OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-174-107-001

ISSUES

1. Whether Respondents proved by a preponderance of the evidence that the September 13, 2021 Final Admission of Liability (FAL) was filed in error, and should be withdrawn based on the Division Independent Medical Examination (DIME) opinion that Claimant did not suffer a compensable injury.

2. Whether Claimant overcame the DIME opinion regarding maximum medical improvement (MMI) and impairment by clear and convincing evidence.

3. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits.

4. If Claimant met her burden regarding TTD benefits, whether Respondents proved by a preponderance of the evidence that Claimant is not entitled to TTD benefits after March 10, 2021 based on termination for cause.

5. Whether PALJ Phillips' Prehearing Order requiring Respondents to pay the fee for the rescheduled DIME violated procedural due process.

STIPULATION

The parties stipulated, via email communications, to the admissibility of communications between Claimant's former counsel and the DIME physician (Ex. N and Ex. O) with the stipulation that the DIME physician cancelled both DIME appointments.[1]

FINDINGS OF FACT

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

1. Claimant is a 66 year-old woman who previously worked for Employer as a custodian.

2. On July 7, 2019, Claimant was walking between buildings when her right knee buckled. She was not pushing, pulling or carrying anything. There was no uneven terrain, and she did not slip. Claimant did not feel a pop or a snap when her right knee buckled. (Ex. M Ex. J.)

[1] Exhibits N and O were admitted during the hearing.

3. Claimant did not immediately report her alleged injury, but reported it to her supervisor sometime between July 9 and July 11, 2019.[2] Claimant's supervisor, [Redacted, hereinafter JR], completed an "Injury & Illness Prevention Plan" form regarding Claimant's injury on July 11, 2019. He specifically noted that it was an "unusual accident" and the "cause [was] not clear." JR[Redacted] offered Claimant treatment through workers' compensation, but Claimant refused, and she signed a document entitled "Medical Treatment Refusal." (Ex. M pp. 274-276). Claimant testified that this was not her signature on the form. Claimant's employment records contain multiple documents that Claimant signed – Employment Application (Ex. M p. 246), Employer Handbook acknowledgement (Ex. M p. 258), and patient information sheet (Ex. M p. 175). Each of the signatures on these documents closely resembles the signature on the form refusing medical treatment. The ALJ finds that Claimant's testimony denying this is her signature on the Medical Treatment Refusal form is not credible.

4. Claimant saw her primary care physician, Mark Unger, M.D., on July 11, 2019. The medical record for this visit was not complete, so there is no indication as to the primary reason for Claimant's visit. Nevertheless, four issues were noted under her assessment and plan: 1) anxiety; 2) chronic left-sided low back pain with left-sided sciatica; 3) osteopenia; and 4) acute pain of right knee. According to the medical record "[t]his past Sunday she was walking from one building to another at work when her right leg buckled on her. She has a remote history of cartilage tear and reports having arthroscopy for meniscus repair many years ago but she had not had any recent problems with her knee giving out on her." (Ex. I). Dr. Unger ordered an x-ray, but also strongly recommended that Claimant follow up with Employer about seeing a workers' compensation doctor for her knee issue.

5. On July 12, 2019, Claimant presented to UC Health for a diagnostic evaluation of her right knee. The x-rays showed moderate to severe tricompartment osteoarthritis. The imaging was compared to a prior right knee x-ray from May 28, 2012 and it was noted there was no joint effusion or fractures. (Ex. L).

6. On July 12, 2019, Employer's First Report of Injury was completed. (Ex M). A few days later, on July 16, 2019, Claimant went to Concentra for an evaluation of her right knee, and she was evaluated by Keith Meier, N.P. Mr. Meier noted that Claimant strained her right knee when she was "[s]imply walking briskly from building to building." Claimant told Mr. Meier she has had problems with her right knee in the past. Mr. Meier concluded that based upon his examination and the information about Claimant's job duties and mechanism of injury, "it does not appear that the presenting complaints arose out of her job duties in the course of the patient performing those duties." Claimant was placed at MMI as of July 16, 2019, and she had no work restrictions. (Ex. H).

7. There is no objective evidence in the record that Respondents were unaware of Mr. Meier's opinion that Claimant's injury was not work-related.

---

[2] The Worker's Claim for Compensation form completed by Claimant on November 17, 2020, states that she notified employer of the injury on July 9, 2019. (Ex. D). Claimant's supervisor signed the "Medical Treatment Refusal" form on July 11, 2019. (Ex. M).

8. Claimant continued to see her primary physician, Dr. Unger, for treatment. He diagnosed Claimant with right knee osteoarthritis that was "recently exacerbated by walking for longer distances than usual." (Ex. M).

9. Claimant saw Brian Lancaster, M.D., on December 31, 2019, and reported walking at work when her knee buckled and she fell. She denied feeling a pop or snap. The medical record notes that the case was evaluated by workers compensation and denied, so Claimant wanted to proceed with addressing the issue under private insurance. Dr. Lancaster indicated Claimant had predominant severe osteoarthritis present on imaging with bone-on-bone pathology. Dr. Lancaster recommended an MRI and an injection. (Ex. J).

10. Claimant had an MRI of her right knee taken at UC Health on January 14, 2020. The MRI showed: markedly truncated medial meniscus likely related to prior partial meniscectomy with prominent chondral loss; partial thickness chondral loss of the patellofemoral compartment cartilage; and small-to-moderate sized suprapatellar joint effusion. The indication was primary osteoarthritis of the right knee. (Ex. L).

11. On February 11, 2020, Claimant returned to Concentra for a "recheck of injury," and she was evaluated by Jeffery Baker, M.D. In the medical record, Dr. Baker noted "[p]atient seen on 7/16/19 for knee pain. It was felt to not be a work related issue. She states that WC insurance has decided to pay for everything. She has subsequently been seen by Dr. Lancaster at OCR. She ha[d] an injection on 1/24/20 and states she will get another one in 6 months." Dr. Baker referred Claimant for physical therapy, twice a week for three weeks. He also gave Claimant work restrictions. (Ex. H).

12. Claimant received treatment from Concentra from February 11, 2020 through August 27, 2020 and Respondents paid for the treatment. There is no objective evidence in the record as to why Claimant returned to Concentra in February 2020.

13. After treating her right knee conservatively with injections, Claimant saw C. Dana Clark, M.D., an orthopedic surgeon, on July 28, 2020. Dr. Clark diagnosed Claimant with end-stage arthritis of the right knee. Dr. Clark recommended a total right knee arthroplasty. (Ex. J).

14. On behalf of Respondents, William Ciccone, M.D., conducted a records review and opined that the request for a total right knee replacement should be denied because Claimant did not suffer a work-related injury. He specifically noted, "[i]t is unclear from the records provided why the claimant was seen again by occupational medicine on 2/11/2020 and was being treated as a work injury after it was denied on 7/16/2019. I am in agreement with the opinion given on 7/16/2019 that the claimant's symptoms are related to her preexisting knee arthritis and are unrelated to a work injury."

15. Claimant saw Dr. Baker for a recheck of her knee on August 27, 2020. Claimant told Dr. Baker she was slowly progressing, but was very fatigued due to the pain. Dr. Baker noted that Dr. Ciccone performed an IME on August 10, 2020, and determined she did not suffer a work-related injury. Dr. Baker noted "[t]his was the original determination

and I still do not understand why she was told to return for treatment." Dr. Baker explained to Claimant that he agreed with Dr. Ciccone that she had not suffered a work-related injury. He placed Claimant at MMI as of August 27, 2020, with no impairment rating. Dr. Baker subsequently completed a WC 164 form noting the MMI date of August 27, 2020 and no impairment. (Ex. H).

16. There is no objective evidence in the record that Respondents were unaware that both Dr. Ciccone and Dr. Baker opined that Claimant did not suffer a work-related injury.

17. Over the course of her employment with Employer, Claimant received multiple written warnings. On March 10, 2021, Employer terminated Claimant for the unauthorized use of a family member's login information to access a client's computer system. (Ex. M). The ALJ finds that Employer terminated Claimant for cause on March 10, 2021.

18. On September 13, 2021, Respondents filed a Final Admission of Liability (FAL). In the FAL, Respondents admit to medical benefits only. According to the FAL, medical benefits of $10,194.47 had been paid to date. The FAL specifically notes that future medical benefits and indemnity benefits are denied. The FAL lists the MMI date as August 27, *2021*, and this is based upon Dr. Bakers' August 27, *2020* report.[3]

19. Claimant objected to the FAL and requested a Division Independent Medical Exam (DIME). Alicia Feldman, M.D. was selected as the DIME physician, and the DIME was scheduled for January 25, 2022. Dr. Feldman cancelled the appointment because Respondents failed to timely provide the packet of medical records. The DIME was rescheduled for April 15, 2022. Dr. Feldman cancelled this appointment because an interpreter had been requested, but no interpreter appeared at the scheduled DIME.

20. Respondents' counsel entered his appearance in this matter on February 17, 2022. His office communicated with the DIME unit, and received confirmation that a DIME had not been rescheduled. Respondent's counsel also emailed Claimant's counsel on February 18, 2022 regarding the requested DIME and cancelled appointment. Claimant's counsel did not respond. On February 25, 2022, Respondents' counsel told his office, via email, that "it is Claimant's DIME so let's let them reset." (Ex. N).

21. Unbeknownst to Respondents' counsel, between January 25, 2022 and April 18, 2022, Insurer's adjuster, [Redacted, hereinafter PC], dealt directly with [Redacted, hereinafter RS], a non-attorney representative from Claimant's counsel's office regarding rescheduling the DIME and the request for an interpreter. On or about April 18, 2022, Respondents' counsel received notice from the adjuster that Claimant did not attend the April 15, DIME appointment. He subsequently emailed RS[Redacted], copying Claimant's counsel, and explained, among other things, that his office was not given any notice of the rescheduled DIME. Respondents' counsel further stated he would be seeking a prehearing conference on the following issues: Motion to Compel Releases and

[3] In the section denying maintenance care, Dr. Baker's August 27, *2021* report is noted. The report in evidence from Dr. Baker noting Claimant's MMI date of August 27, 2020, is his August 27, *2020* report.

Disclosures; Motion to Hold DIME in Abeyance; Motion to Compel Claimant to Pay Costs of Rescheduled DIME; and Motion to Show Cause to Terminate Dime.

22. A prehearing conference was held on April 26, 2022 on two issues: Respondents' Motion to Compel releases and essential information and Respondents' Motion to hold DIME in abeyance. PALJ Sandberg compelled Claimant to provide essential information and signed medical releases, and the DIME process was held in abeyance pending a settlement conference, until May 20, 2022. (Ex. B).

23. The parties did not settle this matter, and a prehearing conference was set on Claimant's Motion to Compel Respondents to pay the DIME rescheduling fee; Claimant's Motion to Compel Respondents to provide interpreter for the DIME, and Respondents' Motion to Compel Claimant to provide a sworn affidavit regarding the ability to speak English. PALJ Phillips denied Respondents' Motion to Compel, and granted Claimant's Motions to Compel. She found that "[i]t is undisputed that Claimant requested an interpreter in the notice and proposal for a DIME. This request was provided to the DIME Unit, to Respondents and to the DIME physician." She further found that good cause existed to reschedule the DIME and Respondents were responsible for paying the rescheduling fee. (Ex. C).

24. It is undisputed that Respondents knew a DIME appointment had been scheduled for April 15, 2022, and an interpreter was requested. There is no objective evidence in the record as to why neither Respondents, nor Claimant's counsel, included Respondents' counsel on the emails. Regardless, the ALJ finds that Respondents had proper notice that an interpreter was requested for the April 15, 2022 DIME appointment. The ALJ further finds that PALJ Phillips' Order is correct and does not violate procedural due process.

25. The DIME with Dr. Feldman occurred on September 19, 2022. Dr. Feldman opined Claimant did not sustain a work-related injury on July 7, 2019. Dr. Feldman further noted that she agrees with Dr. Baker's MMI date of *August 10, 2020*.[4] She gave Claimant a 0% impairment rating because of her opinion that Claimant did not sustain a work-related injury. Dr. Feldman specifically noted that she agreed with Dr. Baker and Dr. Ciccone that there was no work-related injury. (Ex. E).

26. F. Mark Paz, M.D., performed a records review on January 10, 2023, including a review of Dr. Feldman's DIME. Dr. Paz opined that the mechanism of injury reported was consistent with an activity of daily living and that, based on a reasonable degree of medical probability, it was not medically probable that the activity aggravated or accelerated Claimant's preexisting right knee osteoarthritis. Dr. Paz opined that the need for further treatment was attributable to the preexisting right knee osteoarthritis and not the July 7, 2019, event. (Ex. F).

27. Claimant presented no objective evidence to overcome Dr. Feldman's DIME opinion. The ALJ finds that Dr. Feldman's DIME opinion is credible and persuasive.

[4] Dr. Baker's MMI date is August 27, 2020.

28. Respondents seek to withdraw the September 13, 2021 FAL based upon the DIME report and Dr. Feldman's opinion that Claimant did not suffer a work-related injury. Specifically, Respondents assert "the conditions reported pursuant to the July 7, 2019 alleged injury were personal to the Claimant and not related to her employment. ***This is supported by the overwhelming majority opinion of the treating and examining physicians throughout the claim.*** The September 13, 2021, FAL was filed in error and should be withdrawn." (Respondent's Proposed FFCL p. 16, ¶ 9) (emphasis added).

29. As found, Mr. Meier of Concentra, placed Claimant at MMI on July 16, 2019, and opined this was not a work-related injury. It is undisputed that despite this opinion, Respondents continued to authorize medical treatment for Claimant. When Dr. Clark recommended a right total knee replacement, Respondents retained Dr. Ciccone to conduct a records review. Dr. Ciccone prepared a report dated August 10, 2020, and opined that Claimant did not suffer a work-related injury. He questioned why Claimant was being seen by occupational medicine, since the opinion on July 16, 2019 was that this was not a work related injury. On August 27, 2020, ATP, Dr. Baker placed Claimant at MMI with no impairment rating. He too noted that it was unclear why Claimant was told to return for treatment.

30. The ALJ finds that Respondents had notice on July 16, 2019, August 10, 2020, and August 27, 2020 that Claimant's treating providers opined she did not suffer a work-related injury. Despite three different ATPs opining Claimant did not suffer a work-related injury, Respondents admitted liability and paid Claimant medical benefits, as evidenced by the September 13, 2021 FAL.

31. Respondents, however, assert that the FAL was filed in error and should be withdrawn. As found, Respondents were on notice since July 16, 2019 that the providers opined this was not a work-related injury. There is no evidence that Respondents were unaware of Mr. Meier's opinion, Dr. Ciccone's opinion, or Dr. Baker's opinion that Claimant did not suffer a work-related injury when they filed the FAL. Dr. Feldman reviewed and relied on these medical opinions in her DIME report, and she reached the same conclusion. There is no objective evidence in the record that Respondents were unaware multiple providers opined Claimant did not suffer a work-related injury, and they only became aware of this from Dr. Feldman's DIME report.

32. The ALJ finds that there is no objective evidence in the record that Respondents filed the FAL in error.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the

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

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

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

Withdrawal of Admission of Liability

If an admission of liability is contested, the matter must be litigated before an ALJ, who may permit or deny withdrawal at her discretion. *Rocky Mountain Cardiology v. ICAO*, 94 P.3d 1182 (Colo. App. 2004); *HLJ Mgmt. Group v. KIM*, 804 P.2d 250 (Colo. App. 1990). A party seeking to modify an issue determined by general or final admission shall bear the burden of proof for any such modification by a preponderance of the evidence. § 8-43-201(1), C.R.S. Respondents assert, however, that "Claimant has the burden to overcome the DIME on MMI and impairment by clear and convincing evidence on causation *before* any threshold compensability is addressed." (Proposed FFCL p. 14). It is unclear to the ALJ what Respondents are specifically arguing. Regardless, Claimant challenged the FAL to overcome the MMI date and impairment rating. Claimant never challenged compensability, and it is illogical to think Claimant would challenge compensability. Respondents' argument is without merit. Respondents filed the Application for Hearing, and Respondents bear the burden to prove by a preponderance of evidence that they filed the FAL in error and should be allowed to withdraw the FAL.

Respondents seek to withdraw the September 13, 2021, FAL on the basis that there was no compensable injury per the opinions of the DIME physician, the ATP Dr. Baker, Dr. Ciccone, Dr. Lancaster, and Dr. Paz. Respondents' position is that there was no compensable injury in the first place and the FAL was filed in error.

If a claimant does not timely object to the final admission in a timely fashion, admitted issues are closed and may only be reopened in accordance with § 8-43-303, C.R.S. In other words, respondents are in no position to challenge their own final admission where claimant has not objected. *Perry Kizer v. Phil Long Ford*, WC 4-391-990 (Nov. 19, 2001); *Weber v. Mesa Cnty. Sheriff's Dept.*, W.C. 3-113-179 (May 28, 1998). Here, Claimant objected to the FAL and requested a DIME to address MMI and impairment. Claimant never objected to the issue of compensability. Regardless, Respondents have failed to prove by a preponderance of the evidence that the FAL was filed in error. Notably, Respondents were aware of the opinions of Mr. Meier, Dr. Baker, and Dr. Ciccone, all of whom opined that Claimant did not suffer a compensable injury, ***before*** Respondents filed the FAL. Dr. Feldman and Dr. Paz did not offer any new opinion regarding compensability. Thus, Respondents have no basis to argue that the FAL was filed in error. As found, Respondents failed to prove by a preponderance of the evidence that the FAL was filed in error and should be withdrawn.

Overcoming DIME Opinion

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colo. Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy,* WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start,* WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café,* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). As found, Claimant presented no objective evidence to challenge Dr. Feldman's DIME opinion regarding MMI and impairment. Claimant failed to overcome Dr. Feldman's DIME opinion by clear and convincing evidence.

Temporary Total Disability (TTD) Benefits

To qualify for temporary disability benefits, an injured worker must establish three things: 1) the work injury caused the disability; 2) claimant left work as a result of the injury or has reduced wages as the result of the injury; and 3) temporary disability is total and lasts for more than three working days. *Colo. Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Employer properly accommodated all of Claimant's restrictions. Claimant remained working modified duty under restrictions throughout the duration of her remaining employment with Employer. There is no objective evidence in the record that Claimant lost time after the injury on July 9, 2019. Thus, Claimant has failed to prove by a preponderance of the evidence that she is entitled to TTD benefits.[5]

Appeal of June 24, 2022 Prehearing Order

Interlocutory prehearing orders are reviewable by an ALJ. *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998). PALJ Phillips granted Claimant's motion and compelled Respondents to pay the cost of rescheduling a DIME appointment and providing an interpreter. It is undisputed that a representative from Claimant's attorney's office, coordinated the DIME with the adjuster without advising Respondents' counsel. W.C.R.P. 11-4(A)(8) states, in pertinent part: "[t]he requesting party shall immediately notify the DIME Unit and the opposing party in writing of the date and time of the examination." W.C.R.P. 1-4(A) states: "[w]henever a document is filed with the Division, a copy of the document shall be mailed to each party to the claim and attorney(s) of record, if any."

The Colorado Supreme Court has held that, where a party is represented by counsel, due process requires that the attorney of record be provided with notices since a party is entitled to rely on his attorney. *Mountain States Tel. & Tel. v. Dep't of Labor & Employment*, 520 P.2d 586 (Colo. 1974). The court stated:

> "It follows that when a client has employed an attorney to present his defense to claims in litigation, and notice of this representation by entry of appearance has been given to the opposing party and the court, or other adjudicatory body, all notices required to be given in relation to the matters in controversy, including notice of the decision and entry thereof, should be given to the attorney of record. This basic requirement flows from the attorney-client relationship by which the management, discretion and control of all procedural matters connected with the litigation is invested in the attorney. By virtue of such delegation of authority, the client is bound by the actions of his attorney. (citations omitted). If the attorney through no fault of his own is denied notice of the critical determination in the case, and by reason thereof fails to take procedural steps necessary to preserve his client's rights, fundamental unfairness results. Procedural due process cannot be satisfied when counsel, upon whom a client is entitled to rely, is not notified of decisions affecting his client's interests."

---

[5] As found, Claimant was terminated for cause on March 10, 2021.

Where a party denies receipt of notice, the issue becomes one of fact for determination by the ALJ. *Chacon v. R&L Carriers Shared Servs*, W.C. No. 5-178-236 (July 25, 2022). If the issue turns on credibility determinations, then the ALJ is obliged to hold a hearing to resolve the matter. *See Trujillo v. Indus. Comm'n*, 735 P.2d 211, (Colo. App. 1987). Respondents assert that defense counsel was never given notice of the DIME appointment and therefore could not schedule an interpreter on Respondents' behalf. While the ALJ does not take lightly that Claimant's previous counsel and RS[Redacted] did not respond to Respondents' counsel's emails, this is not a sufficient basis to find that due process was violated. As found Respondents had notice the DIME had been rescheduled and that an interpreter was requested, and one was not provided. Respondents could have also notified ***their*** counsel of the communications, just as Respondents notified counsel that there were issues with the April 15, 2022 DIME appointment. PALJ Phillips' Order does not violate procedural due process.

ORDER

It is therefore ordered that:

1. Respondents failed to prove by a preponderance of the evidence that the admission of liability should be withdrawn.

2. Claimant failed to overcome the DIME opinion by clear and convincing evidence.

3. Respondents proved by a preponderance of the evidence that Claimant was terminated for cause.

4. Claimant failed to prove by a preponderance of the evidence that she is entitled to TTD benefits, and her claim for TTD benefits is denied.

5. Respondents' appeal of the June 24, 2022 Prehearing Order is denied.

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

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

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

DATED: October 3, 2023

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

ISSUES

1. Whether Claimants proved by a preponderance of the evidence that each sustained an injury arising out of and in the course of their employment on June 29, 2021.

2. Whether Claimants proved by a preponderance of the evidence that the treatment that each received at Sky Ridge Medical Center on June 29, 2021, was reasonably necessary to cure and relieve them of the effects of the June 29, 2021 motor vehicle accident.

FINDINGS OF FACT

1. Claimants [Redacted, hereinafter MC] and [Redacted, herainfter JC] are married and reside together in Arvada, Colorado. Both worked for Respondent-Employer and were injured in a motor vehicle accident on June 29, 2021.

2. At the time of the accident, Claimants were commuting from home to work in a vehicle provided by Respondent-Employer. JC[Redacted] was driving, and MC[Redacted] was riding as a passenger. Claimants would regularly commute to work together in the company vehicle.

3. MC's[Redacted] position with the Employer was as a pavement marking technician III. His responsibilities included working as a foreman, commercial driving, managing timecards, and submitting job reports. JC[Redacted] was also a pavement marking technician III, and her responsibilities included driving company equipment and trucks, generating reports, performing inspections and maintenance, implementing traffic striping, and mentoring and training employees.

The Employer's Safety Handbook

4. The Employer's Safety Handbook provided regarding "Vehicle Use" that:

> The use of a company vehicle is intended for official company business only. Company vehicles shall not be used for personal purposes except when commuting between home and business for those co-workers specifically assigned a vehicle for that purpose. Incidental stops, such as at a convenience store, restaurant, financial institution, or gas station are not considered to be violations of this policy. Drivers must abide by the Federal DOT hours of service regulations. Drivers must comply with applicable state and local laws regarding cell phone usage while driving.

5. The Safety Handbook also prohibited transportation of non-coworkers in company vehicles, including non-coworker family members, and prohibits drivers from making "incidental stops at locations the public might perceive as inappropriate." The Safety Handbook also indicated that fuel cards were issued for each vehicle, implying that Respondent-Employer paid for the gasoline for the vehicle.

MC's[Redacted] testimony

6. At hearing, MC[Redacted] testified on his own behalf, as well as in support of JC's[Redacted] case. His testimony can be summarized in pertinent part as follows.

7. MC[Redacted] is a supervisor and pavement marking technician for Respondents. He is paid hourly. His responsibilities include supervising the crew, completing timecards, and recording truck numbers to submit to his boss. His primary responsibility is to make sure his crew returns home safe at the end of their shift. MC[Redacted] would supervise eight people.

8. MC[Redacted] and JC[Redacted] would typically get to the workplace by 4:00 P.M. by commuting to work in a company pickup truck. Their crewmembers would show up at the workplace by 6:00 P.M. The reason they would show up to work early was to prepare for the shift.

9. The truck in which MC[Redacted] and JC[Redacted] would commute to work was a specific truck assigned by Respondent-Employer. MC[Redacted] was instructed that he was not to use the truck for personal purposes.

10. Every morning, during their commute in the company truck, MC[Redacted] would have a pre-safety meeting with his wife, JC[Redacted]. JC[Redacted] was a supervisor on MC's[Redacted] crew. JC[Redacted] would assist MC[Redacted] with anything MC[Redacted] could not complete on his own. Additionally, she would deal directly with employees. During the commute from home to the shop, MC[Redacted] and JC[Redacted] would discuss the plan for the day, what they would need to do to be productive and safe, and the performance of their crewmembers. MC[Redacted] testified that he and his wife could wait until they arrived at the shop before having that conversation, but that it would put them behind by an hour. If the jobsite for the day was within the Denver metro area, MC[Redacted] and JC[Redacted] would first clock in at the Englewood facility and then drive out to the worksite in a different vehicle to perform the work. If, however, the jobsite for the day was outside of the Denver metro area, MC[Redacted] and JC[Redacted] would clock in as they left their home and would drive directly to the jobsite.

11. On the date of injury, MC[Redacted] and JC[Redacted] were driving from their home in Arvada to the Employer's Englewood facility at Peoria and I-470. They

were discussing work on the entire commute, including the job performance of their employees and some prior projects. The only personal item they discussed was the fact that they were working on their anniversary. MC[Redacted] and JC[Redacted] were not paid for the time they spent commuting, even though they were discussing work during their commute, nor were they required by the Employer to have pre-shift meetings in the vehicle on the way to work. They were to arrive at the Englewood facility by 4:00 P.M. However, at 3:40 P.M., their vehicle was involved in a motor vehicle accident, and both MC[Redacted] and JC[Redacted] were injured.

12. On the date of injury, both MC[Redacted] and JC[Redacted] departed their home in the company pickup truck. JC[Redacted] was driving. MC[Redacted] was in the passenger seat writing down the employees' hours and truck assignments.

13. The Claimants and their team were to stripe a highway that day. Among the tools MC[Redacted] had with him were his backpack with the employer's emblem on it, tape measures, headlamps, a laser light, a flashlight, and paperwork for "tank charts." MC[Redacted] would carry those tools with him at all times no matter where he was just in case he would need them. He would carry a second backpack with paperwork, his work phone, and his iPad.

14. MC[Redacted] testified that he went to the emergency room at Sky Ridge Medical Center for treatment immediately after the accident. He had internal bleeding and a portion of his intestines were resected at the hospital. The Court finds these injuries to be urgent in nature and the treatment at Sky Ridge Medical Center to be therefore reasonably necessary and related.

15. The Court finds MC's[Redacted] testimony credible.

JC's[Redacted] testimony

16. JC[Redacted] testified on her own behalf and in support of MC's[Redacted] case. Her testimony was largely consistently with MC's[Redacted]. Her testimony is summarized in pertinent part as follows.

17. JC[Redacted] testified that her job was primarily administrative work, including communicating with employees regarding personnel issues.

18. JC[Redacted] added that she was typically the one who would drive the truck in the morning while MC[Redacted] would ride in the passenger seat and work on his phone.[1] Both MC[Redacted] and JC[Redacted] would field text messages and phone calls from their crewmembers during the commute. On the morning commute, the two typically did not talk for the first forty-five minutes of the trip so that MC[Redacted] could perform work on his phone. During the drive, JC[Redacted] prepared a checklist of tasks to perform that day. MC[Redacted]

[1] MC[Redacted] would typically drive the truck on the way home after the shift.

and JC[Redacted] had to do the planning on the way to work because once they reach the Englewood facility they would be saturated with other work. JC[Redacted] acknowledged that she was not required by her employer to conduct a meeting with MC[Redacted] during her morning commute.

19. On the morning of the accident, JC[Redacted] performed a pre-trip inspection of the truck, including checking the fluids, as was required by the Employer each time the truck was driven. She testified that prior to driving the truck, including for the morning commute, she would have to log into the employer's electronic fleet monitoring system. JC[Redacted] explained that the system would monitor driving behaviors. Despite being engaged in work during the morning commute, JC[Redacted] testified that she was not permitted to clock in until reaching the employer's facility, since that day's jobsite would be in the Denver metro area.

20. JC[Redacted] testified that she would have clocked in around 3:45 P.M. were it not for the motor vehicle accident.

21. JC[Redacted] was treated at Sky Ridge Medical Center following the accident for multiple injuries, including ruptured prosthetics. The Court finds these injuries to be urgent in nature and the treatment at Sky Ridge Medical Center to be therefore reasonably necessary and related.

22. The Court finds JC's[Redacted] testimony to be credible.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the

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

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

Compensability

An injury must arise out of, and in the course of, the Claimant's employment to be compensable. § 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 2 (Colo. 1967). One exception, however, to the coming and going exclusion is when "special circumstances" create a causal relationship between the employment and the travel beyond the employee's arrival at work. *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1992); *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989). Where Claimant is injured while on travel status, under certain circumstances that injury is compensable. *SkyWest Airlines, Inc. v. Indus. Claim Appeals Office*, 487 P.3d 1267 (Colo. App. 2020).

The *Madden* Court identified several factors to be evaluated to determine whether special circumstances exist. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. 977 P.2d at 865. The question of whether Claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Elec.*, W.C. 4-939-901-03 (ICAO February 22, 2016). The *Madden* Court reasoned that "the going to and from work rule is such a fact-specific analysis that it cannot be limited to a predetermined list of acceptable facts and circumstances. . . . the proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act." 977 P.2d at 864.

In *Industrial Commission v. Lavach*, 439 P.2d 359, 165 Colo. 433 (Colo. 1968), an employee was injured during his commute home in his employer's vehicle. The employer in that case provided the employee with a pickup truck, all expenses paid, for delivering packaging materials to customers and preparing estimates for local moving jobs. The employee was permitted to commute between his home and work in the truck, and the claimant would occasionally deliver material for the employer while commuting home from work, though he was not making any such deliveries on the evening of the accident. The Colorado Supreme Court, citing the facts that the employee was provided the truck at the employers expense and that the employee would sometimes make deliveries during his commute home, concluded that the scope of the employee's employment had enlarged to include the employee's transportation to and from work.

In *Varsity Contractors and Home Ins. Co. v. Baca*, 709 P.2d 55 (Colo.App.1985), an employee was injured during his commute home. The employee had stopped at a bar to have drinks with a friend on his way home. The employee had planned to go home, shower, change clothes, and await a call from his employer to return to work. However, he was involved in a motor vehicle accident after leaving the bar. The Colorado Court of Appeals agreed that the nexus between the accident and the employee's employment was insufficient to establish compensability.

The Court of Appeals reached a different outcome in *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo.App.1989). In *Burak*, the employee died in a motor vehicle accident while commuting from his home in Fort Collins to his office in Laramie in a vehicle provided by his employer. In addition to providing the vehicle, the employer also provided a credit card with which the employee could purchase fuel for the vehicle. The employee would frequently work from home and during his commute. At the time of the accident, he was dictating into a recording device. The Court of Appeals found the case distinguishable from *Varsity Contractors* in that the employee's home car had become part of the workplace, thus bringing the accident within the scope of the employment. *Id.* at 690.

The Court finds the facts in the present case most analogous to those in *Burak*. The Claimants, like the employee in Burak, were provided with a company vehicle and fuel card for commuting between home and work. Also, like the employee in *Burak*, the Claimants were in fact working at the time of the accident, as they were conducting their pre-shift meeting in the vehicle. Although Respondents argue that there was no dictating device or other documentary evidence of the Claimants' pre-shift meeting, the Court does not find the distinction meaningful, as both Claimants credibly testified that they routinely conducted pre-shift meetings during the morning commute and were in fact conducting such a meeting on the day of the accident.

Furthermore, the fact that Respondent-Employer required Claimants to log into the electronic fleet monitoring system prior the commute, prohibited them from using the vehicle for personal errands, required them to conduct a pre-trip inspection even prior to the commute, and required them to be mindful of their driving hours during the commute so as not to violate the federal DOT hours of service regulations, all suggest that the

employer maintained some level of control over the manner in which the Claimants commuted to work.

Based on the totality of the facts, the Court finds and concludes that the Claimants' pre-shift commute on June 29, 2021, was more probably within the scope of the Claimants' employment with Respondent-Employer. The Court therefore finds and concludes that the Claimants' motor vehicle accident and resulting injuries on June 29, 2021, arose out of and in the course of their employment with Respondent-Employer.

Medical Treatment

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

Although respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

As found above, both Claimants credibly testified that they sustained serious injuries following the accident, including MC[Redacted] sustaining internal bleeding and JC[Redacted] sustaining ruptured prosthetics. The Court also finds these injuries to be most likely urgent in nature and the treatment at Sky Ridge Medical Center to be therefore reasonably necessary and related.

ORDER

It is therefore ordered that:

1. Both Claimants sustained compensable injuries in the motor vehicle accident on June 29, 2021.

2. Claimants' treatment at Sky Ridge Medical Center on June 29, 2021, was reasonably necessary and related to the injuries Claimants sustained on the same date. Respondents shall pay for the treatment Claimants' received at Sky Ridge Medical Center on June 29, 2021.

3. Respondents shall pay for all other medical treatment reasonably necessary to cure and relieve Claimants of their June 29, 2021 injuries.

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

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

DATED: October 4, 2023

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

ISSUES

I. Whether the issue endorsed on Claimant's April 19, 2023 Application for Hearing is within the OAC's limited jurisdiction to determine following settlement of the claim on a full and final basis.

II. If so, whether Claimant established, by a preponderance of the evidence, that Respondents were required to file a Petition to Modify, Suspend or Terminate Compensation to stop his temporary disability benefits.

Because the undersigned ALJ concludes that the OAC no longer has jurisdiction over this claim and Claimant failed to establish that Respondents were obligated to file a Petition to Modify, Terminate or Suspend Compensation, if it had jurisdiction, this order does not address Respondents' contention that Claimant is barred by the doctrine of *res judicata* from litigating issue number II above.

FINDINGS OF FACT

1. This case has a lengthy and complex history. There have been multiple hearings and several post-hearing requests for review, including an appeal to the Colorado Court Appeals and a Petition for Writ of Certiorari to the Colorado Supreme Court. The ALJ was assisted in understanding the history of this claim by reference to the Chronological History of the file maintained by the Division of Workers Compensation and the materials contained in the OAC files. In order to address the jurisdictional issue raised by Respondents, it is necessary to provide a detailed statement regarding Claimant's injury and the complete procedural history of the claim.

2. Claimant, as the finance manager for Employer, suffered admitted injuries on March 31, 2009, when he was hit on the head by a retractable garage door. Claimant, was attempting to secure a repair estimate when he entered a repair shop through a manual garage door. As Claimant lifted the door and stepped into the shop, the door came back down and hit him on the head. (Resp. Ex. E, p. 3). As referenced, liability for Claimant's injuries was admitted and he proceeded through a protracted course of care to treat reported headaches, neck pain and a constellation of cognitive complaints.[1]

3. On April 11, 2011, ALJ Bruce Friend presided over a hearing to determine whether Respondents were liable for a neck surgery performed by Dr. William Choi on November 16, 2010. (Clmt's. Ex. 1). Judge Friend issued an Order containing Findings of Fact and Conclusions of Law on May 25, 2011. (Clmt's. Ex. 1, p. 50). ALJ Friend

[1] The ALJ adopts and incorporates by reference, the Factual Findings of ALJ Spencer regarding the nature and extent of Claimant's medical, psychological and cognitive treatment as set out in his December 31, 2020 Order. (Resp. Ex. E).

credited the opinions of Dr. Douglas Scott and Dr. John Douthit to find and conclude that the cervical spine surgery performed by Dr. Choi was not reasonably necessary or related to Claimant being struck on the head by the falling garage door. *Id.*

4. Claimant filed a Petition to Review Judge Friend's Order and the matter was taken up by the Industrial Claim Appeals Office (ICAO). The ICAO affirmed ALJ Friend's Order on November 7, 2011. The ICAO Panel found no error in Judge Friend's credibility determination and held his findings and conclusions were supported by substantial evidence. Claimant did not appeal further and ALJ Friend's Order became final. (Resp. Ex. F, p. 2).

5. According to medical reports authored by Drs. Jill Castro and Howard Entin, Claimant reached maximum medical improvement (MMI) for the sequela related to his neck and head injury on April 18, 2011.[2] (Resp. Ex. K). Based upon the MMI reports of Drs. Castro and Entin, Respondents filed a Final Admission of Liability on April 11, 2012. *Id.* In addition to reflecting liability for various periods of temporary partial disability, the FAL reflected that Respondents admitted liability for temporary total disability (TTD) benefits beginning January 4, 2010 and running through April 17, 2011. *Id.* Because Claimant had reached MMI for all components related to his industrial injuries per the opinions of Drs. Castro and Entin on April 18, 2011, Claimant's TTD benefits were terminated as of 4/17/2011 pursuant to statute and rule of procedure. *Id.* The FAL also admitted liability for whole person impairment. *Id.* The FAL computed the value of the impairment ratings as $35,849.35 (10% physical) and $17,924.68 (5% psychiatric). However, the FAL also noted benefits were capped at $75,000 pursuant to § 8-42-107.5, and Claimant had already been paid $107,139.96 in TTD and TPD (temporary partial disability). The FAL claimed an overpayment of $38,775.87 which "will be applied towards any future benefits." A copy of the FAL was mailed to Claimant at his address of record of: [Redacted, hereinafter CA]. *Id.* By this date, Claimant was represented by Attorney, [Redacted, hereinafter GY].[3] Accordingly, the Division of Workers Compensation mailed the FAL to GY[Redacted] at: [Redacted, hereinafter AS]. *Id.*

6. Claimant objected to the 4/11/2012 FAL and GY[Redacted], filed an Application for Hearing on April 17, 2012. (Resp. Ex. L).[4] He also requested a Division Independent Medical Examination (DIME). (Resp. Ex. F, p. 2). Based upon the statement that Claimant would seek to continue any hearing as a DIME on PPD/MMI was pending,

---

[2] Per the report of Dr. Entin dated 4/2/2012, Claimant had reached psychiatric MMI on 6/14/2010, however, per the 1/10/2012 report of Dr. Castro, Claimant did not reach MMI for the physical components of his injury until 4/18/2011.

[3] GY[Redacted] also represented Claimant in a third-party personal injury suit against the property owner of auto repair shop. Respondents intervened in the third-party litigation to advance and protect its subrogation interest. [Redacted, hereinafter CS] represented Respondents in the third-party case. The third-party case went to mediation before Judge Sandy Brooke on January 28, 2012. GY[Redacted] represented Claimant. The suit settled for $110,000. Insurer's lien at that time was $200,000, but it agreed to compromise its subrogation claim for $20,000. (Resp. Ex. E, pp. 6-7, FOF ¶¶ 26-27).

[4] Contrary to Respondents' assertion, as reflected in their post-hearing position statement, Claimant did endorse TTD from April 17, 2011 and ongoing as an issue for determination in his April 17, 2012 Application for Hearing.

the ALJ infers that the hearing on Claimant's April 17, 2012 Application was continued and ultimately abandoned. (Resp. Ex. L, p. 1). Claimant would also abandon the DIME process and apply for a hearing claiming entitlement to permanent total disability (PTD) benefits on May 29, 2012. (Resp. Ex. F, p. 2). In preparation for his PTD hearing, Claimant saw Dr. Lynn Parry for an independent medical examination (IME) on July 4, 2012. Dr. Parry documented a lengthy history of Claimant's treatment and cataloged numerous ongoing problems she believed were related to the accident. Dr. Parry noted "two major residual problems secondary to his industrial accident that have not been adequately addressed. Primarily his nausea and vestibular dysfunction." Dr. Parry ultimately opined that Claimant was not at MMI. She recommended that he return to vestibular therapy. (Resp. Ex. E, p. 9, FOF ¶ 41).

7. Dr. Henry Roth performed an IME for Respondents on March 4, 2013. Dr. Roth had previously issued several Rule 16 reports on the claim. Claimant completed a lengthy questionnaire before the evaluation. Dr. Roth spent one hour and 43 minutes with Claimant conducting the interview and examination. Dr. Roth also reviewed hundreds of pages of medical records and subsequently issued a 94-page report. Claimant's chief complaints were headaches, facial pain, neck pain, problems thinking, changed behavior, depression, sleep disturbance, nausea, and vision problems. Claimant complained "bitterly" about headaches and his vision. Dr. Roth opined none of Claimant's ongoing complaints were related to the accident. He opined the injury mechanism was minor and insufficient to injure Claimant's visual system, auditory system, vestibular system, or cause cognitive impairment. (Resp. Ex. E, p. 9, FOF ¶ 42).

8. Dr. Victor Chang also issued a supplemental IME report on March 18, 2013. He opined Claimant suffered a concussion in the accident, "but his ongoing symptoms should not be considered as a manifestation of the concussion itself." He noted Claimant's presentation was "atypical for MTBI," and concluded, "[Claimant's] symptoms are not related to the concussion. It is more probable than not that his ongoing symptoms are related to mental/behavioral and/or motivational factors." He also opined Administrative issues commonly seen in litigation" were also likely contributing to Claimant's presentation. He did not think Claimant had any permanent impairment related to a concussion but agreed with Dr. Entin's decision to provide a 5% rating for "a mental/behavioral condition related to the work injury." He opined that any residual symptoms of the MTBI had resolved and no further treatment was expected to improve Claimant's condition. Dr. Chang disagreed with a previously expressed opinion issued by Dr. David Zierk that Claimant could not work in any capacity. He also commented,

> [Claimant] has previously submitted 2 large binders that detailed his treatment since his injury. At first, I thought these binders were prepared by an attorney's office, as the contents were very organized and had numerous cross-references. I later discovered that these binders had been prepared by [Claimant] himself, which I found to be quite impressive for any person. The ability for a layperson to obtain, organize, cross-reference, draw conclusions, and rebut opinions made by medical providers and legal experts was, in my

> professional opinion, something that would be difficult for any non-legal professional to complete. This compilation of work submitted by [Claimant] demonstrated a high degree of cognitive functioning, including attention to detail, organizational skills, and complex deductive reasoning. These abilities would indicate readiness to perform in a competitive workplace.

(Resp. Ex. E, pp. 9-10, FOF ¶ 43).

9. On March 26, 2013, Claimant and his Attorney, GY[Redacted] along with Respondents Counsel, [Redacted, hereinafter EA] agreed to settle the claim on a full and final basis for a lump sum payment of $182,500.00 plus a contingent Medicare Set-Aside (MSA) agreement. The parties further agreed to leave the medical portion of the claim open pending a response from the Centers for Medicare and Medicaid Services (CMS) regarding the proposed MSA. Respondents retained the right to fund an MSA per CMS requirements or leave Claimant's medical benefits open indefinitely. (Resp. Ex. E, p. 10, FOF 44; Resp. Ex. F, p. 4, Resp. Ex. M, p. 9, ¶ 9(A).

10. The settlement documents contained the following language:

> Claimant sustained or alleges injuries or occupational disease as arising out of and in the course of employment with the employer on or about March 31, 2009 including, but not limited to, head, neck, shoulder, back, knee, psychological, cognitive, and G.I. System. *Other disabilities, impairments and conditions that may be the result of these injuries or diseases but that are not listed here are, nevertheless, intended by all parties to be included in and resolved FOREVER by this settlement.* (emphasis added).

(Resp. Ex. E, p. 10, FOF 45); Resp. Ex. F, p. 4).

11. In consideration for the $182, 500.00, Claimant was paid under the terms of the settlement, he acknowledged that he was rejecting, waiving, and forever giving up the right to claim all compensation to which he might be entitled for each injury or occupational disease he claimed, including: Temporary total and temporary partial disability benefits to compensate Claimant for time he missed from work. (Resp. Ex. M, p. 8).

12. The settlement documents also provided that in keeping with the requirements of the WC Act, the settlement could only be reopened on the grounds of "fraud or mutual mistake of material fact". (Resp. Ex. M, p. 9; Resp. Ex. E, p. 10, FOF ¶ 45; Resp. Ex. F, p. 4). Finally, the agreement stated, "Claimant has reviewed and discussed the terms of the settlement with claimant's attorney, has been fully advised, and understands the rights that are being given up in this settlement." (Resp. Ex. M, p. 10) *Id.* Claimant executed the agreement on April 26, 2013, and it was approved by the Division on May 9, 2013. (Resp. Ex. M, pp. 10, 12). Upon approval by the Division of

Workers' Compensation, Respondents forwarded the lump sum check of $182,500.00 to Claimant's Counsel on June 12, 2013. (Resp. Ex. M, pp. 6-7).

13. An MSA proposal in the amount of $32,178.00 was submitted to CMS for approval. CMS rejected the proposed payment as insufficient, noting instead that a total of $102,126.00 would need to be set-aside to fully protect Medicare's interests. Insurer exercised its rights under the settlement to not fund the MSA at that time. Ultimately, Respondents agreed to fund a self-administered structured MSA under the terms required by CMS. The MSA was funded with a lump sum payment $8,881, plus $4,238 per year for 22 years, if Claimant is living. Claimant reviewed and agreed to the terms of the structured settlement regarding his medical benefits as evidenced by his May 21, 2015 signature. (Resp. Ex. M, p. 3). The parties' then filed a Joint Motion to Amend the Settlement Documents on April 29, 2015 and the Division approved the amended agreement on May 21, 2015. (Resp. Ex. E, p. 11, FOF ¶ 48; Resp. Ex. F, p.5). The claim then closed as all benefits, compensation, penalties and interest to which Claimant might be entitled as a result of his injuries, including medical and other health care benefits had settled on a full and final basis.

14. On May 7, 2020, Claimant, proceeding *pro se*, filed a Petition to Reopen and an Application for Hearing requesting that the settlement be set-aside on the grounds of fraud and mutual mistake of material fact. The Petition and Application for Hearing were received in the Colorado Springs Office of Administrative Courts on May 11, 2020 and a hearing on Claimant's Petition to Reopen was held before ALJ Patrick Spencer over four nonconsecutive days on September 16, October 27, November 9 and November 13, 2020. The hearings were conducted remotely via video/teleconference due to the COVID-19 pandemic. (See generally, Resp. Ex. E).

15. At hearing Claimant asserted multiple instances of "fraud, misrepresentation, or concealment," including:

- "Someone had to cut and paste Claimant's name" onto another patient's medical record and gave it to Dr. Douthit for his IME.

- Respondents "manufactured" evidence, including a prescription made by a physician who never treated Claimant, "with the intent Dr. Roth would act upon false information and produce opinions and reports."

- Judge Friend's May 25, 2011 FFCLO was "altered and falsified by a second author." This allegedly falsified Order was then allegedly used to influence and limit benefits that might otherwise have been available to Claimant.

- Respondents' counsel "recklessly" misrepresented to Dr. Castro that Judge Friend found "the neck is not a compensable component" of his claim.

- Respondents did not regularly send copies of Claimant's medical records to Dr. Castro or Dr. Entin.

- Respondents intentionally presented "incomplete" medical files to ATPs and IMEs to induce them to act to Claimant's detriment.

- Respondents concealed medical records from Claimant's attorney.

- Dr. Roth produced reports for Respondents without having "all medical records."

- Respondents violated *Samms* by corresponding with Claimant's ATPs.

(Resp. Ex. E and F).

16. Following hearing, ALJ Spencer concluded that Claimant had been represented by counsel through much of his claim, including from April 2012 (when the FAL was filed) through the date of the settlement. Claimant neither argued nor suggested he was not adequately informed of the progress of his case. In fact, the record documents several instances of communication between Claimant and his counsel. Accordingly, ALJ Spencer concluded that the persuasive evidence demonstrated that Claimant was "aware of and participated in the tactical and strategic decisions regarding his case through the time of settlement". (Resp. Ex. E, pp. 11-12, FOF 55). Based upon the evidence presented, ALJ Spencer found no persuasive evidence to support any intent on Respondents part to "deceive, misrepresent or conceal material information" relating to the settlement. Thus, ALJ Spencer concluded that Claimant had failed to establish any fraud which would justify reopening the settlement.[5] Likewise, ALJ Spencer concluded that the evidence presented failed to prove that there were any mutual mistakes of material fact to support reopening the settlement. (Resp. Ex. E and F). Accordingly, ALJ

[5] In concluding that Claimant had failed to establish fraud as required by statute to set the settlement aside and reopen the claim, ALJ Spencer specifically considered Claimant's contention that ALJ Friend's May 25, 2011 order had been "altered and falsified" because there were multiple versions of the order containing a signature of ALJ Friend. In addressing this as part of his December 31, 2020 order, ALJ Spencer, notes: "Claimant refers to multiple "versions" of Judge Friend's May 25, 2011 Order. Claimant believes the version at Ex. 18-1 to 18-4 is the "real" Order. The ALJ disagrees. The version referenced by Claimant is incomplete and contains no findings pertinent to the issue being decided, *i.e.*, Respondents' liability for the surgery recommended by Dr. Choi. Judge Friend's true order is located at multiple places in the exhibits and pleadings, including at 18-5 through 18-15. It is then reproduced twice at 18-16 through 18-40, with slightly different formatting. At the time of Judge Friend's FFCLO, the OAC served its orders electronically in Word format. The small formatting differences in the multiple copies of the Order were probably the result of the document being opened and printed on a computer with a different version of Word, or different installed fonts. There is no persuasive evidence anyone "altered" or "falsified" Judge Friend's Order. In this case, Claimant reviews his assertion that ALJ Friend's order was altered and he includes the various copies of the May 25, 2011 order in his hearing exhibits. After careful review of Claimant's Exhibit 1, this ALJ concurs with ALJ Spencer to find and conclude that the likely explanation for there being several copies of ALJ Friends order in slightly different formats with different fonts is that the order was opened and copied from a different computer with different software versions. Like ALJ Spencer, this ALJ is not convinced that the true and accurate version of ALJ Friend's May 25, 2011 Order is contained at Ex. 1, pp. 1-5, because this version of the order is devoid of important findings of fact regarding the issues litigated and contains nothing in the way of a Finding of Fact at paragraph 4 and 5. (Clmt's. Ex. 1, pp. 1-5).

Spencer denied and dismissed Claimant's request to reopen the approved settlement in this claim. *Id.*

17. Claimant timely appealed to the ICAO. On April 26, 2021 a panel from the ICAO affirmed ALJ Spencer's determinations prompting Claimant to seek review of the final order of the ICAO by the Colorado Court of Appeals. The Court of Appeals considered 14 separate arguments advanced by Claimant in support of his request to reverse the ICAO's order. (Resp. Ex. G, pp. 13-16). These enumerated arguments along with several others were rejected by the Court in affirming the Panel's order in an unpublished opinion announced February 3, 2022. It is noted that the Court, to the extent that Claimant raised a challenge to the 2011 order of the ICAO affirming ALJ Friend's order, concluded it did not have jurisdiction to consider such a challenge "[b]ecause [Claimant] didn't timely appeal that order". Citing, *Cornstubble v. Indus. Comm'n.*, 722 P.2d. 448, 450 (Colo. App. 1986) (concluding that the Court of Appeals was deprived of jurisdiction to consider the appeal because the claimant failed to seek review within the statutory period contained in former section 8-53-111(8), which is substantially similar to section 8-43-301(10)).

18. Claimant appealed to the Colorado Supreme Court; however, the Petition for Writ of Certiorari was denied by Order of the Court on May 16, 2022. (Resp. Ex. H, p. 1).

19. On June 30, 2022, Claimant submitted a blank copy of a Petition to Modify, Terminate, or Suspend Compensation Form along with a completed Objection to the Petition to the Division of Workers' Compensation. (Resp. Ex. A). In his objection, Claimant noted: "Claimant is requesting this Petition [be] completed (meaning the blank Form accompanying his objection). Claimant never received this Petition as Required by Statute and Rule. Claimant is requesting this so as to make an informed decision whether to object". *Id*. at p. 1.

20. On September 22, 2022, Claimant filed an Application for Hearing endorsing a single issue for determination. (Resp. Ex. B). Claimant framed the issue as a question of whether Respondents were required to present a Petition to Modify, Terminate of Suspend Compensation. *Id*. at p. 2. A response to Claimant's Application for Hearing, endorsing multiple defenses, including jurisdiction and r*es judicata* (claim preclusion) was filed by Respondents on October 7, 2022 and a virtual hearing was scheduled for January 11, 2023 at 1:00 p.m. before ALJ Spencer. (Resp. Ex. C).

21. Claimant failed to appear for his scheduled hearing. Accordingly, ALJ Spencer issued a Show Cause Order on January 12. 2023, affording Claimant 30 days to demonstrate good cause for his failure to appear. (Resp. Ex. O, p. 1). The show cause order also required Claimant to "show cause why the September 12, 2022 Application for Hearing should not be dismissed for lack of jurisdiction" as the claim was "previously closed by full and final settlement" and a prior "petition to reopen the settlement based on fraud or mutual mistake of material fact was denied and dismissed in a final order dated December 31, 2020, for which all appeals had been exhausted. *Id*. at pp. 1-2.

22. Claimant responded the January 12, 2023, Show Cause Order on January 13th and 17th, 2023. He asserted that he did not receive the electronic invitation to the virtual hearing. He did not otherwise respond to the jurisdictional issue raised by ALJ Spencer. In a February 14, 2023 Order, ALJ Spencer dismissed Claimant's September 12, 2023 Application for Hearing with prejudice noting that the OAC lacked jurisdiction to adjudicate the issues endorsed in Claimant's September 12, 2022 Application for Hearing because the claim was closed by a full and final settlement and a petition to reopen based upon fraud or mutual mistake of material fact had been dismissed and the appeals concerning that determination had been exhausted. Indeed, ALJ Spencer noted: "Absent a reopening for fraud or mutual mistake of material fact, a full and final settlement divests the OAC of jurisdiction over all but a tiny handful of issues. (Resp. Ex. O, pp. 5-9) (citations omitted).

23. No appeals were taken from ALJ Spencer's February 14, 2023 Order dismissing Claimant's September 12, 2022 Application for Hearing. Rather, Claimant simply filed a new Application for Hearing on April 19, 2023. In this application, Claimant endorsed the same issue he outlined in his September 12, 2022 Application for Hearing, namely whether Respondents can terminate benefits without petitioning the Court. As noted above, the hearing concerning Claimant's endorsed issues proceeded on July 20, 2023 and August 24, 2023.[6]

CONCLUSIONS OF LAW

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

Generally

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

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item

[6] While the issue endorsed for hearing, i.e. "Can Respondents terminate benefits without Petitioning the Court? could arguably be characterized as a request for an advisory opinion, the ALJ is persuaded, based upon the statements of the parties during a prehearing/status conference held May 22 and August 18, 2023, in addition to the hearing convened July 20, 2023, that Claimant contends that he is entitled to additional TTD and other benefits because Respondents improperly terminated his TTD benefits because they failed to file a Petition to Modify, Terminate or Suspend Compensation. Accordingly, the ALJ elected to adjudicate the matter upon established facts.

contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Claim Closure and Jurisdiction

C. The Workers' Compensation Act permits injured workers to settle all or part of their claim. Section 8-43-204(1), C.R.S. (20022). Accepting the full and final settlement in this claim effectively closed all issues relating to the claim. Indeed, paragraph 7 of the Settlement Agreement in this case provides: "Claimant understands that this is a final settlement and that approval of this settlement by the Division of Workers' Compensation or by an administrative law judge form the Office of Administrative Courts dismisses this matter with prejudice and FOREVER closes all issues relating to this matter." (Resp. Ex. M, p. 9). Accordingly, Claimant waived and forever gave up the right to claim any additional TTD/TPD he might have been entitled to (See ¶ 3, Resp. Ex. M, p. 8) and all matters concerning Claimant's entitlement to such disability benefits closed upon approval of the settlement agreement by the Division of Workers' Compensation on May 9, 2013. Nonetheless, all final settlements are subject to reopening, *at any time* "on the ground of fraud or mutual mistake of material fact."[7] The party seeking to reopen a settlement bears the burden of proof by a preponderance of the evidence. Section 8-43-303(4), C.R.S.

D. In this case, Claimant failed in his effort to reopen his claim on the basis or fraud or mutual mistake of material fact at hearing before ALJ Spencer and the order denying his petition to reopen was affirmed by the ICAO and the Colorado Court of Appeals. Moreover, a Petition for Writ of Certiorari was denied by the Colorado Supreme Court on May 16, 2022. Accordingly the claim remains closed. In the present action, Claimant did not file a subsequent petition to reopen or allege fraud. Indeed, he did not endorse reopening at all. Rather, he simply sought a determination as to whether the Respondents could terminate his compensation (TTD/TPD) without petitioning the Court to do so. As noted above, the ALJ considers Claimant's endorsement as a demand for additional indemnity benefits based upon his assertion that his TTD/TPD benefits were improperly terminated because Respondents failed to file a Petition to Modify, Terminate or Suspend Compensation. Regardless, because the claim is closed and Claimant waived all rights to additional TTD/TPD and reopen any prior awards, except on the

[7] Compare C.R.S. § 8-43-204(1), providing that settlements shall not be "subject to being reopened under any provisions of articles 40-47 of [the Act] other than on the ground pf fraud or mutual mistake of material fact with C.R.S. § 8-43-303(1) which provides that "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all rights to reopen an award; but a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact." Also, § 8-43-303(2)(a), C.R.S., allows an administrative law judge to reopen a claim on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition "at any time within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable…." Similarly, § 8-43-303(2)(b), C.R.S., allows an administrative law judge to reopen a claim for medical benefits only on the grounds of error, mistake or change in condition "at any time within two years after the date the last medical benefits become due and payable…."

grounds of fraud or mutual mistake of material fact, which he did not endorse for hearing[8], this ALJ agrees with ALJ Spencer that absent reopening of the claim, Claimant's acceptance of the full and final settlement divests the OAC of jurisdiction over the issue endorsed for hearing. Even if the ALJ had jurisdiction to determine the issue Claimant endorsed for hearing, the evidence presented fails to establish that Respondents were required to file a Petition to Modify, Terminate or Suspend Compensation when they terminated Claimant's TTD on April 11, 2012.

Respondents Obligation to File a Petition to Modify, Terminate or Suspend Compensation

E. As found, Claimant's TTD benefits were terminated after he was determined by Dr. Castro and Entin to have reached MMI. (Resp. Ex. K). Per C.R.S. § 8-42-105(3), TTD benefits shall continue until the first occurrence of any one of the following:

(a) The employee reaches maximum medical improvement;

(b) The employee returns to regular or modified employment;

(c) The attending physician gives the employee a written release to return to regular employment; or

(d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

F. In this case, the evidence persuades the ALJ that Respondents were within their rights to terminate Claimant's TTD benefits, without a hearing, by filing the FAL contained at Respondents' Exhibit K because he had reached MMI. The evidence presented also supports a conclusion that Respondents complied with WCRP 6-1 when filing their FAL, because the medical reports from Claimant's authorized treating physicians stating he had reached maximum medical improvement were attached to the FAL and the FAL clearly took a position on permanent disability benefits. Nonetheless, Claimant argues that Respondents were required to file a Petition to Modify, Terminate or Suspend Compensation before terminating his lost wage benefits after April 17, 2011.

G. A Petition to Modify, Suspend or Terminate Compensation provides prospective relief to an Insurer when a claimant is receiving indemnity benefits and there is a basis to change (modify), terminate or suspend those benefits. (WCRP 6-4-6-8). It does not address medical benefits. Claimant did not present any statutory reason for such a Petition to have been filed when the claim was open, and it is undisputed that Insurer was

[8] To the extent that Claimant argues that Respondents defrauded him by actively concealing the Petition to Modify, Terminate of Suspend Compensation form and this caused him harm and otherwise constitutes fraud, the ALJ refuses to determine the merits of those allegations as the issue of fraud, no matter the theory, was not plead or tried by consent of Respondents. Nonetheless, as presented the evidence fails to support Claimant's assertions.

not liable for benefits at the time he filed his objection to Respondents April 11, 2012 FAL. This issue cannot be decided retroactively, and claimant is not entitled to retroactive relief. WCRP 6-4 addresses suspension, modification or termination of temporary disability benefits by petition. This rule provides in pertinent part:

> (A) When an insurer seeks to suspend, modify or *terminate temporary disability benefits pursuant to a provision of the Act, and Rules 6-1, 6-2, 6-3, 6-5, 6-6, 6-7 or 6-9 are not applicable*, the insurer *may*[9] file a petition to suspend, modify or terminate temporary disability benefits on a form prescribed by the Division. All documentation upon which the petition is based shall be attached to the petition. The petition shall indicate the type, amount and time period of compensation for which the petition has been filed and shall set forth the facts and law upon which the petitioner relies. (emphasis added).

H. In this case, Respondents terminated Claimant's TTD benefits based upon C.R.S. § 8-42-105(3) (a). The evidence presented supports a conclusion that they did not seek/move to terminate, modify or suspend Claimant's compensation for any other reason for which a Petition would be required. (See WCRP 6-4(B), 6-5, 6-6 or 6-7). Because the only basis used to terminate TTD was MMI and the evidence presented supports a conclusion that Respondents followed WCRP 6-1 when filing their FAL, the ALJ agrees with Respondents that Insurer was not under a duty file a Petition to Modify, Terminate or Suspend Compensation prior to terminating Claimant's TTD.

ORDER

It is therefore ordered that:

1. The claim is closed.

2. Claimant's request for additional TTD and that Respondents file a Petition to Termination, Modify or Suspend Compensation is denied and dismissed.

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

[9] Rather than file a Petition, an insurer could simply choose to continue to pay indemnity benefits as established; however, if they wish to modify, terminate or suspend the benefit prospectively, they must file the petition and following the process set out in WCRP 6-4(A)-(G).

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

DATED: October 5, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-228-929-001

ISSUES

- Did Claimant prove she suffered a compensable injury on January 27, 2023 arising out of and in the course of her employment?
- If Claimant proved a compensable injury, did she prove Dr. Miguel Castrejon is the ATP because the right of selection passed to Claimant?
- What is Claimant's average weekly wage?
- Did Claimant prove entitlement to TTD benefits commencing January 28, 2023?

FINDINGS OF FACT

1. Claimant works for Employer as a personal care provider. Her duties include household tasks such as housekeeping, meal preparation, personal hygiene, grocery shopping, and running errands. Another core function of her job is providing "companionship," including but not limited to, social interaction, emotional support, reading, writing, and other "mind-stimulating activities."

2. On January 27, 2023, Claimant was working at the home of one of Employer's clients. The client's care plan covered basic ADLs like personal hygiene, toileting, bathing, and transfers. It also included to "homemaking" activities such as housecleaning, laundry, meal preparation, and "shopping errands."

3. On January 27, Claimant was covering the shift of a co-worker from 12:00 PM to 4:00 PM. She left the client's home before the end of her shift to go to the [Redacted, hereinafter DT] and [Redacted, hereinafter KS] stores nearby. Claimant intended to purchase craft supplies and butterscotch candies for the client from the DT[Redacted] store. The craft supplies were for a project Claimant and the client would be working on the next day. The client was distressed about the health of her dog, and they decided to make a "paw print" memento. After obtaining the supplies at the DT[Redacted], Claimant planned to stop at KS[Redacted] to purchase beverages for the client. Claimant was trying to complete these errands before the end of her shift.

4. Claimant was involved in a motor vehicle accident shortly after leaving the client's home. The front of her vehicle was struck by a large Ford F-250 pickup that had turned into her lane. Claimant's vehicle suffered significant damage.

5. Claimant texted Employer shortly after the accident with photos of her vehicle. She also spoke with [Redacted, hereinafter ST] and [Redacted, hereinafter PM] by telephone while still at the scene. Claimant had contacted Employer immediately because, "I was still on the clock, so I wasn't really sure what to do because I've never been in a car accident while I was at work."

6. Most of Employer's clients are Medicaid beneficiaries, including the client with whom Claimant was working on January 27, 2023. Medicaid generally covers two 60-minute shopping trips per week for each client. Medicaid pays for time but does not pay mileage. Because there is no reimbursement for vehicle expenses beyond the caregiver's hourly wage, the caregivers are encouraged to "try to limit the number of shopping errands so it is not as cost exorbitant on the . . . caregiver who is performing the errands."

7. Claimant routinely ran errands at the request of clients or Employer. The errands were not always related to grocery or medication needs. Examples include buying a storage tote from [Redacted, hereinafter WT], going to the pet hospital, and picking up fast food. Claimant also picked up vape pens for a client on at least one occasion.

8. Claimant typically asked her supervisor, ST[Redacted], for permission before running errands other than the two 60-minute shopping trips each week. However, the record contains at least one documented instance when Claimant forgot to contact ST[Redacted] before running the errand. When Claimant mentioned it to ST[Redacted] a few days later, ST[Redacted] responded "that's all okay."

9. On January 27, Claimant neglected to advise ST[Redacted] before leaving the client's home that she was running errands. However, based on the evidence presented, there is no persuasive reason to infer ST[Redacted] would have prohibited her from doing so.

10. Claimant occasionally ran errands at the start of her shift, on the way to a client's home. On those occasions, she was advised to "clock in" and begin her shift when she arrived at the store. The ALJ infers that Claimant would follow the inverse procedure and clock out after leaving the store if she ran an errand at the end of her shift.

11. Claimant initially felt no symptoms after the accident and told ST[Redacted] and PM[Redacted] that she felt "fine." However, she started to experience pain in her back, left shoulder, and neck, and had "a major headache" a few hours after the accident.

12. Claimant went to the UCHealth Urgent Care in Fountain, Colorado the evening of January 27, 2023. She reported pain from her shoulder down to her low back, a headache, and minor chest pain from the seatbelt. CT scans of her head and pelvis were negative and she was discharged home.

13. Claimant spoke with ST[Redacted] and PM[Redacted] before going to the urgent care, and again thereafter. ST[Redacted] and PM[Redacted] conceded they knew within a day of the accident that Claimant had sought treatment for injury-related symptoms.

14. Claimant returned to the UCHealth Urgent Care facility on January 31, 2023, because of worsening injury-related symptoms, including "blacking out." Her decision to go to urgent care was motivated in part by a text from ST[Redacted] suggesting she go to the emergency room and been seen "immediately" if the blackout spells continued. Claimant texted ST[Redacted] after leaving urgent care and stated,

“they said the blacking out is most likely from swelling/inflammation from whiplash and concussion even though I didn’t hit my head.”Employer did not give Claimant a list of designated providers at any time after the accident. A provider list was included in the new-employee paperwork when Claimant was hired in April 2021, but there is no persuasive evidence she recalled the list or any of the named providers after the January 27, 2023 MVA.

16. Claimant had multiple text exchanges with ST[Redacted] in the week after the accident stating she was still symptomatic and did not feel ready to return to work.

17. Claimant was evaluated by Dr. Miguel Castrejon on February 13, 2023. She reported pain, stiffness, and muscle spasms in her neck and low back, numbness and tingling in her hands, and headaches. Claimant described a pre-injury history of headaches, for which she had been prescribed Topamax by Dr. Bower, a neurologist. She stated the headaches had become more intense and frequent since the MVA and now seemed to originate from the base of her neck. She also reported “absence episodes” that were new since the accident. Physical examination showed tenderness and muscle spasm of the cervical and lumbar musculature. Dr. Castrejon diagnosed cervical and lumbar strains with myofascial pain, left SI joint dysfunction, a probable mild concussion, post-traumatic aggravation of pre-existing headaches, and occipital neuralgia contributing to the headaches. He prescribed muscle relaxers, massage therapy, and chiropractic treatment. He was unsure what was causing the absence episodes, so he referred Claimant to Dr. Bowser for further evaluation. Dr. Castrejon restricted Claimant from until her next appointment.

18. Claimant followed up with Dr. Castrejon on March 27, 2023. The corresponding report is not in evidence, but Dr. Castrejon described the encounter during his hearing testimony. Claimant’s neck pain and headaches had improved significantly in the interim. Her low back was improved too, but not to the same extent as her neck. Dr. Castrejon maintained Claimant’s work restrictions, including the limitation on driving because he had not received information from Dr. Bowser whether it was safe for Claimant to drive.

19. Dr. Fall performed an IME for Respondents on May 10, 2023. Claimant’s symptoms had improved since the accident, but she was still having low back pain. Dr. Fall concluded the accident caused a left cervicothoracic myofascial strain and mild lumbopelvic dysfunction. She opined a course of PT would be reasonable.

20. At hearing, Dr. Castrejon opined the work accident aggravated Claimant’s pre-existing headaches and caused new symptoms in her neck and low back. Dr. Castrejon could not offer definitive opinions about Claimant’s current condition because he had not seen her since March 2023. Based on Claimant’s testimony and Dr. Fall’s IME, Dr. Castrejon stated Claimant is probably at or close to “baseline” regarding the headaches and neck pain, but requires additional conservative treatment for her low back. However, he declined to put Claimant at MMI or release her to regular duty during the hearing.

21. Dr. Fall testified via deposition on July 10, 2023. In her deposition, Dr. Fall questioned the reliability of Claimant's subjective complaints and suggested they may be influenced by psychological factors.

22. Dr. Castrejon's opinions and conclusions are credible and more persuasive than any contrary opinions offered by Dr. Fall.

23. Wage records show Claimant earned $7,805.05 in the 12 weeks before the injury. This equates to an average weekly wage (AWW) of $650.42, with a corresponding TTD rate of $433.61.

24. Claimant has been off work since the work accident, at least in part because of limitations and restrictions related to the work accident. As of the hearing, she had not been put at MMI by an ATP, released to regular duty, or returned to work in any capacity.

25. Claimant's testimony is credible.

26. Claimant proved the January 27, 2023 MVA arose out of and occurred in the course of her employment.

27. The treatment Claimant received from UCHealth Urgent Care on January 27 and January 31, 2023 was reasonably necessary emergency treatment for to the work injury.

28. Claimant proved the right to select the treating physician passed to her because Employer did not timely provide a list of designated providers.

29. Claimant selected Dr. Castrejon as the ATP.

30. Claimant proved entitlement to TTD benefits commencing January 28, 2023 and continuing until terminated by law.

CONCLUSIONS OF LAW

A. Compensability

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of employment." Section 8-41-301(1)(b). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The injurious activity need not be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). "Many job functions involve discretionary or optional activities on the part of the employee, devoid of any duty

component and unrelated to any specific benefit to the employer, but nonetheless are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). There is no presumption that an injury occurring at work or during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant proved the January 27, 2023 MVA arose out of and occurred in the course of her employment. Multiple factors support this conclusion. The accident occurred during Claimant's shift while she was still "on the clock." Shopping and running errands are a routine part of Claimant's job. Although most shopping trips are related to groceries or medications, she occasionally shops for other personal items, with Employer's approval. The limitations Employer placed on shopping trips were largely intended to protect the employee from incurring unreimbursed travel expenses, rather than limiting the scope of employment. The items Claimant intended to purchase on the day of the accident related entirely to the client's needs. There is no persuasive evidence to suggest any personal aspect of the journey. Obtaining craft supplies for a project related to the client's aging pet was directly ancillary to Claimant's core job duties of providing companionship and emotional support. As such, the shopping trip was sufficiently incidental to Claimant's job to support a determination that it arose out of and occurred in the course of her employment.

B. Authorized treating providers

The respondents are liable for medical treatment from authorized providers reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). As found, Claimant's treatment at UCHealth Urgent Care on January 27 and January 31, 2021 was reasonably necessary emergency treatment for her injuries. The initial onset of symptoms occurred after regular business hours, making urgent care the only reasonably available option. The January 31 visit was instigated in part by her supervisor's suggestion that she go to the emergency room to be evaluated "immediately."

Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith" upon receiving notice of the injury, or the right of selection passes to the claimant. *Rogers v.*

Industrial Claim Appeals Office, 746 P.2d 565 (Colo. App. 1987). An employer's attempt to "pre-designate" a provider with posted notices or printed forms is not a sufficient tender of treatment if the injured worker does not recall the notice at the time of injury. *E.g*., *Park v. Phil Long Ford d/b/a Academy Ford*, W.C. No. 4-373-188 (December 14, 1999); *Broadmoor Hotel v. Industrial Claim Appeals Office*, (Colo. App. No. 92CA1635, May 27, 1993) (NSOP).

Employer did not timely refer Claimant to a provider after receiving notice of her injuries, and there is no persuasive evidence Claimant recalled the designated provider list she was given in April 2021, nearly two years before the work accident. Claimant had multiple text and phone conversations with ST[Redacted] and PM[Redacted] in the week after the accident in which she indicated a need for treatment related to the MVA. Employer had ample opportunity to give Claimant a provider list but failed to do so. The right of selection passed to Claimant, and she selected Dr. Castrejon. Treatment provided by, and on referral from, Dr. Castrejon is authorized.

C. Average weekly wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly compute" the employee's AWW in any manner that seems most appropriate under the circumstances.

As found, Claimant's AWW is $650.42, with a corresponding TTD rate of $433.61. This determination is based on the 12 weeks immediately preceding the injury, which provides a fair approximation of Claimant's earnings capacity "at the time of the injury.

D. TTD commencing January 28, 2023

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions or limitations that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). A claimant need not prove that the work-related injury was the sole cause of the wage loss to establish entitlement to TTD benefits. Rather, eligibility for TTD requires only that the work-related injury contributes "to some degree" to a temporary wage loss. *PDM Molding, supra*. Once commenced, TTD benefits continue until the occurrence of one of the events listed in § 8-42-105(3)(a)-(d).

As found, Claimant proved entitlement to TTD benefits commencing January 28, 2023. Claimant's job is physically demanding and requires the ability to help infirm clients with transfers, toileting, and other bodily functions, as well as housekeeping activities such as cooking, cleaning, and laundry. The compensable injury impaired Claimant's ability to perform these functions. Additionally, the absence episodes raised concern for the safety of Employer's clients and Claimant's ability to perform work-related driving.

As of the hearing date, no terminating event listed in § 8-42-105(3)(a)-(d) has occurred. Accordingly, Claimant's entitlement to TTD benefits is ongoing at present.

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable.

2. Dr. Miguel Castrejon is Claimant's authorized treating provider.

3. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of her compensable injury, including but not limited to the charges Dr. Castrejon and UCHealth Urgent care.

4. Claimant's average weekly wage is $650.42, with a TTD rate of $433.61.

5. Insurer shall pay Claimant TTD benefits at the weekly rate of $433.61 commencing January 28, 2023 and continuing until terminated according to law.

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

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

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

DATED: October 6, 2023

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

ISSUES

1. Whether or not Respondents have shown by a preponderance of the evidence that Claimant did not sustain a compensable work-related injury (and therefore are permitted to withdraw the admissions of liability).

2. Whether Respondents are entitled to reimbursement for medical and temporary total disability benefits issued on this claim due to fraud (and the amount of that reimbursement Claimant must pay back per month).

FINDINGS OF FACT

Notice

1. Respondents' counsel's paralegal, [Redacted, hereinafter SE], credibly testified that she sent all pleadings related to this hearing, including the hearing confirmation and the notice of hearing, to Claimant at the address [Redacted, hereinafter PO]. The claims adjuster, [Redacted, hereinafter HD], credibly testified that the address was obtained directly from Claimant.

2. The Court finds that Claimant had notice of the September 26, 2023 hearing and the issues to be addressed. The Court also finds that Claimant had an opportunity to present his case.

Personal and Employment Information

3. Claimant is a 50-year-old former technician with the Employer.

Alleged Work Injury – August 25, 2022

4. Claimant alleged that he injured his left shoulder when he lifted a thirty-pound fire extinguisher with the Employer on August 25, 2022. Resp. Ex. W.

5. The First Report of Injury confirms that the Claimant did not report the injury until the day following the alleged work injury. As a result, there were no witnesses to the alleged work injury.

6. Respondents accepted the claim based on Claimant's representation that the injury was legitimate. Respondents also accepted the claim not knowing that Claimant was running his own company or had a prior shoulder condition.

7. Respondents also began paying claimant TTD benefits and for all the medical treatment related to Claimant's left shoulder injury. Respondents paid these benefits based on Claimant's representations that he suffered a legitimate injury and was disabled from working due to the alleged work injury.

Surveillance Demonstrates that Claimant Runs His Own Company

8. Respondents obtained surveillance on Claimant. Resp. Ex. J and Ex. M. Surveillance efforts revealed that Claimant runs his own company, [Redacted, hereinafter BF]. The surveillance also demonstrated that Clamant was working at his company while collecting temporary total disability benefits. Resp. Ex. J, p. 180 and Resp. Ex. L, p., 190, p. 196.

9. Surveillance showed Claimant carrying heavy materials and operating vehicles for his own company while he was also collecting TTD benefits from respondents. Resp. Ex. M.

10. Contemporaneous medical records indicated that Claimant had been placed on medical restrictions that included no lifting, pushing, pulling, carrying with the left arm, repetitive lifting, and no climbing ladders. Resp. Ex. B, p. 7. These restrictions were completely inconsistent with Claimant's work with his company as demonstrated on the surveillance.

11. Claimant's own business, BF[Redacted], performs the same type of work as the Employer.[1]

Claimant has Prior Left Shoulder Injury and Evidence that Rotator Cuff Tear was Pre-Existing

12. Medical records indicate that Claimant previously suffered a left shoulder separation before the alleged work injury with the Employer. Resp. Ex. A, p. 4.

13. The MRI Scan taken of the Claimant's left shoulder demonstrated a supraspinatus full thickness tear and advanced acromioclavicular joint degenerative changes. More importantly, the supraspinatus tear was noted to have "delamination of the retracted fibers." Resp. Ex. F, p. 46. As a result, there is evidence suggesting that the rotator cuff tear in the left shoulder was pre-existing.

---

[1] Adverse inference made consistent with Respondents' Exhibit L, p. 190. ("Subject listed as a current fire suppression systems contractor. A business was located for the subject BF[Redacted].") Adverse inference is appropriate where Claimant has failed to participate in his claim and Respondents' investigation of his pertinent medical history and treatment and potential concurrent employment. C.R.C.P. 37.

14. Based on Claimant's misrepresentations involving his ability to perform work and his pre-existing shoulder problems, respondents contended that no work injury occurred with the Employer. Respondents began a further investigation into the claim and attempted to withdraw the admissions of liability filed on the case.

Termination of TTD Benefits

15. HD[Redacted] was the claims representative at [Redacted, hereinafter BE] who formerly handled the file. She credibly testified that upon discovery of Claimant's concurrent employment and surveillance showing him working outside of his restrictions, Respondents sought to terminate TTD benefits.

16. On February 8, 2023, Respondents filed a Petition to Terminate Compensation pursuant to C.R.S. § 8-42-105(3)(b) on the basis that Claimant was working for his own company while simultaneously collecting TTD benefits. Resp. Ex. R.

17. The Division granted the Petition on March 15, 2023, thereby allowing Respondents to terminate benefits as of February 8, 2023. Resp. Ex. S.

Claimant Failed to Provide Discovery Responses and Violated Multiple Prehearing Conference Orders

18. On April 21, 2023, Prehearing ALJ Mueller issued a Prehearing Conference Order compelling production of medical releases and healthcare provider list pursuant to W.R.C.P. 5-4(C). Releases and the provider list were due within fourteen days of the date of the order. Resp. Ex. N, p. 207.

19. On June 14, 2023, Prehearing ALJ Phillips issued a Prehearing Conference Order that compelled Claimant to provide discovery responses pursuant to W.C.R.P. 9-1 by June 24, 2023. Resp. Ex. O, p. 211.

20. Claimant did not respond to either Order. Therefore, on July 20, 2023, Prehearing ALJ Mueller entered a Prehearing Conference Order imposing sanctions on Claimant. Sanctions prohibited Claimant from presenting any documentary evidence or witnesses at the hearing. Prehearing ALJ Mueller stated that the Court had discretion to draw adverse inferences from Claimant's failure to answer Respondents' discovery requests. Resp. Ex. P., p., 217-218.

21. Claimant never attempted to cure his failure to provide discovery. Instead, he refused to participate in this claim or to allow Respondents to investigate his medical history or whether a work injury actually took place.

Fraud Referral

22. Respondents filed a Uniform Suspected Insurance Fraud Referral Form on the basis that Claimant may have exaggerated his condition and was working while receiving benefits in violation of Colorado law. Resp. Ex. K, p. 185. Claimant never notified Respondents of any written objection to receiving TTD benefits. *Id.*

Respondents Paid Substantial Medical and Indemnity Benefits to the Claimant

23. Respondents paid $31,811.92 in temporary total disability benefits as outlined in the table below. *See also* Resp. Ex. W.

Indemnity Ledger		
Starting Date	**End Date**	**Amount**
08/29/2022	09/04/2022	$1,228.99
08/26/2022	08/28/2022	$526.71
10/12/2022	10/25/2022	$2,457.98
11/9/2022	11/22/2022	$2,457.98
11/23/2022	12/06/2022	$2,457.98
12/07/2022	12/20/2022	$2,457.98
12/21/2022	01/03/2023	$2,457.98
01/04/2023	01/17/2023	$2,457.98
01/18/2023	01/31/2023	$2,457.98
01/11/2023	01/20/2023	$33.75
02/01/2023	02/14/2023	$2,457.98
02/15/2023	02/28/2023	$2,457.98
03/01/2023	03/14/2023	$2,457.98

24. Respondents also paid $30,444.11 in medical benefits pursuant to the Table below. *See also* Resp. Ex. W and Ex. X.

Medical Ledger	
Payment Date(s)	**Amount**
3/30/2023	$130.56
3/24/2023	$130.56
4/25/2023	$143.91
2/17/2023	$130.56
3/17/2023	$134.40
3/27/2023	$130.56
1/18/2023	$130.56
3/16/2023	$130.56
3/22/2023	$130.56
2/21/2023	$143.91
1/16/2023	$130.56
3/15/2023	$130.56
1/27/2023	$130.56

3/9/2023	$130.56
3/14/2023	$22.40
1/13/2023	$130.56
3/7/2023	$130.56
3/1/2023	$130.56
2/24/2023	$130.56
2/27/2023	$130.56
11/30/2022	$119.68
12/26/2022	$119.68
2/13/2023	$130.56
11/14/2022	$119.68
12/1/2022	$119.68
12/6/2022	$119.68
2/15/2023	$130.56
2/21/2023	$1,187.60
2/24/2023	$271.50
2/8/2023	$353.36
2/8/2023	$130.56
2/7/2023	$130.56
1/31/2023	$44.80
2/2/2023	$130.56
1/30/2023	$130.56
11/7/2022	$119.68
1/25/2023	$130.56
1/23/2023	$130.56
1/10/2023	$130.56
1/10/2023	$12.71
1/20/2023	$130.56
1/18/2023	$430.00
12/30/2022	$394.38
1/11/2023	$57.00
1/11/2023	$130.56
1/9/2023	$130.56
1/6/2023	$130.56
1/4/2023	$130.56
12/30/2022	$119.68
1/2/2023	$130.56
12/28/2022	$119.68
12/29/2022	$237.20
10/28/2022	$112.00
12/23/2022	$119.68
12/16/2022	$30.75
12/21/2022	$119.68
12/16/2022	$119.68
12/19/2022	$119.68

12/12/2022	$119.68
12/14/2022	$119.68
12/7/2022	$792.15
12/9/2022	$119.68
12/7/2022	$119.68
12/5/2022	$22.40
11/23/2022	$355.00
11/25/2022	$119.68
11/28/2022	$119.68
11/23/2022	$119.68
11/18/2022	$119.68
11/21/2022	$119.68
11/10/2022	$57.75
10/30/2022	$226.25
9/1/2022	$737.00
10/12/2022	$7.72
11/16/2022	$119.68
10/12/2022	$8.75
11/11/2022	$119.68
11/9/2022	$119.68
10/12/2022	$16.23
10/25/2022	$139.40
10/12/2022	$8.75
11/4/2022	$119.68
10/12/2022	$9,585.37
10/12/2022	$83.92
10/12/2022	$3,259.82
11/1/2022	$211.98
10/12/2022	$556.67
10/12/2022	$189.04
10/26/2022	$112.00
10/21/2022	$208.00
9/7/2022	$391.22
9/12/2022	$203.42
9/8/2022	$106.11
9/1/2022	$395.39
2/8/2023 - 2/21/2023	$353.36
12/30/2022 - 1/10/2023	$394.38
12/16/2022 - 12/28/2022	$30.75
11/23/2022 - 12/1/2022	$355.00
11/10/2022 - 11/21/2022	$57.75
10/30/2022 - 11/10/2022	$226.25
9/1/2022 - 10/28/2022	$737.00

25. Respondents have collectively paid $62,256.03 in indemnity and medical benefits on this claim.

Respondents Have Proven that Claimant Did Not Suffer a Work Injury with the Employer

26. The evidence has demonstrated that Claimant did not suffer a work injury with the Employer. Instead, the Claimant's shoulder condition was pre-existing or resulted from an injury to his shoulder while working for his own company (BF[Redacted]). Respondents have proven that the Claimant did not suffer a work injury to his left shoulder with the Employer.[2]

27. The evidence demonstrates that Claimant intentionally mispresented that an injury occurred with the Employer and also whether he was earning money or disabled from work to improperly obtain workers' compensation benefits from the respondents.[3]

Respondents Have Proven that the Admissions on this Case Can be Withdrawn and are Void <u>Ab Initio</u> and Claimant Must Repay Respondents the $62,256.03 for the Indemnity and Medical Benefits Paid on this Case

28. Respondents have proven that the Claimant engaged in fraud both in alleging that a work injury occurred with the Employer and to obtain ongoing indemnity and medical benefits. Respondents are entitled to withdraw their admissions *ab initio* and collect back all the money paid to Claimant for medical and indemnity benefits.[4]

29. Claimant's admitted average weekly wage was $2,274.48, which corresponds with $9,856.08 monthly. The Court finds this was most likely what Claimant was earning at the time of his alleged injury. There is no direct evidence as to what Claimant's current earnings are. However, the Court infers, based on Claimant's prior earnings, and the fact that he is now performing the same type of work but for his own company, that Claimant is earning roughly the same amount as he was before.

---

[2] Adverse inference made because Claimant failed to respond to discovery to allow Respondents adequate ability to investigate a potential pre-existing or intervening injury in addition to investigating Claimant's concurrent employment. See C.R.C.P. 37; *Sheid v. Hewlett Packard, supra.*

[3] Adverse inference made because Claimant failed to respond to discovery to allow Respondents adequate ability to investigate a potential pre-existing or intervening injury in addition to investigating Claimant's concurrent employment. See C.R.C.P. 37; *Sheid v. Hewlett Packard, supra.*

[4] Adverse inference made because Claimant failed to respond to discovery to allow Respondents adequate ability to investigate a potential pre-existing or intervening injury in addition to investigating Claimant's concurrent employment. See C.R.C.P. 37; *Sheid v. Hewlett Packard, supra.*

30. Because Claimant is currently earning roughly $9,856.08 monthly, the Court finds that a repayment plan of $500.00 per month would not cause Claimant undue hardship.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability – Withdrawal of Admissions

The beneficial intent of the Act is predicated on claimant's providing accurate information. Therefore, when a claimant supplies materially false information upon which his employer and its insurer relied in filing an admission of liability, the court is justified in declaring the admission void *ab initio*. *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981); *Kraus v. Artcraft Sign Co.*, 710 P.2d 480 (Colo. 1985); *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995); *West v. Lab Corp. of America*, W.C. No. 4-684-982 (ICAO February 27, 2009). *Vargo* and *Lewis* stand for the proposition that the authority of an ALJ to remedy fraud is limited to the express provisions of the statute, except where the fraud occurs prior to entry of a final admission or closure of the claim by way of an order. In circumstances where no final adjudication has occurred, "Retroactive Withdrawal" is a permissible remedy. *Cf. Johnson v. Industrial Commission*, 761 P2d 1140 (Colo. App. 1988).

In this case, Respondents filed admissions of liability and paid medical and temporary total disability benefits based on fraudulent information provided by Claimant.[5]

The Court credits the testimony of HD[Redacted] and the exhibits submitted in the claim.

Based on the above, Respondents have proven that it is more likely than not that Claimant did not suffer a work injury with the Employer. Instead, he sustained an injury, or an aggravation thereof, to his shoulder at a prior time or while on the job for his own company. [6] Specifically, Respondents have proven by a preponderance of the evidence that Claimant did not suffer a work injury,[7] and that Claimant fraudulently induced Respondents to admit the compensability of the claim.

As found, Respondents have proven by a preponderance of the evidence that Claimant's medical condition and subsequent medical treatment were not work-related. Accordingly, Respondents may withdraw all admissions of liability filed on this claim.

Fraud and Repayment

To prove fraud, a party must generally show the following: (a) a party made a false representation of a material fact; (b) the party knew that the representation was false; (c) that the person to whom the representation was made was ignorant of the falsity; (d) that

---

[5] Adverse inference made due to Claimant's failure to comply with providing releases pursuant to W.C.R.P. 5-4(c) thereby preventing Respondents an opportunity to thoroughly investigate the claim. Adverse inference also made due to Claimant's failure to respond to discovery or comply with the April, 2023 and June, 2023 prehearing conference orders compelling the same. See Respondents' Exhibits N-P.

[6] Adverse inference made Adverse inference made based on Claimant's failure to provide requisite releases, cooperate with discovery as required by W.C.R.P. 5-4(c) and W.C.R.P. 9-1, and comply with the prehearing conference Orders. *See* Resp. Ex. N, Ex. O, Ex. P. Additionally, adverse inference made consistent with the surveillance and social media investigations. See Resp. Ex. J, Ex. L, Ex. M.

[7] Adverse inference made based on Claimant's failure to provide requisite releases, cooperate with discovery as required by W.C.R.P. 5-4(c) and W.C.R.P. 9-1, and comply with the prehearing conference Orders. *See* Resp. Ex. N, Ex. O, Ex. P.

the representation was made with the intention that it be acted upon; and (e) that the reliance resulted in damages to the plaintiff. *See Nelson v. Gas Research Institute*, 121 P.3d 340, 343 (Colo. App. 2005).

"The existence of these elements is generally a question of fact for determination by the ALJ. *See Vargo v. Industrial Commission, supra*. Because proof of fraud is a factual issue, the ALJ may base his decision on inferences drawn from circumstantial evidence, as well as direct evidence. *See Electric Mutual Liability Insurance Co. v. Industrial Commission*, 391 P.2d 677 (1964). Insofar as the ALJ's inferences are supported by substantial evidence in the record they must be upheld on review. *May D & F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo.App.1988); *Essien v. Metro Cab, Inc.*, W.C. No. 3-853-693 (I.C.A.O. Aug. 22, 1991).

As found, Claimant was performing substantially similar work for his own company, BF[Redacted] and was doing so while collecting TTD from Respondents. Claimant failed to provide medical releases, engage in discovery, or timely respond to the prehearing conference orders. Failure to cooperate in his claim has prevented Respondents a meaningful opportunity to investigate Claimant's medical history and ascertain if the left shoulder condition was related to or aggravated by the August 25, 2022 incident with the Employer or if related to a naturally progressing preexisting condition and/or related to a work incident at BF[Redacted]. Therefore, this ALJ makes an adverse inference that it is more likely than not that the left shoulder condition is unrelated to the August 25, 2022 incident at [Redacted, hereinafter SP]. *See* C.R.S. § 8-43-207(1)(3) (stating that the administrative law judge may improve the sanction provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery); *See C.R.C.P. 37(b); see also Sheid v. Hewlett Packard*, 826 P.3d 396 (Colo. App. 1991).

Because Respondents were induced to make the workers' compensation payments based on Claimant's material misrepresentations, the appropriate remedy is for the admissions of liability filed to be declared void *ab initio* and to order the Claimant to repay the $62,256.03 in benefits administered on this claim. The Colorado Court of Appeals has held that ALJs have discretion to fashion such a remedy with regard to overpayments. *See Turner v. Chipotle Mexican Grill*, W.C. No. 4-893-631-07 (Feb. 8, 2018), *citing Simpson v. Industrial Claim Appeals Offi*ce, 219 P.3d 354 (Colo.App.2009); *see also Arenas v. Industrial Claims Appeals Office*, 8 P.3d 558 (Colo.App.2000); *see Louisiana Pacific Corp v. Smith*, 881 P.2d 456 (Colo.App.1994).

As found above, Claimant's earnings of $9,856.08 monthly are sufficient that a payment of $500.00 per month would not cause undue hardship to Claimant. Payment of $500.00 per month from Claimant until the fraudulently paid out benefits are fully repaid is appropriate.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant did not sustain a work-related injury with the Employer. Therefore, Respondents are permitted to withdraw the admissions of liability previously filed on this claim and they are deemed void ab initio.

2. Because the evidence shows that Respondents were induced to administer benefits due to Claimant's misrepresentations, it is appropriate for the Claimant to repay $62,256.03 in benefits that he obtained through fraud.

3. Claimant is ordered to pay back this amount at a rate of $500.00 a month until the entire amount has been reimbursed.

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

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

DATED: October 27, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-219-282-002

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that on August 16, 2022, she suffered a right shoulder injury arising out of and in the course and scope of her employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of her right shoulder including reverse total shoulder arthroplasty performed on February 7, 2023 by Dr. Jared Lee constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability {TTD) benefits beginning November 15, 2022 and ongoing until terminated by law?

STIPULATIONS

1. At the hearing, the parties stipulated that if the claim is found compensable, Basalt After Hours Care Clinic is an authorized treating provider (ATP).

2. In their position statements, the parties stipulated that if the claim is found compensable, Claimant's average weekly wage (AWW) is $1,500.00.

FINDINGS OF FACT

1. Claimant began working for Employer in January 2011. In 2022, Claimant worked as a server in private dining. Claimant testified that she earned between $1,200.00 and $2,000.00 per week.

2. Claimant testified regarding an incident that occurred at work on August 16, 2022. Claimant testified that it was very busy in her department on that day. At one point during her shift, Claimant noted that a large tray had been left on the floor. Claimant estimates that the tray and its contents weighed approximately 20 pounds. Claimant bent at the waist to lift this tray. Claimant testified that as she began to lift the tray, she immediately felt pain in her right shoulder. Claimant did not report this incident at that time because she had other work to do and she completed her shift.

3. When she reported for her next scheduled shift, Claimant reported the August 16, 2022 incident regarding her right shoulder. Claimant was provided with a list of designated medical providers. Subsequently, Claimant was seen at the Basalt After Hours Care Clinic on August 24, 2022.

Right shoulder treatment prior to August 16, 2022

4. Claimant testified that she has had prior right shoulder issues. She further testified that approximately 10 years ago Dr. Liotta recommended that she undergo rotator cuff repair. Claimant testified that she chose not to undergo the recommended surgery at that time.

5. On April 8, 2014, Claimant was seen by Dr. Donald Corenman at The Steadman Clinic. The purpose of that evaluation was to discuss symptoms of low back pain. However, in that medical record, Dr. Corenman noted Claimant's report that Dr. Liotta had recommended right shoulder surgery.

6. On September 28, 2021, Claimant was seen by Dr. Tomas Pevny for treatment of her right shoulder. In the medical record of that date, Dr. Pevny referenced magnetic resonance imaging (MRI) from 2014 that showed a full thickness rotator cuff tear. Dr. Pevny recommended and administered a right shoulder injection. Dr. Pevny also recommended an updated MRI. Claimant declined to pursue an MRI at that time.

Right shoulder treatment after August 16, 2022

7. As noted above, Claimant underwent treatment of her right shoulder on August 24, 2022 at the Basalt After Hours Care Clinic. At that time, Claimant was seen by Kelly Hill, FNP-C. Claimant reported that she already had an appointment scheduled with Steadman Clinic on October 3, 2022 to address her right shoulder. Nurse Practitioner Hill ordered x-rays of Claimant's right shoulder and diagnosed a chronic rotator cuff tear. Nurse Practitioner Hill assessed work restrictions of no lifting over five pounds. In addition, she referred Claimant for an orthopedic consultation.

8. As previously scheduled, on October 3, 2022, Claimant was seen at The Steadman Clinic by Dr. Dustin Anderson for an orthopedic consultation. On that date, Claimant reported a number of issues including pain in her right shoulder, neck, left low back and hip[1]. Dr. Anderson documented Claimant "has had pain in both her right shoulder and neck since roughly 2015 both have recently worsened over the course of the last 3 months." With regard to her right shoulder, Claimant reported that she had a rotator cuff tear in 2015, which she treated non-surgically. Claimant further reported that she reinjured her right shoulder by "lifting heavy objects at work". On examination, Dr. Anderson noted "significant atrophy of her supraspinatus muscle" and recommended a right shoulder MRI.

9. On October 28, 2022, an MRI of Claimant's right shoulder was performed. In the MRI report, radiologist, Dr. Elizabeth Kulwiec indicated a comparison to an MRI performed on May 13, 2014. Dr. Kulwiec noted a full thickness tear of the distal supraspinatus tendon that had extended since the 2014 MRI. The MRI also showed a new partial thickness bursal surface tear of the subscapularis tendon, with new mild

[1] As the only body part at issue at this time is Claimant's right shoulder, further discussion of symptoms and related treatment of any other body parts is not addressed here.

atrophy of the subscapularis muscle. Dr. Kulweic also noted, *inter alia,* new mild infraspinatus tendinosis; moderate osteoarthritis of the acromioclavicular joint, a new complete tear at the origin of the long head biceps tendon; moderate joint effusion; a new superior labrum anterior and posterior (SLAP) tear; and a new humeral avulsion glenohumeral (HAGL) lesion.

10. On November 2, 2022, Claimant returned to Dr. Anderson to discuss the MRI results. At that time, Dr. Anderson referred Claimant to Dr. Jared Lee to discuss surgical options.

11. On November 7, 2022, Dr. Anderson completed an order for the referral to Dr. Lee. That same document states that Claimant was unable to return to work.

12. Claimant testified that November 15, 2022, was the date that employees were to return to work to begin the season. However, because Dr. Anderson had taken her off of all work, Claimant was unable to return to work on November 15, 2022. As of the date of the hearing, Claimant has not returned to work for Employer.

13. On December 1, 2022, Claimant was seen by Dr. Lee. In the medical record of that date, Dr. Lee noted his independent review of the October 2022 right shoulder MRI. Dr. Lee identified the condition of Claimant's right shoulder as "acute on chronic". Claimant reported to Dr. Lee that her job was physical and recently her shoulder pain had increased. Dr. Lee documented "no know[n] specific injury or trauma but patient does endorse that symptoms have noticeably increased more recently especially with movement." Dr. Lee discussed several treatment options, including a reverse total shoulder replacement, three other surgical procedures, or a steroid injection. At that time, Claimant wished to continue with conservative treatment.

14. On January 5, 2023, Claimant returned to Dr. Lee and reported that her symptoms had persisted, but had not worsened. Dr. Lee again recommended a right reverse total shoulder arthroplasty. Claimant agreed to proceed with the surgery and on February 7, 2023, Dr. Lee performed a right reverse total shoulder arthroplasty with biceps tenodesis.

15. At the request of Respondents, on February 22, 2023, Claimant attended an independent medical examination (IME) with Dr. F. Mark Paz. In connection with the IME, Dr. Paz reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In an IME report dated February 22, 2023, Dr. Paz opined that Claimant's rotator cuff tear was not caused by the activity of lifting the tray on August 16, 2022. Dr. Paz also opined that the pre-existing rotator cuff tear in Claimant's right shoulder was not aggravated or accelerated by her work activities on August 16, 2022. In support of these opinions, Dr. Paz noted that Claimant has a history of chronic right shoulder complaints. Dr. Paz points to the 2021 medical record in which Dr. Corenman noted that in 2014 Dr. Liotta recommended right shoulder surgery. Dr. Paz further noted that the 2022 MRI results are consistent with a chronic rotator cuff tear and related degenerative changes.

16. Dr. Paz's testimony was consistent with his IME report. Dr. Paz testified that Claimant's need for reverse total shoulder arthroplasty is not related to her work activities on August 16, 2022. Dr. Paz further testified that Claimant had pre-existing degenerative changes in her right shoulder that were documented as early as 2014. Dr. Paz explained that the term "new" as used in the October 28, 2022 MRI report does not mean "acute". Rather, since the radiologist was comparing the MRI taken in October 2022 to the MRI taken in May 2014, the term "new" describes a chronic change in the anatomy from that which existed in May 2014. Dr. Paz explained that the degenerative changes noted in the 2022 MRI is typical degeneration that occurs from instability caused by a rotator cuff tear.

17. The ALJ does not find Claimant's testimony regarding the nature and onset of her right shoulder symptoms to be credible or persuasive. The ALJ credits the medical records and finds that Claimant had ongoing right shoulder symptoms prior to the alleged August 16, 2022 incident. The ALJ credits the opinions of Dr. Paz and finds that Claimant's right shoulder was not injured on August 16, 2022. The ALJ further credits Dr. Paz's opinions and finds that Claimant's work activities on August 16, 2022 did not aggravate, accelerate, or combine with the pre-existing degenerative condition of Claimant's right shoulder to necessitate surgery.

CONCLUSIONS OF LAW

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

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

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

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

6. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that on August 16, 2022, she suffered a right shoulder injury arising out of and in the course and scope of her employment with Employer. As found, the medical records and the opinions of Dr. Paz are credible and persuasive.

ORDER

It is therefore ordered that Claimant's claim related to an alleged August 16, 2022 right shoulder injury is denied and dismissed.

Dated October 9, 2023.

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

Jf you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be finat. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-177-827-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that his scheduled eye impairment should be converted to a whole-person impairment.

2. Whether Respondents are liable for penalties for filing the final admission of liability beyond the period set forth in § 8-42-107.2(4)(c), C.R.S.

3. Whether Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his right eye on July 8, 2021, while he was re-treading a tire. A strap broke and struck his safety goggles, causing the safety goggles to strike his right eye.

2. Claimant was taken to the emergency department at Denver Health that same day and underwent eye surgery, consisting of a peritomy and globe exploration of the right eye.

3. On October 11, 2021, Claimant underwent a second right eye surgery with Dr. Jesse Smith. The procedure was a "[c]omplex [p]hacoemulsification and cataract extraction with intraocular lens implantation, CTR, no kenalog."

4. On October 19, 2021, Claimant saw his authorized treating physician, Dr. Jay Reinsma at Concentra. Dr. Reinsma noted that Claimant had one more follow-up scheduled with a retinal specialist, at which point he anticipated Claimant would be released from care and returned to work at full duty. Dr. Reinsma referred Claimant for an impairment evaluation in anticipation of maximum medical improvement (MMI).

5. Claimant underwent an impairment rating evaluation[1] with Dr. Chester Roe on January 25, 2022. Dr. Roe opined that Claimant had reached MMI with a 99% impairment to his right eye based on Table 2, page 163 of the *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, which given the absence of impairment of the left eye, resulted in a total visual system impairment of 25%. Dr. Roe noted that "one entirely blind eye with no visual field can only at

[1] The record is ambiguous as to whether this evaluation was at the referral of Dr. Reinsma or whether it was an independent medical examination sponsored by Respondents pursuant to 8-43-404(3), C.R.S. The distinction does not affect the Court's analysis in this case, and so the Court does not make any findings in this regard.

worst be a 25% visual system impairment, if the other eye is normal, according to the Guides."

6. Dr. Roe later testified at hearing that Claimant would be legally blind if both eyes were as bad as his right eye. Regarding depth perception, Dr. Roe testified that stereo vision—or vision with two eyes—provides better depth perception than one eye alone. Regarding the impairment, Dr. Roe testified that the visual system chapter of the AMA Guides, the calculations were 99% vision impairment in the right eye, which is a 25% visual system impairment, or 24% whole-person impairment. He clarified that he chose not to assign a whole person impairment for cosmetic disfigurement because he could not perceive much of a pupil abnormality from several feet away. The Court finds Dr. Roe's testimony credible and persuasive.

7. Claimant obtained a Division independent medical examination (DIME) with Dr. James McLaughlin on August 2, 2022, a level II accredited physician under the Workers' Compensation Act.[2] Dr. McLaughlin examined Claimant and noted that Claimant was able to drive his seven-minute commute to work. However, Dr. McLaughlin noted that Claimant had difficulty getting in and out of the vehicle because he has to feel around for the handle, would have to hold onto the railing while ascending or descending stairs, and would sometimes miss his mouth while eating. The Court infers that these difficulties are related to his loss of depth perception resulting from his loss of vision in his right eye.

8. Dr. McLaughlin agreed that Claimant was at MMI, and he determined that date to be January 25, 2022. He assigned a 98% impairment to Claimant's right eye, and therefore a 25% visual impairment. Dr. McLaughlin clarified that this would convert to a whole-person impairment of 24%. Regarding permanent work restrictions, Dr. McLaughlin recommended Claimant not work at exposed heights and not operate heavy equipment, power tools, or sharp tools due to loss of depth perception and decreased stereo acuity.

9. The Court finds Dr. McLaughlin's opinion regarding permanent impairment to equate to total loss of use of the eye.

10. Claimant testified at hearing that he cannot see movement in his right eye and that he sees lots of rays of different colors. Claimant also reported left eye fatigue and headaches. In his testimony, Claimant also recounted his difficulties with depth perception, including difficulty putting paste on his dentures in the morning, difficulty preparing food, and difficulty driving.

11. The Court finds Claimant's testimony credible. The Court also finds that Claimant's left eye fatigue and headaches are the result of overuse of his left eye to

[2] Rule 11-1, W.C.R.P. (2022), requires that a DIME physician be level II accredited, have sufficient recency of experience treating patients, and be board-certified in Colorado. Because Dr. McLaughlin performed the DIME, the Court infers that he met these criteria.

compensate for his right eye's loss of vision. Therefore, those symptoms lead the Court to find that Claimant's right eye impairment is beyond that which is set forth on the schedule of injuries at § 8-42-107(2), C.R.S.

12. The Court finds, based on Dr. McLaughlin's DIME report, Dr. Roe's testimony, and Claimant's testimony, that Claimant's loss of vision in his right eye for which he received an impairment rating from DIME Dr. McLaughlin constitutes a total loss of use of his right eye.

13. Dr. McLaughlin sent a copy of his DIME report to the Division as well as to counsel for the parties at some point in time between August 2 and September 7, 2022. Claimant and Respondents had a copy of the report for review by September 7, 2022 at the latest.

14. On September 7, 2022, The Division of Workers' Compensation issued a notice to the parties that the DIME process had concluded. The notice was sent by e-mail, and a copy was sent to Respondents' counsel. Respondents had actual notice as of September 7, 2022, that the DIME process had concluded.

15. On October 4, 2022, the Division issued a notice to Respondent-Insurer that "[t]he period for filing an application for hearing [pursuant to § 8-42-107.2(4)(c), C.R.S.] has expired and a final admission of liability is required." The Court finds that Respondent-Insurer received a copy of this letter.[3]

16. That same day, [Redacted, hereinafter RO], a representative of Claimant's counsel's office, e-mailed Respondents' counsel advising that the DIME process had concluded on September 7, 2022, and asking whether Respondents would be filing a FAL.

17. Respondents' counsel contacted Claimant's counsel via e-mail on October 10, 2022, regarding the possibility of settlement. Claimant's counsel responded on October 14, stating:

    a. *I have discussed the possibility with the client, and there is a possibility of settlement. However, I would like to receive the FA before evaluating this with the Client. If I'm not mistaken, this was due by September 27, and remains outstanding. Please advise on its status*.

18. On Wednesday, October 19, 2022, [Redacted, hereinafter BS], claims management supervisor for the Division, sent an e-mail to [Redacted, hereinafter JH][4] of Respondent-Insurer indicating that a "DIME conclusion notice" was sent to Respondent-Insurer on September 7, and that a FAL was due on September 27,

[3] Respondents' counsel, however, did not receive a copy of the letter until October 19, 2022, after learning about the existence of the letter and requesting a copy from the Division.

[4] JH[Redacted] role with Respondent-Insurer is not entirely clear, but the Court infers based on the circumstances that JH[Redacted] is a claims supervisor for Respondent-Insurer.

2022. BS[Redacted] also made reference to the October 4, 2022 letter sent by [Redacted, hereinafter DC]. BS[Redacted] requested that a FAL be filed by that Friday.

19. Respondents filed a FAL on November 7, 2022, admitting for a 25% scheduled impairment rating of the eye based on DIME Dr. McLaughlin's report and corresponding PPD benefits in the amount of $9,456.20. Respondents reserved the right to credit an overpayment of $715.35 toward PPD. The FAL was filed 61 days after the notice of conclusion of the DIME process, and 41 days after the FAL was due pursuant to § 8-42-107.2(4)(c), C.R.S. Based on the multiple notices Respondents received regarding the need to file an FAL, there is clear and convincing evidence that Respondents should have known that an FAL was due by no later than September 27, 2022, and that they were in continuing violation of the Workers' Compensation Act. The Court finds that Respondents' delay in filing the FAL was unreasonable and was the result of negligence. The Court also finds that with each successive notice, the delay in filing of the FAL became more unreasonable.

20. Four days prior to filing the FAL, Respondents had voluntarily issued a lump sum PPD payment to Claimant without discount in the amount of $8,740.85, the value of the admitted PPD minus an asserted overpayment of $715.35. The Court finds this to be a mitigating factor with regard to the issue of penalties. Though, the Court does also observe that Claimant would have been entitled to the same lump sum upon request pursuant to Rule 5-10, W.C.R.P., and § 8-43-203(2)(b)(II).

21. On December 7, 2022, exactly thirty days after the FAL was filed, Claimant filed an Application for Hearing (AFH) to challenge the FAL on the issues of average weekly wage, disfigurement, temporary disability benefits, permanent disability benefits, and penalties. December 7, 2022, was the latest date Claimant could file an AFH challenging the FAL pursuant to § 8-43-203(2)(b)(II), C.R.S.

22. The Court finds that Claimant's choice to wait thirty days from the date of the FAL before filing an AFH, notwithstanding having a copy of the DIME report since at least September 7, 2022, is evidence that Claimant perceived minimal ongoing harm resulting from delay of resolution of the issues endorsed in Claimant's AFH. The Court finds that the harm Claimant sustained as a result of Respondents' late filing of the FAL consisted of a delay in receipt of PPD benefits and a delay in resolution of the hearing issues. The former was somewhat mitigated by Respondents' voluntary payment of a lump sum PPD award without discount. The latter was of little harm, as evidenced by Claimant's own lack of urgency in seeking to challenge the FAL.

23. The harm resulting from the late filing of the FAL was slightly greater than *de minimus*, and the delay resulted from the negligence of Respondents. However, with each successive notice that Respondents received regarding their late FAL, the degree of culpability increased. Therefore, the Court finds that the following

daily penalties during the 41-day delay in filing of the FAL would be fairest and within Respondents' ability to pay:

a. From September 27 through October 4, 2022, daily penalties of $8 per day;
b. From October 5 through October 10, 2022, daily penalties of $10 per day;
c. From October 11 through October 19, 2022, daily penalties of $15 per day; and
d. From October 20 through November 6, 2022, daily penalties of $20 per day.

24. At the time of hearing, Claimant allowed the Court to observe his right eye for a disfigurement award. The Court observed that Claimant's right eye was slightly more dilated than the left and slightly redder. The Court finds that the disparities in pupil dilation and eye redness are related to Claimant's July 8, 2021 injury, and that Claimant has proved by a preponderance of the evidence that he has been seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view, as described, so as to entitle him to a disfigurement award. While the disfigurements are not particularly stark, their location in Claimant's right eye contributes to their prominence. The Court finds that a $700 disfigurement award is appropriate.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Whole-Person Conversion

The ALJ is the finder of fact on the question of whether the Claimant sustained a "loss of an arm" within the meaning of schedule of disabilities in § 8-42-107(2)(a), C.R.S., or a whole person rating under § 8-42-107(8)(c), C.R.S. *Strauch v. PSL Swedish Healthcare System,* 917 P. 2d 366, 369 (Colo.App.1996). In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883, 884 (Colo.App.1996)*; Strauch* at 368-369.

Injury is the manifestation in part or parts of the body which been impaired or disabled as a result of the industrial accident. *Mountain City Meat v. ICAO,* 904 P.2d 1333 (Colo. App. 1995). The part of the body that sustains the ultimate loss is not necessarily the particular part of the body where the injury occurred. *McKinley v. Bronco Billy's,* 903 P.2d 1239, 1242 (Colo.App.1995). When evaluating functional impairment the ALJ shall look at the alteration of the claimant's functional abilities by medical means and by non-medical means, as well as the claimant's capacity to meet personal, social, and occupational demands. *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333, 1337 (Colo. 1996).

Section 8-42-107(1), C.R.S., provides that a claimant is limited to a scheduled disability award if the claimant suffers an "injury or injuries" described in subsection (2) of that provision. *Strauch*, 917 P.2d 366. The schedule of impairments includes "[t]otal blindness of one eye." § 8-42-107(2)(gg), C.R.S. However, the Act also provides that "[w]hen an injury results in the total loss or total loss of use of . . . an eye . . . the benefits for such loss shall be determined pursuant to this subsection (8),[5] except as provided in subsection (7)(b)(IV)[6] of this subsection." § 8-42-107(8)(c.5), C.R.S.

The only distinction between these two provisions appears to be between total blindness and total loss of use of an eye. Although the distinction is not obvious at first glance, the Colorado Court of Appeals clarified the distinction in *McKinley v. Bronco*

[5] Whole-person.
[6] Where it provides that you must admit for the scheduled rating if it results in greater compensation.

Billy's, 903 P.2d 1239 (Colo.App.1995). The court in *McKinley v. Bronco Billy's* held that "[i]f the loss of use was partial, then . . . the amount of compensation was to be the proportionate share of the amount stated in the schedule for the total loss of a member." However, if the loss was total, then the permanent partial disability award was to be calculated based on the scheme for whole-person impairments set forth at § 8-42-107(8), C.R.S.

Claimant points to the case of *Parra v. Spectrum Retirement Communities*, W.C. No. 5-052-120-005 (May 6, 2021), as a case analogous to the present one. The panel in *Parra* upheld the ALJ's finding that the claimant's impairment of the eye was not limited to the schedule. The claimant in *Parra* suffered a full-thickness corneal laceration. As a result, he did not have a cornea or lens in his right eye and experienced headaches. Nevertheless, he was able to distinguish between lightness and darkness with his injured eye, as well as perceive motion if within several inches of his eye. The DIME physician declined to assign the claimant a whole-person impairment rating because the claimant still had some vision and still had his eyeball. The ALJ concluded that the claimant sustained a total loss of use of the eye and converted the scheduled rating to a whole-person rating.

The respondents in *Parra* appealed, arguing in part that the ALJ's finding that the claimant had "total loss of use" of his affected eye was not supported by the evidence, and that the loss of use was only partial because the claimant could still distinguish between lightness and darkness and perceive some motion. The ICAO panel, however, upheld the ALJ's finding, citing *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 199 P. 482 (1921), for the proposition that an award for total blindness is correct where the vision remaining is of no value for working. The panel further upheld the finding that the impairment was not contained on the schedule in light of the facts that the claimant's "entire life has been altered by this injury" and the claimant experienced "continual headaches."

Here, just as in *Parra*, Claimant has not sustained enucleation of his right eye. Claimant retains some vision, just like the claimant in *Parra*, but the vision is of no value for Claimant's work. He cannot see movement in his right eye, but can see rays of different colors. Claimant's loss of vision has also caused Claimant continual headaches and altered Claimant's activities of daily living in substantial ways.

Parra is sufficiently analogous to the facts in this case such that the Court concludes, based on *Parra*, that it has the discretion to convert the scheduled eye impairment rating if the Court finds that Claimant sustained a total loss of use of his eye for all practical purposes. *See Mut. Ins. Co.*, 199 P. 482.

As found above, Claimant's loss of vision in his right eye for which he received an impairment rating from DIME Dr. McLaughlin constitutes a total loss of use of his right eye. Additionally, given Claimant's decreased ability to meet his personal needs in his activities of daily living, the strain placed on his contralateral eye, and his recurring

headaches, the Court concludes that Claimant's impairment is beyond that which is set forth on the schedule at § 8-42-107(2), C.R.S.

Therefore, Claimant has proved by a preponderance of the evidence that he is entitled to a conversion of his right eye impairment to a whole-person impairment of 24%.

Penalties

Section 8-43-304(1), C.R.S., provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S., is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005).

Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital*, 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Section 8-42-107.2, C.R.S., provides that Respondents shall, within twenty days after the date of mailing of the Division's notice that hit has received the DIME report, either file a FAL or request a hearing to contest the DIME's findings. As found above, the Division issued its notice on September 7, 2022. Respondents had until September 27, 2022, to either file a FAL or request a hearing challenging the DIME. Respondents did neither. Respondents were therefore in violation of the Act.

The Court also considers whether Respondents' violation of § 8-42-107.2, C.R.S., was reasonable. As found above, it was not. Respondents had notice that they were to file a FAL or request a hearing by no later than September 27, 2022, yet did not.

Section 8-43-304(4), C.R.S. permits an alleged violator twenty days to cure the violation. If the violator cures the violation within the twenty-day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003). Section 8-43-304(4), C.R.S., modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo.App.1997); *see Tadlock v. Gold Mine Casino*, W.C. No. 4-200-716 (May 16, 2007).

Respondents came into compliance with the Act upon filing the November 7, 2022 FAL. However, in so doing, Respondents did not cure the daily violations of the Act already accrued for the period between September 27 and November 6, 2022. Even had it done so, as found above, Claimant has proved by clear and convincing evidence that Respondents should have known they were in violation of the Act. Therefore, penalties are appropriate.

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hosp.*, W.C. No. 4-619-954 (May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005); *Espinoza v. Baker Concrete Construction*, W.C. No. 5-066-313 (Jan. 31, 2020).

When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc.*, W.C. 4-981-806 (July 1, 2019).

As found above, the harm resulting from the late filing of the FAL was slightly greater than *de minimus*. Respondents took measures to mitigate the late filing of the FAL by promptly issuing a lump sum payment without discount of all PPD admitted. The mitigation is partial, as Claimant would have been entitled to the same lump sum upon request pursuant to Rule 5-10, W.C.R.P., and § 8-43-203(2)(b)(II).

As found above, the harm Claimant sustained as a result of Respondents' late filing of the FAL consisted of a delay in receipt of PPD benefits and a delay in resolution of the hearing issues. The former was somewhat mitigated by Respondents' voluntary payment of a lump sum PPD award without discount. The latter was of little harm, as evidenced by Claimant's own lack of urgency in seeking to challenge the FAL.

As for reprehensibility, as found above, Respondents' violation is the result of negligence. Nevertheless, the degree of culpability increased with each successive notice Respondents received that their FAL was untimely. Therefore, the Court concludes that daily penalties should be imposed proportional to the unreasonableness of Respondents' failure to file the FAL during each period during which Respondents had additional notice. Penalties should be imposed as follows:

- From September 27 through October 4, 2022, daily penalties of $8 per day;
- From October 5 through October 10, 2022, daily penalties of $10 per day;
- From October 11 through October 19, 2022, daily penalties of $15 per day; and
- From October 20 through November 6, 2022, daily penalties of $20 per day.

Based on the above findings, the penalties payments should be apportioned equally between Claimant and the Colorado Uninsured Employer Fund.

Disfigurement

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

Based on Claimant's testimony and the records submitted at hearing, Claimant's injury caused a visible disfigurement to his body consisting of slight redness in the right eye and slightly more pupil dilation in the right eye than the left. Claimant has proved entitlement to a disfigurement award. As found above, and as the Court here concludes, a disfigurement award of $700.00 is most appropriate for a disfigurement that is not salient in appearance but located in the prominent location of Claimant's eye.

ORDER

It is therefore ordered that:

1. Respondents shall file an amended FAL admitting for a 24% whole-person impairment.

2. Respondents shall pay daily penalties as follow:

   a. From September 27 through October 4, 2022, daily penalties of $8 per day;
   b. From October 5 through October 10, 2022, daily penalties of $10 per day;
   c. From October 11 through October 19, 2022, daily penalties of $15 per day; and
   d. From October 20 through November 6, 2022, daily penalties of $20 per day.

   The penalties shall be paid 50% to Claimant and 50% to the Colorado Uninsured Employer Fund.

3. Respondents shall pay Claimant a disfigurement award of $700.00.

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

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

DATED: October 10, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-110-218-003

ISSUES

1. Whether temporary total disability (TTD) benefits Respondents paid to Claimant before Claimant reached MMI which exceed the statutory cap constitute an overpayment.

2. Whether Respondents may recover TTD benefits Claimant received in excess of the statutory cap prior to MMI, as either a credit against future benefits or in some other form.

FINDINGS OF FACT

1. On June 20, 2019, Claimant sustained an admitted injury arising out of the course of her employment with Employer. (Ex. 1). As a result of his injury, Respondents paid Claimant temporary total disability (TTD) benefits in the amount of $179,786.88 from June 21, 2019 through December 14, 2022. (Ex. 1).

2. Claimant was placed at maximum medical improvement (MMI) effective January 18, 2023, and assigned a whole-person impairment rating of 21%. (Ex. 1).

3. On February 22, 2023, Respondents filed a Final Admission of Liability (FAL) admitting for the whole person impairment of 21%, and for TTD benefits. Respondents asserted an overpayment in the amount of $88,660.04. Respondents' asserted overpayment is based on the difference between the applicable statutory cap on combined TTD and PPD benefits of $91,126,84, and the amount paid for TTD benefits (*i.e.*, $179,786.88 - $91,126.84 = $88,660.04). (Ex. 1). (For the purposes of this order the $88,660.04 in TTD benefits will be referred to as the "Excess TTD Payments").

4. On May 9, 2023, Claimant filed an Application for Hearing challenging the asserted overpayment.

CONCLUSIONS OF LAW

Generally

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

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

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

Overpayment

Ripeness

At hearing, the parties agreed the issue of whether the Excess TTD Payments constituted an overpayment was appropriate for determination. In position statements, Respondents now contend otherwise. An issue is "ripe" when it is real, immediate, and fit for adjudication. *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). An issue is "fit for adjudication" where the issue is disputed and there is no legal impediment to immediate adjudication. *Meacham v. American Blue Ribbon Holdings*, W.C. No. 4-885-416-02 (ICAO July 18, 2014). Where an issue is addressed in a final admission of liability, and the legal prerequisites to adjudication of the issue have been satisfied, the issue is ripe for hearing. *Chavez v. Cargill, Inc.*, W.C. No. 4-421-748 (Nov. 1, 2002).

With respect to the issue of overpayment, these criteria have been met. Respondents identified an alleged overpayment in the February 22, 2023 FAL, and calculated the alleged overpayment based on the TTD benefits paid. The legal prerequisites to determination also have been satisfied. Specifically, Claimant's right to TTD benefits ended pursuant to § 8-42-105 (3)(a), C.R.S., when Claimant reached MMI on January 18, 2023. Respondents filed an FAL, and Claimant did not challenge the FAL with respect to MMI or permanent impairment. That Respondent has not yet sought repayment of the alleged overpayment "[does] not render the issue premature for resolution at a hearing or otherwise not ripe." *Tully v. Southwest Health Systems, Inc.*, W.C. No. 5-062-753-001 (ICAO Feb. 9, 2021). The ALJ finds the issue of whether the Excess TTD Payments constitute an overpayment to be a real, immediate dispute, that is fit for adjudication.

Classification of Excess TTD Payments

Respondents contend the Excess TTD Payments constitute either an "overpayment," or a "credit." The Act defines an "overpayment" as:

> "[M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce death or disability benefits payable under said articles."

§ 8-40-201 (15.5), C.R.S. (2020).[1] Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek an order for repayment of overpayments, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207(1)(q), C.R.S. Respondents bear the burden of proof to establish by a preponderance of the evidence that a claimant received an overpayment, and that respondents are entitled to repayment or recovery. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002). Respondents may also retroactively recover an overpayment of benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

The present scenario was addressed in *United Airlines v. Indus. Claim Appeals Office*, 312 P.3d 235 (Colo. App. 2013), where the issue was whether TTD benefits a claimant received in excess of the statutory cap in § 8-42-107.5, C.R.S., constituted an overpayment subject to recovery by respondents. The claimant received TTD benefits before any condition for termination of TTD benefits under § 8-42-105 (3), C.R.S., had been satisfied. The Court held these were benefits to which the claimant was entitled, and did not constitute an "overpayment." The Court further held that the statutory cap applies to "combined" temporary and permanent disability benefits, and is not applicable where a claimant receives only temporary benefits to which they are entitled. Because the claimant's TTD benefits exceeded the cap before an award of permanent benefits was made, claimant never received combined permanent and temporary benefits. Thus, the statutory cap is not applicable to TTD benefits properly paid, even if they exceed the cap. The Court of Appeals further held that the respondents were not entitled to recovery of TTD benefits that exceeded the statutory cap.

The present case is not factually distinguishable from *United Airlines*. The Excess TTD Payments Claimant received were to compensate him for lost wages before any of the conditions for termination of TTD benefits under § 8-42-105 (3), C.R.S. occurred. Thus, the Excess TTD Payments were benefits to which Claimant was entitled and did not constitute an "overpayment" as that term was defined prior to January 1, 2022. Because the Excess TTD Payments are not an "overpayment," Respondents are not entitled to repayment or recovery of those benefits.

Respondents contention that the Excess TTD Payments may be defined as a "credit," rather than an "overpayment," is without basis. While the Act defines "overpayment," it contains no provision classifying any payments as a "credit." Instead, in appropriate circumstances, respondents may be permitted to "offset" or "credit" overpayments against other benefits. In other words, a "credit" or "offset" is a vehicle for the recovery of an "overpayment," but is not a separate entity itself.

[1] Section 8-40-201 (15.5), C.R.S., amended the definition of "overpayment" effective January 1, 2022. However, the statute does not apply to injuries or causes of action occurring before January 1, 2022, and this is not applicable to Claimant's claim. *See Barnes v. City and Cty. of Denver, W.C*. No. 5-063-493 (ICAO Mar. 27, 2023)

Application of Excess TTD Payments To Future Benefits.

Ripeness

The second issue relates to the application of the Excess TTD Payments toward potential future indemnity benefits. Respondents contend even if the Excess TTD Payments are not an "overpayment," they are entitled to apply the Excess TTD Payments toward future indemnity benefits should they be owed, and that the Excess TTD Payments should not be "expunged." Although the parties agreed this issue should be determined, the ALJ finds the issue to be a hypothetical question not appropriate for adjudication at this time.

As noted above, an issue is ripe when the dispute is real, immediate and there are no legal impediments to adjudication. *Olivas-Soto, supra; Meacham, supra.* "[A]djudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur." *Tully, supra*. "No court can appropriately adjudicate a matter … 'in the absence of a showing that a judgment, if entered, would afford [the parties] present relief.'" *Cacioppo v. Eagle Cty. School Dist.*, 92 P.3d 453 (Colo. 2004) *citing Farmers Ins. Exch. v. Dist. Court*, 62 P.2d 944, 947 (Colo. 1993). "Above all, there must be a present and actual legal controversy and 'not a mere possibility of a future legal dispute over some issue.'" *Id*.

Respondents raise several hypothetical scenarios in which the Excess TTD Payments could potentially be applied as a credit or offset against future benefits, but do not establish more than a possibility of future disputes based on currently-non-existent facts. These scenarios include Claimant reopening his claim and receiving new permanent impairment rating greater than 25%; Claimant's condition worsening to the point he is no longer at MMI, and becoming entitled to additional TTD benefits; or scenarios which could result in duplicate benefits. Respondents argue if these scenarios were to occur, future indemnity benefits, if any, should be reduced by the Excess TTD Payments. No evidence was presented, however, that any of these potential scenarios has occurred, or that a real, present controversy exists.

The ALJ concludes that determination of the issue Respondents' ability to recover, offset, or credit the Excess TTD Benefits against some as-yet-determined future indemnity benefits involves uncertain, contingent future matters which may never occur. Accordingly, the issue is not a real or immediate dispute, and is not fit for adjudication at this time.

ORDER

It is therefore ordered that:

1. The Excess TTD Payments Claimant received do not constitute an "overpayment" under the Workers Compensation Act.

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

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

DATED: October 10, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-231-678-001

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the left shoulder surgery requested by Authorized Treating Physician (ATP) Nathan Faulkner M.D. is reasonable, necessary and causally related to his January 5, 2023 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Field Technician. His job duties involved assisting with and repairing cabinet installations. While exiting his car at a jobsite on January 5, 2023 Claimant suffered admitted industrial injuries during the course and scope of his employment. He specifically slipped on ice and fell on his left side.

2. Claimant initially received medical treatment for his January 5, 2023 injuries from Authorized Treating Provider (ATP) Concentra Medical Centers on January 6, 2023. He reported to Barry Nelson, D.O. that he had slipped on ice and fallen on his left side. Claimant specifically landed on his left shoulder and elbow. He also twisted his left ankle. Claimant noted that he was scheduled to undergo total reverse left shoulder surgery on January 17, 2023 through private medical provider Kaiser Permanente. Dr. Nelson diagnosed Claimant with a left ankle sprain as well as contusions of the left shoulder and elbow.

3. Claimant testified that he had been receiving treatment for his left shoulder from Kaiser prior to January 5, 2023. Notably, medical records reveal Claimant had a pre-existing history of left shoulder problems. On September 10, 2018 Claimant visited Kaiser and presented with continued left shoulder pain and difficulties with movement for just over one week. Claimant reported he initially injured his left shoulder when he fell while hunting approximately two weeks earlier.

4. On September 20, 2022 Claimant visited Seth R. Olson, D.O. at Kaiser. Claimant reported his chief concern was left shoulder pain. He commented that left shoulder pain had been a chronic issue but worsened over the past few days. Claimant specified he has suffered pain in his left arm for three years and reported that "lately arm feels weak" and he kept dropping things. Claimant explicitly denied any recent left shoulder injuries, but noted that it hurt to merely lift his arm a quarter of the way up and move his steering wheel when driving. He acknowledged that left shoulder surgery had previously been recommended, but he never underwent the procedure. Dr. Olson assessed acute and chronic left shoulder pain and recommended an MRI.

5. Claimant testified that on September 28, 2022 he suffered an injury to his left shoulder while working on a drawer at a private residence for Employer. While adjusting the front face of the drawer by pushing it from the bottom with his hands, he felt increased left shoulder pain. Claimant visited David J. Mackey, PA at Kaiser Urgent Care for treatment. PA Mackey noted a recent September 23, 2022 MRI revealed a massive left shoulder rotator cuff tear. Claimant exhibited debilitating pain and was unable to move his left arm. PA Mackey

remarked that Claimant had "extremely limited range of motion." He determined that, based on the mechanism of injury, he did not "suspect any new severe pathology except for possibly new rotator aspect." PA Mackey placed an urgent referral for an orthopedic consultation.

6. On September 30, 2022 Claimant again visited Kaiser and received treatment from Andrew J. Morris, M.D. Dr. Morris remarked that Claimant had a well-established chronic history of a left massive rotator cuff tear. However, Claimant reported he re-injured his left shoulder at work and was unable to use his arm because of pain. Dr. Morris commented that Claimant had suffered pain in his left shoulder that worsened with overhead activities for many years. He recommended a reverse total shoulder arthroplasty once Claimant quit smoking.

7. Employer's Field Manager [Redacted, hereinafter JJ] testified at the hearing in this matter. He explained that Claimant never reported a work-related incident on September 28, 2022 as reflected in a text message he received from Claimant. Instead, Claimant advised JJ[Redacted] that he was experiencing a re-aggravation of a previous injury. The September 28, 2022 text message only specified that Claimant "had some lifting restrictions until I meet with orthopedic surgeon." Employer thus did not complete an Accident/Injury Incident Report.

8. On January 19, 2023 Claimant returned to Kaiser and visited Dr. Morris for an examination. Claimant reported left shoulder pain that had been occurring "for many years" and worsened with overhead activities. Dr. Morris discussed surgical options including a reverse total shoulder arthroplasty because Claimant had not smoked for three months.

9. On February 21, 2023 Claimant returned to Concentra and visited Dr. Nelson for an evaluation. Dr. Nelson recorded that Claimant's left shoulder symptoms were the result of an "old work comp injury from August" where Claimant sustained a rotator cuff tear. He remarked that Claimant had "plans for a reverse total shoulder" based on the recommendations of his Kaiser physicians. Dr. Nelson referred Claimant for an orthopedic evaluation with Nathan Faulkner, M.D. at Orthopedic Centers of Colorado.

10. On March 15, 2023 Claimant visited Dr. Faulkner for an examination. Claimant reported that he initially injured his left shoulder "in August when he was hitting a drawer up while installing a cabinet and developed immediate left shoulder pain." Dr. Faulkner summarized that Claimant had suffered two separate injuries to his shoulder that occurred at work. In addition to the August, 2022 injury Claimant again injured his left shoulder in January, 2023 when he slipped on ice and fell.

11. On March 20, 2023 Claimant underwent an MRI of his left shoulder. The MRI revealed a "massive full-thickness rotator cuff tear." Therefore, on March 24, 2023 Dr. Faulkner sought authorization for a reverse total shoulder arthroplasty. Dr. Faulkner mentioned Claimant's intermittent pain prior to the work injury but explained that he now experienced significant weakness and limited range of motion.

12. On May 3, 2023 Claimant underwent an Independent Medical Examination (IME) with William Ciccone II, M.D. Dr. Ciccone reviewed Claimant's medical records and performed a physical examination. He recounted that Claimant had reported a work injury to his left shoulder in September 2022 when he pushed up on a drawer that weighed about seven

pounds. Claimant stated that he again injured his left shoulder at work on January 5, 2023 when he slipped on ice and landed on his left side. Dr. Ciccone concluded that Claimant's need for a reverse left shoulder arthroplasty was not causally related to either of the preceding work events.

13. Initially, Dr. Ciccone explained that the minor event of simply pushing up on a drawer in September 2022 was unlikely to cause any significant injury to Claimant's shoulder. Moreover, a left shoulder MRI from September 23, 2022 at Kaiser had revealed a massive chronic retracted rotator cuff tear. Kaiser discussed the possibility of a shoulder replacement if Claimant ceased smoking.

14. Dr. Ciccone also determined that the January 5, 2023 slip and fall at work did not aggravate Claimant's pre-existing rotator cuff tear. Notably, Dr. Ciccone compared Claimant's left shoulder MRI from September 23, 2022 with the more recent left shoulder MRI from March 20, 2023. The imaging did not reveal any differences. Both scans reflected a "massive, retracted rotator cuff tear with atrophy." Dr. Ciccone remarked that there have been no differences in the suggested treatment for Claimant's shoulder following his work accident. He emphasized that Claimant has chronic, pre-existing cuff tear arthropathy in the shoulder that was not changed by the fall on January 5, 2023. Dr. Ciccone thus concluded that the reverse shoulder replacement surgery requested by Dr. Faulkner is not causally related to Claimant's work activities. Claimant's need for shoulder surgery preceded any work events.

15. On June 13, 2023 Claimant underwent an IME with Sander Orent, M.D. Dr. Orent reasoned that Claimant's "initial shoulder injury was work related and should have been managed inside the Workers' Compensation system." He remarked that Claimant exacerbated his left shoulder when he slipped and fell on ice on January 5, 2023. Although Dr. Orent recognized that Claimant had planned left shoulder surgery before the fall, the event exacerbated his symptomology. He concluded that Claimant's request for a left shoulder reverse arthroplasty should be covered under Workers' Compensation.

16. On August 23, 2023 the parties conducted the post-hearing evidentiary deposition of Dr. Ciccone. Dr. Ciccone maintained that Claimant's request for reverse left shoulder arthroplasty is not causally related to either the September 28, 2022 or January 5, 2023 work events. He reiterated that both the September 23, 2022 and March 20, 2023 left shoulder MRIs revealed that Claimant had a "massive rotator cuff tear" that was chronic in nature. Notably, the September 28, 2022 work incident in which Claimant was pushing a seven-pound drawer would not have changed his left shoulder condition. Claimant was not trying to reach or lift the drawer. Dr. Ciccone reasoned that the mechanism was unlikely to cause a significant shoulder injury. Furthermore, Claimant's January 5, 2023 slip and fall did not cause the need for a reverse left shoulder arthroplasty. Instead, the necessity of a left shoulder arthroplasty was the pain and dysfunction from a chronic rotator cuff tear that existed prior to the January 5, 2023 accident. Furthermore, the fall on January 5, 2023 did not aggravate Claimant's pre-existing rotator cuff tear arthropathy because the MRIs from September of 2022 and March of 2023 both revealed chronic, complete, full thickness rotator cuff tears. Accordingly, Claimant's request for left rotator cuff surgery was not causally related to an industrial event.

17. Claimant has failed to demonstrate it is more probably true than not that the left shoulder surgery requested by ATP Dr. Faulkner is reasonable, necessary and causally related to his January 5, 2023 industrial injury. Initially, Claimant explained that he slipped on ice, landed on his left side and injured his shoulder while at a jobsite on January 5, 2023. However, the record is replete with evidence that Claimant had significant left shoulder symptoms prior to his accident at work. On September 20, 2022 Claimant visited Dr. Olson at private medical provider Kaiser and reported that he had suffered chronic left shoulder pain that had worsened over the past few days. Claimant specified he had experienced pain in his left arm for three years and reported that "lately arm feels weak" and he kept dropping things. He acknowledged that left shoulder surgery had previously been recommended, but he never underwent the procedure.

18. Claimant testified that on September 28, 2022 he suffered an injury to his left shoulder while repairing a drawer at a private residence for Employer. He visited Kaiser Urgent Care for treatment. PA Mackey noted a September 23, 2022 MRI had revealed a massive left shoulder rotator cuff tear. On September 30, 2022 Claimant again visited Kaiser and Dr. Morris remarked that he had a well-established chronic history of a left massive rotator cuff tear. The preceding Kaiser records reveal that Claimant had chronic, long-standing left shoulder problems, including a massive rotator cuff tear, that warranted surgery even before any alleged industrial injuries.

19. After Claimant's January 5, 2023 work accident in which he slipped and fell on ice, he obtained medical treatment from ATP Concentra. On January 6, 2023 he reported to Dr. Nelson that he was already scheduled to undergo total reverse left shoulder surgery on January 17, 2023 through Kaiser. On a February 21, 2023 visit to Concentra, Dr. Nelson recorded that Claimant's left shoulder condition was the result of an "old work comp injury from August" where Claimant sustained a rotator cuff tear. He remarked that Claimant had "plans for a reverse total shoulder" based on the recommendations of his Kaiser physicians. On March 20, 2023 Claimant underwent an MRI of his left shoulder that revealed a "massive full-thickness rotator cuff tear." Dr. Faulkner at Concentra thus requested a reverse left shoulder arthroplasty.

20. Dr. Ciccone conducted an IME and testified through a post-hearing evidentiary deposition in this matter. He persuasively determined that Claimant's need for a reverse left shoulder arthroplasty was not causally related to either the September, 2022 or January 5, 2023 work events. Dr. Ciccone explained that the minor event of simply pushing up on a drawer in September 2022 was an unlikely mechanism to cause a significant shoulder injury. Furthermore, Claimant's January 5, 2023 slip and fall did not cause the need for a reverse left shoulder arthroplasty. Instead, the cause of Claimant's need for a left shoulder arthroplasty was the pain and dysfunction from the massive, chronic rotator cuff tear visible on the September 23, 2022 MRI at Kaiser. Furthermore, the fall on January 5, 2023 did not aggravate Claimant's pre-existing left shoulder condition because the MRIs from September of 2022 and March of 2023 both revealed chronic, complete, full thickness rotator cuff tears. Dr. Ciccone also remarked that there have been no differences in the suggested treatment for Claimant's shoulder following his work accident. He emphasized that Claimant simply has chronic, pre-existing cuff tear arthropathy in the left shoulder that was not changed by the fall on January 5, 2023. Dr. Ciccone thus persuasively concluded that Dr. Faulkner's requested reverse shoulder replacement surgery is not causally related to Claimant's work activities.

21. In contrast, Dr. Orent remarked that Claimant's September 28, 2022 left shoulder injury was related to his work activities and he exacerbated his symptoms when he fell on ice on January 5, 2023. Although Dr. Orent recognized that Claimant had planned left shoulder surgery before the fall, the event nevertheless aggravated his condition. He concluded that Claimant's request for a left shoulder reverse arthroplasty was related to his work activities and should be authorized. However, although Dr. Orent was correct that Claimant's left shoulder surgery had been planned before the January 5, 2023 fall, the records reveal that he was incorrect in assuming the initial injury was related to Claimant's employment. Extensive medical records from Kaiser clearly show that Claimant had reported left shoulder problems eight days before the September 28, 2022 alleged incident. Notably, a September 23, 2022 MRI showed a "massive rotator cuff tear'" that was the cause of Claimant's need for surgery. Therefore, based on the medical records and persuasive testimony of Dr. Ciccone, Claimant's request for left shoulder surgery is not likely causally related to his work activities for Employer. Accordingly, Claimant's request for a reverse left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the left shoulder surgery requested by ATP Dr. Faulkner is reasonable, necessary and causally related to his January 5, 2023 industrial injury. Initially, Claimant explained that he slipped on ice, landed on his left side and injured his shoulder while at a jobsite on January 5, 2023. However, the record is replete with evidence that Claimant had significant left shoulder symptoms prior to his accident at work. On September 20, 2022 Claimant visited Dr. Olson at private medical provider Kaiser and reported that he had suffered chronic left shoulder pain that had worsened over the past few days. Claimant specified he had experienced pain in his left arm for three years and reported that "lately arm feels weak" and he kept dropping things. He acknowledged that left shoulder surgery had previously been recommended, but he never underwent the procedure.

7. As found, Claimant testified that on September 28, 2022 he suffered an injury to his left shoulder while repairing a drawer at a private residence for Employer. He visited Kaiser Urgent Care for treatment. PA Mackey noted a September 23, 2022 MRI had revealed a massive left shoulder rotator cuff tear. On September 30, 2022 Claimant again visited Kaiser and Dr. Morris remarked that he had a well-established chronic history of a left massive rotator cuff tear. The preceding Kaiser records reveal that Claimant had chronic, long-standing left shoulder problems, including a massive rotator cuff tear, that warranted surgery even before any alleged industrial injuries.

8. As found, after Claimant's January 5, 2023 work accident in which he slipped and fell on ice, he obtained medical treatment from ATP Concentra. On January 6, 2023 he reported to Dr. Nelson that he was already scheduled to undergo total reverse left shoulder surgery on January 17, 2023 through Kaiser. On a February 21, 2023 visit to Concentra, Dr. Nelson recorded that Claimant's left shoulder condition was the result of an "old work comp injury from August" where Claimant sustained a rotator cuff tear. He remarked that Claimant had "plans for a reverse total shoulder" based on the recommendations of his Kaiser physicians. On March 20, 2023 Claimant underwent an MRI of his left shoulder that revealed a "massive full-thickness rotator cuff tear." Dr. Faulkner at Concentra thus requested a reverse left shoulder arthroplasty.

9. As found, Dr. Ciccone conducted an IME and testified through a post-hearing evidentiary deposition in this matter. He persuasively determined that Claimant's need for a

reverse left shoulder arthroplasty was not causally related to either the September, 2022 or January 5, 2023 work events. Dr. Ciccone explained that the minor event of simply pushing up on a drawer in September 2022 was an unlikely mechanism to cause a significant shoulder injury. Furthermore, Claimant's January 5, 2023 slip and fall did not cause the need for a reverse left shoulder arthroplasty. Instead, the cause of Claimant's need for a left shoulder arthroplasty was the pain and dysfunction from the massive, chronic rotator cuff tear visible on the September 23, 2022 MRI at Kaiser. Furthermore, the fall on January 5, 2023 did not aggravate Claimant's pre-existing left shoulder condition because the MRIs from September of 2022 and March of 2023 both revealed chronic, complete, full thickness rotator cuff tears. Dr. Ciccone also remarked that there have been no differences in the suggested treatment for Claimant's shoulder following his work accident. He emphasized that Claimant simply has chronic, pre-existing cuff tear arthropathy in the left shoulder that was not changed by the fall on January 5, 2023. Dr. Ciccone thus persuasively concluded that Dr. Faulkner's requested reverse shoulder replacement surgery is not causally related to Claimant's work activities.

10. As found, in contrast, Dr. Orent remarked that Claimant's September 28, 2022 left shoulder injury was related to his work activities and he exacerbated his symptoms when he fell on ice on January 5, 2023. Although Dr. Orent recognized that Claimant had planned left shoulder surgery before the fall, the event nevertheless aggravated his condition. He concluded that Claimant's request for a left shoulder reverse arthroplasty was related to his work activities and should be authorized. However, although Dr. Orent was correct that Claimant's left shoulder surgery had been planned before the January 5, 2023 fall, the records reveal that he was incorrect in assuming the initial injury was related to Claimant's employment. Extensive medical records from Kaiser clearly show that Claimant had reported left shoulder problems eight days before the September 28, 2022 alleged incident. Notably, a September 23, 2022 MRI showed a "massive rotator cuff tear'" that was the cause of Claimant's need for surgery. Therefore, based on the medical records and persuasive testimony of Dr. Ciccone, Claimant's request for left shoulder surgery is not likely causally related to his work activities for Employer. Accordingly, Claimant's request for a reverse left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

ORDER

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

1. Claimant's request for a reverse left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

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

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

DATED: October 11, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-196-637-002

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that trigger point injections are reasonable, necessary, and related to her admitted industrial injury.

2. Whether Claimant proved by a preponderance of the evidence that prescriptions for Oxycodone and Tizanidine are reasonable, necessary, and related to her admitted industrial injury.

FINDINGS OF FACT

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

1. Claimant worked in Employer's warehouse. On October 28, 2021, Claimant sustained admitted injuries to the right side of her neck and right shoulder while cleaning a machine with her right arm overhead.

2. Claimant first saw her authorized treating physician (ATP) Annu Ramaswamy, M.D., on November 11, 2021. Claimant reported pain in her right shoulder and neck that had not resolved. Based on his examination and history, Dr. Ramaswamy diagnosed Claimant with shoulder impingement and secondary myofascial pain in the neck and rhomboid regions. Dr. Ramaswamy referred Claimant for physical therapy and massage therapy. He also noted that if Claimant did not improve in time, he would perform trigger point injections. (Ex. 4, pp. 9-11).

3. At Claimant's November 17, 2021 appointment, Dr. Ramaswamy noted on the exam that Claimant had moderate trigger point activity involving the right trapezius and levator musculature with tenderness. He gave Claimant trigger point injections in the right trapezius/levator, and noted that a twitch response was obtained. (Ex. 4 p. 14).

4. On November 30, 2021, Dr. Ramaswamy examined and treated Claimant. He noted mild to moderate trigger point activity involving the right trapezius and levator musculature with tenderness. Claimant received three trigger point injections (one to the right praspinous region and two to the right trapezius and levator regions). Dr. Ramaswamy noted that a local twitch response was obtained. Claimant reported some relief from the trigger point injections. (Ex. 4 p. 21).

5. Claimant saw Dr. Ramaswamy for a follow up appointment on December 21, 2021. Dr. Ramaswamy found that Claimant had very localized trigger point activity in the right trapezius/levator musculature with tenderness. Claimant reported that the trigger point injections "helped quite a bit." (Ex. 4 p. 25).

6. Dr. Ramaswamy referred Claimant to Levi Miller, M.D., of Colorado Rehabilitation & Occupational Medicine. Claimant saw Dr. Miller on January 28, 2022, and reported the nature of her injury and detailed her persistent right shoulder pain, popping, and clicking. Claimant reported increased symptoms with reaching and overhead activities. She reported pain with cervical range of motion and some radiating pain into her arms. Claimant also reported some left shoulder pain and other issues from overcompensating on her right shoulder. On physical exam, Dr. Miller noted decreased cervical range of motion, tenderness in her bilateral mid and lower paraspinals, trapezius, and levator scapula. Dr. Miller diagnosed Claimant with a right shoulder sprain and cervical sprain. He recommended an EMG, chiropractic care, and medications. Dr. Miller also discussed possible shoulder injections. (Ex. 5, pp. 110-113).

7. On February 10, 2022, Claimant treated with Dr. Ramaswamy and upon examination, he recorded that significant trigger point activity was present involving the trapezius and levator musculature with tenderness. The following day, February 11, 2022, Claimant saw Dr. Ramaswamy for trigger point injections. She had trigger point injections in her left trapezius/levator, and a local twitch response was obtained. Claimant gained range of motion following the injections. (Ex. 4, pp. 32-37).

8. On February 26, 2022, Respondents filed a General Admission of Liability, and Claimant started receiving temporary total disability benefits on February 14, 2022. (Ex. 1).

9. Claimant continued to be treated by Dr. Ramaswamy. On March 1, 2022, he noted Claimant had moderate trigger point activity involving the right trapezius and levator musculature with tenderness. On April 12, 2022, Claimant also presented with moderate trigger point activity involving the right trapezius and levator musculature with tenderness, and mild trigger point activity involving the left trapezius/levator complex. Dr. Ramaswamy performed trigger point injections to both the trapezius and levator regions. (Ex. 4 pp. 39-49).

10. On June 9, 2022, Claimant told Dr. Ramaswamy that the trigger point injections helped quite a bit, even if the relief was temporary. On exam, Claimant had moderate trigger point activity involving the right trapezius and levator musculature with tenderness. Dr. Ramaswamy recommended trigger point injections every three weeks. He noted the trigger point injections and chiropractic dry needling were treating the secondary issues to maintain the patient. (Ex. 4, pp. 57-58).

11. Claimant returned to Dr. Ramaswamy on June 14, 2022, for treatment. According to the medical record, he noted moderate trigger point activity involving the right trapezius and levator musculature and mild trigger point activity involving the left trapezius and levator musculature. He administered trigger point injections in the left and right trapezius/levator junctions. Dr. Ramaswamy noted Claimant would undergo chiropractic care and trigger point injections every two weeks. (Ex. 4, pp. 60-62).

12. At her June 29, 2022 appointment with Dr. Ramaswamy, Claimant reported that the trigger point injections helped her for about four to five days, but this was the only

thing giving her relief. On examination, Dr. Ramaswamy noted moderate trigger point activity involving the right trapezius and levator musculature with tenderness and mild trigger point activity involving the left trapezius and levator musculature. Dr. Ramaswamy performed trigger point injections, and a twitch response was noted 50% of the time. (Ex. 4 pp. 64-65).

13. On July 14, 2022, Dr. Ramaswamy performed trigger point injections on Claimant. She again noted that the injections gave her temporary relief of four to five days. (Ex. 4, p. 69). At Claimant's August 11, 2022 appointment, Dr. Ramaswamy noted on examination that Claimant had moderate trigger point activity involving the bilateral trapezius and levator regions. He administered three trigger point injections. (Ex. 4 p. 75).

14. Dr. Ramaswamy treated Claimant on August 25, 2023. On examination he noted moderate trigger point activity involving the left trapezius and levator musculature, and mild trigger activity on the right side. He administered trigger point injections. He noted twitch responses on the left side, but not on the right side. (Ex. 4, p 78). On September 8, 2022, Dr. Ramaswamy noted Claimant had trigger point activity in both the trapezius and levator regions, much more on the right side. He gave Claimant two trigger point injections. (Ex. 4, p. 81).

15. At Claimant's October 10, 2022 appointment, on examination, Claimant had moderate trigger point activity involving her right trapezius and levator musculature, and mild trigger point activity on the left side. Claimant underwent trigger point injections and twitch responses were noted on the right side. (Ex. 4, p. 88).

16. Dr. Ramaswamy treated Claimant on November 7, 2022. On examination he noted Claimant presented with moderate trigger point activity in the right trapezius, levator regions and the right parascapular region. He added steroid to the trigger point injection mixture in an effort to obtain a more long-lasting response. Dr. Ramaswamy also discussed Claimant's use of Percocet. He reviewed the PDMP and there were no issues, but his plan was to conduct a urine drug screen at the next visit, and have Claimant sign another narcotic contract. (Ex. 4, p. 95).

17. A hearing was held on November 18, 2022 because Claimant was seeking authorization for cervical medial branch blocks as recommended by her ATPs. On January 9, 2023, ALJ Kabler granted Claimant's request for authorization of cervical medial branch blocks. (Ex. 11).

18. At Claimant's November 21, 2022 follow-up appointment with Dr. Ramaswamy, Claimant expressed her frustration that she continued to suffer from chronic pain. Claimant stated that the last trigger point injections were quite helpful, and she wanted another steroid trigger point injection. On examination, Claimant had moderate trigger point activity involving the right trapezius/levator region, and mild trigger point activity involving the right rhomboid region. (Ex. 4, p. 99).

19. Dr. Ramaswamy had previously referred Claimant to Michael Hewitt, M.D. at Orthopedic Centers of Colorado, and Dr. Hewitt recommended proceeding with non-surgical management, including a PRP injection. On January 11, 2023, Claimant treated with Dr. Hewitt, who performed a PRP injection. (Ex. 6).

20. Claimant had a telemedicine appointment with Dr. Ramaswamy on February 1, 2023. He noted her PRP injections with Dr. Hewitt three weeks prior, and stated he would contact Dr. Miller's office to get the medial branch blocks scheduled. (Ex. 4., p. 105).

21. On February 23, 2023, Claimant had another telemedicine appointment with Dr. Ramaswamy. Claimant told him she noticed improvement following the PRP injection and had a diagnostic response to the C4-C6 medial branch blocks. Dr. Ramaswamy refilled her prescriptions for Percocet and Tizanidine. He noted Claimant took the Percocet very rarely. Dr. Ramaswamy also noted his clinic was closing as of March 5, 2023. (Ex. 4, pp. 107-109).

22. On February 24, 2023, Claimant presented to Dr. Miller. He discussed with Claimant her diagnostic response to the medial branch blocks and requested a follow-up visit to perform trigger point injections. Dr. Miller specifically noted that according to Claimant, Dr. Ramaswamy requested the trigger point injections be performed through his clinic. (Ex. 5, p. 130). The ALJ infers that Dr. Ramaswamy made this request because his clinic was closing.

23. On March 13, 2023, William Barreto, M.D. completed a peer review report regarding Dr. Miller's request for additional trigger point injections. Dr. Barreto opined that the trigger point injections were not medically necessary because there was "no documentation of well circumscribed trigger points demonstrating a local twitch response to support this treatment." He also stated it was unclear how the injections improved Claimant's condition. Dr. Barreto reviewed limited medical records from Claimant's ATP, Dr. Ramaswamy. He reviewed the records from her appointments on February 1, 2023 and February 23, 2023. Both of these appointments were virtual, so Dr. Ramaswamy did not administer trigger point injections, and his examination was limited. Dr. Baretto also reviewed records from Claimant's January 11, 2023 appointment with Dr. Hewitt and her February 24, 2023 appointment with Dr. Miller. But neither of these appointments involved the administration of trigger point injections, or an examination related to trigger point injections. (Ex. V).

24. Dr. Barreto's opinion is neither credible, nor persuasive. Dr. Barreto did not examine Claimant, nor did he review the medical records from the multiple visits, between November 17, 2021 and November 21, 2022, where Dr. Ramaswamy administered trigger point injections, and recorded his examination of Claimant prior to the injections and any twitch response from the injection.

25. Claimant credibly testified she has been experiencing knots in her trapezius area and muscle spasms. Previous trigger point injections have provided her pain relief and increased mobility in her neck. She credibly testified that the reduction in pain and

increase in mobility following a trigger point injection allows her to better perform other recommended treatment. (Tr. 12:20-13:11, 15:18-16:10, and 26:4-7).

26. Claimant's testimony and her medical records demonstrate the trigger point injections provide Claimant with pain/symptom relief and increased range of motion and increased function. Based on the totality of the evidence, the ALJ finds that the requested trigger point injections recommended by Dr. Ramaswamy and Dr. Miller are reasonable, necessary, and related to Claimant's admitted industrial injury.

27. Dr. Ramaswamy prescribed Percocet for Claimant to take as needed when her pain was intolerable. He first prescribed the opioids on November 11, 2021. (Ex. 4, p. 11). Claimant periodically received refills of the Percocet while being treated by Dr. Ramaswamy. As found, Dr. Ramaswamy checked the PDMP and instituted other safeguards to ensure Claimant was not abusing the opioid. Claimant refilled the prescription only sparingly. Claimant credibly testified she only takes the medication as needed. (Tr. 18:3-20:10). Claimant takes the Tizanidine at night so she can sleep. Claimant testified the Tizanidine controls her pain and muscle spasms. (Tr. 20:15-21:16).

28. On March 3, 2023, Respondents denied the Percocet prescription based on a utilization review report from Eddie Sassoon, M.D. Dr. Sassoon recommended denying the prescription for a lack of documentation of the opioid's efficacy at decreasing Claimant's pain and improving function. (Ex. U). The ALJ does not find this opinion to be persuasive.

29. Respondents argue in their position statement that Claimant takes the Tizanidine daily and "muscle relaxers have a potential for addiction and prolonged use can lead to a physical dependence." There is no objective evidence in the record as to why Respondents denied the Tizanidine.

30. Based on the totality of the evidence, the ALJ finds the prescriptions of both Percocet and Tizanidine are reasonable and necessary to help cure and relieve Claimant from the effects of her industrial injury.

31. The ALJ finds Claimant proved by a preponderance of the evidence that the trigger point injections and Percocet and Tizanidine prescriptions are reasonable, necessary, and related to her admitted industrial injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find

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

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

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

MEDICAL BENEFITS

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293, 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 474 P.2d 622 (1970). As found, Claimant proved by a preponderance of the evidence that the trigger point injections and Percocet and Tizanidine prescriptions recommended by Drs. Miller and Ramaswamy are reasonable, necessary, and related to her admitted industrial injury.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence that the trigger point injections recommended by her ATP are reasonable, necessary and related to her admitted industrial injury. Respondents shall pay for the injections subject to the Division of Workers' Compensation Medical Fee Schedule.

2. Claimant proved by a preponderance of the evidence that the prescriptions for Percocet and Tizanidine, recommended by her ATP are reasonable, necessary and related to her admitted industrial injury. Respondents shall pay for the prescriptions subject to the Division of Workers' Compensation Medical Fee Schedule.

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

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

DATED: October 11, 2023

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

ISSUES

The issues determined by this decision are:

I. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment thereby precluding his entitlement to TTD pursuant to C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a).

II. If Respondents failed to demonstrate that Claimant was responsible for his resulting wage loss, whether Claimant established, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits commencing April 16, 2023 and ongoing.[1]

FINDINGS OF FACT

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

General Findings

1. Claimant was working as a mason for Respondent-Employer when he suffered admitted burn injuries to his face, left upper extremity, chest and abdomen on November 14, 2022. On the day of his injury, Claimant and a co-worker were using a demolition saw to cut rebar. The co-worker had filled the saw with gas but unbeknownst to Claimant, had not tightened the gas cap sufficiently causing gas to slosh out of the tank while Claimant was operating the saw. The spilled gasoline ignited, burning Claimant's abdomen/chest[2], left hand/forearm and face. Claimant was taken to the hospital and subsequently transported by ambulance to the UC Health Burn Clinic where he was hospitalized for 17 days. While in the burn unit, Claimant underwent extensive grafting from donor skin harvested from his right thigh. (Exhibit 2, Page 25; Exhibit 4, page. 40).

2. Claimant was unable to work and was paid Temporary Total Disability (TTD) benefits from November 15, 2022 through February 9, 2023, as he recovered from his injuries. (Exhibit F, page 26). However, on February 2, 2023, senior claims representative, [Redacted, hereinafter LP], sent correspondence to Dr. Annu Ramaswamy, Claimant's authorized treating provider, outlining a modified job offer Respondents intended to extend to Claimant in order to return him to work within his physical restrictions. The offer acknowledged that Claimant was under restrictions of no

[1] Although Claimant also sought to litigate his entitlement to Temporary Partial Disability (TPD), the ALJ sustained Respondents objection to hearing this issue as it was not endorsed for hearing.
[2] Claimant's Hearing Testimony, Tr2, page 8, ll. 19-23.

lifting more than 20 pounds, no use of the left hand and limits on carrying, pushing, pulling and climbing ladders. (Exhibit 2, page 28; Exhibit I, page 32).

3. Dr. Ramaswamy approved the modified job offer and Claimant returned to modified duty, in a supervisory capacity at full wages with Employer on February 10, 2023. (Exhibit 2, page 28; Exhibit F, page 26; Claimant's Hearing Testimony, Tr2, page 15, ll. 20-24). At the time, Respondent-Employer was the masonry subcontractor to [Redacted, hereinafter EC]., a general contractor assigned to build a [Redacted, hereinafter DT] location in Peyton, Colorado. (Testimony of [Redacted, hereinafter MS], Tr2, page 22, ll. 4-25).

4. Prior to his return to work on February 10, 2023, Claimant and all other employees of [Redacted, hereinafter MC] signed and acknowledged receipt of Employer's Employee Handbook on February 8, 2023. (Exhibit A, page 19; Claimant's Hearing Testimony, Tr2, page 13, ll. 2-13; Testimony of EA[Redacted], Tr2, page 47, ll. 12-21). Included in the Acknowledgement of Receipt that Claimant signed on February 8, 2023 were the statements: "I understand that I am responsible for familiarizing myself with the policies in this handbook and agree to comply with all rules applicable to me" and "I have received the Company Employee Handbook. I have read (or will read) and agree to abide by the policies and procedures contained in the Employee Handbook." (See Exhibit A, page 19).

5. Claimant testified that his proficiency with English is limited and that the handbook was written in English. Nonetheless, he testified that he tried to read the handbook on his own. (Claimant's Hearing Testimony, Tr2, page 15, ll. 12-19). Regardless, of his English capabilities, Claimant never requested a copy of the handbook in Spanish, nor did he ever indicate that he was unable to understand its contents prior to or following his signing the acknowledgement form. Tr2 at page 47, ll. 22-25; Tr2 at page 48, ll. 1-8). Moreover, Claimant testified that he understood that engaging in certain conduct, including insubordination and failure to comply with Employer's rules could result in discipline up to termination. *Id*. at page 14, ll. 22-25 through page 15, ll. 1-4.

6. The handbook Claimant received and acknowledged on February 8, 2023 contains Employer's "Drug and Alcohol Policy", which included a zero-tolerance policy for drug and alcohol use during working hours and on any sites. (Exhibit A, Section 2.11, page 8). The policy further provides that anyone caught using any substance would be automatically terminated and that Respondent-Employer had the "right to drug test anyone at any time without notice." *Id*. Finally the policy states that "[i]f a drug test is found positive to any drugs or alcohol, [the] employee will automatically be terminated". *Id.* Respondent-Employer reserved the right to pick up the employee or employees suspected of using drugs and/or alcohol during work hours or on jobsites and transport them to a drug testing facility. *Id.*

7. Also contained in the Employee Handbook are policies relating to "Discipline and Standards of Conduct." (Exhibit A, Section 4.3, page 19). This section of the handbook states explicitly that engaging in any conduct the Employer deems

inappropriate may result in disciplinary action up to and including termination. *Id.* "Insubordination, failure to perform assigned duties or failure to comply with the Company's health, safety or other rules" are examples of conduct that is deemed to be inappropriate. *Id*. at Section 4.3(f), page 12.

8. Claimant was given his final paycheck and his employment was terminated on April 17, 2023 for insubordination and failing to submit to drug testing as requested by Employer. (Testimony of [Redacted, hereinafter EA], Tr2, page 70, ll. 1-24). EA's[Redacted] request that Claimant take a drug test has its roots in Claimant's conduct/actions as observed by MS[Redacted] on April 10 and April 14, 2023.

The Testimony of MS[Redacted]

9. MS[Redacted], testified as the construction site superintendent for the general contractor, EC[Redacted]. As noted, Employer had been selected as the masonry subcontractor for EC[Redacted] for the DT[Redacted] build in Peyton, Colorado and Claimant worked for Employer as a foreman on that job. MS[Redacted] testified that as site superintendent, he had numerous interactions with Claimant leading up to his termination in April 2023. (Testimony of MS[Redacted], Tr2, pages 22-23).

10. MS[Redacted] testified that he would call EA[Redacted], as the owner/operator of MC[Redacted] every day, at least once per day, to discuss work on the job site and any issues with the performance of Employer's crew on the DT[Redacted] job site. (Testimony of MS[Redacted], Tr2, page 23, ll. 13-25; Tr2, page 47, l. 5).

11. According to MS[Redacted], he came out of his office on the job site around 3:00 p.m.[3] on April 10, 2023, to observe Claimant's pickup truck parked near, i.e. approximately 20 from the front of his office with the windows rolled down. (Testimony of MS[Redacted], Tr2, pages 24-25). MS[Redacted] testified that he could smell a strong order of marijuana, so he approached Claimant's truck. *Id*. at page 24, ll. 18-19. MS[Redacted] testified that as he advanced towards the truck the order became stronger and he could see lingering smoke. *Id.* at ll. 19-20. MS[Redacted] testified that he advised Claimant that smoking marijuana was not acceptable on the jobsite and that he would need to remove him from the job. Id. at page 25, ll. 22-23. All parties then left for the day. *Id.* at l. 24. As MS[Redacted] was getting fuel, he called EA[Redacted] and explained what he had observed and that he (EA[Redacted]) would need to remove Claimant from the job based upon EC[Redacted] policy. *Id.* at page 25, l. 1; page 26, ll. 7-8.[4]

---

[3] According to MS[Redacted], as foreman of others who were still on site, Claimant was on the clock when he was observed smoking in his truck. (Testimony of MS[Redacted], Tr2, page, 34, ll. 1-6).

[4] EA[Redacted] confirmed this conversation took place, noting that MS[Redacted] called him late in the day on April 10th and reported that he (MS[Redacted]) suspected that employees were getting high on the job. (Testimony of EA[Redacted], Tr2, page 50, ll. 20-25; Tr2, page 51, ll.3-12).v

12. Although MS[Redacted] intended to have Claimant removed from the job site following the April 10, 2023 incident, he permitted Claimant's return to work on April 11, 2023. (Testimony of MS[Redacted], Tr2, page 26, ll. 7-14).

13. On April 14, 2023, the entire crew, i.e. both EC[Redacted] and MC[Redacted]. employees working at the DT[Redacted] job site were scheduled to work a half day. According to MS[Redacted], both he and EA[Redacted] were on the job site on this date, during which MS[Redacted] had a conversation with Claimant. MS[Redacted] testified that Claimant was asking incomplete and incoherent questions and that his eyes were bloodshot. (Testimony of MS[Redacted], Tr2, page 27, ll. 1-21). MS[Redacted] suspected Claimant was under the influence of something, either marijuana or pills. *Id*. at ll. 4-5. Accordingly, MS[Redacted] testified that sometime between 11:00 a.m. and 12:00 noon, he discussed his suspicions that Claimant was intoxicated with EA[Redacted]. During this conversation, MS[Redacted] informed EA[Redacted] he wanted Claimant removed from the job site. (Testimony of MS[Redacted], Tr2, page 27, ll. 17-25; Tr2, page 41, ll. 12-19).

14. MS[Redacted] testified that after discussing the situation with EA[Redacted], he believed that Claimant was going to be asked to take a drug test. As the end of the work day was approaching, and everyone was preparing to leave for the day, MS[Redacted] testified that Claimant was not removed from the job site immediately. (Testimony of MS[Redacted], Tr2, page 42, ll. 7-25).

The Testimony of EA[Redacted]

15. EA[Redacted] testified that because he was not present during the April 10, 2023 incident when MS[Redacted] alleged Claimant was smoking marijuana and because MS[Redacted] did not actually see Claimant smoking, he elected to warn his work crew rather than remove Claimant from the job site. (Testimony of EA[Redacted], Tr2, page 51, ll. 2-22). EA[Redacted] gave a verbal warning to the entire crew in Spanish on April 11, 2023 advising all employees that drug use on the job was unacceptable. *Id.* at pages 51, ll. 13-23 and 52, ll. 3-9. Despite this verbal warning, MS[Redacted] suspected Claimant of being intoxicated while working on the DT[Redacted[job site on April 14, 2023.

16. EA[Redacted] testified that MS[Redacted] called him on April 14, 2023, alleging that Claimant was intoxicated on the job site. (Testimony of EA[Redacted], Tr2, page 53, ll. 19-25). This contradicts MS's[Redacted] testimony that he and EA[Redacted] spoke in person about Claimant's alleged intoxication. EA[Redacted] testified that he told MS[Redacted] that he intended to have Claimant drug tested before making any drastic moves, i.e. removing him from the job. (Testimony of EA[Redacted], Tr2, page 53, ll. 9-25). According to EA[Redacted], at approximately 12:15 p.m. on April 14, 2023, he called Claimant and instructed him and another employee to remain on the clock and proceed to Concentra and submit to drug testing. *Id.* at page 54, ll. 1-9; page 58, ll. 11-24; page 62, ll. 1-9.

17. As evidenced by the [Redacted, hereinafter TS] data Claimant was probably still on the clock at 12:15 p.m. when he was instructed to proceed to Concentra to take a drug test. Indeed, the TS[Redacted] data supports a finding that Claimant probably did not clock out on April 14, 2023 until 12:45 p.m. (Exhibit C, page 22; see also, Tr2, page 55, ll. 1-19; page 58, ll. 11-24; page 62, ll. 1-4).

18. While Claimant acknowledges that EA[Redacted] instructed him to take a drug test, he claims that he was already clocked out for the day and was on his way home in preparation for attending an "important appointment" when he received EA's[Redacted] call to proceed to Concentra.[5] (Claimant's Hearing Testimony, Tr2, page 99-100, ll. 1-10). Claimant maintains that because he is paid by the hour and had clocked out for the day, the request for drug testing was outside his work hours. *Id.* Accordingly, Claimant informed EA[Redacted] that he could ask for such testing during work hours but not after he had clocked out and was on the way home from work. *Id.*

19. Claimant's opposition to proceed with drug testing prompted a lengthy text message string between himself and EA[Redacted]. (Exhibit 5). The text message exchange can be summarized from Claimant's perspective primarily as his assertion that the request for testing came after he had clocked out of work for the day and that his personal time was equally important as the testing request.[6] Conversely, EA[Redacted] text messages convey his assertion that he could request and send Claimant for drug testing at any time, that Claimant clocked out in contravention of Employer's express direction to remain on the clock and proceed to Concentra for testing and that submitting to testing was important because failure to take the test would be taken as a failure to pass it. (See, Tr2, pages 101-117).

20. Regarding the text message exchange, EA[Redacted]testified that he offered to get a cup of coffee with Claimant to discuss the issues and try to find a solution, but Claimant instead insisted he was off the clock and did not want to be bothered. Testimony of EA[Redacted], Tr2, page 59, ll. 6-25; Tr2, page 61, ll. 3-21; Tr2, page 64, ll. 3-19; Exhibit B, page 20). EA[Redacted] also testified that he told Claimant to "get back on the clock and do it" in referring to the drug testing requested on April 14, 2023, however Claimant refused to submit to the same. *Id*. at page 76, ll. 2-13; page 87-88.

21. During cross examination, Claimant admitted that EA[Redacted] asked him to take a drug test. Nonetheless, he reiterated his position that the request came after he had clocked out for the day and he didn't submit to testing because he was on

[5] No corroborating evidence regarding this appointment was presented at hearing.

[6] Despite his limited English capabilities, the evidence presented supports a finding that Claimant was able to respond to text messages written in English by EA[Redacted]. (See Exhibit B). Moreover, EA[Redacted] testified that Claimant was selected to be a foreman for Employer in part because of his ability to communicate in English and Spanish. (Testimony of EA[Redacted], Tr2, page 52, ll. 22-25; Tr2 page 53, ll. 1-11).

his personal time when the request was received.[7] (Testimony of Claimant, Tr2, page 118-119, ll. 1-21). Claimant also admitted that it was his decision to clock out and that he knew he could be terminated if his test was positive.[8] *Id*.

22. EA[Redacted] testified that after Claimant refused to submit to testing on Friday, April 14, 2023, he returned to work on Monday, April 17, 2023. According to EA[Redacted] Claimant was promptly terminated upon his arrival at work due to his failure to submit to drug testing as requested and for insubordination resulting from his failure to comply with Employer's directives/policy. (Testimony of EA[Redacted], Tr2, page 70, ll. 1-24).

CONCLUSIONS OF LAW

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

Generally

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

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

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

---

[7] Concentra Medical Center confirmed, that Claimant and his co-worker never presented for the drug screening on April 14, 2023 despite Employer's request for the same. (Exhibit D, Testimony of EA[Redacted], Tr2, page 64, ll. 23-25).

[8] Claimant testified that despite not submitting to testing, his test would probably have been positive for marijuana because he uses marijuana outside work due to anxiety caused by his accident. (Testimony of Claimant, Tr2, page 94, ll. 16-25; page 95 - 96, ll. 1-6). He also admitted to taking Gabapentin for the residual effects of his injury, which he reported caused dizziness and blurred vision. Id. at page 96, ll. 9-17.

App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). In this case, the ALJ credits the testimony of MS[Redacted] and EA[Redacted] to conclude that Claimant performed a volitional act which he would reasonably expect to cause the loss of his employment, namely failure to submit to drug testing and refusing the reasonable directives of his Employer. See *Patchek v. Dept. of Public Safety*, W.C. No. 4-432-201 (ICAO, Sept. 27, 2001).

Responsibility for Termination

D. Because Claimant's injury in this case was after July 1, 1999, C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a), collectively referred to as the "termination statutes", apply to assertions that Claimant is responsible for his wage loss. These provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Under the termination statutes, a claimant who is responsible for the termination of modified or regular employment is not entitled to temporary disability benefits absent a worsening of condition, which reestablishes the causal connection between the injury and the wage loss. See *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004); see also *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002); *Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). As a result, the claimant loses the right to temporary benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo.App. 1994).

E. Since the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant is responsible for his termination and subsequent wage loss. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office,* 20 P.3d 1209 (Colo.App. 2000). Claimant's suggestion that Respondents' failure to follow its own progressive disciplinary policy precludes a determination of whether he was responsible for his termination is unpersuasive. See generally, *Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo.App. 1993) (employer's failure to follow its established discipline procedures did not prohibit a determination that an employee was responsible for termination). To the contrary, as noted in *Keil*, the dispositive issue is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in discharge. Moreover, Respondents do not have to prove Claimant knew or should have known that his conduct would result in his termination. *Gonzales v. Industrial Commission*, 740 P.2d. 999 (Colo. 1987). Rather, it is necessary only that Respondents establish that Claimant

is “responsible” for his/her termination and subsequent wage loss through a volitional act or the exercise of some control over the circumstances surrounding the termination.

F. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. See, *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control of the circumstances surrounding the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994). “Fault” does not require “willful intent” on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008). In other words, an employee is "responsible" for their termination if the employee precipitated the employment termination through a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety, supra.* A volitional act does not mean moral or ethical culpability. It simply means that the claimant performed an act, which led to his/her termination. *Gleason v. Southland Corp*., W.C. No. 4-149-631 (ICAO, June 13, 1994). Thus, as noted above, the fault determination depends upon whether a claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo.App. 1995). In this case, Respondents assert that Claimant is responsible for his termination and subsequent wage loss after April 14, 2023 because he refused to comply with Employer’s request that he take a drug test.

G. Despite legalization of marijuana in Colorado, the Colorado courts have reiterated that an employer may terminate an employee for drug use. *See, e.g., Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015); *Bolerjack v. Water Edge Pond Service*, W.C. 4-905-434 (ICAO 2014). In the seminal case of *Coats*, the Colorado Supreme Court considered a wrongful termination action where an employee was terminated after a random drug test came back positive for marijuana. In that case, the employer terminated the employee under their zero-tolerance policy. The employee argued that he was licensed by Colorado to use medical marijuana and that his use was off-premises. The Colorado Supreme Court found the termination was lawful because even state-licensed marijuana use was not lawful activity as it related to the employment. *Bolerjack*, an Industrial Claims Appeals Office (ICAO) case, on the other hand, applies this exact reasoning to the termination of TTD post-termination of employment in the workers’ compensation context. As found here, Employer’s handbook, as acknowledged by Claimant, clearly states that Employer had a zero-tolerance policy for drug and alcohol use on any work site and Employer had the right to drug test “anyone at any time without notice.” (Exhibit A, page 8). The Employer’s Handbook also included rules, which Claimant acknowledged, indicating that engaging in certain conduct, such as insubordination or failing to comply with Employer’s rules/policies could result in discipline up to termination. (Exhibit A, page 12; Tr2, page 14, ll. 22-25; Tr2, page 15, l. 4). In this case, Claimant through his testimony, as well as his text message responses to Employer, demonstrated his ability to comprehend the terms of the aforementioned policies. In fact, Claimant was selected to be a foreman for

Employer upon his return to modified duty in part due to his ability to communicate in both English and Spanish. As such, any assertion that Claimant was unable to understand the express terms of the handbook or the policies in question is unpersuasive and without merit.

H. While the evidence presented fails to convince the ALJ that Claimant was using marijuana on the job site on April 10, 2023, the ALJ is persuaded that EA[Redacted] had a reasonable basis to request that Claimant submit to drug testing based upon the observations of MS[Redacted] on April 14, 2023. The totality of the evidence presented persuades the ALJ that EA[Redacted] probably contacted Claimant around 12:15 p.m. on April 14, 2023 and told him to remain on the clock and proceed to Concentra to take a drug test. Instead of following this directive, Claimant elected to clock out and leave the job site.

I. As noted, a finding of fault for termination requires a volitional act or Claimant's exercise of a degree of control over the circumstances leading to his termination. *Gillmore v. Indus. Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008). Here, the evidence presented supports a conclusion that Claimant exercised a degree of control over the circumstances leading to his termination, notably by refusing to submit to the drug screening by 4:30 PM as requested by Employer on April 14, 2023, by arguing with his Employer that he was off the clock on his personal time and as such could not be tested. Claimant's attempts to justify his refusal to submit to testing are contradictory to the handbook policy allowing drug testing to occur at "any time", but also contrary to the facts of this claim. Claimant was advised numerous times by Employer, both before and after he elected to clock out and left the job site, that he was to remain on the clock and submit for drug testing. Not only did Claimant's failure to comply with Employer's reasonable requests violate Employer's drug testing policy, but also Employer's policies surrounding the Standards of Conduct guiding employee behavior. Indeed, the evidence presented persuades the ALJ that Claimant's disobedience and volitional refusal to follow reasonable orders amounts to the type of impermissive insubordination outlined in Section 4.3(f) of Employer's Employee Handbook. Based upon the degree of defiance and contempt Claimant directed towards his employer in this case, it is not surprising that he was terminated. Indeed, the ALJ concludes that any employee acting in a similar fashion would reasonably expect such behavior to result in the loss of employment. Claimant is found to be responsible for the termination of his employment pursuant to C.R.S. §8-42-105(4) (a), and the resulting wage loss from such volitional conduct is not attributable to his November 14, 2022 work injury.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment. Accordingly, his claim for TTD benefits after April 17, 2023 is hereby denied and dismissed.

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

Dated: October 12, 2023

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

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

ISSUES

I. Whether Respondents have shown by a preponderance of the evidence that Claimant's maintenance medical benefits regime is no longer reasonably necessary, in the form of medications of Ambien, Percocet, Flexeril and Lyrica.

PROCEDURAL ISSUE

The parties advised that ALJ Kimberly B. Turnbow issued an order dated February 14, 2018 relating to overcoming a DIME physicians' opinion regarding medical impairment by clear and convincing evidence and finding that Claimant only had a temporary aggravation of his preexisting condition of his lumbar spine when considering permanent impairment. It did not address maintenance medical benefits. This order was not entered as evidence.

The parties also advised that ALJ Edwin L. Felter issued a subsequent decision on September 11, 2018 finding Claimant permanently totally disabled and ordering reasonably necessary post maximum medical improvement maintenance medical benefits. This order was part of the evidence submitted in Claimant's packet.

The parties both indicated that Claimant had been receiving, as part of his maintenance regime, four maintenance medications which included Ambien (zolpidem) 10 mg once a day, Percocet (oxycodone) Acetaminophen 5mg/325mg once a day, Flexeril (cyclobenzaprine) 10 mg once a day, and Lyrica (pregabalin) 50 mg twice a day.

A Final Admission of Liability dated June 20, 2019 was filed admitting to permanent total disability benefits and medical maintenance benefits pursuant to the ALJ's order.

FINDINGS OF FACT

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

A. Generally:

1. On January 20, 2015, Claimant sustained an admitted industrial injury while employed for the mining company, held by Employer, located in Leadville, Colorado, where Claimant has continued to reside and has lived all his life.

2. The Claimant hurt himself when he, and three other coworkers, carried a magnetic belt weighing an estimated 400-450 pounds. One of the workers lost his grip on the belt jolting the Claimant forward and causing him to fall to his knees.

3. The Claimant immediately felt severe pain in his lower back. Dr. Zwerdlinger, the Claimant's primary care physician, saw him on the same day as his injury. Dr. Zwerdlinger took Claimant off work. Since his date of injury, Claimant has not worked.

4. Dr. Zwerdlinger was Claimant's provider prior to this injury and had seen Claimant regarding some back pain before it happened. However, she indicated that Claimant had significantly improved after treatment with a chiropractor.

5. Claimant testified that prior to his injury he had an ankle and foot injury and surgery, which left him with a shorter leg. What he was really having problems with before his injury was his hip, not his back, which was what the chiropractor had worked on successfully. Claimant was able to continue working his heavy duty job without significant problems until this January 20, 2015 work injury happened.

B. Medical Records:

6. Claimant had an MRI on March 16, 2015 showing a central L3-4 disc herniation with annular fissure measuring 4.5 mm in maximum AP dimension and indented thecal sac which in combination with mild bilateral facet arthrosis produced mild-to-moderate central stenosis. There was an L4-5 broad-based disc bulge asymmetrical left with an annular fissure in combination with bilateral facet arthrosis producing mild-to-moderate central stenosis.

7. Dr. Corenman, Claimant's authorized treating provider (ATP), found a central L3-L4 disc herniation with mild to moderate central stenosis. He also found an L4-L5 disc bulge and left lateral recess stenosis.

8. Dr. Barry Ogin performed an Independent Medical Examination at Respondent's request on December 16, 2016 and a medical record review. At that time Claimant was having back and bilateral leg pain, problems sleeping due to the numbness in his legs, though no shortness of breath or abdominal complaints. He noted Claimant was significant for multiple pain behaviors and had pain that, with a seated straight leg test reproduced back and buttock pain, numbness along his thighs extending down into his lower legs as well, including his dorsal and plantar feet, Patrick maneuver produced inguinal region pain, and limited range of motion though no valid tests were produced. Dr. Ogin's impressions included possible lumbar strain following work injury of January 20, 2015 and somatoform pain disorder. He believed Claimant was at maximum medical improvement and remarked that Claimant's medication regime was Lyrica 150 mg b.i.d., cyclobenzaprine 10 mg twice per day, Percocet 5/325 one per day, metformin, glipizide, Ambien, and atorvastatin. The report provides no further credible assistance regarding Claimant ongoing medication needs in this report.

9. Dr. Ogin performed a second IME on May 31, 2017. He noted Claimant was maintained on Percocet 5/325 four times per day, Ambien and Lyrica 150 mg b.i.d. as well as cyclobenzaprine only once per day. Claimant confirmed that injections had offered relief for a few weeks or a month but not a sustained period of time. He mentions an MRI performed on April 26, 2017 which showed L4-5 has a superimposed central to left posterolateral disc extrusion that contributed to moderate to severe left lateral recess narrowing compressing the descending left L5 nerve root. There was also mild to

moderate facet joint arthritis and small facet joint effusions. There was mild to moderate central spinal stenosis. It stated that the extruded component was new compared to the prior examination. There were also modic endplate changes. The spondylosis had progressed since the prior study of May 6, 2015. The L3-4 disc protrusion was unchanged at 5 mm. The spondylosis at L4-5 had mildly progressed. He opined that the new herniated disc, which was caused by an event in April 2017, was not related to the work related injury of January 20, 2015 and should be addressed outside of the workers compensation system. He provided no further insight with regard to continuing medication management.

10. On February 15, 2018 Dr. Ogin performed a third IME on Respondents' behalf, including reviewing additional medical records. In this report Dr. Ogin agreed that Claimant was a candidate for surgical intervention for the low back but did not agree that it was related to the January 20, 2015 claim.

11. The fourth IME report issued by Dr. Ogin on June 27, 2018 included consideration of further medical and vocational assessments, examination and addressed Claimant's ability to work as well as his work restrictions, and agreed with his ATP, Dr. Corenman's work restrictions assigned when he reached MMI on March 17, 2016, of no lifting more than 20 pounds, no pushing or pulling more than 40 pounds, no squatting, pivoting, crawling, or kneeling, limited stooping, bending, twisting, and limited overhead work. Dr. Ogin opined that Claimant did not require any maintenance medical for the work related conditions.

12. In the last report dated August 2, 2018 Dr. Ogin revised his opinion with regard to the work restrictions not being related to the January 20, 2015 work incident. This is specifically not found credible.

13. Dr. Ernest Braxton of Vail-Summit Orthopaedics & Neurosurgery evaluated Claimant on July 23, 2018. He noted that Claimant had undergone multiple transforaminal epidural steroid injections, facet blocks, rhizotomies and SI joint blocks with diagnostic relief. He noted that EMG nerve conduction studies showed radiculopathies and little evidence of peripheral neuropathy. He noted that the most recent MRI showed degenerative changes at L3-4 and L4-5 with Modic changes in the L5 body, along with a large central disc herniation causing central stenosis. He also noted contributing bilateral facet arthropathy at the L4-5 level with bilateral proximal leg pain as well as leg pain that descended below the knees. He remarked that Claimant had a recommendation of a 2 level fusion and was seeing Dr. Braxton for a third opinion. He noted that Claimant was on Lyrica, Cyclobenzaprine HCI, Zolpidem Tartrate and Percocet 5-325 mg as needed for pain.

14. On exam he noted that Claimant was walking with an antalgic gait, abnormal tandem and Romberg tests, decreased sensation of the left lower extremity and decreased strength, positive straight leg test and increased low back pain with external rotation of the hips bilaterally. Dr. Braxton noted that given Claimant's radiculopathy findings that stabilization and decompression were indicated. He diagnosed lumbar degenerative disc disease, radiculopathy (lumbar region) and lumbar stenosis with neurogenic claudication and recommended an anterior lumbar interbody fusion with L4-

5 posterior pedicle screws and rods. Dr. Braxton performed the surgery on September 11, 2018.

15. On August 11, 2018 Dr. Lisa Zwerdlinger noted that Claimant was being seen for maintenance medication with a 30% pain relief and no side effects. She noted that the MRI of March 2015 showed hepatic steatosis with no suspicious lesions seen. She continued the Ambien, Lyrica and Percocet. She recommended that Claimant taper off of narcotics after his surgery.

16. Claimant was attended by Dr. Braxton's PA Holley Spears in post-surgical follow up on October 2, 2018. Claimant reported interval improvement of his right lower extremity pain symptoms which extend below the knee. He also had improvement in his walking tolerance since surgery. He continued to experience some low back pain and some right lower extremity radiating pain into his anterolateral thigh with some burning and tingling as well as some intermittent left groin pain which was positional. He denied any new areas of pain. There were some additional pain medications that were added to Claimant's regime including Medrol, Methocarbamol and Ultram.

17. On October 17, 2018 Claimant reported he had had improvement of the low back pain symptoms. He continued to have some right lower extremity paresthesia and numbness in his anterior thigh. He also had some intermittent medial thigh pain in the right leg. Dr. Braxton noted that "Patient has new 2 view x-rays of the lumbar spine done in clinic today. The imaging shows that the instrumentation is intact and appropriately placed without signs of loosening or subsidence. Patient's lumbar spinal alignment is within normal limits."

18. Following the surgery, Dr. Braxton recommended he increase the pregabalin from 150 mg to 300 mg BID. Dr. Zwerdlinger refilled the pregabalin at 150 mg twice a day on October 18, 2018.

19. On April 13, 2020 Dr. Zwerdlinger completed a Physician's Report of Workers' Compensation refilling Claimant's four medications, Percocet, Ambien, Flexeril and Lyrica.

20. Amanda King, P.A.-C noted on May 13, 2021 that maintenance medications control Claimant's pain and made it tolerable.

21. On June 14, 2021 PA King examined Claimant noting that he was a healthy appearing, well-nourished and well developed 51 year old male. She prescribed oxycodone-acetaminophen 5mg/325 mg 30 tablets, cyclobenzaprine 10 mg 30 tablets, pregabalin 50 mg 90 capsules, and zolpidem 10 mg 30 tablets. She diagnosed chronic pain syndrome, degenerative lumbar intervertebral disc disease and lumbar radiculopathy. She remarked that he was there for follow up regarding his chronic pain management. She documented that he was seeing the orthopedic specialist who was trying to determine if some of his pain in the leg was coming from his hip, not his back. She observed that the last provider he had seen believed that pain, tingling and weakness was coming from his back and needed to go back to a neurosurgeon. She found that he had a small tear in his right labrum but that Claimant's symptoms were not consistent with the labrum being the issue. She noted that Claimant had the following:

> Patient reports no fever, no night sweats, **no significant weight loss**, no exercise intolerance, and **no fatigue**. He reports no vision change and no irritation. He reports no difficulty hearing and no ear pain. He reports no sinus problems. He reports no sore throat, no dry mouth, no oral ulcers, and no teeth problems. He reports **no chest pain**, no palpitations, and no known heart murmur. He reports no cough, no wheezing, **no shortness of breath**, and no coughing up blood. He reports **no abdominal pain**, no nausea, no vomiting, no constipation, normal appetite, no diarrhea, no GERO, and no dyspepsia. He reports no penile lesions, no erectile dysfunction, no incontinence, no difficulty urinating, no hematuria, and no increased frequency. He reports no changing skin lesions, **no jaundice**, no rashes, and no laceration. He reports no loss of consciousness, no seizures, no dizziness, no headaches, and no tremor.

22. PA King noted on July 14, 2021 that Claimant followed up regarding his workers compensation case, with generally no changes, except that on the top of his left foot he felt like it was on fire but was relieved by taking 100 mg of Lyrica and after 20 minutes he felt better.

23. An MRI was performed on November 15, 2021 which showed post-surgical changes and was compared to a July 2019 MRI without any significant interval changes. Dr. Chelsea Jeranko noted that the interbody fusion and posterior stabilization remained patent and adjacent segment disc degeneration stable. There was mild paraspinal muscle atrophy associated with the surgical levels and was chronic and symmetric.

24. Dr. Matthew Gnirke of Vail-Summit Orthopaedics evaluated Claimant on November 29, 2021. He reported that Claimant continued to have bilateral low back pain with radicular pain, weakness, numbness, and tingling in the bilateral lower extremities. He rated his pain as a 4 out of 10 on the VAS pain scale and noted that it was constant, and had problems with sleep. He was taking Lyrica, cyclobenzaprine, and Percocet for pain management and was ambulating with the assistance of a cane. This is the first time fatty liver showed in the past medical history at Vail-Summit Orthopaedics.

25. On February 14, 2022 Dr. Gnirke noted Claimant continued to have bilateral anterior hip pain as well as bilateral low back pain with radicular pain down both lower extremities and into the bilateral groins. He also complained of weakness in bilateral lower extremities. He rated his pain to be 5 out of 10 on the VAS pain scale, described as burning, shooting and electric in nature. This pain was constant and woke him up from sleep. He was taking Percocet, Lyrica and cyclobenzaprine for pain management. Dr. Gnirke performed a bilateral L3 transforaminal epidural steroid injection on February 18, 2022.

26. Claimant followed up with PA King on March 10, 2022 PA King reporting some abdominal pain, difficulty urinating and increased frequency. He denied any swelling in his lower extremities, no weight loss, no fatigue, no shortness of breath, no jaundice, among other denials. Due to the complaints, PA King did a full abdominal exam. Lisa Zwerdlinger, M.D. performed an ultrasound and Ms. King, by using a catheter removed urine, after which the bladder normally collapsed. They suspected diverticulitis based on the physical exam. They ordered multiple labs and a CT.

27. Upon Claimant's return to see PA King on April 7, 2022, Claimant was no longer reporting abdominal pain or urinary problems. He reported no weight loss, no fatigue, no shortness of breath, no abdominal pain, no jaundice. He did report leg spasms

and shooting pain in the left leg but no swelling. PA King continued to prescribe the same four medications.

28. On April 28, 2022 Claimant had an MRI of the sacrum that showed unremarkable SI joints, no evidence of fracture and moderate to severe bilateral L5-S1 facet arthropathy with small facet joint effusion.

29. Dr. Gnirke performed a bilateral L5-S1 intra-articular facet corticosteroid injection on June 10, 2022.

30. On October 4, 2022 PA King noted no swelling in the extremities, no weight loss, no fatigue, no shortness of breath, no abdominal pain, and no jaundice among other things. She remarked that Claimant's medications were necessary for quality of life and that she discussed the risks of continued medications. There were no change in his four medications related to his workers compensation case.

31. Claimant underwent an EMG nerve conduction study on October 10, 2022 with Dr. Gnirke which showed evidence of a remote right L5/S1 lumbar radiculopathy, which was consistent with Claimant's prior EMG from 2015, no active denervation noted in the right lower extremity, no evidence of a left or right peroneal neuropathy across the fibular head and no evidence of a large fiber peripheral neuropathy affecting the lower extremities. Dr. Gnirke performed an L3-L4 interlaminar epidural steroid injection on October 28, 2022.

32. On December 12, 2022 Dr. Gnirke's PA Haley Zipperer referred Claimant to UCH Neurology clinic for a second opinion EMG/nerve conduction study and again on January 19, 2023.

33. Claimant returned to see PA King on January 5, 2023 in follow up for medication maintenance. She remarked that Claimant had a failed back surgery due to "delay in WC company approving his surgery." She observed that Claimant subsequently continued with persistent numbness/tingling/weakness in the lower extremities and had to walk with a cane. She documented that Claimant reported muscle aches and back pain but no weight loss, fatigue, shortness of breath, abdominal pain, urinary problems or jaundice. She remarked that she would prefer Claimant not have such sedating medication but that they were required for Claimant's quality of life. She prescribed the same medications, zolpidem 10 mg 30 tablets, oxycodone-acetaminophen 5mg/325 mg 30 tablets, cyclobenzaprine 10 mg 30 tablets, and pregabalin 50 mg 90 capsules, making arrangements for a mail order delivery system.

34. Linda Manna, Pharm.D,[1] on January 9, 2023 issued a Pharmacist Report pursuant to Insurer's request. Dr. Manna stated that:

> While long-term opioid therapy may benefit some patients with severe suffering that has been refractory to other medical and psychological treatments, it is not generally effective in achieving the original goals of complete pain relief and functional restoration.

She stated that adverse effects from the chronic use of opioids included multiple conditions, none of which were identified by any provider in this matter as happening to

[1] As found, Dr. Manna is not an "M.D." as stated by Respondents, but is licensed in Michigan (MI) and Maryland (MD).

Claimant. Dr. Manna also stated that neuroendocrine problems included hypogonadism and erectile dysfunction, both of which Claimant had at the time of the hearing. However, Claimant was not seeking "complete pain relief" nor complete functional restoration, simply to be able to function in his daily life considering his conditions.

35. Dr. Manna stated that pregabalin has been known to augment the euphoric effect of opiates, particularly when used long-term and at high doses, putting the injured worker at risk for physiological/physical dependence. Claimant, however, is not using the opioid at a high dose and there is no evidence that he is experiencing a euphoric effect from his limited opioid use.

36. She opined that the addition of cyclobenzaprine was not recommended as adjunct with other medications and not to be used for longer that two to three weeks. She noted that long-term use of zolpidem (Ambien) can impair function, memory, and cause decreased high-level cognitive functioning. None of which were identified by his providers nor the IME physician.

37. To an inquiry to the treating provider, Ms. King, she responded that

> The medication help the patient to maintain function with symptomatic relief. This combination of medication and MED of 8 mg/day is the lowest baseline that the patient can tolerate. If there is improvement in the future, then there can be plans to wean. The patient has no aberrant signs of behavior and is counseled on the signs of respiratory depression.

38. PA King responded to Dr. Manna that she did not agree to wean Claimant off his four medications.

39. On February 2, 2023 Claimant was evaluated by Nicholas Olsen, D.O. of Rehabilitation Associates of Colorado at Respondents' request for an independent medical examination. Dr. Olsen took a history consistent with Claimant's testimony at hearing, reviewed the records and examined Claimant. Claimant rated his pain as 4/10. He reported he believed the surgery helped him. He noted, prior to the surgery, his pain as 7 to 8/10 and felt that he did get some relief from the spine surgery. He also noted his back was now straight up and down. He reported aggravating factors as walking greater than 20 minutes, standing, increased activities, bending, twisting, sitting on hard surfaces. He reported relief with lying flat or reclining, heat, ice and holding onto a supportive device, with injections and pain medications.

40. On exam Claimant was pleasant; oriented to time, place and person; appropriate; nonantalgic, but had difficulty ambulating; with neutral mechanics, limited range of motion and pain with terminal flexion; and an equivocal straight leg raise on the right but negative on the left. He had decreased pinprick on the right L5 dermatome. He stated that Claimant was status post a work injury on January 20, 2015 and an MRI of March 16, 2015 that showed a herniated disc at L3-4 with annular fissure measuring 4.5 mm, an indented thecal sac and facet arthrosis producing mild to moderate central canal stenosis. There was a broad disc bulge on the left at the L4-5 level with an annular fissure and bilateral facet arthrosis producing central canal stenosis. There was no disc herniation at L5-S1. He reported that Dr. Brian Shea placed Claimant at MMI on March 17, 2016 and provided a rating of 18% whole person.

41. Dr. Olsen opined that after the review of the records and a scathing critic of PA King's documentation and records, he opined that within a reasonable degree of

medical probability, that Claimant should be weaned off of all four medications. He opined that none of these medications were indicated by the fact that he has a nonalcoholic fatty liver disease, none of these have demonstrated a significant increase in functional benefit to Claimant, that he has only taken these habitually and was not trialed on alternate medications.

42. PA King evaluated Claimant on February 9, 2023 at St. Vincent General Hospital. She noted that the patient seemed hydrated, was non-toxic appearing, with no findings of acute occlusion in his bilateral lower extremities though pulses were diminished. She noted that Claimant had a long standing diagnosis of Type II diabetes without complications, with numbness, tingling and weakness in the lower extremities and had a chronic failed back surgery which was complicating his lower extremity symptoms. She ordered a CT scan/angiogram with contrast of the abdomen with runoff.

43. A CT angiogram of the abdomen, pelvis and runoff vessels from February 24, 2023 noted that the "visualized solid organs and hollow viscera in the abdomen and pelvis are within normal limits." This ALJ infers from this report that Claimant's organs were within normal limits including his liver.

44. On March 9, 2023 Dr. Dianna Quan of UCHealth neurosciences performed an EMG nerve conduction study which showed chronic right L5-S1 radiculopathies and no electrophysiologic evidence of superimposed generalized polyneuropathies affecting the lower limbs. This ALJ finds that this is in opposite to the suggestions made by Dr. Olsen that Claimant's diabetes may be causing lower extremity neuropathy that could explain the Claimant's lower extremity symptoms. As found, Claimant does not have diabetic neuropathy and has had symptoms into his legs from his initial complaints on January 20, 2015, including by Dr. Ogin.

45. PA King documented that Claimant had steatosis of liver or fatty liver disease with an onset of October 3, 2015. She notes her observations at each visit. For example, on April 13. 2023 she documented that Claimant has

> no arthralgias/joint pain and **no swelling in the extremities**. He reports weakness and numbness but reports no loss of consciousness, no seizures, no dizziness. no headaches, no tremor, and no muscle weakness. He reports no fever, no night sweats, **no significant weight loss,** no exercise intolerance, and **no fatigue**. He reports no vision change and no Irritation. He reports no difficulty hearing and no ear pain. He reports no sinus problems. He reports no sore throat, no dry mouth, no oral ulcers and no teeth problems. He reports no chest pain, no palpitations, and no known heart murmur. He reports no cough, no wheezing, **no shortness of breath**, and no coughing up blood. He reports **no abdominal pain**, no nausea, no vomiting, no constipation, normal appetite, no diarrhea, no GERD, and no dyspepsia. He reports no incontinence, no difficulty urinating, no hematuria, and no increased frequency. He reports **no jaundice**, no rashes, no laceration, and no changing skin lesions. He reports no swollen glands, no bruising, and no excessive bleeding. [**Emphasis added.**]

46. PA King continued to prescribe oxycodone-acetaminophen 5mg/325 mg 30 tablets, cyclobenzaprine 10 mg 30 tablets, pregabalin 50 mg 90 capsules, and zolpidem 10 mg 30 tablets. This is the same dosage as two years prior. She documented that Claimant was there for a "WC f/u. Is here for his monthly visit for meds he needs to maintain his quality of life. Today pain is worse but this happens-pain will ebb and flow. No recent Injury. Right leg has been painful and spasming. Is seeing Dr. [Gnirke] later

this month." She continued to diagnose degenerative lumbar intervertebral disc, chronic pain and insomnia. She remarked that

> … meds are required for quality of life. Will cont to rx. Pt aware of risks of medications. During his 7 years of treatment with me, we have tried numerous medications. Some didn't work and others had side effects. My preference would be that he didn't need as much of this sedating medication but this is what is required for quality of life. Pt has never exhibited any worrisome behavior for misuse or abuse.

47. Dr. Gnirke evaluated Claimant on April 23, 2023 following up on his lumbar spine complaints. He noted that

> …he rates his pain to be 3 out of 10 on the VAS pain scale describes it as stabbing, aching, throbbing, shooting, and sharp in nature. This pain is constant and does occasionally wake him up from sleep. His pain is located in his low back and radiates down the lateral aspect of the right lower extremity. He takes cyclobenzaprine, Lyrica, and Percocet for pain management. He engages in a home exercise program with an emphasis on core strengthening and aquatic therapy. He had an L3-4 interlaminar epidural steroid injection performed on October 28, 2022 which gave him a few weeks of pain relief. Of note, he has a history of an L4-5 ALIF performed in 2018. He recently had an EMG performed at UC health…

48. On exam he noted that claimant had radicular pain greater on the right than the left lower extremity in a patchy L3-L5 distribution, diminished gross sensation to light tough over the right lower extremity in the L4-5 distribution grossly, antalgic gait using a cane. He diagnosed a failed back surgical syndrome, which had a diagnosis code of M96.1 and was primary; lumbar radiculopathy; history of lumbar fusion; and right knee pain. They discussed the fact that Dr. Quan's EMG nerve conduction study as being similar in results to the one he performed. The nerve conduction study showed the exact same findings that he found on previous EMG with a chronic right LS/S1 lumbar radiculopathy without active denervation and no evidence of superimposed peripheral neuropathy or other compressive peripheral neuropathies. Considering the chronic nature of the L5 radiculopathy, he referred Claimant for a new MRI of the lumbar spine. The request for authorization was sent to the Insurer's adjuster on April 26, 2023.

49. Dr. Olsen performed a second IME on behalf of Respondents on May 18, 2023. Dr. Olsen conducted a phone interview of Claimant and reviewed additional records. He was asked to assess whether the Claimant's current right knee conditions were related to the work injury of January 20, 2015. Dr. Olsen assessed Claimant as status post a lumbar spine injury on January 20, 2015, status post L4-5 ALIF on September 11, 2018, steatosis of liver with onset of October 3, 2015, nonalcoholic fatty liver disease with onset of June 14, 2021, male hypogonadism, Type II diabetes mellitus, hyperlipidemia and status post right knee arthroscopy in 1989. Dr. Olsen opined that Claimant did not suffer from a knee injury related to the January 20, 2015 work injury and would be preexisting and related to his prior injury of 1989, though he did recommend Claimant continue to use his straight cane for support related to his altered gait dysfunction.

50. The June 8, 2023 MRI was read by Dr. Mark Murray and was compared to the prior MRI of November 21, 2021. It showed no significant interval changes, no stenosis at the fusion level, adjacent segment facet arthrosis without stenosis at the L5-S1 level and an annular tearing and disc protrusion at the L2-3 level with questionable contact of the exiting left L2 nerve root.

C. Dr. Olsen's Testimony:

51. Nicholas K. Olsen, D.O. testified at hearing as a board certified physician in physical medicine and rehabilitation as well as a Level II accredited physician with 30 years' experience treating musculoskeletal conditions with physical therapy, medications and referrals to surgery as well as electrodiagnostic testing and interventional medicine performing spinal injections under fluoroscopy. Dr. Olsen evaluated Claimant on February 2, 2023 and May 18, 2023 at Respondent's request. Dr. Olsen was asked to determine if ongoing prescription medications, including those for pain and sleep, were reasonably necessary.

52. Dr. Olsen stated that Claimant had been receiving maintenance medications prescribed by Amy King, PA-C. He was not able to determine from the records who was Ms. King's supervising physician. He noted that Claimant was on cyclobenzaprine (Flexeril), oxycodone, pregabalin (Lyrica), zolpidem (Ambien). He explained that Flexeril was a muscle relaxant that worked at the level of the brain, similarly to an antidepressant when used long term, to calm the central nervous system and relieve muscle spasms. Oxycodone was an opioid that affect the brain in the opioid receptors to reduce the expression of pain to provide pain relief. He questioned its effectiveness when using it chronically. He expounded that Lyrica affected the GABA receptors in the brain helping to control the peripheral nerve system. Ambien was a hypnotic which induced somnolence and helps people fall asleep, typically used acutely, not chronically.

53. Dr. Olsen discussed the report issued Dr. Manna. Dr. Olson stated that he agreed with Dr. Manna's statement that opioid treatment failed to achieve complete pain relief and functional restoration because there were multiple studies that demonstrated that there was a buildup of tolerance to opioids over time and proved less effective. He stated that the study showed that those weaned off of the opioids showed no difference than those on opioids, as over time they became less effective. However, this ALJ concludes that Claimant is not attempting to obtain complete pain relief or functional restoration but simply maintaining MMI status. Dr. Olsen agreed that there were neuroendocrine problems with the chronic use of opioids, including psychomotor/cognitive impairment, daytime sedation, and respiratory depression when used with Flexeril, Ambien and Lyrica because they work on similar pathways in the brain. Also, all three medications needed to be cleared through the liver.

54. Dr. Olsen agreed with Dr. Manna regarding the combined increased euphoric effect of using opioids and pregabalin because both opioids and GABA receptors are co-expressed by neurons in the brain, meaning one neuron can be affected by either opioid or GABA, and you get a combination of effect because they are GABA analogues. He noted that the addition of cyclobenzaprine was not recommended as an adjunct to other medications because of the risk of respiratory depression.

55. Dr. Olsen disagreed that Claimant had a failed lumbar surgery because Claimant had a good response the first four months following the surgery. He stated that Ms. King failed to properly document how medications enhanced Claimant's function or symptom relief. He also opined that Ambien was to be used as a short term, usually two to six weeks, for treatment of insomnia. He stated that it was rare from him to have a patient on long term Ambien. He stated that articles alluded that long term use can impair

function, memory and decreased higher level cognitive function because the patient only gets restorative sleep and does not go through the process of deep sleep, REM sleep and regular sleep. He explained that multiple of the medications, in addition to having these side effects, they are cleared through the liver, with the exception of Lyrica, and when a patient is having liver issues, like Claimant's nonalcoholic fatty liver disease (NAFLD), the risks need to be weighed against the benefits of continuing the medication. Dr. Olsen opined that continued use of narcotics, Ambien and cyclobenzaprine were probably going to affect his liver function.

56. Dr. Olsen stated that Claimant had been diagnosed with diabetes and that Claimant may have peripheral neuropathy instead of failed back syndrome. However, multiple EMG nerve conductions studies including the one by Dr. Gnirke and Dr. Quan showed the contrary, that there was no peripheral neuropathy.

57. Dr. Olsen stated that Claimant also had hyperlipidemia, which is high cholesterol, and the current medications being metabolized through the nonalcoholic fatty liver was challenging his liver because the liver also helps manage cholesterol. Dr. Olsen opined that Claimant had to be weaned off of these medications that were challenging his liver until the medications are discontinued completely within six months on an outpatient basis.

58. Dr. Olsen agreed that Claimant was being prescribed narcotics to treat his ongoing chronic low back pain. He was uncertain why the other medications were being prescribed but assumed that the Ambien was being prescribed as a sleep aid. He agreed that the prescriptions of Percocet (Oxycodone), Ambien, Lyrica and Flexeril were not prescribed before his workers' compensation injuries to his low back and that they were prescribed by his workers' compensation providers while treating his work related injuries.

59. Dr. Olsen was concerned that PA King failed to document Claimant's other medical concerns in conjunction with any side effects of the medications but is providing the maintenance medications. Dr. Olsen agreed that he did not seen any reports of side effects in any of the medical records he reviewed.

60. Dr. Olsen testified that the Type 2 diabetes caused the fatty liver disease, which in turn caused the hyperlipidemia or high cholesterol. The three diagnosis worked together, one creating the other. He noted that Claimant could not have normal labs considering these diagnosis, but they may be stable for Claimant.

D. Claimant's Testimony:

61. Claimant was initially prescribed Tramadol by Dr. Zwerdlinger but it was not sufficient to help him with the pain. In fact, Tylenol helped more than the Tramadol. That is when she changed the prescription to low dose Percocet about two months after his injury.

62. Claimant had not taken this kind of medications prior to his injury of January 2015 nor did he have any problems with his back prior to his admitted work injury. Claimant had excruciating lower back pain and could barely walk at the time because it was affecting both of his legs. He was even on crutches for a time before his surgery.

63. Claimant had taken other medications than the ones he was on at the time of the hearing, including gabapentin, Methocarbamol, Tramadol, Effexor and Cymbalta

under the direction of Dr. Zwerdlinger and Ms. King, her PA as well as her nurse practitioner, Ms. Laura Hoffman. At the time he was being seen by Dr. Evans at Steadman Hawkins, for injections, who also knew about the medications he was being prescribed.

64. Claimant testified that he took Zolpidem (Ambien) as a sleep agent, because he has back pain, and numbness and pain in his right leg that prevent him from sleeping, noting that he was unable to sleep without the medication. When he does not take the Zolpidem, he would remain awake most of the night, and then would have to increase his intake of Lyrical for the nerve pain going from his back down his leg. He even sleeps with pillows between his legs due to symptoms.

65. Claimant testified that he had suffered severe pain for approximately three years until a physician was willing to perform his back surgery. He had been prescribed Dexamethasone for the back pain flare ups, which was a five day steroid. He had pain going into his groin.

66. After the surgery, he continued to have groin pain, numbness in the thigh and has back pain. He stated he believed he had a failed back fusion because he had continued back pain.

67. Claimant continues to take pregabalin (Lyrica) for the nerve pain in the right leg that comes from permanent damage to the spine. If he is unable to take the Lyrica, the pain in his right leg becomes severe and cause a flare up. He generally takes 100 mg of pregabalin a day but is allowed up to 300 mg per day for flare ups. Prior to that he had taken 300 mg pills and it would cause brain fog. When he reported the symptoms, his prescription was changed to 50 mg pills and he takes them as needed.

68. Claimant takes cyclobenzaprine (Flexeril) only when he has back or leg spasms and he may use one when he feels the spasms come on. He limits how much he takes and only takes one at a time. The Flexeril generally takes 20 to 30 minutes to take effect and start calming the muscle spasms. This normally happens on a daily basis.

69. Claimant takes a low dose oxycodone acetamitaphen 5 mg/325 mg (Percocet) for pain. He generally only takes one a day. He only takes two a day when that pain in his back and hip are not well controlled. He has a hard time functioning when he is unable to take the low dose medication. He stated that the Flexeril and low dose Percocet is the combination of pain relief that has been most effective for him. He stated that he has his labs on a regular basis to test him. He also has his fatty liver disease checked on a frequent basis too, with the last one approximately six months prior to the hearing at St. Vincent Health where he sees either Dr. Stewart or PA Amy King, as Dr. Zwerdlinger left the system. He reported that his kidney function is good without any issues.

70. Claimant testified that the medications keep him functioning, able to do small chores around his house. If he was unable to take them, he would not be able to function and his quality of life would go downhill. He had used a cane since approximately 2019 in order to walk because his right leg gives out. He is able to drive.

71. He has attended a water core strengthening class weekly upon the recommendation of Dr. Evans since August 2022. This is in order for his muscles not to atrophy. The exercise help his right leg and low back.

72. Claimant testified that he has had no side effects related to taking the four medications.

73. From both Claimant's testimony and the records, it is determined that PA King worked under Dr. Zwerdlinger at St. Vincent's Health, until Dr. Zwerdlinger left the practice and PA King continued to provide Claimant's maintenance care.

74. Claimant stated that he was not taking any narcotic medications at the time of the January 20, 2015 accident because he was afraid of being drug tested and being fired. Neither did he recall taking any pain medications at that time.

E. Other Evidence:

75. The Medical Treatment Guidelines propounded by the Division of Workers' Compensation, Rule 17, Exhibit 9 state that the CDC recommends limiting opioid dose to 90 MME per day to avoid increased risk of overdose and that there was strong evidence that any dose above 50 MME per day was associated with a higher risk of dead. Claimant is taking Oxycodone 5 mg, which, when multiplied by the opioid factor of 1.5 is an MME equivalent to 7.5 mg, well below the recommended maximum dosage.

76. Under Opioid Medication Management of the Guides, it states that in selective cases, opioids may prove to be the most cost effective means of ensuring the highest function and quality of life.

77. In this case, Claimant has been on a stable dose of 5 mg of oxycodone since after his 2018 surgery and has maintained a stable medication regime. PA King has documented that she has considered other alternatives and ruled them out as well as assessing that Claimant is not at risk for abusing his narcotic medication. Ms. King sees Claimant every month to assess continuing need for opioids, risks, and signs of abuse. Claimant credibly stated that he has his labs drawn and had done so recently before the hearing. PA King is found credible and persuasive. While the records do not show significant details of each question Ms. King asked of Claimant, she documents what is most important. Specifically that Claimant has no swelling in the extremities, no weight loss, no fatigue, no shortness of breath, no abdominal pain, and no jaundice, all of which might indicate poor liver function. As found, Claimant has used his medications to remain and maintain function for many years without significant worsening or requiring more aggressive treatment.

ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order on September 11, 2018. ALJ Felter found Claimant permanently totally disabled and ordered reasonably necessary post maximum medical improvement maintenance medical benefits. This order was part of the evidence submitted in Claimant's packet. ALJ Felter considered ALJ Turnbow's opinion, noting that she had only issued a decision regarding permanent partial impairment, not regarding permanent total disability or maintenance medical benefits and that the determination of the DIME physician as to which body parts and resulting work restrictions were related to the work injury could be considered, but they

were not entitled to additional weight by the statute. *Cole v. Dish Network,* W.C. No. 4-918-651-02 [Indus. Claim Appeals Office (ICAO), January 15, 2016] *(aff'd sub nom. Dish Network v. Indus. Claim Appeals Office,* 2016 WL 7404847 (Colo. App., December 22, 2016). ALJ Felter did note that ALJ Turnbow's determination regarding MMI as of March 17, 2016 was binding.

78. Facts that may be pertinent to this decision are that ALJ Felter found Dr. Ogin was of the opinion that Claimant's permanent restrictions were causally related to the admitted injury, and was inconsistent with his insistence that Claimant had only a "temporary aggravation." He found that Lisa Zwerdlinger, M.D., the Claimant's primary care physician, saw him on the same day of his injury of January 20, 2015. She took the Claimant off work. Since his date of injury, the Claimant had not worked nor had he been released to return to his pre-injury job by an authorized treating physician. The Claimant had seen Dr. Zwerdlinger prior to his injury. Although Dr. Zwerdlinger's reports indicated that the Claimant had back pain prior to January 4, 2015 she noted that the Claimant's back pain had "significantly improved" after visits with chiropractor. At the hearing of August 23, 2018, the Claimant stated that the pain prior to his injury was related to his hip. Notwithstanding the Claimant's prior symptoms, the Claimant testified that he had no problems performing the duties related to his heavy duty job for the Employer until his admitted injury occurred on January 20, 2015. ALJ Felter found that the MRI on March 16 2015, as interpreted by Donald S. Corenman, M.D., the Claimant's primary authorized treating provider, showed Claimant had a central L3-L4 disc herniation with mild to moderate central stenosis and an L4-L5 disc bulge with left lateral recess stenosis. Dr. Corenman stated that the Claimant was unable to work. He further added, "I do not expect [Claimant] will ever be able to do heavy lifting." On May 6, 2015, Kelly Lindauer, M.D., performed an MRI which showed a disc protrusion at both Claimant's L3-4 and L4-5. Two years later, in April of 2017, Dr. Lindauer performed an additional MRI on the Claimant. She compared her findings to the prior imagining from May of 2015. She agreed that the findings were similar to the prior imaging done on the Claimant's lumbar spine in 2015 with some progression of pathology since the earlier imaging noting a "left posterolateral disc extrusion." He found Dr. Kuklo credible in his opinion that a "450-pound load can literally hit 1500 pounds of force across the disk *(sic),* which tears the annulus or the outer rim resulting in a disk (sic) bulge, back pain, [or] strain" and had worsened Claimant's condition since his industrial injury. ALJ Felter found Dr. Kuklo's, Dr. Zwerdlinger's and Corenman's opinions highly persuasive and credible over the opinions of Dr. Ogin and Dr. Reiss, stating that Dr. Kuklo's opinions were not available to ALJ Turnbow before her decision of February 14, 2018. Ultimately, ALJ Felter found that Claimant was entitled to maintenance medical care, which was reasonably necessary to address the injury and ordered Respondents to pay the costs of authorized, causally related and reasonably necessary post maximum medical maintenance care, including care by Dr. Corenman, and by Dr. Zwerdlinger.

79. This decision was appealed and the ICAO affirmed the decision in *In re Claim of Bertolas v. Climax Molybdenum,* WC 4-972-988-001, I.C.A.O. (May 3, 20219). The panel noted that there was no issue preclusion due to the distinct issues addressed in each case. ALJ Turnbow's determination was regarding overcoming the DIME physician's opinion and ALJ Felter addressed permanent total disability

and maintenance medical benefits. The panel determined that ALJ Turnbow's findings were not binding with regard to the issues addressed by ALJ Felter. This ALJ failed to find any further appeals and the panel's decision was final.

F. Conclusive Findings:

80. After consideration of both prior orders issued by ALJ Turnbow and ALJ Felter, this ALJ determines that the orders in those matters have little bearing on the single issue before this ALJ regarding the reasonableness and necessity of the ongoing maintenance medications, specifically Ambien, Oxycondone-Acetamenophen, Flexeril and Lyrica, in light of the evidence presented at this hearing. While it is clear from ALJ Felter's order that he considered ALJ Turnbow's findings overcoming the DIME physician's medical impairment, he found that the standard of proof was different in both cases and Judge Turnbow's decision only related to a finding regarding MMI and permanent partial disability benefits. Issue preclusion did not apply. This is true for this case as well.

81. As found, fatty liver is caused by buildup of excess fat in the liver when blood from the digestive system filters through the liver. Symptoms include fatigue, weight loss and abdominal pain, though there can be other more severe signs such as jaundice, swollen lower extremities, and shortness of breath.

82. As found, it is confusing to this ALJ how Dr. Olsen simply relies on other providers notes and Claimant's report of fatty liver disease and that he has failed to review any lab work reports. In fact, no lab work-up was provided by either party to this ALJ for consideration.

83. As found, Dr. Manna stated that use of opioids included hypogonadism and erectile dysfunction but did not identify whether she considered Claimant's ongoing need for pain management and what the options were. Only that all four medications should be discontinued. Further, PA King, who has managed Claimant's ongoing problems, has stated that she would prefer that Claimant not be on narcotics but, in light of the fact that Claimant had been tried on multiple other medications which caused side effects or were not effective, Claimant's current medication regime was necessary to keep Claimant functional. PA King is found to be credible and persuasive in this matter. This opinion was determined to be shared by other providers like Dr. Zwerdlinger, Dr. Corenman and Dr. Gnirke, as all noted Claimant's continued use and need for medication management after he was found to be at MMI on March 17, 2016.

84. Further, Claimant was credible in the fact that he testified that he tries to take as little medication as possible, frequently less than the prescribed amount, but requires it in times when the muscle spasm, intractable pain and problems sleeping increases in order to maintain some level of activity. If he does not have access to the maintenance medications, Claimant persuasively stated that he would not functioning well, could not walk around, do his core strengthening or the limited chores or simple daily living activities as needed. Further, he credibly stated that he has been stable due to the medication management. Claimant was credible and persuasive.

85. As found, Respondents have failed to prove by a preponderance of the evidence that the Claimant's Ambien, Percocet, Flexeril and Lyrica (or their generic counterparts) were no longer reasonably necessary or related to his ongoing needs for maintenance care related to Claimant's admitted January 20, 2015 work injury.

86. As found, Claimant has proven by a preponderance of the evidence that he continues to require maintenance medical care, as found by ALJ Felter, that is reasonably necessary and related to the January 20, 2015 admitted work related accident.

87. Testimony and evidence inconsistent with the above findings is not credible, persuasive or relevant to the issue determined herein.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial*

Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

B. Continuing Post MMI Medical Benefits

Section 8-42-101(1)(a), C.R.S. provides that respondents are liable for authorized medical treatment which is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). This includes maintenance medical treatment recommended after MMI. W.C.R.P. Rule 5-5(A)(1). The question of whether a particular treatment modality is reasonable and necessary is one of fact for resolution by the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995); *Young v. Bobby Brown Bail Bonds, Inc.,* W.C. No. 4-632-376, I.C.A.O. (April 7, 2010)(the question of whether the continued use of narcotic medications is reasonable and necessary is one of fact for determination by the ALJ); *Deane v. Regis Corp*., W.C. No. 4-664-891, I.C.A.O. (August 7, 2023)

A claimant is entitled to post-MMI maintenance medical benefits if future medical treatment will be "reasonably necessary to relieve the claimant from the effects of the industrial injury or occupational disease even though such treatment will not be received until sometime subsequent to the award of permanent disability". *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1998). In deciding whether maintenance care is necessary there must be evidence which establishes "but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that [s]he will suffer a greater disability than [s]he has thus far." *Stollmeyer v. Industrial Claim Appeals Office of State of Colo.*¸916 P.2d 609, 610 (Colo. App. 1995). Where the claimant's entitlement to continuing benefits is disputed, the claimant has the burden to prove the reasonableness and causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office, supra.*

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability,

reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). When respondents seek to terminate post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn,* W.C. No. 4- 754-838 (ICAO, Oct. 1, 2013). Specifically, respondents are not liable for future maintenance benefits when they no longer reasonable and necessary, or relate back to the industrial injury. See *In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

In *Deane,supra,* the ALJ credited the opinions of Dr. Olsen and Dr. Patel that the claimant needed to be weaned from her opioid medications. There was no evidence suggesting that the claimant's opioids should be immediately discontinued. Consequently, the ALJ determined that the claimant had established that ongoing opioid medications and Ketamine were reasonable, necessary, and related through the weaning process. *George v. Industrial Commission,* 720 P.2d 624 (Colo. App. 1986). The panel in *Deane* determined that an ALJ was unable to direct a medical professional to administer a treatment the professional did not believe was appropriate because it was not a matter arising under articles 40 to 47 of title 8 for which the ALJ is provided authority by Sec. 8-43-201(1), C.R.S. and Sec. 8-43-503(3), C.R.S. (employers, insurer. claimant or their representative shall not dictate to any physician the type or duration of treatment...). The panel emphasized that, should the respondents dispute the reasonableness and necessity of the opioids during the weaning process, the respondents remained free to file another application for hearing pursuant to Sec. 8-43-207, C.R.S., *Snyder v. Industrial Claim Appeals Office*, supra, or to possibly request a utilization review under Sec. 8-43-501(2), C.R.S. See Deane v. Regis Corp., *supra; Torres v. City & County of Denver,* W.C. No. 4-937-329-03, I.C.A.O. (May 15, 2018) and *Short v. Property Management of Telluride,* W.C. No. 3-100-726, I.C.A.O. (May 4, 1995).

The Medical Treatment Guidelines (MTGs), contained in Workers' Compensation Rule of Procedure 17, 7 CCR 1101-3, provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. Sec. 8-42-101(3)(b), C.R.S. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005). The ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the

deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (Jan. 25, 2011). The Guidelines, however, do not constitute evidentiary rules, and an expert's compliance with them does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the Guidelines may affect the weight given by the ALJ to any particular medical opinion. *Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (February 23, 2009); *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009; *In re Claim of Foust*, 102120 W.C. No. 5-113-596, I.C.A.O. (October 21, 2020). Neither are the Guidelines definitive. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150, I.C.A.O. (May 5, 2006), affirmed *Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (NSOP); *In re Claim of Reyes*, W.C. No. 4-968-907-04, I.C.A.O. (December 4, 2017)

Respondents' major arguments are that the four medications being prescribed by ATPs are no longer reasonably necessary for Claimant to continue due to the diagnosis of NAFLD and other risks as well as PA Kings lack of documentation as indicated in the Medical Treatment Guidelines and that they are not related to the January 20, 2015 work related injury.

Respondents' arguments that Claimant's continuing maintenance is related to the preexisting spinal degeneration and not the admitted January 2015 work related injury is not persuasive. Prior to Claimant's injury, Claimant was clearly able to work a very heavy duty job and, in fact, was moving a very large and heavy 450 lb. belt, which required four men to move, when he was injured. Claimant persuasively testified that he was not having significant problems with his lower back that prevented him from performing his heavy work and was not taking narcotic or pain medications at the time of his January 20, 2015 injury. While the records do show some indications that Claimant had either lower back pain or hip pain prior to his injury, they did not affect his ability to work. Claimant persuasively showed that it was more likely than not that his injury, and subsequent progression of disability and need for medications was as a consequence of the aggravation and acceleration of Claimant's spinal degeneration, was caused by the admitted work injury of January 20, 2015. Claimant's accident and injury of January 20, 2015 was the tipping point that led to a significant and progressive acceleration of his preexisting condition, causing his continued need for a medical maintenance regime of medications provided by Dr. Zwerdlinger and PA King, and other treatments such as the injections provided by Dr. Gnirke, in order to maintain Claimant's condition stable and prevent any further worsening.

This ALJ is not persuaded by Dr. Olsen's opinions with regard to either the NAFLD or the risks assessed by Dr. Manna. PA King, and Dr. Zwerdlinger before she left the St. Vincent Health practice, persuasively and frequently addressed all the risks involved, including examining Claimant with symptoms associated with NAFLD, such as fatigue, weight loss, abdominal pain, jaundice, swollen lower extremities, and shortness of breath. PA King has been assessing risk with regard to abuse and finding none. This is supported by the stability of Claimant's continued medications at the lowest level dosages possible, while still being effective in controlling his symptoms and maintaining Claimant at MMI without any further worsening other than occasional flares in symptoms. PA King, Dr. Gnirke and Dr. Zwerdlinger are more credible and persuasive than the contrary opinions

of Dr. Ogin and Dr. Olsen. Respondents have failed to show that it is more likely than not that the Ambien, Oxycodone, Flexeril and Lyrical are no longer reasonably necessary and related to the January 20, 2015 admitted work related injury.

Both parties failed to submit any lab work results or imaging showing what Claimant's liver condition is at this time. This might have been support for an argument that Claimant's medications are no longer reasonably necessary because his NAFLD has worsened over time, such as an increasing decline in liver function. Claimant has purportedly had this diagnosis of NAFLD, or steatosis, for many years, maybe even before the work related injury of 2015. Yet multiple ATPs have been prescribing Claimant narcotics, and other medications, which are metabolized by his liver, since his work related injury in 2015.

Respondents argue that the four medications, Ambien, Oxycodone, Flexeril, and Lyrica are no longer reasonably necessary due to Claimant's diagnosis of steatosis because the medications are potentially hazardous to Claimant's liver. This ALJ concludes that it is not because the medications are not reasonably necessary, but that they may be unwise for Claimant to continue the medications in light of the steatosis diagnosis without further confirmation that the NAFLD is being affected or that Claimant's liver function is declining due to the continued use of medications that are metabolized by the liver. In fact, while this ALJ has no authority or jurisdiction to direct Claimant's ATP to either continue or terminate medical treatment that is reasonably necessary, this ALJ encourages Claimant to consult with this ATP to wean the narcotics or other medications, even if for a short time, to determine if Claimant's function remains the same or declines, and assess whether continuing on the prescription medications is affecting his steatosis. Further, this ALJ encourages Claimant to confer with his ATP if the ATP has an opioid contract in effect, that regular lab tests are taking place, that Claimant have regular urine drug screens and that the ATP is monitor the PDMP.

Respondents also argue that PA King has failed to comply with the Medical Treatment Guidelines by not laying out every one of her assessments and findings regarding the benefits of medications and Claimant's functional performance which is assisted by the medications. This ALJ is not persuaded by this argument either. While providers are required to use the MTGs, this ALJ determines and finds that Claimant's ATPs are documenting Claimant's benefits from his continuing medications regime, though maybe not in the manner that Dr. Olsen is stating is required by documenting every specific activity that shows Claimant has benefited from the use of medications. This ALJ finds that, in fact, PA King is substantially complying with the rules and documenting that Claimant is benefiting from the medication, is not abusing them and understands the risks of continuing to use them. Respondents have failed to show that Claimant's continued use of the four medication is no longer reasonably necessary and related to the January 20, 2015 admitted work injury.

Claimant has proven by a preponderance of the evidence that Ambien, Oxycodone, Flexeril and Lyrical continue to be reasonably necessary. Claimant credibly and persuasively explained the medications he has taken for the last multiple years have helped him remain as functional as possible, including with activities of daily living, driving, core strengthening, aquatic exercises and chores around his home, considering his

ongoing continued and persistent lumbar spine pain, lower extremity radicular pain and muscle spasms, and difficulties with sleeping.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall continue to pay for Claimant's reasonably necessary and related medical care, including the Ambien, Oxycodone, Flexeril and Lyrical as long as they are prescribed by his authorized treating providers. Medical benefits are subject to the Colorado Workers' Compensation Fee Schedule. Respondents retain the right to challenge any treatment recommendation of the grounds that it is not reasonable, necessary or related to Claimant's 2015 injury.

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

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

DATED this 13th day of October, 2023.

DIGITAL SIGNATURE

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-217-011-002

ISSUES

The hearing in this matter was set on the endorsed issue of Respondents overcoming the Division IME with respect to rating and Claimant's temporary partial disability. The following stipulations were offered and accepted:

- The Claimant's Average Weekly Wage is $580.00.
- TPD is owed from September 7, 2022 to September 29, 2022, when Claimant was initially placed at MMI.
- Dr. Johnson initially placed claimant at Maximum Medical Improvement (MMI) on September 29, 2022.
- Respondents stipulate that the date of MMI is December 29, 2022, as opined by the DIME doctor, Dr. Higginbotham.

The issues remaining for determination are:

- Did Respondents overcome the DIME's cervical spine rating by clear and convincing evidence?
- Did Claimant prove by a preponderance of the evidence that she is entitled to TPD beginning September 30, 2022 through December 28, 2022?

FINDINGS OF FACT

1. Claimant was employed as a cook for the employer and sustained an admitted injury on September 7, 2022 when she fell backward, tripping over a co-employees foot as she was carrying a container of chicken wings on her way to the fryer. When she fell backwards, she sustained a whiplash type injury.

2. Claimant treated at Concentra beginning on September 10, 2022. Claimant received conservative care from Dr. Johnson until he placed Claimant at MMI on September 29, 2022 with no impairment.

3. Respondent filed a Final Admission of Liability (FAL) on November 7, 2022 based on Dr. Johnson's report dated September 29, 2022. Claimant timely objected to the FAL and requested a DIME.

4. Claimant returned to Concentra on November 5, 2022 for worsening pain in her neck. She saw Dr. Baron. Claimant told her that she was discharged when she still had significant pain. Claimant was referred for Chiropractic treatment for a total of six visits.

Claimant saw Dr. Lance Weidner for chiropractic treatment beginning on December 6, 2022. Dr. Weidner diagnosed neck strain, segmental and somatic dysfunction of the cervical region and muscle spasms of the neck. He performed massage and spinal manipulation. The exhibits show the Claimant treated four more times according to the notes, with one more visit scheduled, but not documented in the hearing exhibits.

5. Dr. Thomas Higginbotham performed the DIME on January 23, 2023. He noted that Claimant's clinical pain picture diagram identified pain and discomfort about the suboccipital, cervical paraspinal, CT junction and superior scapulothoracic areas and both heels. He opined that the Claimant reached maximum medical improvement on December 29, 2022 and had a 12% whole person impairment rating for her cervical spine.[1]

6. [Redacted, hereinafter LE] testified by telephone on behalf of the Respondents. He is the Vice President of Operations for the Employer. He described the physical demands of the claimant's job which did not involve lifting more than two pounds. He stated pulling a basket of chicken out of the fryer is about two pounds. The "bone-in" chicken would weigh more than the boneless check or chicken tenders. It was his testimony that Claimant's decrease in wages during the disputed time period was due to construction of the road in front of the business, causing decreased sales in general as opposed to Claimant's physical limitations.

7. Dr. Thurston performed an IME on behalf of Respondents on April 6, 2023. He agreed with the determination of Dr. Higginbotham that Claimant reached MMI on December 29, 2022. However, he disagreed with the rating of Dr. Higginbotham. The basis for the disagreement was that Table 53(II)(B) requires an "intervertebral disc or other soft tissue lesions: unoperated, with medically documented injury and a minimum of 6 months of medically documented pain and rigidity with or without muscle spasm, associated with none to minimal degenerative changes on structural tests". Exhibit F, p. 5. He reasoned that since the Claimant was placed at MMI less than 6 months from the date of injury, this requirement was not met so the Claimant would not be eligible for permanent impairment under this section.

8. During his testimony, Dr. Thurston was asked a series of questions regarding whether imaging was required in order meet the "structural test" requirement under the Table 53(II)(B). The following testimony was taken

> "Q. Would you agree that, based on the phrasing of that that you can qualify for a Table 53 rating with no findings on imaging?
>
> A. Some -- some examiners would rate that.
>
> Q. All right. Is that practically any different than having no imaging at all?

[1] Doctor Higginbotham notes that the original MMI date is the last visit the Claimant had with the chiropractor, but the note was unavailable for his review. Similarly, neither party included this note in their hearing exhibits so it is unclear as to the chiropractor's opinion on MMI or the need for further treatment.

A. Can you restate that? I'm not sure I quite understand.

Q. Yeah. So if a doctor get a Table 53 rating and there are no findings on imaging, is it equivalent of a doctor giving a rating where no imaging exists, effectively or practically the same?

A. Probably effectively the same. It -- it -- in my opinion it doesn't bear the same weight, but yeah, you'd have some overlap." (Transcript p. 40).

9. Claimant underwent an IME with Dr. Miguel Castrejon on April 24, 2023 at the request of her counsel. Exhibit 8. He took a history from Claimant, he performed a physical examination of Claimant, and he reviewed the medical records, including the DIME report. Claimant reported to Dr. Castrejon that the chiropractic treatment she received did substantially help her neck pain. *Id.* at 134. Exactly as reported to Dr. Thurston weeks prior, Claimant stated she was in a level 1 out of 10 pain at that time; however, the pain increases more with activity, particularly her work activity. *Id.* Claimant reported a dull neck pain at the base of her neck and her trapezius muscles. *Id.* The noticeable differences come in the form of physical examination. Dr. Castrejon did note some decreased cervical range of motion with pain in reported end ranges, "especially with extension." He also found mild muscle hypertonicity with several trigger points elicited with deep palpation. *Id.* at 135.

CONCLUSIONS OF LAW

A. Burdens and standards of proof

Respondent must overcome the DIME's cervical rating by clear and convincing evidence. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Claimant must prove by a preponderance of the evidence entitlement to temporary partial disability benefits.

B. Respondent did not overcome the cervical rating

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

Respondent failed to overcome the DIME's cervical rating by clear and convincing evidence. Respondents rely upon Dr. Thurston's opinion that it is improper to provide a Table 53(II)(B) rating when there has not been 6 months of medically documented pain and rigidity at the time of MMI. Since the Claimant was placed at MMI less than 6 months after the injury, Dr. Thurston reasons that there should be no table 53 rating greater than 0% since Table 53(2)(A) would apply. Based on this analysis, Dr. Thurston further opines there can be no impairment for loss of range of motion based on the Division of Workers' Compensation Impairment Rating Tips.

Contrary to Dr. Thurston's opinions, there is established case law that arrives at a different conclusion. In *Lopez v. Redi Services*, 5-118-981, 5-135-641 (ICAO October 27, 2021), *citing McLane Western, Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263(Colo. App. 1999), the Panel in *Lopez* quoted from *McLane* "Once a disability has become permanent, the resulting physical impairment must be determined in accordance with the AMA Guides. See §8-42-101(3.7). But, contrary to employer's contention, the AMA Guides do not require that the documented pain occur prior to MMI. As the Panel observed, an injury could produce some determinable and stable medical impairment at a certain point, yet remain unratable under the AMA Guides because insufficient time had passed. . . We therefore reject employer's contention that, as a matter of law, permanent impairment must be determined at the time of MMI, and cannot be assessed under Table 53 unless claimant shows that six months of documented pain occurred prior to MMI." (Citation omitted). Since the Claimant had continued documented pain at the time of the IME with Dr. Castrejon, which was more than 6 months after the date of injury, she is entitled to an impairment rating based on Table 53(II)(B). Having reached that conclusion, the next issue is whether the fact that the DIME occurred less than 6 months after the date of injury makes a difference. Taking the next step from the McLane case, I conclude that it does not make a difference that the DIME occurred less than six months after the date of injury since there is documented pain by Dr. Castrejon more than six months after the date of injury.

The final step of the analysis is the lack of x-rays or other imaging at any time. Since the table 53 requirement includes the word "none" it would appear that there is no requirement of actual imaging to obtain an impairment rating. I rely on the testimony of Dr. Thurston that in response to questions that no imaging is essentially the equivalent of no findings on imaging. As such, this does not pose an impediment to a rating under Table 53(II)(B).

Based on this analysis, I conclude that the Respondents have failed to overcome the rating of the Division IME by clear and convincing evidence.

C. Claimant failed to sustain her burden of proof of entitlement to Temporary Partial Disability from September 30, 2022 to December 28, 2022.

Claimant's wage loss after originally being placed at MMI is not due to a disability. TPD was properly terminated when was originally placed at MMI and assigned a full duty release. LE[Redacted] is credible in his testimony as to the non-injury related factors which resulted in claimant's wage loss. When these factors were not present, claimant's hours increased.

The wage loss after September 29, 2022 is not attributed to a disability or the industrial injury and not owed.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME's 12% whole person cervical rating is denied and dismissed.

2. Claimant's request for TPD from September 29, 2022 to December 29, 2022 is denied and dismissed.

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

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

DATED: October 13, 2023

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

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that on August 29, 2022, he suffered a work injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of his right knee, including surgery performed on February 15, 2023 by Dr. Thomas Dwyer, constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits?

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

FINDINGS OF FACT

1. Claimant began working for Employer on February 17, 2017. At all times relevant to the current matter, Claimant was employed as a Patrol Corporal. Claimant's job duties include all aspects of a law enforcement patrol officer. In addition, Claimant is a member of the [Redacted, hereinafter ST] team.

2. Claimant asserts that he suffered an injury to his right knee while performing his job duties on August 29, 2022.

3. Claimant testified that when he was 17 or 18 years old he undeiwent arthroscopic surgery to his right knee. Claimant further testified that between his recovery from that prior surgery and August 29, 2022, he had no right knee issues.

4. On August 29, 2022, officers from both the [Redacted, hereinafter MS] and the [Redacted, hereinafter MD] responded to a domestic incident. The incident escalated and an armed individual barricaded himself in a local automotive business and threatened suicide. Claimant was tasked with maintaining sight of the individual. This involved kneeling to view the individual through a window that was close to the ground. Claimant knelt in this position for approximately 30 to 40 minutes.

5. Claimant testified that while he was kneeling in this manner there came a moment when the individual neared the window where Claimant was located. As a result, Claimant turned and twisted on his right knee to avoid being seen. Claimant immediately felt a "crunch" and pain in his right knee. However, due to the emergent and volatile nature of the situation unfolding inside the building, Claimant continued to kneel to maintain sight of the individual.

6. Officer [Redacted, hereinafter JL] is an officer with the MD[Redacted]. JL[Redacted] was also involved with the August 29, 2022 barricaded individual. JL[Redacted] testified that he observed Claimant kneeling to be able to look in the low window. At one point, Claimant asked JL[Redacted] to change positions with him because Claimant's knee was beginning to hurt. While JL[Redacted] took the kneeling position for a brief period of time, Claimant was able to walk around to try to loosen up his right knee. Claimant then returned to kneeling before the window and remained there.

7. Claimant's direct supervisor, [Redacted, hereinafter MB] was also present at the August 29, 2022 incident. After the incident was resolved, Claimant interacted with MB[Redacted]. In addition to the the normal debriefing discussions and completion of paperwork, Claimant told MB[Redacted] that his knee was sore from kneeling at the scene. MB[Redacted] offered Claimant medical treatment, and Claimant declined. Claimant testified that although his right knee was painful on August 29, 2022, he believed he was just sore and could treat his symptoms with rest and ice.

8. Claimant's right knee pain did not resolve and continued to bother him in the coming days and weeks. Claimant attempted to continue to perform all of his job duties, despite his ongoing right knee pain. On October 11, 2022, Claimant was involved in training with ST[Redacted] Claimant disclosed to the ST[Redacted] supervisor that his right knee was painful, and he was unable to fully perform the functions of the ST[Redacted] training.

9. At his next shift on October 13, 2022, Claimant reported his right knee concerns to MB[Redacted] and requested medical treatment. At that time, Claimant completed an Employee's Written Notice of Injury to Employer. In his description of the incident, Claimant wrote "After kneeling on the ground for some time I noticed my right knee hurt. I assumed it was nothing major. It has only gotten worse to the point I can not perform my duties." Claimant testified that he did not include language about turning and twisting his knee because he believed his description was sufficient, and the form lacked additional space for more details.

10. On October 13, 2022, an Employer's First Report of Injury was completed by [Redacted, hereinafter CC], Safety and Risk Coordinator. The written statement from Claimant was included in that form.

11. On October 14, 2022, Claimant was seen by his authorized treating physician (ATP) Dr. Stephen Adams with Peak Professionals. Dr. Adams noted Claimant's development of right knee symptoms while kneeling for a prolonged length of time. Claimant's symptoms were noted to include right knee pain, stiffness, mild

swelling, catching, and locking. Dr. Adams ordered magnetic resonance imaging (MRI) of Claimant's right knee and placed Claimant on light duty.

12. On October 25, 2022, a right knee MRI was performed and showed surgical changes to the medial meniscus; an extrusion of the body segment; a meniscus flap in the meniscotibial recess at the medial joint line; mild medial compartment chondral degeneration; and mucoid degeneration of the anterior cruciate ligament (ACL).

13. On October 31, 2022, Claimant returned to Dr. Adams. Dr. Adams listed Claimant's mechanism of injury as "kneeling down for half hour by a window I turned my upper body so no one would see me and knee felt funny after". Based upon Claimant's ongoing symptoms and the MRI findings, Dr. Adams referred Claimant for an orthopedic consultation.

14. On December 8, 2022, Claimant was seen by Dr. Thomas Dwyer. At that time, Claimant described his August 29, 2022, mechanism of injury as kneeling down and then twisting quickly so that the individual would not see him. He further reported feeling immediate pain that has not improved. Claimant also reported right knee symptoms of swelling, popping, and catching. After an examination and review of the MRI results, Dr. Dwyer opined that Claimant would not likely benefit from an injection. Dr. Dwyer recommended an arthroscopic surgery with partial meniscectomy. A request for authorization for this procedure was sent to Insurer on that same date.

15. At the request of Respondents, Dr. Timothy O'Brien reviewed Claimant's medical records. In a report dated December 20, 2022, Dr. O'Brien opined that Claimant did not suffer a right knee injury at work on August 29, 2022. Dr. O'Brien further opined that Claimant's right symptoms are "a manifestation of [Claimant's] personal health". In support of his opinions, Dr. O'Brien noted that Claimant has pre-existing arthritis in his right knee and the MRI did not show an acute injury. Dr. O'Brien further stated that kneeling would not cause damage to soft tissue or aggravate the pre-existing condition in Claimant's right knee. Dr. O'Brien also opined that Claimant did not behave as if he was injured. It is also Dr. O'Brien's opinion that Claimant is not a candidate for surgery. In support of this opinion, Dr. O'Brien noted that the recommended surgery would likely increase Claimant's pain symptoms.

16. Based upon Dr. O'Brien's opinions, Respondents denied authorization for the recommended right knee surgery.

17. Claimant responded to Dr. O'Brien's December 20, 2022 report in an undated letter in which he explained his various disagreements with Dr. O'Brien. On January 10, 2023, Dr. O'Brien authored a second report in response to Claimant's letter and reiterated the opinions he outlined in his initial report.

18. On January 24, 2023, Dr. O'Brien further supplemented his reports. This was done in response to a letter Claimant sent to Insurer regarding his August 29, 2022 body cam footage. Reviews of the body cam footage did not change Dr. O'Brien's opinions.

19. On February 15, 2023, Dr. Dwyer performed the recommended right knee surgery. The procedure included arthroscopy with partial medial meniscectomy and chondral shaving of the medial femoral condyle and trochlea.

20. The cost of the surgery was paid for by Claimant and his private medical insurance. Claimant testified that since undergoing the right knee surgery in February 2023, he has far less pain. In addition, Dr. Dwyer has released Claimant to full duty.

21. On July 7, 2023, Dr. Dwyer authored a letter regarding his treatment of Claimant. Dr. Dwyer opined that the February 15, 2023 surgery, was reasonable and necessary to treat the condition of Claimant's right knee. Dr. Dwyer further opined that the kneeling incident on August 29, 2022 caused Claimant's right knee symptoms and the related need for surgery. Dr. Dwyer also noted that the surgery improved Claimant's symptoms. Dr. Dwyer opined that Claimant's mechanism of injury was consistent with objective findings. Dr. Dwyer further stated "[i]t is very common to sustain a meniscus tear on a flexed knee with a twisting motion."

22. Dr. O'Brien's deposition testimony is consistent with his written reports. Dr. O'Brien testified that the October 25, 2022 MRI showed degenerative findings and no new pathology. Therefore, it is his opinion that there was no acute work injury on August 29, 2022. Dr. O'Brien further testified that substantial energy would be necessary to tear a meniscus, and such energy does not exist when one is kneeling. It is Dr. O'Brien's opinion that Claimant would have had to engage in a twisting motion, while standing, to produce such a tear. Dr. O'Brien testified that the meniscectomy performed when Claimant was a teen, accelerated the wear and tear of Claimant's right knee. Dr. O'Brien also stated that chondral defects are often degenerative, but can be produced during athletic pursuits. Dr. O'Brien also noted that such a defect could have been created by Dr. Dwyer during surgery.

23. Pay records demonstrate that in the 12 week period[1] prior to the August 29, 2022 injury, Claimant had total earnings of $16,544.93. When this total is divided by 12, it results in an average weekly wage (AWW) of $1,378.74.

24. After he was placed on work restrictions by Dr. Adams, there were weeks in which Claimant earned less than his AWW. Claimant testified that due to his work restrictions, he was unable to accept overtime hours.

[1] Although Claimant was paid on August 30, 2022, the day after the incident, the ALJ notes that payment was for the pay period ending August 20, 2022.

25. The ALJ credits Claimant's testimony regarding his activities on August 29, 2022, and specifically the nature and onset of his right knee symptoms. The ALJ further credits the medical records and the opinions of Dr. Dwyer over the contrary opinions of Dr. O'Brien. Claimant has successfully demonstrated that it is more likely than not that on August 29, 2022 he suffered a right knee injury arising out of and in the course and scope of his employment with Employer. The ALJ finds that the kneeling and twisting incident on August 29, 2022, aggravated, accelerated, and combined with Claimant's pre-existing right knee condition. This resulted in Claimant's right knee symptomology and the need for medical treatment.

26. The ALJ further credits the medical records and the opinions of Dr. Dwyer over the contrary opinions of Dr. O'Brien and finds that Claimant has demonstrated that it is more likely than not that treatment of Claimant's right knee is reasonable, necessary, and related to the work injury. The ALJ specifically finds that the surgery performed by Dr. Dwyer on February 15, 2023 was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

27. The ALJ credits the payroll records and Claimant's testimony and finds that Claimant has demonstrated that it is more likely than not that he suffered periodic wage loss after being placed on work restrictions. Therefore, the ALJ finds that after Claimant was placed on light duty by Dr. Adams on October 14, 2022, there were weeks in which he earned less than his AWW. Therefore, Claimant was entitled to payment of temporary partial disability (TPD) benefits for those weeks.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has demonstrated, by a preponderance of the evidence, that he suffered a work injury arising out of and in the course and scope of his employment with Employer on August 29, 2022. As found, the kneeling and twisting incident on August 29, 2022, aggravated, accelerated, and combined with Claimant's pre-existing right knee condition, resulting in the need for treatment. As found, Claimant's testimony, the medical records, and the opinions of Dr. Dwyer are credible and persuasive.

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

7. As found, Claimant has demonstrated, by a preponderance of the evidence, that treatment of his right knee, including the surgery performed on February 15, 2023 by Dr. Thomas Dwyer, constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the August 29, 2022 work injury. As found, the medical records and the opinions of Dr. Dwyer are credible and persuasive.

8. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to

establish a temporary disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair a claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 P.2d 595 (Colo. App. 1998).

9. As found, Claimant has demonstrated, by a preponderance of the evidence, that he suffered periodic wage loss after being placed on work restrictions. Therefore, the ALJ finds that after Claimant was placed on light duty by Dr. Adams on October 14, 2022, there were weeks in which he earned less than his AWW. As found, Claimant was entitled to payment of TPD benefits for those weeks. As found, the payroll records and Claimant's testimony are credible and persuasive on this issue.

10. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food* & *Commercial Workers Local No.* 7, W.C. No. 4-240-475 (ICAO, May 7, 2007).

11. As found, Claimant's average weekly wage (AWW) is $1,378.74. The payroll records are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable injury to his right knee on August 29, 2022.

2. Respondents shall pay for reasonable, necessary, and related medical treatment of Claimant's right knee.

3. Respondents shall pay for the right knee surgery performed by Dr. Dwyer on February 15, 2023.

4. Respondents shall pay temporary partial disability (TPD) benefits to Claimant for any week after October 14, 2022, in which he earned less than his AWW.

5. Claimant's average weekly wage (AWW) is $1,378.74.

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

Dated October 17, 2023.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ•s order will be final. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Claimant prove she suffered a compensable injury on March 10, 2023?
- If the claim is compensable, did Claimant prove she is entitled to medical benefits?

FINDINGS OF FACT

1. Claimant worked at the office of the employer on March 10, 2023. While seated at her desk, she experienced a sudden loss of consciousness and fell from her chair.

2. An ambulance from AMR, Colorado was called. Colorado Springs Fire Department also responded to the call. In the report prepared by the EMS personnel, it was reported that Claimant had seizure like activity. Claimant had no history of seizures. When she fell, she sustained a contusion to her head when the hair clip she was wearing hit the ground.

3. Claimant was transported to Penrose Hospital Emergency Room in Colorado Springs. Claimant was treated by Dr. Jason Younga. He ordered that Claimant undergo a CT scan of the head to determine if there were any intracranial injuries suffered from the seizure. The CT findings were "Small left parietal contusion without images and calvarium fracture. No acute intracranial injury".

4. Dr. Younga also ordered that an EKG for Claimant. The findings of the EKG were "Normal sinus rhythm. Possible left atrial enlargement. Nonspecific T Wave abnormality". After all of the tests were conducted, Dr. Younga opined that "Is potentially patient's Wellbutrin is the etiology of the seizure-like activity today". (Exhibit B, p. 17). He also provided a differential diagnoses including medication reaction, hyponatremia, hypoglycemia, and grand mal seizure.

5. On March 13, 2023 Claimant attended an appointment at Concentra with Physician's Assistant Kimberly Shenuk. She conducted a physical exam of Claimant as well as exams centered on the pulmonary and neurologic symptoms of the body. She stated "Patient understands that the syncope episode is not by WC, but the symptoms related to hitting her head may be covered". Exhibit D, p. 35.

6. Dr. Burris performed a record review at the request of Respondents and issued a report of August 12, 2023. Subsequent to his report, he reviewed the records of Claimant's primary care physician. It was his opinion that the cause of the seizure was the medication Wellbutrin that she was taking for depression. This medication lowers the seizure threshold for an individual. This was the inciting cause of the seizure.

7. Claimant understood that the cost of the medical investigation as to the cause and nature of the syncope episode would be paid by the Carrier. This was based on the assumption that since [Redacted, hereinafter SY] paid for some of the medical treatment, it was obligated to pay for the rest of the initial costs to determine what was causing her symptoms.

8. SY[Redacted] voluntarily paid for some of the initial medical evaluations but not all. On June 26, 2023, the adjuster from Sentry sent an email to Claimant that SY[Redacted] provided coverage for the medical bills to date.

9. Claimant failed to prove she suffered a compensable injury on March 10, 2023. It is more probable that the seizure-like symptoms she experience resulted as a side effects from the Wellbutrin she was taking.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The mere fact an employee experiences symptoms at or after work does not automatically establish a compensable injury. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008); *Garamella v. Paul's Creekside Grill, Inc*., W.C. No. 4-519-141 (March 6, 2002). The claimant must prove entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is evidence that leads the ALJ to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). Put another way, the standard is met when the existence of a contested fact is "more probable than its nonexistence." *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant failed to prove she suffered a compensable injury on March 10, 2023. As found previously, Dr. Burris' testimony and written opinions, which are credible, supports this conclusion.

Although Claimant had no prior history of seizures, I conclude that the seizure like activity was personal to Claimant as the result of the Welbutrin that she was taking for depression.

I am also not persuaded that the adjuster/carrier committed to paying all medical expenses while the medical personnel tried to sort out the cause of Claimant's seizure-like episode. Although that may be Claimant's perception, the credible, admissible evidence does not support that conclusion. Further, it has generally been held that payment of medical services is not in itself an admission of liability. "This is based on the sound public policy that carriers should be allowed to make voluntary payments without running the risk of been held to have made an irrevocable admission of liability (Citation omitted) In addition, the Colorado Rules of Evidence generally govern workers' compensation proceedings. Section 8-43-210, CRS 2008. C.R.E. 409 provides that evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury. *Zarate v. Silver Peaks*, (ICAO 4-740-886, October 23, 2008). This analysis applies to this case and, as such, Respondents are not liable for the cost of medical services beyond the voluntary payments made.

ORDER

It is therefore ordered that:

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

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

DATED: October 18, 2023

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

ISSUES

I. Did Respondents prove by a preponderance of the evidence that the statute of limitations under Section 8-43-103(2), C.R.S., precluded Claimant from bringing this claim?

II. Did Claimant prove by a preponderance of the evidence that she sustained a compensable mental-mental injury arising out of and occurring within the course and scope of her employment?

III. Did Claimant prove by a preponderance of the evidence that she was entitled to medical benefits related to her mental-mental claim?

IV. Did Claimant prove by a preponderance of the evidence that Claimant was entitled to temporary total disability (TTD) benefits after March 10, 2021?

V. If Claimant met her burden regarding TTD benefits, did Respondents prove by a preponderance of the evidence that Claimant was terminated for cause unrelated to the alleged injury?

VI. If Claimant met her burden regarding TTD benefits, did Respondents prove by a preponderance of the evidence that Claimant was subject to a penalty for late report of injury per Section 8-43-102(1), C.R.S., between May 13, 2020 and February 21, 2023?

FINDINGS OF FACT

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

A. Generally

1. Claimant was 67 years old at the time of the hearing. She was hired as a custodian for Employer beginning September 16, 2017. Claimant acknowledged receipt of the Policies and Procedures for Employer on September 11, 2017.

2. Employer was contracted by another corporation, hereinafter "Contractor," to do custodial work in the contractor's facility, which was comprised of multiple buildings. Claimant worked at the contractor's location under the supervision of a site manager who worked for Employer as well as under her supervisors and Team Leads for Employer.

3. Claimant provided a letter from her counsel's office that a claim had not been reported to the Division as of October 12, 2020. They requested Claimant complete the form and return it to them for filing. While the letter does not specify which claim, it is presumed that Claimant submitted this exhibit regarding her May 8, 2020 claim.

4. Claimant completed a Workers' Claim for Compensation (WCC) on April 15, 2022 alleging she suffered a psychological injury ("mental-mental") on May 8, 2020 from ongoing harassment, being accused of wrongdoing, ignored disability and physical restrictions, and wrongful discharge. It further stated that Claimant's last day of employment with Employer was March 5, 2021 but that Employer notified her of the termination on March 31, 2020.[1] The WCC was not filed with Division until February 21, 2023.

5. In addition to this claim, Claimant previously filed four other workers' compensation claims:

a. A right knee injury claim with an alleged date of injury of July 7, 2019, which was the subject of W.C. 5-174-107;

b. A claim for September 20, 2019 for multiple body parts, which was the subject of W.C. 5-155-262;

c. An alleged left ankle injury for October 31, 2019, which was the subject of W.C. 5-155-269; and

d. An alleged left knee injury with a June 3, 2020 date of injury, which was the subject of W.C. 5-155-271).

6. Claimant also filed an EEOC claim for alleged discrimination in 2021. Claimant submitted Employers' statement to the EEOC noting that no less than eight employees made complaints against Claimant of unprofessional behavior in the workplace. They encompassed all races, ages and disability statuses. The complaints included refusing to perform certain job tasks, arguing with supervisors and coworkers, threatening to sue supervisors when they complained about her poor attitude, telling other employees to "shut up," and advising coworkers that she had falsely made claims against her employer. The EEOC dismissed the charges on September 21, 2022 stating that based on the EEOC investigation they were unable to conclude that the information obtained established any statutory violations.

7. The allegations surrounding this claimed injury of May 8, 2020 are documented in a letter issued by Claimant, addressed to Human Resources, on June 16, 2020.

a. Claimant alleged that, on May 8, 2020, the Team Lead of Building 1 (B1), approached Claimant to "pull out all 6 [sanitation] boxes but leave the 6 boxes by the back grind." Claimant claims that the Team Lead had notified the site manager, about the changes and that both the Contractor and Employer supervisors agreed to pull out all the boxes. Claimant saw her regular Team Lead, passing by her station and both she and Team Lead of B1 gave her permission to bag the boxes. According to Claimant, the changes in B1 created a lot of confusions and problems and she felt that, due to misunderstandings and miscommunication, she was not properly informed of the changes by her leads. Claimant believed her leads accused her of gossiping. When Claimant went to go out on break, Claimant was

[1] Claimant lists the date the Employer notified Claimant of the termination as March 31, 2020 but this ALJ infers that was intended to be March 31, 2021.

told by her Team Leads she had to go home due to her conduct. Claimant claimed she felt insulted.

b. On May 13, 2020, Claimant claims that a coworker went to B1 to check Claimant's work. She took pictures of the dirty overflow and put back all of the dirty boxes Claimant had taken out of B1. Claimant claimed it was done without consulting her, which confused her, and that this same thing occurred again the following day. Claimant felt that she should have been consulted if there was a problem with her work.

c. On May 22, 2020, Claimant attended a training meeting and again alleged she was accused of gossiping by management. Claimant claimed that one of her leads did not like Claimant speaking both Tagalog and English to another lead. Claimant claimed she was given the option of completing her job or going home. Claimant also claimed her supervisor spoke with her before the meeting about what was going on with a co-worker and this made her feel uncomfortable. Claimant claimed her managers told her she was the oldest person they will ever hire and accused her Team Lead of yelling at her and to stop using "that tone of voice" in front of the managers.

d. Claimant asserted that she felt bullied, intimidated, and suffered from dysfunctional behaviors from her leads. Claimant asserted that she had no proper communication or direction to succeed or do her best. Claimant further claimed that she felt harassed due to her disability and change of duties that was approved by her manager.

8. As found, nowhere in the June 16, 2020 document did Claimant make a claim that she had a mental impairment or required medical care.

9. Claimant signed a Visitor Confidential Information and Internet Policy Terms on September 15, 2020, which stated that any information Claimant had access to or viewed was not to be disclosed and that, if Claimant was logged into the Contractor's guest internet system, she was subject to Contractor's rules of use and requirements.

10. Claimant signed a second copy of the Visitor Confidential Information and Internet Policy Terms on December 20, 2020, which was exactly the same as the first one. As found, contrary to Claimant's allegation that this form granted her access to Contractor's computer system, this ALJ determines this is a simple form granting access to guest Wi-Fi only, and does not give permission to use their computers or log into their system.

11. Claimant was provided access to a phone application and given instructions regarding how to access the "App" and log in with the designated "ID" and password. There was a follow up email from the "app" system administrator confirming Claimant logged into that system on December 20, 2020.

12. On February 23, 2023 Division of Workers' Compensation (Division) sent a letter advising insurer that Claimant had filed a Workers' Claim for Compensation (WCC) and had twenty days to state a position.

13. Respondents filed a First Report of Injury (FROI) on April 11, 2023, after having been notified about the alleged injury.

14. Respondents subsequently filed a Notice of Contest (NOC) on April 24, 2023, for further investigation regarding compensability.

15. On June 7, 2023, Employer's Site Manager submitted a sworn affidavit stating she did not have any recollection of Claimant reporting an injury on or around May 8, 2020. She also stated she reviewed emails from around that time, as well as voice messages and messages on her cell phone, and did not receive any correspondence or messages concerning a May 8, 2020 alleged mental injury. The Site Manager stated that, if she had received such report, she would have advised Claimant to complete a company injury packet to document the injury. The Site Manager affirmed during testimony that the representations in her affidavit were true and correct.

16. Respondents filed a Motion for Summary Judgment at OAC on June 13, 2023, seeking summary judgment on the basis that the statute of limitations had run and also that Claimant failed to meet the statutory criteria for a mental injury. On July 6, 2023, ALJ Glen Goldman denied the Motion, finding there were disputed issues of material fact as to whether the statute of limitations barred the claim (specifically as to when Claimant would have known of the probable compensable nature of her claim), and that the court must also make a finding as to whether any disciplinary actions and the termination were made in good faith.

B. Disciplinary History and Termination

17. Claimant had a documented history of disciplinary actions leading up to the June 16, 2020 letter outlining complaints of harassment.

18. On February 27, 2018, Claimant was given an Employee Warning Report by the cleanroom manager for unwillingness to perform routine cleaning duties despite numerous trainings and verbal coaching. It was noted that "even [Contractor's] staff have all commented on [Claimant's] lack of performance in her assigned duties."

19. On February 19, 2019 the cleanroom manager issued Claimant another Employee Warning Report for "bad-mouthing" and making derogatory remarks to her co-workers. It was noted in this report that this behavior had been occurring for some time. They noted that any further policy violation identified by the Contractor would be the third one, and would be the subject of further consideration by Employer's Human Resources office.

20. Claimant admitted that she had been reprimanded by her Team Leads, on May 8, 2020, for gossiping about other employees, which Claimant denied doing.

21. On May 26, 2020, Claimant was again cited with an Employee Warning Report, authored by Employer's Site Manager, noting violations of workplace policy for disobedience and work quality. Claimant was cited for talking about not participating in her job duties after a training exercised and was requested to refrain from slander and gossip.

22. On March 4, 2021 Contractor's HR Business Partner issued an email to Employer's Site Manager that "per our earlier discussion, we would like for you to end the assignment of [Claimant] at [Contractor's location].

23. On or around March 10, 2021, Claimant was terminated by the Employer at the express request of Contractor due to security policy violations. The Notice to Employee as to Change in Relationship cited to "security policy violations, [Contractor] has asked [Employer] to end our employment of [Claimant]."

24. Earlier in March 2021, one of the team leads observed Claimant using one of Contractor's computers and took a picture, then related her observations to the Site Manager and gave her the picture. The Team Lead communicated that Claimant was using a family member's login to access the Contractor's system. This observation was discussed directly with the Contractor by the Employer management and the Contractor requested that Employer end the Claimant's assignment at the Contractor's location. Suspension protocol was carried out by the Site Manager and Claimant's supervisor.

C. Medical Records

25. On November 11, 2019 Dr. Christopher Stockburger documented that Claimant had a past history of depression and anxiety. The records also mentioned that Claimant's psychological history included chronic fatigue, anxiety, panic attacks and depression. On October 24, 2019 there was documentation of a past history of anxiety disorder.

26. On February 10, 2020 Dr. Brian G. Lancaster had Claimant on limited stooping and lifting more than 20 lbs. until further evaluation.

27. Claimant was provided restrictions for her right knee given on May 1, 2020 by Stephen Toth, PA-C immediately prior to the alleged mental injury.

28. Claimant was released to full duty effective July 14, 2020 by Bryan Copas at Banner Occupational Health Clinic for her left knee injury.

29. On July 30, 2020 PA Toth provided restrictions under the July 7, 20219 claim, including sitting 50% of the time, use of a cane, weightbearing as tolerated, and may not walk on uneven surfaces.

30. Claimant was placed at MMI and discharged without restrictions for her right knee injury, on August 29, 2020.

31. On November 9, 2020 Dr. Mark Unger of Associates in Family Medicine issued work restrictions of sitting at least 50% of the time, limited walking to 100 yards, use of a cane, weightbearing as tolerated, and no walking on uneven surfaces.

32. Claimant was first evaluated by Erin Morgan, LPC, at LIV Health on June 10, 2021. The note indicated that Claimant was referred by her primary care physician for symptoms of anxiety and depression. Claimant reported that she was terminated from her job in March and the termination caused "increased hopelessness, sadness, feelings of worthlessness, anxiety, ruminating thoughts, tearfulness, stress and stated she feels like she has lost herself." Claimant conveyed that she had siblings who worked with the Employer and she could not see them as much, and that she had been staying in bed and watching TV since she was terminated. Claimant reported that she had experienced "ongoing harassment at work that has been causing her significant distress." Claimant was diagnosed with adjustment disorder with mixed anxiety and depressed mood, which

LPC Morgan attributed to the recent stressor of being terminated from her job, which had significantly impacted her functioning.

33. Claimant continued treating at LIV Health on a frequent basis, from June 14, 2021 until at least January 4, 2023. The visits were conducted through telehealth with the intention of stabilizing Claimant's anxiety and depression while increasing her ability to function, keeping in mind difficulties with mobility, chronic pain and medical limitations, exploring her symptoms that continued to impact her life, identifying unhelpful and inflexible cognitive messages that were impacting her quality of life and emotional wellbeing, and providing cognitive behavioral therapy, exploration of emotions and coping skills.

34. On June 28, 2021 LPC Morgan noted that she engaged Claimant in discussions about her thoughts, feelings and ongoing reactions to being terminated from work. They discussed how Claimant was handling the impact of the termination on Claimant personally, as well as regard to her functioning. She emphasized the need to build rapport with the patient and build on the therapeutic relationship.

35. UCHealth records for Discharge from the Orthopedics Clinic at Poudre Valley Hospital on August 9, 2021 is the first instance in the exhibits where there is mention of Claimant falling in the bathroom in April 2021, following the alleged May 8, 2020 psychological injury claim and following her March 31, 2021 termination, listing a diagnosis of anxiety, depression and a concussion.

36. Beginning on December 9, 2021, the records reflect that Claimant maintained treatment with LPC Morgan but under the supervision of Natasha Trujillo, Ph.D. Throughout the records, it was referenced that Claimant's termination was the source of her depression, stating that "her previous job being a significant part of her identity and whether her life as it is now is worth living."

37. On September 29, 2022 Claimant was evaluated by a Division of Workers' Compensation Independent Medical Examining physician, Dr. Alicia Feldman, in regard to a July 7, 2019 claim for the lumbar spine, and right foot, ankle, knee and hip. Dr. Feldman determined that Claimant suffered no injury on this date and that Claimant's continuing complaints were preexisting.

38. The claimant reported to Dr. Feldman having seen a psychologist but had no records to review. However, based on her presentation during her examination, Claimant appeared to have significant amount of psychological distress, likely had poor coping mechanisms related to her pain and agreed with Dr. O'Toole's February 18, 2020 assessment that Claimant's subjective complaints were not consistent with the lack of objective findings and probably denoted significant psychosocial overlay. Her consistent complaints regarding how she was treated by her supervisors and co-workers suggested that job satisfaction was a significant component to her complaints. Dr. Feldman noted that multiple other providers observed significant psychosocial issues and her past medical records revealed Claimant had significant psychosocial issues before her alleged July 7, 2019 work-related injury that required treatment with therapy and medications.

39. On January 4, 2023 LPC Morgan noted that Claimant had been dealing with anxiety and depression for approximately one and one half year and Claimant's

symptoms were somewhat worse at that time due to some legal developments, which were not specifically identified. Ms. Morgan provided empathetic validation and listening of issues that had brought the resurgence of difficulties, and presented multiple insights regarding management of feelings and challenges Claimant faced, in order to move forward with her life despite roadblocks. She continued to diagnose adjustment disorder with mixed anxiety and depressed mood pursuant to the DSM V, noting Claimant continued to have moderate difficulty and impairment, including problems with mobility and engaging physically with the world, including her family, community and obligations. Claimant was yet discharged as of January 2023.

40. On April 4, 2023 Dr. Mark Unger stated Claimant should continue to follow her previously prescribed work restrictions until further treatment was completed through her orthopedist, including sitting at least 50% of the time, use of a cane, weightbearing as tolerated, and no walking on uneven surfaces. As found, there were no specifically identified restrictions that related to Claimant's mental health conditions.

D. Testimony of Employer's Site Manager

41. Employer's Site Manager testified by deposition on April 28, 2023 that she became both the Site Manager and Claimant's supervisor in April 2020. She stated that Claimant was a very difficult and stubborn employee and was very intimidating. While Claimant did require a lot of assistance, she would also refuse to perform certain tasks associated with her job. She noted that Claimant had had multiple verbal admonitions due to conflicts with co-workers and supervisors, which she tried to handle quickly without having to do written warnings. Because a lot of Claimant's family members worked for the Contractor directly she was having to defend the staff of what were really small grievances. At one point, even though she would finish her work around 4:30 p.m. and was not around, she would keep in touch with the supervisors and leads. On one occasion she authorized the Team Leads to send Claimant home for insubordination.

42. She explained that Claimant was performing minimal cleaning when she became Claimant's supervisor, working in Building 1, mainly doing wipe down of surfaces, bagging items for transfer (she did not do the transfers), pre-cleaning containers that would go into the washing machine and would be sitting most of her shift. She was not required to do any heavy lifting.

43. Employer's Site Manager testified credibly at hearing. She reiterated that she was Claimant's supervisor and the site manager at Contractor's location. She stated that Claimant's work restrictions from her existing injury allegations from other workers' compensation claims were always accommodated by Employer, and that these restrictions were communicated to Claimant's other supervisors. This included the restrictions for both left and right knee injuries.

44. She testified that she believed Claimant was playing psychological games with her coworkers and supervisors. She testified as follows:

> And yes, it was -- it was my opinion, up to that point, that I felt -- I felt like, sometimes, [Claimant] would hit (sic.)[2] people against each other, or say one thing and then do another

[2] This ALJ determined that the testimony was the word "pit" not "hit."

> thing. And you know, based on all of the written and verbal complaints I had compiled and statements that I had received from employees, I felt like there was mounting evidence that, you know, that she would befriend somebody, get close with them, and then if there were any issues, she would immediately turn on that person, and there would be a conflict, a blowup, that would happen. So I -- I began to see a pattern, and that's -- that's something I noticed.
>
> I also felt personally uncomfortable talking to [Claimant] because, you know, there were many comments made about suing people and -- companies, people, whatever it may be. I know she had some pending cases that she talked to me, personally, about. So I felt uncomfortable whenever we were in conversation, just disclosing anything.

45. The Site Manager accurately recalled at hearing Claimant's restrictions for her right knee given on May 1, 2020 by PA Toth, immediately prior to the alleged mental injury. The Site Manager also accurately recalled Claimant being released to full duty effective July 14, 2020 by Bryan Copas at Banner Occupational Health Clinic for her left knee injury. She testified that she continued to accommodate Claimant after she was placed at MMI and discharged without restrictions for her right knee injury, on August 29, 2020. The accommodations were continued for Claimant's comfort despite her workers' compensation providers releasing her to full duty.

46. Site Manager testified that Claimant was reprimanded per the prior Employee Warning Reports in accordance with the Employer policy, outlined in Employer's Handbook, for refusal to follow her supervisor's instructions.

47. Contractor's policy forbade unauthorized access of Contractor's computers using someone else's login information and Contractor themselves requested that Employer terminate Claimant from that location.

48. It is in Employer's code of ethics and Employer's handbook that employees should not use any company property, including computers. Claimant would have signed the policy when she was hired as the handbook was given to all employees.

49. The Site Manager testified that Claimant would have been aware of the policy. She testified that Claimant was observed using Contractor's computers to page and had logged in using a family member's login, as communicated by Claimant's Team Lead. The Team Lead is the one that caught Claimant and took the picture of Claimant in the clean room using the computer. Site Manager concluded that the only way that Claimant could access Contractor's computers was to have an ID and password, which Employer's employees were not provided including Claimant, though as the site manager, she did have access to Contractor's system.

50. The Site Manager testified that Contractor discussed the issue with the Employer and that Claimant was terminated from access to the property after discussion with Contractor. Both she and the day shift supervisor were involved in informing Claimant of her termination from Contractor's job site and suspended until Employer could fully investigate.

51. She testified that the computer incident was not the only factor in the decision to terminate Claimant. Employer's HR managers conducted an investigation after the March 5, 2021 suspension, and made the decision to terminate based on the unauthorized computer access as well as her history of written warnings and also the history of complaints and conflict with coworkers and supervisors/team leads.

52. Claimant was officially terminated by Employer on March 31, 2021 for misconduct and violation of company policies.

E. Testimony of Claimant

53. Claimant testified at hearing on her own behalf. She explained that she felt ignored when she would complain of issues. She denied using the internet other than to use the "app" to call for help and she was mostly ignored. She stated that she was not very familiar with the iPhone or how to use a cell phone, so she just used the icon to page her coworkers. She stated that she still had a landline at home because she did not know how to use a cell phone.

54. Claimant recalled that, after she had been out for some time, she returned to work approximately February 4, 2020 and was informed by one of the Team Leads for B1 that there were a lot of changes to how things had to be done and that the work was not being done correctly.

55. When there was meeting, she asked about all the changes and then spoke to her lead about another worker. Because of that conversation, Claimant stated that her Team Lead sent her home and that she felt insulted because she did not believe she was spreading gossip. She asked for a meeting to discuss what was happening because she felt mentally stressed, especially with all her physical problems but no meeting took place. That is when she wrote the letter of June 16, 2020.

56. She stated that she had been to Harmony in Fort Collins for treatment related to the May 8, 2020 claim. She insisted that Claimant reported the incident to her supervisor. She complained that because of the all the emails and mailings, and her insistence that she had not done anything wrong, she fell unconscious in her bathroom on April 5, 2021. Her husband took her to Urgent Care.[3] They returned her to her family doctor who prescribed Alprazolam for panic attacks and Bupropion and Trazadone for her stress (depression). She was also interviewed by Social Services who recommended that she see a psychologist for therapy, which happened around June 10, 2021. Claimant stated that the process was that Dr. Unger had to make the referral, it had to be authorized and only then did the provider contact her for an appointment. Claimant stated that it was not until she had therapy and discussed her issues with her second prior attorney that they filled out the claim because initially she did not understand if it would be a claim for workers' compensation or for discrimination (EEOC-related).

57. Claimant testified about her perception of what happened when she was terminated by Contractor from the premises on March 4, 2021. She was advised that she was not terminated by Employer but could not return to Contractor's property. Claimant was confused because if she could not return to the premises, she did not know where she would be working and was not told where she would be working. She was provided with a copy of Contractor's HR Business Partner letter to Employer requesting her termination. She was also advised to await Employer's HR representative's decision.

58. She complained about Contractor's employees thinking that she had been terminated and that there was no confidentiality. She explained that it was not until 2023

[3] These records were not in evidence.

when she received her file from her prior lawyer that she understood everything that had happened, including the write-ups and the termination. She fell back to actions that happened in 2018 and 2019. She denied that she had "bad-mouth[ed]" anyone, especially her supervisor. Claimant complained that the Site Manager is the one that mismanaged the investigation, despite the manager's denial that it was not her responsibility to complete the investigation and that it would be conducted by Employer's HR personnel. Claimant also denied that she received any of the paperwork before. As found, this is not credible as each of the warnings was signed by Claimant and there were statements by Employer employees submitted by Claimant in evidence to support the warnings.

59. Claimant testified that she believed her termination was really related to her having so many work restrictions and her employer not being able to accommodate them, not the incident with the Contractor, not about the slander and gossiping, or the difficulties with her supervisors. She believed that she had not been able to work for the last two years because of all the pain she had suffered and the depression. She continued to be worried about all the medical bills related to her multiple surgeries.

60. Claimant specifically stated that she didn't "mind losing a job, every -- every second, every minute, every hour, people lose their job. It's about how I lost my job that's a (sic.) mentally, physically affected me."

61. As found, this ALJ determines that, while Claimant may be credible with regard to her personal perceptions, she is not credible with regard to the facts of her termination. As found, Claimant was terminated for good cause for failure to comply with company policy and for using Contractor's computer without authorization.

F. Conclusory Findings

62. As found, while Claimant made a claim for May 8, 2020, she likely did not understand the extent of her mental disability until she was referred by her primary care provider for psychological care. Claimant was terminated on March 31, 2021. Shortly thereafter, Claimant experienced significant depression and anxiety and was placed on antidepressant and antianxiety medications. Therefore, Claimant knew or should have known she had a potential claim for mental impairment closely following the March 31, 2021 termination date. As found, this ALJ has jurisdiction to determine if this claim is compensable and there is no statutory prohibition for failure to file the claim within two years of her alleged date of injury on May 8, 2020. Claimant filed her claim with Division of Workers' Compensation on February 21, 2023, within two years of March 31, 2021. Respondents failed to show that Claimant was precluded from bringing a claim pursuant to the statute of limitations.

63. As found, Claimant has failed to show that she suffered a psychological injury caused by harassment, or other mental stressors from the working environment. As found, Claimant failed to introduce necessary evidence from a mental health professional, either a physician or a psychologist, establishing that Claimant suffered a recognized disability arising from a psychologically traumatic event which occurred in the workplace. Because such evidence is necessary to establish a claim for mental distress arising out of a nonphysical or purely mental event or injury, Claimant failed to meet her

burden of demonstrating entitlement to benefits for her "mental-mental" claim. As found, Claimant's mental impairment, if she has any, is related to her termination of employment and her personal revisionist view of acts and facts which happened during her employment with Employer including interactions with co-workers and supervisors as well as normal disciplinary actions. The May 8, 2020 claim arose from a disciplinary action of her supervisor sending her home due to insubordination. Subsequent to this, Claimant acted in a manner that was in violation of company policies, including utilizing the Contractor's computer and another individual's "ID" and password. Employer terminated Claimant in good faith for good cause.

64. As found, it is clear from multiple employee statements that Claimant was belligerent towards her supervisors, she declined to perform assigned activities and did not get along with her co-workers. Further, the Site Manager's testimony was credible and persuasive that, over the contrary testimony from Claimant, Claimant was allowed to work within her medical restrictions and personal abilities. As found, Claimant violated both the Contractor's and the Employer's policies by accessing and using Contractor's computer with another employee's ID and password. As found, Claimant did not have permission to do so from Contractor. As found, Claimant was terminated in good faith by Employer for good cause due to violation of company policies.

65. Even if this claim was compensable, which it is not, Claimant would not be entitled to temporary disability benefits. First, because no provider established that Claimant was unable to work due to her mental impairment and Employer had accommodated all of Claimants work restrictions, which remained substantially the same prior to and after her termination from employment. Secondly, because Claimant was terminated for cause, since she had a hand in her own termination and any benefits she may have been entitled to would have been forfeit and terminated. Respondents have shown that Claimant was terminated for a cause unrelated to the alleged May 8, 2020 mental-mental injury.

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

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

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

B. Jurisdiction

Section 8-43-103(2), C.R.S., provides that the right to workers' compensation is barred unless a formal claim is filed within two years of the injury, or three years if a reasonable excuse exists. The statute of limitations begins when the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). The statute of limitations is tolled, however, where the employer fails to report the injury to the Division as required by Section 8-43-101(1), C.R.S. See *City of Englewood v. Industrial Claim Appeals Office*, 954 P.2d 640 (Colo. App. 1998).

Section 8-43-103(1) provides that "any notice required to be filed by the injured employee 'shall be in writing and upon forms prescribed by the division for that purpose

and served upon the division." The Division's Workers' Compensation Rules of Procedure, 7 CCR 1101-3, Rule 5-1(D) and (E), refers to this notice and requires the claimant to file a WCC form (form WC15) to achieve compliance with this statutory direction." *Galagar* v. *E2 Optics, LLC*, W.C. No. 5-016-677-01 (March 6, 2018.)

As found, Claimant was not aware of the probable compensable character of her alleged injury, the nature of her alleged injury or the seriousness of her claimed injury until after she was terminated from her employment and she broke down, requiring medical care, medications and counselling pursuant to Dr. Unger and LPC Morgan. Claimant filed her claim with the Division on February 21, 2023, less than two years from her date of termination. Therefore, this ALJ has jurisdiction to address the issue of compensability in this matter.

C. Compensability of Mental-Mental Claim

Section 8-41-301(2) (a), C.R.S. states as follows:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim must have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

To receive benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence, that he or she has sustained a compensable injury proximately caused by his or her employment. Sec. 8–41–301(1)(c), C.R.S. (2023). Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant's alleged injury falls within the scope of "mental-mental" injuries, in which "mental impairment follows solely an emotional stimulus." *Oberle v. Indus. Claim Appeals Office,* 919 P.2d 918, 920 (Colo. App.1996). An injury that is "the product of purely an emotional stimulus that results in mental impairment," requires a "heightened standard of proof." *Davison v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004).* The legislature juxtaposed "recognized, permanent disability" with the requirement that a claimant provide "evidence supported by the testimony of a licensed physician or psychologist" to reduce the incidence of fraudulent claims. *Davison, supra*, at 1029. As noted by the supreme court in *Davison,* the legislature adopted this heightened burden "in mental impairment claims in order to help prevent frivolous or improper claims." *Kieckhafer v. Indus. Claim Appeals Office of State, 2012 COA 124, 284 P.3d 202 (Colo. App. 2012).*

Under the express terms of the statute, "the testimony of a licensed physician or psychologist" is required to establish a claim for mental impairment. Sec. 8–41–301(2)(a). The Colorado Supreme Court has interpreted this phrase broadly to include "the work product of a licensed physician or psychologist," which "may include letters, reports, affidavits, depositions, documents, and/or oral testimony." *Colo. Dep't of Labor & Employment v. Esser,* 30 P.3d 189, 196 (Colo.2001).

Expert testimony is necessary to prove that the event was psychologically traumatic, but the other elements can be proved by lay and/or expert evidence. *Davison, supra*, at 1033; see also *City of Loveland Police Dep't v. Indus. Claim Appeals Office,* 141 P.3d 943, 951 (Colo. App. 2006). In addition, an expert need not use the precise statutory language to opine on a claimant's condition. "What is required is the presentation of sufficient facts such that the ALJ can find there existed a psychologically traumatic event or events." *City of Loveland, supra*, at 951.

Whether a claimant has met his or her burden of establishing a compensable mental impairment is a question of fact for determination by the ALJ. *See Pub. Serv. v. Indus. Claim Appeals Office,* 68 P.3d 583, 585 (Colo.App.2003) ("The causes of a claimant's mental impairment and the commonality of those causes are questions of fact to be resolved by the ALJ.").

Sec. 8-41-301(2)(d), C.R.S. provides that, in addition to satisfying the heightened burden for establishing compensability of a mental impairment claim under section (2)(a), a claimant must also show that the mental impairment itself is "sufficient [either] to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment." *Kieckhafer v. Indus. Claim Appeals Office of State*, *supra,* at 207. Nothing in that language negates the requirement in subsection (2)(a) that, as a threshold for compensability, a claimant must prove a recognized, permanent psychological disability by evidence supported by a licensed physician or psychologist. *Kieckhafer v. Indus. Claim Appeals Office of State*, *supra,* at 207.

Claimant failed to introduce credible and persuasive evidence needed from a mental health professional—a physician or a psychologist—establishing that "claimant suffered a recognized disability arising from a psychologically traumatic event." Because such evidence was necessary to establish a claim for mental distress arising out of a nonphysical or purely mental event or injury, it is found that Claimant failed to meet her burden of demonstrating entitlement to benefits for her "mental-mental" claim for either May 8, 2020 or March 31, 2021.

Further, Claimant failed to identify any specific event or events that lead to her psychological breakdown other than the disciplinary actions taken by Employer and her supervisors, and ultimately her termination for good cause. The instances Claimant identified were not outside the usual experience of an employee nor did Claimant identify why these reprimands and disciplinary actions would evoke significant distress in a reasonable worker. Claimant failed to identify any particular event which would be considered outside of the normal course of her job. In fact, this ALJ finds more credible the Site Manager's testimony that Claimant was the instigator that cause the need for reprimands and discipline, including failure to follow instructions by supervisors, insubordination, slandering other coworkers, and encouraging other employees not to participate in particular job duties. As found, the Site Manager credibly and persuasively explained that Claimant acted in a manner that was in violation of the company policies. As found, Claimant was terminated in accordance with the company policies in good faith.

Lastly, Claimant did not understand the nature of her disability until after her March 31, 2021 termination, and LPC Morgan's records establish that Claimant sought care as

a consequence of the effect her termination had on her psychologically. The Act specifically precludes any claim being based on disciplinary actions or termination for good cause and in good faith. The good faith actions of Employer in this case are supported by the Site Manager's credible and persuasive testimony. Despite Claimant's continuous claims that Employer failed to accommodate her restrictions and that failure was the underlying reason for her termination, Claimant's testimony was not persuasive. The Site Manager credibly and persuasively testified that Claimant's restrictions and perceived limitations were being accommodated and that she had been provided with a very easy job, including accommodating her sitting requirements, even after her workers' compensation providers had released her to full duty without restrictions. Claimant failed to present persuasive evidence that she suffered any impairment from a psychologically traumatic event outside of her usual course of work that another, reasonable employee would have likewise suffered. Claimant's allegations of being harassed at work and wrongfully discharged was not credible and does not constitute the basis for a mental-mental injury for either a date of disability of May 8, 2020 or March 31, 2021.

D. Medical Benefits

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Here, Claimant failed to show a causal link between her need for medical care and a compensable claim. No medical benefits are due in this matter.

E. Temporary Disability and Termination in Good Faith

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, which she left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), C.R.S. (2023) and 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. (2023) requires the claimant to establish a causal connection between a work-related injury and

a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Here, Claimant's claim is not deemed compensable so the issue of TTD is moot. However, even if the claim was compensable, Claimant failed to show that she had any work restrictions or that there was a causal connection between her wage loss and her medical disability as she was responsible for her own termination from employment in good faith. As found, Claimant's wage loss was not caused by any medical impairment or disability related to her mental or psychological conditions, but to her termination for good cause.

F. Penalty for Late Reporting

Section 8-43-102(1), C.R.S., states that every employee who sustains an injury from an accident shall notify the employer, in writing, of the injury within four days of the injury. The time begins to run for filing a notice claiming compensation when the claimant, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). A "compensable" injury is one which is disabling, and entitles the claimant to compensation in the form of disability benefits. *City of Boulder v. Payne, supra*; *see also Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). To recognize the probable compensable character of an injury, the claimant must appreciate a causal relationship between the employment and the condition. *Taylor v. Summit County*, W.C. No. 4-897-476 (March 18, 2014).

Respondents argue that Claimant knew or should have known that she had an injury on May 8, 2020 and they would be entitled to a penalty of one day's compensation for every day between May 13, 2020 and February 21, 2023, when Claimant filed her formal claim with the Division. Here, the claim has been found to not be compensable. However, even if the claim were compensable, Claimant did not recognize the nature, seriousness and probable compensable character of her injury until after she was terminated on March 31, 2021 and had a breakdown which required medical attention from her PCP, Dr. Unger for treatment with medications and the subsequent referral and treatment with a counselor, LPC Morgan. Therefore, Respondents failed to show a penalty is appropriate in this matter.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant failed to show she had a compensable claim either on May 8, 2020 or March 31, 2021 for a mental-mental disability related to her employment pursuant to Sec. 8-41-301(2)(a), C.R.S. Claimant's claim is *denied* and *dismissed*.

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

DATED this 19th day of October, 2023.

DIGITAL SIGNATURE

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-570-001

STIPULATIONS

- Respondents agreed to file a general admission of liability in Colorado.
- The Claimant's Average Weekly Wage is $1,460.84.

ISSUES

- Did Claimant prove that the right hip surgery recommended by Dr. Adams reasonable, necessary and related to her work injury of July 31, 2022?

FINDINGS OF FACT

1. Claimant worked for the Employer driving a semi-truck and delivering goods to [Redacted, hereinafter WT]. She picks up the loads in Wyoming and delivers them to the WT[Redacted] in Denver, Colorado Springs, Pueblo and Cañon City.

2. On the date of the injury, July 31, 2022, Claimant was delivering to the WT[Redacted] in Woodland Park. When she arrived, she initially could not find anyone to unload the pallets. She finally found someone, a young lady, to unload the pallets. The WT[Redacted] employee used an electric pallet jack and was having difficulty because two of the pallets were stuck together due to the plastic wrap surrounding the merchandise. The pallet began to fall over on to the Claimant and she turned to brace herself against the wall of the trailer. The goods on the pallet hit the right side of her body.

3. Claimant went to Concentra for treatment on August 1, 2022. Dr. Johnson saw the Claimant at this visit. He took a history that Claimant was there "for R side of the body injury after a heavy palette fell on her R side of the her body while she was trying to help a co-worker. Pt states she has some neck pain on the right side. R hip and R low back pain". Exhibit B, p. 12. His assessment included injury of back, injury of right hip and strain of neck muscle. He deferred taking an x-ray since no tech was available to take the imaging.

4. Claimant returned to Concentra on August 3, 2022 for follow up. Dr. Johnson performed a physical examination. With respect to the right hip, he noted "Appearance normal. No deformity. No tenderness. Full range of motion. Strength normal". Exhibit B, p. 15.

5. Claimant continued to receive conservative care at Concentra, consistently showing full range of motion without any objective findings related to her right hip. Prior to November 9, 2022, the focus of treatment was involving her lower back and her neck. However, on November 9, 2022, Claimant presented with limited range of motion in her

right hip. Specifically, Dr. Johnson noted “Appearance is normal. Tenderness in iliac crest. Palpation normal. Limited range of motion in all planes. Forward flexion: AROM 60 degrees with pain. Extension: AROM 10 degrees with pain. Abduction: AROM 20 degrees with pain.” Dr. Johnson then ordered an MRI of the right hip”. Exhibit B, p.111.

6. On December 2, 2022, Dr. Johnson noted that the MRI of the right hip showed a labral tear. He referred the Claimant to Dr. Adams for a surgical evaluation of the right hip. Exhibit B, p. 124.

7. Dr. Adams saw Claimant on January 11, 2023. He reviewed the MRI and noted the following findings: “Chondral thinning and loss involving the acetabulum and femoral head. Mild reactive bone marrow edema. Degenerative tearing of the anterior and superior labrum. No evidence of AVN or femoral neck stress fracture”. Exhibit D, p.199. Dr. Adams recommended arthroscopic surgery to repair the torn labrum. Exhibit D, p. 203. Dr. Adams was sent a questionnaire from Claimant’s counsel on April 3, 2023. In response to one of the questions, he stated “[Redacted, hereinafter MN] injury resulted in a right hip labral tear, hip bursitis and chondromalacia”. However, Dr. Adams did not provide any causation analysis to support this opinion.

8. Claimant underwent an IME with Dr. Rook at the request of her attorney. The IME occurred on March 23, 2023. After taking a history, a review of the records and physical examination, Dr. Rook opined that hip injury and the need for hip surgery was related to Claimant’s work injury on July 31, 2022. Although Dr. Rook does a cursory causation analysis, he failed to address the lack of symptoms or treatment for the hip until November 9, 2022 when Dr. Johnson documented loss of range of motion and pain which was previously undocumented. While it is true that she did complain of hip pain on her first visit with Dr. Johnson, the pain apparently resolved shortly after the initial incident. Similarly, the Claimant is noted to have full range of motion in right hip until a marked decrease in range of motion on November 9, 2022.

9. Claimant also underwent an IME with Dr. Lesnak on April 3, 2023 at the request of Respondent’s counsel. Dr. Lesnak also reviewed the medical records, took a history and examined the Claimant. With respect to her right hip, Dr. Lesnak opined that “(b)ased on all the information that I currently have available to me and to a reasonable degree of medical probability, there is no medical evidence to support that the reported mechanism that involved MN[Redacted] during work hours on 07/31/2022, in any way caused or aggravated any reported MRI pathology involving her right hip whatsoever. Being struck on the lateral aspect of one’s buttock/proximal thigh is not a mechanism that would cause or aggravate any type of intraarticular right hip joint pathology, including any type of symptomatic labral pathology whatsoever. Therefore, there is absolutely no medical evidence to support that the requested right hip arthroscopy procedure by Dr. Adams would in any way appear to be related whatsoever to the reported occupational incident claim of 07/31/2022”. He also questioned whether the procedure recommended by Dr. Adams was reasonable and necessary. Exhibit F, p. 238.

CONCLUSIONS OF LAW

Medical Treatment

The Respondent is liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondent admits liability, it retains the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment to the same body part was proximately caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondent disputes the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not prove an injury objectively caused any structural anatomical change to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact a claimant experiences symptoms after an accident at work does not necessarily mean the employment aggravated or accelerated a preexisting condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Ultimately, the ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Claimant failed to prove the arthroscopic surgery to her right hip is reasonable, necessary and causally related to her industrial injury. I am persuaded by the opinions of Dr. Lesnak, whom I find to be credible, that the Claimant's request for surgery is not reasonable and necessary or related to the incident on July 31, 2022. I am not persuaded by the opinions of Dr. Adams and Dr. Rook to the contrary.

ORDER

It is therefore ordered that:

1. Claimant's request for arthroscopic surgery to repair Claimant's torn labrum in her right shoulder is denied and dismissed.

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

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

DATED: October 19, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-097-379-005

ISSUES

- Did Claimant prove by a preponderance of the evidence that lumbar epidural steroid injections are reasonably needed and causally related to his admitted injury?

- Although the evidence suggests Claimant may have paid for certain medications out of pocket, Claimant agreed that prescription reimbursement is not an issue for the hearing.

FINDINGS OF FACT

1. Claimant worked for Employer as a power plant engineer. He suffered admitted injuries on January 5, 2019 when he slipped and fell on a wet floor.

2. Claimant was transported to the Parkview Hospital emergency department. He reported landing on his right thoracic back and ribs and striking the back of his head on the floor. X-rays showed multiple rib fractures.

3. Claimant was referred to Dr. Terrence Lakin at the Southern Colorado Clinic. Medical records in the first several months after the accident document complaints of and treatment for thoracic spine pain, rib pain, and tinnitus. There is no mention of any injury-related lumbar pain.

4. Dr. Lakin put Claimant at MMI on March 12, 2019, with no impairment.

5. A thoracic MRI on May 2, 2019 showed compression fractures at T3, T4, and T9, and transverse process fractures at T5 and T6.

6. Claimant saw Dr. Velma Campbell for a DIME on July 10, 2019. Dr. Campbell diagnosed multiple rib fractures, a thoracic spine contusion with possible compression fractures (she did not have access to imaging of the thoracic spine during the DIME), an occipital contusion, and tinnitus possibly related to the accident. No injury-related symptoms or diagnoses relating to the lumbar spine were noted. Dr. Campbell determined Claimant was not MMI.

7. Claimant returned to Dr. Lakin on August 22, 2019 for additional treatment. He completed a pain diagram on which he drew a circle from the mid thoracic area to the upper lumbar area. Dr. Lakin opined the new lumbar complaints were "normal age-related aches/pains of normal life," and not related to the work accident.

8. On September 19, 2019, Dr. Jack Chapman performed a T9 kyphoplasty and thoracic spine injections.

9. Dr. Chapman administered two sets of bilateral medial branch blocks at T9-10 and T10-11 in December 2019. Claimant later underwent rhizotomies to his thoracic spine.

10. Dr. Chapman performed intra-articular facet injections at T10-11, T11-12, T12-L1, and L1-L2 on January 17, 2020. The record contains no persuasive causation analysis regarding the lumbar levels that were included in the injections.

11. Claimant followed up with Dr. Lakin on January 29, 2020. He reported some improvement in his thoracic pain, "but now pain in the lower back that radiates to the legs. . . . Not sure if this occurred at work or not." Dr. Lakin added diagnoses of lumbosacral pain and radiculopathy to Claimant's chart, but dated the "onset" of low back pain to January 29, 2020, more than a year after the industrial accident. Dr. Lakin opined Claimant was at MMI and needed a follow-up DIME.

12. Claimant had a lumbar MRI through his primary care provider on February 18, 2020. It showed lumbar spondylosis and bilateral foraminal stenosis at L5-S1 encroaching on the existing nerve roots without evidence of nerve root compression. There is no persuasive indication the findings were acute, and instead were most likely degenerative in nature.

13. Dr. William Watson performed the follow-up DIME on August 18, 2020. Dr. Watson determined Claimant suffered multiple rib fractures and a thoracic compression fracture from the work accident. Dr. Watson did not ascribe Claimant's complaints of low back pain to the industrial injury. He agreed Claimant was at MMI on January 29, 2020, and assigned a 7% whole person impairment for the thoracic spine.

14. Respondent filed a Final Admission of Liability based on Dr. Watson's DIME report, and Claimant requested a hearing to challenge the DIME regarding impairment.

15. Claimant saw Dr. Gary Zuehlsdorff for an IME at the request of his counsel on February 17, 2021. Dr. Zuehlsdorff disagreed with Dr. Watson's rating in several respects. However, he expressed no disagreement over the omission of a rating for the lumbar spine. Dr. Zuehlsdorff noted that Claimant's low back "has not ever been part of the claim. The patient notes that it did start a while after the injury, at least a couple of months. ***He understands and accepts that the lumbar spine is not part of the claim***." (Emphasis added).

16. Dr. Zuehlsdorff assigned a substantially higher rating than Dr. Watson for the thoracic spine, hearing loss/tinnitus, and psychiatric impairment. Consistent with Claimant's agreement that the low back was "not part of the claim," Dr. Zuehlsdorff provide no injury-related diagnosis or impairment for the lumbar spine.

17. A hearing was held on April 8, 2021 before Administrative Law Judge Richard Lamphere to consider Claimant's challenge to the DIME. Judge Lamphere found that Claimant overcame the DIME and adopted Dr. Zuehlsdorff's rating. Judge Lamphere also found Claimant proved entitlement to a general award of medical benefits after MMI. Judge Lamphere awarded no benefits specifically related to the lumbar spine.

18. Claimant was involved in a serious motor vehicle accident on September 22, 2021. He was stopped at a red light when he was struck by a [Redacted, hereinafter FX] truck traveling approximately 35 miles per hour. Claimant suffered injuries and was transported to the emergency department by ambulance. He reported pain in multiple areas, including his low back, and was diagnosed with acute on chronic lumbar pain.

19. Claimant returned to the emergency department on October 1, 2021 with complaints of "ongoing low back pain."

20. Claimant eventually settled a personal injury lawsuit related to the MVA for $375,000.

21. A second lumbar MRI was completed on June 3, 2022. The radiologist appreciated "age-related lumbar disc degeneration" at L4-5, "without significant interval progression" since the previous MRI in February 2020.

22. Dr. Tashof Bernton performed an IME for Respondent on June 28, 2023. Dr. Bernton opined Claimant's low back symptoms are not causally related to the January 2019 work accident.

23. Dr. Bernton's opinions and conclusions regarding Claimant's low back symptoms are credible and persuasive.

24. Shaileen Johnson, NP testified at hearing regarding the reasonable necessity of treatment for Claimant's low back. However, she offered no persuasive analysis or conclusions regarding causation.

25. Claimant failed to prove his low back symptoms are causally related to the January 5, 2019 admitted injury.

CONCLUSIONS OF LAW

Claimant's claim remains open for medical benefits after MMI pursuant to Judge Lamphere's Order. Respondent is liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of Claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, Respondent retains the right to question the reasonable necessity and causal relationship of any specific treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent treatment was caused by the industrial injury. *Fairchild v. GCR Tire Center*, W.C. No. 4-632-507 (February 2, 2006). Similarly, payment of medical benefits related to a body part or condition is not in itself an admission of liability, and the respondents may still dispute causation even if they have paid for treatment. *Ashburn v. La Plata School District 9R*, W.C. No. 3-062-779 (May 4, 2007). Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical

benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The fact that Claimant was not awarded PPD benefits for a lumbar spine rating does not preclude him from trying to establish a causal relationship in the context of a request for medical benefits after MMI. *Cf. Yeutter v. CBW Automation, Inc.*, W.C. No. 4-895-940-03 (February 26, 2018). But Claimant failed to carry his burden of proof here. By Claimant's own admission, his low back symptoms did not start until many months after the admitted injury. The imaging studies show only degenerative conditions, with no acute pathology that could reasonably be ascribed to the work accident. Claimant has been thoroughly evaluated by multiple Level II accredited physicians, none of whom have attributed his low back complaints to the industrial injury. Nor did Judge Lamphere note any injury-related low back issues in his detailed Findings of Fact, Conclusions of Law, and Order. The persuasive evidence presented at hearing fails to prove that Claimant's low back symptoms and associated limitations were proximately caused by the admitted work injury.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits related to his low back is denied and dismissed.

2. All issues pertaining to Claimant's general award of medical benefits after MMI not decided herein are reserved for future determination.

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

DATED: October 19, 2023

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

ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome the maximum medical improvement (MMI) determination of Dr. Michael Maher.

II. If Claimant is found to be at MMI, whether Respondents established, by clear and convincing evidence, that Dr. Maher erred in assigning 15% whole person impairment for mental health disorders.

III. If Claimant is found to be at MMI, whether Respondents established, by a preponderance of the evidence, that Dr. Maher erred in assigning a 30% scheduled impairment rating for Claimant's left knee condition.

IV. If Claimant is determined to have reached MMI, whether she established, by a preponderance of the evidence, that she is entitled to maintenance care for the injuries associated with her July 27, 2021 work-related trip and fall.

V. If is found that Claimant is not at MMI, whether she has established, by a preponderance of the evidence, that she is entitled to Temporary Partial Disability (TPD) benefits beginning May 26, 2022 through July 23, 2022, and Temporary Total Disability (TTD) benefits beginning July 24, 2022 and ongoing.

VI. Whether Claimant established, by a preponderance of the evidence, that she is entitled to disfigurement benefits and if so, the amount of such award.

Because the undersigned ALJ concludes that Claimant is not at MMI for all conditions related to her July 27, 2021 industrial injury, this order does not address issues II, III, and IV outlined above.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to her left knee when she tripped and fell while training a new employee for Employer on July 27, 2021. (RHE C). Claimant received treatment for her left knee injury from Concentra Medical Centers (Concentra). (RHE K, 77-187). Her care was overseen primarily by Nurse Practitioner (NP) Brendan Madrid, who ultimately referred her to Dr. David Walden. For an orthopedic evaluation. *Id.* at 89.

2. An MRI of the left knee was obtained on September 22, 2021 to help determine the extent of Claimant's injuries and the source of her pain complaints. (RHE M, pp. 221-23). The MRI revealed multiple findings, including complex tearing of the lateral meniscus, a bony contusion injury to the lateral tibial plateau and a high-grade injury to the fibular collateral component of the lateral collateral ligament (LCL) complex. Joint effusion was also noted on the radiologist's report. *Id.* at 222.

3. Dr. Walden recommended continued conservative care after reviewing the MRI and in conjunction with his examination and discussion with Claimant. (RHE L, p. 193). Although Dr. Walden agreed the MRI showing the meniscal tear was consistent with her pain complaints, he wanted to exhaust conservative treatment methods first. *Id.* On October 28, 2021, Claimant returned to Dr. Walden. *Id.* at 198. She reported no relief from an intraarticular injection at her last visit along with failure to improve with physical therapy (PT). Indeed, she discontinued PT due to severe pain in her knee when performing squatting motions. *Id.* Dr. Walden recommended arthroscopic surgery to address her condition. *Id.*

4. Surgery was performed on November 17, 2021. (RHE L, p. 212). Dr. Walden performed three procedures directed to the left knee: an arthroscopic partial lateral meniscectomy, an arthroscopic chondroplasty of the femoral trochlea and lateral tibial plateau, and an excision of synovitis. *Id.*

5. Claimant continued her post-operative care through Concentra. (RHE K, pp. 77-179). Claimant was evaluated by Dr. Leah Johansen on January 26, 2022. (RHE K, p. 152). Dr. Johansen imposed physical restrictions on Claimant's ability to work including no squatting, no kneeling, and lifting no more than 30 pounds. *Id.* at 155-56. These restrictions would remain in place until Claimant saw Dr. Johansen for a final visit on April 23, 2022. (RHE K, pp. 174-79). During this appointment, Dr. Johansen opined that Claimant was at MMI. *Id.* at 174, 175. Dr. Johansen raised Claimant's lifting capacity to 40 pounds, but left the restrictions of no kneeling and no squatting unchanged. *Id.* at 174. She also indicated that Claimant would have "permanent restrictions moving forward." *Id.* at 175.

6. Following her appointment with Dr. Johansen, Claimant was seen by Dr. Daniel Peterson on May 25, 2022. (RHE K, p. 181). The sole reason for the visit was to complete an impairment rating. *Id.* After reviewing Claimant's restrictions and Functional Capacity Evaluation report, Dr. Peterson assigned a scheduled impairment rating of 30% (22% for range of motion loss, and an additional 10% for ratings under Table 40 of the AMA Guides: 5% for #2 for the disorder of the meniscus, and 5% for #5 for "arthritis due to any cause….") *Id.* at 186. He also released Claimant to full duty work without restrictions, and opined that Claimant required no maintenance care.

7. Claimant requested a Division Independent Medical Examination (DIME) after Respondents filed their Final Admission of Liability (FAL) on June 28, 2022,

pursuant to Dr. Peterson's report.[1] (RHE C, p. 9). Dr. Michael Maher was selected to perform the examination and did so per his February 6, 2023 report. (CHE 10).[2] The body parts/conditions checked for Dr. Maher to examine were both Claimant's knees and her mental health. *Id.* at 192.

8. Claimant has a history of major depression.[3] (CHE 11). According to Claimant's testimony, she has been treated for depression by Dr. John Hardy for a number of years. (See also, CHE 11). Her psychiatric treatment has included the use of a number of different prescriptions for mood stabilization. *Id.*

9. Claimant contends that her workers' compensation injury precipitated a worsening of her depression and that her authorized providers ignored her repeated complaints that she was deteriorating emotionally. Indeed, when asked if she told her providers about her mental health decline since the work injury, Claimant testified, "Yes. Like, every time I went in there. They asked me how I'm doing. I'm like, 'Well, my mental health isn't good,' but they would never say anything else." (Tr., 41:9-14). She further testified she expressed all of this to Dr. Maher during his examination of her. (Tr., 41:19-24).

10. Careful review of Dr. Hardy's records indicate that four days prior to her work-related trip and fall, Claimant saw Dr. Hardy. She was taking her medications and reported that "somedays she 'over thinks" things and that can make her feel a bit depressed but no real plummets of her mood." (CHE 11, p. 241). She was scheduled for a follow-up visit in 6 months. *Id*. at p. 242.

11. Claimant returned for her follow-up visit on December 21, 2021. (CHE 11, p. 243). During this visit she reported significant personal stressors including the fact that her brother-in-law (BIL) died of COVID before Thanksgiving and that her mother had been hospitalized with COVID the week prior to her visit but had since been released and was home with her. *Id*. at p. 243. Claimant also reported that she had injured her knee and had surgery as part of the claim at issue. Claimant was drinking alcohol compulsively and was unmotivated. *Id.* She was not involved in therapy and rated her mood as a 4/10. *Id.* Medication management suggestions were made as was the recommendation to secure a therapist. *Id.* No specific cause for Claimant's mental/emotional deterioration was documented.

---

[1] As part of their June 28, 2022 FAL, Respondents admitted to TPD benefits from August 2, 2021, through November 14, 2021; TTD benefits from November 15, 2021, through November 30, 2021; TPD benefits from December 1, 2021, through May 24, 2022; and permanent partial disability (PPD) benefits pursuant to the 30% scheduled impairment rating. (RHE C, p. 9).

[2] There are two versions of Dr. Maher's DIME report contained at CHE 10. There are subtle differences between the reports and the copy beginning at page 205 appears more complete than the copy beginning at page 192. Accordingly, citations to the DIME report include references to the DIME report contained at pages 205-215 of CHE 10. The second report was generated because Dr. Maher did not include a provisional mental health rating in his initial report, thus prompting the issuance of his addendum report, though not clearly marked as such. *See* CHE 10, p. 212 ¶ H (stating he conducted the mental impairment rating worksheet in order to "satisfy the requests of the DIME")

[3] Just prior to her July 27, 2021 work injury, Claimant's ICD 10 diagnosis was documented as "Major depressive disorder, recurrent, mild." (CHE 11, p 242).

12. Claimant was re-evaluated approximately one month later on January 25, 2022. During this encounter, Claimant reported feeling "[a] lot better". (CHE 11, p. 245). She was no longer at "[r]ock bottom", noting that she was able to talk things out with herself and this had helped. *Id.* No mention of Claimant's work-related injury is referenced in Dr. Hardy's note from this date of visit.

13. On March 31, 2022, Claimant returned to Dr. Hardy's office for a reassessment. She was noted to be smiling during this appointment and reported that her mood was, "OK, but she lack[ed] motivation." (CHE 11, p. 247). The only mention of Claimant's work-related injury in the note from this visit is documented as: "She is waiting for final rating from workman's comp on her knee so she can get settlement and then resume work." *Id.*

14. Claimant saw Dr. Hardy in follow-up on June 20, 2022. (CHE 11, p. 249). Dr. Hardy noted that Claimant was back to work but was "still waiting for final workman's comp." *Id*. Claimant reported that she felt "unstable" emotionally and that she was "easily triggered and quick to tearfulness" although no cause for her increased emotionality was cited. *Id.* Additional medication adjustments were suggested to improve Claimant's mood. *Id*. at p. 250

15. On August 16, 2022, Dr. Hardy noted that Claimant had tested positive for COVID and that she had stopped her Wellbutrin which made no difference in her mood, which she described as "pretty good". (CHE 11, p. 251).

16. On November 22, 2022, Dr. Hardy noted that Claimant "has workman's comp for her left knee" and that she had to "decide by Monday if she will quit or return to [Redacted, hereinafter OG]." (CHE 11, p. 253). It was also noted that Claimant was "ambivalent" and was "mostly a shut in [because] she finds people upsetting." *Id*. Again, no cause was cited for Claimant's emotional state.

17. On February 7, 2023, Dr. Hardy noted that Claimant was no longer working for Employer and had decided to take some time off. (CHE 11, p. 256). Claimant reported "[f]eeling much better because 'I am not expecting myself to be something that I am not.'" *Id.*

18. During a follow-up appointment with Dr. Hardy on May 3, 2023, Claimant reported that she was "doing well" and that her mood was "good." (CHE 11, p. 259). No mention was made regarding her knee or her current employment. *Id.*

19. Dr. Maher agreed with Dr. Peterson's May 25, 2022 MMI date regarding Claimant's left knee injury. (CHE 10, p. 213). While he agreed with the date of MMI for the left knee, Dr. Maher indicated that Claimant was not at MMI for the psychological aspect of the claim. *Id.* Based upon a careful review of the DIME report, this ALJ finds that Dr. Maher elected not to place Claimant at psychological MMI because Claimant's prior psychological records had not been supplied to him. *Id.* For similar reasons, Dr. Maher noted that he could not give an impairment rating for any claim related psychological condition. *Id.* Indeed, Dr. Maher indicated: "I was asked to evaluate the

patient for a potential impairment rating for her psychological status. As stated above in section A, I do not have any psychiatric or psychological records to review. The patient was seeing a psychiatrist before, during and after the injury and continues to do so." *Id*. at ¶ H, p. 212. Because he did not think Claimant was at psychological MMI (because he did not have records to review), Dr. Maher indicated that he would not be "giving [Claimant] a mental impairment' at the time of the DIME. *Id*. at ¶¶ H, K, pp. 212-213). Instead, Dr. Maher "strongly" recommended that Claimant be evaluated by a psychiatrist through the Workers' Compensation system to evaluate her for "exacerbation of pre-existing conditions as a result of this injury." *Id*. at ¶ K, p. 212.

20. While he elected not to place Claimant at MMI, Dr. Maher asked Claimant about her psychological condition. (CHE 10, p. 206). Claimant reported to Dr. Maher that her providers at Concentra ignored her reports of worsening mental health. She specifically reported that her social anxiety had "greatly worsened" since the work injury. *Id.* In fact, she felt her mental health was a larger impediment to returning to work than her knee condition. *Id.* Based upon Claimant's subjective history and to "satisfy" the DIME requirements, Dr. Maher provided a provisional mental health impairment rating equal to 39% whole person, which he subsequently reduced to a 15% whole person impairment. Id. at ¶ H, p.212. While he provided a provision psychological rating, Dr. Maher made it clear that he was not assigning impairment because he needed Claimant's mental health records. *Id.*

21. As noted, Dr. Maher found Claimant to be at MMI for her left knee condition. He assigned a 30% scheduled extremity rating for the knee based on range of motion loss, along with Table 40 diagnoses #2 and #5, as also provided by Peterson, though to a different extent. (CHE 10, ¶ G, pp. 211-212; ¶ K, p. 213). Dr. Maher provided 8% for range of motion loss after normalization, along with 10% per Table 40 #2 and 15% for Table 40 #5. *Id.* at 213, 216. Dr. Maher also felt Claimant should have permanent work restrictions in line with those recommended by the FCE. *Id.* at 214.

22. Dr. Fall performed an independent medical examination (IME) at Respondents request on July 19, 2023. (RHE J). As part of her IME, Dr. Fall obtained a medical history from Claimant. She also reviewed Claimant's medical records and completed a physical examination. *Id*. Following her examination and records review, Dr. Fall made the following pertinent observations:

- Dr. Peterson assigned 22% impairment for range of motion of the left knee along with an additional 10% scheduled impairment per Table 40, for a total left knee extremity impairment rating for 30%. (RHE J, p. 72). Because the surgical report from Dr. Walden indicated that Claimant underwent a "*partial* lateral meniscectomy", Dr. Fall opined that utilizing 10% per Table 40 for meniscectomy was not appropriate because that would indicate that the entire meniscus was resected, which did not occur during Claimant's November 17, 2021 surgery. *Id.*

- Dr. Maher assigned 8% scheduled impairment for left knee range of motion loss after using the right knee for normalization. Consistent

with Dr. Peterson, Dr. Maher assigned 10% scheduled impairment from Table 40 for the meniscus surgery. Finally, Dr. Maher assigned 15% scheduled impairment for arthritis due to any cause including chondromalacia. (RHE J, p. 73). According to Dr. Fall, Dr. Maher made the same error that Dr. Peterson did in assigning 10% impairment from Table 40, because Claimant did not have a complete meniscectomy as would be required to assign the full 10% from Table 40.[4] Dr. Maher erred further when he added the 10% impairment from Table 40 to the 15% impairment for arthritis due to any cause for 25% scheduled impairment. Per Dr. Fall, Dr. Maher should have combined the 10% and the 15% pursuant to the Combined Values Table in the AMA Guidelines which would yield 24% lower extremity impairment not 25%. *Id.* Dr. Fall observed that Dr. Maher would later correct this addition error in a subsequent worksheet he completed as part of the second DIME report referenced above. *Id*. at p. 74

- Claimant has been involved in psychiatric treatment for an extended period of time (probably since a teenager) and has taken medication for anxiety and depression over the years. (RHE J, p. 70). According to Dr. Fall, Dr. Maher erred in concluding that Claimant's psychological symptoms were causally related to her July 27, 2021 trip and fall. Indeed, Dr. Fall noted: "There had been no diagnosis of a mental condition or an impairment as related to the work-related injury." Moreover, "[Claimant] did not request to be evaluated and treated for a work-related mental issue." *Id.* at p. 73. Accordingly, Dr. Fall opined that Dr. Maher erred in refusing to place Claimant at psychiatric MMI, even if Claimant's non work-related psychiatric condition/symptoms were exacerbated (temporarily worsened) by the July 27, 2021 trip and fall. Indeed, Dr. Fall suggested that not having Dr. Hardy's records were immaterial to the issue of whether Claimant reached MMI. *Id.*

- Dr. Maher erred further when he stated that Claimant was not at psychological MMI but failed to indicate what treatment would be necessary for Claimant to attain MMI. (RHE J, p. 74).

- Dr. Maher's psychological impairment worksheet was completed without a DSM diagnosis and included impairment based upon physical rather than mental health deficits leading directly to a rating that was grossly out of proportion to the medical record documentation. (RHE J, p. 74). While she acknowledged that Claimant was subjected to "bullying" issues at work, Dr. Fall opined that there was no record evidence that this, or other mental health issues delayed Claimant's

[4] Dr. Fall would amend this opinion during her testimony, noting that Dr. Peterson correctly assigned 5% impairment per Table 40 for the partial meniscectomy and another 5% for aggravation of underlying arthritis for a total of 10% rather than assigning 10% for the partial meniscectomy alone. (Tr., 31:19-25-32:1-4) (See also, RHE K, p. 186).

recovery or interfered with her function. *Id.* Instead, Dr. Fall characterized this "bullying" as a "worksite stress issue." *Id.*

23. Dr. Fall summarized her opinions in the "Discussion" section of her report. (RHE J, pp. 75-76). In summarizing her opinions regarding Dr. Maher's conclusion that Claimant was not at psychological MMI, Dr. Fall wrote:

> [Claimant] has long standing psychiatric issues. There is no expectation that addressing psychiatric issues through Workers' Compensation would lead to any improvement in her function. Besides the prior errors I noted in [Dr. Maher's] report, it is not appropriate to set out different areas when assessing MMI status. In other words, when one is at MMI, they are either at MMI for the date of injury or not at MMI for the date of injury. I disagree with separating out a psychological part because there was no psychological part such as a mental health diagnosis related to the work-related injury. [Dr. Maher] did not provide any treatment she required for the psychological/psychiatric issues to get [Claimant] to MMI. I disagree with his causation analysis. Furthermore, [Dr. Maher's] own report is inconsistent in that he used the word exacerbation but recommended treatment and discussed permanent impairment. He also made an error in his mental impairment by assigning impairment to areas that were affected by her musculoskeletal condition and not a mental health condition.

24. According to Dr. Fall, there are many errors in Dr. Maher's DIME report and prompting her to adopt Dr. Peterson's report of MMI/Impairment as more accurate. (RHE J, p. 76).

25. Dr. Fall testified as board certified, Level II accredited expert in physical medicine and rehabilitation (PM&R). (Tr., 16:1-16). Dr. Fall testified consistently with her report. She reiterated that Dr. Maher erred when he did not "address how the psychological issues were caused by the work-related injury or account for the lack of documentation in the medical records." (Tr., 18:1-5). While she acknowledged that Dr. Maher did not have Claimant's prior psychiatric records when he concluded that Claimant was not at MMI, Dr. Fall testified that there was no work-related psychiatric diagnosis in the medical records and Dr. Maher did not recommend any treatment for Claimant to reach MMI. (Tr., 18:5-6; 20:6-16). Rather, he simply opined that Claimant was not at MMI, which conclusion, Dr. Fall testified, was erroneous because a finding of "not at MMI . . . means that . . . the provider, is indicating that there is some additional active treatment that needs to occur . . . to achieve maximum medical improvement", which Dr. Maher failed to outline in his DIME report. (Tr., 18:7-11). She also recapped her opinion that Claimant's psychological condition was not work-related because there was no temporal relationship between the manifestation of psychiatric symptoms and Claimant's industrial injury and no such connection was noted by Dr. Maher in his DIME

report. (Tr., 22:17-25-23:1-20). Finally, Dr. Fall restated her belief that Dr. Maher erred in completing the psychiatric impairment worksheet because, he assigned very high mental impairment scores for limitations caused by Claimant's physical condition rather than her mental disorder. (Tr., 19:3-16).

26. Dr. Fall also repeated her opinion that Dr. Maher improperly used the full 10% impairment available under Table 40 for the partial meniscectomy, which she testified is reserved for complete meniscus resections. (Tr., 18:15-24; 33:2-15). Nonetheless, Dr. Fall agreed on cross-examination that Table 40 of the AMA Guides provides for a range of impairment from zero to ten percent for one meniscus. (Tr., 29:2-6). While Table 40 provides for a 0-10% range, Dr. Fall testified that 10% impairment would be reserved for a "full meniscectomy of one meniscus." (Tr., 29:8-9).

27. Claimant is seeking a disfigurement award for the surgical scarring associated with her left knee meniscus repair surgery. Visual Inspection of the left knee reveals two approximately ⅜ inch in diameter, semi-circular arthroscopic surgical scars, one on each side of the left patella. These scars are smooth and pink in color, when compared pigment and contour of the surrounding skin.

CONCLUSIONS OF LAW

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

Generally

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

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

Overcoming Dr. Maher's DIME Regarding MMI

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo.App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (October 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998). Careful review of the written DIME report of Dr. Maher and the reports/opinions of Drs. Peterson and Fall persuades the ALJ that Claimant is not at MMI for all conditions Dr. Maher has concluded are related to Claimant's July 27, 2021 industrial injury. Here, the evidence supports a conclusion that Dr. Maher believes that Claimant's pre-existing depressive and anxiety disorders were exacerbated by her July 27, 2021 industrial injury and subsequent recovery. Nonetheless, he did not have Claimant's prior psychiatric records upon which to verify her reported history and confirm a date of MMI or degree of impairment. Without such records, the ALJ concludes that Dr. Maher could not determine whether Claimant would need additional psychiatric treatment to achieve MMI or if at MMI, her degree of permanent impairment. Consequently, the ALJ concludes that the "not at MMI" determination is consistent with the overall purpose of the DIME process in permitting an injured worker to seek a second opinion based upon a complete review of the medical records regarding all physical and mental conditions felt to be related to the work injury, either directly or as a compensable consequence thereof.

E. After considering the totality of the evidence presented, including Dr. Fall's various claims or error, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that Dr. Maher's determination regarding MMI is highly probably incorrect. As determined above, the persuasive medical evidence establishes that Dr. Maher believes that Claimant likely suffered a compensable aggravation of her pre-existing depressive and anxiety disorders. While Dr. Fall maintains contrary opinions and "disagrees" with Dr. Maher's conclusion regarding causality, a professional difference of opinion between medical experts does not rise to the level of clear and convincing evidence that is required to overcome Dr. Maher's

opinions concerning causality and MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set the MMI determination aside. Until such time that Dr. Maher has reviewed Claimant's prior psychiatric records the ALJ agrees it would be inappropriate to place her at MMI and/or rate her mental impairment. In this case, the ALJ concludes, as was demonstrated by Dr. Maher's attempt to rate Claimant's impairment without reviewing Dr. Hardy's records to satisfy the DIME requirement, that placing Claimant at MMI with/without impairment is likely to result in a highly probably incorrect conclusion. Based upon the evidence presented, the ALJ concludes that Claimant's is not at psychological MMI. Because Claimant is not at MMI for all compensable conditions (including the exacerbation of her pre-existing mental health disorders) related to her industrial injury, this order does not address whether Respondents established, by a preponderance of the evidence, that Dr. Maher erred in assigning a 30% scheduled impairment rating for Claimant's left knee condition.

F. Claimant has the burden to prove by a preponderance of the evidence that she is entitled to further TPD and TTD benefits. C.R.S. § 8-42-101. When the attending physician provides a written release to work, unless the record contains conflicting opinions from attending physicians regarding the release to work, an ALJ is not at liberty to disregard the attending physician's opinion that a claimant is released to return to employment. *See Burns v. Robinson Dairy, Inc.*, 911 P.2d 661, 662 (Colo. App. 1995).

G. Claimant has failed to prove that she is entitled to further TPD benefits from May 25, 2022, through July 23, 2022, and TTD benefits from July 24, 2022, through ongoing. Here, the evidence presented supports a conclusion that Dr. Peterson placed the claimant at MMI with a release to *full-duty* employment on May 25, 2022. There is no dispute that Dr. Peterson is the attending physician. The claimant relies on the functional capacity evaluation conducted by Elizabeth Smith, DPT to argue that she needed work restrictions contrary to Dr. Peterson's assessment. Dr. Smith placed the claimant in the medium work category. As Dr. Peterson noted in his MMI report and Dr. Fall testified, the medium work category is acceptable for the type of restaurant work performed by the claimant. The claimant did not present any evidence into the record showing conflicting opinions from attending physicians regarding the claimant's release to work. In the absence of any such evidence, the claimant's testimony regarding her ability to perform her job is irrelevant and should be disregarded. *See Burns*, 911 P.2d at 662-663. Because the claimant's release to work by Dr. Peterson is controlling, the Claimant has failed to establish that she is entitled to further TPD or TTD benefits.

H. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As noted above, the ALJ conducted a disfigurement viewing in this case. As part of that viewing, the ALJ observed two smooth and pink in color arthroscopic scars, one on the front of the left lower extremity in close proximity to the knee and the other located on the lateral aspect of the left lower extremity in close proximity to the knee joint. The ALJ also observed

that Claimant ambulates with a perceptive limp favoring the left leg. Based upon the in-court observations, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles her to additional compensation. Section 8-42-108 (1), C.R.S. Accordingly, the ALJ orders that Insurer pay Claimant $1,500.00 for the above-described disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Respondents request to set aside the MMI determination of Dr. Maher is denied and dismissed. Dr. Hardy's medical records shall be directed to Dr. Maher and Claimant shall be scheduled for a follow-up DIME with Dr. Maher to further determine MMI and Claimant's degree of permanent physical and mental impairment.

2. Claimant's request for additional TPD and TTD benefits is denied and dismissed.

3. Insurer shall pay Claimant $1,500.00 for her serious permanent disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

DATED: October 19, 2023

/s/ Richard M. Lamphere

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-228-169-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right shoulder arising out of and in the course of his employment on December 31, 2022.

2. Whether Claimant proved that the treatment he has received for his right shoulder since the date of injury is reasonably necessary to cure and relieve him of the effects of the December 31, 2022 injury.

3. What amount most fairly represents Claimant's average weekly wage for purposes of his December 31, 2022 injury.

4. Whether Claimant sustained a wage loss resulting in temporary disability arising from his December 31, 2022 injury.

FINDINGS OF FACT

1. Claimant began working as a security guard for Respondent-Employer in August of 2022. He worked at St. Joseph's Hospital to ensure the safety of medical doctors, nurses, and staff. On December 31, 2022, as a part of his security duties, Claimant physically assisted in restraining a violent visitor to secure him for arrest, along with two other police officers and security guards.

2. Claimant later testified that he "plowed so much pressure on [the detainee's] . . . back to try and get his arm bent and everything. And once I got this part bent, that's when I grabbed it and then we could get the cuffs on him. It was like – I mean, it was tough." Claimant testified that he was using both his arms to pull the individual off the police officers; his right arm was pushing forward and down.

3. After the altercation, Claimant did not have immediate pain, so he finished his shift and then went home. Later that evening, Claimant presented to the emergency room at Lutheran Hospital complaining of a work injury to his right shoulder. He reported shoulder pain that was "constant, dull/aching, nonradiating, moderate severity, worse with palpation and improved with rest." An x-ray performed that evening was "not significant for any acute findings." Given the pain complaints, it was noted that an MRI could be considered, but there was no emergent reason for it to be performed at the ER.

4. Claimant had a significant prior history of right shoulder symptoms and treatment.

5. On June 2, 2021, Claimant saw Barbara Wright, PA-C, at Panorama Orthopedics and Spine Center. Claimant complained that he had two-to-three years' history of right shoulder pain after trying to start his lawnmower. He rated the pain at 7 out of 10. He had tried over-the-counter medications, physical therapy exercises, and anti-inflammatory medications with no improvement in symptoms. PA Wright recommended an MRI to evaluate the condition of Claimant's rotator cuff.

6. In the Fall of 2022, Claimant noticed that his arms were tired while he was doing photography and driving. He was having more problems with his left shoulder, but was also having some problems with his right arm in the biceps and triceps areas.

7. He went to Rocky Mountain Primary Care for these issues, who noted that that Claimant had chronic left shoulder pain and "pain in right upper arm," primarily in the "R proximal bicep tendon." The physician's assistant referred Claimant to physical therapy for "chronic left shoulder pain and R upper arm pain." Claimant attended PT to improve his strength back in both arms.

8. On November 7, 2022, at Claimant's first PT appointment, Claimant documented upper arm pain ("muscles right") with the image of the body showing pain in the middle of the right upper arm.

9. On December 19, 2022, the physical therapist documented that "[Claimant] reports this R shoulder is feeling pretty good today." They noted that Claimant "[t]olerated treatment well. Noted no pain with PROM or exercises but some fatigue." However, they also recommended an MRI because testing revealed potential rotator cuff pathology, labral pathology, and impingement. Claimant's health insurance did not authorize any MRIs in the absence of more physical therapy. However, X-rays performed on December 22, 2023, on both Claimant's left and right shoulder showed on the right no lesions, no advanced degenerative changes, and a "normal shoulder radiograph."

10. On December 29, 2022, two days before the injury, Claimant reported significant right shoulder pain with any movement and at rest. He reported experiencing a sharp burst of pain with simple activities such as reaching to shake someone's hand or lifting a plate off the table. He reported being unable to bear weight with the right arm. The right shoulder physical examination performed on that date showed decreased range of motion, pain with flexion/abduction and external range of motion, and positive provocative testing. Claimant had decreased strength scores for flexion, abduction, internal rotation, and external rotation. Claimant testified that prior to the alleged work injury, he discussed a potential right rotator cuff surgery with his physical therapist.

11. Claimant completed a questionnaire that same day in which he reported severe difficulty opening a jar and doing household chores and moderate difficulty

washing his back, sleeping, and carrying a shopping bag. He reported moderate tingling. He also noted he was unable to perform recreational activities that used the arm and that he was moderately limited in his work or other daily activities.

12. Claimant's physical therapist documented the following on December 29, 2022: limited range of motion, limited strength (with pain on flexion, abduction, and external rotation) and positive impingement, labrum, and rotator cuff provocative testing.

13. Following Claimant's December 31, 2022 injury and hospitalization, Claimant first presented to Injury Care Associates on January 3, 2023, where he was evaluated by PA Sophie Schmitz. He reported moderate to severe pain in his shoulder and severe difficulty functioning in his activities of daily living. He reported he had a preexisting "history of bilateral shoulder weakness over the past couple of months when lifting his photography equipment, therefore patient has started physical therapy roughly 3 weeks ago through his private care insurance for strengthening of bilateral upper extremities." PA Schmitz felt that the objective findings were consistent with a work-related injury. She also gave Claimant work restrictions, a prescription for PT, more lidocaine patches, and referred him for an MRI of his right shoulder.

14. Claimant returned to Injury Care Associates the next day, January 4, 2023, where he was attended by Dr. Eric Tentori. Claimant reported that he woke up at 1:00 A.M. from "major pain" and was now experiencing pain of 10 out of 10 in his right shoulder. He reported that he was unable to perform a number of activities of daily living. Dr. Tentori noted in his report, "Patient denies any previous injuries or surgeries to the right upper extremity," and that Claimant had "a history of bilateral shoulder weakness over the past couple of months when lifting his photography equipment, therefore patient started physical therapy roughly 3 weeks ago through his private care insurance for strengthening of bilateral upper extremities." Dr. Tentori's final assessment was "Acute pain of right shoulder," and he prescribed Claimant Norco and further increased his restrictions.

15. Claimant underwent an MRI on January 13, 2023, which showed two tendinous tears and a supraspinatus rupture. On January 20, 2023, Dr. Tentori noted that he reviewed the results with orthopedist Dr. Lucas Schnell. Per Dr. Tentori's note, Dr. Schnell's assessment was as follows: "After review of this MRI report I would have to agree that this appears more chronic. The retraction and moderate atrophy of the supraspinatus tear leads me to believe this. It is hard to know if partial tears are acute or chronic but there is no mention of edema of the muscles to suggest an acute tear." Dr. Tentori added that the MRI findings "do not appear to be acute and makes reference to moderate atrophy. . . . I believe it to be more medically probable that the MRI findings . . . predate this work-related events/injury."

16. On January 16, 2023, Dr. Tentori documented that he received the physical therapy records from prior to the injury and that he reviewed them with Claimant.

Per Dr. Tentori, "patient reports that prior to this work-related injury on 12/31/22 he was only experiencing minimal pain of the right shoulder but due to this injury his pain has increased and caused functional limitations."

17. Claimant returned to Dr. Tentori on January 19, 2023. Claimant reported that the work injury had "escalated his shoulder symptoms significantly." Dr. Tentori opined that Claimant had suffered acute pain of the right shoulder and strain of the right shoulder resulting from the work injury. However, he felt that Claimant's current right shoulder symptoms were consistent with Claimant's pre-injury baseline. Dr. Tentori placed Claimant at maximum medical improvement with no impairment and no restrictions on that date. He advised Claimant to pursue further treatment with his private healthcare provider.

18. Claimant went to see his personal physician that same day for his right shoulder treatment through his personal insurance. Dr. Martha Ives stated in her impression section of the report: "Suspect this is an acute on-the-job injury, that Workmen's Comp. is not planning to cover. Patient may need urgent surgery for a tendon repair to improve his long-term range of motion and ability to hold this job. Refer to cornerstone orthopedics right away."

19. Respondents issued a notice of contest (NOC) on the claim on January 20, 2023.

20. On February 2, 2023, Claimant saw orthopedic surgeon Dr. Thomas Mann. Dr. Mann reported that Claimant's symptoms since December 31, 2022, were "incapacitating and worsening." Dr. Mann documented that the MRI, which he personally reviewed, demonstrated a full-thickness supraspinatus tear with moderate partial thickness infraspinatus tear and secondary findings consistent with internal impingement. Additionally, he noted a moderate grade partial-thickness subscapularis tendon tear with some medial subluxation and partial-thickness of the proximal biceps. In discussing possibilities for treatment, Dr. Mann wrote, "given [Claimant] has had issues with his shoulder and been doing physical therapy and then had an aggravating episode with progression surgical intervention for his dominant shoulder would be recommended."

21. On February 24, 2023, Claimant underwent surgery performed by Dr. Mann to repair a right rotator cuff tear, impingement syndrome of right shoulder, and biceps tendinopathy.

22. Dr. Mann stated in his indications for surgery section of his surgical report:

> "The patient is a 61-year-old gentleman who suffered an aggravating injury from a scuffle while working as a security guard. The patient had some preexisting shoulder issues, but this was an acute change from the incidents. Subsequent MRI demonstrated significant rotator cuff tear, as well as some underlying impingement anatomy, arthritis, and biceps

tendinopathy. Operative intervention to address this acute shoulder injury with notable pain and loss of function is indicated."

23. Dr. Mann noted that the rotator cuff exhibited mobility consistent with an acute injury.

24. Claimant conceded on examination at hearing that he did not bring his 2022 physical therapy records or his 2021 Panorama records for Dr. Mann to review. He conceded he did not tell Dr. Mann that he had previously gone to an orthopedic facility. The Court finds that Dr. Mann did not know of Claimant's pre-injury medical history.

25. Respondents hired Dr. Timothy O'Brien, an orthopedic surgeon, to perform a record review, which Dr. O'Brien completed on August 2, 2023. Dr. O'Brien opined that the physical therapy records from both before and after the date of injury documented essentially the same levels of pain and function, which Dr. O'Brien felt supported the absence of a new injury or aggravating/accelerating event. Dr. O'Brien also opined that the right shoulder MRI demonstrated no evidence of an acute injury. Specifically, he noted the atrophy of the rotator cuff, the retraction of the rotator cuff tendon units, and absence of accumulation of joint fluid that would be expected after an acute tear. Ultimately, Dr. Obrien felt that a rotator cuff repair surgery would be reasonably necessary, but his opinion was that it was due to Claimant's pre-existing right shoulder pathologies rather than the December 31, 2022 injury.

26. Dr. O'Brien testified by deposition as an expert in orthopedic surgery on August 15, 2023. He testified largely consistently with his record review reports. He observed that Claimant's historical accounts and physical therapy records showed similar symptoms before and after the accident, and these symptoms were not consistent with a significant acute injury. He also opined that the mechanism of injury described by Claimant was not consistent with a rotator cuff tear, as injuries resulting in rotator cuff tears typically involve overhead movements or shoulder dislocations.

27. Regarding the mobility of Claimant's rotator cuff, Dr. O'Brien felt that it was not telling regarding the age of the rotator cuff tear. Rather, he felt that the level of atrophy was more informative.

28. Dr. O'Brien also pointed out during his testimony that the physical therapy records from prior to the date of injury documented testing that appeared to be focused on determining the presence or absence of inflammation and dysfunction in Claimant's right shoulder intraarticular structures, including the rotator cuff, the labrum, the acromioclavicular joint, and the glenoid humeral joint. He noted that the tests were consistent with inflammation in those areas.

29. The Court finds Dr. O'Brien's and Dr. Tentori's opinions more credible more credible than those of Dr. Mann insofar as they address the question of whether Claimant's rotator cuff tears were related to the December 31, 2022 injury. However, the Court does not find Dr. O'Brien's testimony credible as to whether Claimant sustained an injury at all on December 31, 2022.

30. Claimant testified at hearing on his own behalf. He testified that he had been working as a security officer for Respondent-Employer for approximately one year. In that role, Claimant testified that he was responsible for ensuring the safety of hospital staff, doctors, nurses, and patients in the building. His duties included performing various tasks that included screening people entering the building and dealing with potentially violent situations.

31. Claimant was asked about his symptoms prior to his injury. He testified that he had a prior surgical repair on his left shoulder between thirteen and fifteen years ago. He experienced issues with both shoulders, which he attributed to his work as a motocross racing photographer. He had been concerned about potential rotator cuff surgery for his left shoulder, but not for his right. However, Claimant later testified that he discussed the possibility of right shoulder surgery with his physical therapist prior to the injury. He also testified that he would have severe pain prior to the date of injury even while reaching to shake somebody's hand.

32. Claimant described the work injury itself, including his involvement in restraining the combative individual. Claimant testified that he used his right arm to assist with restraining the visitor, pushing the visitor forward and down. He initially did not experience pain. However, later that night, he had an onset of severe pain and sought treatment at the emergency room.

33. Regarding the initial post-injury period, Claimant testified that it was marked by severe pain. Though, he clarified that treatment helped to alleviate the pain to some extent.

34. On cross examination, Claimant testified that he did not fall to the ground during the December 31, 2022 incident, nor did he experience direct trauma to his right shoulder. Claimant also testified that he had not received treatment for his right shoulder prior to the December 31, 2022 incident. However, Claimant testified that prior to the December 31, 2022 injury, Claimant had discussed with his physical therapist the possibility of a right rotator cuff surgery.

35. Except insofar as Claimant testified that he had not received treatment for his right shoulder prior to the date of injury, the Court finds Claimant's testimony credible.

36. The Court finds that Claimant has proven by a preponderance of the evidence that he did sustain an injury to his right shoulder on December 31, 2022, and that the injury resulted in a need for treatment. Specifically, Claimant's injury was the proximate cause of Claimant's onset of severe pain that night. Claimant's severe

pain caused Claimant's need to seek emergency medical treatment, which he would not have otherwise needed but for the December 31, 2022 injury.

37. However, the Court also finds that Claimant's December 31, 2022 injury did not aggravate or accelerate Claimant's right shoulder condition so as to cause the need for the right shoulder surgery. Claimant had a significant prior history of right shoulder symptoms resulting from what Claimant's medical providers suspected to be a rotator cuff tear. Indeed, just two days before the injury itself, Claimant exhibited significant symptoms and lack of function in his right shoulder, and Claimant discussed with his providers the need for right shoulder surgery. The Court finds that Claimant, prior to the injury, was in need of a right rotator cuff repair surgery and that Claimant's need for surgery did not arise from the December 31, 2022 injury.

38. Claimant earned during the sixteen weeks leading up to the date of injury an average of $1,284.61 per week. The Court finds that this figure most fairly represents Claimant's average weekly wage for purposes of this claim.

39. The Court finds that Claimant did not sustain any wage loss until undergoing rotator cuff surgery of his right shoulder. However, because the Court finds that the need for the right shoulder surgery was not related to Claimant's December 31, 2022 injury, the Court finds that the resulting wage loss did not arise from Claimant's December 31, 2022 injury either. Therefore, the Court concludes that Claimant has not proven that he is entitled to temporary total disability in this matter.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Compensability

An injury must “arise out of and occur in the course of” employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S. *See also Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). An injury “arises out of” the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. Popovich, 811 P.2d at 383.

The existence of a preexisting condition will not prevent an injury from "arising out of" the employment. *Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 124 Colo. 217, 220, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). Generally, an injury will be found compensable if the employment aggravated, activated, caused, or accelerated a medical disability or need for medical treatment. *Id*.

An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Barba v. RE 1J School District*, W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company*, W.C. No. 3-850-024 (December 14, 1989). Rather, a claimant must establish to a reasonable degree of probability that the need for additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing

condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo.1949); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) *cf. Valdez v. United Parcel Service*, 728 P.2d 340 (Colo. App. 1986).

As found above, Claimant's December 31, 2022 injury aggravated his right shoulder symptoms such that he needed to obtain emergency medical treatment later that night. Because the aggravation caused a need for medical treatment which he would not have otherwise needed, Claimant sustained a compensable injury on December 31, 2022.

Medical Treatment

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

Although respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. Sny*der v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997).

"It is sufficient if the injury is a 'significant' cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment." *Burbank v. PepsiCo Inc*, W.C. No. 5-127-122 (April 17, 2023). Thus, if the industrial injury aggravates or accelerates a preexisting condition so as to cause a need for treatment, the treatment is compensable. *Id*.

As found above, Claimant's need for right shoulder rotator cuff surgery did not arise from the December 31, 2022 injury. Therefore, Claimant's injury was not the but-for cause of Claimant's need for right shoulder rotator cuff surgery, and Claimant has failed to prove by a preponderance of the evidence that right shoulder rotator cuff surgery is reasonably necessary to cure and relieve him of the effects of the December 31, 2022 injury.

Average Weekly Wage

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corporation*, 867 P.2d 77, 82 (Colo. App. 1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d

548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

Where the prescribed methods will not result in a fair calculation of a claimant's AWW in the particular circumstances, section C.R.S. § 8-42-102(3) grants an ALJ discretion to determine AWW "in such other manner and by such other method as will, in the opinion of the director *based upon the facts presented*, fairly determine such employee's average weekly wage." Section 8-42-102(3), C.R.S. (emphasis added).

As found above, Claimant's earnings during the sixteen weeks preceding his date of injury, which averaged $1,284.61 per week, most fairly represent Claimant's wage earning capacity as of the date of injury. Therefore, the Court concludes that $1,284.61 is the average weekly wage for this matter.

Temporary Total Disability

Temporary total disability (TTD) benefits are designed to compensate an injured worker for wage loss while employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson*, 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo.App.1997).

As found above, Claimant did not sustain a wage loss after his injury until undergoing right shoulder surgery on February 24, 2023. However, because the Court finds that the February 24, 2023 surgery was not reasonably necessary to cure and relieve Claimant of the effects of his December 31, 2022 injury, the Court concludes that Claimant has not proved by a preponderance of the evidence that his December 31, 2022 industrial injury caused his disability. Therefore, the Court concludes that Claimant is not entitled to TTD benefits in this matter.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable right shoulder injury on December 31, 2022.

2. The February 24, 2022 surgery was not reasonably necessary to cure and relieve Claimant of the effects of his December

31, 2022 injury, and Respondents are not liable for the cost of the surgery.

3. Claimant's average weekly wage is $1,284.61.

4. Claimant is not entitled to temporary total disability benefits for his December 31, 2022 injury.

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

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

DATED: October 19, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-188-909-002

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the left shoulder surgery performed by Alex Romero, M.D. on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Registered Nurse. On November 2, 2021 Claimant suffered an admitted left shoulder injury during the course and scope of her employment with Employer. Specifically, a patient grabbed Claimant's arm and struck her in the chest, shoulder, neck and chin.

2. On November 4, 2021 Claimant visited Jonathan Claassen. M.D. at Authorized Treating Provider (ATP) Concentra Medical Centers. He noted a prior work incident where Claimant was attacked by a patient in December 2019. Claimant subsequently underwent left shoulder surgeries in October 2020 and October 2021 with Landon Fine, M.D. consisting of repairs of the rotator cuff and labrum.

3. On November 11, 2021 Claimant underwent a left shoulder MRI. The imaging revealed a possible partial tear of the anterior infraspinatus tendon with retraction but no other abnormalities.

4. On November 15, 2021 Claimant visited Dr. Fine at Concentra for an evaluation. Dr. Fine determined the MRI revealed a left infraspinatus tear and a rotator cuff strain. He administered a subacromial injection. The injection did not provide any significant improvement. On December 8, 2021 Dr. Fine commented there was nothing "severe enough [to] warrant surgical intervention" and recommended against surgery because it was too "risky."

5. On January 24, 2022 Claimant was evaluated by ATP Alex Romero, M.D. at Centura Orthopedics. Dr. Romero noted that Claimant exhibited "inconsistent shoulder findings," but did not identify a pain generator by conducting diagnostic testing. Nevertheless, on February 18, 2022 Dr. Romero performed an additional left shoulder surgery.

6. Claimant continued to report high levels of left shoulder pain. After undergoing an arthrogram MRI and a repeat EMG Claimant returned to Dr. Romero on August 9, 2022. Dr. Romero noted that Claimant was not making any improvement despite unremarkable EMGs and MRIs consistent with postoperative changes. He recommended a second opinion with Adam Seidl, M.D. to address the causes of her lack of improvement and "significant regression." Notably, in the fall and winter of 2022 Dr. Romero was scheduled for deployment to [Redacted, hereinafter IA] with the [Redacted, hereinafter AR].

7. On August 17, 2022 Claimant visited Adam Seidl, M.D. at the Steadman Hawkins

Clinic for an evaluation. Claimant reported significant limitations in her left shoulder function with accompanying pain. She specifically noted stiffness, locking, catching, grinding, popping, swelling, numbness and tingling. In reviewing the MRI, Dr. Seidl remarked that the rotator cuff was intact and the shoulder looked "quite good." He thus did not recommend additional surgical intervention.

8. In September, 2022 Dr. Seidl administered a steroid injection to Claimant's left shoulder. However, Claimant failed to receive any benefit from the injection. Dr. Seidl recommended continued physical therapy because additional surgery would not provide any benefit. After a repeat EMG, Claimant returned to Dr. Seidl on September 21, 2022. He reiterated that the MRI revealed an intact rotator cuff repair. Dr. Seidl recommended against additional surgery and endorsed conservative treatment.

9. Prior to Dr. Romero's return from deployment, Claimant visited Dr. Fine for an evaluation. Dr. Fine recommended an additional left shoulder MRI that was performed on November 25, 2022. The MRI revealed small areas of bursal fluid with partial thinning and tearing in the supraspinatus and anterior infraspinatus. In December, 2022 Dr. Fine noted the MRI findings "shouldn't be what is causing you to not move your arm."

10. By January 4, 2023 Dr. Romero had returned and Claimant visited him for an examination. Claimant was still experiencing intense pain and had made little or no progress during his absence. Dr. Romero noted the November 25, 2022 left shoulder MRI revealed a small defect in the anterior supraspinatus at the repair level. The defect could have been "simple postoperative changes" or represented a failure of healing in the area. He commented that he could passively forward flex the left shoulder to 120 degrees before pain, however "active range of motion again [was] minimal with essentially pseudoparalysis of the shoulder."

11. Dr. Romero testified that Claimant initially made good progress after her surgery on February 18, 2022 but then experienced significant, unexplainable regression. He remarked that diagnostic testing did not reveal the pathology for Claimant's continuing pain. Dr. Romero commented that the "gold standard" for ascertaining Claimant's pathology was to perform a diagnostic arthroscopy to actually examine the tissue. He reasoned that it had been a little over ten months since her last surgery and conservative treatment had not provided relief. Claimant's options were to continue with therapy and pain management or perform an arthroscopy. Because the radiologist believed the November 25, 2022 MRI potentially reflected a re-tear of the rotator cuff and Claimant was still suffering significant shoulder pain, Dr. Romero recommended an arthroscopy. He submitted a pre-authorization request for the procedure.

12. On January 16, 2023 Mark S. Failinger, M.D. conducted a records review of Dr. Romero's surgical request. Dr. Failinger remarked that the records review was notable not only for the numerous treatment measures that had failed to improve Claimant's condition, but also that all treating physicians had been puzzled as to the source of her pain. He commented that, despite the confusion regarding the source of Claimant's pain and the inability to identify why Claimant's pain was dramatically out of proportion to her pathology, Dr. Romero nevertheless proposed another surgery. Dr. Failinger reasoned that, in the absence of a clear pain source, another surgery was not reasonable. He determined that Claimant is at high risk of either not improving or developing worsening shoulder symptoms if she undergoes another surgery. Dr.

Failinger summarized that it was far from medically probable that a repeat surgery would improve Claimant's function and decrease her pain levels. He remarked that non-organic sources for Claimant's subjective complaints should be considered.

13. On February 8, 2023 Dr. Failinger conducted an Independent Medical Examination (IME) of Claimant. After reviewing Claimant's medical records and conducting a physical examination, Dr. Failinger maintained that Dr. Romero's surgical request was not reasonable. He explained there was no rotator cuff pathology identified in the MRIs that would cause severe active range of motion deficits and no neurologic explanation for her loss of active motion. Dr. Failinger commented that loss of active motion was very likely due to Claimant's volitional actions. Nonorganic factors were likely the primary reason for Claimant's ongoing pain and significant dysfunction. He remarked that, despite multiple surgeries, Claimant's pain source has never been identified. Furthermore, multiple clinicians have raised concerns about the inconsistencies between the objective imaging and Claimant's subjective, high pain levels. Dr. Failinger concluded that it is not medically probable another surgery to repair any thinning of Claimant's rotator cuff will result in a successful outcome by improving Claimant's function and decreasing her pain. Respondents thus denied Dr. Romero's surgical request.

14. Contrary to numerous physicians, Dr. Romero proceeded with the diagnostic arthroscopy on March 21, 2023 "to evaluate the supraspinatus defect as to whether it is a failure of healing versus postsurgical changes." He remarked that Claimant's pre-operative diagnosis was a "left rotator cuff tear." When Dr. Romero performed the surgery on March 21, 2023, he found Claimant's rotator cuff to be intact, the prior graft was incorporated well and the abnormalities on the MRIs were normal post-surgical changes. Dr. Romero detailed that Claimant had developed scar tissue or adhesions above the rotator cuff and deltoid. He characterized the amount of scar tissue as "severe." Dr. Romero explained that any time Claimant moved her left shoulder the rotator cuff and the deltoid pulled against each other and generated pain. He thus used an arthroscopic shaver and radiofrequency ablation device to remove scar tissue.

15. Claimant subsequently received medical treatment from Concentra with Scott Richardson, M.D. The medical records reveal that by June 27, 2023 Claimant's left shoulder was still grinding and popping. She had good range of motion except for abduction of only about 70 degrees. Claimant was also only lifting two pounds in physical therapy. By August 3, 2023 Claimant remarked that her left shoulder was improving. She specifically had less pain and better range of motion. Claimant believed that massage therapy and acupuncture were helping.

16. After reviewing additional medical records, Dr. Failinger authored an IME addendum on August 21, 2023. He maintained that the diagnostic arthroscopy on March 21, 2023 was not reasonable. Dr. Failinger explained that no rotator cuff tearing was discovered during the surgery. He specified that, aside from some subacromial adhesions, Dr. Romero did not find any significant pathology during the procedure. However, adhesions would be expected in many cases following multiple rotator cuff surgeries and a manipulation. After the surgery Claimant underwent postoperative physical therapy with improvement in forward flexion but still had fairly significant limited abduction. Dr. Failinger summarized that, based on the recent MRI findings and the lack of any significant pathophysiology found by Dr. Romero during the March 21, 2023 surgery, there was "no pathophysiologic explanation, nor an anatomic structural

explanation" for Claimant's dramatic loss of range of motion and high pain levels. He reasoned that Dr. Romero recommended the surgery despite noting that Claimant had essentially a "pseudoparalysis" of the shoulder. Dr. Failinger commented that a pseudoparalysis generally means there was no ability to use the shoulder. Based on the absence of identifiable pathology on the MRI or during surgery to explain the pseudoparalysis, he remarked that nonorganic and/or psychological issues would be the most reasonable explanation for Claimant's shoulder limitations.

17. Claimant testified at the hearing in this matter. She explained that, after her surgery on February 18, 2022, she suffered increasing pain and loss of range of motion. Claimant specifically had a strong stabbing pain in her shoulder down into her arm that made it difficult to do anything. However, after the March 21, 2023 surgery and subsequent physical therapy, Claimant made huge improvements. She remarked that, "[m]y pain has decreased a ton. I'm able to fully lift my arm now, which I couldn't do before. I'm lifting things. I'm able to basically use my arm again, which is nice." Claimant commented that, throughout her treatment since her November 2, 2021 work injury, she has given complete effort in all of her physical therapy.

18. Claimant has failed to establish it is more probably true than not that the left shoulder surgery performed by Dr. Romero on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 industrial injury. Initially, the record reveals that Claimant previously underwent left shoulder surgeries in October 2020 and October 2021 with Dr. Fine consisting of repairs of the rotator cuff and labrum. On November 2, 2021 Claimant suffered an admitted left shoulder injury. A November 11, 2021 MRI revealed a left infraspinatus tear and a rotator cuff strain. On December 8, 2021 Dr. Fine commented there was nothing "severe enough [to] warrant surgical intervention" and recommended against additional surgery. Nevertheless, on February 18, 2022 Dr. Romero performed another surgery to repair Claimant's left shoulder.

19. On August 17, 2022 Claimant visited Dr. Seidl and reported significant limitations in her left shoulder function with accompanying pain. In reviewing the November 11, 2021 MRI, Dr. Seidl remarked that the rotator cuff was intact and the shoulder looked "quite good." He thus did not recommend additional surgical intervention. In September, 2022 Dr. Seidl administered a steroid injection to Claimant's left shoulder that failed to provide relief. He recommended continued physical therapy because additional surgery would not provide any benefit. On September 21, 2022 Dr. Seidl again recommended against additional surgery and endorsed conservative treatment. A November 25, 2022 MRI revealed small areas of bursal fluid with partial thinning and tearing in the supraspinatus and anterior infraspinatus. Dr. Fine subsequently noted the MRI findings "shouldn't be what is causing [Claimant] to not move [her] arm."

20. By January 4, 2023 Dr. Romero had returned from his deployment and Claimant visited him for an examination. Claimant was still experiencing intense pain and had made little or no progress during his absence. Dr. Romero noted the November 25, 2022 left shoulder MRI revealed a small defect in the anterior supraspinatus at the repair level. He commented that the "gold standard" for determining Claimant's pathology was to perform a diagnostic arthroscopy to actually examine the tissue. Dr. Romero thus recommended an arthroscopy and submitted a pre-authorization request. However, Dr. Failinger determined that Dr. Romero's surgical request was not reasonable. He explained there was no rotator cuff pathology identified in the MRIs that

would cause severe active range of motion deficits and no neurologic explanation for Claimant's loss of active motion. Dr. Failinger remarked that, despite multiple surgeries, Claimant's pain source has never been identified. Furthermore, multiple clinicians have raised concerns about the inconsistencies between objective imaging and Claimant's subjective, high pain levels. Dr. Failinger thus concluded it was not medically probable that another surgery to repair any thinning of Claimant's rotator cuff would result in a successful outcome by improving Claimant's function and decreasing her pain. Respondents thus denied Dr. Romero's surgical request.

21. Contrary to numerous physicians, Dr. Romero proceeded with the diagnostic arthroscopy on March 21, 2023. He found Claimant's rotator cuff to be intact, the prior graft was incorporated well and the abnormalities on the MRIs constituted normal post-surgical changes. Dr. Romero detailed that the source of Claimant's pain was scar tissue or adhesions above the rotator cuff and deltoid. However, Dr. Failinger authored an IME addendum and maintained that the diagnostic arthroscopy on March 21, 2023 was not reasonable. He specified that, aside from some subacromial adhesions, Dr. Romero did not find any significant pathology during the procedure. Dr. Failinger summarized that, based on recent MRI findings and lack of any significant pathophysiology found by Dr. Romero during the March 21, 2023 surgery, there was no pathophysiologic or anatomic structural explanation for Claimant's dramatic loss of range of motion and high pain levels. Moreover, despite Claimant's testimony that she had significant improvement after the March 2023 surgery, medical records reflect just a two-pound change in work restrictions months after the exploratory arthroscopy. Dr. Romero also acknowledged that the adhesions he removed during the March 21, 2023 surgery were a "normal part of the healing process" and could be reduced through non-surgical measures such as physical therapy that Claimant attended after March 2023.

22. Drs. Seidl and Failinger did not identify any basis for proceeding with additional surgery because the imaging was unremarkable despite numerous EMGs and MRIs. However, with no identifiable pain generator or explanation for Claimant's loss of range of motion, Dr. Romero nonetheless elected to proceed with surgery. With an intact rotator cuff and graft, the alleged supraspinatus defect that was to be investigated by Dr. Romero's diagnostic arthroscopy did not exist. The lack of a supraspinatus defect was suggested by numerous physicians and imaging studies prior to the March 21, 2023 procedure. The pathophysiological cause of Claimant's subjective complaints was not even ascertainable prior to the arthroscopy. Contrary to the MTGs, physicians were unable to determine a "specific diagnosis with positive identification of pathologic conditions." Notably, Dr. Romero justified his basis for performing the March 21, 2023 surgery not because of specific pathology or an identifiable pain generator, but only after he discovered adhesions while conducting the exploratory procedure. Although he found the adhesions during surgery, there was no reasonable basis for performing the surgery at the outset. As Dr. Failinger summarized, there was no pathophysiologic or anatomic structural explanation for Claimant's dramatic loss of range of motion and high levels of pain. Claimant has thus failed to demonstrate that the left shoulder surgery performed by Dr. Romero on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 industrial injury. Accordingly, Claimant's request for Respondents' to cover the cost of the surgery is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

6. The Colorado Division of Workers' Compensation Medical Treatment Guidelines (MTGs) were propounded by the Director pursuant to an express grant of statutory authority.

See §8-42-101(3.5)(a)(II), C.R.S. It is appropriate for an ALJ to consider the MTGs in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); *see Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the MTGs are a reasonable source for identifying diagnostic criteria). The MTGs are regarded as accepted professional standards of care under the Workers' Compensation Act. *See Rook v. Indus. Claim Appeals Off.*, 111 P.3d 549 (Colo. App. 2005); *Hall v. Indus. Claim Appeals Off.*, 74 P.3d 459 (Colo. App. 2003).

7. While the MTGs may carry substantial weight and provide significant guidance, the ALJ is not bound by the MTGs in deciding individual cases. Notably, §8-43-201(3), C.R.S. specifically provides:

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

8. Rule 17, Exhibit 4(B)(9) of the MTGs addresses surgical intervention of the shoulder and specifies:

> SURGICAL INTERVENTIONS should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. All operative interventions must be based upon positive correlation of clinical findings, clinical course, and diagnostic tests. *A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic conditions*.

(emphasis added).

9. As found, Claimant has failed to establish by a preponderance of the evidence that the left shoulder surgery performed by Dr. Romero on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 industrial injury. Initially, the record reveals that Claimant previously underwent left shoulder surgeries in October 2020 and October 2021 with Dr. Fine consisting of repairs of the rotator cuff and labrum. On November 2, 2021 Claimant suffered an admitted left shoulder injury. A November 11, 2021 MRI revealed a left infraspinatus tear and a rotator cuff strain. On December 8, 2021 Dr. Fine commented there was nothing "severe enough [to] warrant surgical intervention" and recommended against additional surgery. Nevertheless, on February 18, 2022 Dr. Romero performed another surgery to repair Claimant's left shoulder.

10. As found, on August 17, 2022 Claimant visited Dr. Seidl and reported significant limitations in her left shoulder function with accompanying pain. In reviewing the November 11, 2021 MRI, Dr. Seidl remarked that the rotator cuff was intact and the shoulder looked "quite good." He thus did not recommend additional surgical intervention. In September, 2022 Dr.

Seidl administered a steroid injection to Claimant's left shoulder that failed to provide relief. He recommended continued physical therapy because additional surgery would not provide any benefit. On September 21, 2022 Dr. Seidl again recommended against additional surgery and endorsed conservative treatment. A November 25, 2022 MRI revealed small areas of bursal fluid with partial thinning and tearing in the supraspinatus and anterior infraspinatus. Dr. Fine subsequently noted the MRI findings "shouldn't be what is causing [Claimant] to not move [her] arm."

11. As found, by January 4, 2023 Dr. Romero had returned from his deployment and Claimant visited him for an examination. Claimant was still experiencing intense pain and had made little or no progress during his absence. Dr. Romero noted the November 25, 2022 left shoulder MRI revealed a small defect in the anterior supraspinatus at the repair level. He commented that the "gold standard" for determining Claimant's pathology was to perform a diagnostic arthroscopy to actually examine the tissue. Dr. Romero thus recommended an arthroscopy and submitted a pre-authorization request. However, Dr. Failinger determined that Dr. Romero's surgical request was not reasonable. He explained there was no rotator cuff pathology identified in the MRIs that would cause severe active range of motion deficits and no neurologic explanation for Claimant's loss of active motion. Dr. Failinger remarked that, despite multiple surgeries, Claimant's pain source has never been identified. Furthermore, multiple clinicians have raised concerns about the inconsistencies between objective imaging and Claimant's subjective, high pain levels. Dr. Failinger thus concluded it was not medically probable that another surgery to repair any thinning of Claimant's rotator cuff would result in a successful outcome by improving Claimant's function and decreasing her pain. Respondents thus denied Dr. Romero's surgical request.

12. As found, contrary to numerous physicians, Dr. Romero proceeded with the diagnostic arthroscopy on March 21, 2023. He found Claimant's rotator cuff to be intact, the prior graft was incorporated well and the abnormalities on the MRIs constituted normal post-surgical changes. Dr. Romero detailed that the source of Claimant's pain was scar tissue or adhesions above the rotator cuff and deltoid. However, Dr. Failinger authored an IME addendum and maintained that the diagnostic arthroscopy on March 21, 2023 was not reasonable. He specified that, aside from some subacromial adhesions, Dr. Romero did not find any significant pathology during the procedure. Dr. Failinger summarized that, based on recent MRI findings and lack of any significant pathophysiology found by Dr. Romero during the March 21, 2023 surgery, there was no pathophysiologic or anatomic structural explanation for Claimant's dramatic loss of range of motion and high pain levels. Moreover, despite Claimant's testimony that she had significant improvement after the March 2023 surgery, medical records reflect just a two-pound change in work restrictions months after the exploratory arthroscopy. Dr. Romero also acknowledged that the adhesions he removed during the March 21, 2023 surgery were a "normal part of the healing process" and could be reduced through non-surgical measures such as physical therapy that Claimant attended after March 2023.

13. As found, Drs. Seidl and Failinger did not identify any basis for proceeding with additional surgery because the imaging was unremarkable despite numerous EMGs and MRIs. However, with no identifiable pain generator or explanation for Claimant's loss of range of motion, Dr. Romero nonetheless elected to proceed with surgery. With an intact rotator cuff and

graft, the alleged supraspinatus defect that was to be investigated by Dr. Romero's diagnostic arthroscopy did not exist. The lack of a supraspinatus defect was suggested by numerous physicians and imaging studies prior to the March 21, 2023 procedure. The pathophysiological cause of Claimant's subjective complaints was not even ascertainable prior to the arthroscopy. Contrary to the MTGs, physicians were unable to determine a "specific diagnosis with positive identification of pathologic conditions." Notably, Dr. Romero justified his basis for performing the March 21, 2023 surgery not because of specific pathology or an identifiable pain generator, but only after he discovered adhesions while conducting the exploratory procedure. Although he found the adhesions during surgery, there was no reasonable basis for performing the surgery at the outset. As Dr. Failinger summarized, there was no pathophysiologic or anatomic structural explanation for Claimant's dramatic loss of range of motion and high levels of pain. Claimant has thus failed to demonstrate that the left shoulder surgery performed by Dr. Romero on March 21, 2023 was reasonable, necessary and causally related to her November 2, 2021 industrial injury. Accordingly, Claimant's request for Respondents' to cover the cost of the surgery is denied and dismissed.

ORDER

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

1. Claimant's request for Respondents' to cover the cost of the March 21, 2023 surgery performed by Dr. Romero is denied and dismissed.

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

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

DATED: October 23, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-224-953-001

ISSUES

1. Whether Dependent has demonstrated by a preponderance of the evidence that she is a proper and sole recipient of death benefits related to Decedent's industrial fatality.

STIPULATIONS OF THE PARTIES

1. By stipulation of the parties, Decedent was fatally injured on December 17, 2022, while in the course and scope of his employment with Employer, thereby establishing the compensable nature of Decedent's industrial fatality.

2. By stipulation of the parties, Decedent's weekly death benefit rate is $446.78, with a corresponding pre-death average weekly wage of $670.17.

FINDINGS OF FACT

1. Decedent died on December 17, 2022, while in the course and scope of his employment.

2. Claimant and Decedent were married on February 11, 2019. Prior to his death, Decedent and Claimant cohabitated as husband and wife at [Redacted, hereinafter AT]. Decedent was the sole financial provider of the household. Claimant was financially depended on Decedent prior to his death.

3. Claimant credibly testified that Decedent had two biological children, but neither of them were under the age of 21 and Decedent was not financially supporting either of his adult children prior to his death.

4. Claimant credibly testified that Decedent was not allegedly or in fact married to any other individual prior to his death.

CONCLUSIONS OF LAW

1. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

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

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

4. A widow is presumed to have been wholly dependent on a decedent unless she was either "voluntarily separated and living apart from the spouse at the time of the . . . death or was not dependent in whole or in part on the deceased for support." §8-41501(1)(a), C.R.S.

Dependency

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

2. A widow is presumed to be wholly dependent on a decedent unless she was either "voluntarily separated and living apart from the spouse at the time of the . . . death or was not dependent in whole or in part on the deceased for support." §8-41-501(1)(a), C.R.S.

3. As found, Claimant has demonstrated by a preponderance of the evidence that she was married to Decedent at the time of his industrial fatality. Furthermore, Claimant has demonstrated that she and Decedent were living together at the time of Decedent's death and that she was financially dependent on Decedent prior to his death.

4. As found, Claimant is the only individual that has filed a claim for death benefits and has established herself as a whole dependent under §8-41-501, C.R.S., she is the sole recipient of said benefits.

ORDER

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

1. Claimant is the sole wholly dependent of Decedent and is hereby awarded death benefits at a weekly rate $446.78.

2. Respondents shall pay death benefits dating back to Decedent's death plus interest at a rate of 8% per annum.

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

DATED: October 25, 2023.

Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-211-550-001

ISSUES

- Did Claimant prove she suffered a compensable occupational disease involving her left arm?
- If Claimant proved a compensable injury, the following issues will be addressed:
- Did Claimant prove entitlement to TTD benefits commencing July 26, 2022?
- What is Claimant's average weekly wage (AWW)?
- The parties stipulated that if the claim is compensable, Claimant is entitled to a general award of reasonably necessary and related treatment from authorized providers, including mileage reimbursement. The parties agreed to reserve any specific medical benefit issues for future determination if they cannot resolve those issues by mutual agreement depending on the outcome of the hearing.

FINDINGS OF FACT

1. Claimant worked for Employer as a lettuce harvester. She commenced work on July 19, 2022. Claimant had not previously performed this type of work.

2. Harvesting lettuce required Claimant to cut heads of lettuce with her right hand and place them into bags using her left hand. At hearing, Claimant demonstrated grasping a head of lettuce with her left hand in a pronated position (palm-down), cutting the lettuce stalk with her right hand, supinating her left wrist and forearm to hold the lettuce in a palm-up position, and placing the lettuce into plastic bags carried around her waist.

3. By the end of the first day, Claimant noticed pain in her left wrist. She mentioned the pain to a supervisor but continued working. She noticed some swelling in her left wrist the next day. The remainder of the week, she primarily cut lettuce, but occasionally switched to making boxes or packing lettuce, for approximately 30-60 minutes at a time. Claimant performed a similar pronation-to-supination motion with her left arm while packing heads of lettuce. Her arm also bothered her while making boxes, because the cardboard was stiff and required her to exert what she perceived as significant force with her hands.

4. [Redacted, hereinafter AC] is the daughter of Employer's owners. She handles bookkeeping, payroll, and other financial matters for Employer. Claimant texted AC[Redacted] on July 25, 2022, that she needed to see a doctor because her wrist was hurting, and she could no longer tolerate the pain. Claimant said the pain started on July 19 and became progressively worse during the week. Claimant had also reported the pain to AC's[Redacted] father, "and they tried moving her around, but she still couldn't keep up because her wrist was hurting." AC[Redacted] told Claimant she could go the clinic in

Center, CO but Claimant replied that she wanted to finish the day and then go to the hospital after work.

5. On July 25, 2022, Claimant was evaluated by Vanessa Zwegers, NP at the San Luis Valley Health Regional Medical Center emergency department for complaints of left arm pain. Claimant said she had recently started work as a lettuce harvester cutting and packaging lettuce. Ms. Zwegers documented, "early in this week, she started to have discomfort, especially when rotating her hand." She had tried ibuprofen, icing, and elevation without relief. Physical examination showed an area of soft tissue swelling with mild warmth in the radial aspect of the left forearm. The area was tender to palpation. Finklestein's test was positive. The examination was otherwise normal. Ms. Zwegers opined, "this is a tendinitis from repetitive movement related to her job." She gave Claimant a spica splint and restricted her from work until she could follow up with an occupational medicine physician. If the symptoms did not resolve with splinting, NSAIDs and rest, she could consider a steroid injection.

6. Employer referred Claimant to its designated provider at the SLV Occupational Medicine clinic. Claimant saw Dr. Tasha Alexis at her initial appointment on August 3, 2022. Dr. Alexis documented the history as, "she was cutting lettuce and she had to twist the lettuce and had to twist her hand as well in a weird way and she noticed her wrist was swollen the next day and they kept her working." Claimant felt her symptoms were related to "overuse" of her left arm and "a specific twisting position." Her arm remained symptomatic despite rest, bracing, and taking NSAIDs. The examination showed pain in the dorsal aspect of the left wrist, reduced grip strength, and limited wrist range of motion. Dr. Alexis diagnosed soft tissue strains of the left wrist and hand. She opined the objective findings were consistent the history and a work-related mechanism of injury. She referred Claimant to occupational therapy and imposed work restrictions of no lifting more than 10 pounds and no work involving cutting.

7. Employer could not accommodate the restrictions, so Claimant remained off work.

8. Claimant followed up with Dr. Alexis on August 17, 2022. She was still having 4-5/10 pain in the left arm. Claimant had received an email from the claims adjuster stating Insurer would not pay temporary disability until Dr. Alexis reviewed and commented on a job demands analysis (JDA). Because she was not receiving any income, Claimant asked Dr. Alexis to remove her restrictions be lifted. Dr. Alexis stated, "I have no choice but to remove this patient's restrictions even though I feel it is appropriate for her to have those restrictions."

9. Claimant returned to work on August 18, 2022. However, the work aggravated her left arm pain and she resigned.

10. Claimant texted AC[Redacted] on August 19, 2022 and stated she could not continue working because "it was too painful and her hand was still hurting."

11. Claimant started occupational therapy on August 26, 2022. She explained she "started working on the 19th of July, and by the 20th, I was already in pain. I kept working with the pain." Claimant stated the pain started while she was gripping and manipulating lettuce with her left hand. Claimant reported increased pain with grabbing lettuce, moving suddenly, and twisting with her wrist. The pain radiated from the wrist, up the forearm, to the inside of her shoulder. She stated, "I don't know if [the shoulder pain] has to do with the hand, but it started since then." Claimant had moved back to Las Cruces, NM, after she stopped working, and was driving up to Colorado for therapy.

12. Claimant saw Dr. Alexis again on August 31, 2022. Claimant explained she had quit the job and was having to drive from Las Cruces for treatment. She was wondering if her care could be transferred to New Mexico. Dr. Alexis advised Claimant about a telephone conversation with the therapist on August 26. The therapist had expressed concern that Claimant may be "faking" her physical exam and pain. The therapist stated Claimant reported 9/10 pain "and with provocative testing that is not where she really was with her pain level."[1] The therapist was also "concerned" because "she is trying to get the shoulder into the claim." Dr. Alexis indicated she was going to order an EMG to rule out radiculopathy because Claimant was reporting radiating pain from the wrist up to the shoulder. Dr. Alexis left Claimant's work restrictions in place because she was no longer working.

13. Dr. David Orgel performed multiple record reviews for Insurer. In a report dated August 16, 2022, Dr. Orgel opined a JDA was needed to determine if Claimant's condition was work-related. In the meantime, he agreed ongoing conservative care was "certainly reasonable."

14. Sara Nowotny performed a JDA at Insurer's request on August 31, 2022. Ms. Nowotny interviewed Claimant by telephone, but observed other employees performing work tasks because Claimant was no longer working for Employer. Ms. Nowotny concluded the job involved no primary or secondary risk factors identified in the Cumulative Trauma Disorder Medical Treatment Guidelines (CTD MTGs).

15. Dr. Orgel issued his final report on September 15, 2022 after reviewing the JDA. He concluded the condition was not work-related based on the causation criteria delineated in the CTD MTGs.

16. Dr. Orgel testified at hearing consistent with his report. Dr. Orgel reiterated that Claimant's job involved no primary or secondary risk factors outlined in the MTGs. He opined that the absence of risk factors means the condition is not work-related, irrespective of Claimant's perception that the symptoms were associated with her work activities. He opined that Claimant may have developed "soreness" from performing work tasks to which she was previously unaccustomed, but opined that is not a work-related "injury." According to Dr. Orgel, the fact that Claimant experienced pain while performing work activities is insufficient to establish causation because "pain doesn't count" under

[1] This statement by the therapist is puzzling, because the August 26, 2022 OT report indicates that Claimant reported "7/10" pain at "worst," and "3/10" pain "current[ly]."

the MTGs. Dr. Orgel opined that repetitive tendonitis cannot be a work-related condition under the MTGs without the presence of primary or secondary risk factors.

17. Claimant's testimony is credible.

18. The causation opinions of Ms. Zwegers and Dr. Alexis are credible and more persuasive than the contrary opinions offered by Dr. Orgel.

19. Claimant proved she suffered a compensable injury to her left arm on July 25, 2022.

20. Claimant proved she suffered an injury-related wage loss from July 26, 2022 through August 17, 2022. Her entitlement to TTD terminated on August 18, 2022, because she returned to work.

21. Claimant proved she left work again because of the work injury on August 18, 2022. She has not subsequently been put at MMI by an ATP, released to regular duty, or returned to work.

22. AC[Redacted] testified Claimant was paid a piece rate or minimum wage, "whichever is greater." She was guaranteed at least minimum wage but could earn more depending on how much lettuce she picked during a shift. The harvesters worked 10-hour shifts Monday through Friday, and 5 hours on Saturday. This corresponds to 55 hours per week.

23. No documents or other persuasive evidence was presented to show Claimant's actual wages from July 19 to July 25, 2022. Therefore, the minimum wage provides the most appropriate metric to estimate her wages. The Colorado minimum wage was $12.56 in July 2022.[2] This equates to an average weekly wage of $690.80 ($12.56 x 55 = $690.80).

24. AC's[Redacted] testimony is credible and persuasive.

25. Claimant's average weekly wage is $690.80, with a corresponding TTD rate of $460.53.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no

[2] Overtime rules did not apply to agricultural workers before November 1, 2022. *See* 7 CCR 1103-1 § 2.3.2(A).

presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

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

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The Division has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). The MTGs are primarily intended to facilitate quick determinations by insurers regarding requests for pre-authorization. They are not binding rules, and not intended to supplant a case-by-case evaluation of individual circumstances. *See* § 8-43-201(3).

As found, Claimant proved she suffered a compensable occupational disease affecting her left arm. Claimant's testimony is credible. Claimant has provided consistent accounts of the onset and progression of symptoms to AC[Redacted], other representatives of Respondents, and multiple medical providers. Claimant perceived that the left arm symptoms were directly associated with specific work tasks. Although Claimant is not a medical expert, she is in the best position to say how her body responded to particular activity. Claimant worked 10-hour shifts, which further concentrated her exposure to the injurious activities. Ms. Zwegers observed swelling over the radial aspect of Claimant's left wrist on July 25, 2022, which correlated with the reported symptoms and provides objective evidence of a soft tissue injury. There is no

persuasive evidence Claimant had any problems with her left arm before starting the job with Employer or has any nonwork-related medical condition that would explain her symptoms. There is no persuasive evidence that Claimant is equally exposed to potentially injurious activities outside of work. The causation determinations of Ms. Zwegers and Dr. Alexis are more persuasive than the contrary opinions offered by Dr. Orgel. Dr. Orgel did not personally examine or interview Claimant, and his conclusions are based strictly on the records of others. Dr. Orgel's opinions are too heavily focused on the causation algorithm in the MTGs, with insufficient consideration of the other persuasive factors supporting a determination of compensability.

B. Average weekly wage

Section 8-42-102(2) provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $690.80 based on AC's[Redacted] credible testimony and the applicable minimum wage on the date of injury. Although Claimant testified she earned more than minimum wage, she presented no persuasive evidence to establish a specific AWW based on a piecework rate or using any method other than minimum wage.

C. TTD benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). A work injury need not be the sole cause of a wage loss; a disabled claimant is entitled to TTD benefits if the injury contributed "to some degree" to their wage loss. *PDM Molding, Inc. v. Stanberg, supra*.

As found, Claimant proved entitlement to TTD benefits commencing July 26, 2022. She was taken off work by Ms. Zwegers on July 25, and subsequently given work restrictions that precluded a return to her pre-injury job. Employer had no modified duty available, and Claimant remained off work through August 17, 2022.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). Claimant returned to work on August 18, 2022, which terminated TTD benefits under § 8-42-105(3)(b).

However, Claimant proved she left work again on August 18, 2022 because of the injury and is entitled to reinstatement of TTD benefits effective August 19, 2022. There is no persuasive evidence Claimant has subsequently been put at MMI by an ATP, released to regular duty, or returned to work. Therefore, TTD benefits remain ongoing at present.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

3. Claimant's average weekly wage is $690.80, with a corresponding TTD rate of $460.53.

4. Insurer shall pay Claimant TTD benefits at the rate of $460.53 per week, from July 26, 2022 through August 17, 2022, and from August 19, 2022 until terminated by law.

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

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

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

DATED: October 25, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-219-381-002

STIPULATIONS

1. The parties stipulated on the record to an average weekly wage of $2,917.13.

2. The parties further stipulated that a general award of medical benefits would be appropriate if the claim were found compensable.

ISSUES

1. Whether Claimant sustained a compensable injury on August 24, 2022, arising out of and in the course of his employment with Respondent-Employer.

2. Whether the right of first selection of the authorized treating physician passed to Claimant, and, if so, whom Claimant selected.

FINDINGS OF FACT

1. Claimant was a CEO for [Redacted, hereinafter NB], a subsidiary of Respondent-Employer, who on August 24, 2022, around 7:00 A.M., sustained a low back injury, while removing a bicycle from the back of his vehicle. Claimant was at the [Redacted, hereinafter BS] in Fort Collins and was planning to take the bicycle for a test ride prior to going into the office. The bicycle was a prototype of NB's[Redacted] research and development department, which Claimant oversaw.

2. Claimant's low back pain gradually worsened over the next day. Claimant reported his injury to [Redacted, hereinafter JP], from the human resources department, and [Redacted, hereinafter MK], his supervisor. Claimant's employer did not provide Claimant with a designated provider list as required by Rule 8-2(A)(1), W.C.R.P. and § 8-43-404(5), C.R.S. (2022).

3. The day after the injury, Claimant sought treatment with his primary care provider at Associates in Family Medicine in Fort Collins where he was attended by Melissa Jones, FNP. Claimant reported that he had pulled a muscle in his back while pulling his bicycle out of his car. He was assessed with a lumbar strain and prescribed a muscle relaxer.

4. Claimant followed up with his provider on January 10, 2023, reporting that his pain had improved overall, though he still had intermittent flare-ups in back pain. Claimant's provider did not recommend imaging at that time, but instead recommended that Claimant continue with stretching, ice, and massage. NP Jones indicated that she would refill his muscle relaxer prescription as needed.

5. Claimant filed a Worker's Claim for Compensation (WC15) on October 19, 2022. On that form, Claimant described the injury as: "Attempting to test ride company bicycle. Strained and heard popping sound from lower back. Immediate intense pain in lower back. When attempting to pull Electric Bike from vehicle." Claimant indicated that there were no witnesses to the accident and that he had reported the injury to JP[Redacted] and MK[Redacted].

6. Respondents denied the claim for further investigation.

7. Claimant underwent an independent medical examination (IME) with Dr. John Raschbacher on May 23, 2023. Claimant recounted the facts of the injury in a way consistent as found herein. At the time of the IME, Claimant reported that he was experiencing only minimal back pain. He reported that he had experienced persistent pain for a month or two after the injury, but that the pain slowly abated with ibuprofen and exercises he learned on the internet. Dr. Raschbacher also reviewed Claimant's prior medical history.

8. Dr. Raschbacher opined that Claimant sustained a lumbar strain or sprain on the August 24, 2022, while attempting to lift the bicycle out of his vehicle. Dr. Raschbacher recommended lumbar X-rays and an MRI to determine if there is any lumbar annular ligament tears that might be pain generators. Dr. Raschbacher also recommended a course of physical therapy.

9. Claimant testified at hearing on his own behalf as follows.

10. Claimant testified that he had been employed by [Redacted, hereinafter HY] since August 24, 2018. He had a long history with the company, starting his own business, NB[Redacted], in 2005 before it was acquired by HY[Redacted] in 2018. Under HY's[Redacted] ownership, he held the position of president or CEO of the NB's[Redacted] Division, with responsibilities including overseeing research and development, design, sales, and marketing. Claimant also played a pivotal role in testing and developing new products, making him the final decision-maker in product development.

11. He frequently commuted to work on bicycles and actively tested different iterations of bicycles, as well as accessories. His team comprised ten to fourteen individuals, with their main focus on research and development. While some responsibilities shifted to HY[Redacted] after the acquisition, Claimant continued to have a significant role in testing and maintaining the quality of new products.

12. Claimant's responsibilities included test-riding the bicycles himself, given his lifelong experience with biking. This testing was crucial to product development, and he believed that NB[Redacted], a product from his division, had benefited from his insights, winning numerous awards. Claimant was a salaried employee and had flexible working hours, typically working 40 to 55 hours a week.

13. On August 22, 2022, at 7:00 A.M., he went out to the BS[Redacted] Trailhead to test a prototype bicycle for the market. He noted that the BS[Redacted] Trailhead was conveniently located near his office and provided a variety of terrain, making it a common testing location. During an attempt to remove the bicycle from his SUV, he injured his back. This injury prevented him from completing the test ride. He explained that testing in this mountainous terrain was necessary since it provided a more rigorous environment compared to the flatter Ohio location where HY[Redacted] was based.

14. After the incident, he returned to work and initially self-treated with Aspirin, but the pain worsened over the next day. He reported the injury to JP[Redacted] and MK[Redacted], although they did not offer immediate medical care as it had occurred outside of office hours. JP[Redacted] indicated that he could file a claim but expected it to be denied due to the belief that he was riding outside of work hours.

15. Claimant emphasized that even when riding for leisure, he constantly assessed the bicycle's qualities, believing that the company would benefit from his observations. Claimant regularly shared notes with MK[Redacted] about their bicycle observations, which were pertinent to his performance reviews and goals for the year. Claimant clarified that MK[Redacted] also would test ride prototypes.

16. During cross-examination, Claimant stated that his new job duties after NB's[Redacted] acquisition included working as a board member for HY[Redacted]. He also clarified that while he had no obligation to report or document his test rides, he did produce data, including "shock analysis," for some rides. However, written reports were only required for specific back-to-back tests, and his injury incident was not part of such testing.

17. In the redirect examination, Claimant reiterated that he had never seen or recognized Respondents' Exhibit E, his job description which described his duties as, among other things, "Oversees all research and development efforts to ensure brand sustainability and the organization's financial health." The job description did not specifically address whether Claimant was to personally test the products rather than leave the testing to his research and development team. Nevertheless, Claimant emphasized that test rides were routinely discussed within the team. Additionally, he confirmed that he had never been asked to submit written ride reports to HY[Redacted] management.

18. The Court finds Claimant's testimony credible.

19. Respondents called JP[Redacted] to testify at hearing as well. Her testimony was as follows.

20. JP[Redacted] is the Manager of People and Culture for [Redacted, hereinafter UW] and HY[Redacted], which she described as being the head of the human resources department. She was the Talent and Recruitment specialist at the time of Claimant's injury.

21. Claimant notified JP[Redacted] on the day of the accident, though it might have been the next day. Claimant reported that he had gone out for a ride before work because he had not ridden his bicycle in some time, and he wanted to get some practice in before meeting with some vendors that afternoon. JP[Redacted] testified that it was not within the normal work hours of 8 to 5.

22. Claimant was an employee of HY[Redacted]. JP[Redacted] met with Claimant in March of 2020 in her first week in the company. Her understanding of Claimant's duties and responsibilities was that Claimant was the strategic leader for the brand NB[Redacted]. JP[Redacted] felt that Ex E was consistent with Claimant's duties and responsibilities at NB[Redacted].

23. JP[Redacted] testified that Claimant oversaw the research and development team for NB[Redacted]. The research and development team was obligated to ride bicycles as part of their employment, as testing the bicycles on trails was necessary for their work. She clarified that it was common practice of the NB's[Redacted] team to test their bicycles themselves, though they would sometimes use outside testers or influencers.

24. Despite Claimant being in charge of the research and development team, JP[Redacted] testified that she was not aware of any obligations for Claimant to test or ride bicycles himself, nor did she believe anybody directed Claimant to go on a bicycle ride that morning. She also testified that she was not aware of any reports that Claimant was required to produce that morning of the ride nor that Claimant was subject to any safety protocols. However, she acknowledged that nobody at NB's[Redacted] would ever seek permission from her before testing bicycles and that she was unaware if there was a way for the company to verify whether Claimant would be testing a bicycles. JP[Redacted] admitted that she was working in Miamisburgh, Ohio, and did not have access to the day-to-day work at NB[Redacted] at the time of the injury other than HR matters.

25. JP's[Redacted] testified that Claimant told her he had not ridden a bicycle in some time and that he needed to practice before riding with some vendors that afternoon. She testified that Claimant did not mention to her that he was test-riding a bicycle nor did he mention the type of bicycle or parts he was using. Though, Claimant did report the injury to JP[Redacted] as being work-related.

26. The Court finds JP's[Redacted] testimony credible, except insofar as she testified that Claimant told her that the purpose of his morning ride was to practice before riding with vendors that afternoon.

27. The Court finds based on the totality of the circumstances that Claimant's August 24, 2022 low back injury arose out of and in the course of his employment with Respondent-Employer.

28. As CEO of the NB[Redacted] brand, Claimant had broad discretion to execute his duties as he saw fit. Although his job description did not specifically identify test-riding bicycles as the means by which he would achieve any of his other duties, the job description was in fact not specific as to the means by which Claimant was to execute any of his duties. One of his duties was to "oversee[] all research and development efforts to ensure brand sustainability and the organization's financial health." The Court infers that the means by which he was to execute that duty was within his discretion. Claimant credibly testified that he, along with the rest of his research and development team, regularly tested prototypes, and that he would conduct those tests outside of normal working hours.

29. The Court also finds that Respondents did not provide Claimant with a designated provider list and that Claimant, by choosing to treat with Associates in Family Medicine, selected that provider as his authorized treating physician.

CONCLUSIONS OF LAW

Generally

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

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

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

Compensability

An injury must "arise out of and occur in the course of" employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S. *See also Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). An injury "arises out of" the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Popovich*, 811 P.2d at 383.

The Workers' Compensation Act excludes from the definition of "employment" an employee's "participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Section 8-40-102(8), C.R.S. (2022).

The fact that an activity is recreational in nature does not preclude an injury arising from that activity from being compensable. When presented with a situation where, as here, the employer's principal business is recreation, the following test should be applied to determine whether the injured employee was in the course of employment: (1) the extent to which the employer derives substantial benefit from the policy—beyond the intangible value of improvement of employee morale; (2) the extent to which the recreational activity represents compensation for employment; (3) the extent to which the obligations of employment create the special danger which precipitates the injury; (4) whether the use of the recreational activity was an inducement for employment; (5) whether the use of the recreational facility was originally contemplated by the parties at the time of employment. *Dorsch v. Industrial Commission*, 523 P.2d 458, (Colo. 1974).

In this case, the Court concludes the first and third factors are most informative as to whether Claimant's injury arose out of and in the course of his employment. The first factor weighs in favor of a finding that Claimant's injury arose out of and in the course of his employment. As found above, Claimant oversaw the product testing performed by the research and development team. Claimant was in fact engaged in product testing at the time of the injury, and Respondent-Employer certainly benefited from the product testing performed by the research and development team.

The third *Dorsch* factor also weighs in favor of a finding that Claimant's injury arose out of and in the course of his employment. Within his role as CEO of NB[Redacted] and as the manager of the research and development team, Claimant exercised his executive discretion to personally partake in the product testing. He had an obligation to oversee research and development, and he executed that obligation by personally testing some of the products. Handling bicycles created a special danger that precipitated the injury in this case.

Therefore, as found above, Claimant's low back injury on August 24, 2022, arose out of and in the course of his employment.

Authorized Provider

Claimant seeks determination of his authorized provider.

Pursuant to Section 8-43-404(5), C.R.S. (2022), Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, a claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Indus. Claim Appeals Office*, 931 P.2d 570 (Colo.App.1996).

A copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven business days following the date the employer has notice of the injury. Rule 8-2(A)(1), W.C.R.P. A physician or corporate medical provider is presumed willing to treat injured workers unless the employer is specifically informed by the physician or corporate medical provider to the contrary. Rule 8-2(D), W.C.R.P. If the employer fails to supply the required designated provider list in accordance with the W.C.R.P., the injured worker may select an authorized treating physician or chiropractor of their choosing. Rule 8-2(E), W.C.R.P.

In situations where the claimant has signified "by words or conduct that he has chosen a physician to treat the industrial injury," they have made a physician "selection". *Murphy-Tafoya v. Safeway, Inc.*, WC No. 5-153-600-001 (Sept. 1, 2021).

As found above, Claimant selected Associates in Family Medicine as his authorized treating physician through his conduct, namely choosing to treat with Associates in Family Medicine.

Average Weekly Wage

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corporation*, 867 P.2d 77, 82 (Colo. App. 1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d 548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

As documented herein, the parties, on the record, stipulated to an AWW of $2,917.13. The Court approves this stipulation and adopts the stipulated AWW as its own finding.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable low back injury on August 24, 2022.

2. Claimant's authorized treating provider is Associates in Family Medicine in Fort Collins.

3. Respondents shall pay for all medical treatment reasonably necessary to cure and relieve Claimant of the effects of his August 24, 2022 injury.

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

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

DATED: October 25, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-200-463-003

ISSUES

- Did Claimant prove she sustained a compensable injury?
- If so, Did Respondents prove Claimant was responsible for termination of her employment?
- Entitlement to medical benefits.
- Temporary disability.
- Average Weekly Wage.

FINDINGS OF FACT

1. Claimant was employed as a well site mechanic by [Redacted, hereinafter OS] on March 10, 2022. She alleges that on that date she sustained a work injury when her work vehicle was involved in a one vehicle accident.

2. Claimant testified that on the date of the incident, she went to a site to perform mechanic work on a well site motor. It was snowing on that day. She was not able to complete the work on the unit before the weather became worse. Due to the weather, she packed up her equipment early. Since everything was covered in snow when she came out of the sound walls surrounding the unit she was working on, she put on her snow chains. After she put on her snow chains, she began driving down little [Redacted, hereinafter BM], a switch back mountain road. On her way down the steep mountain, she was unable to brake the vehicle and lost control of the truck. She testified that the truck hit the side of the mountain and she hit a rock and the truck became airborne and its back wheels hit first and the truck ended up in a ditch. She testified that she had a complete loss of brakes. She testified that the brake pedal went all the way to the floor.

3. During the incident, Claimant testified that she experienced whiplash and pain in her back. She did not lose consciousness but experienced shock.

4. After the incident, Claimant used her CB radio to tell the employer that she was in an accident and needed help. She was told that they were sending two people to help her. The two people who came to help her were [Redacted, hereinafter JB] and [Redacted, hereinafter KR]. They looked at the truck. There were no dents on the truck but there were scratches on the truck. Claimant was not sure if the scratches were new or old. She observed brake fluid in a puddle under the driver side front tire coming from the brake caliper. She did not see any breaks in the brake lines. The snow chains were still intact.

5. In her testimony, Claimant described what happened after the accident. She rode back to the shop with KR[Redacted] in KR's[Redacted] truck. When she got to the shop, she spoke with [Redacted, hereinafter DB] and she told him that she hurt her back. DB[Redacted] was Claimant's supervisor. He did not acknowledge her claim that she hurt her back. He accused her of putting the snow chains on wrong. When the tire was removed she saw the brake fluid coming from the banjo bolt. She claimed in her testimony that the banjo bolt was purposefully loosened. She testified that [Redacted, hereinafter CA] intentionally tried to kill her. (July 25, 2023 transcript, p. 53).

6. KR[Redacted] testified at the hearing on behalf of Claimant. He testified that the Claimant's truck had no brakes when they picked her up. However, it was not KR[Redacted] that drove the Claimant's truck down the last half mile of BM[Redacted], JB[Redacted] drove it down the rest of the way, so KR[Redacted] would not be best position to determine if the brakes were completely gone as opposed to partially working as testified to by DB[Redacted]. KR's[Redacted] credibility is also called into question since he was terminated for a positive drug test. He denies that the test was accurate. However, the test administered by a third-party, [Redacted, hereinafter MH], was independently done without any interference with the Employer.

7. Claimant testified that she hit her head initially on the steering wheel and then on the dashboard. She did not recall if she had any bruising on her head.

8. Claimant testified that did not seek immediate medical care. Claimant sought treatment for her back after she obtained Medicaid since she did not have health insurance. She initially treated with a chiropractor at McGowan Chiropractic on March 17, 2022. Claimant thinks she scheduled an appointment with the chiropractor on the day of the injury but could not get in to see him until March 17, 2022. After the initial treatment with the chiropractor, she was referred to Eileen Romero at Sunrise Clinic.

9. DB[Redacted] testified at hearing. He is the operations manager and Claimant's supervisor. He was aware of the incident with the truck and he discussed the incident with the Claimant. He did ask her if she was ok. According to DB[Redacted], although the Claimant looked "shook up" after the incident, she did not request medical treatment or complain of any physical injuries.

10. When the truck arrived in the shop, JB[Redacted] said the brakes were working. However, when [Redacted, hereinafter SB], JB[Redacted] and [Redacted, hereinafter CB] examined the brakes more thoroughly they discovered that the banjo bolt had loosened and had a brake fluid leak. Something had hit the bolt. They further discovered that the tire chain link hit the bolt and caused damage to the chains. The chain link was "smashed". The tire chain had been installed improperly. Specifically, the link that hooks the chain and locks the chain. This allowed the chain to move toward the inside of the tire so that the chain hit the caliper and the banjo bolt.

11. CA[Redacted], the shop mechanic also evaluated the brakes on Claimant's truck. He determined that the snow chains were put on backwards which caused the banjo bolt to loosen and cause the brake fluid to leak out. CB[Redacted] denied ever

intentionally loosen the banjo bolt in contrast to Claimant's testimony that she suspected him of doing that.

12. There was no structural damage to the truck involved in the incident. No repairs were required for the body of the truck. The banjo bolt was replaced and Claimant drove the truck the day after the incident.

13. Claimant worked full duty from the date of the incident, March 10, 2022 through the date of termination on March 16, 2022. During that same time period, she alleges that another co-worker, [Redacted, hereinafter FK], purposefully tried to hit her truck with his truck and that he was drunk when this occurred. Other than Claimant's testimony, she offered no other evidence that FK[Redacted] was drunk.

TERMINATION[1]

14. Prior to the alleged incident, on March 8, 2022 Claimant had been reprimanded for yelling at CA[Redacted], a co-employee, demanding that he change her truck tire immediately. SB[Redacted] investigated the incident and interviewed co-employees who witnessed the interaction and issued a final notice to Claimant that she would be terminated if she engaged in similar behavior in the future. Exhibit I, p. 127.

15. A couple of days after the incident, the Claimant was again involved in loud verbal conflict with a co-employee. Claimant was terminated due to the combination of the incident on March 8, 2022 and the verbal conflict with [Redacted, hereinafter AM] on March 16, 2022. The conflict stemmed from AM[Redacted] working with another co-employee when that co-employee was assigned to work with Claimant. Claimant was terminated on that day since she had previously been warned on March 8, 2022 that she would be terminated for the next incident involving rudeness to co-employees or customers.

16. Claimant testified that the Employer set her up to be terminated based on the fact that the Employer did not report the work injury and would be in trouble for that failure. She also claims that the employer would provoke her into conflicts with co-workers.

17. I find that, contrary to Claimant's testimony, it was only after the termination that Claimant complained of injuries. On March 17, 2022, the day after her termination, she sought treatment with McGowan Chiropractic.

18. I do not find the Claimant to be credible with respect to how the accident occurred, including her testimony that the left side of her truck hit the side of the mountain, and the that the testimony that truck became airborne and forcefully landed first on the truck's back wheels and then on the front tires resulting in injuries to her neck and back. The lack of physical damage to the vehicle is inconsistent with the Claimant's description

[1] Although the issue of termination for cause was identified as an issue, the determination that the claim is not compensable renders this issue moot. The findings related to this issue are included since they provide insight regarding a determination of Claimant's credibility.

of the incident. I am also not persuaded that she was terminated because the employer was “out to get her”.

MEDICAL EVIDENCE

19. Dr. Burris testified that he performed an IME on February 7, 2023. He issued a report on that day which was in evidence. Of note is the Claimant’s subjective pain of 10 out of 10 in her entire posterior torso. In his review of the medical records, he mentions that a thoracic and a lumbar MRI were taken. Both showed no significant abnormality.

20. Dr. Burris’ assessment was “Diffuse back pain with nonphysiologic presentation”. He also indicated in the discussion portion of the report “that the only diagnoses that can be causally related to the 3/10/2022 workplace event are relatively minor spinal soft tissue strains and contusions with possible mild concussion”. Exhibit A, p. 13.

21. Dr. Rook also performed a record review and issued a report dated June 29, 2023. He also testified at hearing. It was Dr. Rook’s opinion that based on the history given to the medical providers that Claimant had muscular pain in her neck and back along with facet mediated pain caused by the accident when the Claimant’s truck was airborne and then landed with the rear wheels first then the front wheels.

22. Despite Dr. Burris’ initial diagnoses, he changed his opinion after hearing the testimony of the lay witnesses at hearing. Specifically, he would have expected some damage to the vehicle if the Claimant’s truck had hit the side of the mountain as she claimed. The other thing was that the Claimant said that she experienced immediate pain after the accident. This is contrary to the testimony of the witnesses that she continued to work after the incident and continued to drive the work truck. Finally, the Claimant’s had non-physiologic reported pain which called into question whether she sustained any injury as the result of the truck incident.

CONCLUSIONS OF LAW

A. Generally

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

respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In assessing credibility in this case, I have considered the testimony of the Claimant and the testimony of the other witness presented by both parties. I conclude that Claimant is not credible based on her description of the work incident, the facts leading up to her termination and the fact that Claimant did not seek medical care until she was terminated. Although she claims that she could not afford medical care immediately after the accident, she nonetheless did see the Chiropractor the day after her termination and paid the for treatment, despite the fact that the Chiropractor did not accept Medicaid.

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

B. Compensability

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

Claimant has failed to sustain her burden of proof that she sustained an injury in the incident that occurred on March 10, 2023. If the accident occurred in the manner that Claimant testified, including hitting the side of the mountain with the left side of her vehicle, there would have been some damage to the vehicle. However, there was no damage to the truck other than scratches of an undetermined age. Additionally, although the Claimant was observed to be "shook up" following the incident, she did not seek medical treatment until after her termination. I do not find her testimony credible that she was told not to make a claim since it would result in her termination. I find that Dr. Burris' testimony that Claimant did not sustain any injuries based on his review of the records, physical examination, and listening to the testimony of the witnesses at hearing to be credible. I find that Dr. Rook's opinions to the contrary not to be credible since it is based on the inaccurate history of the Claimant given to Dr. Burris as to the mechanism of the unwitnessed automobile accident. He assumed that the history given to Dr. Burris to be

"accurate". I conclude that the history given is inaccurate and therefore his opinions based on that history are inaccurate.

ORDER

It is therefore ordered that:

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

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

DATED: October 26, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-236-859-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a right knee injury during the course and scope of his employment with Employer on April 4, 2023.

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

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

FINDINGS OF FACT

1. Claimant is a 54-year-old Fire Prevention Officer who has worked for Employer since 2013. On April 4, 2023 Claimant was sitting in a chair at his work desk. When he stood up, he felt sharp pain in his right knee. Claimant's knee buckled, but he did not fall to the ground. Claimant testified that he had not previously received medical treatment for his right knee. He reported his injury to Employer and was referred to Concentra Medical Centers for treatment.

2. On April 4, 2023 Claimant visited Jonathan Claassen, D.O. at Concentra. He reported right knee pain and loss or range of motion after standing up from his desk chair. Claimant specifically felt his knee pop and then "lock." Dr. Claassen referred Claimant for an MRI and to Thomas Noonan, M.D. for an orthopedic evaluation.

3. The MRI revealed a tear that was superimposed on the "free edge fraying and intrasubstance mucid degeneration. The anterior and posterior root insertions [were] frayed but intact." There was also soft tissue edema and a small joint diffusion.

4. On April 13, 2023 Claimant underwent a surgical consultation with Dr. Noonan. Dr. Noonan recounted that Claimant had suffered extreme right knee pain since getting up from his chair at work about 1.5 weeks earlier. In reviewing the right knee MRI he noted a free edge radial tear in the medial meniscus body segment, moderate patellofemoral compartment osteoarthritis and a small joint effusion. Dr. Noonan thus diagnosed Claimant with right knee pain, a medial meniscus tear with likely flap component, patellofemoral arthritis and grade 2 chondral changes to the medial compartment. After a long discussion about treatment options, Claimant elected to proceed with arthroscopic intervention. Dr. Noonan agreed surgery was the best option.

5. On April 18, 2023 Claimant returned to Dr. Claassen to review his MRI results. Dr. Claassen determined there was a greater than 51% probability that Claimant's right knee injury was work-related. He reasoned that, due to the degenerative nature of

Claimant's knee, it was likely that standing up from the chair caused his meniscus to tear. Dr. Claassen explained that Claimant exhibited high grade cartilage loss in the medial compartment of the knee. The finding meant there was increased force on the meniscus with weight bearing and knee motion. Therefore, standing from a chair could have created the force required to tear Claimant's meniscus. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he arose from his chair "corresponded to the event of the meniscus tearing."

6. Claimant testified he was able to work modified duty following his injury but was unable to work "on call." He explained that the inability to work "on call" or overtime reduced his Average Weekly Wage (AWW). Claimant's wage records revealed an AWW of $2,030 plus "on call" wages of $721.61 for a total AWW of $2,751.61.

7. Following his right knee injury, Claimant worked modified duty until he underwent knee surgery with Dr. Noonan on June 5, 2023. The surgery involved repair of Claimant's right knee medial meniscus tear. The surgical notes reflected "complex tearing of the meniscus" that was debrided with a basket punch and shaver. Approximately 60% of the posterior horn and 50% of the body remained intact. Claimant explained that the surgery relieved his right knee symptoms and permitted him to return to full duty work on September 1, 2023.

8. Claimant's supervisor [Redacted, hereinafter BC] testified at the hearing in this matter. He explained that on the date of Claimant's alleged injury there had been a discussion about a picture of a vehicle on the whiteboard in Claimant's office area. After BC[Redacted] left the room, he heard a "thud" and returned to the office area. He noticed Claimant reaching for his knee. Claimant told BC[Redacted] that when he stood up from his chair, he felt a pop and pain in his right knee.

9. BC[Redacted] testified that he took pictures of the work area in which Claimant was allegedly injured. The photos showed various work stations with computers and rolling desk chairs. There was nothing about the work environment that was uneven or otherwise would have caused a risk of injury. The pictures were not taken on the day of Claimant's injury, but BC[Redacted] testified the pictures accurately reflected the circumstances and condition of the room on the date of the incident.

10. Respondents retained Timothy S. O'Brien, M.D. to perform a records review, provide an opinion on the cause of Claimant's knee symptoms and evaluate Dr. Noonan's surgical request. Dr. O'Brien concluded that Claimant's right knee symptoms were the result of his degenerative condition. The mechanism of simply standing up from a chair would not have aggravated or accelerated his underlying condition. He explained that Claimant's MRI findings were not acute, but instead reflected degeneration of the knee joint. He summarized that Claimant had an advanced arthritic knee and the mechanism of injury would not have created sufficient force to injure a healthy knee. Dr. O'Brien determined that Claimant's pre-existing osteoarthritis was the cause of his right knee problems and the surgery performed by Dr. Noonan was neither reasonable nor necessary.

11. Claimant has established it is more probably true than not that he suffered a right knee injury during the course and scope of his employment with Employer on April 4, 2023. Initially, on April 4, 2023 Claimant arose from a desk chair at work and felt a sharp pain in his right knee. After undergoing a right knee MRI, he was diagnosed with a torn meniscus. Claimant credibly testified that he had not previously received medical treatment for his right knee.

12. On April 18, 2023 Dr. Claassen determined there was a greater than 51% probability that Claimant's right knee injury was work-related. He reasoned that, due to the degenerative nature of Claimant's knee, it was likely that standing up from the chair caused his meniscus tear. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he stood up from the chair "corresponded to the event of the meniscus tearing." The record reveals that Claimant was engaging in an employment function by arising from his chair at Employer's facility when the injury occurred. But for his employment, Claimant would not have been at work and stood up from his office chair.

13. In contrast, Dr. O'Brien determined that Claimant's work activities did not cause his right knee injury. He explained that Claimant's MRI revealed degenerative fraying of the meniscus and mucoid degeneration. Dr. O'Brien remarked that the findings were not "acute," but instead reflected degeneration of the knee joint. He summarized that Claimant had an advanced arthritic knee and the mechanism of injury would not have created sufficient force to injure a healthy knee. However, Dr. O'Brien acknowledged that the medical records did not reveal any prior radiographic evidence of fraying in Claimant's meniscus, work restrictions, or modified duty because of his right knee condition. Claimant's employment causally contributed to his right knee injury because it obligated him to engage in employment-related functions, errands, or duties at the time of his symptoms. His employment obligations placed him in the particular place at the specific time when he injured his right knee when arising from his chair.

14. The record reflects a direct causal connection or nexus between the conditions and obligations of Claimant's employment and his injuries. Because Claimant was performing a service arising out of and in the course of his employment when he developed symptoms, his injuries were proximately caused by his work activities for Employer. Accordingly, Claimant's work activities on April 4, 2023 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

15. Claimant has demonstrated it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for his right knee injury. On April 4, 2023 Claimant was arising from his chair at work and developed significant right knee pain. He immediately obtained medical treatment with Dr. Claassen. An MRI revealed that Claimant had suffered a torn meniscus. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he stood, "corresponded to the event of the meniscus tearing." After reviewing the MRI Dr. Noonan diagnosed Claimant with right knee pain, a medial

meniscus tear with likely flap component, patellofemoral arthritis and grade 2 chondral changes to the medial compartment. Dr. Noonan determined surgical repair of Claimant's right knee medial meniscus tear was the best option and completed the procedure on June 5, 2023. The surgical notes established "complex tearing of the meniscus" that was debrided with a basket punch and shaver. Claimant explained that the surgery relieved his right knee symptoms and permitted him to return to full duty work on September 1, 2023. All of the preceding treatment was designed to address Claimant's right knee symptoms as a result of his April 4, 2023 work injury. Accordingly, Claimant's treatment constituted reasonable, necessary and causally related medical benefits for his industrial injury.

16. Claimant credibly testified that his base weekly salary is $2,030.00. He also receives overtime benefits of $721.61 per week. However, Claimant explained that his inability to work overtime or "on call" while on modified duty after his injury reduced his AWW. Claimant's wage records corroborated his testimony and revealed an AWW of $2,030 plus "on call" wages of $721.61, for a total AWW of $2,751.61. Accordingly, an AWW of $2,751.61 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

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

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

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

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

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

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

7. In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Colorado Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of the Workers' Compensation Act and is thus compensable. Specifically, in *City of Brighton* the claimant was walking to her basement office when she suffered an unexplained fall. The supreme court rejected the employer's argument that the claimant could not show a sufficient legal causal connection between her work activities and her injury because she could not provide the precise mechanism for her fall. The supreme court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The second category of personal risks includes those referred to as idiopathic injuries. The preceding are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the

simple fact of being at work would have caused any employee to be injured. *Id.* at 504-05.

8. The supreme court in *City of Brighton* declared that "some form of the "but-for" test appears to be the approach taken by the majority of states that have addressed unexplained falls." *Id.* at 505. The supreme court did not require an employee to rule out idiopathic causes for an injury, absent a known idiopathic event such as a stroke or seizure, and reasoned:

> Importantly, however, injuries stemming from neutral risks, whether such risks be an employer's dry and unobstructed stairs or stray bullets, "arise out of" employment because they would not have occurred but for employment. That is, the employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of injury.

Id. at 504.

9. In *King Soopers v. Indus. Claim Appeals Off.*, 2023COA73 (Colo. App. Aug. 3, 2023), the Colorado Court of Appeals relied on the "but-for" test applied in *City of Brighton*. In *King Soopers*, the respondents argued that the claimant had not sustained a compensable injury because the injury was "unexplained." In rejecting the respondents' argument, the court of appeals found that the claimant's unexplained injury fell within the "neutral risk" category. The court of appeals also approved the "positional risk" analysis of an injury occurring within the course and scope of employment. Thus, an injury is compensable under the Act if it is triggered by a neutral source that is not specifically targeted to a particular employee and would have occurred to any person who happened to be in a position of the injured employee at the time and place in question. *Id.* at ¶ 32-33. The court of appeals rejected the employer's argument that an unexplained injury can never be compensable due to the fact that an injured worker has the burden of proving an injury was caused by work activities. *Id.* at ¶ 39. The court of appeals reasoned that the employee was required to engage in employment related functions, errands, or duties that gave rise to the injury. *Id.* at ¶ 42.

10. As found, Claimant has established by a preponderance of the evidence that he suffered a right knee injury during the course and scope of his employment with Employer on April 4, 2023. Initially, on April 4, 2023 Claimant arose from a desk chair at work and felt a sharp pain in his right knee. After undergoing a right knee MRI, he was diagnosed with a torn meniscus. Claimant credibly testified that he had not previously received medical treatment for his right knee.

11. As found, on April 18, 2023 Dr. Claassen determined there was a greater than 51% probability that Claimant's right knee injury was work-related. He reasoned that, due to the degenerative nature of Claimant's knee, it was likely that standing up from the chair caused his meniscus tear. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he stood up from the chair "corresponded to the event of the meniscus tearing." The record reveals that Claimant

was engaging in an employment function by arising from his chair at Employer's facility when the injury occurred. But for his employment, Claimant would not have been at work and stood up from his office chair.

12. As found, in contrast, Dr. O'Brien determined that Claimant's work activities did not cause his right knee injury. He explained that Claimant's MRI revealed degenerative fraying of the meniscus and mucoid degeneration. Dr. O'Brien remarked that the findings were not "acute," but instead reflected degeneration of the knee joint. He summarized that Claimant had an advanced arthritic knee and the mechanism of injury would not have created sufficient force to injure a healthy knee. However, Dr. O'Brien acknowledged that the medical records did not reveal any prior radiographic evidence of fraying in Claimant's meniscus, work restrictions, or modified duty because of his right knee condition. Claimant's employment causally contributed to his right knee injury because it obligated him to engage in employment-related functions, errands, or duties at the time of his symptoms. His employment obligations placed him in the particular place at the specific time when he injured his right knee when arising from his chair.

13. As found, the record reflects a direct causal connection or nexus between the conditions and obligations of Claimant's employment and his injuries. Because Claimant was performing a service arising out of and in the course of his employment when he developed symptoms, his injuries were proximately caused by his work activities for Employer. Accordingly, Claimant's work activities on April 4, 2023 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

Medical Benefits

14. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

15. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his right knee injury. On April 4, 2023 Claimant was arising from his chair at work and developed significant right knee pain. He immediately obtained medical treatment with Dr. Claassen. An MRI revealed that Claimant had suffered a torn meniscus. Dr. Claassen concluded that the mechanism of injury and Claimant's report that he developed severe, sharp pain when he stood, "corresponded to the event of the meniscus tearing." After

reviewing the MRI Dr. Noonan diagnosed Claimant with right knee pain, a medial meniscus tear with likely flap component, patellofemoral arthritis and grade 2 chondral changes to the medial compartment. Dr. Noonan determined surgical repair of Claimant's right knee medial meniscus tear was the best option and completed the procedure on June 5, 2023. The surgical notes established "complex tearing of the meniscus" that was debrided with a basket punch and shaver. Claimant explained that the surgery relieved his right knee symptoms and permitted him to return to full duty work on September 1, 2023. All of the preceding treatment was designed to address Claimant's right knee symptoms as a result of his April 4, 2023 work injury. Accordingly, Claimant's treatment constituted reasonable, necessary and causally related medical benefits for his industrial injury.

Average Weekly Wage

16. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury, the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of injury. *Id.*

17. As found, Claimant credibly testified that his base weekly salary is $2,030.00. He also receives overtime benefits of $721.61 per week. However, Claimant explained that his inability to work overtime or "on call" while on modified duty after his injury reduced his AWW. Claimant's wage records corroborated his testimony and revealed an AWW of $2,030 plus "on call" wages of $721.61, for a total AWW of $2,751.61. Accordingly, an AWW of $2,751.61 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. Claimant suffered a compensable right knee injury while working for Employer on April 4, 2023.

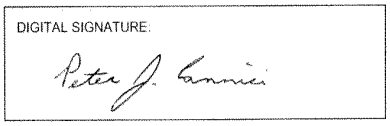
2. The medical treatment performed at Concentra and its referrals, including the MRI of April 5, 2023 and the surgery performed by Dr. Noonan on June 5, 2023, was reasonable, necessary and causally related to Claimant's April 4, 2023 right knee injury.

3. Claimant earned an AWW of $2,751.61.

4. Any issues not resolved in this Order are reserved for future determination.

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

DATED: October 27, 2023.



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