoulder was achy but had improved, and that she also had some occasional headaches and dizziness. Examination of the upper extremities was normal with no swelling or palpable edema. Tenderness was reported in the xyphoid, right posterior paracervicals, right thoracic paraspinal musculature, right trapezius, lumbar paraspinal musculature and right elbow. X-rays of the cervical spine demonstrated multilevel cervical and thoracic degenerative changes without definite acute bony abnormality and mild thoracic spine dextroscoliosis. X-rays of the elbows were negative for acute bony abnormalities. Dr. Ritzer gave an assessment of thoracic myofascial strain, right-sided chest wall pain, right elbow pain and neck pain. She opined that Claimant's symptoms were consistent with a work injury. Dr. Ritzer referred Claimant for physical therapy and placed Claimant on work restrictions of seated duty only and lifting no more than five pounds.

19. Claimant testified she attempted to return to work after being placed on restrictions by Dr. Ritzer on August 17, 2022, but that she was unable to stand or sit for any extended amount of time.

20. Claimant returned to Dr. Ritzer on August 19, 2022 complaining of 10/10 pain. She reported that she could only sit for three to four minutes without experiencing severe pain. Dr. Ritzer restricted Claimant from all work.

21. On August 22, 2022 Dr. Ritzer noted that Claimant's pain still was not managed despite undergoing a Toradol injection two days prior. Claimant reported difficulty breathing, dizziness, nausea, and diarrhea. She complained of 9-10/10 pain mostly to the right scapular right lateral chest wall. Her neck pain and medial right elbow pain had improved. Dr. Ritzer ordered MRIs of the thoracic spine and chest and referred Claimant for chiropractic treatment.

22. On August 31, 2022 Claimant reported to Dr. Ritzer that after undergoing the recent thoracic MRI she developed pressure in her upper thoracic spine that radiated up her neck. She also reported experiencing lower back pain a day or so after the MRI, with pressure to the sacrum and tightness to both gluteus and radiation down the back of her bilateral knees. Claimant complained of a tingling sensation and numbness to the right side of her neck and radiating to below her right breast. She further reported difficulties breathing and numbness down her elbow into her hand. Dr. Ritzer documented that the thoracic MRI revealed: (1) T4-5 through T7-8 and T-9-10 small disc protrusions with moderate degenerative findings of the endplates throughout. Thecal sac narrowing is mild at multiple levels. (2) Facet arthropathy in the upper and lower thoracic spine resulting in mild foraminal narrowing. She noted that x-rays of the sternum were unremarkable and a CT scan of the chest demonstrated no acute findings. Dr. Ritzer transferred care of Claimant to Yusuke Wakeshima, M.D. at Mile High Sports Rehabilitation, noting that Claimant's subjective complaints were out of proportion to the objective findings. She opined that the new complaints of neck pain and lower back pain with radiation to the back of both knees were not work related.

23. Claimant first presented to Dr. Wakeshima on September 8, 2022. She reported right neck pain, right upper back pain, right thoracic spine pain, right periscapular pain, right-sided rib pain, right axilla pain, right shoulder pain, right medial elbow pain, and right hand paresthesias beginning after an 8/6/22 work injury. Claimant denied any pre-existing conditions in those regions prior to that date. Dr. Wakeshima documented a history of Chiari malformation. Claimant reported a mechanism of injury consistent to her testimony. Dr. Wakeshima noted that Dr. Ritzer had concerns about Claimant's expanding pain complaints and minimal mechanism of injury. He documented that Claimant had undergone multiple radiologic studies that were negative for acute abnormalities, including a thoracic spine MRI which demonstrated multilevel degenerative findings, but nothing predominantly right-sided that would lead one to suspect that she has a thoracic radiculopathy condition. Dr. Wakeshima assessed Claimant with: neck pain; upper back pain on right side; periscapular pain; right shoulder pain; pain in the right axilla; rib pain on the right side; right hand paresthesia;

right elbow pain; and pain in the thoracic spine. He referred Claimant for a cervical MRI, EMG of the right upper extremity and right shoulder MRI.

24. Claimant underwent the right shoulder MRI on September 15, 2022, which demonstrated supraspinatus tendinopathy with high-grade partial-thickness partial width bursal sided tearing.

25. Dr. Wakeshima subsequently referred Claimant to Dr. Griggs (changed to Ariel Williams, M.D.) for an orthopedic surgery evaluation.

26. On September 23, 2022 Claimant reported to Dr. Wakeshima experiencing a profound increase in pain since undergoing dry needling and massage therapy. Dr. Wakeshima noted that a cervical spine MRI obtained on 9/15/22 revealed cerebellar tonsillar ectopia, multilevel degenerative disc disease from C2-3 through C6-7, moderate stenosis of the central canal at C3-4 with no foraminal impingement, and mild stenosis and central canal at C4-5 with no foraminal impingement. He further noted that the right shoulder MRI revealed supraspinatus tendinopathy with high-grade partial- thickness partial width bursal tearing, mild infraspinatus tendinopathy, and acromioclavicular and glenohumeral joint osteoarthritis. Dr. Wakeshima referred Claimant for a brain MRI.

27. Dr. Williams evaluated Claimant on September 30, 2022. Claimant reported symptoms primarily in the medial elbow, scapula, axilla and upper chest wall. Dr. Williams noted,

> She has tremendous difficulty with range of motion on exam with a lack of tolerance of even passive range of motion and a feeling of active resistance that is not consistent with a adhesive capsulitis type picture. Her shoulder external rotation is actually quite well-maintained. She does have pain with shoulder provocative maneuvers but these actually localize more to the chest wall and axilla and to the shoulder itself. In short, based upon both her history and her physical exam, I do not think her rotator cuff tear is the primary issue for her at this point although she would benefit from physical therapy for her shoulder and upper extremity as a whole. She is not indicated for surgical intervention for her rotator cuff at this time. Physical therapy may also help with her elbow where I suspect she may have a flexor pronator strain. Dr. Wakeshima is planning on nerve conduction studies and I agree that this is appropriate. She will return to me in 6 weeks to re-evaluate her shoulder and see her progress with therapy, sooner if the nerve conduction study reveals a peripheral compressive neuropathy.

(Cl. Ex. 9, pp. 109-110).

28. Dr. Wakeshima reevaluated Claimant on October 7, 2022 and referred Claimant to Dr. Hammerberg for a neurological evaluation under her worker's compensation claim for reported worsening headaches and neck pain after the injury. He noted,

> The patient presents with diffuse pain issues which is difficult to localize. If the radiologist documents that there is been no sign of interval changes on her MRI of the brain from the MRI from 2007, and Dr. Hammerberg documents that there has been no significant change regarding her Chiari I malformation neurologic conditions since he has been treating her prior to her work injury, and she still reports diffuse pain issues, I will discuss with patient about being seen by Dr. DiSorbio of pain psychology for further assessment for the psychological aspect of her chronic pain condition.

(Cl. Ex. 6, p. 83).

29. Claimant saw Dr. Hammerberg on October 18, 2022. She reported that after the alleged work injury she experienced, *inter alia*, lightheadedness, dizziness, blurry vision, photophobia, phonophobia, difficulty swallowing, hand numbness, and pain in the lower back and left hip extending into the left knee. Dr. Hammerberg reviewed Claimant's 9/15/22 cervical spine MRI, 9/15/22 right shoulder MRI, and brain MRI obtained on 9/28/22. He concluded that there were no changes in Claimant's Chiari I malformation.

30. Claimant returned to Dr. Wakeshima on November 3, 2022 with complaints of right-sided neck, back, shoulder, elbow and hand pain, as well as right hand paresthesias. Claimant was now also complaining of pain in her left shoulder, elbow, wrist, groin and anterior hip region. Dr. Wakeshima performed an EMG of the right upper extremity and compared it to Claimant's September 2018 EMG. He opined that the EMG demonstrated slight worsening of Claimant's mild carpal tunnel syndrome. He referred Claimant back to Dr. Williams for assessment.

31. Surveillance video was taken of Claimant on November 21-23, 2022 and admitted into evidence as Respondents' Exhibit L-1. Claimant is observed in the front of her home and in her garage lifting and carrying items without apparent difficulty or noticeable pain.

32. On November 14, 2022 Lawrence Lesnak, M.D. performed an Independent Medical Evaluation ("IME") at the request of Respondents. Claimant reported a mechanism of injury consistent with her testimony. Claimant reported that her current symptoms were different than those from her 2018 MVA. On examination, Claimant complained of frequent diffuse right should girdle and axillary burning pains that occur with any movement of her right upper extremity, as well as constant diffuse right elbow soreness and pain, frequent swelling of the left groin, frequent swelling throughout the entirety of her left leg and thigh, constant pins and needles as well as pain involving all of her toes, her plantar feet and diffuse symptoms involving her left leg and left lateral ankle. Claimant also reported frequent diffuse bilateral hand numbness encompassing the entirety of both hands, diffuse right arm, lateral neck and chest pains, and constant right-sided jaw and anterior throat pain. She reported that one month after the work incident she developed a frequent cough. Claimant stated she experiences frequent popping sensations in the center of her chest associated with diffuse pins and needles and a burning sensation throughout the entirety of her anterior chest and breast region.

Claimant further reported low back pain and pressure and diffuse occipital and global head pain.

33. In connection with his evaluation, Dr. Lesnak performed a Computerized Outcome Assessment, designed to identify any potential psychosocial factors that might be affecting the claimant's symptoms, recovery, or perceived function. Dr. Lesnak noted that the results of his testing strongly suggested the presence of an underlying symptom somatic disorder/somatoform disorder in Claimant.

34. Dr. Lesnak noted Claimant's expanding pain complaints. He concluded that the right shoulder MRI on 9/15/22 evidenced some rotator cuff tendinopathy without documentation of any full-thickness tears and without any documented evidence of any injury or trauma-related pathology related to her work incident. Dr. Lesnak noted that other imaging, including the cervical and thoracic spine MRIs and CT scan of the chest, did not evidence any injury or trauma related pathology. Dr. Lesnak opined,

> [t]here is absolutely no medical evidence to support that she sustained any type of injury whatsoever as it would pertain to this reported occupational incident. Additionally, there is absolutely no medical evidence to support that she has any medical diagnoses (which would be confirmed with any reproducible findings) that would in any way pertain to this reported occupational incident of 08/06/2022.

(R. Ex. I, p. 337).

35. Dr. Lesnak opined that there was no medical evidence supporting a conclusion that Claimant requires any type of activity limitations or work restrictions. He noted that there was a complete lack of any reproducible findings on examination.

36. On November 18, 2022 Dr. Wakeshima noted,

> With the patient's diffuse pain issues I also informed her that we may consider at our next appointment of having her undergo a rheumatoid panel, sedimentation rate, and ANA for further assessment for any rheumatologic conditions that could be contributing to pain. However, this would then be exploring not work-related condition, and therefore I informed her that if Dr. Lesnak determines that she is at MMI, this most likely will not be authorized by her workers' compensation carrier. However if Dr. Lesnak determines that he is not sure of the ideology of her continued pain issues, then we will have this obtained to rule out any nonwork related issues. If this is positive then her current situation will be nonwork related and will need to be treated under her private health insurance and we will then discuss maximum medical improvement (MMI) issues.

(R. Ex. G, p. 223).

37. Claimant testified that prior to the work incident she had not been informed of any tear in her right shoulder. Claimant testified that she has been restricted from working completely since being removed from work by Dr. Ritzer on August 19, 2022. Claimant testified that she believes the work incident resulted in injury to all of the body parts she marked on the pain diagram at Dr. Ritzer's August 17, 2022 evaluation (referenced herein in Finding of Fact #18 and contained in Respondents' Exhibit F, p. 96).

38. Dr. Lesnak testified at hearing on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Dr. Lesnak testified consistent with his IME report and continued to opine that Claimant did not suffer any work-related injury on August 6, 2022 that caused the need for medical treatment or restrictions. Dr. Lesnak testified Claimant suffers from a somatic disorder or somatoform disorder, which he explained results from poorly controlled psychological or psychiatric symptoms that manifest themselves as bodily pain complaints in the absence of identifiable anatomic pathology. Dr. Lesnak testified that, in Claimant's case, there are various subjective complaints but a lack of reproducible findings related to the August 6, 2022 work incident. He explained that none of the imaging, including the right shoulder MRI, indicates evidence of an acute injury or aggravation. Dr. Lesnak explained that the fact Dr. William's injection did not result in relief to Claimant indicates that Claimant's right shoulder pathology, which is unrelated to this work incident, is not even symptomatic. Dr. Lesnak testified that he reviewed surveillance video taken of Claimant and Claimant's presentation on the video was different than her presentation during his examination.

39. MH[Redacted] testified at hearing on behalf of Respondents. MH[Redacted] testified that employees receive training instructing employees to immediately report injuries to their manager. He testified that there are also posters above the time clock containing information regarding how to report work injuries to Employer. Regarding Claimant's AWW, MH[Redacted] explained that the "Other Earnings" category reflected in Claimant's wage records reflects a bonus paid to associates based on the store's quarterly earnings. He testified that the bonus is not guaranteed and depends on the store's circumstances. MH[Redacted] testified that the bonus is taxed as wages.

40. Claimant's wage records indicate Claimant earned the following gross earnings, including "other earnings", during the following pay periods:

Week Ending	**Gross Earnings**	**Other Earnings**
May 13, 2022	$1,472.22	$0.00
May 27, 2022	$1,552.68	$4.46
June 10, 2022	$1,621.08	$4.46
June 24, 2022	$1,670.67	$4.46

July 8, 2022	$1,633.14	$175.46
July 22, 2022	$1,576.05	$4.46
TOTAL	$9,525.84	

41. The ALJ finds the opinion Dr. Lesnak, as supported by the medical records, more credible and persuasive than Claimant's testimony and the opinions of Drs. Ritzer, Wakeshima and Williams.

42. Claimant failed to prove it is more probably true than not she sustained a work injury arising out of and in the scope of her employment on August 6, 2022.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109- 001 (ICAO, Mar. 18, 2020).

As found, Claimant failed to prove it is more probably true than not she sustained a compensable work injury on August 6, 2022. While Claimant is credible in her testimony that a work incident occurred on August 6, 2022, the preponderant evidence does not establish that the incident actually caused any injury resulting in disability and the need for medical treatment. Each of Claimant’s providers, Dr. Ritzer, Dr. Wakeshima, and Dr. Williams, have noted Claimant’s diffuse pain complaints. Dr. Ritzer transferred care to Dr. Wakeshima, specifically noting that Claimant’s subjective complaints were out of proportion to the objective findings. While right shoulder pathology is demonstrated on imaging, Dr. Lesnak credibly opined that none of the findings evidenced any acute trauma related to the work incident.

Claimant has a documented history of diffuse pain complaints to her wrists, elbows, shoulders, neck, hips, feet, thoracolumbar spine, TMJ, and chest, as well as other complaints such shortness of breath, photophobia, phonophobia, and dizziness. Many of these same complaints presented after the work injury, including expanding and diffuse complaints after undergoing an MRI. As acknowledged in her testimony, Claimant attributes her various symptoms to the work incident of August 6, 2022. Dr. Lesnak credibly testified that Claimant has somatoform disorder. Such condition does not automatically negate Claimant's reported symptoms or the existence of a work injury; however, it does call into question Claimant's expanding and diffuse subjective complaints in the absence of objective reproducible findings, as credibly noted by Dr. Lesnak. To the extent her providers opined Claimant sustained a work injury, the preponderant evidence indicates that such conclusion was based on Claimant's subjective reporting of the work incident and her symptoms. The ALJ is persuaded by Dr. Lesnak's opinion that no injury trauma related pathology occurred as a result of the August 6, 2022 work incident.

As the preponderant evidence does not establish that Claimant sustained a compensable work injury, the remaining issues of medical treatment, temporary indemnity benefits and AWW are moot.

ORDER

It is therefore ordered that:

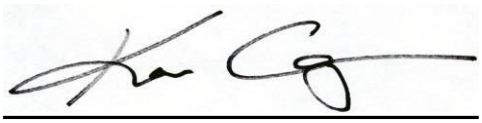
1. Claimant failed to prove by a preponderance of the evidence she suffered a compensable work injury arising out of and in the scope of her employment on August 6, 2022. Claimant claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order

with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 16, 2023.



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-185-023-001

ISSUES

I. Whether Respondents proved by a preponderance of the evidence Claimant willfully violated a reasonable safety rule, resulting in a fifty percent reduction in Claimant's benefits.

FINDINGS OF FACT

1. Claimant works for Employer as a housekeeper. Claimant has worked for Employer in such capacity for separate periods of time over the course of 12 years. Claimant's first language is Spanish.

2. On October 6, 2021 Claimant sustained an admitted industrial injury to her right shoulder while lifting a bag of trash.

3. Claimant testified at hearing that, on the date of injury, she was lifting a trash bag of empty wine bottles at the Colorado Convention Center. Claimant testified that six people were typically assigned to clean a floor but, on the date of injury, only she and one other co-worker were assigned to a particular floor. Claimant testified that she "indirectly" told her supervisor she needed additional help with completing the tasks on her assigned floor by telling her co-worker, who was going on a lunch break at the time, to tell the supervisor she needed assistance. Claimant testified that she also asked [Redacted, hereinafter AR (last name unknown)], a supervisor with [Redacted, hereinafter XE], why extra people were not assisting with the cleaning on her assigned floor.

4. Claimant testified that she could not wait for her co-worker to return from his lunch break to assist in emptying the trash bins because the bins were getting full. She testified she first slightly lifted the trash bag to assess its weight. Claimant determined she was able to lift the trash bag by herself. Claimant proceeded to lift and move the bag onto a cart and at that time felt a pop and pain in her right shoulder. Claimant testified she initially did not think the bag was too heavy to lift and if she would have known the bag was so heavy she would not have attempted to lift it on her own. Claimant further testified that there was no one to ask for help lifting the bag because she was the only one on the floor at the time.

5. On October 6, 2021, Claimant completed an Employee Report of Incident in Spanish, translated to English by a co-worker, in which she stated,

> I told the XE[Redacted] Supervisor that I need help and he told me that my partner was in (*sic*) his break and that I was going to be fine doing the job own (*sic*). This when (*sic*) I went to pick a large trash bag from one of the

> bars full of beer cans that was way to (sic) heavy and this when (*sic*) my right arm pop and now it is hurting.

(R. Ex. E, p. 25).

6. Claimant's supervisor, [Redacted, hereinafter MD], completed a written statement on October 21, 2021 which read,

> October 6, 2021 around 7:50pm I saw [Claimant] dumping trash in her tilt cart by the escalator c lobby. I noticed that something was wrong with her and asked her if she was ok, she told me that she hurt her shoulder trying to lift a recycle bag from the bar. I told her that she needed to go to security and make a report. She told me that she didn't want to go, I told her that she had to go & I walked her to security. I asked her why she didn't ask for help and she told me that she saw AR[Redacted] the supervisor for XE[Redacted] across the floor but she didn't want to ask him because she didn't want him to tell her no & look at her crazy. I told her that she should have asked him or called me on the radio & asked me.

(Cl. Ex. 1, p. 5).

7. Respondents filed a General Admission of Liability ("GAL") on November 1, 2021 admitting for medical benefits and temporary total disability ("TTD") benefits. Respondents claimed a 50% reduction in Claimant's TTD benefits based on a safety rule violation. Respondents alleged Claimant violated a safety rule by failing to ask for assistance in lifting heavy items.

8. Claimant received yearly training from Employer, including ergonomics training from Employer on August 18, 2021, which included information on proper techniques for lifting. Safety tips included, "If the load is too heavy, too large, or too awkward…Stop and Get help" and "Lift properly using your legs, not your back. Get help to lift heavy objects." (R. Ex. D, pp. 13-14). Claimant signed the training attendance form attesting that she was responsible for, and understood, all of the information provided in the training.

9. [Redacted, hereinafter VK] testified at hearing on behalf of Respondents. VK[Redacted] is employed by Employer as an onboard trainer and infection prevention coordinator. VK[Redacted] explained that temporary employees through XE[Redacted], including AR[Redacted], do not supervise Employer's employees nor have any authority to instruct Employer's employees on their tasks. VK[Redacted] testified that he provided several training sessions to employees, including Claimant, regarding lifting and recycling. He testified that he ensured all employees understood the training by having them give a thumbs up, sideways, or down. He testified that Claimant indicated she understood the instructions and training by giving a thumbs up. VK[Redacted] testified that that no interpreter was present at his trainings because employees are required to be able to communicate effectively in English.

10. Claimant's job description specifically states that the ability to speak, understand, and read standard English and follow direction is required.

11. Claimant acknowledged that she attended and signed the attestation for the August 18, 2021 ergonomics training as well as a general safety training on September 9, 2021.

12. The ALJ finds that Employer had a reasonable safety rule adopted for the safety of the employees, of which Claimant was aware. Claimant's testimony that she did not she did not initially think the bag was too heavy to lift on her own is found credible. Respondents failed to demonstrate it is more probably true than not Claimant's violation of Employer's safety rule was willful.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent (50%) reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* WC 4-559- 275 (ICAO, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct. *See In re Heien*; WC 5-059-799-01 (ICAO, Nov. 29, 2018). However, a safety rule that is not enforced by the employer will not be enforced by the Workers' Compensation system. *Burd v. Builder Services Group Inc.*, WC 5-085-572 (ICAO, July 9, 2019).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado*, WC 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, WC 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez*, WC 4-561-352 (ICAO, Apr. 29, 2004). An employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, WC 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, §35.04. Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

As found, Respondents failed to prove it is more probably true than not Claimant willfully violated a reasonable safety rule adopted by Employer. The credible and persuasive evidence does establish Employer has a reasonable safety rule instructing employees to ask for assistance in lifting heavy items and Claimant was aware of the rule via Employer's training. Nonetheless, the preponderant evidence does not demonstrate Claimant's violation of the rule was willful. Claimant credibly testified that, prior to fully lifting and moving the trash bag, she first assessed the weight of the bag by picking it up slightly. Claimant determined she could lift the bag by herself. She credibly testified that, had she known the bag was that heavy or believed the bag was too heavy for her to lift, she would have left the bag there and not attempted to fully lift and move

it. Claimant ultimately misjudged the weight of the trash bag and proceeded to lift and move the item without assistance. Claimant was working without additional assistance of co-workers at the time and attempting to complete her tasks as the trash bins were getting full. Based on the totality of the circumstances, Claimant lifting the trash bag by herself due to underestimating the actual weight of the bag does not rise to the level of a deliberate intentional violation of Employer's safety rule. *See In re Bauer*, *supra* ("Further, the exercise of poor judgment within the realm of the claimant's legitimate discretion might well qualify as mere 'negligence' sufficient to preclude a finding of willfulness"). Accordingly, Claimant's non-medical benefits shall not be reduced by fifty percent.

ORDER

It is therefore ordered that:

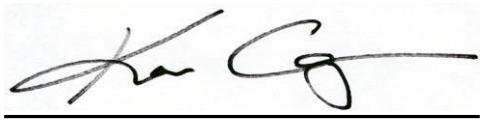
1. Respondents failed prove by a preponderance of the evidence Claimant willfully violated a reasonable safety rule adopted by Employer. Claimant's non-medical benefits shall not be reduced by fifty percent.

2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 21, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-170-824-001

ISSUES

1. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant was employed by Employer for approximately twenty years as a mechanic. Claimant's job duties included performing tasks related to the repair and maintenance of recreational vehicles. Claimant sustained an admitted injury arising out of the course of his employment with Employer on April 22, 2021.

2. From April 12, 2020 through the end of 2020, Claimant received a weekly wage of $1,100. (Ex. C). Claimant testified that sometime in 2020, Employer lost another mechanic which required Claimant to take on additional job duties. Claimant testified that due to these additional responsibilities, Employer increased his wages.

3. Claimant's payroll records (Ex. C) demonstrate Claimant received multiple wage increases beginning with his January 4, 2021 paycheck. Claimant's weekly wage was increased as follows:

Paycheck Date	Weekly Wage	Wage Increase
1/4/2021	$1,200	$100
2/15/2021	$1,300	$100
3/8/2021	$1,400	$100
3/29/2021	$1,455	$55
4/19/2021	$1,555	$100

4. On the date of his injury, April 22, 2021, Claimant was being paid a weekly wage of $1,555.

5. Following his injury, Claimant received work restrictions from his authorized treating provider (ATP). Claimant was off work from the date of his injury until the week of June 13, 2021, when he returned and worked a reduced-hours schedule. Claimant remained on a reduced-hours schedule until April 2022. At that time, Employer ceased operations and laid-off its employees, including Claimant.

6. On May 6, 2022, Employer filed a General Admission of Liability (GAL) admitting to Claimant's $1,555.00 AWW, and paid Claimant temporary disability benefits based on that AWW. (Ex. A).

7. When Claimant's ATP released Claimant to return to work on a reduced-hours schedule in June 2021, Employer paid Claimant an hourly rate which was the equivalent of $1,555 per week (assuming a 40-hour per week schedule). (Ex. C).

8. Claimant testified that throughout his employment, he had semi-annual reviews with Employer. During those reviews, Employer never notified Claimant he would receive a pay increase. Claimant testified when he did receive a pay increase from Employer, the increased wage would appear on his paycheck without prior notice.

9. Claimant testified he had an annual review with Employer's owner, [Reduced, hereinafter JG], on April 3, 2021, and was promised a raise of $5.00 per hour to $1,755.00 per week, beginning May 3, 2021 because he was taking on more responsibility.

10. Claimant's hourly wages after returning to work in June 2021 did not reflect the purportedly promised wage of $1,755.00 per week. (Ex. C). Claimant testified he did not receive the wage increase because he did not return to work on a full-time basis following his injury, and was unable to perform his full pre-injury scope of work.

11. On April 25, 2022, Employer sent Claimant a letter notifying him Employer would be closing and employees would be laid off. The letter indicated the business was closing due to "the lack of parts and full time employees." (Ex. B).

12. The April 25, 2022 letter was signed by JG[Redacted] and contains the following signature block which identifies JG[Redacted] as "President":

JG[Redacted signature line]

13. On or about April 28, 2022, Employer ceased operations. At that time, Employer had five employees, including Claimant, Claimant's wife, JG[Redacted] and two other employees.

14. Claimant testified that JG[Redacted] began to experience a memory issues in December 2021, and ultimately that supply chain issues, and a lack of business lead to the closure of the business.

15. The ALJ does not find credible Claimant's testimony that he was promised a raise to $1,755 per week at his April 3, 2021 review. Claimant testified he had semi-annual reviews during his twenty-year tenure with Employer, and had never before been promised a raise during his annual review. Claimant offered no credible evidence why Employer purportedly deviated from this practice at his April 3, 2021 review. Moreover, Claimant received a wage increase after his April 3, 2021 review. Claimant's payroll records show his weekly wage on April 3, 2021 was $1,455 per week. (Ex. C). Claimant's pay was increased to $1,555 per week with his April 19, 2021 paycheck. (Ex. C).

16. In support of his contention that he was to receive a wage increase to $1,755 per week in May 2021, Claimant offered a letter dated December 27, 2021 addressed "To Whom it may concern," which states: "[Claimant] did not get his annual raise on May 3, 2021 due to his injury. [Claimant] was going to get a $5.00 per hour raise of $200.00 per week starting on the paycheck of May 10, 2021. To date he has still not received the raise he was promised back on April 3, 2021 at his yearly review." (Ex. 2).

17. The December 27, 2021 letter contains the following signature block, which identifies JG[Redacted] as "Owner":

Unknown[Redacted signature line]

18. The December 27, 2021 letter is not credible or persuasive evidence that Claimant would have received a wage increase but for his work injury. There are several discrepancies between the December 27, 2021 letter and the April 25, 2022 letter which cast doubt on the authenticity of the December 27, 2021 letter. The signatures purporting to be from JG[Redacted] on the December 27, 2021 letter and the April 25, 2022 letter are different. JG[Redacted] is identified on one letter as "President" and on the other as "Owner," and the letters contain different letterheads. (*Compare* Ex. B and Ex. 2). Finally, the December 27, 2021 letter was written at the time Claimant testified JG[Redacted] began to develop memory issues.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S., requires the ALJ to calculate Claimant's average weekly wage based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Indus. v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

An ALJ may base an AWW determination "not only on the claimant's wage at the time of the injury, but on other relevant factor when the case's unique circumstances require." *Avalanche Indus, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008), *rev'd on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). The ALJ's discretionary authority permits the ALJ to consider post-injury pay increases a claimant would have received absent the work-related injury. *See In Re Tibbs*, W.C. No. 4-422-333 (ICAO, Apr. 12, 2001); *Wheeler v. Archdiocese of Denver Management Corp*., W.C. No. 4-669-708 (Dec. 21, 2010). But, an ALJ may not base an award on speculation or conjecture. *Nanez v. Industrial Claim Appeals Office*, 444 P.3d 820 (Colo. 2018); *Upchurch v. Industrial Commission*, 703 P.2d 628 (Colo. App. 1985). To that end, the alleged post-injury wage increase must be "sufficiently definite" to support an increase in the AWW. *Tibbs, supra; Ebersbach v. UFCW Local No. 7*, W.C. No. 4-240-475 (May 5, 1997); *Romero v. Cub Foods*, W.C. No. 4-218-823 (Sept. 28, 2000).

Claimant has failed to establish, by a preponderance of the evidence that his admitted AWW of $1,555.00 is incorrect. The evidence establishes that Claimant's AWW at the time of injury was $1,555.00. Claimant's testimony that he was "promised" a raise

to $1,755 per week effective May 3, 2021 was corroborated by any credible evidence and is not credible. As found, Claimant testified he had never before been promised a pay raise, in contrast to the raise purportedly promised on April 3, 2021. The only corroborating document, December 27, 2021 letter, contains significant discrepancies from the April 25, 2022 letter, including different signatures, different headers, and different descriptions of JG's[Redacted] role, rendering the letter uncredible. The evidence presented does not establish that Claimant's alleged post-injury wage increase was sufficiently definite to support an increase in Claimant's AWW.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $1,555.00. Claimant's claim for an increased average weekly wage is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: *nunc pro tunc* February 1, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-264-001

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits for which Respondents are entitled to repayment.

2. If Respondents established an overpayment, the terms of repayment.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of her employment with Employer on April 29, 2021. As a result of her injury, Claimant was entitled to receive temporary total disability (TTD) benefits for the period of August 5, 2021 to December 6, 2021, a period of 17 5/7 weeks. Claimant returned to work on December 7, 2021. (Ex. B).

2. Claimant's average weekly wage (AWW) at the time of injury was $669.65. (Ex. C & D). Pursuant to § 8-42-105 (1), C.R.S., Claimant was entitled to TTD benefits at the rate of $446.43 per week (the "TTD Rate"). Based on the TTD Rate, Claimant's total TTD entitlement was $7,908.19.

3. Insurer began paying Claimant's TTD benefits at $669.65 per week, rather than the correct TTD Rate. (Ex. C). Insurer's "Payment Detail" (Ex. C) shows Insurer paid Claimant $669.65 per week for eight weeks (August 5, 2021 to October 6, 2021), and then paid the correct TTD rate for six weeks (October 7, 2021 to November 17, 2021). The Payment Detail does not document any payment of TTD after November 17, 2021. In total, Insurer paid Claimant $8,035.77 in TTD benefits. (Ex. C).

4. On January 19, 2022, Respondents filed a Petition to Modify Claimant's TTD payments seeking leave to pay Claimant at the TTD Rate. Respondents' Petition states Insurer paid TTD "at the correct rate of $446.43 from 9/16/21 - 10/6/21, however, Respondents returned to the admitted rate of $669.95 due to the absence of an Order or stipulation permitting such unilateral modification of TTD benefits." The Petition also states Insurer paid Claimant TTD benefits totaling $11,192.71 through December 7, 2021. (Ex. E).

5. The record does not contain an order from the Division granting or denying Respondent's Petition to Modify. However, on September 16, 2022, the Division sent a letter to Insurer which references a September 2, 2022 "admission," which apparently indicated Claimant's TTD payments from August 5, 2021 to December 6, 2021 were reduced from $669.65 to $446.43. The September 16, 2022 letter advised Insurer that benefits could not be reduced prior to the date of the Petition, and directed Respondents

to reinstate Claimant's TTD payment of $669.65 from August 5, 2021 to December 6, 2021. (Ex. A). The ALJ infers the Division issued an order permitting Respondents to reduce Claimant's TTD payments to the TTD Rate after January 19, 2022.

6. On October 10, 2022, Respondents filed a Final Admission of Liability (FAL), which indicates the Claimant was paid TTD at the rate of $669.65 from August 5 2021 to December 6, 2021, totaling $11,862.37. (Ex. B). The FAL also asserts an overpayment of $3,954.18. Attached to the FAL is a document entitled "Remarks" (Ex. B, p. 13), which purports to explain the overpayment calculation.

7. The "Remarks" document states: "$11,862.37 was erroneously paid in TTD benefits from August 5, 2021 to December 6, 2021 at the weekly rate of $669.65. In fact, the appropriate TTD rate was $446.43 for this time period and only $7,908.19 was owed in TTD benefits." (Ex. B., p. 13).

8. In the FAL, Respondents admit Claimant is entitled to permanent partial disability (PPD) benefits of $3,505.94. (Ex. B, p. 5). The "Remarks" document indicates the alleged overpayment of $3,954.18 would be applied to Claimant's PPD award. (Ex. B, p. 13). No evidence was admitted indicating Respondents have paid Claimant's admitted PPD benefits.

9. Multiple discrepancies exist between Respondents' Petition to Modify, the October 10, 2022 FAL, and Insurer's Payment Detail. First, the Petition to Modify indicates Insurer paid Claimant TTD benefits totaling $11,192.71 through December 7, 2021, while the October 10, 2022 FAL, indicates Insurer paid Claimant $11,862.37 for the same period. The Payment Detail, however, documents payments totaling $8,035.77, from August 5, 2021 to November 17, 2021, and includes no evidence of payments after November 17, 2021. (*Compare,* Exs. E, B., 13, and Ex. C).

10. Next, the Petition to Modify indicates Insurer paid the "correct rate of $446.43 from 9/16/21 - 10/6/21." (Ex. E). The Payment Detail, however, shows Insurer paid Claimant the incorrect rate of $669.65 for these dates. (Ex. C). The FAL "Remarks" document, on the other hand, indicates Claimant was paid $669.65 for the entire period of August 5, 2021 to December 6, 2021. (Ex. B, p. 13). Next, the Petition to Modify and FAL indicate Insurer paid Claimant TTD through December 6 or 7, 2021. The Payment Detail, however, does not document any payment after November 17, 2021. (*Compare*, Exs. E, B. p. 13, and C).

11. Respondents offered no testimony or other credible evidence at hearing explaining the discrepancies between the various documents. Given the inconsistencies, the ALJ finds neither the Petition to Modify nor the FAL to be credible evidence of the TTD benefits Insurer paid to Claimant. In contrast, Insurer's "Payment Detail" is a line-item listing of each TTD payment made to Claimant, and includes the date each payment was processed, the check number, the associated TTD time period, and the amount of each payment. Because no credible evidence was offered or admitted demonstrating TTD payments to Claimant after November 17, 2021, the ALJ finds that Exhibit C,

Insurer's Payment Detail is the only credible evidence of Insurer's payments to Claimant, and is the complete statement of TTD payments Insurer made to Claimant.

12. The credible evidence thus demonstrates Insurer paid Claimant TTD benefits totaling $8,035.77, not $11,192.71 or $11,862.37, as represented in the Petition to Modify and the FAL, respectively.

13. The credible evidence does not support Respondents' contention that Claimant received an overpayment of $3,954.18. Claimant was entitled to $7,908.19 in TTD benefits, and Respondents paid Claimant $8,035.77, resulting in an overpayment of $127.58 (*i.e.,* $8,035.77 - $7,908.19 - $127.58).

14. Claimant credibly testified that she was not aware she had received any overpayments and that if she was overpaid, she would repay the amount owed. Claimant further testified, credibly, that she is not currently employed, although she anticipated gaining employment within a few months.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Effect of Division Order

As found, Respondents filed a Petition to Modify with the Division, seeking to reduce Claimant's TTD payments to the TTD Rate. No order from the Division was offered or admitted into evidence. However, the ALJ infers from Ex. A, that an Order was issued permitting Respondents to reduce Claimant's PPD payments to the TTD Rate for benefits paid after January 19, 2022. Petitions to Modify are governed by W.C.R.P. 6, 7-CCR 1101-3, which does not authorize the retroactive modification of temporary disability benefits. However, ALJs are permitted to order repayment retroactively, pursuant to § 8-43-207 (q), C.R.S. Thus, the ALJ concludes that W.C.R.P. 6 does not bar the Respondents from recovery of an overpayment made prior to the Division's order.

Overpayment

Pursuant to § 8–43–303(1) C.R.S., upon a *prima facie* showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In relevant part, the Colorado Workers' Compensation Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. § 8-40-201 (15.5), C.R.S. (2021).[1] An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek and order for repayment of an overpayment, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207 (q), C.R.S. Respondents may retroactively recover an overpayment of benefits, and such recover is not limited to duplicate benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents bear the burden of proof to establish, by a preponderance of the evidence, that a claimant received and overpayment, and that respondents are entitled to recovery of that overpayment. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002); See *In Re: Robert D. Scott,* W.C. No. 4-777-

[1] The General Assembly amended § 8-40-201 (15.5), C.R.S., effective January 1, 2022, removing the phrase "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive " from the definition of "overpayment." However, the matter before the ALJ is based payments prior to January 1, 2022, consequently the operative, applicable statute is the Worker's Compensation Act in effect prior to January 1, 2022. *See Stark v. Zimmerman*, 638 P.2d 843 (Colo 1981) (repeal of a statutory provision does not operate retroactively to modify vested rights or liabilities); *Martinez v. People*, 484 P.2d 792 (Colo 1971) (repealed statutory provisions remain in force as far as pending actions, suits and proceedings are concerned).

897, (ICAO Oct. 28, 2009). Respondents have established by a preponderance of the evidence that Claimant received $127.58 for TTD benefits to which she was not entitled. Accordingly, Respondents are entitled recover from Claimant the overpayment of $127.58.

Repayment

Under § 8-43-303 (1), C.R.S., upon a finding of an overpayment, an order of repayment is mandatory. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

Insufficient evidence was admitted permitting the ALJ to determine whether Respondents have paid Claimant the $3,505.94 in PPD benefits to which she is entitled. If Respondents have not paid Claimant's PPD benefits, Respondents may take credit for the $127.58 overpayment against PPD benefits due and owing, less any accrued interest on the outstanding PPD benefits.

If Respondents have paid Claimant PPD benefits, Claimant shall repay Respondents $127.58. Claimant credibly testified she is currently unemployed, although she anticipates obtaining employment within a few months. The ALJ finds that requiring immediate repayment of the overpayment may impose financial hardship on the Claimant who is unemployed. Therefore, if Respondents have paid Claimant's PPD benefits in full, Claimant shall pay Respondents $127.58 within six months of the date of this Order.

ORDER

It is therefore ordered that:

1. Claimant received an overpayment in the amount of $127.58, for which Respondents are entitled to repayment.

2. If Respondents have not paid Claimant's PPD benefits of $3,505.94, Respondents may credit the overpayment of $127.58 against her PPD benefits.

3. If Respondents have paid Claimant's PPD benefits of $3,505.95 in full, Claimant shall repay the overpayment of $127.58 within six months of the date of this Order.

4. Respondents shall pay 8% interest on all sums not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 23, 2023

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-207-497-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right shoulder arising out of the course of his employment with Employer.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits.

4. Whether Respondents established by a preponderance of the evidence that Claimant was responsible for his own termination.

FINDINGS OF FACT

1. Claimant was employed by Employer as a truck driver for approximately five years. Claimant's job duties included driving a truck and making deliveries of products, including cement powder, liquid admix, and other materials used in construction.

2. Claimant alleges he sustained an injury to his right shoulder March 11, 2022 or March 17, 2022[1] while making a delivery to a [Redacted, hereinafter MM] facility in Fort Collins, Colorado. Claimant testified while opening a set of heavy, metal container doors his right shoulder "gave out."

3. Claimant initially testified his injury occurred at approximately 1:00 p.m., on March 17, 2022, and that he returned to Employer's terminal after 5:00 p.m. Claimant asserted he could not report his injury to either the terminal manager, [Redacted, hereinafter TS], or Employer's safety manager, [Redacted, hereinafter MK], because it was after hours, and neither TS[Redacted] nor MK[Redacted] was present at the terminal.

4. Claimant testified he did not work the two days after the injury and verbally reported his injury to TS[Redacted] when he returned to work the following Monday. Claimant testified he told TS[Redacted] he injured his shoulder and would need to see a doctor, and then went to work that day. Claimant testified he discussed his alleged injury with TS[Redacted] two additional times after the initial conversation. Claimant testified Employer did not refer Claimant to a physician, and did not offer medical treatment after these conversations. Claimant also testified that he initially did not want to pursue a workers' compensation claim and wanted to handle his injury under other insurance.

[1] The date of Claimant's alleged injury is in dispute, and is discussed below.

5. TS[Redacted] testified at hearing that he had no recollection of any conversation with Claimant regarding an injury to his right shoulder, and that Claimant did not report any injury in March 2022.

6. Over the next two months, Claimant continued to work for Employer, and had regular interactions with MK[Redacted]. MK[Redacted] testified that she and Claimant would smoke cigarettes together at the terminal, and during this time Claimant did not report the alleged injury to her, and she did not observe any behavior consistent with an injury. MK[Redacted] credibly testified that Claimant first reported an injury on June 6, 2022 or June 8, 2022.

7. Employer's policy requires all employees to immediately report all injuries in writing, and that employees could be terminated for not following this policy. Claimant agreed that this was Employer's policy, and that he was aware of the policy at the time of his injury. Claimant had been previously written up for failing to timely report an injury.

8. Notwithstanding his knowledge of this policy, Claimant did not immediately file a written report. Claimant first notified Employer of his alleged March 2022 injury on June 6, 2022, when he reported the injury to MK[Redacted], and completed the appropriate paperwork on June 8, 2022. On June 8, 2022, Employer terminated Claimant's employment for failure to timely report his alleged injury.

MEDICAL TREATMENT

Claimant's Prior Relevant Medical History

9. Claimant has a history of right shoulder issues that began in November 2018 when he fell on his right shoulder while fishing. Following that incident, Claimant sought and received treatment at the Veterans' Administration Medical Center (VAMC)[2]. At Claimant's first documented right shoulder examination on May 20, 2019, he reported a six-month history of right shoulder pain, with occasional numbness and tingling in the right elbow to the hand, and worsening pain with lifting. Claimant's examination was consistent with rotator cuff tendonitis. No MRI was performed, but an x-ray demonstrated mild degenerative changes. Claimant was referred for physical therapy for his right shoulder, which Claimant later indicated did not help. (Ex. N).

10. Following the November 2018 injury, Claimant received treatment at the VA, including participating in physical therapy. In October 2019, received a right shoulder subacromial steroid injection. (Ex. N). Claimant later returned to the VAMC, in April 2020, for evaluation of his right shoulder, and reported the steroid injection provided approximately one and a half months of relief. An MRI was recommended, but was not performed. (Ex. N). Claimant continued to report pain and issues with his right shoulder through at least April 1, 2020. No additional evidence was admitted indicating Claimant

[2] The admitted medical records from the VAMC contain numerous transcription or typographical errors, however, the ALJ is able to discern relevant information regarding Claimant's treatment and evaluations at the VAMC.

received treatment or evaluation for his right shoulder after April 1, 2020 at the VAMC, until May 2022.

Post March 2022 Treatment

11. Claimant's first documented medical treatment for his right shoulder after the alleged date of injury was on May 28, 2022, when he was evaluated at the VAMC by James Thompson, PA. At that visit, Claimant reported right shoulder pain present since February 2022, and was referred for an MRI. Claimant did not report his shoulder pain arose from his employment, that he sustained an injury while opening a container door, or that the injury occurred in March 2022. (Ex. N).

12. On June 21, 2022, Claimant underwent a right shoulder MRI. The MRI was interpreted as showing significant pathology in Claimant's right shoulder, primarily large, retracted tears of the supraspinatus and infraspinatus tendons. The specific MRI findings were:

> Acromioclavicular joint degenerative changes appear relatively significant. Significant superior humeral head migration. Bulk of the supraspinatus is torn and retracted to level of the AC joint with thickened edematous fibers more anteriorly possibly remaining intact. Infraspinatus tendon torn and retracted to level of the glenoid. Partially visualized supraspinatus and infraspinatus muscles appearing significantly atrophied with small surrounding-and internal-edema. Teres minor with small tearing through musculotendinous junction with possible partial tearing of the tendon. Subscapularis with moderate tendinosis and partial Interstitial tearing. Glenohumeral joint with effusion containing small debris. Small subcortical cystic changes with slight narrow edema involving the superolateral humeral head. There may be chronic degenerative superior labral tearing. Potential chronic partial humeral avulsion inferior glenohumeral ligament. Some laxity in the more proximal middle glenohumeral ligament may indicate partial tearing. (Ex. N).

13. Claimant's last documented medical visit for his right shoulder was on August 11, 2022, at the VAMC. Claimant was referred for a consult with neurosurgery for a consideration of a reverse TSA (total shoulder arthroplasty). (Ex. N). At hearing Claimant testified that surgery has been recommended and that he has not undergone the procedure because a new physician was assigned by the VAMC.

14. Claimant presented no credible testimony or medical reports opining that his shoulder pathology was causally related to a work-related injury.

15. Robert Messenbaugh, M.D., was admitted as an expert in orthopedic surgery, and testified at hearing. Dr. Messenbaugh performed an independent medical examination

(IME) of Claimant on October 18, 2022, a subsequent review of additional records, and issued two reports, dated October 18, 2022 and December 10, 2022. (Ex. K & L).

16. Based on his October 18, 2022 examination, and review of records, including Claimant's right shoulder MRI, Dr. Messenbaugh opined that Claimant had severe, chronic damage to his right shoulder, including a complete rotator cuff tear, retracted biceps tendon, and atrophy of the rotator cuff muscles. He noted that Claimant's right humeral head was pulled upward into the socket, which he opined was evidence of a severe chronic condition. He testified that the MRI did not show any damage caused by trauma in March 2022. Dr. Messenbaugh also testified that Claimant's VAMC records confirmed he had chronic right shoulder problems that existed prior to March 2022.

17. Dr. Messenbaugh further testified that given Claimant's preexisting shoulder condition, it was probable Claimant could experience pain opening a container door, but that it was unlikely that it would have caused any alteration of his shoulder anatomy or injury. Dr. Messenbaugh agreed that surgery on Claimant's right shoulder is indicated, but does not believe that the surgery is related to any alleged work injury. Dr. Messenbaugh's testimony was credible and persuasive.

DATE OF INJURY

18. As noted above, the date of Claimant's alleged injury is the subject of dispute. Claimant initially testified his injury occurred on March 17, 2022, at a MM[Redacted] facility in Fort Collins, Colorado at approximately 1:00 p.m., and that he returned to Employer's terminal after 5:00 p.m., on the date of injury.

19. Employer utilizes a tracking system for its drivers which creates a "Driver's Log" which records information regarding driver's start time and end time, driving time, and GPS locations throughout the day. Claimant's Driver's Logs for the month of March 2022 are contained in Exhibit S, pages 447 to 581. Claimant agreed his Driver's Logs were accurate.

20. Claimant's Driver's Logs show he was not in Fort Collins on March 17, 2022, and he returned to Employer's terminal at 10:39 a.m. on that day. Thus, the Driver's Logs are inconsistent with Claimant's initial testimony regarding the time and date of injury, and when he returned to Employer's terminal. After being questioned about this at hearing, Claimant reviewed his Driver's Logs, and indicated he now believed his injury occurred on March 11, 2022, not March 17, 2022.

21. Although the March 11, 2022 Driver's Log shows Claimant was in Fort Collins, the record indicates he left Fort Collins at 12:30 p.m., returned to the terminal at 1:44 p.m., not after 5:00 p.m., as he testified. Claimant's Driver's Logs for the month of March 2022 show Claimant did not return to the terminal after 5:00 on any date, and returned after 4:00 p.m., on only two dates (March 16, 2022 and March 28, 2022). Claimant was not in Fort Collins on either of those dates. (Ex. S).

22. After Claimant reported his injury in June 2022, he later completed a Worker's Claim for Compensation (WCC), on July 12, 2022. Two versions of the WCC form were

admitted into evidence: Claimant's Exhibit 1 and Respondents' Exhibit B. On Respondents' Exhibit B, the date of injury is listed as March 22, 2022. Claimant's version of the WCC is the same document as Respondents' version, except the date of injury is listed as March 1, 2022, in different color ink and different handwriting than the remainder of the form. (Compare Ex. 1 & Ex. B). No evidence was admitted explaining the discrepancy between the two WCC forms. Both WCC forms indicate Claimant reported an injury on April 22, 2022.

23. On June 20, 2022 and July 21, 2022, Respondents filed two Notices of Contest which list the date of injury as March 1, 2022. (Ex. 2). Similarly, Claimant's Application for Hearing and Respondents' Response to Application for Hearing also list the date of injury as March 1, 2022. (Ex. 3 & Ex. I). In response to written discovery, Claimant indicated the injury occurred on March 17, 2022, and that he reported the injury to TS[Redacted] when he arrived at Employer's Terminal on that date. (Ex. J).

24. Given the multiple discrepancies regarding the date of Claimant's alleged injury, ranging from sometime in February 2022, as reported to the VAMC, to April 22, 2022, the ALJ is unable to determine when, if ever, Claimant experienced pain in his right shoulder from opening a metal container.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable right shoulder injury arising out of the course of his employment with Employer. Notwithstanding the multiple discrepancies related to the alleged date of injury, Claimant has failed to establish that he sustained an injury to his right shoulder arising out of the course of his employment with Employer. Dr. Messenbaugh credibly testified that Claimant has significant, pre-existing pathology in his right shoulder. His testimony is supported by the June 21, 2022 MRI which demonstrates significant pathology in Claimant's right shoulder, including multiple torn or potentially torn tendons, retraction of ligaments and displacement of the humeral head.

No health care provider credibly testified that the pathology in Claimant's right shoulder was consistent with an injury sustained by opening a heavy door, or that the pathology in Claimant's shoulder was caused by or aggravated by a work activity.

While Claimant may have experienced pain in his right shoulder while opening a metal container, Claimant has failed to establish that such an incident, if it occurred, caused a compensable injury. Claimant's testimony regarding the alleged injury was contradictory, inconsistent, and uncorroborated. Claimant testified that his right arm "gave out" when he opened a heavy, metal container door in March 2022, but he did not seek medical attention for his right shoulder until May 28, 2022, and did not report the alleged injury to Employer until June 2022. When Claimant did seek treatment, he did not report the injury as work-related, or indicate it was caused by opening a metal container door. Instead, Claimant reported that his right shoulder began to worsen in February 2022. Based on the totality of the evidence, Claimant has failed to establish it is more likely than not that he sustained a compensable injury to his right shoulder arising out of the course of his employment.

MEDICAL BENEFITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App.

2002). *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Id.*

Because Claimant has failed to establish a compensable injury, Claimant has failed to establish an entitlement to medical treatment for his right shoulder issues.

TEMPORARY TOTAL DISABILITY

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Because Claimant has failed to establish a compensable injury, Clamant has not established an entitlement to temporary disability benefits.

CAUSE OF TERMINATION

Because Claimant has failed to establish a compensable injury or entitlement to TTD benefits, the issue of whether Claimant was responsible for his own termination is moot.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

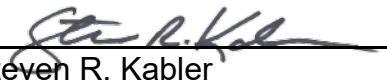
2. Claimant is not entitled to workers' compensation medical benefits.

3. Claimant is not entitled to temporary disability benefits.

4. The issue of Claimant's responsibility for termination is moot.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 23, 2023



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment thereby precluding his entitlement to TTD pursuant to C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a).

II. If Respondents failed to demonstrate that Claimant was responsible for his resulting wage loss, whether Claimant established, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits commencing July 29, 2022 and ongoing.[1]

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a former employee of Respondent-Employer. He was hired on October 19, 2015 (Ex. D), and was working as a foreman when he sustained admitted injuries to his low back and left shoulder on or about November 15, 2021. As his acute back pain improved, it was discovered that Claimant had also suffered a right inguinal hernia as a consequence of the industrial accident. (Ex. 5).

2. As noted, liability for these injures has been accepted. (Exs. E, F). Claimant was referred to physical therapy to treat his low back and shoulder injuries. He was also referred to a general surgeon to evaluate his inguinal hernia. These initial referrals were ignored resulting in the need to "redo" the referral and "reconsult" a different therapist and general surgeon. (Ex. 5, pp. 13, 31). Ultimately, Claimant would participate in therapy. He would also undergo a right inguinal hernia repair with Dr. Ihor Jurij Fedorak on February 3, 2022. (Ex. 6, p. 20). Claimant was off of work from February 3, 2022 through June 5, 2022, as he recovered from his injury and hernia surgery. (Ex. F). Claimant returned to work in a modified capacity following his surgery. Claimant continued to work within his restrictions as a foreman/supervisor doing office tasks and training others in the shop, from June 6, 2022, until he was fired by Employer on July 29, 2022[2].

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[1] Respondents stipulated that because Claimant was working in a modified duty capacity with physical restrictions, he would be considered temporarily disabled and entitled to TTD benefits commencing July 29, 2022 and ongoing if they failed to establish that he was responsible for the termination of his employment and subsequent wage loss. Nonetheless, Respondents also contend that Claimant is not entitled to TTD benefits because he is working in a family owned business.

[2] The ALJ credits Claimant's testimony to find that he was informed that his employment with Respondent-Employer was terminated on July 29, 2022, not July 28, 2022 as referenced in the Termination Report and testified to by [Redacted, hereinafter MW].

3. MW[Redacted] testified as the owner/operations manager of Respondent-Employer. MW[Redacted] testified that Claimant returned to work in a modified capacity after undergoing hernia surgery. According to MW[Redacted], Claimant returned to work as a foreman training others. He also worked in the office performing light duty tasks. In addition to his work for Employer, MW[Redacted] suggested that Claimant was self-employed in a variety of businesses including an adult object/lingerie shop co- owned with his wife, a vending machine business and as a car salesman.

4. MW[Redacted] testified that sometime in June, 2022, he initiated an investigation into Claimant's behavior at work after receiving complaints from employees of the company, including a worker that Claimant supervised. According to MW[Redacted], an employee under Claimant's supervision made "serious" accusations about Claimant's conduct in the workplace prompting MW[Redacted] to gather witness statements from Claimant's co-workers. Because none of the complaining witnesses testified at hearing and because Claimant objected to the introduction of the witness statements without authentication/foundation, which objections were sustained prior to hearing, the exact nature of the complaints are unknown. However, the evidence presented supports a finding that Respondents insist that Claimant inappropriately used his position as a foreman/supervisor to gain access the personnel file of a subordinate worker he was supervising to obtain her birthdate.

5. MW[Redacted] testified that company personnel files contain confidential identifying information about the employee, such as their driver's license and social security numbers and seemingly, in this case, their birthdates. According to MW[Redacted], Claimant had no authority to go "digging around" in the files to obtain this kind of information. Consequently, MW[Redacted] testified he considered Claimant's actions immoral. MW[Redacted] testified further that by accessing the personnel file to obtain confidential information about another employee of the company, Claimant violated company policy and safety protocols. After investigating the complaint, MW[Redacted] testified that he summoned Claimant to a meeting on July 28, 2022, during which he demanded that Claimant explain his actions. According to MW[Redacted], he advised Claimant that a complaint had been filed alleging that he had engaged in inappropriate workplace conduct and that he had misused company information. Claimant generally denied the allegations against him. Moreover, Claimant denied MW's[Redacted] contention that he (Claimant) mentioned the name of the person he suspected of making the complaints based upon a prior dispute between the two, i.e. between Claimant and the complainant. While MW[Redacted] referenced that a complaint had been filed, he would not confirm the identity the complainant(s) nor would he provide Claimant any details regarding the allegations of inappropriate conduct raised by the complaining party(ies). Indeed, MW[Redacted] testified that he only gave Claimant an "overview" of the allegations of inappropriate conduct made by the complainant(s). MW[Redacted] testified that he instructed Claimant to provide a written response to the allegations of wrongdoing within 24 hours.

6. Because he didn't know the nature of the allegations leveled against him and because he did not know how he had supposedly violated company policy, Claimant testified that he could not respond to the accusations. The ALJ infers from

Claimant's testimony that he needed more information regarding the allegations of inappropriate conduct and misuse of confidential information before he could provide the written response requested by MW[Redacted]. Nonetheless, the evidence presented supports a finding that MW[Redacted] took Claimant's reported inability to respond to the allegations as a refusal to provide a statement. MW[Redacted] testified that because Claimant refused to present any evidence, facts, or a statement refuting the allegations against him, he determined the complainant's assertions were true. Upon concluding that the allegations against Claimant were true, MW[Redacted] testified that he summarily terminated Claimant's employment on July 28, 2022.

7. MW[Redacted] testified that following the July 28, 2022 meeting with Claimant, he drafted a termination letter (Termination Report) and gave a copy of it to Claimant as he left the building. The Termination Report provides the following basis for Claimant's termination: "Other employees made allegations of inappropriate conduct in the work place and misuse of confidential company information. MW[Redacted], the owner, did an investigation and found the offense to be a terminateable (sic) offense." (Ex. 13).

8. Clearly the Termination Report does not identify any accusers or provide specific detail on the alleged inappropriate conduct Claimant supposedly carried out in the work place and no witness testified about these details. Consequently, the nature of the "inappropriate conduct" Claimant allegedly instigated is unknown. Moreover, the report does not provide detail on what confidential company information was allegedly accessed or how it was misused. As noted above, the evidence presented supports a finding that Respondents maintain that Claimant's decision to access the personnel file of a subordinate to obtain her birthdate constituted "misuse of confidential company information" because birthdates are treated as confidential information at the company and because Claimant purportedly obtained this information by accessing the complainant's personnel file. Indeed, during his testimony, MW[Redacted] clarified that he considered employee birthdates confidential company information and that by accessing the complainant's personnel file to obtain her birthdate, Claimant misused company information for his benefit, although the evidence presented fails to establish the nature of that benefit or how this information was "misused" other than that Claimant allegedly obtained the complainant's birthdate[3]. Because he considered Claimant's alleged conduct of obtaining a co-employee's birthdate from the personnel file a complete breach of trust between Claimant and the company rather than a safety rule per se, MW[Redacted] testified that he did not follow a progressive discipline protocol before terminating Claimant. Rather, MW[Redacted] testified that Claimant was simply fired.

9. MW[Redacted] testified that access to employee files is protected by lock and key. The cabinet where these files are kept is locked and has a sign on it providing that the files are confidential and that inappropriate or wrongful access could lead to

[3] Although a vague reference to a gift or gifts was raised during the testimony of MW[Redacted], no foundation for how this reference may have constituted inappropriate workplace conduct or misuse of confidential information was presented. Accordingly, the ALJ is disinclined to speculate on what role a gift or gifts may have played in Claimant's termination.

termination. There is only one key to the file cabinet and only three people have access to that key, i.e. MW[Redacted] and two other high level employees of the company, i.e. [Redacted, hereinafter LW] and [Redacted, hereinafter SR]. Anyone seeking access to the cabinet was required to go to one of the aforementioned persons and explain why access was necessary. If access was granted, the cabinet would be opened and the key-holder would monitor the employee requesting access as they reviewed and/or modified the contents of the personnel file selected. Filing of materials, such as performance evaluation reports, would be managed in the same fashion, specifically the supervisor for an employee would gain access to the personnel files of those employees under his direction from the gatekeeper who would then observe as the report would be placed in the file.

10. Based upon the evidence presented, the ALJ finds that MW[Redacted] probably had no direct knowledge regarding any breach of confidences on Claimant's part. Rather, the evidence presented persuades the ALJ that the information forming the basis of Claimant's termination, including the suggestion that Claimant accessed the complainant's personnel file to obtain her birthday, came from employee statements which MW[Redacted] simply concluded were true and which, as noted above, were not supported by witness testimony or introduced into evidence.

11. Claimant testified that he supervised 15 employees for Respondent-Employer. He testified further that as a supervisor, he was routinely granted access to the personnel files of those employees under his direction in order to review their past performance evaluations so he could recommend appropriate wage increases as part of his new performance review. Claimant testified that he was given access to the files by LW[Redacted], SR[Redacted] or MW[Redacted], who would supervise him as he reviewed the files. Claimant was never given the key to independently access the file cabinet. Based upon the evidence presented, the ALJ finds that Claimant was probably never left alone while reviewing subordinate employee files.

12. Claimant disputes that he participated in a meeting with MW[Redacted] on July 28, 2022. Rather, Claimant testified that the meeting took place on Friday, July 29, 2022 and that he was terminated during this meeting. Claimant testified that at the outset of this meeting, MW[Redacted] presented him with the July 28, 2022, Termination Report and asked him if he had anything to say. Claimant testified that he read the Termination Report and informed MW[Redacted] he had "no idea what [MW[Redacted]] was talking about." Based upon the evidence presented, the ALJ infers from Claimant's testimony that he had no understanding of the basis for the allegations raised in the termination report.

13. Claimant testified that MW[Redacted] refused to provide the names of any of the complainants whose statements formed the basis of the termination report. He testified further that he was unaware that someone was complaining about him prior to the July 29, 2022 meeting. Finally, Claimant confirmed MW's[Redacted] testimony that no details regarding the allegations of inappropriate work place conduct were provided during the meeting since MW[Redacted] considered those details confidential. Indeed,

when Claimant asked MW[Redacted] what he had done to get fired, MW[Redacted] purportedly responded, “You tell me.”

14. Claimant reported that he was given an opportunity to provide a written statement in response to the allegations contained in the Termination Report; however, he testified that he did not know what to write because he did not know who had complained about him and because he had no understanding of the nature of his alleged wrongdoing. As Claimant testified, he had no idea what he had done at the time he was handed the termination report.[4]

15. Claimant testified that after returning to work in a modified capacity, he retained his supervisory capacity and had to access personnel files to complete performance evaluations for the employees under his direction. Claimant testified that between his return to work and the date of his termination, he had to gain permission to access personnel and during this period MW[Redacted] would monitor him as he accessed/reviewed the file. Claimant was never denied access to personnel files during this same period, i.e. from June 6, 2022 to July 28, 2022. Claimant adamantly denied ever using confidential information contained in the personnel files for any other purpose than to evaluate those employees under his supervision.

16. Claimant testified that he was never trained in the management/protection of information contained in the personnel files. He also testified that he never considered the potential ramifications of unauthorized/inappropriate access to a file because he never would and did not access personnel files for anything but legitimate business reasons.

17. Claimant testified that he has not received any unemployment compensation benefits since his termination. He also testified that he could not return to his regular position as a working foreman for Employer given his current lifting limitations and physical restrictions.

18. Claimant testified that since his termination, he has not derived any income from the sale of cars. Indeed, Claimant testified that he did not work in the auto sales business at any time while working for Employer. Rather, Claimant testified that on one occasion during his employment with Respondent-Employer he had a personal vehicle that had broken down car in front of his house, which he decided to sell. Based upon the evidence presented, the ALJ is not convinced that Claimant has been or currently is employed as a car salesman.

19. Concerning the contention that he is self-employed as the owner of a vending machine business, Claimant testified that he maintained a single vending

[4] Although Claimant did not know the identity of the person(s) alleging misconduct or the substance of those accusations at the time he was asked to provide a written statement, he testified that through the litigation process he subsequently learned the identity of the complainant, recognized her to be a worker under his supervision and learned the basis for her complaint. Again, none of the details surrounding the complaint are known as the complaining witness did not testify.

machine containing soda, chips and candy at Employer's premises until he was terminated. Claimant testified that upon his termination he was instructed to remove his vending machine from Employer's building. Claimant testified that the vending machine is in his garage and that he has not derived any income from this or any other vending machine since being terminated by Employer. Based upon the evidence presented, the ALJ is not convinced that Claimant is independently employed in a vending machine business.

20. Claimant testified that his wife owns a clothing store that he has volunteered his time at both before and after his termination from Respondent- Employer. The shop does not sell lingerie. According to Claimant, he agreed to volunteer in the shop after his termination to help "keep her business afloat." Claimant testified that after his termination from Employer, he has volunteered his time in the shop six days a week, Monday through Saturday, 11:00 a.m. to 7:30 p.m. daily. Prior to his termination, Claimant he would spend approximately 4 hours volunteering at the store arriving there after his shift for Respondent-Employer.

21. The clothing shop has not turned a profit since its establishment and Claimant does not take a salary nor is he paid by the shop for his work there. Indeed, Claimant has never been paid for his volunteer time while working in the shop. Claimant does not have an expectation of being paid and he has no agreement with the shop that he will be paid for his time in the future.

22. Claimant testified that he works alone when volunteering his time in the shop. Claimant's volunteer duties include keeping the store open, stocking items, moving mannequins, organizing the items for sale, selling the store's items, assisting customers with their shopping, and completing customer purchases. Previously, the shop had an employee who would be paid $150.00 for 10 hours of work involving the same tasks Claimant is now performing on a volunteer basis. Claimant testified that the shop has had no employees since his termination on July 29, 2022, suggesting that the shop could not afford to pay any employee's. Claimant agreed that if he did not volunteer at the shop, it would be necessary to hire an employee if they could afford it but if not, the shop would close. Accordingly, Claimant agreed that his volunteer work allows the shop to remain open and devote more money to paying the shop's bills, rent, utilities, so it can remain a viable business. Nonetheless, the shop has not been profitable and Claimant has not derived any income for the time he spends working there.

23. Claimant denied that he experienced increased back pain as a result of moving mannequins. He also denied lifting items in excess of his assigned restrictions, testifying that the October 17, 2022 physical therapy note in these regards was inaccurate because his physical therapist misunderstood his reports to her. Finally, Claimant denied experiencing increased back pain following a break-in to his wife's apparel shop which required a cleanup. While he acknowledged the break-in, Claimant testified that the cleanup simply required sweeping the floors of the shop. Based upon the evidence presented, the ALJ finds that Claimant has not suffered subsequent injuries since being released to modified duty.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). In this case, the ALJ credits the testimony of Claimant and MW[Redacted] regarding the housing/storage of confidential employee information in a protected filing cabinet. While the ALJ is convinced that Claimant routinely accessed the personnel files of the employees he supervised, the evidence presented fails to persuade the ALJ that he accessed those files inappropriately or that he gathered the personal information of an employee under his supervision, which he later "misused" for his personal benefit. Accordingly, Respondents have not carried their burden to establish that Claimant performed a volitional act which he would reasonably expect to cause the loss of his employment. See *Patchek v. Dept. of Public Safety*, W.C. No. 4-432-201 (ICAO, Sept. 27, 2001).

Responsibility for Termination

A. Because Claimant's injury in this case was after July 1, 1999, C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a), collectively referred to as the "termination statutes", apply to assertions that Claimant is responsible for his wage loss. These provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Under the termination statutes, a claimant who is responsible for the termination of modified or regular employment is not entitled to temporary disability benefits absent a worsening of condition, which reestablishes the causal connection between the injury and the wage loss. See *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004); see also *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002); *Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). As a result, the claimant loses the right to temporary benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo.App. 1994).

B. Since the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant is responsible for his termination and subsequent wage loss. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office,* 20 P.3d 1209 (Colo.App. 2000). Claimant's suggestion that Respondents' failure to follow its own progressive disciplinary policy precludes a determination of whether he was responsible for his termination is unpersuasive. See generally, *Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo.App. 1993) (employer's failure to follow its established discipline procedures did not prohibit a determination that an employee was responsible for termination). To the contrary, as noted in *Keil*, the dispositive issue is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in discharge. Moreover, Respondents do not have to prove Claimant knew or should have known that his conduct would result in his termination. *Gonzales v. Industrial Commission*, 740 P.2d. 999 (Colo. 1987). Rather, it is necessary only that Respondents establish that Claimant is "responsible" for his/her termination and subsequent wage loss through a volitional act or the exercise of some control over the circumstances surrounding the termination.

C. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. See, *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control of the circumstances surrounding the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,*
W.C. no. 4-676-410 (ICAO, April 9, 2008). In other words, an employee is "responsible" for their termination if the employee precipitated the employment termination through a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety, supra.* A volitional act does not mean moral or ethical culpability. It simply means that the claimant performed an act, which led to his/her termination. *Gleason v. Southland Corp*., W.C. No. 4-149-

631 (ICAO, June 13, 1994). Thus, as noted above, the fault determination depends upon whether a claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo.App. 1995). In this case, Respondents assert that Claimant is responsible for his termination and subsequent wage loss after July 29, 2022 because he "inappropriately, without permission or business reason, and in violation of employer's policies and rules, wrongly accessed a coworkers confidential personnel file and obtained that employee's personal information . . .", namely that workers birthdate. According to Respondent- Employer, Claimant then used that information for his personal benefit. The ALJ is not persuaded.

D. The written "Termination Report" in this case provides that Claimant was terminated because "other employees made allegations that he engaged in inappropriate conduct in the work place" and because he misused confidential company information. In this case, the termination report does not identify any accusers or provide specific detail on the alleged inappropriate conduct Claimant supposedly instigated in the work place and no witness testified about these details. Moreover, the report does not provide detail on what confidential company information was allegedly accessed or how it was misused.

E. Although testimony was presented suggesting that Claimant accessed a file containing a subordinate coworker's birthdate, the ALJ finds this evidence to rest on the veracity and competency of other persons rather than MW[Redacted]. As found, MW[Redacted] probably had no direct knowledge regarding any breach of confidences based upon confidential information Claimant allegedly lifted from the complainant's personnel file. Rather, the evidence presented persuades the ALJ that the information forming the basis of Claimant's termination, including the suggestion that Claimant accessed the complainant's personnel file to obtain her birthday, came from employee statements which MW[Redacted] simply concluded were true and which, as noted above, were not supported by witness testimony or introduced into evidence. While there may be substantially more to the allegations leading to Claimant's dismissal, Respondents never produced a complaining witness to corroborate Claimant's alleged "inappropriate conduct" and MW[Redacted] did not testify about why the complaining witness statements led him to believe that personal information had been used inappropriately. Here, Respondents urge the ALJ to conclude that Claimant had to have obtained the complainant's birthdate from the personnel file simply because she complained and because he had regular access to the files. As presented, the evidence simply fails to establish that Claimant obtained the complainant's birthdate from her personnel file or that he used this information for an inappropriate reason. Consequently, the ALJ agrees with Claimant that it would indeed be a slippery slope to determine that Claimant performed a volitional act that he would reasonably expect to result in the loss of employment when the evidence presented regarding those alleged volitional acts was based upon the vague and unverified statements of coworkers who did not testify. Considering the entire evidentiary record, the ALJ concludes that Claimant probably did not exercise a degree of control over the circumstances

surrounding his termination by accessing and misusing confidential workplace information. Accordingly, Respondents have failed to establish that Claimant is responsible for the loss of his employment. While the evidence presented supports a conclusion that Claimant is not responsible for his termination and subsequent wage loss after July 29, 2022, Respondents assertion that Claimant is not entitled to TTD because he is working must also be addressed.

Claimant's Entitlement to Temporary Total Disability Benefits

F. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P. 3d 872 (Colo.App. 2001).

G. As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo.App. 1995). As noted above, Section 8-42-103(1) (a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

H. In this case, Respondents concede that Claimant was provided with work restrictions that impaired his ability to perform his regular employment. Indeed, Respondents noted that Claimant was working modified duty when his employment was terminated. Accordingly, Respondents stipulated that, if they failed to establish that Claimant was responsible for his termination he would be entitled to TTD commencing July 29, 2022 and ongoing, if not for the fact that he was self-employed and also working in a family business. Specifically Respondents contend that Claimant is employed selling cars, maintaining a vending machine business and working in a family owned apparel shop. The ALJ is not persuaded.

I. Although raised by Respondent's through the testimony of MW[Redacted], the evidence presented fails to support that Claimant is employed in vehicle sales or through an independent vending machine business. In fact, Respondents do not assert that Claimant is working in either capacity in their position statement. Rather, Respondents contend that Claimant is employed in the capacity as a "sales associate"

by his wife's apparel shop. Accordingly, Respondents contend that Claimant is not entitled to TTD.

J. Although Respondents recognize that Claimant is not remunerated for his time in the shop, they urge the ALJ find and conclude that Claimant is not entitled to TTD because the time he spends volunteering in his wife's apparel shop essentially constitutes a reinvestment of the wages that would normally be paid to an "employee" into the business which allows the shop to save money by devoting the payroll savings towards paying the shops bills, rent and utilities. Indeed, Respondents assert that the value of Claimant's volunteer time in the shop saves the business $765.00 in wages weekly, which is being reinvested into the organization to maintain its viability. Accordingly, Respondents contend that Claimant is actually employed by the shop. In support of their contention that Claimant is not entitled to TTD, Respondents argue that there is "no requirement that Claimant net any income from his employment and work" in the shop. Rather, Respondents note that Claimant is free to donate the value of his earnings to charity, refuse the money, give it away or as in this case, "reinvest it into his business." Based upon the evidence presented, the ALJ is not convinced that Claimant fits the definition of an employee working or under a contract for hire that would entitle him to any wages that he could refuse, donate or reinvest into his wife's business.

K. The Workers' Compensation Act (Act) defines "employee" in C.R.S. § 8-40-202(1)(b), as "[e]very person in the service of any person, association of persons, firm, or private corporation . . . under any contract of hire, express or implied . . . but not including any persons who are expressly excluded from [the Act]...." For purposes of Colorado's Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a contract of hire. *Younger v. City and County of Denver*, 810 P.2d 647, 652-653 (Colo. 1991). In *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 593, 307 P.2d 805, 810 (1957), the Colorado Supreme Court stated that "[a] contract of hire is subject to the same rules as other contracts even though workmen's compensation laws are liberally construed in our state." Further, the Court held that "[a] contract is an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." *Id.* 134 Colo. at 592, 307 P.2d at 810 (quoting 17 C.J.S. 310, § 1a). However, the Court has also determined that "[a] contract of hire may be formed even though not every formality attending commercial contractual arrangements is observed as long as the fundamental elements of contract formation are present." *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384, 1387 (Colo. 1994); see also *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 220, 422 P.2d 630, 632 (1966).

L. In this case, Respondents contend that Claimant is "obligated" and "must" continue his work in the shop 8.5 hours per day, six days per week "for if he does not, the business will close and the investments in the business by he and his wife will be lost." Consequently, Respondents argue that there is, and has been since Claimant was terminated on July 29, 2022, an employee/employer relationship between himself and his wife's business. According to Respondents, merely because Claimant "[puts]

the earnings and income realized by this time, energies, efforts and hours back into the business' accounts, [rather] than his personal [bank] account or pocket" does not mean he is not an employee of the shop.

M. Based upon the evidence presented, the ALJ finds/concludes that Claimant is volunteering in his wife's business because the work he is performing for the shop is within his physical restrictions and he wants/needs something to do since being terminated because he has been unable to find other modified duty work. The ALJ is not convinced that the evidence presented supports a conclusion that Claimant is "controlled" by his wife's business and he "must" work there. Indeed, while Claimant spends a significant amount of time in the shop, the evidence presented supports a finding/conclusion that he does so by choice. Nothing about the evidence presented persuades the ALJ that Claimant could not simply walk away from the shop and chalk up any losses incurred by closure of the business as a bad investment. Simply put, the evidence presented fails to persuade the ALJ that Claimant is "duty-bound" to spend his time in the shop. Rather, the evidence presented supports a reasonable inference that Claimant spends time there because he has not been able to secure other work within his restrictions. Because Claimant has received no pay for his work in the shop, either before or after his industrial injury and subsequent termination and because he has no reasonable expectation of compensation in the future, the ALJ concludes that Claimant is acting as a volunteer for his wife's shop. Claimant's volunteer work for his wife's business does not satisfy the basic definition of him acting as an "employee" "in the service of" the employer under a contract of hire. Indeed, the ALJ is convinced that there is no mutuality of obligations between the shop and Claimant. Rather, if a party performs services without the expectation of remuneration, as is the case here, the person is a "volunteer," and not an employee within the meaning of the Workers' Compensation Act. See *Hall v. State Compensation Insurance Fund*, 154 Colo. 47, 387 P.2d 899 (1963). Because there was no contract between Claimant and the shop that created an employer/employee relationship, the ALJ concludes that Claimant could not demand compensation as an employee that he could refuse to take, donate or reinvest into the business.

N. As noted above, to receive temporary disability benefits, Claimant must prove that his injury caused a disability, that he left work as a result of the injury and that his temporary disability is total and lasts more than three regular working days. Sections 8-42-103(1) (a) and (b), 8-42-105(1), C.R.S. 2020; *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Because Respondents have stipulated that Claimant is disabled within the meaning of C.R.S. § 8-42-105, as evidenced by restriction of bodily function and the offer of modified duty to accommodate his restrictions, the analysis concerning Claimant's entitlement to TTD shifts to the question of whether Claimant suffered an actual wage loss.[5] In this case, the evidence presented supports a conclusion that Claimant has

[5] Even if Respondents had not stipulated that Claimant is disabled, Claimant's testimony combined with the content of his medical records persuades the ALJ that his low back injury and hernia has resulted in medical incapacity as evidenced by a loss/restriction in bodily function, which restriction has reduced his wage earning capacity as demonstrated by his inability to return to full duty employment based on the

suffered a wage loss as a direct result of his disabling low back/hernia injuries. Indeed, Claimant credibly testified that he is incapable of returning to his regular position for Employer and has been unable to secure other modified work within his restrictions for which he has derived pay since his employment was terminated. Accordingly, the ALJ concludes that Claimant has established that he has suffered an actual wage loss directly related to his industrial injury. Because Claimant's industrial injury caused a disability and he has suffered an actual wage loss as a result of his work injuries, he is entitled to TTD. C.R.S. §§ 8-42-103(1) (a) and (b); 8-42-1051); *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999).

O. Once the claimant has established a disability and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Because none of the factors permitting TTD to be terminated under C.R.S. § 8-42-105(3) (a)-(d) have not been met, the ALJ is persuaded that Claimant is entitled to TTD benefits commencing July 29, 2022 and ongoing.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish, by a preponderance of the evidence, that Claimant is responsible for the termination of his employment and subsequent wage loss.

2. Respondent shall pay Claimant TTD benefits commencing July 29, 2022 and ongoing, at the appropriate TTD rate associated with Claimant's average weekly wage (AWW). The parties shall determine Claimant's AWW and the amount of the offsets to which Respondents are entitled. If the parties are unable to reach an agreement regarding the amount of the AWW or offset, either may apply for a hearing to determine the same.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination

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imposition work-related restrictions. Consequently, the ALJ would have concluded that Claimant is "disabled" within the meaning of C.R.S. § 8-42-105.

Dated: February 8, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43- 301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-146-595-001

ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Dr. Anjmun Sharma regarding permanent medical impairment.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to maintenance care to cure and alleviate the ongoing effects of his August 26, 2020 admitted industrial injury.

III. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a disfigurement award and if so, the amount of said disfigurement benefit.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant suffered serious injuries in the course and scope of his employment on August 26, 2020, when the blade on a demolition saw he was using to cut down a flagpole bound between two metal layers on the pole causing the saw to kick back violently. Claimant lost his grip on the tool which subsequently came into direct contact with the left side of his chest. The saw traveled across Claimant's chest carving a path through the skin, muscle and bone of the left ribs and sternum while severely lacerating the lower portion of Claimant's left lung.

2. Fortuitously for Claimant, the jobsite was located on the grounds of a local hospital and he was close to the emergency room at the time of the accident. Claimant was able to ambulate to the emergency department room entrance where the severity of Claimant's injuries were assessed. Claimant was immediately transported to the operating room for hemorrhage control and further injury assessment. Following successful ligation of a completely severed mammary artery, Claimant underwent a thoracotomy with placement of two chest tubes to treat a left sided pneumothorax. Claimant was then airlifted to Parkview Medical Center in Pueblo, Colorado for hospitalization and additional treatment. (See generally, Resp. Exs. G, H and I).

3. After surgical repair and initial recovery from his chest wound, it was discovered that Claimant had also sustained an injury to his left shoulder during the August 26, 2020 accident. Claimant ultimately underwent additional surgery to repair a labral and subscapularis tear in the left shoulder.

4. Following extensive post-surgical care with his authorized treating provider (ATP), Dr. Thomas Centi, Claimant was placed at maximum medical improvement (MMI) on November 2, 2021. (Resp. Ex. A, p. 9). Dr. Centi assigned Claimant an 11% upper extremity impairment rating for reduced range of motion in the left shoulder. *Id.* at pp. 10-11.

5. Respondents filed a Final Admission of Liability (FAL) admitting to Dr. Centi's impairment rating on December 17, 2021. (Resp. Ex. A). Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME). Dr. Anjmun Sharma was selected as the DIME physician.

6. Dr. Sharma completed the DIME on May 2, 2022. (Resp. Ex. E). Following his medical records review and physical examination, Dr. Sharma, assigned a 17% scheduled left upper extremity impairment rating and a 10% whole person impairment for a skin disorder pursuant to Chapter 13, Section 13.4, Table 1 at p. 232 of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*) (hereinafter the Guides) (Resp. Ex. E, p. 23, 47).

7. Dr. Sharma assigned the aforementioned 10% whole person impairment for the residual scarring on Claimant's left upper torso and chest caused by the laceration from the saw blade. In allocating impairment for Claimant's scarring, Dr. Sharma noted:

> The patient does meet the criteria for skin disorders. Referencing page 231 (sic) of the AMA Guide, impairment classification for skin disease, the patient meets the criteria under Class II, 10 to 20% of the whole person. The patient belongs in Class II when signs and symptoms of skin disorder are present and intermittent treatment is required which I commented on in Section E of this report of the patient's subjective complaints of using a special cream and there are some limitation in the performance of some activities of daily living, which the patient has reported an (sic) which is commensurate with his current for (sic) functional activity status.[1]

(Resp. Ex. E, p. 47).

8. Dr. Sharma did not recommend maintenance medical treatment. (Resp. Ex. E, p. 47).

9. Dr. Carlos Cebrian performed an independent medical examination (IME) of Claimant at the request of Respondents on August 10, 2022. Dr. Cebrian also

[1] As referenced Section E of Dr. Sharma's DIME report notes that Claimant did not have "full range of motion" and reported "some pain" and "functional limitation in the performance of certain physical activities of daily living" associated with his scar. Claimant also reported that he is to "use a certain type of cream for soothing his symptoms", i.e. the pain related to his scar.

testified via pre-hearing deposition on October 21, 2022. Dr. Cebrian was admitted as an expert in occupational medicine. (Depo. of Dr. Cebrian, 6:19-21).

10. In his written IME report and throughout his deposition testimony, Dr. Cebrian opines that Dr. Sharma erred by assigning impairment for a Class 2 condition of the skin, i.e. for the scarring on Claimant's chest caused by the laceration from the saw blade on August 26, 2020 (See generally, Resp. Ex. F; Depo. of Dr. Cebrian, 15:6- 8).

11. During his deposition, Dr. Cebrian acknowledged that section 13.4 of the Guides, provides that if there is "any loss of function due to sensory deficit, pain or discomfort in the scar area, the scar should be evaluated according to criteria in Chapter 4 of the Guides. (Depo. of Dr. Cebrian, 16:20-25). Dr. Cebrian also noted that loss of function due to a scar, including loss of function due to limited motion in the scar area should be evaluated according to the criteria in chapter 3 or if in the chest, Chapter 5 of the Guides. (Depo. of Dr. Cebrian, 17:1-5). Because Claimant's scar was painful and having an effect on his range of motion which was limiting his functional abilities, Dr. Cebrian opined that any impairment associated with Claimant's scar would be rated in accordance with the principles in Chapter 3 of the Guides, which Dr. Cebrian noted is the chapter concerning extremities, involving the shoulder, elbow and wrist. *Id*. at ll. 6- 10.

12. Dr. Cebrian testified that Claimant did not meet the Guides to receive an impairment rating for his chest scar because even if the scar was causing some limitation in Claimant's ability to carry out his activities of daily living, there was no way to separate the range of motion loss due to Claimant's left shoulder injury from the range of motion loss attributable to Claimant's chest scar. (Depo. of Dr. Cebrian, 19:7- 15). Based upon the type of shoulder injury Claimant sustained and the surgery directed to that shoulder, Dr. Cebrian testified that the range of motion deficits Claimant was experiencing in the arm and chest wall were "exclusively" related to the shoulder injury. Alternatively, Dr. Cebrian opined that if there was range of motion loss due to the scar, it was "such a minimal component" that any range of motion loss from the scar would be accounted for in the range of motion loss attributable to the left shoulder. (Depo. of Dr. Cebrian, 19:16-22). Accordingly, Dr. Cebrian testified that to assign a separate rating for Claimant's scar would be duplicative. *Id*. at ll. 23-24.

13. In support of his opinions, Dr. Cebrian reasoned that although Claimant had some discomfort and thickness in his scar, the scar was not causing any abnormalities in his range of motion or difficulties with pushing, pulling, lifting, or engaging in overhead activity. Instead, Dr. Cebrian concluded that those issues were attributable to Claimant's left shoulder injury, and not from the chest scar itself. According to Dr. Cebrian, there must be a functional loss specific to the scar itself and not from another injured body part to receive a rating under Chapter 13 of the Guides. Indeed, Dr. Cebrian noted: "And related to [Claimant] there is nothing specifically that can be pinpointed to the scar in isolation that you would assign an impairment rating for that scar itself . . ." (Resp. Ex. F, p. 88, Depo. of Dr. Cebrian, 18:7-24).

14. Dr. Cebrian stated that “the scar itself wasn’t restrictive to the point that it was the scar that was preventing range of motion in [Claimant’s] shoulder”. (Depo. of Dr. Cebrian, 22:22-24). Instead, it was Claimant’s shoulder limitations that were restricting his range of motion. Specifically, Dr. Cebrian noted, Claimant’s “scar, the location of the scar wasn’t something that was causing [Claimant] to not be able to move his shoulder to the full extent. It was the shoulder joint itself”. (Depo. of Dr. Cebrian, 23:1-3).

15. During cross-examination, Dr. Cebrian admitted that there “may be residual effects” from Claimant’s scar, “but not to the point that it qualifies for a separate permanent impairment”. (Depo. of Dr. Cebrian, 31:22-24).

16. Dr. Sharma testified by deposition of November 4, 2022 as a Level II accredited physician with a board certification in family practice. (Depo. of Dr. Sharma, 6:7-13). Dr. Sharma testified that he did assign a Class 2 rating for Claimant’s scar because Claimant reported “using medication, anti-inflammatories for pain, sometimes over-the-counter gel, like Voltaren” and because “there’s limitations of performance of some activities of daily living”, such as “[p]utting on [his] shirt, taking off [his] shirt, perhaps brushing his hair, combing his hair, maybe even cleaning himself or cleaning parts of his body on his chest, maybe it’s hurting, also when he is cleaning his chest in the shower. (Depo. of Dr. Sharma, 13:4-14). Dr. Sharma made clear that Claimant’s functional limitations were caused by both the shoulder injury and the scar and he rated both based upon his review of the medical records, his physical examination and asking Claimant “questions with regard to his scar and activities of daily living”. (Depo. of Dr. Sharma, 14:12-25, 15:1-6).

17. Concerning Claimant’s need for ongoing medical treatment, Dr. Sharma testified that Claimant will need ongoing anti-inflammatories and over-the-counter preparations such as Voltaren gel to manage his pain which will “[mitigate] his symptoms of pain” and allow him to be as “functional as possible”. (Depo. of Dr. Sharma, 16:2-25; 17:1-3).

18. Dr. Sharma testified that his assignment of impairment related to Claimant’s chest scar was based on pain and loss of function not range of motion loss. (Depo. Dr. Sharma, 20:3-18).

19. Claimant testified that he has limited mobility of his left shoulder and chest wall describing a rough scar that felt wadded up. He reported persistent pain, aching and numbness in the left pectoralis muscle and chest wall. He admitted he did not need to go back to a doctor for the scar, that he had no scheduled appointments for treatment of scar, and that he was using oils and cream that were recommended, rather than prescribed.

20. The evidence presented supports a finding that none of Claimant’s authorized treating physicians have recommended that he undergo maintenance care.

Dr. Cebrian also concluded that no medical maintenance care was reasonable, necessary, or related to Claimant's August 26, 2020 injury. (Resp. Ex. F, p. 87). Dr. Cebrian reasoned that Claimant's lack of work restrictions indicated Claimant was "doing well, was stable, and there really wasn't any medical treatment that was going to make any difference with any of [Claimant's] ongoing complaints that he had". (Depo. of Dr. Cebrian, 13: 24-25, 14:1-3).

21. As noted above, Dr. Sharma did not indicate that Claimant required maintenance care in his DIME report. Nonetheless, the ALJ credits Claimant's testimony regarding his ongoing symptoms and the subsequent testimony of Dr. Sharma to find that Claimant probably requires ongoing over-the-counter analgesics, including topic analgesics, to manage the persistent pain associated with his chest injury and resultant scar. Without such analgesics, the ALJ is convinced that Claimant's condition will probably deteriorate further resulting in worsening pain and greater functional decline. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that he is entitled to a general order for ongoing maintenance treatment. The contrary opinions of Dr. Cebrian are unpersuasive.

22. Visual inspection of the left side of Claimant's body, including his left shoulder, left chest and left torso reveals the following scarring:

- A total of three (3) arthroscopic surgical scars located about the left shoulder. These scars are all thin in width and vary in length between ⅜ to ½ inch long. They also vary in color from being lighter than the surrounding skin to a light pink. While the scars on the front and outside of the shoulder appear to be of the same contour as the surrounding skin, the scar located on the upper back aspect of the left shoulder is slightly depressed.

- In addition to the left shoulder scarring, there is a large, variously pigmented, rough appearing and thickened scar which begins in the center of the chest wall in the area of the mid sternum and runs diagonally down the chest for approximately 14 inches terminating below the left pectoralis muscle on the lower aspect of the left ribs. This scar varies in width with some portions appearing up to ½-inch wide. Multiple pairs of lightly pigmented and slightly raised suture scars appear adjacent to and run along the length of this scar. There is a secondary surgical scar from Claimant's thoracotomy located below the left nipple. This scar extends from the left side of the chest wall over the pectoralis muscle for approximately 10 inches before it intersects with the aforementioned 14-inch scar described above. This surgical scar varies in width from ⅜ to ½ an inch, is red in color and raised when compared to the surrounding skin.

- Below the 10-inch scar on the left side of the torso are two additional scars the first appearing approximately 1 inch long by ⅜ inch wide. This scar is red in color and raised when compared to the color and contour of the surrounding skin. The second scar is approximately 3 inches long and

½ inch wide. This scar is pink in color and raised when compared to the surrounding skin.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to Assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo.App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo.App. 1990). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo.App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Overcoming Dr. Sharma's Impairment Rating Opinion

D. A DIME physician's findings regarding causation and whole person impairment are binding on the parties unless overcome by "clear and convincing evidence". *Section 8-42-107(8) (b) (III), C.R.S.*; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo.App. 1998). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. In other words, to overcome a DIME physician's opinion concerning the cause of a particular component of a claimant's overall medical impairment or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual- Med v. Industrial Claim Appears Office, supra.*

E. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions, including whether the DIME appropriately utilized the AMA Guides in his opinions. *Section 8-43-301(8), C.R.S.*; *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo.App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). In this case, Dr. Sharma testified that he assigned a separate impairment rating for Claimant's chest scar on the basis that it was causing him pain which in turn restricted his ability to "fully and unreservedly" perform such activities of daily living as donning/doffing his shirt, brushing/combing his hair and cleaning parts of his body, including his chest because "it's hurting". (Depo. of Dr. Sharma, pp. 13-16, ll. 1-9). Respondents' challenge to the impairment rating opinion of Dr. Sharma centers on Dr. Cebrian's opinion that no specific functional deficits can be "pinpointed" to the scar in isolation that you would assign an impairment rating based upon a limitation of Claimant's activities of daily living. (Depo. of Dr. Cebrian, 18:7-15). While admitting that the scar may cause some discomfort and may be thickened creating some residual limitations (effects) in some areas, Dr. Cebrian testified that these factors were not what is causing Claimant's limitation with functional activities. *Id.* at ll. 16-19. Rather, Dr. Cebrian testified that Claimant's left shoulder injury is what is causing his limitations with pushing, pulling, lifting and reaching/lifting overhead because the shoulder injury is responsible range of motion loss and thus, Claimant's functional limitations. *Id*. at ll. 19-24. (See also, Resp. Ex. F, pp. 88-89). Because there is "no way to separate out what's coming from the shoulder (injury) and what's coming from the scar" when assessing the impairing components of the injuries in this case, Dr. Cebrian testified that Dr. Sharma erred when he assigned a separate impairment for the scar. (Depo. of Dr. Cebrian, 19:7-24). Indeed, Dr. Cebrian testified that given the type of shoulder injury Claimant sustained, along with the documented range of motion deficits in the left shoulder post-surgery, any "minimal component" of range of motion loss attributable to the scar would be completely subsumed in the range of motion impairment related to the left shoulder. Accordingly, Dr. Cebrian opined that assigning impairment for functional deficits based

upon range of motion loss caused by the scar, even if caused by pain and some residual effects, essentially amounted to impermissible impairment double dipping. (Depo. of Dr. Cebrian, 19:23-24; See also, Resp. Ex. F, p. 89).

F. Pursuant to the *AMA Guides, Section 1.2,* Structure and Use of the *Guides*, "[i]n practice, the first key to effective and reliable evaluation of impairment is a review of office and hospital records maintained by the physicians who have provided care since the onset of the medical condition". This same section of the *AMA Guides* continues by noting, "This information gathering and analysis serves as the foundation upon which the evaluation of a permanent impairment is carried out. It is most important that the evaluator obtain enough clinical information to characterize the medical condition fully in accordance with the requirements of the guides". *In Re Goffinett,* W.C. No. 4-677-750 (Industrial Claims Appeals Panel, Apr. 16, 2008). Based upon the evidence presented, including Dr. Sharma's DIME report, the ALJ is convinced that Dr. Sharma adhered to the principals of the Guides by conducting a thorough review the medical records to gather information to accurately and fully describe Claimant's medical condition. Indeed, Dr. Sharma testified that he rated both Claimant's shoulder and skin disorder, i.e. his scar based upon his review of the medical records, his physical examination and asking Claimant "questions with regard to his scar and activities of daily living". (Depo. of Dr. Sharma, 14:12-25, 15:1-6).

G. The Guides also provide a method for determining the impairing effect of scars following bodily injury. Indeed, Section 13.4 provides "If a scar involves a loss of sweat gland function, hair growth, nail growth or pigment formation, the effect of such loss on performance of the activities of daily living should be evaluated. Furthermore, any loss of function due to sensory deficit pain or discomfort in the scar area should be evaluated according to the criteria in Chapter 4. Loss of function due to limited motion in the scar area should be evaluated according to criteria in Chapter 3 or if the chest wall excursion is limited in Chapter 5". The ALJ agrees with Dr. Cebrian that the guidance for rating scars in Section 13.4 should be interpreted to indicate that if a scar is having an effect on range of motion, then the impairing nature of the scar should be rated pursuant to Chapter 3, which is an extremity chapter containing the extremities, including the shoulder.

H. Based upon the evidence presented, the ALJ is persuaded that Dr. Sharma followed the principles set out in Section 13.4 of the Guides. Furthermore, the ALJ is convinced that Dr. Sharma properly considered and appropriately used Table 1-Impairment Classification for Skin Disease when calculating Claimant's impairment rating. The difference between Dr. Sharma and Dr. Cebrian regarding impairment is not based on whether Dr. Sharma appropriately utilized the principles set out in the AMA Guides, but rather on Dr. Cebrian's belief/opinion that any functional deficits caused by range or motion loss owing to Claimant's chest scar, were already accounted for in the range of motion loss attributable to Claimant's shoulder injury.

I. While it is clear that Dr. Cebrian believes that Dr. Sharma has erred because there is nothing that specifically indicated that the scar was affecting

Claimant's functional activities and because Claimant's left shoulder range of motion was limited to the extent that there would be no effect from the scar on Claimant's range of motion and activities of daily living, the ALJ has considered all of the DIME physician's written and oral testimony[2] to find and conclude that Dr. Sharma did not believe that all the deficits in Claimant's functionality were due to the range of motion loss caused by Claimant's left shoulder injury and he cited specific examples of those activities he believed were impaired secondary to Claimant's extensive chest scar. Moreover, Dr. Sharma addressed Claimant's use of topical agents to treat the ongoing pain and sensitivity caused by the scar, which forms the basis for his ongoing functional limitations. As a result, the ALJ is not persuaded that Dr. Sharma erred in assigning a Class 2 permanent impairment based on Table 1 for Claimant's extensive chest scar. Indeed, after considering the totality of the evidence presented, including the DIME report of Dr. Sharma, the report of Dr. Cebrian along with the balance of the medical record, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that Dr. Sharma's determination that Claimant is entitled to a separate impairment for his chest scar is highly probably incorrect. Rather, the ALJ concludes that the evidence presented establishes a mere difference of opinion between Dr. Sharma, as the DIME physician and Dr. Cebrian regarding the impairing components of Claimant's extensive injuries. A difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Sharma's opinions concerning impairment. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents request to set aside the impairment rating opinion of Dr. Sharma must be denied and dismissed.

Claimant's Entitlement to Maintenance Medical Treatment

J. The need for medical treatment may extend beyond the point of maximum medical improvement (MMI) where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition". If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*".

K. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra.* Indeed, a claimant is only

[2] When rendering his order, the ALJ should consider all of the DIME physician's written and oral testimony. See *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998).

entitled to such future benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); C.R.S. § 8-41-301(1) (c). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those, which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

L. The question of whether the claimant met the burden of proof to establish his/her entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, Dr. Sharma indicated in his DIME report that Claimant did not require maintenance medical care. Nonetheless, he testified that Claimant was managing the pain associated with his chest scar with over-the-counter medications and other preparations, including Tylenol, Ibuprofen and Voltaren gel, which he needed to "mitigate" his pain symptoms to "allow him to be as functional as possible". (Depo. of Dr. Sharma, 16:2-9; 17:1-3 and 21:6-15). The ALJ credits Claimant's testimony and the opinions of Dr. Sharma to finds/conclude that Claimant's present condition will likely deteriorate and he will, more probably than not, experience functional decline without the continued use of the aforementioned over-the-counter analgesics, including Voltaren gel or an equivalent preparation. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that he is entitled to a general award of maintenance medical care. In concluding that Claimant has established his entitlement to maintenance medical benefits, the ALJ specifically rejects Dr. Cebrian's opinion that there "really [isn't] any medical treatment that [is] going to make any difference with any of [Claimant's] ongoing complaints . . . " Nonetheless, even with a general award of maintenance medical benefits, Respondents retain the right to dispute whether the need for future medical treatment is related to Claimant's compensable injury or whether that treatment is reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

Claimant Entitlement to Disfigurement Benefits

M. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement", as used in the statute, contemplates that there be an "observable impairment of the natural appearance of [the] person". In this case, the ALJ finds and concludes that as a result of his August 26, 2020 work injury; Claimant has visible disfigurement to the body consisting of significant scarring as described in Finding of Fact, ¶ 22 above.

N. Respondents suggestion that Claimant would not be entitled to disfigurement if he received an impairment rating for the substantial scarring is unpersuasive. In concluding that Claimant is entitled to both an impairment rating for his chest scar and a disfigurement award for his disfiguring scarring, the ALJ finds the case of *Gonzales v. Advanced Component Systems*, 949 P.2d 569 (Colo. 1997) instructive. In *Gonzales*, the Court held that the impairment rating statute did not "preclude other recovery" available to the claimant under the disfigurement statute enumerated at C.R.S. § 8-42-108 for a functionally impairing and disfiguring facial scar. Analogous to the situation presented in *Gonzales*, the impairment assigned for Claimant's chest scar is to compensate him for the functional deficits caused by his injury while the disfigurement award is designed to compensate Claimant for the visible,
i.e. observable alteration in the natural appearance of his body. Accordingly, the ALJ is not convinced that Claimant's receipt of an impairment rating and a disfigurement award for the same scar constitutes a "duplicative" award as asserted by Respondents. Because visual inspection of Claimant's chest, left torso and left shoulder supports a finding that he has suffered an "observable impairment of the natural appearance of [the] person", the ALJ finds/concludes that he is entitled to a disfigurement award. Nonetheless, a question remains as to whether Claimant's disfigurement constitutes "extensive body scars" so as to trigger the second tier of disfigurement benefits as referenced in C.R.S. § 8-42-108 (2).

O. "Extensive" is defined as, "Widely extended in space, time, or scope; great or wide or capable of being extended". Black's Law Dictionary, *Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, Sixth Ed. 1990. The common and ordinary meaning of the word "extensive" is "having wide or considerable extent", with the term "extent" being defined as the "amount of space or surface that something occupies*". Webster's New Collegiate Dictionary*, (1973). In interpreting C.R.S. § 8-42-108 (2), the ALJ gives the terms and phrases used in the statute their plain and ordinary meanings, and has read them in context and construed them according to the rules of grammar and common usage. Based upon that interpretation the ALJ concludes that the statute contemplates that in order to trigger a second tier disfigurement award, there must be evidence of scars or alteration in the appearance of the body over a wide area. Without question, the residual scars located on Claimant's chest, torso and left upper injury are substantially unsightly and entitle him to a significant disfigurement award. Moreover, Claimant's disfigurement covers an expansive portion of the chest and left torso and is not limited/confined to these areas. Rather, there is an extension of the scarring associated with Claimant's injuries to his left shoulder. While the scarring on the left shoulder is not nearly as severe as the scarring on the chest/torso, it constitutes an expansion of the body parts beyond the chest, which have also been visibly altered due to Claimant's injuries. Accordingly, the ALJ finds/concludes that Claimant's scarring is "extensive" as contemplated by C.R.S. § 8-42-108 (2) (b). As these scars are normally exposed to public view, Respondents shall pay Claimant $7,800.00 for the above-described disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside the impairment rating opinions of Dr. Sharma is denied and dismissed.

2. Respondents shall provide all reasonable, necessary and related maintenance medical treatment to prevent deterioration of Claimant's present condition and otherwise relieve him from the ongoing chest pain related to his industrial injury, including the continued provision of over-the-counter analgesics such as Ibuproen, Tylenol and Voltaren gel or an equivalent preparation. Respondents retain the right to challenge any future request for maintenance treatment on the grounds that it is not reasonable, necessary or related to Claimant's November 26, 2014 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc., supra.*

3. Respondents shall pay Claimant $7,800.00 in disfigurement benefits.

4. Any and all issues not determined herein are reserved for future decision.

DATED: February 10. 2023

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-484-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he suffered a compensable injury arising out of the motor vehicle accident on March 12, 2022?

2. If Claimant suffered a compensable injury, is Claimant entitled to ongoing medical and indemnity benefits?

3. If Claimant suffered a compensable injury, is Claimant entitled to temporary partial disability benefits?

STIPULATIONS

The parties stipulate that Claimant was in travel status at the time of his March 12, 2022, motor vehicle accident.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 44 year-old man who is a national restoration project manager for Employer. Claimant resides in Alabama, but traveled to Colorado on January 1, 2022, for work.

2. On Saturday, March 12, 2022, Claimant was driving from the job site back to his hotel in Boulder. He was stopped at a light when he was rear-ended. Claimant was wearing his seatbelt, and the airbags did not deploy.

3. Claimant was driving a 2021 Dodge Ram, 4 x4, quad cab, half-ton pickup, and the vehicle that rear-ended him was a significantly smaller vehicle. Claimant thought the vehicle was a Ford Fusion. (Tr. 29:7-11). The impact did not cause Claimant to hit the vehicle in front of him, which was also stopped. Claimant's vehicle suffered very little damage. (Ex. 12). The driver who rear ended Claimant told the police he was going approximately five miles per hour. Claimant told subsequent medical providers that the car that hit him was going five miles per hour. (Ex. D).

4. Claimant called the police, and when they arrived, he said he felt fine. Claimant testified that while he was sitting in his vehicle waiting for the police to complete their report, the back of his neck started hurting. He reported this to the police, but declined to go the emergency room. (Tr.26:3-20).

5. Right after the accident Claimant tried to contact his managers, but no one was available. He texted [Redacted, hereinafter KP], the national operations

manager, told him he had been rear ended and asked KP[Redacted] to call him. (Ex. 5). KP[Redacted] called Claimant and provided him with Employer's insurance information.

6. The following day, Sunday, March 13, 2022, Claimant went to AFC Urgent Care in Boulder. He reported being in a motor vehicle accident the previous day. Claimant denied hitting his head or losing consciousness. He reported headaches and occasional dizziness with pain in his neck and left shoulder. Claimant was able to move his neck and shoulder normally. There was no swelling, and he had full range of motion in his neck and shoulder. Claimant was advised to rest for 48-72 hours and take Tylenol/Ibuprofen for pain. (Ex. B). Claimant testified that he felt the practitioner at AFC Urgent Care was dismissive of him. (Tr. 43: 20-25).

7. Claimant emailed [Redacted, hereinafter DH], Director of Risk Operations, and others on March 13, 2022. Claimant provided details regarding the accident, and stated he walked to urgent care that morning because his neck and shoulder were really sore, his back was stiff, he was light headed/dizzy and had a bad headache. Claimant further explained that the nurse practitioner told him the soreness was from the impact of the accident, but he should seek further care if he did not get better. DH[Redacted] agreed Claimant should be reevaluated if he did not improve, and she also suggested massage therapy. (Ex. 7).

8. Claimant testified he continued to work following his accident. He went back into the field on March 15, 2022, visited job sites and checked with supervisors about projects they were working on. (Tr. 81:3-25).

9. Claimant regularly communicated with Employer regarding his condition. On March 16, 2022, [Redacted, hereinafter NH], Loss Control Specialist for Employer, emailed Claimant and said "[a]s we discussed, please utilize our nurse triage program, WorkCare, in the event of future injuries, be they vehicle accident related or not. Obviously call 911 or go to the ER if the situation warrants." (Ex. 7). There is no evidence in the record that Claimant ever utilized WorkCare.

10. On Friday, March 18, 2022, nearly a week after the accident, Claimant had a telephonic meeting with NH[Redacted] and [Redacted, hereinafter MZ] from Employer's risk management department. DH[Redacted] recapped the meeting in an email to Claimant. According to the email, Claimant was to remain off-site that weekend, and the following Monday through Wednesday. If by Wednesday, Claimant needed more time off, he was to notify Employer. Claimant was to only work in the capacity of phone calls and emails. Claimant told Employer his dizzy spells were less frequent. He was instructed to notify Employer immediately if his pain worsened, and he was given a list of facilities to visit for massage/muscle therapy, including Concentra Urgent Care. (Ex. K). Claimant testified that NH's[Redacted] email "pretty much summarized" the meeting. (Tr. 41:24-42:1).

11. Claimant testified he told NH[Redacted] he was going to the doctor the next day, which would have been a Saturday, for a follow-up because he was still having issues. He testified his symptoms were not as severe, but still present. (Tr. 42:5-

22). The ALJ does not find this testimony credible. First, there is no mention of Claimant's plan to go to the doctor on a Saturday in NH's[Redacted] email summarizing the meeting with Claimant. Second, it is not logical that Claimant would go to a doctor for a "follow-up" on a Saturday. The only places claimant could have gone on a Saturday would be an urgent care or emergency room (ER). And by Claimant's own testimony, his symptoms were not severe.

12. On Saturday, March 19, 2022, Claimant went to Boulder Medical Center for an Urgent Care visit. Caroline Cooper, AP evaluated Claimant. Claimant told Ms. Cooper that he had been rear ended the previous week, and the driver was going five miles per hour. He complained of left shoulder and back pain, headaches, and neck stiffness. He denied any vomiting, and reported nausea one to two times throughout the week. According to Claimant, the nausea and dizziness ended on Thursday, March 17, 2022. Claimant denied the visit as a workers' compensation visit. According to the medical record, Claimant had left shoulder pain and neck pain, but he declined a work note or physical therapy order. Claimant was also assessed with a "concussion without loss of consciousness, sequela." Claimant was to rest for two weeks, and gradually increase physical exertion in a stepwise manner. Ms. Cooper ordered x-rays of Claimant's cervical spine and his left shoulder. (Ex. C). The x-rays revealed no acute injuries in any of these regions. (Ex. D).

13. Claimant spoke with MZ[Redacted] on March 20, 2022 and told her he went to Boulder Medical Center the previous day for another evaluation, and the doctor determined he suffered a concussion as a result of the accident. He also told MZ[Redacted] that the dizzy spells were back, and his balance was off. (Ex. 9). Claimant told Ms. Cooper, however, that he had not had any dizziness of nausea since March 17, 2022. (Ex. C).

14. The ALJ finds Claimant's subjective reports of dizziness and nausea were inconsistent, and not credible.

15. Claimant testified he fell in the shower and hit his head on March 21, 2022. According to Claimant, he was rinsing the shampoo out of his hair, and when he leaned back and closed his eyes, he got dizzy and lightheaded. (Tr. 48:7-22).

16. Claimant went to Foothills ER at Boulder Community Health that same day with a chief complaint of dizziness. The record notes Claimant's motor vehicle accident, and his "continuing worsening and new symptoms." The record also says Claimant took a Flexeril Saturday night and woke up vomiting with more dizziness. Claimant reported being dizzy and unsteady when he fell in the shower that morning and hit his head. He had no specific visual symptoms and no headache. Claimant had a CT scan of his head that revealed no significant intracranial abnormality. Dale Wang, M.D. noted '[n]ormal head and neck imaging. The dizziness and headache are symptoms that are more likely to be a concussion. Symptomatic treatment as discussed. Follow up in worker's compensation clinic." (Ex. 15). There is no evidence in the record that Claimant followed up in a worker's compensation clinic or utilized WorkCare as instructed by his Employer.

17. The very next day, on March 22, 2022, Claimant went to Boulder Medical Center for another urgent care visit. According to the medial record, Claimant went to the ER the previous day and was diagnosed with a concussion. There is no mention of Claimant falling in the shower and hitting his head, just that he had dizziness and vomiting due to the Flexeril he took. Claimant wanted to be cleared to go back to work that day. He reported feeling "great" and denied any dizziness, headaches, sensitivity to light, or blurred vision. Claimant was given a "work/school status note" stating he was cleared to return to work on March 22, 2022. (Ex. F).

18. Claimant spoke with MZ[Redacted] that day, and reported a general resolution of his symptoms. MZ[Redacted] noted on March 22, 2022, Claimant reported his headache and "dizzy spells" had resolved. (Ex. 9).

19. Claimant returned to work on March 22, 2022, and continued to report regularly to Employer how he was feeling. After a few days of work, on March 25, 2023, Claimant reported he was feeling "ok." Claimant noted he had been busy the past few days at work, but he reported no symptoms. (Ex. 9).

20. Claimant testified at hearing that he may have been misquoted by MZ[Redacted] on March 25, 2022 and he "believed" he told her that he was not feeling "a hundred percent and that [he] had been wearing a hard hat and [his] head was hurting at the time." (Tr. 58:4-21). Claimant's account of this conversation is not supported by the call log MZ[Redacted] kept.

21. On March 30, 2022, Claimant spoke with MZ[Redacted] and told her that his headaches were back, and he was not sure if wearing a hard hat applied pressure to his head. (Ex. 9).

22. Two days later, on April 1, 2022, Claimant went to Boulder Medical Center for an Urgent Care visit and reported having amnesia symptoms, worse headaches, and daily vomiting for the past six days. They sent Claimant to the ER because of his new and/or worsening symptoms, and provided Claimant information regarding local concussion clinics. (Ex. F and Ex. 16). There is no evidence in the record Claimant contacted WorkCare.

23. Claimant's chief complaint in the ER was a headache. The record notes that he had been seen previously for a headache and dizziness, and underwent a CT that was negative. According to Claimant, his symptoms had improved, but a week prior (approximately March 25, 2022) he worked quite hard, and woke up the next day with worsening of symptoms, including a headache, dizziness, and continued vomiting. David Whitling, M.D., ordered a brain MRI. Claimant's MRI showed no sign of acute pathology, but noted mild white matter disease within the periventricular regions in the right centrum semiovale. Dr. Whitling discussed with Claimant the likely diagnosis of post-concussion syndrome, and the need for self-care and follow up with a concussion specialist. Claimant was discharged that evening in "good" condition. (Ex. G).

24. Claimant was in the emergency room from 10:52 a.m. to 6:37 p.m. on April 1, 2022. (Ex. G). Claimant filed a Worker's Claim for Compensation on April 1, 2022. With respect to body parts injured, it stated "left shoulder, back, neck, head injury (ringing in ears, dizziness, difficulty in word finding, headaches, etc. . . .)" Under nature of injury it says "see medical records." [Redacted, hereinafter BP] signed the form for Claimant. (Ex. M). Claimant's counsel entered his appearance with the Division on April 1, 2022, and BP[Redacted] signed the certificate of service. (Ex. N).

25. There is no reference in Claimant's April 1, 2022, medical records of him having ringing in his ears or difficulty in word finding.

26. According to the phone log, Claimant called MZ[Redacted] from the ER, while he was waiting for an MRI. She noted that he was seeing a concussion specialist. Employer was fully in support of keeping Claimant off of work until he made a full recovery. They discussed sending Claimant back to Alabama to recover, but wanted clearance from the doctor that it was safe for him to fly. MZ[Redacted] advised Claimant not to drive until he was cleared to do so. (Ex. 9).

27. Claimant told the physicians in the ER on April 1, 2022, he had been vomiting for six days. Even though Claimant was in regular communication with MZ[Redacted], updating her regarding his symptoms, there is no evidence that anytime between March 25, 2022 and April 1, 2022 Claimant reported he had been vomiting, let alone daily. Additionally, there is no reference in the phone log regarding Claimant having ringing in his ears, or difficulty in word finding.

28. On April 5, 2022, three and a half weeks after the accident, Claimant was evaluated by Kathryn Reitz, D.O., at the Colorado Concussion Clinic. Dr. Reitz felt that based on the mechanism of injury, Claimant's high symptom score, and his abnormal concussion neurologic examination, Claimant suffered a concussion. She noted that Claimant had a concussion diagnosis related to the accident by at least three other providers. She opined that his high symptom score and medical history of diabetes and ADHD increased his risk of Post-Concussion Syndrome (PCS). According to Dr. Reitz, "PCS is defined as having the constellation of concussion symptoms present for longer than 3 months." (Ex. 19).

29. The medical professionals who diagnosed Claimant with a concussion made such a diagnosis based upon Claimant's subjective symptoms. The ALJ finds Claimant's description of his alleged concussion symptoms, to his Employer and medical providers, is vastly inconsistent and not reliable.

30. Claimant underwent an IME with Lawrence Lesnak, D.O. on June 27, 2022. Dr. Lesnak opined, to a reasonably degree of medical probability, that Claimant did not sustain "any type of cerebral concussion or mild traumatic brain injury or any injuries to his cervical spine structures or left shoulder" as a result of the motor vehicle accident on March 12, 2022. In reaching this opinion, Dr. Lesnak reviewed Claimant's medical records, including the imaging studies, and he personally examined Claimant. (Ex. A).

31. Dr. Lesnak acknowledged the white matter disease on Claimant's MRI, but opined it was "completely unrelated to his involvement in the motor vehicle collision on 03/12/2022." He noted this is a "very typical finding identified in hypertensive patients and is consistent with cerebral microvascular ischemia." (Ex. A).

32. Dr. Reitz, in response to Dr. Lesnak's opinions, asserted that "[w]hite matter changes can be seen with concussion." Dr. Reitz does not assert that the white matter on Claimant's MRI was caused by the alleged concussion, and she acknowledged not having a prior MRI to compare findings. (Ex. 19).

33. Dr. Reitz further opined "[t]he diagnosis of concussion does not require that a patient hit their head nor lose consciousness. If he did hit his head or did have a loss of consciousness then a diagnosis of concussion is more likely. But, concussion may be caused by whiplash or violent shaking to the body without direct head involvement." (Ex. 19). There is no objective evidence in the record that Claimant ever suffered whiplash or violent shaking. Dr. Reitz concludes Claimant "had an accidentwith enough force to cause sudden neurological change." (Ex. 19). There is no objective evidence in the record that Claimant suffered a "sudden neurological change" as a result of the March 12, 2022 motor vehicle accident. Claimant's alleged symptoms escalated three weeks after the accident. The ALJ finds Dr. Reitz's opinion credible, but not persuasive.

34. Dr. Lesnak was deposed on October 31, 2022, regarding the conclusions in his IME report, and his determination Claimant did not sustain a concussion. Dr. Lesnak testified "if there's any concussion, if there's any temporary or even permanent injury to the brain, the symptoms are always worst [sic] at the onset, immediately following the incident; and then they improve and hopefully recover." (Dep. Tr. 31:14-18).

35. Dr. Lesnak reviewed the several tests Dr. Reitz performed. He testified these tests lack any controls for validation. (Dep. Tr. 26:4-23). Many of them, for example, the cognitive and balance testing, are dependent upon Claimant's own efforts and his own report of symptoms. (Ex. 19). As found, Claimant's report of symptoms was inconsistent and not credible.

36. Dr. Lesnak also performed tests on Claimant. He noted Claimant's speech was "fluent without evidence of semantic or phonemic language errors." Claimant's closed-eye, finger nose testing showed no abnormalities, and the Romberg sign was negative. Claimant did not have any ocular nystagmus and a modified Hallpike-Dix test, which measures vertigo, reproduced no symptoms. Dr. Lesnak opined Claimant exhibited the ability to perform abstract thinking, multistep, mathematical calculations without difficulty, and also showed both short, and long-term memory recall. (Ex. 19).

37. John Hughes, M.D., conducted an independent medical examination of Claimant in June 2022. Dr. Hughes opined that Claimant presented with a "straightforward history" of head and cervical spine injuries. He further opined that Claimant suffered a closed head injury with concussion, improving over a course of

interdisciplinary care. Dr. Hughes concluded that Claimant was not at MMI. The ALJ finds Dr. Hughes's opinion to be credible, but not persuasive.

38. Considering the mechanism of injury, Claimant's performance on cognitive tests, his normal CT imaging and unremarkable MRI, Dr. Lesnak concluded that Claimant suffered no concussion. (Dep. Tr. 35:11-36:18). The ALJ finds Dr. Lesnak's opinion credible and persuasive.

39. Claimant also alleged injuries to his left shoulder and neck, but he has never been assessed as having more than shoulder and neck pain. (Ex. C). His thoracic spine MRI revealed only degenerative changes with "[n]o evidence of acute thoracic spine fracture or dislocation." The MRI of his cervical spine revealed only degenerative changes, with "[n]o evidence of acute cervical spine fracture or dislocation." The x-ray of Claimant's left shoulder revealed "[n]o evidence of left shoulder fracture or distortion." (Ex. D).

40. Claimant receives a base wage of $2,692.31 per pay period or $70,000 annually. (Ex. J). This translates to an average weekly wage of approximately $1,346.15. Claimant has continued to receive his regular salary every pay period following his March 12, 2022 motor vehicle accident, even though he has not been working. (Ex. H); (Tr. 96:21-25).

41. Based on the totality of the evidence, the ALJ finds that Claimant did not suffer a compensable injury as a result of the March 12, 2022 motor vehicle accident.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Claimant has the initial burden to prove that he or she suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Also, with particular importance to this claim, it is not enough to establish merely that an "accident" occurred in order for a claim to be compensable. *Wherry v. City and County of Denver,* 2002 WL 596784, W.C. No. 4-475-818 (ICAO, Mar. 7, 2002). A claimant must also show that an "injury" resulted from the accident. *Id*. Injury is defined here as physical trauma caused by the accident. *Id*. A compensable industrial accident is therefore one in which an injury has resulted requiring the need for formal medical treatment or causing disability. *Id*.

While in travel status, Claimant was involved in a minor motor vehicle accident on March 12, 2022. Claimant's large pickup truck was rear ended by a smaller vehicle that was going approximately five miles per hour. Claimant's airbags did not deploy, he did not hit his head, nor did he lose consciousness. Claimant testified he continued to work following the accident, and went back out into the field on March 15, 2022. Claimant regularly communicated with Employer regarding any symptoms he was experiencing. Employer instructed Claimant to utilize the nurse triage program, WorkCare, in the event of any other issues related to the accident or not, and go to the ER if situation warranted. There is no evidence in the record that Claimant ever utilized WorkCare.

Initially, Claimant experienced headaches and occasional dizziness, but the nausea and dizziness ended on March 17, 2022. According to Claimant, his dizziness returned on March 20, 2022, and led to his falling in the shower and hitting his head, on March 21, 2022. Based on Claimant's description of his symptoms, he was diagnosed with a concussion. As found, Claimant's description of his symptoms was vastly inconsistent, and not reliable. For example, the day after Claimant went to the ER because he woke up with vomiting and dizziness prior to falling in the shower, Claimant was seeking a release to work. He told the providers her felt "great" and denied any dizziness, headaches, sensitivity to light, or blurred vision. Similarly, on April 1, 2022, Claimant went to the ER and complained of worse headaches and vomiting for six days.

Claimant however, never told Employer he was vomiting for six days even though he regularly communicated with Employer regarding his condition.

During Claimant's IME with Dr. Lesnak he displayed fluent speech, mathematical reasoning abilities, and also good long-term and short-term recall. There were no objective findings of a concussion during this examination. Dr. Lesnak performed a modified Hallpike-Dix test, looked at ocular nystagmus, had Claimant perform finger-to-nose testing and noted the lack of any Rhomberg sign.

This is consistent with imaging of Claimant's head. The CT scan from March 21, 2022 was normal, and he MRI from April 1, 2022 similarly showed no signs of any acute pathologies. While there was mild periventricular white matter disease, there is no objective evidence that this was caused by the accident.

Although there are multiple medical credible opinions, the ALJ finds Dr. Lesnak's opinion to be the most persuasive. Dr. Reitz relies heavily on Claimant's own reporting and efforts. And as found, Claimant's reporting of symptoms is inconsistent and not reliable. Considering the mechanism of injury, Claimant's performance on cognitive tests, his normal CT imaging and unremarkable MRI, Dr. Lesnak concluded that Claimant suffered no concussion. The ALJ finds Dr. Lesnak's opinion credible and persuasive. Based on the totality of the evidence, Claimant did not suffer a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant did not suffer a compensable injury as a result of the March 12, 2022 car accident. Any claim for benefits or compensation is denied and dismissed with prejudice.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 9, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on September 8, 2022, primarily on the issue of overcoming the Division of Workers' Compensation Independent Medical Examination (DIME) physician's determination that Claimant had not reached maximum medical improvement (MMI). Other issues included medical benefits that are reasonably necessary and permanent partial disability benefits. Respondents clarified at hearing that waiver, overpayment and credit offsets were no longer issues for hearing, as Claimant's benefits were terminated as of July 8, 2022 when the authorized treating physician (ATP) placed Claimant at MMI and that the issues were listed because Respondents were concerned that Claimant may have been receiving benefits on another worker's compensation claim for her right upper extremity with a date of injury of August 25, 2019. He noted that Claimant's benefits on the prior claim had stopped prior to Claimant's date of injury in this matter. Counsel also mentioned that there were delays in obtaining both a DIME in the prior claim and the DIME with Dr. Orent for this injury. The DIME in this matter was requested by Respondents, took place on August 8, 2022 and a report was issued on August 29, 2022. No Final Admissions of Liability have been lodged in this claim.

Claimant filed a Response to Application for Hearing on October 7, 2022 on issues that included medical benefits that are reasonably necessary, average weekly wage, temporary disability benefits and, if Claimant was found to be at MMI, then permanent partial disability benefits and *Grover* medical benefits.

Claimant and Dr. Sander Orent, M.D. testified on behalf of Claimant, and John Aschberger, M.D. and Douglas Scott, M.D. testified on behalf of Respondents.

Claimant's exhibits 1 through 10 were admitted into evidence. Respondents' exhibits A through L, N, and P were admitted into evidence. Exhibits M, O and Q were not admitted.

Also submitted, post-hearing, was Respondent Addendum Report from Dr. Aschberger dated January 16, 2023 (Integrated Medical Evaluation report dated January 18, 2023). This exhibit was designated as Respondents' Exhibit R. During the hearing and following the DIME physician's testimony, Respondents made an offer of proof regarding Dr. Aschberger's potential rebuttal testimony. Respondents' moved for leave to submit this report, in lieu of a continued hearing, as further evidence for review, which was granted over Claimant's objection. Exhibit R was admitted.

Also discussed during the January 5, 2023 hearing was the outstanding Motion to Withdraw as Counsel by [Redacted, hereinafter BR]. The parties agreed that an order would be appropriate considering his passing and an order was issued on January 12, 2023.

A status conference was held on January 24, 2023 regarding evidentiary matters. The parties agreed to a submission deadline of February 8, 2023 for position statements or proposed orders. Claimant withdrew his motion to submit as supplemental exhibit the IME recording of Claimant's appointment with Dr. Kleinman. Respondents withdrew their request for submission of Respondents' Supplemental Exhibits 1 through 5. Those exhibits were stricken from the record by order of this ALJ dated January 24, 2023. There was no further discussion with regard to Dr. Aschberger's addendum report dated January 16, 2023.

STIPULATIONS OF THE PARTIES

The parties stipulated that Claimant is entitled to *Grover* maintenance medical care if Respondents meet their burden of proving by clear and convincing evidence that the DIME was overcome on the issue of MMI.

The parties further stipulated to an average weekly wage of $333.00 and that, if Claimant was found not at MMI in accordance to with the DIME physician's opinion, and that Claimant was entitled to continued temporary total disability benefits, the period of benefits should be from July 20, 2021 to present. The parties further agreed that the calculation of TTD would be agreed upon by the parties and this ALJ need not address the exact amount.

The stipulations of the parties were accepted and approved by this ALJ and are incorporated in this order.

ISSUES

I. Whether Respondents proved by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician, Dr. Sander Orent, was incorrect in his determinations of maximum medical improvement (MMI).

II. If Respondents proved that Claimant is at MMI, whether Respondents proved by a preponderance of the evidence that the date of MMI was July 20, 2021.

III. Whether Respondents proved by a preponderance of the evidence that there was a non-work related intervening event that ended Respondents' liability towards Claimant.

IV. If Respondents failed to prove that Claimant was at MMI, whether Claimant is entitled to temporary total disability (TTD) benefits and interest from July 20, 2021 to the present and continued until terminated by law.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Generally

1. Claimant was 56 years old at the time of the hearing. She was employed as a housekeeper for Employer as of approximately May 2019. Her duties involved cleaning hotel rooms, including kitchenettes with microwaves and refrigerators. This ALJ noted that Claimant was short in stature and the medical records noted that she was four foot, eight inches tall[1] and has no formal education. Claimant had difficulty reaching the tops of the microwaves as they exceeded her height.

2. Claimant sustained an admitted work related injury of August 25, 2019 related to her right upper extremity. She was placed on modified duty that included working up to three hours a day, lift, push and pull up to 10 lbs. constantly, and no reaching above shoulder with the right upper extremity, could not grip, squeeze or pinch with the right upper extremity, should wear a splint or brace on the right upper extremity constantly, could do no sweeping, mopping or vacuuming with the right hand and no overhead work with the right arm.[2] The medical records suggest that Claimant was required to exceed her restrictions.

3. On February 15, 2020 Claimant was in the process of cleaning a microwave. She could not reach the top in order to clean, it due to her height. She stepped onto a chair with the left foot. She was cleaning with the left hand since she was restricted from using her right hand overhead. Her right leg slipped, then the chair slipped out from under her, causing her to lose her balance. She twisted her back and lower extremities then Claimant fell onto her left side, landing on her left hip and knee, injuring her right ankle, knees, lower back and hip. The medical records suggest that the chair landed on her.

B. Medical Records

4. Claimant was seen the same day at Concentra Fort Collins by Sheree Montoya, NP. She documented Claimant's mechanism of injury as follows:

> Left side posterior hip pain Pt states when she went to stand on a chair to clean the top of a refrigerator the chair fell on top of her causing her to fall down landing on her left side twisting her back and landing on her *left lateral knee* She has not treated with anything as it happened just prior to arrival. *[Emphasis added]*

5. Nurse Montoya noted that Claimant had burning pain radiating to the left buttocks, causing decreased lateral bending, decreased spine range of motion (ROM), decreased rotation. The symptoms were exacerbated by twisting, climbing stairs, and walking. On exam she noted that Claimant had joint stiffness, back pain, with tenderness in the left lumbar paraspinals and left sacroiliac joint. She also noted that claimant had abnormal thoracolumbar spine range of motion and a positive FABER test[3] on the left, but otherwise within normal limits. She diagnosed sacroiliac strain and prescribed ice, medications, physical therapy, and provided modified work restrictions. She noted that history and mechanism of injury were obtained directly from the patient and appeared to be consistent with presenting symptoms and physical exam.

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[1] Claimant reported to Psychologist Brady on August 3, 2020 that she was four foot six inches.
[2] Respondents' Exhibit D, Bates 295 through 298, PA Toth, January 18, 2020.
[3] Test to identify pathology within the hip, lumbar spine or sacroiliac region.

5. Claimant presented to Jeffrey Baker, MD, on February 17, 2020, with *complaints of left hip, left le*g, and lower back pain *with radiating pain to the knee*. The pain was worse when going up the stairs as she *gets a "pulling" sensation, lifting her leg*, and had difficulty sleeping through the night due to the pain. Claimant reported that she was under restrictions due to her prior workers' compensation claim and that Employer was having her work in excess of her restrictions, which is why she fell. On exam, Claimant had tenderness in the left sacroiliac joint and loss of range of motion, but had a negative exam otherwise. An *injection of dexamethasone sodium phosphate* was administered* and Claimant was diagnosed with sacroiliac strain. She was returned to modified work, including restrictions of 10 lbs. lifting occasionally, push/pull up to 20 lbs. occasionally, bend or twist occasionally and no climbing ladders.

6. Claimant was also seen by Nicholas Wright, DPT, in physical therapy on February 17, 2020. PT Wright noted Claimant was tender to palpation in the left quadrant of the paraspinals and the gluteus maximus, and had abnormal range of motion (ROM) in extension, bilateral thoracolumbar side bending, pain in the left low back and gluteus with resisted motion, pain in the low back with hamstring, gluteal and hip stretching. She had symptoms consistent with left lumbosacral contusion and experienced notable benefit from manipulation. Claimant retuned for therapy with Mr. Wright on February 18, 2020 and reported that her back pain was improving but that she continued to have pain in the lateral knee but had no symptoms distal to the knee. *He put a patch with dexamethasone on the left lateral knee*, noting that Claimant had a lateral collateral ligament (LCL) sprain. On February 19, 2020 Mr. Wright stated that Claimant reported decreased lateral knee and gluteal region pain but that the pain persists in the left low back.

5. On February 24, 2020, Claimant reported that she was still having notable pain to the left low posterior ribcage but the gluteal and lateral knee pain were both improving. Mr. Wright noted Claimant had *a "popping" sound occurring bilaterally in her knees and the left knee was painful*. Claimant continued with physical therapy complaining of both low back/SI joint as well as left knee pain.

6. Dr. Baker attended Claimant on February 25, 2020. Claimant complained of *sharp left lateral knee* pain with intermittent and variable degrees of intensity and dullness. Claimant informed Dr. Baker that the *injection in her left knee* did not make much difference.[4] *Associated symptoms included clicking, tenderness, and painful walking*. *Exacerbating factors included knee extension, direct pressure*, using stairs and walking. On exam Dr. Baker noted that there was *tenderness over and in the lateral tibial plateau of the left knee* with a slight flexion limitation, but was otherwise unremarkable. He also noted that Claimant continued to have tenderness in the left sacroiliac joint with limited range of motion. Dr. Baker diagnosed contusion of the left knee and referred Claimant to physical therapy. He also diagnosed sacroiliac strain. Claimant reported that physical therapy and the patches of lidocaine were helping. Claimant described her low back pain as burning and constant though did wax and wane.

5. Mr. Wright attended Claimant on March 17, 2020 and noted that Claimant's

[4] This ALJ infers that the injection of dexamethasone sodium phosphate administered on February 17, 2020 was for the left knee. See * above.

low back was painful to the point that it caused difficulty breathing. Claimant had pain to left" low back/glute" with resisted glute in prone, pain to left low back with hamstring, gluteal and hip external and internal rotation (ER/IR) with passive range of motion and stretching.[5] Mr. Wright noted that progress was slower than expected.

6. On March 24, 2020, Dr. Baker's diagnoses were sacroiliac strain and thoracic myofascial strain. He specifically noted as follows:

> [Claimant] is returning for a recheck of injury(s): Left thoracolumbar strain that occurred on 2/15/2020. This is her 2nd WC claim, she is being treated for her right wrist, shoulder and neck also. She reports that her boss makes her do activities that are outside her WC and that is why she fell. She was put on naproxen and *lidocaine patches but the patches were not approved.* She has done 12 PT visits and is progressing slower than expected. The pain is a left thoracolumbar area. She is applying the bengay and that is helping. Pain is sharp and worse with stairs, sleeping and *lifting her leg*. She has had 12 visits with PT and feels that it s (sic.) improving. She feels that she is about 70%. *Her Adjustor did call and stated that the knee would not be covered. (Emphasis added).*
>
> …
>
> There is left mid back pain. There is left lower back pain. The pain does not radiate. The symptoms occur intermittently. She describes her pain as sharp in nature. The severity of the pain is variable (constantly present but the level of intensity waxes and wanes). Associated symptoms decreased lateral bending, decreased rotation, decreased flexion, … Exacerbating factors include twisting, lifting and bending, but not sitting and not standing. Relieving factors include heat, rest, nonsteroidal anti-inflammatory drugs, physical therapy and muscle rub.

Claimant restrictions were changed to 20 lbs. lifting frequently, push/pull up to 40 lbs. frequently, bend and twist frequently, but was to perform no ladder climbing. He referred Claimant to chiropractic care for the lumbar spine.

7. On April 2, 2020 Claimant returned to manual therapy with Mr. Wright to address ongoing left hip mobility as it reduced the complaints of lumbar spine pain, stating that Claimant's *left hip dysfunction* almost certainly limited her lumbar spine recovery.

8. On April 7, 2020 Dr. Baker noted that "Her Adjustor did call and stated that the knee would not be covered." He also noted that Claimant was not currently working due to COVID-19. He noted Claimant had muscle pain, back pain, *muscle weakness*, night pain, and limited ROM.

9. On April 22, 2020, Claimant *complained of left knee and right leg pain* with walking. The pain was also in the left thoracolumbar area. She was applying the muscle rub and that was helping. Pain was sharp and worse with stairs, sleeping and lifting her leg. She was doing PT and felt that it was improving her function. Stephen Toth, PA, noted that Claimant was referred to a Chiropractor and that was currently on hold per DORA due to COVID-19. PA Toth also noted that Claimant's Adjustor called and stated that the knee would not be covered. She was not currently working also due to COVID-19. This ALJ noted that from this date forward, Claimant's providers did not mention either examining Claimant's knee or taking Claimant's complaints of knee pain. In fact,

[5] This ALJ infers that IR is internal rotation, ER is external rotation and PROM is passive range of motion.

the knee was left blank in some of the records.

> Physical Exam
> Constitutional: well appearing and well nourished.
> Head/Face: Normocephalic and atraumatic.
> Eyes: conjunctiva and lids with no swelling, erythema or discharge. Extraoccular movement intact.
> ENT: . No erythema or edema of the external ears or nose. Hearing is grossly normal.
> Neck: trachea midline, no JVD.
> Pulmonary: no increased work of breathing or signs of respiratory distress.
> Knee:
> Lumbosacral Spine: Appears normal. Tenderness present in left sacroiliac joint, but

10. Claimant continued with physical therapy for her lumbar spine and SI joint. On May 8, 2020 Claimant reported that she had low back pain upon standing from a prolonged sitting position. She was also *worried about dragging her left toes* when trying to walk quickly. Mr. Wright noted in the assessment that:

> Therapy Assessment:
> Overall Progress Slower than expected Today is the first time that I can remember [Claimant] reporting a concern with L toe dragging The complaint is with fast walking/running. As she hasn t (sic.) had any sign of DF weakness from radicular compression, I assume this complaint comes from altered mechanics, potentially due to lumbar stiffness I have provided her with a heel walking exercise to address this issue, but remain focused on the low back

11. Scott Parker, D.C., evaluated Claimant on May 13, 2020. He took a history of the mechanism of the injuries consistent with Claimant's hearing testimony. Claimant was complaining of left-sided thoracolumbar pain which she rated at 7/10, *left lateral knee pain* which aggravated her back, *numbness* traveling from the left gluteus musculature laterally *in the lower extremity to the left great toe and second toe* which was constant since this fall. He noted on exam that restrictions were palpated at left SI joint, L5 slightly to the left, T6-T7 anterior, the left T7 rib, T12 LP in the left, and L1 slightly to the left. He noted that Claimant had moderate muscle spasm palpated in the thoracic and lumbar regions, trigger points noted in the bilateral thoracic and lumbar regions and adhesions palpated throughout bilateral thoracolumbar fascia.

12. On May 27, 2020, Claimant reported to PA Toth that her back pain was worse with pain radiating down her left side radiating down her left glute. She noted that she had been tripping as a result of her *left foot giving way while walking*.

13. Claimant had multiple chiropractic visits focused on her lumbar, sacroiliac dysfunction and thoracolumbar pain. On June 3, 2020 Dr. Parker noted that Claimant continued with low back pain, that it was especially so when she would put on herpants or shoes. He documented that her pain was a 6/10. She complained that she continued to have *lower extremity numbness* though it was somewhat improved. Claimant was also complaining of *continuing knee pain* that was concerning to her. While Dr. Parker states Claimant had full range of motion of the lumbar spine, they were not documented as being with an inclinometer or whether it was passive or active range of motion, and Claimant complained of discomfort. Dr. Parker clearly examined the lower extremities because he stated that Claimant gave a "suboptimal effort." He also noted that there were adhesions are palpated in the bilateral thoracolumbar fascia, trigger points in the

bilateral thoracolumbar muscles and mild muscle spasm palpated.

14. PA Toth evaluated Claimant on July 8, 2020 and continued to diagnose thoracic myofascial strain, sacroiliac strain and radicular low back pain. He ordered lumbar and sacroiliac MRIs at this time. He noted that while Claimant did have improvement in her range of motion, that she was still stiff, having lower left back and hip pain and *numbness radiating down the left leg*. He ordered continued chiropractic care, and her HEP[6], noting that she declined dry needling due to concerns of risks, as noted in prior records. On July 17, 2020 PT Wright noted Claimant was tolerating the dry needling treatment.

15. Claimant continued with chiropractic care, due to continued low back pain, adhesions and muscle spasms in the lumbar spine, including when he released her from his care on July 29, 2020. What is apparent from reading Dr. Parker's records and the records from other providers at Concentra is that significant portions of the reports are likely copy and pasted information from prior records and this ALJ is disinclined to rely on every notation in Dr. Parker's reports stating that there was full range of motion despite "moderate muscle spasms," trigger points, and adhesions.

16. Claimant was evaluated by Molly M. Brady, PsyD. on August 3, 2020 pursuant to a referral from Mr. Toth to evaluate whether any mental or emotional factors could complicate the treatment of Claimant's medical condition, and to make recommendations with regard to treatment. The Behavioral Health assessment was initially recommended in January 2020 by Jon Erickson, M.D., who had completed an IME at Respondents' request regarding the 2019 claim. BHI 2 testing was valid though potentially indicated that psychological factors may have been contributing to Claimant's perception of pain and disability. Results also were indicative of the presence of an optimistic outlook, emotional control, or an unusual degree of acceptance with a likely support system. Dr. Brady wrote that "[G]iven that validity indicators do not suggest that [Claimant] is magnifying her sense of distress by responding in a biased manner, this may be an accurate report of her internal perception of emotional distress." Dr. Brady diagnosed Claimant with pain disorder and adjustment disorder with mixed anxiety and depressed mood. She noted that "the onset of the injury to [Claimant]'s right arm, a significant stressor, functioned to exacerbate that pre-existing anxiety and dysphoria to a significant extent." She opined that the majority of the symptoms of psychological adjustment developed related to her workplace injury.[7] Dr. Brady recommended interventions including relaxation training, mindfulness-based stress reduction training, biofeedback training, coping skill development to decrease psychological distress, stress management techniques, behavioral activation, and education on the interaction between psychological distress and physiological pain experiences. Claimant continued with psychologic treatment through April 12, 2021 and Dr. Brady recommended an additional 5 visits given Claimant's progress with treatment.[8]

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[6] Home exercise program.

[7] Specifically relating to the August 25, 2019 work related injury. Dr. Brady was engaged to treat Claimant under that claim.

[8] No other records were provided as exhibits after April, 2021. Exhibit D was the DIME packet provided under the 2019 claim and Dr. Lindenbaum (DIME) conducted his evaluation on May 27, 2022. This ALJ

17. Claimant had an MRI of the lumbar spine without contrast on August 14, 2020. Dr. Eric Nyberg read the results as follows:

> Disc Spaces:
> Lower thoracic spine: Mild disc bulges without significant spinal canal or foraminal stenosis.
> L1-2: Mild disc degeneration without spinal canal or foraminal stenosis.
> L2-3: Mild disc degeneration without spinal canal or foraminal stenosis.
> L3-4: Mild disc degeneration with broad disc bulge resulting in mild bilateral foraminal stenosis.
> L4-5: Mild disc degeneration with minimal disc bulge resulting in mild bilateral foraminal stenosis.
> L5-S1: Mild disc degeneration and bilateral facet arthrosis resulting in mild to moderate right and mild left foraminal stenosis.

18. Also on August 14, 2020 Claimant had a MRI of the pelvis. Dr. Andrew Mills noted that there was no acute or aggressive osseous abnormality, chronic degenerative changes of the lumbar spine at L3-S1 and patent appearance of the SI joint which showed minimal degenerative changes.

19. On August 18, 2020 Nurse Elva Saint advised Claimant to return to physical therapy for more PT as the left low back pain persisted. The *main concern at that point is was the left lower extremity (L LE) heaviness and quickness to fatigue as well as the left knee complaints.* Claimant gave good effort and tolerated the PT sessions, treatment and exercises well. Claimant completed her course of PT without much improvement. In fact the records show that Claimant slowly continued to deteriorate.

20. Claimant was seen on September 9, 2020 by PA Toth who documented that Claimant complained of back pain, d*ifficulty bearing weight on the left foot, and some numbness in left leg*. She also *complained of bilateral knee pain* and *was limping since seeing the chiropractor and states that is the reason for not going anymore*. Claimant denied "outside causation of injury including sports, hobbies, accidents or external employment." On system review, PA Toth documented *back pain and limping*, but found nothing abnormal during exam. PA Toth referred Claimant to a physiatrist for further evaluation.

21. On October 5, 2020, Claimant presented to Gregory Reichhardt, MD for evaluation of her low back injury and knee pain. Dr. Reichhardt reviewed the mechanism of injury, which was consistent with Claimant's testimony. He mentioned that Claimant was referred to Dr. Brady who diagnosed pain disorder and adjustment disorder with mixed anxiety and depressed mood. Upon exam, Claimant complained of low back pain across the L4-L5 level, diffuse *left gluteal pain*, lateral hip and *lateral thigh symptoms going down to the foot, with leg weakness and left knee pain*. Dr. Reichhardt's work-related impressions and diagnosis were low back pain, probably discogenic, with possible component of radicular involvement, causing left lower extremity pain and weakness, left knee pain with a February 15, 2020 mechanism of injury, pain disorder and adjustment disorder with mixed anxiety and depressed mood, and *right ankle pain*. *Dr. Reichhardt deferred to Concentra providers regarding the causation of any right lower*

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infers that no further treatment with Dr. Brady took place as Claimant was found to be at MMI as of December 4, 2020 in the 2019 claim.

extremity complaints. Dr. Reichhardt recommended trigger point injections for the lumbar spine, an *MRI of the left knee* and that she continue treating with Dr. Brady for the pain disorder and adjustment disorder. On the M-164 he also recommended an *EMG/NCV*[9] *study of the left lower extremity*.

22. Dr. Reichhardt noted on October 28, 2020 that Claimant had a normal left lower extremity electrodiagnostic evaluation. The study was negative for left-sided axons loss lumbosacral radiculopathy, lumbosacral plexopathy, peroneal or tibial mononeuropathy and for peripheral polyneuropathy. Dr. Reichhardt did not have a good explanation for the *lower extremity weakness* and recommended she see her PCP. Claimant requested the trial of trigger point injections. He also stated that future considerations would also be for a hip MRI arthrogram.

23. Dr. Baker followed up with Claimant on October 19, 2020 and noted on physical exam that Claimant had *left knee tenderness in the lateral femoral condyle*, in the *lateral hamstrings*, diffusely *over the lateral knee* and in the *lateral tibial plateau*, a positive lateral McMurray test and positive medial McMurray test.[10] He diagnosed sacroiliac strain, radicular low back pain and *strain of the left knee*. He *ordered the MRI of the left knee* and noted that the EMG/NCV was already scheduled. He also documented that he did not anticipate MMI until at least January 31, 2021.

24. Claimant proceeded with trigger point injections on November 18, 2020 over the bilateral L5 paraspinals, left gluteus maximus and left tensor fascial latae. His diagnosis did not change.

25. Claimant was evaluated by Dr. Reichhardt for an impairment evaluation with regard to her August 25, 2019 claim on December 4, 2020. He placed her at MMI for that claim and provided an impairment rating. He noted that Claimant had completed a Functional Capacity Evaluation on October 27, 2020 during which Claimant functioned at a "sub-sedentary level."[11]

26. On December 8, 2020 Claimant had an MRI of the left knee. Dr. Jamie Colonnello noted that the left knee medial and cruciate ligaments were intact, there was medial and patellofemoral compartment predominant chodrosis/osteoarthritis of the left knee, cartilage loss most pronounced at the medial compartment involving weight-bearing surfaces of the medial femoral condyle as well as joint effusion. This ALJ infers that the joint effusion is a sign of joint inflammation or aggravation of underlying joint osteoarthritis.

27. Claimant returned to see Dr. Reichhardt on December 11, 2020 and noted that she was having *weakness in the right leg* which she thought was *related to dry needling.* Claimant complained that they hit a nerve and one day after her second dry needling treatment, she had difficulty coordinating her right leg then got worse after her last chiropractic treatment and had paresthesias over the lateral aspect of the left lower leg. She was having *pain down the posterolateral aspect of both thighs*. Moderate pain behavior was noted. He observed Claimant to be somewhat angry, but he was not sure

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[9] Electromyography (EMG) and Nerve Conduction Velocity (NCV).

[10] McMurrays test is a test to assess knee injuries, including meniscal tears.

[11] The functional capacity evaluation (FCE) report is not contained in the exhibits in evidence.

if this was just her communication style. He noted giveaway weakness but overall normal strength with encouragement. His impression was probable discogenic pain, and he felt that there was a pain disorder with adjustment disorder and mixed mood and anxiety. The doctor was unclear why her legs were weak and the loss of coordination, and he recommended possibly a repeat MRI. She indicated that she was upset because she had not met the orthopedic doctor. Dr. Reichhardt recommended an evaluation with an orthopedist with regard to Claimant's left knee complaints. Multiple other evaluations occurred following this exam, he documented Claimant's distress at the failure to identify the causes of her pain and discomfort, provided a knee neoprene brace as well as topical medications for the knee, while awaiting the results of an IME as the orthopedic evaluation was not authorized. Claimant was insistent that her right lower extremity symptoms of weakness were related to dry needling, chiropractic care and the EMG testing.

28. An Independent Medical Evaluation (IME) took place on January 6, 2021 with Dr. Jon M. Erickson. He noted that he had previously evaluated Claimant regarding her 2019 upper extremity injuries, and those findings are not relevant in this matter.

29. Dr. Reichhardt attended her on January 28, 2021, rating her pain as 9 out of 10 with weakness in both legs and inability to walk. He felt that her leg weakness was related to the pain. The patient still wanted to see an orthopedist at that point.

30. Claimant underwent an IME with Dr. Douglass Scott on February 23, 2021. He noted that claimant had a lower back injury, and that Claimant informed him she had left knee pain as well as issues with the right leg. On exam, the left knee appeared normal, with no tenderness and had full range of motion and strength. He reviewed the medical records and drew multiple conclusions based on this analysis of the records, that are not persuasive to this ALJ. He conducted a physical examination and noted no swelling in the left knee and no crepitus and no deformity or tenderness to the left knee. He noted in his diagnosis that the right knee was unrelated to the original injury. The pain disorder was noted and he suspected there were psychological or somatoform disorders present. He noted that the changes on the MRI of the left knee of chondrosis/ osteoarthritis probably pre-existed the injury. He reviewed the mechanism of injury, and opined that it occurred without significant force or velocity as her right foot was on the floor and her given height of 4'8. He diagnosed her with a lumbosacral strain as he noted that the EMG was normal, without neurological impairment and did not appreciate an injury to either lower extremity. He stated that, based on Claimant's initial response to treatment for the low back, he opined Claimant had reached MMI on June 3, 2020 without impairment and required no further medical care after that date.

31. On February 11, 2021 Dr. Reichhardt noted Claimant had a mild gait alteration and discussed Claimant's left knee pain with PA Toth who advised Dr. Reichhardt that Claimant did not have immediate pain in her left knee following the accident and had not reported it until after 10 days of the injury. Relying of the accuracy of this information Dr. Reichhardt noted that the left knee condition was probably not related to her injury. As found, this is not credible, as Nurse Montoya documented on February 15, 2020 that Claimant landed on her left lateral knee and Dr. Baker documented on February 17, 2020, two days later, that Claimant complained of left hip, left leg, and lower back pain with radiating pain to the knee, with pain worse when going

up the stairs as she had a "pulling" sensation, lifting her leg. He further injected that knee with medication.

32. On April 8, 2021 Dr. Reichhardt recommend evaluation with Dr. Quickert for an SI joint injection as provocative maneuvers qualified her for the treatment, including tender to palpation, pain in the low back, pain over both sacroiliac areas, negative straight leg test, positive Patrick's maneuver, positive gapping and positive iliac compression tests. He also referred Claimant for x-ray of the lumbar spine to rule out a foreign body (dry needling needle). There were multiple subsequent records documenting symptoms of the left knee as sharp pain, worse with cold, constantly present, with symptoms of clicking, "popping" sound at the time of her injury, tenderness and painful walking. Documentation of joint pain, muscle pain, back pain, joint stiffness, muscle weakness, limping and night pain. Exams of the left knee showing tenderness diffusely over the anterior knee, diffusely over the anterolateral aspect, diffusely over the anteromedial aspect, in the lateral femoral condyle, in the lateral hamstrings, diffusely over the lateral knee and in the lateral tibial plateau.

33. Dr. Scott issued a Rule 16 UMR on April 23, 2021 noting that, based on Dr. Reichhardt's exam, it may be reasonable to perform an SI joint injection. However, based on his prior opinion, that Claimant was at MMI as of June 3, 202 and required no further care, it was not related to the February 15, 2020 work related injury.

34. Claimant had the x-ray performed at Banner Imaging on May 7, 2021, which was read by Dr. Gregory Reuter. It showed mild L5-S1 degenerative changes but no foreign body.

35. On June 24, 2021 Dr. Reichhardt recommended a trial of massage therapy. Claimant returned to Concentra on June 30, 2021 and Dr. Baker made a referral for massage therapy, which took place at Medical Massage of the Rockies between July 9 through August 3, 2021.

36. Claimant was evaluated by Julie Quickert, APRN[12] on June 25, 2021. She noted tenderness with light palpation of the lumbar spine and left SI joint, paraspinal tenderness and muscle tightness noted with light palpation, generally reduced ROM of L- spine, increased pain reported with forward flexion greater than extension, or bilateral flexion. Strength to the bilateral lower extremities was normal and equal, straight leg raise test was negative, FABER test was positive on the left and thigh thrust and Iliac compression test were positive. She recommended proceeding with the SI joint injection but, as Claimant requested ask about a guarantee that there would be no further complications, she did not proceed.

37. On June 28, 2021 Dr. Douglas Scott issued a report in response to a Rule 16 request for authorization from Dr. Timo Quickert/Nurse Quickert for the SI joint injection. He opined that the SI joint injection was not reasonably necessary or related to the February 15, 2020 work related injury as Claimant had reached MMI as of June 3, 2020.

38. On July 20, 2021, Dr. Reichhardt examined Claimant finding tenderness to palpation in the lumbar spine with mild lumbar paraspinal muscle spasm and decreased

[12] Advanced Practice Registered Nurse.

lumbar range of motion. Examination of the left knee also showed tenderness to palpation though no effusion or instability. Dr. Reichhardt's final impressions were that Claimant had a low back and left lower extremity pain and weakness. He related the lumbar spine and left knee pain mechanism of injury as related to the February 15, 2020 work related fall and injury. He opined that Claimant should be allowed to have an SI joint injection under maintenance care as well as physical therapy to review her home exercise program (HEP), medications, laboratory tests, and follow ups with an advanced practice provider.

39. Dr. Reichhardt placed Claimant at MMI as of July 20, 2021 and assigned permanent lifting, pushing and pulling restrictions of 20 pounds and limit bending and twisting at the waist to an occasional basis.

40. He assigned a 14% lower extremity rating based on range of motion limitations of the left lower extremity, and a 5% rating for arthritis for a total of 18% for the lower extremity. Claimant's lower extremity rating converted to a 7% whole person rating. He assigned Claimant a 5% whole person impairment for specific disorder and a 12% for loss of range of motion of the lumbar spine, which combined to a 16% whole person impairment. Dr. Reichhardt also issued a mental impairment rating of 1% whole person impairment. Claimant's combined impairments were 23% whole person related to the February 15, 2020 work related injuries.[13]

41. On July 30, 2021 Dr. Baker ordered the maintenance physical therapy to review a HEP, which took place with Brian Busey, MPT beginning as of August 5, 2021, through September 13, 2021, and February 15, 2022 through March 31, 2022. Mr. Busey noted Claimant had moderate antalgia, with abnormal range of motion. She was using a cane in the left hand due to her right "wrist injury." He noted that the overall response was that Claimant was not progressing.

42. Dr. Baker's final diagnosis as of August 20, 2021 were strain of the left knee, radicular low back pain, adjustment disorder. He stated that the objective findings were consistent with the history and work related mechanism of injury. His final work related restrictions were to limit lifting, pushing, pulling and carrying to 20 lbs., and limit bending and twisting at the waist to an occasional basis. These restrictions were consistent with Dr. Reichhardt's final restrictions given on July 20, 2021. Dr. Baker also recommended maintenance care, concurring with Dr. Reichhardt in this regard, including 6 follow up visits with a provider, 4 follow up visits with a PT, coverage of medications, and any lab tests to monitor for side effects, if needed over each for the next 2 years Availability of an SI injection and an Orthopedic consult for the left knee.

43. Respondents requested a DIME and Sander Orent, MD was selected to conduct the examination. Dr. Orent documented on August 10, 2022 that Claimant reported she had constant low back pain when walking, bending, sitting, and sleeping. The pain started at waist level and radiated down both legs. Dr. Orent noted marked weakness in the right leg and trouble raising her left leg. Claimant had pain and swelling

[13] While Dr. Reichhardt's narrative report notes that Claimant's mental impairment is "zero" the final combined impairment rating includes the 1% mental impairment. The 16% lumbar spine rating combined with 7% whole person for the left lower extremity is 22%. The 22% combined with the 1% is 23% whole person impairment in accordance with the *AMA Guides* Combined Values Chart at p. 254.

noted in both knees and her right ankle.

44. Dr. Orent's diagnoses were (1) Lumbar strain secondary to fall with symptoms of lumbar radiculopathy and some symptom magnification noted, but clear evidence of injury. (2) Bilateral knee contusions. The left occurring at the time of injury with swelling and notably an effusion in the joint on imaging and the right apparently manipulated by a chiropractor causing her ongoing pain and discomfort. This happened in the course and scope of her injury. He noted it strange that a chiropractor would be manipulating her knee. The diagnoses of the knees were bilateral knee strains, possible meniscal injuries and on the left exacerbation of preexisting osteoarthritis as the result of the fall with ongoing symptomology requiring further care. (3) A diagnosis of right ankle sprain. The swelling was obvious over the right lateral malleolus. His opinion was that the mechanism of injury was certainly consistent, there had been no intervening events, there was swelling over the joint and he believed the patient's history.

45. Dr. Orent found Claimant was clearly not at MMI as she required a repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs were so weak, consideration of hyaluronic or other viscosupplementation into the left knee and an MRI of the right knee and the right ankle. Further care would be dictated based on the findings of those studies. Regarding her lumbar spine, it was clear and obvious she had ongoing pain, and recommended repeat imaging. He also stated that injection into the SI joint was reasonable and should proceed given the changes noted on her imaging. In addition, she had a facet syndrome and possible discogenic pain in the lumbar spine which should be further sorted by a repeat MRI with further treatment as necessitated.

46. Dr. Orent assigned a provisional impairment rating to Claimant. He rated the lumbar spine, bilateral knees, and right ankle for a combined 50% whole person impairment without basis for apportionment. Claimant was also unable to work as she was barely able to ambulate or get out of a seated chair at the time of his examination.

47. Following the initial report, on August 18, 2022 Dr. Orent issues a supplemental report correcting an error regarding the impairment for the right lower extremity, but concluded the error was minor and, with the corrected rating, the final whole person impairment did not change.

48. Claimant was evaluated on November 11, 2022 by Dr. John Aschberger, for an IME requested by Respondents. Dr. Aschberger opined that Claimant had a upper motor neuron neurological problems, likely above the cervical spine. Dr. Aschberger opined that there had been progressive involvement affecting both lower extremities that may be explained by further workup. He further stated that Claimant's presentation showed deterioration probably affecting her presentation at the time of the DIME, affecting the impairment rating issued by Dr. Orent, and that it may not reflect the actual residual from the work injury alone. He further opined that Dr. Reichhardt's impairment would be the best estimate for the correct impairment.

49. Dr. Reichhardt did examine Claimant on November 14, 2022, following his conversation with Dr. Aschberger. He confirmed Claimant had lower extremity clonus and a positive right sided upper extremity Hoffman's, which had been negative previously. He noted that the clonus was likely caused by cervical spine impingement

and stenosis at the cervical spine level. He recommended Claimant be seen immediately by Salud Clinic. He did not related any cervical spine issue with her February 15, 2020 fall.

50. On December 14, 2022 Dr. Scott issued a supplemental report at Respondents' request. He reviewed further records and noted that his opinions had not changed with regard to the February 15, 2020 work related injury, opining that Claimant reached MMI as of June 3, 2020, and that any impairment provided by Dr. Orent was questionable, in light of Dr. Parker's findings on that date.

C. Claimant's Testimony

51. Claimant stated that she recalled her treatment at Concentra with multiple providers. She also recalled her care under Dr. Reichhardt, and that he took measurements of her movement. She also recalled seeing Dr. Quickert and that injections were recommended. She denied having declined to go through them only that the injections were not authorized by Insurer, so she was unable to have the injection. She continues to be open to having the injections. She recalled seeing an IME physician but did not recall his name. She recalled being released by Dr. Reichhardt but continued with physical therapy after that date for several months. Her condition with the weakness in her lower extremities continued to deteriorate and she started using a cane over a year before the hearing in this matter. She stated that she had recently returned to see Dr. Reichhardt due to her continued deterioration including her right ankle. She informed Dr. Reichhardt that she has had many falls due to the weakness in her lower extremities.

52. Claimant recalled when they tried to perform dry needling in her lumbar spine, they pinched a nerve and there was a lot of blood. The next day she could not move her right foot properly. Somehow, it affected her right leg. Since that time she has had greater weakness in both leg and has had many falls.

53. Claimant testified that prior to her work related injuries of August 25, 2019 and February 15, 2020 she was healthy and did not have any limitations or restrictions. However, she now has limitations caused by her injury and could not work at this time. Even when she was working, prior to being laid off due to COVID-19, her employer would violate her restrictions and make her perform activities outside of her restrictions.

54. In November 2022 she was called in for an evaluation with Dr. Reichhardt, who asked her questions related to the weakness in her lower extremities and for the name of her personal care provider (PCP). She noted that Dr. Reichhardt attempted to contact her PCP but could not reach her. He recommended that she schedule an appointment. Claimant scheduled the appointment and was evaluated by Katie at Salud Family Health in Fort Collins.

55. Claimant acknowledge that she had travelled due to an emergency to Mexico but was only there for approximately one month after she was released and no longer going to therapy. After she returned, she restarted therapy in the Spring of 2022. She testified that she started using a cane approximately a year before because the weakness in her legs caused her to be unstable and caused multiple falls.

D. Testimony of Dr. Douglas Scott

56. Dr. Douglas Scott testified at hearing on behalf of Respondents, Board Certified Occupational Medicine expert as well as a Level II accredited physician. He explained his examination of Claimant when he conducted the IME as well as review of the records. He opined that, based on the mechanism of injury and his consideration of the chiropractor's finding on June 3, 2020, Claimant reached MMI without impairment at that time. He stated that he disagreed with Dr. Orent's findings, especially with regard to the lower extremities, as they were not part of the initial injury in his opinion. Further, he question Dr. Orent's range of motion numbers.

57. He was of the opinion that Claimant was disqualified from receiving further care under the workers' compensation system because her current problems were not related to her work related injury. However, he did concede that a degenerative or chronic conditions did not disqualify Claimant from receiving benefit under the WC system. He further opined that Claimant should have been released to work without restrictions as of June 3, 2020 as she had a normal exam including the ability to perform a squat despite the pain. He noted that pain alone does not equate to injury or impairment.

E. Testimony of Dr. John Aschberger

58. Respondents also called Dr. John Aschberger to testify in this matter as a Board Certified expert in Physical Medicine and Rehabilitation as well as a Level II accredited physician. He noted he had reviewed the records and examined Claimant. He specified that at the time of the exam, Claimant was having difficulty walking and standing, and was assisted by her husband. He could not perform ROM measurements because she was not stable on her feet. He stated he found clonus of the left knee and bilateral ankles representing a possible upper motor neuron neurological finding. She had an abnormal gait.

59. Dr. Aschberger recalled that Claimant reported having worsening of condition following her treatment with the chiropractor, though there was some mention in the records that following a walk with a friend she had problems with walking. He further opined that the records did not support a left knee or left lower extremity injury. He opined that Claimant reported multiple falls and that they may constitute an aggravation or new injury. He agreed with Dr. Reichhardt's determination of MMI and impairment. He stated that the SI joint injection could provide some relief and could be done as maintenance medical care. He did not change his opinions relayed in his IME report.

F. Testimony of Dr. Sander Orent, DIME physician

60. Dr. Orent, a Board Certified Occupational Medicine and Internal Medicine expert as well as a Level II accredited physician, was called by Claimant as the Division selected DIME physician. Dr. Orent testified at hearing as a Board Certified Occupational Medicine and Internal Medicine expert as well as a Level II accredited physician. He stated that there were no upper motor neuron findings when he examined Claimant in

August 2022. He did identify severe lumbar dysfunction as well as bilateral lower extremity injuries. He noted that he considered the medical records as well as Claimant's reports of the injuries when he made the determination to related the right lower extremity and ankle injuries to the February 15, 2020 work related injury. He chose to believe Claimant's reports despite the lack of a specific report in the medical documentation that Claimant had been hurt either by the dry needling or the chiropractor's records, especially considering his examination and findings of swelling in the knees as the right ankle. He opined that something was going on in Claimant's spine that needed to be addressed as well as her lower extremities, especially considering that the weakness of her lower extremities has resulted in multiple falls. He opined that Claimant's ongoing deterioration required further investigation and that providers should not rely on 2 year old exams.

61. Dr. Orent stated that simply because a Claimant had an asymptomatic condition did not mean that the condition could not be aggravated, causing the asymptomatic condition to flare and become symptomatic. He opined that this is what happened when the chiropractor manipulated Claimant's knees. He failed to understand why the chiropractor, who was in charge of addressing lumbar spine issues, was addressing anything with regard to Claimant's knees. Now Claimant has effusion in both knees as well as an antalgic gait, which he related to the February 15, 2020 work injury.

62. Dr. Orent further considered the Claimant's adequate mechanism of injury and the sequelae caused by the ongoing injuries and treatment when making his causation analysis. He continued to opine that Claimant was not at MMI and required further diagnostic testing and medical care as stated in his report, including viscosupplementation in the knees, SI joint injection and even repeat MRI of the lumbar spine and repeat EMG, related to her February 15, 2020 admitted work injury as laid out in his DIME report. He stated that Dr. Scott and Dr. Aschberger simply disagreed with his opinions and that physicians frequently disagree with each other.

63. Dr. Orent testified persuasively that he took valid measurements of Claimant's lumbar spine at the time of his examination. He confirmed that the measurements were in fact the numbers he took during the examination and disputed Dr. Scott's opinion that it was not possible to obtain the numbers Dr. Orent actually obtained. Dr. Orent continued to opine that Claimant injured her lumbar spine and bilateral lower extremities, including her right and left knees and her right ankle. He appropriately provided a provisional rating as required by the Division in accordance with the requirements for a DIME physician. He considered the medical records, Claimant's testimony and the responses Claimant provided him at the time of her examination, as well as the mechanism of injury and the sequelae treatment she received to arrive at his opinions as laid out in his DIME report. He continued to opine that Claimant was not at MMI and required further diagnostic evaluation and treatment as he had previously laid out. His opinion did not change from that reflected in his DIME report despite the testimony of Drs. Scott and Dr. Aschberger. He stated that they simply have a different opinion.

64. Dr. Orent stated that, even if Claimant was found to be at MMI, that she continued to require medical care related to her work injury.

G. Ultimate Findings of Fact

65. As found, Respondents have failed to overcome by clear and convincing evidence the opinions of Dr. Sander Orent, the DIME physician in this matter. Dr. Sander considered the evidence, the facts as described by Claimant, the medical records, the mechanism of injury and examined Claimant in order to arrive at his opinions in this matter. Dr. Orent is credible and his opinions more persuasive than the contrary opinions provided by Dr. Aschberger and Dr. Scott. Claimant explained to Dr. Orent how her injury occurred, Dr. Orent reviewed the records and examined Claimant in order to perform a causality analysis and reach the determination that Claimant injured her low back, left lower extremity, her bilateral knees and her right ankle, all as a consequence of the February 15, 2020 work related injury. This includes further injury to her lower extremities caused by treatment while under the care of her workers' compensation authorized treating providers.

66. As found, Dr. Orent credibly concluded that, due to the progression of Claimant's symptomology, she required further medical care, including but not limited to repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs are so weak, consideration of hyaluronic or other viscosupplementation into the left knee, SI joint injections and MRIs of the right knee and the right ankle. He opined that this diagnostic care and treatment are essential to cure and relieve Claimant from the effects of her February 15, 2020 admitted work related injury.

67. Drs. Aschberger and Scott did not disagree that Claimant needed further evaluations. In fact, they recommended Claimant seek further evaluation outside of the workers' compensation system with her PCP. However, neither were able to identify what exactly was happening to Claimant other than that she continuing to have complaints of pain in her low back, lower extremities including weakness. Those physicians simply concluded that since the treatment provided did not resolve her complaints that they were probably unrelated to the work injury. Dr. Orent credibly opined that Claimant continue to suffer from the work related injuries and required further care and diagnostic treatment and that Drs. Aschberger's and Dr. Scott's opinions were simply difference of opinions.

68. Dr. Scott is simply not credible in his opinion that, based on his understanding of the mechanism of injury, Claimant should have reached MMI as of June 3, 2020 when the chiropractor identified Claimant was able to perform a squat, despite Claimant's continuing symptoms. He relied heavily on Dr. Parker's notations. However, Dr. Parker's notes are suspect. From the initial exams on May 13, 2020 he stated that Claimant "transitions from a seated to a standing position without difficulty, pain complaints or pain behaviors." The phraseology of "transitioned from a seated to a standing position without difficulty, pain complaints, or pain behaviors" is commonly added in most of Dr. Parker's reports despite complaints of pain and symptoms. Dr. Parker clearly documents that Claimant was having significant pain with ratings at 6/10 and 7/10, with left lateral knee pain and numbness traveling from her gluteus musculature laterally in the left lower extremity to the left great toe and second toe. He noted significant loss of range of motion, positive Patrick's, Hibb's, Yeoman's, and hyperextension, and while he may not have provided significant chiropractic care to the lower extremity, his exam notes that he clearly examined the lower extremity,

manipulating them. On June 3, 2020 Dr. Parker documented that Claimant continued to have a 6/10 pain with activity and noted that she had palpable adhesions, trigger points and muscle spasms. Therefore, Dr. Scott's reliance of Dr. Parker's normal findings make his opinions not credible.

69. Claimant was under medical restrictions issued by her ATPs, including Dr. Reichhardt who stated as of July 20, 2021 that Claimant was limited in her ability to work including a 20 lbs. lifting, pushing and pulling limitation as well as limited bending and twisting. These restrictions are similar to Claimant's restrictions when she was laid off from her employment due to COVID-19. Further, both Dr. Aschberger and Dr. Reichhardt noted in their more recent reports that Claimant was not able to engage in employment at that time. This is consistent with Dr. Orent's opinion as well. Claimant has shown the she has been unable to return to her employment with Employer of injury or any other employment due to her work restrictions.

70. As found, Claimant's loss of employment was caused by a combination of her physical limitations, her restrictions and due to the COVID-19 pandemic. As found, from the totality of the evidence, including Claimant's credible testimony and the medical records, Claimant has proven that it was more likely than not that that she left work as a result of the disability related to this claim and has incurred an actual wage loss. This has caused a disability lasting more than three work shifts. Claimant has proven that it was more likely than not that there was a causal connection between a work-related injury which caused her subsequent wage loss. As found, Claimant continues to have work restrictions that limit her ability to return to her prior employment or any other employment.

71. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which

leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Whether Respondents overcame the DIME physician's opinion, that Claimant is not at MMI, by clear and convincing evidence.

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S.

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A party meets this burden if the evidence

contradicting the DIME physician is “unmistakable and free from serious or substantial doubt.” *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002). A “mere difference of medical opinion” does not constitute clear and convincing evidence. E.g., *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523- 097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). Further, a finding of MMI inherently involves issues of diagnosis because the physician must determine what medical conditions exist and which are causally related to the industrial injury*. Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). Because the determination of causation is an inherent part of the diagnostic process, the DIME physician's finding that a condition is or is not related to the industrial injury must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office, supra.*

If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*, (if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine the DIME physician's true opinion). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. ICAO*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO*, 984 P.2d 656, 659 (Colo. App. 1998); *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005). Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician’s true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]; *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005); In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*. Lastly, Respondents bear the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339, ICAO, (June 17, 2005); *Gurule v. Western Forge*, W. C. No. 4-351-883, ICAO, (December 26, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. ICAO, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. ICAO, supra.*

In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination [and true opinion] is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical

opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., *supra*; *Shultz v. Anheuser Busch, Inc*., *supra.*

In the case at bench, Respondents' had the burden of proof to overcome Dr. Orent's opinions on MMI and causation. Respondents relied on the opinions of Drs. Scott and Aschberger, as well as other medical reports, to support their contentions. The ALJ found Drs. Scott and Aschberger were unpersuasive in their opinions with regard to causation and MMI, especially their diverging opinions. Dr. Aschberger put great emphasis on his findings that there was a clonus sign at the low extremities but more importantly at the right upper extremity. It is clear from the record that Claimant has continuously complained of right upper extremity problems related to the admitted August 25, 2019 work related injury. Dr. Aschberger's report makes little mention of his review of records from the 2019 claim or Claimant's symptoms in that case, which are extensive in this ALJ consideration and that case is not before the court at this time. Dr. Aschberger actually recommended further diagnostic work up with regard to Claimant's symptoms outside of the Workers' Compensation system considering his examination to determine if there was a true upper motor neuron condition, though he suspected there was. However, there was no specific diagnosis provided and little that shows that Dr. Orent is incorrect in his determination. Dr. Aschberger's opinion was, in fact, somewhat speculative and just a different opinion than Dr. Orent's. Dr. Aschberger's opinion amounted to a mere difference of medical opinion with those of Dr. Orent's, which does not rise to the level of clear and convincing evidence that is unmistakable and fee from serious or substantial doubts and is insufficient to show that it is highly probable the DIME physician's opinion on MMI is incorrect. See *In re Claim of Tomsha*, W.C. No. 5-088-642-002 (I.C.A.O. March 18, 2021).

With regard to Dr. Scott's opinions, he is simply not credible. In his estimation Claimant should have reached MMI within four months of her injury. In his opinion, based on his understanding of the mechanism of injury, Claimant should have reached MMI as of June 3, 2020 when the chiropractor identified Claimant was able to perform a squat, despite Claimant's continuing symptoms. He relies heavily on Dr. Parker's notations. However, Dr. Parker's notes are suspect and conflicting. From the initial exams on May 13, 2020 he stated that Claimant "transitions from a seated to a standing position without difficulty, pain complaints or pain behaviors," which is a phrase he frequently uses in his notes despite complaints of pain and symptoms. Dr. Parker clearly documents that Claimant was having significant pain with ratings at 6/10 and 7/10, with left lateral knee pain and numbness traveling from her gluteus musculature laterally in the left lower extremity to the left great toe and second toe. He noted significant loss of range of motion, positive Patrick's, Hibb's, Yeoman's, and hyperextension, and while he may not have provided significant chiropractic care to the lower extremity, his exam notes that he clearly examined the lower extremity, manipulating them. On June 3, 2020 Dr. Parker documented that Claimant continued to have a 6/10 pain with activity and noted that she had palpable adhesions, trigger points and muscle spasms. Therefore, Dr. Scott's reliance of Dr. Parker's normal findings make his opinions not credible.

As found, Dr. Reichhardt found Claimant at MMI as of July 20, 2021 based on a stagnated system. He was awaiting authorization for SI joint injections he recommended

with Dr. Quickert, which were denied. His hands were tied as he found his recommendations rejected and could offer nothing else. Further, Dr. Reichhardt relied on communications from Mr. Toth that Claimant had not complained of leg pain during the initial visits. Mr. Toth mislead Dr. Reichhardt in this matter. And while this ALJ was more persuaded by Dr. Reichhardt's opinion than by Dr. Scott or Dr. Aschberger, his opinion did not rise to the level of clear and convincing evidence that was free from doubt. It was simply a difference of opinion.

Respondents argued that because Dr. Brady mentioned that Claimant was wearing an ankle brace on August 3, 2020 and that clearly the somatic distress and pain magnification were the causes of Claimant's continuing symptoms, her continuing problems were not the work related injury. This is not persuasive. In fact, Dr. Brady diagnosed a pain disorder and adjustment disorder which were either caused by or aggravated by the work related claim of 2019.

Respondents also argued that Dr. Orent made a mistake, which was not corrected, following the Incomplete Notice of August 18, 2022. This is not correct. In fact, Dr. Orent did correct his mistake and issued a letter on the same day, including the revised summary form.[14] Immediately thereafter, the DIME Unit at the Division issued the "Notice: DIME Report "Not at MMI"" on August 25, 2022 to the parties.[15] As found, Dr. Orent's true opinion is found to be inclusive of this revised report.

Respondents also argue that based on Dr. Scott and Dr. Kleinman's opinions, Claimant's conditions were preexisting. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, caused an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949);

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[14] See Claimant's Exhibit 7, bates 25, and Exhibit 8, bates 27-29.
[15] See Exhibit 9, bate 32.

Dietrich v. Estes Express Lines, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant credibly testified that, before her workers' compensation incidents, Claimant she was in good health and did not have any medical or health problems which affected her low back and bilateral lower extremities. Neither were any medical record in evidence presented that showed to the contrary. While the diagnostic testing showed Claimant clearly had degenerative conditions, those conditions were asymptomatic. Dr. Orent credibly testified that Claimant's current problems with her low back and bilateral lower extremities are related to her February 15, 2020 work related accident. He also credibly testified that the need for the recommended care was related to the claim. Further, he opined that it was not only the injuries she sustained at the specific date and time of the work related event or accident but the sequelae that results from those injuries were also related to the February 15, 2020 work related claim. In short, because Claimant was further injured during the course of her treatment for the work related injury, those additional injuries are also related to the February 15 2020 claim and compensable. While Dr. Parker's records did not record causing an injury to Claimant's right knee, he did examine them including doing range of motion of the knee. It is not surprising or unanticipated that he would not record causing an injury to a patient.

Lastly, Respondents argue that Dr. Orent was in error because he relied on Claimant's reports instead of pointing to particular medical records to substantiate his opinion.[16] As found, Dr. Orent did substantiate his opinions, first by stating that he acknowledge that Dr. Reichhardt obtained better range of motions but that Claimant's condition had clearly worsened since that time. Secondly, Dr. Orent's range of motion testing was valid and therefore no second set needed to be completed under the *AMA Guides*. Further, he opined that Claimant clearly explained what had occurred with regard to the reporting. Claimant did complain of her lower extremity weakness. The medical records show a pattern of Claimant's complaints, despite the providers being told by Insurer that the knee complaints were not compensable. Dr. Reichhardt also documented in his records that Claimant was complaining of bilateral lower extremity pain and weakness from his initial report of October 5, 2020, despite noting that it was not initially reported because Employer did not list it initially.

As Dr. Orent testified, chiropractors are not trained in range of motion for the purposes of evaluating MMI and impairment. Dr. Scott's opinion also ignores the reports that followed from Dr. Parker. Claimant reported she still experienced low back pain, but treatment was helpful. The fact that treatment continued to be helpful to Claimant shows

[16] Respondents specify in their brief that Dr. Orent's reliance of Claimant's statements is "outside of the Guides page 246." The AMA Guides have nothing on this page and the MTGs for both low back and lower extremities have less than 246 pages each.

that Claimant had not reached the level of maximum improvement. It is reasonable to believe additional care would continue to improve Claimant's condition. All of Dr. Parker's impressions noted "slowly improving (objective greater than subjective) low back pain/ lumbosacral strain and thoracolumbar pain complaints." By definition, Claimant had not reached a point of stability.

After considering the multitude of reports in evidence[17] from both the 2019 and the 2020 claims as well as the testimony of three experts, this ALJ concludes from the totality of the evidence, based on the heightened standard of proof, Respondents failed to show by clear and convincing evidence that Dr. Orent was in error.

C. Whether there was an Intervening Event

An intervening injury may sever the causal connection between the industrial injury and the claimant's condition. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). Further, the existence of an intervening event is an affirmative defense. Consequently, it is Respondent's burden to prove that Claimant's disability is attributable to the intervening injury or condition and not the industrial injury. *See Owens v. ICAO*, 49 P.3d 1187 (Colo. App. 2002); *see also Atlantic & Pacific Insurance Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983). Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.* It is also clear that, pursuant to the Court's conclusion in the *Owens* case cited above, that no compensability exists if the disability or need for treatment was caused as a direct result of an independent intervening cause. Whether Respondents have sustained their burden to prove Claimant's disability was triggered by an intervening event is a question of fact for resolution by the ALJ. *See City of Aurora v. Dortch*, 799 P.2d 462 (Colo. App. 1990).

Respondents stated that Claimant had an intervening event, speculating that something must have happened when Claimant was in Mexico on an emergency. Claimant testified that she had traveled to Mexico and stayed there for approximately one month but did not recall exactly when. She confirmed it was after she had been released from physical therapy in the fall of 2021 and when she restarted physical therapy in February 2022. However, there was no confirmation or credible evidence that Claimant suffered any accident or incident while she was in Mexico.

Claimant did testify that the weakness in her legs had caused her to fall multiple times. This was documented by Dr. Reichhardt in his November 2022 report. However, it has not been persuasively proven that it was more likely than not that Claimant's falls were caused by a condition other than the documented and diagnosed lumbar spine injury with radiculopathy or the bilateral lower extremity injuries diagnosed by Dr. Orent in his DIME report. The records are full of complaints that Claimant had weakness in her bilateral lower extremities. Dr. Aschberger and Dr. Reichhardt speculated that Claimant has some stenosis or upper motor neuron condition, but this has not been confirmed either, and no diagnostic testing has been completed to rule out the probability that the falls are a consequence of the weakness caused by the work related lower extremity

[17] There are approximately 1300 pages of records, including medical records and pleadings.

injuries or the radicular symptoms. Dr. Reichhardt continued to note in his November 14, 2022 report that Claimant had suffered a work related low back discogenic injury with radicular involvement and a left knee injury. He rated both. And these records and opinions were considered by the DIME physician. Nothing in those reports persuaded this ALJ that there was clear and convincing evidence of a diagnosis that was not work related as determined by Dr. Orent.

Respondents also point to the event Claimant reported when she was walking with a friend in April 2020 and was feeling pain in her knee. This ALJ finds no merit in this theory or suggestion as walking in and of itself is found not to be a causative intervening event. Claimant likely walked many places, including in her home, the medical providers buildings, and for every other activity of daily living. Even if Claimant had just been walking while in the course and scope of her employment that would likely not be considered a work related injury as there would be no cause and effect, no heightened risk.

This ALJ has insufficient evidence to determine that it is more probable than not that Claimant suffered an intervening event. Respondents have failed to show that it was more probable than not that Claimant had an intervening event at this time.

It is further found that Respondents have failed to overcome the determination of the DIME physician's opinion by clear and convincing evidence that there was no intervening event. Dr. Orent acknowledged reading the opinions of Dr. Aschberger and Dr. Reichhardt with regard to the clonus signs, as well as Dr. Aschberger's testimony and this information did not change his opinions.

D. Entitlement of Temporary Total Disability benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant was given work restrictions as of the date of her injury on February 15, 2020. She continued working until sometime in March 2020, when she was laid off from work due to the COVID-19 pandemic. This was a time when her employer failed to comply with her work restrictions. She continued on work restrictions when Dr. Reichhardt placed her at MMI on July 20, 2021. At that time she continued having work restrictions of 20 lbs. lifting, pushing and pulling, and limit bending and twisting at the waist to an occasional basis. In fact, Dr. Orent stated that he saw no possibility of Claimant engaging in any form of active employment at that time and Dr. Aschberger opined that Claimant could not work or was not employable. Claimant has established by a preponderance of the evidence that she is entitlement to TTD benefits as a result of her work related injury from the date she had previously been placed at MMI on July 20, 2021 until terminated by law.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents failed to prove by clear and convincing evidence that the DIME physician was incorrect. Claimant is not at maximum medical improvement.

2. Respondents shall pay for reasonably necessary and medical care related to the February 15, 2020 work injury, in accordance with the Colorado Fee Schedule, to cure and relieve her of the compensable injury.

3. Respondents shall pay temporary total disability benefits as of July 20, 2021 and continuing until terminated by law.

4. Respondents shall pay interest on any benefits at the rate of eight percent (8%) per annum for all benefits that were not paid when due.

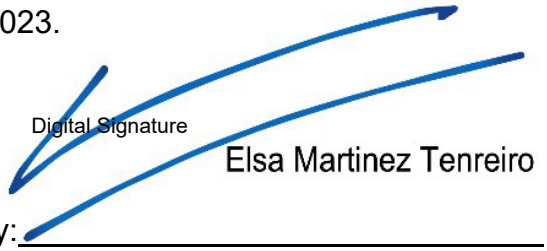
5. Claimant’s average weekly wage is $333.00 pursuant to the stipulation of the parties.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 17th day of February, 2023.



By: _____

Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-203-196-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Claimant was injured in the course and scope of his employment on April 8, 2022.

IF THE CLAIM IS DEEMED COMPENSABLE, THEN:

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the April 8, 2022 work related injury.

III. If Claimant proved he is entitled to medical benefits, who is his authorized treating physician.

IV. Whether Claimant established what his average weekly wage (AWW) is.[1]

V. Whether Claimant established by a preponderance of the evidence he is entitled to temporary total disability benefits (TTD) or temporary partial disability (TPD) benefits.

VI. Whether Respondents proved by a preponderance of the evidence Claimant was terminated for cause or was responsible for his wage loss.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if compensability was established, then Claimant's agreed upon average weekly wage (AWW) was $507.59.

The parties further stipulated, if compensability was established, that they only require a general award for temporary disability and that the parties would calculate and/or negotiate the amounts due and owing as Claimant received unemployment benefits for which Respondents are entitled to an offset.

These stipulations are approved and become part of the order.

PROCEDURAL ISSUES

Claimant limited the period of temporary total disability benefits being requested from April 18, 2022 through June 8, 2022 and temporary partial disability benefits thereafter. Respondents asserted that temporary disability benefits would terminate as of April 26, 2022 if the authorized treating physician placed Claimant at maximum medical improvement.

Respondents also withdrew the issues of waiver, estoppel, latches and overpayment.

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[1] See stipulation.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Generally:

1. Claimant was 27 years old at the time of the hearing. He worked in the housekeeping department for Employer since approximately April 1, 2021. His job included high and low dusting, vacuuming, mopping, cleaning bathrooms, wipe down counters and surfaces, mirrors, ledges, cleaning bathrooms, and general housekeeping chores. He was hired to clean the office suites on the 2nd floor, the call center and the common areas (which did not include all hallways).

2. On April 8, 2022 Claimant was scheduled to work from 5:00 p.m., after they closed the medical care facility. That particular day he was assigned extra duties of cleaning baseboards of the lobby and hallways, in addition to his normal tasks. He started cleaning the hallway baseboards around 11:20 p.m., for which he had to bend over in awkward positions, kneeling and bent over, when he started feeling pain in his low back after starting the task. He started having pain in his lower back after approximately one half hour. However, he completed his tasks for the day, including taking out the trash, locking up the janitor closet and turning in his dirty rags around 12:20 a.m. on April 9, 2022.

3. His wife picked him up from work because he was unable to drive. He went home and started feeling excruciating low back pain but also nausea, vomiting, and had a fever. He did not see a medical provider and stated he wanted to see how he was feeling the following work day and whether he would recover quickly, as Saturday and Sunday were his days off. He did not report his symptoms to his employer at that time as he was concerned with losing his job. He had bed rest the whole weekend. He had not had a problem like this before but he assumed that the symptoms would get better by Monday. On April 9, 2022 his pain level was a 3/10 on a 10-point pain scale.

4. His back started to get worse and on Monday he called the human resource department (HR) and spoke with [Redacted, hereinafter MB], advising her that he would not be in to work as he was feeling sick. At that time, Claimant thought he might have COVID because of the nausea, vomiting and fever as well as back pain. He did not mention that he had any work related injury.

5. Claimant called his employer on multiple occasions to advise he would be unable to work. By April 14, 2022 his back pain was unbearable and he sought medical attention.

6. Claimant went to his primary care provider (PCP), but his regular provider, Dr. Moran was not available, so he was seen by Linsey Durrough, a nurse practitioner at Banner. By that time, his pain level was at around an 8/10 and was excruciating. Ms. Durrough provided him with a medical excuse letter, which he provided to Employer on April 14, 2022.

7. Claimant did not have any history of back pain or problems prior to April 8, 2022.

B. Medical Records:

8. On April 14, 2022 Claimant was evaluated by Nurse Practitioner Lyndsay Dorrough at Banner Heath BMG Health Clinic, Timnath Family Medicine,[2] under the direction of Dr. William Ratliff. Claimant provided a history as follows:

> [Redacted, hereinafter MA] Is a 26 year old male presenting with back pain. This started last week, Friday. Reports was squatting cleaning/installing baseboards at work and developed back pain after 1/2 hour of doing activity. Reports no heavy lifting at work, no popping sensation felt Reports no hx previous injury. Pain starts lower back and works up to mid back. Pain has been 9/10. Aleve did not help the pain. Does not wish to pursue workman's compensation evaluation at this time. States pain makes him feel nauseated. Has not worked since occurred. No radiation down legs, foot drop or incontinence.

Claimant reported pain in his mid and low back as well as nausea due to the pain, but no numbness, tingling or lower extremity symptoms. On exam Nurse Durrogh noted pain in the paraspinal muscles of the thoracic spine on the right side, muscle spasms on the right thoracic and lower back. Pain and limited range of motion (ROM) on extension and with flexion. She diagnosed thoracic back pain, lumbar back pain, and muscle spasms. She prescribed celecoxib, tizanadine, lidocaine patches and x-rays, and recommended he avoid lifting and twisting as well as a trial of heat, Epsom salts and rest. She advised if symptoms persist despite medication she would order physical therapy. She further stated that "If you chose to file workman's compensation claim (we are not covered), recommend filing with your company. We discussed if you file with workman's compensation this visit may not be covered under that insurance." Nurse Dorrough also provided Claimant with a note that stated that "['Claimant] was seen in clinic today. May return to work Monday April 18, 2022."

9. Dr. Curtis Henderson evaluated Claimant on April 18, 2022 at Banner Fort Collins Medical Center Emergency Department regarding his back pain. The history of illness was consistent with Claimant's testimony. On exam, Dr. Henderson found right-sided paravertebral musculature spasm, but most of Claimant's pain was left sided, some sacral discomfort, decreased range of motion due to the pain. Claimant was prescribed Toradol, Norflex IM and Norco. Dr. Henderson recommended rest in reclined position, restrict activity until reevaluated by specialist or PCP, outpatient physical therapy, use ice and heat, no lifting and return to ER if conditions worsen. He excused Claimant from work for one week with a return date of April 25, 2022. The discharge summary specified that Claimant should restrict activities, no lifting, rest in a reclined position, use ice and heat.

10. Respondent Insurer provided a designated provider list (DPL) indicating Claimant could choose from Concentra of Fort Collins, Banner Occupational Health in

[2] Claimant was previously seen at the clinic by Dr. Robert Moran on March 28, 2022 for a general checkup. No concerns were reported regarding low back or thoracic spine issues, though dysthymia (depression) was present.

either Greely or Loveland and UCHealth Occupational Medicine Clinic Harmony Campus. Employer provider a similar one. Neither of these DPLs were dated.

11. Claimant was seen on April 19, 2022 at Banner Occupational Health Clinic in Loveland by Bryan Copas, PA-C, for low to mid back pain radiating to the right shoulder. Claimant complained of fatigue, fever, trouble sleeping, dizziness, shortness of breath, wheezing, nausea, neck pain, scoliosis, joint pain, joint stiffness, joint swelling, muscle cramping, muscle pain, muscle weakness, and back pain. Claimant complained of problems walking, feeling dizzy, difficulty concentrating, and loss of memory. He advised he did not have preexisting conditions. Mr. Copas documented a mechanism of injury consistent with Claimant's testimony at hearing. Claimant reported that the following day (April 9, 2022) after his initial onset of symptoms, he developed nausea and a fever. On exam, Mr. Copas documented decreased range of motion (DROM) and loss of strength of T-spine and L-spine with all planes limited by 5-10 degrees except for rotations bilaterally which was normal. He reported tenderness and response to light touch was diffuse and without localization, he had slight scoliosis of lower T-spine to right (dextroscoliosis), and slight scoliosis of L-spine to left (levoscoliosis)[3], an exaggerated response to slightest touch over the bilateral SI joints as well as diffusely throughout back and posterior right shoulder. Mr. Copas diagnosed dorsalgia, specifically stating that "[T]he cause of this problem is not known at this time., (sic.) and No clear dominant pathology." He recommended restricted duty through April 26, 2022 including no bending, carrying, climbing, crawling, kneeling, lifting, repetitive lifting, pushing, pulling squatting, stooping or twisting. Lastly, he stated that claimant's symptoms should resolve with conservative care, regardless of the cause of the injury. This report was co-signed by Dr. Daniel Bates.

12. On April 19, 2022 [Redacted, hereinafter BP] issued the BP[Redacted] First Report of Injury, which includes a general first report comments. The note seems to have been written by an Employer representative stating as follows:

> The claimant worked on Friday 4/8 and then was off for his scheduled days off on 4/9 and 4/10. On 4/11 the claimant called off for their scheduled shift stating they were starting to get a sore throat and felt sick to their stomach. The claimant then called off again on 4/12 stating they were still feeling awful and would not be in. On 4/13 the claimant called off and stated they were still feeling pretty sick and thought it was the stomach bug. On 4/14 the claimant called in to call off again stating they were still not feeling well at which point they were informed they would need to provide a doctor's note since it had been more than 3 days in a row. They stated they would be providing a doctor's note after their appointment that afternoon. The doctor's note received did not stale anything about the reason for the absence. It just slated the claimant was seen and may return to work on April 18th. On April 18th the claimant stopped by our office to drop off a doctor's note that excused him from work until April 25th at which point in time he stated he was Injured at work and was experiencing back pain. The claimant failed to report this injury in a timely manner and it seems odd/suspicious that the claimant reported they had a stomach bug and then it turned into a back Injury 10 days later.

[3] Mr. Copas read the x-ray films of the T-spine and L-spine as demonstrating dextroscoliosis of lower T-spine and levoscoliosis of L-spine, consistent with his exam.

13. PA-C Andrea Hibma from UCHealth evaluated Claimant on April 21, 2022. Claimant reported that "[T]he injury occurred at approximately 11:20 pm as he was cleaning the baseboards in the hallway of an office" on April 8, 2022. He describe the movements as follows:

> He states that he initially bend at the waist to wipe the baseboards, but then started to crouch/kneel to clean. He states that he does typically clean the baseboards, but "it is not in my job description to clean baseboards in the hall". He typically cleans the baseboards in the lobby and suites only. MA[Redacted] states that he was doing this activity for approximately an hour. He states that about five minutes after he was finished he noticed pain to his entire back and went home.

Claimant reported "severe" ache and numbness to the anterior and posterior lower legs, right greater than left. He reported difficulty sleeping due to discomfort and that he had not returned to work yet. He also advised that he reported his injury to his employer the prior week. Claimant denied any prior back injuries. Ms. Hibma review the medical records of Claimant's visits with his PCP and Banner ER. Following exam, she diagnosed a thoracic myofascial strain and an acute myofascial lumbar strain, recommending physical therapy. Since Ms. Hibma noted that she believed Claimant's condition was related to activities of his employment but was not certain, she recommended a Level II physician evaluate Claimant to make a causation determination.

14. Claimant was evaluated by Paul Braunlin, P.T. on April 22, 2022 in the UCHealth Physical Therapy and Rehabilitation Clinic for his myofascial thoracic and lumbar strains, pursuant to a referral by PAC Andrea Hibman. Mr. Braunlin noted that Claimant was injured on April 8, 2022 when working in stooped position cleaning baseboards. He documented that Claimant was finishing up a dose of prednisone, which was helping, was taking a muscle relaxant, which was helping Claimant sleep. He indicated Claimant had pain levels that would range from a 3/10 to a 10/10, intermittent numbness into his thighs, and multiple functional limitations. On exam, Mr. Braunlin noted that Claimant had no altered gait thought slow, could stand and walk on his heels and toes, had a negative straight leg test, symmetrical quadriceps and Achilles reflexes. Mr. Braunlin provided 25 minutes of therapeutic exercises and Claimant's posture and gait improved.

15. On April 26, 2022 Claimant was evaluated at UCHealth Occupational Medicine Clinic, Harmony Campus, by Kimberly Siegel, M.D. in the discussion portion of her report she stated:

> [Claimant] reports worsening widespread pain involving the mid and lower back pain, right upper back, right neck, bilateral thighs, and right knee 2-1/2 weeks after onset of pain in the context of cleaning baseboards for 1 hour. He attributes this pain to bending and squatting and notes that it is not normally his responsibility to clean the baseboards in the hallway, though he does normally clean them in the lobby and suites. Frequent bending and squatting over 1 hour while performing a job task that he normally does in a different location is a questionable mechanism of injury. It is consistent with muscular soreness or minor muscular strain at most. It is not consistent with worsening diffuse back, neck, and lower extremity pain despite 2.5 weeks of rest (no work since date of injury). It is clear that MA[Redacted] does have thoracolumbar scoliosis (obviously pre-existing and not work-related) which may or may not account for some of his pain. However, I think

> nonorganic cause(s), such as psychosocial factors, are more likely. In my opinion, MA's[Redacted] current symptoms are not probably work-related.

Dr. Siegel discharged Claimant as she stated that "[T]he worker is discharged from care due to having symptomas (sic.) that are not probably work-related." She referred Claimant to consult his PCP or other provider outside the workers' compensation system for further evaluation or treatment. She specifically noted on the WC M-164 form that MMI was unknown at that time.

16. On April 26, 2022 Claimant's counsel wrote to Respondents demanding they continue to pay for Claimant's reasonably necessary and related medical benefits or the right to select a provider would pass to Claimant.

17. Respondents responded by stating that as of April 26, 202 the claim was denied and that no further medical care would be covered.

18. Respondents filed a Notice of Contest on April 27, 2022 denying that Claimant had a work related injury.

19. The following day, on April 28, 2022, Claimant was evaluated by Dr. William Ratliff of Banner Health Fort Collins regarding is lumbar and thoracic pain and scoliosis. Claimant reported that he had a follow up with workers compensation who advised his condition was not work related. Claimant provided a history consistent with his testimony at hearing. Claimant had some paraspinal thoracic and lumbar pain, but no midline tenderness of the thoracic and lumbar region. He had discomfort with rotation in both directions but no loss of ROM on exam. He diagnosed thoracic and lumbar back pain and scoliosis of the thoracolumbar spine. He recommended physical therapy and ordered MRIs.

20. On May 27, 2022 Dr. Ratliff issued a letter that Claimant was unable to return to work until May 31, 2022 with no lifting greater than 10 lbs., no bending over at the back for 4 weeks.

21. On May 19, 2022 Claimant was attended by Dr. John Shonk of the Neurosurgery Office at Banner Health. Dr. Shonk took the following history:

> Patient is a 26-year-old, right-handed, Hispanic male who reports onset of originally thoracic back symptoms and now on his pain diagram shows pain throughout the head, posterior and lateral neck across the shoulder blades and in between them going down into the lower thoracic and lumbar back wrapping around to the lateral rib cage at about the T7-T12 level and then across the obliques as well as the lumbar paraspinous muscles with paresthesias of anterior posterior thighs and right calf. Patient notes that this pain on my scale by his reporting is ranging from 2-10 out of 10 averaging 5 out of 10 is aching to burning to sharp and piercing in character with no radicular symptoms and no decreased sensation in the saddle region or decreased sensation or control of the bowel or bladder. Patient's pain is increased by holding a constant position, rapid movements, bending, twisting, stress as well as changes in weather to cold wet stormy. Patient has difficulty getting to maintaining sleep and to wake up very stiff in the morning.

Dr. Shonk noted that Claimant's injuries were brought on by cleaning baseboards on April 8, 2022.

22. Claimant had MRIs of his thoracic and lumbar spine on May 23, 2022, which were read by radiologist Malay Bhatt, M.D. The thoracic spine MRI showed no abnormalities other than mild a dextroconvex thoracic curvature at the apex of T10. The lumbar spine MRI showed mild diffuse disc bulges at L4-L5 and L5-S1, with trace inferior foraminal narrowing at L4-L5 and left facet hypertrophy; no high-grade canal stenosis and mild left foraminal narrowing at L5-S1, in addition to mild levoconvex lumbar bowing.

23. Claimant returned to see Dr. Shonk on May 31, 2022 regarding his bilateral sacroiliac joint arthropathy and cervical facet arthropathy with myofascial pain syndrome. Claimant complained of pain at a level of 2 out of 10, but also marked the posterior neck upper trapezius shoulders lumbar paraspinous muscles and some paresthesias in the lower extremities. He noted that the pain goes from aching to burning to sharp throbbing and piercing. Claimant had still not completed physical therapy or cervical facet blocks previously recommended. He principally wanted to go over the MRI results to determine if Claimant could return to his regular medium duty job cleaning. Dr. Shunk advised he saw no indication to prevent him from returning to his regular work though still recommended Claimant use good biomechanics and proceed with an SI joint injections.

24. Claimant returned to see Dr. Ratliff due to ongoing back pain on June 10, 2022. He reported Claimant attempted to return to work in housekeeping at a hotel but the pain in his mid and low back increased. He was released from work and advised to return part time the following week. He noted that Celebrex helped control his pain and continued with physical therapy. Dr. Ratliff recommended that when Claimant return to work only to light duty, refraining from bending at the waist and lifting greater than 10 lbs. for the following two weeks.

25. On June 24, 2022 Claimant was seen by Dr. Inhyup Kim at Banner Neurology Clinic for review of seizure history and possible recurrence. Dr. Kim recommended seizure medications. Claimant returned to see Dr. Kim on August 30, 2022 due to further seizures-like activity. Dr. Chelsea Risinger examined Claimant at Banner Fort Collins Medical Center on July 2, 2022 in the emergency room due to a reported seizure in a store, that caused Claimant to fall on his right knee and sprain his right hip. No significant findings and nothing regarding the low back. He was released from care.

26. Claimant was evaluated at Banner Health Fort Collins by Dr. Steven Broman regarding back pain on July 26, 2022. Claimant reported his back pain had gotten better but that he bent down and strained his upper back. Dr. Broman limited Claimant's activities and made a new referral to PT. Claimant followed up on August 22, 2022 with Dr. Benjamin Kober, who documented that Claimant was cleaning cabins the prior day and was walking without golf cart assistance at work. He noted that Claimant had an acute on chronic problem in the lumbar spine. He assessed back muscle spasm though physical exam was "largely unremarkable." Dr. Kober noted that Claimant had "some mild lower thoracic muscle spasticity with tenderness." He prescribed anti- inflammatory and muscle relaxers as well as further physical therapy.

27. Claimant was examined by Dr. Anjmun Sharma on September 12, 2022 for an independent medical evaluation (IME) at Claimant's request. Dr. Sharma documented a history of present illness relatively consistent with Claimants' testimony. He reviewed the records. Upon physical exam, Dr. Sharma noted mild paravertebral muscle spasm but otherwise a normal exam, including no Waddell signs and negative Faber and

Patrick's tests. Dr. Sharma opined that Claimant sustained a work related lumbar strain within a reasonably degree of medical probability from the activities he was performing on April 8, 2022 when he stood up from a stooped position. He noted that this was a common injury that occurs in the workplace. He recommended that Claimant be allowed to continue his physical therapy (PT) of approximately 6 to 12 visits. He did state Claimant did not require an MRI, would be at maximum medical improvement (MMI) at the conclusion of the PT sessions and that his prognosis was excellent.

28. Dr. Douglas Scott issued an IME dated October 18, 2022, as requested by Respondents, related to Claimant's complaints of thoracolumbar spine pain. He reviewed 540 pages of medical records. Dr. Scott noted that Claimant had a thoracolumbar myofascial or muscle strain related to the April 8, 2022 work activities. However, he opined that it resolved by April 28, 2022. He wrote a supplemental report on December 6, 2022. Dr. Scott testified that from his report and records, he believed claimant suffered a temporary and mild myofascial strain of the thoracolumbar spine on April 8, 2022.

29. Other medical records prior to Claimant's date of injury are not relevant to this case as they relate to other medical issues.

C. Claimant's Testimony

30. On April 18, 2022 Claimant went to his employer and completed a work incident report and reported the symptoms he believed were caused by the work he had performed bending and twisting awkwardly to clean the baseboards. He noted that his pain was a 3/10 when he left work on April 9, 2022 but was an 8/10 by the time he completed the accident report. He was assisted in completing the report by his wife, who explained some of the terminology. This was after he had been seen at the emergency room earlier that day by Dr. Henderson.

31. Claimant explained that he was scared of losing his job, as he did not have any other job, needed to support his family and that was why he did not report the injury before this. He explained that he was not able to perform the job at that time due to his pain and back injury. If he could not perform his job, he believed he would have been terminated. Claimant did not return to work for Employer.

32. Claimant stated that the pain became so severe by April 18, 2022 that his wife called an ambulance and he was taken to the emergency room. Claimant was evaluated by Dr. Henderson. Claimant indicated that he advised Dr. Henderson that he was hurt while cleaning baseboards, bending in awkward positions, twisting his back, while feeling discomfort doing the job.

33. He stated that when he was cleared to return to work, his employer would not take him back, so he went to work for a chain hotel in the housekeeping department starting on June 9, 2022. He worked there until approximately June 15, 2022 but the pain due to flare-ups did not allow him to continue that employment.

34. He then found another job with a commercial camping cite company, around the first week of August, also as a housekeeper. He was able to continue that employment until around the end of August. He left because of a back pain flare-up that caused low back pain that did not allow him to perform his work anymore.

35. He started working for a commercial space building around September 1, 2022 performing janitorial tasks that were more varied and allowed him to continue work there through the date of the hearing. This last employer was aware of his back pain and injury, and knew he was being seen by his doctors and physical therapy for back related problems. They were able to accommodate him with different tasks that would not cause the symptoms to flare-up. This job is limited to light vacuuming and doing wipe downs, which allows him to avoid bending and twisting.

36. Claimant stated that since the April 8, 2022 accident he has had flare-ups if he does anything that might exceed his physical abilities, which flare up his condition and cause further temporary flare-ups.

37. Claimant was provided with a designated prover notification letter on April 18, 2022 and he chose to be seen by Dr. Brian Copas at Banner Occupational Health Clinic in Loveland. But after seeing Copas, Claimant was seen by a different provider, Dr. Siegel's assistant, PA Hibma at UCHealth Harmony on April 21, 2022. Then on April 26, 2022 Claimant was seen by Dr. Siegel. When Dr. Siegel opined that Claimant's back issues were not work related, she referred Claimant to be seen by his PCP. He was attended by Dr. Ratliff who referred him to physical therapy.

D. Employer Records and Witness Testimony:

38. The Front Desk Receptionist, [Redacted, hereinafter BR], handled the incoming phone calls, performed general office work, and would send out communications. She would receive the calls from employees that were calling off from work. When she would receive one of these calls, she would write down the pertinent information, the description of who was calling and why, and then would send a message to the employee's manager or to HR. BR[Redacted] spoke with Claimant on April 11, 2022, when he called in to work to advise that he was not well, had a sore throat and was sick to his stomach. BR[Redacted] advised that Claimant did not report a work injury nor that he was having back pain at the time of the call.

39. The next day, April 12, 2022 [Redacted, hereinafter LH], the HR administrative assistant since November 16, 2021, took the call from Claimant when he called off from work again. LH[Redacted] issued an email that Claimant was "still feeling awful and won't be in to work tonight. I have updated his timesheet and asked him to call tomorrow to let us know how he is feeling." She advised that Claimant had not made any statements with regard to his back pain or that he had any work injury at that time.

40. Then on April 13, 2022 Claimant called again and spoke with BR[Redacted], to advise he was "pretty sick" and thought he had the stomach flu. BR[Redacted] advised LH[Redacted] by email. She did recall that Claimant never reported that he had back pain.

41. On April 14, 2022 Claimant spoke with [Redacted, hereinafter AC], the HR Manager for Employer since 2016, who advised the staff, including BR[Redacted] and LH[Redacted], that Claimant had called out sick again. She noted that Claimant had a doctor's appointment that afternoon and advised the staff and Claimant that he had to provide the doctor's note at that point.

42. When LH[Redacted] received the doctor's note, it did not mention a work related injury nor that he was having back pain. When LH[Redacted] would receive any paperwork or medical reports from employees, she would generally scan them and send them to the HR Manager who worked off-site.

43. LH[Redacted] advised the staff by email, when she received the doctor's note, that Claimant could return to work beginning April 18, 2022.

44. The next time BR[Redacted] had any interaction with Claimant was when he went to the office on April 18, 2022 to report the injury. She directed him to LH[Redacted] and had no further interactions with Claimant.

45. On April 18, 2022, when Claimant went into the office to report the injury, LH[Redacted] stated that she printed out the forms and gave Claimant and his wife the workers' compensation paperwork to fill out and the designated provider list (DPL). The DPL was not marked up when she provided it to Claimant.[4] Once the accident report was filled out she scanned and sent the paperwork to AC[Redacted]. The Employee Accident Report stated that

> Team lead had me do lobby baseboards and hallway baseboards on the same night by myself, was rushed to do it. CEO of surgery center mentioned just the lobby baseboards needed to be wiped by the Team. Bent over for a full hour wiping them down. Afterwards my back started getting stressed. April 9th, back pain started from a 3-10. Didn't realize this would get worse until today. I didn't want to lose this job. Back pain is at an 8-10 as of lately.

He noted that his back pain was in his spine, lower back, left and right shoulder.

46. LH[Redacted] advised the staff that Claimant had hurt his back and had a doctor's note that he could return to work beginning Monday, April 25, 2022, after he was evaluated by his PCP.

47. On April 19, 2022 AC[Redacted] completed a "Management Accident Investigation Report." She noted the following:

> [Claimant] was assigned to wipe down baseboards in his area of work after a customer complaint was received that the baseboards were very dusty and hadn't been cleaned in awhile (sic.). [Claimant] states he was bending over/kneeling to wipe/clean all of the baseboards for about an hour of his shift. [Claimant] worked from 5pm-12:40am. [Claimant] said his back felt a little sore at the end of his shift. Then on 4/9 [Claimant] states he was even more sore and by 4/18, his pain was an 8/10 and his entire back hurt.

48. Employer made a record of a conversation with Claimant on April 20, 2022 stating that Claimant had called to update Employer regarding his injury. AC[Redacted], the HR Manager, had spoken to Claimant and Claimant had informed her that he had seen his PCP, and reported that "his back was very messed up and he was possibly going to need surgery or something."

49. On April 26, 2022 LH[Redacted] reported to AC[Redacted], that Claimant and his wife had been into the office on April 18, 2022 and requested to fill out a worker's

[4] LH[Redacted] specifically noted that someone had made notations by the doctors' names in the DPL included in the exhibits for hearing. (Exhibit 11)

compensation form for his back that “he had injured from work.” She had given them the appropriate paperwork to fil out for his injury as well as a copy of the DPL, advising Claimant that he would need to “visit them as well.” LH[Redacted] stated that “I did ask him why he didn’t report it sooner, he said that the back pain started on the 9th, but it wasn’t bad, then it got bad so he decided to report it. He told me he was scared of losing his job if he reported it, but was in too much pain to ignore it.”

50. The HR Manager testified that Claimant was not terminated for reporting an employment related injury. She stated that Claimant provided an “off-work” note releasing him from work through April 25, 2022, but Claimant did not return to work on April 26, 2022, or thereafter and his employment was ultimately terminated at the beginning of June for failing to attend work and communicate regarding his absences. The HR Manager, who was found credible, testified that had Claimant communicated regarding ongoing work restrictions or worker’s compensation treatment, his employment would not have been terminated.

E. Ultimate Findings

51. As found, Claimant is credible with regard to the cause of injury. Claimant has proven by a preponderance of the evidence that he injured his low back and thoracic back in the course and scope of his employment causing a work related injury while bending over and crouching cleaning baseboards for Employer on April 8, 2022. This is supported by Claimant’s testimony as well as medical records from Nurse Durrogh, Dr. Henderson, PA Copas, PA Hibma, and Dr. Anjmun Sharma. Dr. Siegel is specifically not found credible. Her analysis that Claimant has psychological overlay though stating Claimant’s injury may be consistent with muscular soreness or minor muscular strain is contradictory and found not persuasive. Further, her reliance on the fact that Claimant performed the duty of cleaning baseboards in areas he was generally assigned to is not persuasive. Claimant’s testimony that he did not generally perform the additional tasks of cleaning baseboards in the hallways, in addition to his normal tasks was persuasive, especially in light of the fact that this was supposed to be a team duty, but Claimant was advised to perform it quickly and on his own, which he did in the limited time he was given.

52. As found, Claimant was provided a DPL on April 18, 2022 when he made a claim for his work-related injuries. Claimant chose to see medical providers at Banner Occupational Health Clinic in Loveland. PA Copas was the provider that examined Claimant on the April 19, 2022 and Dr. Bates was the co-signer of his report. Neither party indicated that Claimant had been provided with permission to change medical providers at that time, and no change of physician form was provided among the exhibits. As found Claimant was not authorized to change providers, therefore, neither UCHealth Occ. Med. Harmony Clinic nor Dr. Siegel were authorized treating providers. As found, since Dr. Siegel was not an authorized treating provider, the referral she made to Claimant’s PCP, Dr. Ratliff was also not authorized. Neither was Claimant authorized to change providers to PA Hibma at UCHealth Occ Med, Dr. Chunk from Banner Neurology or any other providers that were not within the chain of referral from PA Copas and Dr. Bates.

53. As found, while the physical therapy ordered by PA Hibma was reasonably necessary and related to the April 8, 2022 work related injury, it was not authorized or within the chain of referral.

54. As found, Claimant has proven that he was entitled to medical benefits that are reasonably necessary and related to cure and relieve Claimant from the effects of the work related injury of April 8, 2022.

55. As found, Claimant was placed on medical restrictions by PA Copas and Dr. Bates on April 19, 2022. While other providers have given other restrictions or taken them away, Claimant credibly testified that he was unable to return to janitorial duties that required him to bend and twist, and ultimately found employment on June 1, 2022. Claimant is entitled to temporary total disability benefits from April 18, 2022 through May 31, 2022. Claimant did not return to employment with Employer and failed to communicate with Employer about his absences. Respondents showed Claimant was responsible for his termination and wage loss beginning June 1, 2022.

56. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The claimant must also prove by a preponderance of the evidence that that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See, Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993).

The Act imposes additional requirements for compensability of a claim based on an occupational disease. A compensable occupational disease must meet each element of the four-part test mandated by Section 8-40-201(14), C.R.S. that defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "equal exposure" element, the "peculiar risk" test, which requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The employment must expose the claimant to the risk causing the disease "in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The conditions of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. *Id*. at 824. If the condition resulted from multiple or concurrent causes, the respondents may mitigate their liability by proving an apportionment of benefits. *Id*. If the claimant proves that the hazards of employment caused, intensified, or aggravated the disease process "to some reasonable degree," the burden shifts to the respondents to prove the existence of nonindustrial causes and the extent to which they contribute to the disability or need for treatment. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *Vigil v. Holnam, Inc*., W.C. No. 4-435-795 & 4-530-490 (August 31, 2005).

The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

The Colorado Workers' Compensation Medical Treatment Guidelines (MTGs) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTGs "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

The Division has adopted the MTGs to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to

employers. W.C.R.P. Rule 17, Exhibit 1 effective as of April 30, 1993 and most recently updated effective January 30, 2022. Under Sec. 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTGs are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive).

As found, Claimant has proven by a preponderance of the evidence that his thoracic and lower back injuries were a direct result of his job functions as a janitor for Employer and required medical treatment. Claimant suffered a work-related injury to his mid and low back on April 8, 2022 within the course and scope of his employment.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

As found, Claimant has shown he was injured within the course and scope of his employment with Employer sustaining a compensable injury to his low and thoracic spine for which he requires medical care that is reasonably necessary and related to the injuries. Respondents are liable for the authorized medical care within the chain of referral.

D. Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment

providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, was attended at the Banner Fort Collins Medical Center Emergency Department on April 18, 2022 for urgent medical care. This provider is authorized under the emergency care provision.

However, as further found, Claimant selected a provider on the DPL provided by Employer on April 18, 2022. Claimant was attended by Bryan Copas, PA-C, on April 19, 2022 at Banner Occupational Health Clinic in Loveland, supervised by Dr. Daniel Bates. The report recommended conservative care. Claimant proceeded with physical therapy which was reasonably necessary and related to the injury. Claimant failed to show that PA Hibma and Dr. Siegel were authorized treating providers within the chain of referral. Neither has Claimant shown that he was authorized to change providers to other providers including Dr. Ratliff. Claimant's authorized treating provider is Banner Occupational Health Clinic, Dr. Bates and PA Copas.

E. Average Weekly Wage

An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992).

As found, the parties stipulated to an average weekly wage of $507.59, which is accepted and adopted as Claimant's AWW.

F. Temporary Disability Benefits and Voluntary termination

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbois* Logic, 952 P.2d 831 (Colo. App. 1997).

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury."

As found, Claimant showed by a preponderance of the evidence that he was entitled to temporary disability benefits. Claimant was initially taken off work and testified that he was unable to return to full employment due to his work restrictions and his back pain. Claimant has shown by a preponderance of the evidence that he was off work from the date he reported the incident on April 18, 2022 through May 31, 2022.

Further, Claimant testified that he was able to return to modified work on June 1, 2022. Respondents argued that Claimant would have been accommodated had Claimant remained in contact with Employer and that Employer did not terminate the employment but that Claimant failed to show upon release to employment as of June 1, 2022. The

HR manager was credible in her testimony that Claimant was at fault for his wage loss and, but for his actions, Employer would have continued to employ Claimant. Respondents have shown by a preponderance of the evidence that Claimant was at fault for his wage loss as of June 1, 2022.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has shown that he sustained a compensable work related injury on April 8, 2022 while in Employer's employment.

2. Respondents shall pay for reasonably necessary and related medical benefits for his thoracic and low back strain.

3. Dr. Bates and PA Copas at Banner Occupational Medicine are Claimant's authorized treating providers.

4. Claimant has shown he is entitled to temporary total disability benefits beginning April 18, 2022 through May 31, 2022.

5. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 22rd day of February, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-199-642-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained work related injuries in the course and scope of her employment on February 16, 2022.

IF CLAIMANT SUSTAINED A WORK RELATED INJURY, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she established a refusal to treat for nonmedical reasons and the right to select a physician passed to Claimant, who selected Karin Gallup, N.P. at La Casa of Denver Health.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on May 2, 2022 on the issues of compensability, medical benefits, AWW and TTD benefits from February 21, 2022 until terminated by law.

Respondents filed a Response to Claimant's May 2, 2022 Application for Hearing on June 14, 2022. No additional issues were listed.

Following the October 11, 2022 hearing, this ALJ issued Findings of Fact Conclusions of Law and Order dated October 31, 2022, which was served upon the parties on the same day.

Respondents filed a timely Petition to Review on November 18, 2022 and requested a transcript of the hearing. The transcript was filed with the OAC on January 5, 2023 and a briefing schedule issued on January 12, 2023. Respondents filed a Brief in Support of Petition to Review on February 1, 2023. Claimant filed a Reply Brief on February 14, 2023. This Supplemental Findings of Fact, Conclusions of Law and Order follows.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, then the average weekly wage was $800.00 based on $20.00 per hour, 40 hours a week. The temporary total disability benefits (TTD) rate would be $533.33.

The parties further stipulated that, if the claim was deemed compensable, then Claimant would be entitled to TTD from February 21, 2022 until terminated by law. The parties agreed that, if TTD was paid, Respondents were entitled to an offset for short-term disability benefits beginning February 21, 2022 through August 19, 2022 in the

amount of $250.00 per week, which would result in a payment of TTD of $283.33 per week while the offset lasted.

The parties also agreed that Concentra was an authorized treating provider.

The stipulations of the parties are accepted by this ALJ and shall become part of the order in this matter.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 45 years old at the time of the hearing. Claimant was a machine operator for Employer since approximately August of 2021. She began her work through a temporary agency then was hired by Employer permanently in January 2022. She would fill the machine casings with molding powder. After the material was "cooked" she would take them out of the casings and trim the remnants of plastic parts with a tool that had a wood handle and a metal blade of approximately three to four inches long and about two inches wide. The blade was provided by her employer. She would generally start her work at 3:00 p.m. and work to 11:00 p.m.

2. Claimant had a slip and fall injury while at work for a prior employer, a hospital, where she performed housekeeping duties. She injured her low back, but not in the same way as in this case. It was higher up on her spine. She was prescribed a steroid that help her problem really well. The injury resolved and she was released from care.[1]

3. On December 2, 2019 Claimant was seen at Denver Health for a UTI and complained of back pain. The provider suspected muscle strain but made no recommendations nor provided treatment.

4. In December 2020 Claimant had a slip and fall on snow and injured her left foot. The fracture was reduced in the emergency department and she wore a cast for several weeks. She was again evaluated on December 17, 2020 for ankle pain and x-rays. There was no mention of a low back problem during this visit. Further, of note, there have been several left foot incidents as far back as September 12, 2017, including an old left fifth metatarsal fracture of unknown age.

5. Claimant was assessed by telehealth on January 8, 2021 due to complaints of lower back problems. However, those complaints clearly resolved by the next visit as there was no mention in the February 1 or February 2, 2021 follow ups and evaluations.

6. On September 17, 2021 Claimant injured her left knee, which occurred while working for the temporary agency, who had placed Claimant at Employer's business to perform work as a machine operator. She last treated for that claim on March 9, 2022 for the last time in follow up of a third viscosupplementation injection. Claimant has not

[1] Claimant did not recall the date and no records were provided for this event as it was remote.

sought any further care for that left knee injury. There was no mention of the low back pain.

7. While working for Employer, Claimant would take her breaks in her car because she would frequently be making personal phone calls on one of her 15-minute breaks and she did not like to do that in the breakroom. The employees were allowed to take their breaks anywhere on the Employer's premises. Claimant's car was required to be parked in the Employer's parking lot, which was enclosed by a fence and part of Employer's premises.

8. On February 16, 2022, while working for Employer, Claimant was taking her break and she slipped on the snow, without warning. She landed hard on her buttocks. She had been going to her car when the fall happened. She has had pain in her lumbar region and her buttocks since that time and the pain seemed to be deep in the bone at the base of her spine or buttocks, causing pain to radiate to her low back and cause muscle spasms. She stated that she sat in her car a while on her break. She had her tool in her back pocket, which she generally takes out when she sits in her car. After her break, she got out of her car to return to work, forgetting her blade. When she realized she left her blade in her car, she returned to get it to continue working.

9. Claimant testified she told the man, who was training her on the machine she was working at, about her fall while on break on February 16, 2022. She laughed it off but her pain slowly increased during her shift. She mentioned her fall again, letting him know her back pain was getting worse, but he did not seemed to care about the incident

10. As the days went on, the pain in her buttocks and low back continued to worsen. Claimant called the HR Department to advise the HR representative about the injury and requested medical attention. Claimant did not hear back from the HR representative on where Employer wanted her to go for care so she determined to go to an urgent care facility for treatment as her low back pain continued to worsen.

11. On February 22, 2022 Claimant presented at Federico F. Pena Family Health Center – Urgent Care at Denver Health for an evaluation of her low back pain, where she was treated by Amy N. Quinones, N.P. Nurse Quinones treated Claimant for "acute back pain" and took Claimant off of work from February 22, 2022 to February 24, 2022.

12. When Claimant took the note from Nurse Quinones to Employer, she was advised she could not return to work until she was fully recovered. Her Employer did not contact her after this conversation to follow up or provide her with a designated provider list.

13. On March 4, 2022 Claimant returned to Denver Health where she was evaluated by Alicen M. Nelson, M.D., whose assessment was that of "bilateral low back pain without sciatica occurring after a fall three weeks ago."

14. At the March 4, 2022 visit, Claimant had two trigger point injections in the low back area. The working diagnosis was that of chronic bilateral low back pain without sciatica.

15. On March 9, 2022 Employer filed a Workers Compensation "First Report of Injury or Illness" (FROI) stating that Claimant had injured herself on February 16, 2022, that the time of the injury occurred at approximately 6:00 p.m., and that Employer was notified on February 16, 2022 of the injury. The report documented that Claimant had "slipped on the snow, fell on her bottom, hurting her back." The report was filed by the HR manager and indicated that Claimant had reported the injury to another Employer representative (PC) on February 16, 2022.[2]

16. On March 11, 2022 Claimant had her first visit with authorized treating physician ("ATP") Theodore Villavicencio, M.D. at the Concentra Medical Centers in Lakewood where ATP Villavicencio took a history of injury as follows:

> Reason for Visit
> Chief Complaint: The patient presents today with new injury, slip and fall on 02/16/2022 injured back, reports that she has pain in back and night pain.

At that visit, Dr. Villavicencio assessed that Claimant had a lumbar contusion and a strain of the lumbar region. He started her on a muscle relaxer, and provided her work restrictions of lifting 10 lbs. and pushing/pulling up to 20 lbs. with no forward bending, noting that she should be working only sedentary office type work. He gave the opinion that Claimant's objective findings were "consistent with history and/or work-related mechanism of injury/illness." In fact, all the Work Status reports from March 11, 2022 through April 19, 2022 all show the same causation analysis. Dr. Villavicencio also indicated that MMI was unknown.

17. On March 16, 2022 Claimant started physical therapy at the Concentra offices in Lakewood with Christi Galindo, P.T. This was the first of six visits programed. She documented Claimant's back pain was 3/10 but could rise to about a 7/10. The impairments identified during the examination prevented Claimant from performing her standard activities of daily living and/or work activities. Ms. Galindo noted abnormal range of motion, pain, abnormal muscle performance and gait. She proceeded with therapeutic exercises, neuromuscular reeducation, manual therapy and therapeutic activities. The treatment was provided by Austin Lyons SPT under Ms. Galindo's supervision.

18. Respondents filed a Notice of Contest on March 18, 2022, stating that the injury or illness was not work related.

19. On March 25, 2022 Claimant returned to Concentra and this time was evaluated by ATP Autumn Schwed, D.O. who noted that Claimant indicated that physical therapy "is not helping, but got cupping which has helped" and that Claimant was 25% of the way to meeting the physical requirements of her job. Dr. Schwed referred Claimant to Dr. Samuel Chan, a physiatrist, for an evaluation.

20. Dr. Schwed also referred Claimant for an MRI and noted that the indications were for back pain and sacrococcygeal disorder. The MRI was performed on April 1, 2022. It was read by Dr. Scot E. Campbell as showing a disc bulge at the L3-4 level with left paracentral small extrusion, mild facet arthropathy, mild left subarticular recess

[2] This ALJ infers that the trainer advised the HR representative despite Claimant's impression that he did not seem to care about the fall.

stenosis, and mild right neural foraminal stenosis. He noted a central disc protrusion at L4-5 with mild facet arthropathy, mild right subarticular recess stenosis and mild right neural foraminal stenosis. He also noted a right paracentral protrusion at the L5-S1 level with mild facet arthropathy. Dr. Campbell concluded that Claimant had degenerative disc disease and facet arthropathy without high-grade stenosis or nerve root impingement.

21. Claimant was evaluated by Dr. Samuel Chan on April 12, 2022.[3] Claimant described pain in the low back spine as well as radiation into the groin but not the lower extremities. On exam, he noted that Claimant's pain was centered around the PSIS and the sacral sulci. Claimant was also positive for Patrick's, Gaenslen's, FABER's, and Yeoman's[4] testing. Dr. Chan concluded that Claimant's exam was most consistent with sacroiliac joint dysfunction and recommended sacroiliac joint injections should her symptoms persist. He also diagnosed lumbar contusion and strain of the lumbar region. He indicated Claimant was to return in four weeks. He also noted that objective findings were consistent with the work-related mechanism of injury.

22. On April 19, 2022 Claimant returned to Concentra where she was evaluated this time by Chelsea Rasis, PA-C. ATP Rasis noted that the muscle relaxer (Flexeril) helped at night with the low back pain and that cupping therapy was also providing temporary relief, stating that Claimant had more sessions scheduled. ATP Rasis documented that Dr. Chan had offered Claimant cortisone injections and that Claimant was looking into the side effects. ATP Rasis ordered six visits of chiropractic care and six acupuncture sessions. ATP Rasis continued the prior sedentary restrictions.

23. Claimant's last visit with Concentra was on May 13, 2022, when Claimant was released from care by PA Rasis required more treatment as a "Specialist Referral" was to "Consult and Treat," that Claimant should "continue medications as directed" and that Claimant's "work restrictions" were "to be managed by her PCP" (primary care provider).

24. Claimant testified that PA Rasis advised Claimant to go to her PCP for further care as the claim had been denied by the Insurer. Rasis did not allow Claimant to return to Concentra for further care. Rasis further advised Claimant that Claimant's PCP would have to provide any further medical care, such as the injections, work restrictions and that Claimant was being released to her PCP's care. As found, Concentra, by and through PA Rasis, was no longer willing to treat Claimant for her work-related injuries due to the denial of the claim by insurer.

25. Claimant started physical therapy on June 9, 2022 at Select Physical Therapy pursuant to Karen Gallup's referral. Jon Baird, PT noted that Claimant had a slip and fall in February 2022 and landed on her "butt." He documented that Claimant had had lumbar back pain, left greater than right, ever since then. Mr. Baird noted that Claimant ambulated slowly with a stiff spine pattern, a slight flexed trunk and would stand with an increased lumbar lordosis. He provided exercise education and training, as well

[3] Pages are missing from this report.
[4] Medical tests used to detect musculoskeletal abnormalities and inflammation of the lumbar vertebrae, but more commonly the sacroiliac joint.

as manual intervention modalities. He recommended ongoing therapy for a period of 3 months.

26. Claimant's return visit to Denver Health, documented in the evidence presented, was for June 23, 2022, following Concentra's refusal to continue to treat Claimant at Concentra Medical Centers. She was evaluated by Morris M. Askenazi, M.D. who indicated that Claimant continued to have significant pain and limitations and would be unable to work at that time. He ordered continued physical therapy for the following two months. He stated Claimant should be on work restrictions of no lifting more than 5 pounds overhead, no repetitive bending, limited reaching/stretching, and anticipated the limitations to continue for the following two months.

27. Following Concentra's refusal to treat, Claimant's counsel wrote to Respondents indicating that if Claimant could not get follow-up care at Concentra, Claimant was requesting to change physician to Karin Gallup, N.P. at La Casa-Denver Health, based on that refusal to treat. Based on the letter to Respondents' counsel dated June 24, 2022, a copy of the May 13, 2022 Work Activity Status Report was provided to Respondents on May 17, 2022. Respondents failed to act on this information. Further, on June 24, 2022 Claimant's counsel advised Respondents' counsel that Claimant was "treating with Karin Gallup at La Casa. [W]e are designating her as a treating physician unless we hear differently from you."[5] No credible evidence indicated that Respondents provided a new designated provider following either communication.

28. Claimant credibly testified that she had had previous episodes of back pain, which typically resolved quickly. As found, immediately prior to February 16, 2022 Claimant had no ongoing medical care for back pain and was symptom free.

29. As found, there was a medical record from Denver Health which references back pain on January 8, 2021 and resulted from the fall where Claimant injured her left ankle. At the follow-up visit on February 1, 2021, however, there was no reference to back pain, but rather only to the old metatarsal fracture of Claimant's left foot. Claimant credibly testified that she had no problems with her low back immediately prior to the work injury.

30. Claimant is found to be credible and persuasive by the ALJ. As found, Claimant was injured in the course and scope of her employment when she slipped and fell in Employer's parking lot while on her break. This is specifically not considered a deviation as Claimant was allowed to take her breaks on any area of Employer's premises and the parking lot was within Employer's premises.

31. As found, Claimant injured her low back, coccygeal area as well as her SI joint, causing a need for medical care and disability benefits.

32. Also as found, from the documents in evidence, Claimant's last appointment at Denver Health was on July 19, 2022. She was advised that they anticipated proceeding with steroid injections into her lumbar spine. She was advised that she needed to await the scheduling of the injections but had not received a call back with the scheduled

[5] It is inferred that the statement in the letter that "*Ms. Rasis* is treating with Karen Gallup at La Casa" is in error and that it is Claimant that was treating with her.

appointment to the date of the hearing. As found, Claimant continues to require medical attention related to her compensable work related injury of February 16, 2022.

33. Further, as found, Concentra refused to continue seeing her and Respondents did not provide a new designated provider willing to provide further medical care for the work related injuries. Claimant has shown that the right to select a medical provider passed to Claimant, that Claimant selected Nurse Gallup at Denver Health and that the Denver Heath system, including Nurse Gallup are authorized treating providers.

34. Claimant has remained under temporary work restrictions which the employer could not accommodate, but have paid some benefits to Claimant, as noted by the stipulation of the parties, through the Employer funded short-term disability benefits for the period of February 21, 2022 through August 19, 2022. Claimant continued to be off work in accordance with documentation from the medical providers at Denver Health.

35. Any evidence or testimony not consistent with the above findings is specifically found not relevant, credible or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Sec. 8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001).

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to

produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Industrial Claim Appeals Office*, *supra*. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008); *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008).

The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, *supra*.

Respondents requested that this ALJ assume that the Concentra medical providers were not furnished with the Claimant's prior history of low back pain, as set forth above, for consideration in regard to whether there was objective findings consistent with the history and work-related mechanism of injury. For example, Dr. Villavicencio on March 11, 2022 noted that Claimant had "[N]o significant past medical history." This could mean either that Dr. Villavicencio reviewed the past history and did not find it significant or that no history was provided at all. Nothing in the report provides guidance to this ALJ and therefore, this ALJ has inferred and found that Dr. Villavicencio determined that the past history was *not a significant* factor in his determination of causality as Claimant's prior conditions or symptoms were resolved and not continuing problems.

Claimant's was credible and persuasive in her description of her injuries, symptoms and pain complaints cause by the February 16, 2022 slip and fall at work. The arguments made by Respondents regarding Claimant's veracity are not persuasive. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable low back injury during the course and scope of her employment with Employer on February 16, 2022 when she fell in the designated parking lot for employees

and landed on her bottom. This is supported by the opinions of Nurse Quinones, Dr. Chan, Dr. Villavicencio and Dr. Schwed and the Work Status Reports covering March 11 through April 12, 2022 indicating that Claimant's objective findings were consistent with a history of work-related mechanisms of injury. It is even supported by the Employer's First Report of Injury filed by Employer's HR representative on March 9, 2022. Claimant has shown that it was more likely than not that there was a direct causal relationship between the accident she sustained on February 16, 2022, the subsequent injuries to her low back and sacral area and the disability as well as the need for treatment.

Moreover, although the records reflect that Claimant suffered at times from back symptoms prior to February 16, 2022, those incidents did not cause the need for significant medical care and Claimant credibly testified that they were short lived symptoms that did not require the care that has been consistent since Claimant's injury of February 16, 2022. Accordingly, Claimant's work injuries were proximately cause by the February 16, 2022 accident and aggravated, accelerated or combined with any pre-existing conditions to produce the need for medical treatment. Thus, Claimant suffered compensable lumbar and sacral injuries during the course and scope of her employment with Employer on February 16, 2022.

C. Authorized Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. Sec. 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician."

W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial*

Claim Appeals Office, 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan, supra*. Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonably necessary and causally related medical benefits for her work related injuries caused by the fall of February 16, 2022, including for her low back, SI joint and sacrococcygeal injuries. Respondents noted that they had notice of the injury on February 16, 2022. However, there is no record that Respondents provided Claimant a designated provider list within the allowed seven days.[6] Claimant went to the Denver Health Medical Center (DHMC) --Urgent care and was evaluated by Nurse Quinones for acute low back pain on February 22, 2022[7], and Claimant provided Nurse Quinones' medical note to Employer. Claimant then followed up with DHMC on March 4, 2022 and was treated with injections by Dr. Nelson. Further, Claimant's care at Denver Health Urgent Care was reasonable and necessary emergent care. Claimant was not provided an appointment with Concentra until March 11, 2022.[8] Claimant eventually saw Dr. Villavicencio on March 11, 2022 at Concentra and he found that Claimant's mechanism of injury was work related and that she required medical care.

Claimant argued at hearing that Concentra's refusal to treat was for nonmedical reasons, and thus the right to select a physician passed to Claimant. Claimant selected La Casa which operates under the auspices of Denver Health. Respondents argued at hearing and in their position statement that because the Claimant was under a denial of care there was no obligation to designate a treating provided willing to treat and that the designated provider remained designated, and thus they did not waive the right to select

[6] Seven days from February 16, 2022 was February 24, 2022.

[7] The February 22, 2022 visit would normally be considered only an emergency visit.

[8] The parties stipulated that Concentra was an authorized treating provider. Respondents failed to designate a provider until well after the date of injury and notice, and later than the seven day period required by statute. Respondents knew of the accident as of February 16m 2022 but did not designate a provider until March 11, 2022. Claimant's choice of DHMC for the initial urgent care visit and all the follow up medical care at DHMC, indicated that DHMC should be an authorized treating provider initially, before Claimant was referred to Concentra.

the medical provider. Sec. 8-43-404(5), C.R.S. implicitly contemplates that the Respondents will designate a physician *who is willing to provide treatment*. *Ruybal v. University Health Sciences Center*, 768 P.2d 1259, 1260 (Colo. App. 1988). If the employer fails to timely tender the services of a physician, the right of selection passes to the claimant and the selected physician becomes an ATP. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAO, Sept. 3, 2008). Whether the ATP refused to treat the claimant for nonmedical reasons, whether the insurer received notice of the refusal to treat and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for resolution by the ALJ*. Garrett v. McNelly Construction Company, Inc.*, *supra; Ruybal*, 768 P.2d at 1260.

Here, it is specifically found that PA Rasis, as a Concentra representative, refused to treat Claimant. Claimant was credible and persuasive in her testimony that PA Rasis advised Claimant her claim was being denied and that Concentra would no longer treat her for her injuries. As found, PA Rasis in effect, referred Claimant to her primary care provider (PCP). Claimant's counsel sent a letter to Respondents that specifically notified Respondents of Concentra's refusal to treat. No other persuasive evidence that Respondents responded to the notice was within the records or evidence provided at hearing. Claimant identified her PCP to be the providers at Denver Health Medical Center's Clinic La Casa and specifically Nurse Gallup. As further found, the refusal to treat and Respondents' failure to identify a provider that was willing to treat Claimant caused the right of selection to pass to Claimant and Claimant designated Nurse Gallup of DHMC, who is now Claimant's treating provider.

Respondents argue that once they had designated a provider, in this case Concentra, that Claimant did not have the ability to select a new provider because the claim was contested and an obligation to designate a new provider would cause a "chilling effect" on Respondents' "right to legitimately contest the claims." However, the statutory requirement under Sec. 8-43-404(10)(a) set out the requirements when an authorized physician refuses to provide medical treatment to an injured worker that requires medical treatment to cure and relieve the effects of the work injuries. It actually requires the designated provided to provide notice to Employer or Insurer of the denial of care, explaining the reasons. As found, this did not occur in this case. The statute specifically states that the ALJ has jurisdiction to resolve disputes regarding whether a refusal to provide medical care was for nonmedical reasons, and this ALJ found that Claimant was credible in her testimony that PA Rasis had referred Claimant to her PCP due to nonmedical reasons, specifically because the claim was denied.

Section 8-43-404(10)(b) further elucidates the process by stating that if the Insurer receives notice that an ATP has refused to provide the necessary medical care, which in this case they did by letter of Claimant's counsel advising them of the refusal, Respondents had fifteen calendar days to designate a new provider *willing to provide medical treatment*. Respondents were provided with PA Rasis' Work Activity Status Report no later than May 17, 2022 indicating that PA Rasis was affirming that Claimant required more treatment as a "Specialist Referral" was to "Consult and Treat," that Claimant should "continue medications as directed" and that Claimant's "work restrictions"

were “to be managed by her PCP.” Counsel’s letter was written on June 24, 2022 stating they would select a new provided unless Insurer responded to the notice of refusal to treat. No response was provided other than inference that the claim was on a notice of contest. As found, this ALJ had the jurisdiction to determine that PA Rasis was acting on behalf of the Concentra provider in advising Claimant they would no longer treat because of the denial of the claim and fully determined that this refusal to treat was for nonmedical reasons.

Lastly, this ALJ declines to reweigh the evidence in this matter. As ultimately found, Claimant showed by a preponderance of the evidence that Claimant was entitled to select a physician of her choosing that was willing to treat Claimant for her work related injuries. Claimant showed that it was more likely than not that selection of an ATP passed to the Claimant and that Nurse Gallup and DHMC was authorized.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has shown by a preponderance of the evidence that she sustained compensable work related injuries to her low back, coccyx and SI joint within the course and scope of her employment on February 16, 2022.

2. The Stipulations of the parties are approved and become part of this order.

3. Claimant’s average weekly wage is $800.00.

4. Respondents shall pay temporary total disability benefits at the rate of $533.33 beginning February 21, 2022 until terminated by law.

5. Pursuant to the parties’ stipulation, Respondents may take an offset due to payment of short-term disability benefits in the amount of $250.00 per week from February 21, 2022 to August 19, 2022.

6. Respondents shall pay interest at the statutory rate of eight percent (8%) on all benefits that were not paid when due.

7. Claimant is entitled to medical benefits that are reasonably necessary and related to the February 16, 2022 injuries to her low back, coccyx and SI joint. As stipulated by the parties, Concentra is an authorized treating provider. Further, Claimant’s care at Denver Health Urgent Care was reasonable and necessary emergent care.

8. Claimant has shown by a preponderance of the evidence that selection of provider passed to Claimant due to a refusal to treat for nonmedical reasons and that La Casa--DHMC and Nurse Gallup are now authorized treating providers.

9. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 23rd day of February, 2023.

Digital Signature

By: Elsa Martinez Tenreiro

Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the right to select a treating physician passed to Claimant due to Respondents failure to comply with Section 8-43-404(5)(a) or WCRP 8-2?

- Whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary disability benefits?

- What is Claimant's appropriate average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on March 19, 2020. Claimant testified at hearing that after work, she slipped on snow and fell onto her back. Claimant testified she began driving her car and after 7-8 minutes, her leg started to get numb. Claimant testified that when she got home, she was unable to get out of her car and needed assistance to get into her home.

2. Claimant began her employment with Employer in January 2020. Prior to her employment, Claimant passed a pre-employment physical examination which required her to complete certain lifting activities.

3. Claimant testified she arrived at work the next day and the director noticed she was walking "badly" and she informed the director what had happened. Claimant testified she was provided with a packet and told to go to Concentra. Claimant testified she reported the injury to [Redacted, hereinafter SG] on March 20, 2020.

4. The Designated Provider List entered into evidence at hearing is signed by Claimant and dated March 20, 2020. The Designated Provider List offers Concentra Aurora North and Midtown Occupational Health Services as designated providers. Concentra Aurora North is circled on the Designated Provider List. Claimant testified at hearing that she did not circle Concentra on the Designated Provider List. Claimant testified that in addition to the Designated Provider List, she was provided with a map that was colored and provided Claimant with directions to only the Concentra Aurora North facility. Claimant testified she was not provided with a choice of providers to choose from, but was instructed by Employer to go to the Aurora North location for treatment.

5. SG[Redacted] testified at hearing that in addition to the Designated Provider List, Claimant was provided with a map of the two medical facilities. A copy of the map was entered into evidence by Respondents at hearing. Claimant testified that

the map entered into evidence was not provided to her with the Designated Provider List, but was a colored map and she was instructed to go to the Concentra listed on the Designated Provider List.

6. SG[Redacted] testified that when she provided Claimant with the Designated Provider List, she printed Claimant's name on the line where the Employee's name is to be printed. SG[Redacted] testified that Claimant stated that she would go to the Concentra that was close to the Employer's location. SG[Redacted] denied providing Claimant with a colored map or being aware of any colored map being given to any employee.

7. SG[Redacted] testified at hearing that she did not recall whether she circled the Concentra Aurora North location on the Designated Provider List or if Claimant circled the Concentra Aurora North location on the Designated Provider List. But SG[Redacted] testified that Claimant indicated to her that she would seek medical treatment at the Concentra Aurora North location. SG[Redacted] testified that after Claimant indicated that she wanted to treat at the Aurora North location, SG[Redacted] informed Claimant that there were other locations where Claimant could seek treatment. SG[Redacted] testified that in addition to the Designated Provider List, she provided Claimant with a second page that includes a map of the Denver area with various Concentra locations. SG[Redacted] testified that sometimes injured workers may elect to seek medical treatment at a clinic that is closer to their home as opposed to the Concentra Aurora North location. SG[Redacted] testified that after indicating that Claimant could go to other locations, Claimant again stated that she wanted to go to the Aurora North clinic for treatment.

8. Claimant denied at hearing receiving the second page with the list of Concentra clinics from SG[Redacted]. Claimant testified she was only provided with a colored map that had the Aurora North location on it and no other locations.

9. Claimant testified that she went to the Concentra Aurora North location on March 20, 2020 for medical treatment. According to the medical records entered into evidence at hearing, Claimant was seen by Dr. Birge at Concentra on March 20, 2020. Claimant reported a history of slipping and falling at work with complaints of back pain. Claimant denied leg weakness or leg numbness. Dr. Birge reported no radicular symptoms. Claimant was diagnosed with a lumbar strain, cervical strain, lumbar contusion and coccyx contusion. Clamant was referred for an x-ray and provided prescribed cyclobenzaprine. Dr. Birge also took Claimant off of work until March 21, 2020.

10. Claimant returned to Concentra on March 21, 2020 and was evaluated by Dr. Shackelford. Claimant reported her low back pain persisted unchanged. Claimant reported she had vomited that morning which Dr. Shackelford indicated could be due to the Flexeril. Claimant was prescribed ibuprofen and allowed to return to work on modified duty on March 23, 2020 with restrictions that she be allowed to sit 90% of the time with no squatting or kneeling and limited bending at the waist.

11. Claimant testified that she returned to work for Employer and worked with restrictions until May 1, 2020. Claimant testified that after May 1, 2020 she was sent home due to the pandemic. This testimony was confirmed by the testimony of [Redacted, hereinafter KG], the human resources representative from Employer, who confirmed that Claimant was furloughed as of May 1, 2020 due to the pandemic.

12. Claimant returned to Concentra on March 25, 2020 and reported her back felt the same as it did on the previous visit. Claimant was examined by nurse practitioner ("NP") Kleberger who noted Claimant had attended on physical therapy appointment. NP Kleberger noted on examination that palpation revealed bilateral muscle spasms of the cervical spine with tenderness in the lumbar spine and muscle spasm on palpation. NP Kleberger recommended that Claimant continue with physical therapy.

13. Claimant next returned to Concentra on April 3, 2020 and was examined by NP Kleberger. NP Kleberger noted that on examination, Claimant had no muscle spasm on palpation of her cervical spine and minimal muscle spasm on palpation of her lumbar spine. NP Kleberger noted Claimant had achieved roughly 25% of anticipated healing. Claimant was instructed to continue to follow up with physical therapy.

14. Claimant returned to Concentra on April 13, 2020 and was examined by Dr. Cava. Claimant reported to Dr. Cava that while her neck pain had improved, she was still having issues with her low back pain. Dr. Cava noted Claimant reported some radicular type symptoms and recommended a magnetic resonance image ("MRI") of the lumbar spine.

15. Claimant underwent the MRI of the lumbar spine on April 24, 2020. The MRI showed a tiny bulge in the L2-L3 disc which indented on the thecal sac. A small perineural cyst or dilated nerve root sleeve associated with the exiting right L2 nerve root was also noted. Tiny perineural cysts or dilated nerve root sleeves were also noted with the exiting L3 nerve roots. A mild disc bulge asymmetric to the right which indented on the ventral thecal sac was noted at the L4-L5 level and was possibly compressing the traversing right L5 nerve root.

16. Claimant returned to Concentra on April 27, 2020 and was evaluated by NP Hedien. Claimant reported that her leg pain was feeling a lot better, but was still having pain in her back. NP Hedien referred Claimant to a physiatrist for a possible injection. NP Hedien reported that Claimant was 50% back toward meeting the physical requirements of her job. Claimant was released to return to work with lifting restrictions of 5 pounds constantly and pushing/pulling restrictions of 10 pounds constantly.

17. Claimant returned to Concentra on May 4, 2020 and was evaluated by Dr. Kawasaki. Dr. Kawasaki noted that Claimant reported pain in her low back, left greater than right with pain along the sacral and coccygeal region along with numbness in her toes. Dr. Kawasaki noted that the MRI showed disc bulges most prominently at L4-5

with potential L5 nerve impingement, which would correlate with Claimant's symptoms. Dr. Kawasaki recommended a trial of chiropractic treatment and, if there was no relief from the chiropractic treatment, she could be considered for potential interventional pain procedures including injections.

18. Claimant began the chiropractic treatment with Dr. Aspegren on May 12, 2020. Claimant underwent six chiropractic treatment with Dr. Aspegren between May 12, 2020 and May 29, 2020.

19. Claimant was examined by Dr. Cava on May 19, 2020. Dr. Cava noted Claimant had completed 10 physical therapy appointments and had a repeat evaluation with Dr. Kawasaki set for June 4, 2020. Claimant did not attend the medical appointment with Dr. Kawasaki on June 4, 2020.

20. Respondents filed a medical only General Admission of Liability on June 3, 2020.

21. Claimant testified she tried to cancel the June 4, 2020 appointment but was only provided with the option of rescheduling the appointment for another time. [Redacted, hereinafter RW], the receptionist for Concentra, testified at hearing in this matter. RW[Redacted] testified that Claimant called and cancelled the June 4, 2020 appointment because she was sick. RW[Redacted] testified that if a patient called to cancel an appointment they would require the patient also reschedule the appointment. RW[Redacted] testified Claimant's appointment was rescheduled for June 16, 2020 and then rescheduled for June 30, 2020. Claimant did not attend these appointments. Additional appointments were made for Claimant with Dr. Cava at Concentra for December 4, 2020 and December 29, 2020. Claimant failed to attend these appointments as well.

22. Claimant was provided an offer of modified employment with Employer on July 3, 2020. Claimant returned to work for Employer until August 25, 2020. KG[Redacted] testified that on August 25, 2020 Employer became aware that Claimant had permanent restrictions from an earlier workers' compensation case and KG[Redacted] requested that Claimant provide employer with updated work restrictions before they would allow her to return to work.

23. Claimant was examined at Swedish Hospital Medical Center on July 6, 2020. Claimant had previously sought treatment at Swedish Hospital on June 18, 2020 for follow up for a brain tumor which Claimant had last treated in January 2020, but did not receive medical treatment for her low back on this visit. Claimant reported a history of low back pain with right leg numbness after a fall. Claimant was referred for an MRI of the lumbar spine.

24. The MRI was performed on July 27, 2020 and was compared to a prior MRI from November 29, 2017. The July 27, 2020 MRI showed internal resolution of disc bulges that were present on the November 29, 2017 MRI and a disc bulge at the

L4-L5 level that results in right greater than left subarticular zone stenosis contacting the descending L5 nerve roots.

25. Claimant sought medical treatment with Dr. Lynn Parry on August 10, 2020. Claimant testified she was told of Dr. Parry by her attorney. Dr. Parry reviewed Claimant's medical records from Concentra and performed a physical examination. Dr. Parry diagnosed Claimant with a sacral contusion, right sacroiliac ("SI") joint dysfunction, and right sciatica. Dr. Parry agreed that Claimant was not a surgical candidate and would not likely benefit from epidural steroid injections or other pain procedures. Dr. Parry recommended therapy directed at core stabilization, a trial of an SI belt as well as one consistent health care provider. Dr. Parry provided Claimant with work restrictions of no repetitive lifting over 10 pounds, no repetitive bending or twisting, no stairs, an adjustable chair with lumbar support and the ability to change positions on an as needed basis.

26. Claimant underwent an independent medical examination ("IME") with Dr. Burris on August 25, 2020. Dr. Burris reviewed Claimant's medical records, obtained a history of the injury and performed a physical examination in connection with his IME. Dr. Burris noted that Claimant was complaining of low back pain and right leg pain and numbness. Claimant denied any past injuries, pain or problems involving her low back.

27. Dr. Burris diagnosed Claimant with lumbosacral contusion/strain. Dr. Burris opined that the findings on the April 24, 2020 MRI were degenerative in nature and, more likely than not, pre-existing and unrelated to the March 19, 2020 incident. Dr. Burris recommended additional therapy for Claimant including consideration for pool therapy that would allow Claimant to transition to a self-directed home exercise program.

28. Dr. Burris testified at hearing consistent with his medical report. Dr. Burris noted that Claimant denied any prior injuries to her low back, which Dr. Burris noted was inconsistent with the medical records. Dr. Burris testified that because of the issue involving the prior medical treatment to her low back, he would rely only on objective evidence with regard to Claimant's injury. Dr. Burris testified that the objective evidence shows Claimant has full range of motion of the lumbar spine and normal strength and there was no objective evidence that would justify a finding of work restrictions.

29. Employer provided Claimant with a letter in November 2020 that requested Claimant provide them with documentation of permanent restrictions from a prior injury or medical documentation stating that Claimant no longer needs the medical restrictions.

30. Claimant was examined by Dr. Yamamoto on November 25, 2020. Dr. Yamamoto reviewed Claimant's medical records in connection with his evaluation. Dr. Yamamoto did not indicate Claimant having a prior low back injury in connection with his evaluation. Dr. Yamamoto completed a Fitness for Duty / Accommodation Form in connection with his examination. The Fitness for Duty form indicated that Claimant had

lifting restrictions of 10 pounds with restrictions on pushing and pulling of up to 12-15 pounds. Dr. Yamamoto noted that Claimant could perform her previous job with the 10 pound lifting accommodations and the ability change positions.

31. Claimant testified at hearing that she had a prior injury to her mid back, but denied any prior injury to her low back. However, medical records entered into evidence demonstrate Claimant was seeking medical treatment for low back pain on September 28, 2017 with Dr. Rabinowitz. Claimant reported to Dr. Rabinowitz that she had low back pain with pain into her left thigh and left toes. Claimant reported the back pain was not new, but was worse. Claimant was diagnosed with sciatica of the left side associated with disorder of the lumbar spine and left leg weakness. Claimant was referred for an MRI of the lumbar spine. Claimant was seen on October 30, 2017 by Dr. Mendez and reported she had back pain that started 4-5 months ago and located in her left lower back and radiates towards her glutes.

32. Claimant's testimony that she did not have low back pain prior to her date of injury is found to be not credible or persuasive.

33. Claimant testified that she continued to work for Employer until August 25, 2020 when she was told by human resources that her restrictions were a problem. Claimant testified that she was provided with a piece of paper and was told she needed to call the number on the piece of paper. Claimant testified she called the number and spoke to ["Redacted, hereinafter MC"] who informed Claimant that the issue was not with her most restrictions from her worker' compensation injury, but were related to prior work restrictions Claimant had received. Claimant testified she has not worked since August 25, 2020.

34. Claimant returned to Swedish Medical Center on April 27, 2021 and was evaluated by Dr. Killan. Claimant reported complaints of low back pain with radiating pain in her right buttock and down her right leg. Claimant was diagnosed with a lumbar strain and it was noted that Claimant was neurovascularly intact and there was nothing to suggest a lumbar radiculopathy or sciatica.

35. Claimant eventually underwent a lumbar interlaminar epidural steroid injection on August 27, 2021 under the auspices of Dr. Pasto.

36. [Redacted, hereinafter HC], the cash management supervisor for Employer, testified at hearing in this matter. HC[Redacted] testified that Claimant was working for Employer processing deposits in a modified duty capacity. HC[Redacted] testified that there were times when Claimant would leave work early because Claimant reported she was in too much pain to complete her shift. HC[Redacted testified there was an occasion where Claimant was given a written record for a mistake and Claimant reported it was difficult for her to concentrate at work. HC[Redacted testified she told Claimant to address this issue with her doctor. HC[Redacted testified Claimant continued working on modified duty until August 25, 2020.

37. The wage records entered into evidence at hearing demonstrate that Claimant began her employment with Employer on January 21, 2020. In the 8 2/7 weeks between when she started and her March 19, 2020 injury date, Claimant earned $5,023.72 in earnings. This equates to an AWW of $606.31.

38. Respondents elicited testimony from Claimant at hearing regarding a prior workers' compensation injury she sustained which resulted in a settlement. Claimant testified that the prior workers' compensation injury involved her hands and her hands improved after she settled her claim. Claimant testified she settled this claim in July 2010.

39. With regard to the issue of authorized treating physician, Claimant argues at hearing that Respondents provided Claimant with a list of only two physicians, and therefore did not provide a list of providers in compliance with Section 8-43-404(5)(a), C.R.S. Claimant argues that the failure of Respondents to properly provide Claimant with a list of four physicians or four clinics available to treat Claimant results in the right of selection of medical provider passing to Claimant. Claimant therefore argues that her designated authorized treating physician is Dr. Parry. The ALJ is not persuaded that Claimant has demonstrated that Respondents failed to comply with Section 8-43-404(5)(a), C.R.S.

40. Conflicting testimony was presented at hearing as to what was provided to Claimant by SG[Redacted] after her workers' compensation injury. Based on the testimony and evidence presented at hearing, the ALJ credits the testimony of SG[Redacted] over the testimony of Claimant regarding what was provided to Claimant following her work injury and finds that Respondents have complied with Section 8-43-404(5)(a), C.R.S. The ALJ credits the testimony of SG[Redacted] and finds that Claimant selected the Aurora North Concentra clinic to serve as her medical provider for her workers' compensation injury. The ALJ credits the testimony of SG[Redacted] and finds that Claimant was provided with the second page that included the list on Concentra clinics in Colorado and was informed by SG[Redacted] that she could select any of the Concentra clinics listed on second page of the document.

41. With regard to the issue of temporary disability benefits, Respondents argue that Claimant has failed to demonstrate that her wage loss was related to her workers' compensation injury. In support of this argument, Respondents note that Dr. Burris opined that Claimant's records documented prior low back complaints and Claimant had full range of motion and normal motor strength of her lumbar spine.

42. However, in this case, Claimant sustained an admitted injury to her low back which resulted in medical treatment and restrictions from her authorized treating provider. Claimant was off of work until March 25, 2020 and then returned to work for employer in a modified duty position. Claimant was furloughed from work on May 1, 2020 due to the pandemic, but at that time, Claimant still had work restrictions as set forth by her authorized treating physician. The fact that Claimant had work restrictions

set forth by her treating physician when she was furloughed due to the pandemic establishes that Claimant's work injury contributed to her wage loss.

43. Employer became aware of Claimant having work restrictions related to a prior work related injury in August 2020. Employer than requested that Claimant get a full release to return to work or documentation of the prior restrictions as reflected in the November 2020 letter. Notably, however, Claimant had passed a pre-employment physical for Employer and had been found to be capable of performing the required job duties for Employer in January 2020.

44. Moreover, Claimant's restrictions that she was working with as of August 25, 2020 were related to her March 19, 2020 work injury with Employer, not related to any other injury. Because these work restrictions were related to Claimant's work injury with Employer, Claimant is entitled to an award of temporary disability benefits.

45. The ALJ notes that Dr. Burris opined that Claimant had no work restrictions related to her work injury. However, Dr. Burris is an IME physician in this case and his opinion regarding Claimant's work restrictions are not a defense to temporary disability benefits where the treating physician has established work restrictions related to Claimant's injury.

46. The ALJ therefore finds that Claimant has demonstrated that it is more likely than not that her injury on March 19, 2020 resulted in work restrictions that contributed to Claimant's loss of wages.

47. According to the wage records, Claimant was off of work with restrictions related to her work injury from May 1, 2020 through June 24, 2020. Claimant returned to work on June 25, 2020 for 2.5 hours and earned $39.38. Claimant was then off of work from June 26, 2020 to July 11, 2020.

48. Claimant returned to work on July 12, 2020 and worked until August 25, 2020. Claimant earned her regular wages during the period of July 12, 2020 through August 25, 2020, but was not earning the same weekly rate. Specifically, Claimant earned $3,635.90 during this period of 6 2/7 weeks. This equates to a weekly rate of $578.44. Claimant is entitled to an award of temporary partial disability benefits for this period of time based on Claimant's loss of earnings. The ALJ further finds that Claimant has established that the loss of earnings was related to the work restrictions set forth by the authorized treating provider in this case.

49. Employer advised Claimant on August 25, 2020 that she could not return to work until she had a release to return to work without restrictions from her prior permanent restrictions. However, at this time, Claimant was still on restrictions from her designated authorized provider (Concentra Aurora North). Therefore, Claimant is entitled to an award of TTD benefits commencing August 25, 2020 and continuing until terminated by law or statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

4. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304- 437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

5. As found, Claimant reported her injury to Employer and was provided with a list of physicians authorized to treat Claimant for his injury, which included Concentra Aurora North, Midtown Occupational Health Services and the Concentra clinics on the second page of the Designated Provider List. The ALJ further finds that Claimant selected the Concentra Aurora North clinic to serve as her authorized treating provider.

6. The medical treatment Claimant received from Dr. Parry and Swedish Medical Center is found to be outside the chain of authorized providers and Respondents are not responsible for the cost of this treatment.

7. As found, Claimant's request to change her authorized provider to Dr. Parry is denied.

8. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

9. Section 8-42-102(2) states in pertinent part:

> (d) Where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from said daily wage in the manner set forth in paragraph (c) of this subsection (2).

10. As found, the ALJ calculates Claimant's AWW based on the wage records entered into evidence to be $606.31.

11. To prove entitlement to temporary total disability ("TTD") benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is

sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

12. As found, Claimant has proven by a preponderance of the evidence that she is entitled to an award of TTD benefits commencing May 1, 2020 through June 24, 2020 and from June 26, 2020 through July 12, 2020. And from August 26, 2020 and continuing until terminated by law or statute. As found, the medical records from Concentra establish that Claimant was on work restrictions related to her admitted work injury.

13. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

14. As found, Claimant earned $39.38 on June 25, 2020. Claimant's AWW being $606.31, this results in a daily wage of $86.61. Because Claimant earned $39.38 on June 25, 2020, Claimant is entitled to temporary partial disability benefits in the amount of $31.49 for June 25, 2020 ($86.61 - $39.38 = 47.23 x 2/3 = $31.49).

15. As found, Claimant earned $3,635.90 for the period of July 12, 2020 through August 25, 2020 for a weekly wage of $578.44. Claimant is entitled to an award of $207.74 in temporary partial disability benefits for the period of July 12, 2020 through August 25, 2020 ($606.31 - $578.44 = $27.87 x 6 2/7 = $406.11 x 2/3 = $207.74).

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits based on an AWW of $606.31 for the period of May 1, 2020 through June 24, 2020 and from June 26, 2020 through July 12, 2020. And from August 26, 2020 and continuing until terminated by law or statute.

2. Respondents shall pay Claimant TPD benefits in the amount of $31.49 for June 25, 2020. Respondents shall pay Claimant TPD benefits in the amount of $207.74 for the period of July 12, 2020 through August 25, 2020.

3. Respondents shall pay the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury including the treatment from Concentra North Aurora.

4. Respondents are not responsible for the cost of Claimant's medical treatment with Dr. Parry or Swedish Medical Center.

5. Claimant's request for a change of physician to Dr. Parry is denied.

6. All matters not determined herein are reserved for future determination.

DATED: February 15, 2023

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-212-146-001

ISSUES

- Did Claimant prove that he sustained a compensable injury to his neck, right arm and right shoulder on June 16, 2022?
- Did Claimant prove entitlement to medical benefits?

FINDINGS OF FACT

1. Claimant worked for Employer [Redacted, hereinafter CH], the owner of the company. Claimant's job is very physically demanding. He would work 12 to 14 hours per day.

2. On June 16, 2022, Claimant left his house early that morning and went to Denver to pick up containers and load them on the trailer. He was strapping the container down on the flatbed trailer and was tightening the straps. He had placed 4 straps on the container and was tightening the fifth strap with a winch and bar. The fifth strap snapped when it broke and he fell down when the strap tension released. After the fall, he experienced pain. He immediately call the owner of the Employer, CH[Redacted], and told him about the incident. CH[Redacted] asked him if he needed an ambulance and the Claimant indicated that he did not. He said he would drive home and see how it felt. When he arrived at the yard in Del Norte, he told CH[Redacted] that he thought he had a rib "out" and would go see the chiropractor for an adjustment.

3. The Claimant testified that when he fell, he fell on to his side he hit his right shoulder and elbow. The fall knocked the wind out of him. He laid there on his back for a while after falling. The immediate pain was in his knuckles and elbow and from the middle of his back all down his right side including his right shoulder. After he went home, he took a hot bath and took Advil dual action for the pain. He experienced trouble breathing, which he attributed to having a rib "out". He had experienced having a rib out previously but lower down in his torso.

4. CH[Redacted] testified at hearing. He is the owner of [Redacted, hereinafter HI]. His company sells or rents shipping containers and storage. Claimant works for his company. He has worked for him for approximately three years. His job duties include truck driving and some mechanical work. He worked ten to twelve hours per day. He confirmed that Claimant reported the work related incident where he fell down when a

strap broke on June 16, 2022. Although the pain Claimant experienced did not seem serious at the time, it worsened over time, according to the Claimant. CH[Redacted] did not observe the Claimant work on a daily basis, but Claimant would tell him that his pain was worsening. Based on his experience, when a strap breaks one could be injured. M CH[Redacted] did not doubt that the Claimant injured himself in the way he described.

5. Claimant had seen chiropractors on occasion prior to this incident for ribs going out, hips going out, and preventative care. However, Claimant testified that the symptoms he felt after the June 16, 2022 incident were completely different, in severity than the symptoms he felt previously. Specifically, his right hand is now numb, and he has pain from his shoulder all the way down his right arm. He also has pain between his shoulder blades.

6. When he saw the chiropractor, Dr. Poindexter, after the incident, Dr. Poindexter told him that his number 1 rib was out and he popped it back in. Additionally, Claimant testified that he complained of numbness and tingling in his right hand. Claimant saw him the following week and he tried the same treatment, without relief. Claimant returned to him on the third week and the chiropractor said he was not going to do the adjustment and recommended an MRI before he provided any more treatment. The pain was not going away despite the chiropractic treatment. The Claimant continued to work in pain taking Tylenol or dual action Advil to control the pain. CH[Redacted] would notice that the Claimant was in pain when he drove with him. Claimant had to drive with his hand above his head since it was painful to have his arm down by his side. After he received the results of the MRI, CH[Redacted] told him he should remain off work until he took care of the problem since he needed him back healthy.

7. The MRI performed on July 11, 2022 showed, among other findings, a suspected free disc fragment in the right C7-T1 foramina with moderate foraminal narrowing. (Claimant Exhibit 6).

8. After Claimant received the MRI results, he met with Dr. Poindexter, to discuss the results. He took Dr. Poindexter's advice to take it easy, relaxing, keeping a pain [Redacted, hereinafter PI] and Claimant submitted a statement regarding what happened in the original incident. CH[Redacted] did not want Claimant to return to work until he received a clearance to return to work from the doctors. Claimant began treatment with Dr. Tasha Alexis at the ROMP clinic in Alamosa on July 18, 2022.[1] She took a history that the claimant injured himself when he was strapping down a load and the strap broke and slammed the patient to the ground. (Claimant Exhibit 3). The Claimant presented to the clinic for neck pain. Dr. Alexis also noted that Claimant's chiropractor recently ordered

[1] Although Claimant refers to the treating facility as the "ROMP" clinic, the medical records indicate that the facility's name was SLV Health Occupational Medicine.

an MRI due to the fact that the Claimant was not improving and the MRI showed a suspected extruded free disc fragment in the right C7-T1 foramina with moderate foraminal narrowing. She provided restrictions of no lifting, carrying or pushing or pulling greater than 25 pounds. She referred Claimant to Dr. Timothy for further evaluation and treatment.

9. [Redacted, hereinafter JH] began seeing Dr. Timothy on August 11, 2022 following the referral from Dr. Alexis. Dr. Timothy noted that JH[Redacted] had right arm pain complaints and that he had sought treatment with his chiropractor and had then sought medical care following an MRI that showed cervical spine pathology. Dr. Timothy diagnosed JH[Redacted] with radiculopathy, site unspecified, paresthesia of skin and other cervical disc displacement, high cervical region. Dr. Timothy recommended consultation with a qualified pain management specialist for a cervical epidural steroid injection at C7- T1 for a HNP/extrusion. JH[Redacted] was also referred to a back surgeon. Dr. Timothy assigned bilateral neck restrictions of no overhead work, pushing/pulling of up to 25 lbs. and lifting up to 25 lbs. He also assigned right shoulder restrictions of limited use, no overhead work and no work above chest height, pushing pulling up to 25 lbs. and lifting up to 25 lbs. (Plaintiff's Exhibit 3, pp. 16 -20).

10. Dr. Timothy referred Claimant to Denver Spine and Pain Management. He received an injection from Dr. Bainbridge at that facility.

11. Claimant testified that after he received the right C7-T1 transforaminal Epidural injections, administered on 10/26/2022 by Dr. Bainbridge, he reported his pain as 1/10. Prior to that, his pain was reported as 8/10. This is consistent with Dr. Bainbridge's chart note of October 26, 2022. (Plaintiffs Exhibit 8, pp. 77-78). Following the injection, Claimant was able to regain some functionality and use of his right hand. He testified that his hand/arm is still numb and it hurts but following the injection, he can now hold things and shift gears again when driving his truck. Claimant testified that he had never had the problems of right hand numbness or difficulty prior to the June 16, 2022 injury.

12. The injection helped his symptoms and the pain is no longer debilitating. Following the injection, he was able to return to work on November 11, 2022. Dr. Timothy allowed him to return to work with restrictions including no lifting above his head. He allowed him to drive as long as he could maintain control of his right hand.

13. Dr. Timothy testified at hearing. Dr. Timothy's specialty is physical medicine and rehabilitation, occupational medicine and is Level II accredited. He was accepted as an expert in those areas.

14. Dr. Timothy last saw Claimant on November 10, 2022 and his assessment was that Claimant had radiculopathy, site unspecified, and he had right sided disc extrusion at C7-T1, based on imaging. He recommended physical therapy.

15. Dr. Timothy testified that JH's[Redacted] pain and numbness complaints were consistent with the findings on JH's[Redacted] MRI reading at C7-T1. Dr. Timothy was in agreement with Dr. Bainbridge's treatment plan and recommendations that he provided in his initial evaluation of September 9, 2022.

16. With respect to causation, Dr. Timothy stated that his medical history reflected that JH[Redacted] reported that he was injured when a strap he was tightening down broke and he fell to the ground. Dr. Timothy further stated that given the type of pressure or loads on those straps that the strap breaking certainly could be the cause of injury, even though the mechanism of injury may not be typical of that type of injury. Dr. Timothy further testified that JH's[Redacted] injuries and the treatment he had provided as a result of those injuries, were caused by Mr. JH's[Redacted] June 16, 2022 work injury.

17. Dr. Poindexter also testified at hearing. Dr. Poindexter's specialty is chiropractic medicine. He provided chiropractic treatment to the Claimant. He last saw Claimant on July 11, 2022. At that time, he was treating him for radiculopathy of the right arm and hand and low back pain. He first saw him on August 29, 2021, prior to the work-related incident. At that time he provided conservative care including normal chiropractic adjustments. The first time he treated him post-injury was on June 24, 2022. His complaints after his injury included pain that was more intense that prior to his work injury. However, his records did not document any change in treatment pre-injury and post-injury. But, he does recall the Claimant mentioning the increased pain post-injury. Dr. Poindexter also noted that the frequency of visits had increased, post-accident. Claimant was also not responding to treatment as he previously had and at that point, Dr. Poindexter recommended an MRI since there was something different in Claimant's presentation and response to treatment. After review of the MRI, he concluded that further chiropractic was not appropriate and a surgical consult would be appropriate. It was Doctor Poindexter's opinion that the Claimant's injuries were work related. Unfortunately, since Dr. Poindexter's chart notes are not consistent with his testimony, with the exception of the recommendation for an MRI, I must look elsewhere to determine if the Claimant sustained a compensable work related injury.

18. Dr. Michael Janssen performed a medical records examination and gave his opinion that "it would give high suspicion that this may not be an occupational-related

condition specifically." Dr. Janssen stated he was asked to comment on whether the mechanism of injury correlated and if this would be a work -related condition. In response, Dr. Janssen stated "It is impossible to completely say, but C7-T1 disc herniations are less common than the rest of the subaxial cervical spine. This is an extruded disc fragment. They can occur with normal activities of daily living and occur spontaneously, and they can also occur with trauma". Dr. Janssen also states that it is impossible to directly correlate whether this is truly a compensatory injury or an incidental finding. (Plaintiff's Exhibit 9, pp. 80-81).

19. Claimant currently continues to have pain in from his mid-back all the way into his right hand. His right hand currently is numb and it hurts. But, he is able to drive and shift gears and hold things without dropping them since the injection.

20. After consideration of the evidence, I find Dr. Timothy's opinions that the injuries and treatment were caused by his June 16, 2022 work injury to be credible and persuasive. I find his opinions as to causation to be more persuasive than those of Dr. Janssen.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical

treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

In this case, there is no question that an incident occurred on June 16, 2022. The question is whether the Claimant's post-accident symptoms are attributable to the incident or are as a result of the natural progression of his degenerative conditions, for which he treated prior to the incident. I conclude, based on the credible and persuasive evidence that Claimant proved he suffered a compensable injury to neck, right shoulder and right arm as the result of the incident that occurred within the course and scope of his employment on June 16, 2022.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The parties have indicated that in addition to compensability, the second issue to be determined is whether the medical treatment provided related to the claimed work injury. There appears to be no question that the treatment provided was reasonable and necessary. The real issue is whether the treatment is related to the incident that occurred on June 16, 2022 or the natural progression of his preexisting condition. I conclude that the treatment provided by the authorized treating physicians were reasonable, necessary and related to the work injury.

.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury to his neck, shoulder and right arm on June 16, 2022.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule to cure and relieve Claimant from the effects of his neck, right shoulder and right arm injuries.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 2, 2023

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-135-286-003

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that the left sacroiliac (SI) joint injection recommended by Dr. Ellen Price is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement **(MMI).**

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S. Specifically, the claimant has requested cost reimbursement in the amount of $230.35.

FINDINGS OF FACT

1. The claimant was injured while working for the employer on March 8, 2019. The claimant injured his low back when he bent and twisted to pick up iron and plywood at a muddy job location. This is an admitted claim.

2. The claimant's authorized treating provider (ATP) for this claim is Work Partners Occupational Health. Throughout this claim, the claimant has primarily seen Erica Herrera, PA-C with Work Partners Occupational Health.

3. The claimant has undergone three surgeries related to the March 8, 2019 injury. On July 1, 2020, Dr. James Gebhard performed a microdiscectomy at the L4-L5 level. On June 23, 2021, Dr. Michael Janssen performed a disk replacement at the L4- L5 level. On January 10, 2022, Dr. Janssen performed a left sided LS foraminotomy for disk herniation removal and performed a left 51 foraminotomy. Following each surgery, the claimant participated in physical therapy.

4. On June 20, 2022, the claimant was seen by Dr. Laurie Marbas at Work Partners Occupational Health. On that date, Dr. Marbas placed the claimant at maximum medical improvement **(MMI).** In addition, Dr. Marbas assessed a whole person impairment rating of 31 percent. This impairment rating was related to the claimant's thoracic spine range of motion, and spondylosis of the claimant's lumbar spine. Dr. Marbas also listed a number of maintenance medical treatment modalities including medications, physical therapy, pool therapy, psychologist/therapist, pain medicine specialist, neurosurgeon, and Work Partners.

5. On January 9, 2023, the respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of June 20, 2022, and the impairment rating of 31 percent whole person. In addition, the respondents admitted to "future medical care that is reasonable, necessary and related to the compensable claim."

6. As part of the recommended maintenance medical treatment, on August 24, 2022, the claimant was seen by pain management specialist, Dr. Ellen Price. On that date, Dr. Price noted that the claimant's treatment history includes physical therapy, massage, use of a TENS unit, medications, and surgical history. On examination, Dr. Price noted that the claimant had tenderness at the left sacroiliac (SI) joint on palpation. Dr. Price diagnosed bilateral sacroiliitis, left greater than right. Dr. Price recommended the claimant use an SI joint belt. She also recommended a left SI joint injection.

7. On September 21, 2022, the claimant returned to Dr. Price. On examination, Dr. Price noted tenderness at both of the claimant's SI joints. She also noted a positive Gaenslen's test and a positive Faber maneuver. Dr. Price opined that the claimant's main pain complaint was coming from his SI joint pain. Dr. Price noted that "[i]t is not uncommon for people with disk replacements or fusions to have hypermobility below the level." On that date, Dr. Price recommended that the claimant undergo bilateral SI joint injections. [1]

8. The respondents denied authorization for the recommended left SI joint injection.

9. Dr. Price continued to recommend SI joint injections for the claimant when she saw him on October 19, 2022.

10. At the request of the respondents, Dr. Brain Mathwich reviewed the claimant's medical records and opined regarding the recommended left sided SI joint injection. Dr. Mathwich opined that the claimant does not meet the Colorado Medical Treatment Guidelines (MTG) for SI joint injection. Specifically, Dr. Mathwich listed the requirements of the MTG for SI joint injection: "1. At least 3 months of pain, unresponsive to 6 weeks of conservative therapy. 2. Confounding psychological risk factors have been screened for and clinically addressed 3. Three positive physical examination findings consistent with SI joint origin pain" For each item listed, Dr. Mathwich found that the claimant does not meet these requirements. Specifically, Dr. Mathwich stated that the claimant has not undergone at least six months of conservative therapy. Dr. Mathwich also noted that the claimant has significant psychiatric issues. Finally, Dr. Mathwich noted that Dr. Price noted a positive Faber maneuver "but did not perform additional SI joint examinations."

11. The respondents relied upon Dr. Mathwich's report and denied authorization for the requested left SI joint injection.

12. On January 17, 2023, Dr. Price authored a letter regarding the recommended SI joint injections. In that letter, Dr. Price stated that she recommended the SI joint injections because the claimant has "chronic pain because of his sacroiliac joint". Dr. Price noted that this is appropriate treatment when there is a positive Gaenslen test or a positive Faber test. Dr. Price reiterated that "it is very common that

[1] Only the recommended **left** St joint injection is before the ALJ at this time.

patients have sacroiliac joint dysfunction after they have had disk replacements or fusions."

13. PA Herrera testified at the hearing. PA Herrera explained that there are various tests used to diagnose sacroiliitis. Those tests include the Fortner finger sign, the Gaenslen test, and a Faber test. PA Herrera testified that it is her understanding that Dr. Price performed all of these tests on the claimant and each was positive. PA Herrera also testified that SI joint injections are both therapeutic and diagnostic.

14. The claimant testified that his current symptoms include pain in the middle of his low back that radiates into his left leg and left hip. Specifically, the claimant indicated he has pain in his left upper buttock area below his beltline.

15. The claimant has requested cost reimbursement in the amount of $230.35 related to the denial of the left sided SI joint injection.

16. The ALJ credits the medical records and the claimant's testimony. The ALJ credits the opinions of Dr. Price over the contrary opinions of Dr. Mathwich. The ALJ specifically credits Dr. Price's statement that "it is very common that patients have sacroiliac joint dysfunction after they have had disk replacements or fusions." The ALJ also credits PA Herrera's testimony regarding the methods used in diagnosing sacroiliitis. The ALJ finds that the claimant has demonstrated that it is more likely than not that the recommended left sided SI joint injection is reasonable medical treatment necessary to maintain the claimant at **MMI.**

17. As the requested medical treatment has been found to be reasonable and necessary to maintain the claimant at **MMI,** the claimant has successfully demonstrated that he is entitled to costs related to pursuit of this treatment.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

6. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left St joint injection recommended by Dr. Price is reasonable medical treatment necessary to maintain the claimant at **MMI.** As found, the medical records, the claimant's testimony, the opinions of Dr. Price, and PA Herrera's testimony regarding the methods used in diagnosing sacroiliitis, are credible and persuasive on this issue.

7. The claimant has requested costs related to the current Application for Hearing. Section 8-42-101(5), C.R.S. provides:

> If any party files an application for hearing on whether the claimant is entitled to medical maintenance benefits recommended by an authorized treating physician that are unpaid and contested, and any requested medical maintenance benefit is admitted fewer than twenty days before the hearing or ordered after application for hearing is filed, the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit. Such costs do not include attorney fees.

8. As found, the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S. related to the requested left SI joint injection

ORDER

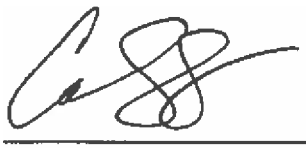
It is therefore ordered:

1. The respondents shall pay for the recommended left SI joint injection, pursuant to the Colorado Medical Fee Schedule.

2. The respondents shall pay the claimant $230.35 for reimbursement of costs.

3. All matters not determined here are reserved for future determination.

Dated February 21, 2023.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-199-776-001

ISSUES

- Did Claimant prove she[1] suffered a compensable occupational disease to her bilateral upper extremities?

- Did Claimant prove treatment provided by Dr. William Schroeder on or after February 11, 2022 was authorized and reasonably needed to cure and relieve the effects of the compensable injury?

FINDINGS OF FACT

1. Claimant works for Employer as a public defender. Claimant's residence and primary office are in Salida, but she regularly appears in courts across the 11th Judicial District, including Fremont, Park, and Custer counties.

2. Claimant uses a small, employer-supplied laptop computer for data entry and drafting documents. Claimant does not have a legal assistant or paralegal to generate documents and does all her own typing. She spends approximately four to six hours per day typing pleadings, correspondence, emails, and detailed case notes.

3. Claimant works at a variety of desks, tables, and other workspaces, depending on whether she is at her Salida office or in one of the courthouses. Although the specific dimensions of each space are different, the ergonomics of each setup can fairly be described as "poor." The ergonomic deficiencies are compounded by the fact that Claimant is quite tall.

4. In her main office, Claimant has no keyboard tray and was typing with the laptop on a fixed-height desk. Eventually she fashioned a makeshift "standing desk" from a cardboard box to allow a less uncomfortable typing posture.

5. Claimant started having wrist and right elbow pain in late January 2022. She perceived the onset of symptoms to be associated with her work activities, particularly typing and mousing.

6. Claimant approached management about improving the ergonomics at her workstation in the Salida office. Employer arranged for a virtual ergonomic assessment to be completed online. Employer agreed to improve the furniture in Claimant's office, but the process was delayed by supply issues and logistical concerns related to an upcoming office move. Claimant investigated dictation software because "it physically hurt to type, [which] was very much part of her job."

[1] Claimant's preferred pronouns are she/her/hers.

7. There is no persuasive evidence Employer referred Claimant to a designated provider despite receiving notice of a potential work-related injury. Therefore, Claimant sought treatment from her personal provider.

8. Claimant saw her PCP, Dr. William Schroeder, on February 11, 2022. Examination of the upper extremities showed positive Phalen's and Tinel's tests bilaterally, worse on the right. Dr. Schroeder opined Claimant's clinical presentation was consistent with bilateral carpal tunnel syndrome (CTS). He referred Claimant to a hand specialist, physical therapy, and ordered an EMG. That same date, Dr. Schroeder noted significantly elevated liver enzymes and long-standing hypertension. He ordered more lab tests and prescribed a beta-blocker.

9. After the appointment with Dr. Schroeder, Claimant advised his supervisor, [Redacted, hereinafter DZ], that he had "officially" been diagnosed with CTS and referred to a hand specialist. Claimant asked DZ[Redacted] if he preferred any specific doctors but was not given any names of providers or clinics.

10. On February 15, 2022, Claimant emailed management that she and DZ[Redacted] were exploring solutions that would allow Claimant to continue working. She had tried dictation software but discovered that numerous corrections required almost as much keyboarding as simply typing the documents from scratch.

11. Claimant saw Becky Pack, an orthopedic PA-C, on February 18, 2022. Claimant described bilateral forearm and hand pain, worse on the right. Claimant stated the symptoms were exacerbated by typing, using a computer mouse, and heavy lifting. Examination showed positive Tinel's bilaterally. Ms. Pack diagnosed bilateral CTS and cubital tunnel syndrome and ordered an EMG. She also recommended an ergonomic evaluation of Claimant's workstation and restricted her to "light duty."

12. Around that time, Claimant continued discussions with management about ergonomic solutions. Employer planned to purchase the legal version of Dragon software in hopes it would be more efficient.

13. Claimant had an initial OT evaluation on February 24, 2022 at Heart of the Rockies Occupational Therapy. She reported increased bilateral upper extremity symptoms "when engaged in computer tasks on a daily basis." Claimant explained she spent approximately 4-6 hours each day working on the computer. Examination showed mild reduction in wrist ROM, and mild tenderness to palpation around both wrists, proximal forearms, and elbows. Tinel's was positive at both wrists and the right elbow. The therapist recommended therapy for "overuse syndrome with tendonitis and medial/ulnar nerve compressions." She also recommended nighttime splinting and "ergonomic changes to current workstation to improve BUE alignment and protection with repetitive typing/computer tasks to avoid increased overuse symptoms."

14. That same day, DZ[Redacted] emailed upper management about a part-time schedule he worked out with Claimant, which they believed struck a reasonable balance between giving Claimant's "hands a rest" while not placing excessive stress on

the other attorneys in the office from covering Claimant's caseload. DZ[Redacted] stated if the part-time schedule were not approved quickly, he would put Claimant on sick leave and reassign her cases. Management responded it needed additional information and time to review the request. As a result, DZ[Redacted] advised the office staff that Claimant's caseload would be reassigned. DZ[Redacted] hoped the reassignment would be only temporary and the part-time plan would eventually be approved.

15. Claimant was evaluated by Dr. Edmund Rowland, an orthopedic hand specialist, on February 25, 2022. She reported bilateral arm pain and occasional numbness and tingling. Examination of the right elbow showed tenderness over the common extension tendon origin, lateral epicondyle pain with resisted wrist extension, and tenderness around the ulnar nerve. The left elbow was unremarkable. Tinel's was positive at both wrists. Dr. Rowland was not convinced Claimant had CTS and cubital tunnel syndromes, and "would think more along the lines of an overuse tendonitis, lateral epicondylitis, etc." He diagnosed "likely overuse" right lateral epicondylitis, and probable radial, median, and ulnar "neuritis." Claimant wanted to avoid surgery and was hoping for nonoperative solutions "likely ergometric adjustment and/or therapy with a break from mousing and keyboarding."

16. Electrodiagnostic testing was performed on March 8, 2022. It showed mild right median neuropathy at the wrist consistent with the clinical diagnosis of CTS. No electrodiagnostic abnormalities were found in the elbows or left wrist.

17. Dr. Rowland reviewed the electrical testing data and stated Claimant's CTS would be characterized as "the mildest of mild as the numbers are nearly normal." He maintained that Claimant suffers primarily from tendinopathy and nerve irritation rather than a true compressive neuropathy. He concluded, "I do believe [Claimant's] symptoms come down to an overuse phenomenon. It is my medical advice that [she] figures out a way to type less." Dr. Rowland recommended Claimant continue working with the occupational therapist to adjust her workstation and implement a regimen of frequent breaks and regular stretching "to minimize the symptoms created by prolonged typing. I would like [her] to limit typing if at all possible."

18. On April 28, 2022, Dr. Schroeder documented Claimant's hypertension had been brought under control with medications.

19. Claimant was off work from late February to approximately the end of July 2022. Claimant's upper extremity symptoms improved significantly while she was off work but recurred "almost immediately" when she returned to regular work.

20. Dr. Carlos Cebrian performed an IME for Respondent on August 24, 2022. Dr. Cebrian diagnosed right CTS, bilateral wrist tendonitis, and bilateral elbow epicondylitis. Relying on the DOWC Cumulative Trauma Disorder Medical Treatment Guidelines (MTGs), Dr. Cebrian concluded none of the conditions were caused by Claimant's work. He opined Claimant's work involved no primary or secondary risk factors identified in the MTGs. He noted the MTGs state that typing up to seven hours per day "at an ergonomically correct workstation" is not a risk factor for CTD. Although four hours

of mousing per day is an established risk factor for CTS, Claimant does not meet that criterial because she only used a mouse for approximately one hour total with breaks. Dr. Cebrian speculated that Claimant's hypertension or elevated liver enzymes may be causative of her mild right CTS and tendinopathies.

21. Dr. Schroeder responded to Dr. Cebrian's IME on September 9, 2022. He "totally disagreed" with the "unfounded" conclusion that Claimant's condition is not work-related. Dr. Schroeder thought his opinions should be given more weight because they are based on a long-term treatment relationship.

22. Claimant's testimony regarding the onset and progression of symptoms and their temporal relationship to her work activities is credible.

23. The causation opinions of Dr. Rowland and Dr. Schroeder are credible and more persuasive than the contrary opinions of Dr. Cebrian.

24. Claimant proved she suffered a compensable occupational disease involving her bilateral upper extremities.

25. Claimant proved the evaluations and treatment provided by Dr. Schroeder, Heart of the Rockies Occupational Therapy, and Ms. Pack were reasonable needed to cure and relieve the effects of her compensable injury.

26. Claimant proved Dr. Schroeder, Heart of the Rockies Occupational Therapy, and Ms. Peck are authorized providers. Claimant had the right to select his own treating physician because Employer did not refer him to a designated provider after receiving notice of the injury.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a

> natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The Division has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant proved she suffered a compensable occupational disease affecting her bilateral upper extremities. The causation opinions of Dr. Rowland and Dr. Schroeder are more persuasive than the contrary opinions offered by Dr. Cebrian. Claimant's testimony is credible. Claimant has consistently reported that her wrist and elbow symptoms were directly associated with her work activity. Although Claimant is not a medical expert, she is in the best position to say how her body responded to particular stimuli. Additionally, Claimant's condition improved when she stopped working but recurred "almost immediately" when she returned to regular work activities, which also supports a causal relationship. Dr. Cebrian's mechanical application of the MTG causation matrix is unpersuasive in this case. First, the MTGs are not binding on the ALJ in the face of persuasive contrary evidence regarding an individual claimant. In any event, the MTGs do not categorically state that computer work can never cause CTS, nerve irritation, or tendinopathy. Rather, the MTGs provide that computer work up to seven hours per day at an *"ergonomically correct"* workstation is not a risk factor for CTD. WCRP 17, Exhibit 5, § D.3 (emphasis added). None of Claimant's regular workspaces can fairly be described as "ergonomically correct." In fact, the ergonomics in her main office were so poor she resorted to building a jerry-rigged "standing desk" with a cardboard box.

Moreover, even if we concluded that Claimant's upper extremity symptoms were not caused by her work, her symptoms were aggravated and perpetuated by work activities, which ultimately prompted her to seek treatment and caused disability. Accordingly, Respondent would still be liable for a compensable aggravation irrespective of direct causation.

There is no persuasive evidence that Claimant was "equally exposed" to the injurious employment hazards outside of work. Therefore, Claimant proved a compensable occupational disease.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith," or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). The obligation to designate a physician arises when the employer receives information indicating to a reasonably conscientious manager that a potential compensation claim might be involved. *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984).

As found, Claimant proved the evaluations and treatment provided by Dr. Schroeder, Heart of the Rockies Occupational Therapy, and Ms. Pack were reasonably needed to cure and relieve the effects of her compensable injury. Additionally, Claimant proved Dr. Schroeder, Heart of the Rockies Occupational Therapy, and Ms. Peck are authorized providers. Claimant had the right to select her own treating physician because Employer did not refer her to a designated provider after receiving notice of the injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is compensable.

2. Respondent shall cover treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to treatment on and after February 11, 2022 by Dr. William Schroeder, Heart of the Rockies Occupational Therapy, and PA-C Beth Pack.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review

electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 2, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-168-369-004

ISSUES

- Did Claimant prove his claim should be reopened based on a change of condition?
- Did Claimant prove a reverse total shoulder arthroplasty recommended by Dr. John Pak is reasonably needed and causally related to the admitted industrial injury?

FINDINGS OF FACT

1. Claimant worked for Employer since 2017 as a building engineer. He performed maintenance on a wide variety of physical plant systems such as HVAC, electrical, plumbing, and landscaping. The job was physically demanding, requiring heavy lifting and frequent use of the upper extremities, including overhead work.

2. Claimant suffered an admitted injury to his right shoulder on June 1, 2020 while manipulating a 150-pound steel plate to repair a loading dock leveling system. Claimant lifted the plate and felt a painful pop in his right shoulder.

3. Claimant's case is complicated by a prior work-related right shoulder injury in September 2011. The prior injury involved a torn rotator cuff and biceps rupture. Claimant had surgery for the rotator cuff tear, but the biceps was irreparable. He was put at MMI by his ATP for that claim, Dr. Daniel Peterson, on May 9, 2012. At the final appointment, Claimant reported improvement after surgery. He was working full duty but still had occasional "twinges" of pain with certain movements, and slight weakness with overhead work.[1] Examination that date showed positive impingement test and "mild" weakness. Dr. Peterson commented that Claimant had "surprisingly good strength recovery at this point for as large an RTC tear as he had." He anticipated Claimant's strength and ROM would continue to improve over time. Dr. Peterson assigned an 11% upper extremity rating for range of motion deficits. Claimant was released to work without restrictions.

4. There is no persuasive evidence Claimant sought any additional medical care for the right shoulder between May 2012 and the June 1, 2020 injury with Employer. Claimant performed physically demanding work without difficulty during that interval.

5. After the June 1, 2020 accident, Employer referred Claimant to Concentra for authorized treatment. The initial examination showed reduced range of motion and positive painful arc, Hawkins, drop arm, and empty can tests. Claimant was diagnosed with a right shoulder "strain." He was advised to wear a sling constantly and referred to physical therapy. He was given work restrictions of no use of the right arm.

[1] In 2012, Claimant was performing similar facilities maintenance work for a different employer.

6. Claimant saw Dr. Peterson at his third visit to Concentra, who has remained the primary ATP since. On June 15, 2020, Claimant discussed the prior injury with Dr. Peterson and stated, “his shoulder does not feel the same way as his previous injury.”

7. Claimant had a right shoulder MRI on June 17, 2020. It showed severe rotator cuff pathology, including supraspinatus, subscapularis, and infraspinatus tears, extensive fatty atrophy of the subscapularis muscle and lesser atrophy of the supraspinatus and infraspinatus.

8. After reviewing the MRI report, Dr. Peterson referred Claimant to Dr. Michael Simpson, an orthopedic surgeon.

9. Claimant saw Kimberly Anne Dial Shenuk, PA-C in Dr. Simpson’s office on June 19, 2020. Claimant reported his pain was improving with PT and NSAIDs. Ms. Shenuk reviewed the MRI images and opined, “there is definitely chronic involvement on top of his acute injury. There is fatty atrophy in the subscapularis, supraspinatus, and infraspinatus muscle bellies. He denies any weakness or significant pain prior to this injury.” Ms. Shenuk requested medical records from Concentra and scheduled Claimant to see Dr. Simpson.

10. Dr. Simpson evaluated Claimant on June 29, 2020. He reviewed the MRI images and confirmed the supraspinatus, infraspinatus, and subscapularis tendon tears. He noted fatty deposition in the subscapularis muscle but no atrophy of the infraspinatus. He also saw some atrophy of the supraspinatus “but more muscle than fat.” Dr. Simpson opined, “The subscap[ularis tear] is definitely chronic. Supraspinatus probably has some degree of chronicity, the infraspinatus less so.” Dr. Simpson advised Claimant that any surgery could be “quite complicated depending on what is chronic and what is acute.” He thought it reasonable to treat the “acute component” of Claimant’s “multi-tendinous tear” to maintain as much function as possible. However, the “chronic aspects” were not repairable and would likely require a capsular reconstruction or shoulder replacement arthroplasty. Dr. Simpson did not think surgery was warranted immediately because Claimant was functioning relatively well. He gave Claimant a subacromial Toradol injection and asked him to return in three weeks to further discuss the possibility of surgery.

11. Claimant returned to Dr. Simpson on July 20, 2020. His symptoms had improved in the interim with PT and the injection. Examination showed some weakness to external rotation but good supraspinatus and subscapularis compensatory function. Dr. Simpson did not recommend any surgery “at this point.” He opined Claimant’s condition may deteriorate with time and indicated Claimant could follow up periodically over the next 12 months if needed.

12. Dr. Peterson put Claimant at MMI on July 27, 2020. Claimant told Dr. Peterson he did not want surgery and thought he could return to his regular duties. Range of motion measurements showed no additional impairment compared to the 2011 rating. Dr. Peterson assigned a 0% rating after apportionment and released Claimant to full duty. Dr. Peterson opined, “[Claimant] will need medical maintenance care with Dr. Simpson

every 3 months over the next 2 years to monitor the RTC tear and determine if he will eventually need surgery."

13. Claimant returned to his regular job after MMI. Although he had no formal restrictions, Employer assigned a co-worker to help with overhead work and heavy lifting.

14. Claimant initially had no difficulty completing his work, with the co-worker's assistance. But approximately four weeks after being put at MMI, his shoulder started to become "irritated" and "agitated" by the end of his shifts. This became progressively worse over the next several months.

15. Claimant contacted Dr. Simpson's office in late November or early December 2020 for an appointment to evaluate his increased symptoms. Dr. Simpson's schedule was booked out several months, and the first available appointment was in March 2021.

16. Claimant saw Dr. Simpson on March 24, 2021. Claimant reported "worsening pain" and "more limited function in his shoulder." He was having difficulty lifting and carrying objects, and had his symptoms had reached the point that "simply trying to play the piano is hard for him." Dr. Simpson referred Claimant to Dr. John Pak for consideration of a reverse total shoulder arthroplasty.

17. Claimant was evaluated by Trisha Finnegan, NP in Dr. Pak's office on March 31, 2021. Claimant described a 9-month history of "ongoing and progressive shoulder pain" since the June 2020 work injury. He was having difficulty performing activities of daily living because of daily 8/10 pain and right shoulder weakness. Physical examination showed reduced range of motion and significant weakness of the rotator cuff muscles. It is unclear whether Dr. Pak personally saw Claimant at that appointment, but he at least reviewed the MRI images and discussed the case with Ms. Finnegan. Based on that review, Dr. Pak recommended a right shoulder reverse total arthroplasty. Dr. Pak did not discuss causation. However, his office submitted a surgical preauthorization request to Insurer under this claim.

18. Dr. Adam Farber performed an IME for Respondents on July 27, 2021. Dr. Farber reviewed the MRI images and saw no evidence of any acute injury or structural anatomical change. Instead, he opined that all pathology is pre-existing and unrelated to the June 1, 2020 injury. He noted Claimant's symptoms improved significantly within two months of the accident and he returned to work without restrictions. Dr. Farber concluded the work accident caused a temporary symptomatic exacerbation, but no structural aggravation of Claimant's longstanding, pre-existing rotator cuff pathology. Dr. Farber opined Claimant's ongoing symptoms and limitations reflected the natural progression of the failed rotator cuff repair in 2011. Although a reverse total shoulder arthroplasty may be appropriate treatment for Claimant's condition, he believes it is not causally related to the June 1, 2020 work accident.

19. Claimant had a DIME with Dr. Matthew Brodie on September 15, 2021. Dr. Brodie provided a somewhat confusing discussion of causation with respect to surgery.

He noted that Claimant improved after the 2011 injury and "had the capacity for unrestricted work" before the June 2020 injury. Additionally, Claimant sought no treatment for the shoulder "during the 9-year timeframe preceding the current work injury" despite performing physically demanding work. Dr. Brodie concluded, "it is medically probable that the claimant suffered a substantial aggravation or a new injury." He opined that without an MRI immediately before the June 2020 work injury, the post-injury findings cannot be "dated" to a specific injury date. However, he agreed that at least some of the MRI findings predated the work injury. Dr. Brodie concluded he could not provide a "definitive causal assessment" based on the available documentation, and ultimately adopted the July 27, 2020 MMI date originally assigned by Dr. Peterson.

20. Respondents files a Final Admission of Liability (FAL) based on Dr. Brodie's DIME. Claimant timely objected to the FAL and requested a hearing. The parties reached a stipulation that was approved on April 13, 2022. Respondents agreed to file an amended FAL and Claimant agreed not to object. The amended FAL closed all issues except medical benefits after MMI.

21. Claimant returned to Dr. Peterson on May 2, 2022. Dr. Peterson noted Claimant had "gotten worse" since last seen in July 2020 and a reverse total shoulder arthroplasty had been recommended. He observed supraspinatus and infraspinatus atrophy on gross inspection of the shoulder. Range of motion was significantly less than at the time of MMI, and strength testing showed "marked weakness" of the supraspinatus and infraspinatus. Dr. Peterson opined, "his claim should be re-opened as he is no longer at MMI." Dr. Peterson noted Claimant had worked five years for Employer doing building maintenance without difficulty before the work injury, and opined, "he clearly had a new injury at this company and unfortunately to restore him to previous ability and function it has now become clear that his only option is a RTSA." The arthroplasty was necessary "to restore him as much as possible to pre-injury function and pain level." He added, "I gave him 24 months of medical maintenance care . . . and in fact he has gotten worse and now he is in need of further surgery. This should not be surprising or contested." Dr. Peterson referred Claimant back to Dr. Pak.

22. Claimant was re-evaluated by Ms. Finnegan on May 9, 2022. He reported ongoing significant pain and difficulty with ADLs. Claimant reiterated that "prior to his [June 2020] injury he had been doing quite well with no difficulty performing activities of daily living or work duties." After reviewing the case with Dr. Pak, Ms. Finnegan again recommended a reverse total shoulder arthroplasty. She opined, "the patient was not having any difficulty prior to his work injury in regard to his function and mobility of his right shoulder. He denies any pain prior to his injury. Given his mechanism of injury and chronicity[2] of symptoms with failure to respond to conservative modalities, surgical intervention is indicated."

23. Dr. Farber performed a second IME for Respondents on June 28, 2022. Claimant reported 7/10 shoulder pain, aggravated by activities such as writing, playing

[2] The ALJ infers that Ms. Finnegan was referring to "chronicity" of symptoms since the June 2020 work accident.

piano, moving his fingers, fishing, and golfing. He also described weakness with lifting. His pain was worse than at the prior IME. Dr. Farber reviewed a handful of additional records, and stated his opinions were unchanged from the first IME.

24. Dr. Farber testified at hearing consistent with his reports.

25. Dr. Peterson testified in a post-hearing deposition on January 5, 2023. Dr. Peterson described objective evidence of worsening between July 2020 and May 2022, including "definite" deterioration of shoulder range of motion and strength. He disagreed with Dr. Farber that Claimant's shoulder pathology is entirely pre-existing. Instead, he agreed with Dr. Simpson's characterization of the condition as "acute on chronic." Dr. Peterson emphasized that Claimant "did extremely well" after the 2011 surgery and performed heavy work without difficulty until the June 1, 2020 injury. He agreed with Dr. Simpson and Dr. Pak that a reverse total shoulder arthroplasty is the most appropriate treatment at this juncture because a lesser surgery would not likely provide significant functional benefit.

26. Claimant's testimony is generally credible.

27. The opinions of Dr. Peterson, Dr. Simpson, Dr. Pak, and Ms. Finnegan are credible and more persuasive than the contrary opinions offered by Dr. Farber.

28. Claimant proved his condition worsened after July 27, 2020 and he is no longer at MMI.

29. Claimant proved the reverse total shoulder arthroplasty recommended by Dr. Pak is reasonably needed to cure and relieve the effects of his injury. Claimant proved the shoulder arthroplasty is causally related to the admitted June 1, 2020 work accident. Although Claimant had underlying, pre-existing rotator cuff pathology, the work injury aggravated, accelerated, and combined with the pre-existing condition to produce the need for surgery.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition has changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from a separate cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. When a claimant seeks reopening based on a change of condition after MMI, a prior DIME determination is entitled to no special weight. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The claimant must prove a basis to reopen by a preponderance of the evidence. Section 8-43-304(4).

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved his condition worsened after July 27, 2020 and he is no longer at MMI. Although Claimant was not completely symptom-free when put at MMI, his pain levels were low, and returned to work, albeit with a helper for overhead tasks and heavy lifting. Within a month of MMI his shoulder started becoming "irritated" and "agitated" by the end of his shifts. By the time he was able to get back in with Dr. Simpson in March 2021, his symptoms were significantly worse, and his functional ability had deteriorated. At that point, Dr. Simpson thought surgery was probably warranted and referred Claimant to Dr. Pak for consideration of arthroplasty. Claimant's condition continued progress over the next year, and was clearly worse when he saw Dr. Peterson in May 2022 than he had been at MMI in July 2020. Dr. Peterson persuasively explained that Claimant's subjective descriptions of worsening are corroborated by objective clinical findings.

Although it is fairly obvious that Claimant's condition worsened after MMI, the more challenging question involves causation. Claimant undeniably had significant underlying rotator cuff pathology before the June 1, 2020 injury. But his shoulder was asymptomatic (or at most minimally symptomatic), required no treatment, and did not impede his ability to perform physically demanding work. That status changed when Claimant lifted the heavy plate at work on June 1, 2020. Although Claimant's symptoms improved with therapy and an injection, they never entirely resolved, and progressively worsened over the next several months.

The ALJ credits the opinions of Dr. Simpson and Dr. Peterson that the work accident probably caused some acute tearing and further progression of the underlying condition. But even if Dr. Farber is correct that all pathology shown on the MRI was pre-existing, that is not the end of the analysis. A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment she would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). Regardless of the underlying condition of his rotator cuff before the work accident, Claimant was not a candidate for an arthroplasty because he

had no symptoms and functional impairment. No one performs arthroplasties on asymptomatic and nondisabling shoulders, no matter how damaged they might be. Although Claimant's shoulder improved relatively quickly with PT and an injection, he remained symptomatic to some degree. He never fully returned to his pre-injury baseline level of symptomlogy and function, and started slowly worsening relatively quickly after returning to work. Evenentually the shoulder was bad enough that he sought additional evaluation and treatment. Claimant proved the worsening of his condition reflects the natural progression of the June 1, 2020 work injury.

Claimant also proved the reverse total shoulder arthroplasty is reasonably needed. Dr. Simpson, Ms. Finnegan, and Dr. Pak are persuasive that a lesser surgery is unlikely to help Claimant, and an arthroplasty is the most appropriate course of treatment.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is granted.

2. Insurer shall cover the right reverse total shoulder arthroplasty recommended by Dr. John Pak.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 17, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-113-937-001

ISSUES

- Did Claimant prove his claim should be reopened based on a change of condition?
- Did Claimant prove an L4-S1 lumbar fusion recommended by Dr. James Bee is reasonably needed and causally related to the admitted work injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver, delivering oxygen concentrators, cylinders, and associated supplies to patients' homes. The job was physically demanding and required lifting and carrying 70 pounds on a regular basis. Before going to work for Employer, Claimant performed essentially the same job for a different oxygen supply company, from approximately 2007 to 2018.

2. Claimant suffered an admitted low back injury on July 15, 2019 while moving multiple oxygen tanks down a flight of stairs. Claimant was using a two-wheeled dolly with an integrated rack, loaded with approximately 10 cylinders. Approximately halfway down the staircase, Claimant fell and felt a pop and sharp stabbing pain in his back. He rested for a few minutes, and then finished moving the tanks back to his delivery van. The injury occurred on his last stop of the day, so he returned to the warehouse and reported the injury to his manager. The manager told Claimant to "keep me posted if anything comes of it."

3. Claimant worked his regular job for approximately 10 days after the injury. The symptoms gradually worsened until he stopped working on July 26. Claimant requested treatment and was referred to Emergicare.

4. Claimant saw Dr. Michael Dallenbach at his initial appointment on July 30, 2019. Physical examination showed decreased lumbar range of motion, bilateral lumbosacral paraspinal muscle spasm, positive straight leg raise testing, and decreased strength with dorsiflexion and plantar flexion of both ankles. X-rays showed approximately 7 mm of anterolisthesis of L5 on S1, but no fracture was noted. Dr. Dallenbach diagnosed a soft tissue strain and gave Claimant a Toradol injection. He assigned work restrictions of no lifting more than 10 pounds, referred Claimant to physical therapy.

5. At the initial PT evaluation on August 1, 2019, Claimant described low back pain with radiating pain into his right buttock. The therapist noted some mild radicular symptoms on the right.

6. At a follow-up with Dr. Dallenbach on August 7, 2019, Claimant described ongoing 7/10 back pain. He was performing sedentary modified duty and the prolonged sitting was making his back pain worse. Dr. Dallenbach adjusted Claimant's restrictions to alternate sitting and walking.

7. Claimant continued PT with gradual improvement in his back pain. On August 23, 2019, the therapist documented Claimant's "main pain" was right "sciatic" pain.

8. On August 26, 2019, Claimant reported diminished strength and motion on the right side, despite slow improvement in his pain. Physical exam confirmed decreased ROM and strength on the right. Dr. Dallenbach ordered a lumbar MRI.

9. A lumbar MRI was completed on August 31, 2019. It showed significant degenerative disc and facet changes at L4-5 and L5-S1 that were "potentially causing symptoms" in a bilateral L4 and L5 distribution. The MRI also showed mild degenerative changes from T11-12 through L3-4, which the radiologist opined were not clinically significant.

10. Claimant followed up with Dr. Dallenbach on September 4, 2019 to review the MRI results. Dr. Dallenbach documented abnormal weakness on the right side in an L4-5 distribution. He referred Claimant to Dr. Michael Sparr, a physiatrist.

11. Claimant saw Dr. Sparr on September 19, 2019. He described ongoing 5-7/10 pain. The greatest pain was in the right central back and buttock, increased with bending, sitting on hard surfaces, and standing for more than 20 minutes. He described radiating pain intermittently into the right central buttock and posterior thigh with occasional cramping in his dorsal leg. He denied numbness and tingling or perceived weakness in the leg. Physical examination showed moderate tenderness over the lower lumbar paraspinal muscles and facets, particularly at L4-5 and L5-S1. Claimant was "exquisitely" tender over the right SI joint and surrounding gluteal muscles. Sacroiliac positive tests were markedly positive. Neurological examination of the legs was normal. Dr. Sparr diagnosed SI dysfunction causing right sacroiliitis and gluteal myofasciitis, with an element of trochanteric bursitis. Dr. Sparr also noted Claimant "may be experiencing some intermittent right L5 radiculitis but it is not obvious on today's examination." He noted the spondylolisthesis shown on x-rays predated the work injury. He recommended an SI joint injection and trochanteric bursa injection. He also advised Clamant to reinitiate PT.

12. On September 25, 2019, Dr. Dallenbach documented Claimant was working modified duty and doing his best to alternate positions to manage his pain. Claimant reported pain radiating down his leg. Physical therapy was helping. Claimant was eager to return to regular work but was concerned about prolonged sitting and going up and down stairs to deliver oxygen supplies.

13. Dr. Stephen Scheper performed a right SI joint injection on October 8, 2019. Claimant saw Dr. Dallenbach the next day, October 9. He described "notable improvement" after the injection. Claimant was pleased because Dr. Sparr had said it might take a couple of weeks for the injection to take effect. Contemporaneous notes from the physical therapist also documented significant benefit from the injection.

14. Claimant followed up with Dr. Sparr on October 24, 2019. His back and leg pain were significantly improved after the SI joint injection. His major pain that day was in

the right lateral buttock. He was doing aggressive deep tissue therapy, which had been beneficial. Physical examination findings were improved compared to before the injection. Dr. Sparr administered a trochanteric bursa injection.

15. On December 3, 2019 Dr. Sparr documented Claimant had responded well the injections and was only using ibuprofen once per day. Dr. Sparr switched to meloxicam to reduce the possibility of any adverse GI side effects. Claimant was still having radiating pain down through the buttocks. Dr. Sparr opined Claimant may be a candidate for epidural steroid injections in the future, but "for now," he recommended trigger point injections and aggressive manual therapy.

16. The trigger point injections and therapy were somewhat helpful.

17. At Dr. Sparr's recommendation, Claimant underwent bilateral L3, L4, and L5 medial branch blocks on February 28, 2020. Claimant had a "minimal" diagnostic response, leading Dr. Sparr to conclude that Claimant's primary issue was SI joint dysfunction. He recommended right SI joint lateral branch blocks, to be followed by a rhizotomy if the blocks were successful.

18. The lateral branch blocks were completed on May 15, 2020.

19. On May 28, 2020, Dr. Sparr documented Claimant had an "excellent diagnostic response" to the lateral branch blocks. He opined Claimant's "persistent rather severe lumbosacral pain" was probably related to ongoing SI joint dysfunction. Dr. Sparr thought Claimant was an excellent candidate for SI joint rhizotomy.

20. SI joint rhizotomies were performed on June 23, 2020. At a follow-up with Dr. Sparr on July 7, Claimant reported significant improvement and "very minimal pain" since the procedure. He was participating in physical therapy and massage.

21. Dr. Dallenbach left practice in approximately April or May 2020 and Dr. Anthony Stanulonis took over as Claimant's primary ATP.

22. On July 15, 2020, Claimant told Dr. Stanulonis he was still enjoying significant benefit from the rhizotomies, with only occasional radicular pain in the right leg. However, he was having some radicular symptoms on the left leg with prolonged sitting and standing. Dr. Stanulonis ordered massage therapy.

23. On August 14, 2020, Dr. Stanulonis noted Insurer had delayed authorization for therapy, but Claimant had finally started therapy the day before. Claimant reported less sciatic pain on the right compared to before the rhizotomies, but he was having more radicular symptoms on the left. The leg symptoms were worsened by prolonged standing.

24. Dr. Timothy O'Brien performed an IME for Respondents on October 22, 2020. Dr. O'Brien stated there was "not a shred of objective data to support [Claimant's] representation that an injury occurred." Nevertheless, he opined Claimant suffered a minor lumbosacral strain, which fully resolved within six weeks. He likened Claimant's injury to a paper cut and opined such minor injuries "heal reliably 100% of the time." In

Dr. O'Brien's opinion, further treatment was neither reasonably needed nor causally related to the work accident. Rather, Dr. O'Brien thought Claimant's ongoing symptoms were solely related to pre-existing degenerative changes in his spine. Dr. O'Brien advised Claimant to "assume responsibility for his own level of health," and opined that "Western Medicine" had nothing to offer that could not be better obtained by exercise and weight loss. Dr. O'Brien concluded Claimant was at MMI, with no impairment, no restrictions, and no need for further care.

25. Dr. Stanulonis reviewed Dr. O'Brien's report on November 13, 2020. He disagreed that Claimant had only a minor injury that healed in six weeks. Dr. Stanulonis thought Claimant may benefit from a left SI rhizotomy and a surgical evaluation. He referred Claimant back to Dr. Sparr and referred him to Dr. James Bee, a spine surgeon.

26. Claimant was evaluated by Dr. Bee and Dr. Bee's PA-C, Nathan Carpenter, on November 24, 2020. Claimant described constant pain in his low back and stated, "the longer he stands, moves, or works, it goes down the back of both legs, right leg greater than left, causing him to have difficulty walking and weakness." Examination of the lumbar spine showed diminished muscle tone, pain to palpation, and reduced range of motion. Claimant walked with a "slow, hunched over gait." Strength and sensation were normal bilaterally. X-rays obtained in the office showed disc space collapse at L4-5 and L5-S1, anterolisthesis of L5 on S1 and an "obvious" pars defect at L5-S1. Flexion and extension x-rays showed subtle instability. Dr. Bee wanted a new MRI before making any determination regarding surgery. However, he also noted Claimant's severe obesity "makes surgery difficult." He recommended "intensive weight-loss" and consideration of a gastric bypass.

27. The updated MRI was completed on December 2, 2020. Claimant returned to Dr. Bee on December 9, 2020. The MRI showed similar pathology at L4-5 and L5-S1 compared to the prior MRI. The degenerative changes at other spinal levels were again characterized as "mild." Despite the significant pathology, Dr. Bee advised that, "given his size, moving forward with surgical intervention is really not safe at this point. I think he needs to drop a significant amount of weight in order to make surgery safe." He noted Insurer had declined the referral for a gastric bypass consultation, and advised Claimant to explore the procedure through his PCP. He asked Claimant to return in six months, at which time they could entertain surgical intervention if Claimant were still symptomatic after a significant weight loss.

28. Dr. Stanulonis put Claimant at MMI on January 29, 2021 with a 13% whole person impairment rating. He opined, "[Claimant's] permanent work restrictions should be reevaluated and adjusted one year after any lumbar spinal surgery." He recommended medical treatment after MMI including "any recommended injections, spine surgeon eval and recommendations for lumbar surgery in the next 2 years after significant weight loss." Dr. Stanulonis referred Claimant to Dr. Bissell for ongoing pain management.

29. Claimant had his initial appointment with Dr. Bissell on February 8, 2021. Dr. Bissel noted Claimant's PCP had recently referred him to Dr. Fisher to discuss gastric bypass surgery. Claimant described aching, numbness, pins and needles, and stabbing

pain in his low back radiating into both legs. He explained his back has been painful "ever since" the work accident despite numerous conservative modalities including physical therapy, dry needling, ice, heat, TENS unit, NSAIDs, Tramadol, Biofreeze, and Lidocaine patches. Dr. Bissell prescribed a lumbar brace and several medications.

30. Respondents filed a Final Admission of Liability (FAL) on March 26, 2021. The FAL admitted for medical benefits after MMI. Claimant did not object to the FAL and the claim closed, except for *Grover* medical benefits.

31. Claimant underwent a laparoscopic gastric sleeve surgery on September 30, 2021. Thereafter, he rapidly lost weight. The gastric surgeon documented a 31-pound weight-loss within three weeks of the surgery.

32. Claimant followed up with Dr. Bee on November 3, 2021. He had already put lost 40 pounds since the gastric sleeve surgery. Dr. Bee obtained new flexion-extension x-rays, which showed grade 2 spondylolisthesis and some motion at the L5-S1 level. Dr. Bee reiterated Claimant was "a good candidate for an L4 to S1 anterior posterior [fusion] if indeed he loses weight." He further stated, "[Claimant] is still quite uncomfortable, but I cannot in good conscience recommend surgical intervention for someone who is still north of 300 pounds. I am going to see him back in 6 months. We would have him undergo clearance from Dr. Fisher before looking at an anterior approach."

33. On March 29, 2022, Dr. Fisher documented Claimant had lost 80 pounds. Dr. Fisher cleared Claimant for spine surgery from a gastric standpoint.

34. Claimant returned to Dr. Bee on May 4, 2022. Dr. Bee re-reviewed the imaging studies confirming significant pathology at L4-5 and L5-S1. He determined Claimant had lost enough weight to proceed with surgery. Dr. Bee's office requested preauthorization for and L4-S1 anterior and posterior lumbar fusion with pars repair.

35. Dr. O'Brien performed a record review for Respondents on May 12, 2022. The additional documentation "in no way" altered his previous opinions. Dr. O'Brien reiterated that Claimant suffered "a very minor injury" but returned to his preinjury level of function within six weeks. He opined an L5-S1 fusion was "doomed to fail" because it would not address the widespread degenerative changes at multiple spinal levels. He further stated Claimant had "too many comorbidities for the surgery to be undertaken safely."

36. Claimant had a follow-up IME with Dr. O'Brien on November 7, 2022. He maintained his opinions that the "L5-S1 surgery" recommended by Dr. Bee was neither reasonably needed nor causally related to Claimant's "minor, self-limited, self-healing lumbosacral spine strain sprain."

37. At hearing, Claimant described ongoing low back and leg symptoms. His pain is typically 4-5/10 but increases to 8/10 on "bad days." He described radiating pain, numbness and tingling in his legs, right greater than left. He weighed 275 pounds at the time of hearing. He was still losing weight, but more slowly than in the first several months

after surgery. Claimant described a restricted lifestyle and significant disability because of his symptoms. Claimant's testimony was generally credible.

38. Dr. O'Brien testified in a post-hearing deposition consistent with the opinions expressed in his reports. He continued to misidentify the surgery proposed by Dr. Bee as a "single-level" fusion confined to L5-S1.

39. There is no persuasive evidence of any pre-injury back problems or need for treatment despite performing physically demanding work for many years. Nor is there any persuasive evidence of any preinjury functional limitations related to Claimant's back.

40. Claimant proved his claim should be reopened based on a change of condition. Claimant was put at MMI on January 29, 2021 because he had exhausted conservative options and could not have surgery unless he lost significant weight. Claimant subsequently lost enough weight to become eligible for surgery.

41. Claimant proved the recommended L4-S1 fusion is reasonably needed and causally related to the work accident. Dr. Bee's opinions and recommendations are credible and more persuasive than the contrary opinions offered by Dr. O'Brien. Claimant has completed extensive conservative treatment without sustained improvement. The surgery proposed by Dr. Bee will address the two most damaged spinal levels, which are probably the primary pain generators. The presence of "mild" degenerative changes at higher levels does not preclude surgery to address the more severe pathology. Flexion-extension x-rays have shown some evidence of instability, which is another indication for a fusion. Regarding the "safety" of surgery, the ALJ credits the opinions of Dr. Bee, who owes Claimant a duty of care as a treating physician, over those of Dr. O'Brien. The argument that Claimant's injury was "minor" and resolved within six weeks is not persuasive. Claimant's preinjury baseline condition was an asymptomatic (or minimally symptomatic) back that required no treatment and caused no functional limitations. By contrast, Claimant has remained continuously symptomatic since the accident and has become disabled from his customary occupation. The work accident substantially aggravated the preexisting degenerative changes in Claimant's spine, requiring treatment, including surgery.

CONCLUSIONS OF LAW

A. Reopening

Section 8-43-303 authorizes an ALJ to reopen any award based on a change in condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. The claimant must prove a basis to reopen by a preponderance of the evidence. Section 8-43-304(4).

As found, Claimant proved his claim should be reopened based on a change of condition. Claimant was put at MMI on January 29, 2021 because he had exhausted conservative options and could not have surgery unless he lost weight. Dr. Stanulonis explicitly contemplated future surgery at the time of MMI if Claimant could get his weight down. Claimant subsequently lost enough weight that he became eligible for back surgery. Although Claimant's longstanding obesity was not directly caused by the work accident, it is enmeshed with his claim because it was the reason he could not pursue the otherwise reasonably necessary surgery before being placed at MMI.[1] Now that the impediment to surgery has been removed, it is appropriate to reopen the claim and allow Claimant to proceed with Dr. Bee's recommendation.

B. Reasonable necessity and causal relationship of surgery

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

Claimant proved the recommended surgery is reasonably needed. Dr. Bee's opinions and recommendations are credible and more persuasive than the contrary opinions of Dr. O'Brien. Claimant has completed extensive conservative treatment including PT, massage, medications, trigger point injections, steroid injections, and rhizotomy. He also underwent bariatric surgery and lost considerable weight. None of these modalities have resolved or substantially improved his symptoms or functional capacity. It is therefore reasonable to conclude that nothing short of surgery has a reasonable prospect of success. Although there is no guarantee surgery will improve his condition, it is an appropriate option at this point given the failure of lesser interventions and the persistence of his disabling symptoms. Dr. O'Brien is correct that a single-level fusion at L5-S1 would not adequately address all significant pain generators in Claimant's

[1] The gastric sleeve treatment could potentially have been covered under the claim as necessary to allow Claimant to pursue treatment for the work injury. *E.g., Public Service Co. v. Industrial Claim Appeals Office*, 979 P.2d 584 (Colo. App. 1999). But the fact that Claimant pursued the weight loss treatment outside the claim does not alter the inherent causal connection.

spine. That is why Dr. Bee is recommending a *two-level fusion* at L4-S1. Even though Claimant has “mild” degenerative changes at the lower thoracic and upper lumbar levels, it makes sense to target the two worst levels, which are probably responsible for Claimant's leg symptoms. Additionally, Dr. Bee noted some evidence of instability on flexion-extension x-rays, which is another indication for a fusion. Regarding the “safety” of surgery, the ALJ credits the opinions of Dr. Bee, who owes Claimant a duty of care as a treating physician, over those of Dr. O’Brien.

Claimant also proved the surgery is causally related to the work injury. Dr. O’Brien’s argument that Claimant’s injury was “minor” and resolved within six weeks is not credible. Claimant’s preinjury baseline condition was an asymptomatic (or minimally symptomatic) back that required no treatment and caused no functional limitations. By contrast, Claimant has remained continuously symptomatic since the accident and has become disabled from his customary occupation. The notion that his back pain became suddenly disconnected from the work injury within six weeks, based on generic assumptions about when an injury of this “should” heal, is not persuasive. Nor is such a scenario consistent with the other persuasive medical and lay evidence in the record. The work accident substantially aggravated and accelerated the preexisting degenerative changes in Claimant’s spine, requiring treatment and ultimately surgery.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is granted.

2. Insurer shall cover the L4-S1 fusion surgery recommended by Dr. Bee.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 27, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts